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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

GALLATIN WILDLIFE ASSOCIATION, *et al*. Plaintiff, v. UNITED STATES FOREST SERVICE, *et al*. Defendants.	Case No. 2:15-cv-00027-BU-BMM **DEFENDANT-INTERVENORS SHEEP INDUSTRY'S COMBINED RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF DEFENDANT UNITED STATES FOREST SERVICE'S CROSS-MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

COMES NOW the Montana Wool Growers Association (MWGA) and the American Sheep Industry (ASI) (collectively, the "Prospective Defendant-Intervenors" or "Sheep Industry") and files the Sheep Industry's Combined Response Brief in Opposition to Plaintiffs' Motion for Summary Judgment (ECF No. 116) and in Support of Defendants' Cross-Motion for Summary Judgment (ECF No. 122) and in support of their own Motion for Summary Judgment.

Plaintiffs' Motion must be denied because Plaintiffs have failed to demonstrate they are entitled to judgment as a matter of law on their claims. *See*, Fed. R. Civ. P. R. 56(a). Correspondingly, because Plaintiffs' claims actually fail as a matter of law, this Court should grant the Defendants' Cross-Motion(s) for Summary Judgment. As a result, this Court should issue an order dismissing with prejudice Plaintiffs' Complaint (ECF No. 122).

BACKGROUND

The Plaintiffs' Motion asserts that the Revised Forest Plan for the Beaverhead-Deerlodge National Forest was enacted in violation of the National Environmental Policy Act (NEPA) and that the Defendant United States Forest Service ("USFS") violated the law by failing to prepare supplemental NEPA analysis on allotment plans for long-existing domestic sheep grazing allotments. (ECF No. 116.) However, the relief sought by Plaintiffs in this case, namely

through the request for injunction, reveals the true goal of this case, which is to obtain the Court's assistance in permanently removing domestic sheep grazing and trailing within the Beaverhead-Deerlodge National Forest, namely within the Gravelly Mountain Range. Further, as evidenced by the repeated assertions by the Plaintiffs in their pleadings that they desire to have bighorn sheep use the allotments at issue for their range, Plaintiffs are using this lawsuit as a basis to try to have this Court dictate and reverse substantive wildlife management and habit adequacy and policy decisions made by the state wildlife agency and federal agencies. However, such relief is not appropriate in APA-based proceedings. Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004) (agencies are protected under the APA from undue judicial interference with their lawful discretion and to avoid judicial entanglement in abstract policy disagreements which courts lack the expertise and information to resolve).

Domestic sheep grazing has occurred within the Gravelly Mountain Range since the 1860s. *See*, Court's Amended Memorandum in Support of Order Denying Plaintiff's Motion for Preliminary Injunction at p. 2 (ECF No. 56); Gallatin Wildlife Ass'n v. USFS, 2015 WL 4528611 (D. Mont. July 27, 2015). The seven domestic sheep allotments for which the Plaintiffs seek to enjoin use have been operating and managed on a continuous basis since the 1920s. *See*, Id. Domestic sheep have been grazing in the Gravelly Mountain Range prior to the

time the United States Forest Service was even created in 1905, and has been in existence since well before the creation of the Beaverhead-Deerlodge Forest designation. The sheep allotments are authorized under the multiple use mandate of the National Forest Management Act and the Taylor Grazing Act (43 U.S.C. §315b) and are used as part of the domestic sheep operations of three Beaverhead County families: the Helles, the Konens, and the Rebishes. In 2001, the State of Montana, by and through the Department of Fish, Wildlife and Parks ("Montana FWP") decided to transplant bighorn sheep into the Greenhorn Mountain Range as part of its efforts to expand bighorn sheep populations in Montana. The transplant decision was made after Montana FWP undertook an environmental analysis on the environmental impact of the bighorn sheep reintroduction on the Gravelly Mountain range landscape. USFS008140. As part of that environmental analysis performed by Montana Fish, Wildlife and Parks ("FWP"), the State analyzed and noted the existence of domestic sheep grazing occurring on allotments within the Beaverhead-Deerlodge National Forest, namely grazing taking place on the allotments at issue in the present case. USFS 008138-008148.

The initial bighorn sheep transplant occurred in February of 2003. The initial transplant consisted of 69 sheep—30 taken from the Missouri Breaks herd and 39 taken from the Sun River herd. USFS 08320-008641 at pp. 220-221. Prior to the 2003 transplant, in 2002 Montana FWP, Defendant the USFS, the Bureau of

Land Management ("BLM"), and the sheep allotment permittees, the Rebish and Helle Partnership and the Rebish and Konen Partnership, entered into a Memorandum of Understanding ("MOU") as to the Greenhorn bighorn sheep population transplantation. USFS008219-24. The Memorandum recognized that the transplantation of the bighorn sheep into a new area of Montana would not work to harm existing agriculture production by precluding domestic sheep grazing operations already existing on the challenged allotments from containing to operate under their permits. And, in fact, the permits were reissued in 2006 and 2008. USFS 000010, 000347.

Further, the MOU set forth management actions designed to protect the health of the introduced Greenhorn bighorn sheep herd and to protect agriculture production and livestock from the potential threat posed by the transplant, such as by defining the instances when the sheep producers should notify the FWP of potential interaction between the bighorn sheep herd and domestic sheep—whether the domestic sheep are situated on public land or private deeded ground. USFS008220. The MOU was entered into as part and parcel of Montana FWP's state statutory responsibility to protect Montana's livestock operations and livestock operators from the harm that may accrue from the introduction and transplantation of wildlife within the State of Montana. Mont. Code Ann. Section 87-5-701 and 87-5-711.

In January of 2009, Defendant USFS issued a Final Environmental Impact Statement for the 2009 Revised Beaverhead-Deerlodge Forest Plan. USFS004870-6340. The Record of Decision ("ROD") was issued by Defendant USFS in January of 2009. USFS003348-98. Plaintiff Gallatin Wildlife Association filed an administrative appeal of the ROD shortly thereafter on the grounds that the bighorn sheep analysis was inadequate. USFS006341-6463.

The administrative appeal was denied, in part, because the reviewing officer concluded that the Forest Plan was adequate under the 1982 National Forest Management Act ("NFMA") diversity requirements and would further ensure the viability of the transplanted Greenhorn bighorn sheep herd. USFS007653. Even so, the reviewing officer directed the Regional Forester to make a determination as to whether an amendment to the Forest Plan was necessary to give more detail to management of possible domestic sheep/bighorn sheep interactions within the Beaverhead-Deerlodge National Forest. USFS007654. Pursuant to that directive, the Regional Forester undertook a review of the allotments at issue. The review determined that the allotment management plans on those allotments provided sufficient direction as to domestic sheep management on federal lands and determined that there was both adequate separation between the Greenhorn bighorn herd and domestic sheep to ensure the protection of the bighorn sheep. USFS007798-007896

The Plaintiffs assert in their briefing that bighorn sheep have been killed due to the possible interaction of the same with domestic sheep. ECF No. 115 at p. 11. However, the Plaintiffs are purposefully misleading the Court in this regard. As the record demonstrates, there has never been a single instance where a bighorn sheep has been lethally removed as a result of actual contact with or possible contact with domestic sheep grazing on any of the federal grazing allotments at issue. This was confirmed by Defendant USFS during its review of the adequacy of its bighorn sheep management. USFS007830. Ironically, the bighorn sheep rams to which Plaintiffs refer were removed due to the possibility of contact between those rams and domestic sheep operations located and running on private lands at issue. USFS08230. Further, the removals were done pursuant to Montana law which contains a statute specifically authorizing lethal removal of wildlife that may have a harmful effect on agriculture production or livestock operations in the state. *See*, Mont. Code Ann. Section 87-5-715.

Further, contrary to what Plaintiffs allege in their briefing, there has never been a documented case of interaction between the Greenhorn bighorn sheep herd and any domestic sheep grazing on the Beaverhead-Deerlodge grazing allotments. USFS008681-008682.

LEGAL STANDARD

Summary Judgment should only be awarded to the moving party when "there is no genuine issue as to any material fact and the movant to judgment as a matter of law." Fed. R. Civ. P. 56(c). The evidence and all reasonable inferences must be construed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co., LTd. v. Zenith Radio Corp. 475 U.S. 574, 587 (1986).

Plaintiffs' claims on summary judgment are all brought as NEPA claims. (ECF Nos. 114, 115.) NEPA is a purely procedural statute. It does not impose any substantive requirements on any agency undertaking environmental review. Lands Council v. McNair, 537 F.3d 981, 1000 (9th Cir. 2008) (en banc), *overruled on other grounds by* Winter v. Nat. Res. Def. Council, Inc. 555 U.S. 7, 20 (2008). Rather, the purpose of NEPA is to ensure only that the challenged agency has made an informed decision, as opposed to reviewing whether an agency has made an unwise policy decision. Id**.**

NEPA violation claims, such as those asserted by Plaintiffs herein, are reviewed by this District Court under the Administrative Agency Procedure Act ("APA"), 5 U.S.C. Sections 701-706. The review is limited to determining whether the Forest Service's analysis was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. at 987, *quoting* 5 U.S.C. Section 706(2)(A). On review, the Court is to give deference to the agency

decision and the challenged decision will only be overturned if the decision is a "clear error in judgment." 5 U.S.C. Section 706(2)(A).

As discussed below and, contrary to the Plaintiffs' meritless claims on summary judgment, the Forest Service neither acted arbitrarily nor capriciously, nor abused its discretion, nor violated law when promulgating the challenged Revised Forest Plan.

ARGUMENT

Per the Plaintiffs' request that the Sheep Industry Intervenors consult with the other intervening party, Helle Livestock, et al., regarding briefing so as not to duplicate argument between the two parties, all legal counsel for the Defendant Intervenors and amici parties participated in a joint telephone conference on March 18, 2016. During that call, the parties discussed the briefing already filed on summary judgment and the parties' respective arguments so as to ensure compliance with that request.

Based on the parties' discussions, this Brief is limited to addressing Sections IV and V of the Plaintiffs' Brief in Support of Summary Judgment—the alleged failure to disclose the Greenhorn MOU and the alleged failure to supplement claims. Both of these claims lack merit. As to the remaining claims of Plaintiffs on summary judgment, the Sheep Industry adopts and joins in the argument of

Defendant USFS and incorporates its briefing in full as that such briefing is set forth fully herein. (ECF No. 123.)

1. Plaintiffs' Supplementation Claims Fail as a Matter of Law.

Section V of the Plaintiffs' brief argues that Defendant USFS violated NEPA by allegedly failing to supplement the allotment management plans ("AMPS") for the allotments at issue. (ECF No. 115 at pp. 15-21.) This claim fails as a matter of law. Thus, it must be denied.

Initially, Plaintiffs do not have a claim for which relief can be granted in the first instance. This is because there is no NEPA requirement to supplement unless there is an ongoing major federal action. Here, there is no ongoing major federal action because the challenged grazing permits were issued in 2006 and 2008. The issuance of the permits was the final agency action as to those permits for purposes of bringing a Section 706(1) APA claim. Western Watersheds Project v. Bureau of Land Management, 971 F. Supp. 2d 957 (E.D. Calif. 2013). As such, Plaintiffs do not have legal standing to even bring a NEPA supplementation claim pursuant to the APA.

Even if Plaintiffs' claims are cognizable, their claims still fail. In their briefing, Plaintiffs essentially renew, repackage, and reargue the legal assertions this Court already rejected as part of its Preliminary Injunction denial order. (ECF No. 56.) In that Order, this Court correctly determined that the Plaintiffs'

supplementation claims are controlled by Congressional directive—that is, the terms of the 1995 Rescission Act and the 2004 Appropriations Act are directly contrary to the relief sought by Plaintiffs herein. Under those legislative enactments, Congress specifically exempted the grazing allotments at issue herein from supplemental analysis until so ordered by the Secretary of Agriculture at the Secretary's discretion.[1] *See, e.g.* Great Old Broads for Wilderness v Kempthorne, 452 F. Supp. 2d 71, 76-77, 81-82 (D.D.C. 2006).

Plaintiffs seek to end run the correct analysis contained in this Court's preliminary injunction order by now arguing that the Congressional rider language cited above does not apply here because they are challenging the AMPs[2] for the

[1] The Plaintiffs argue that even if the rider language applies to every other allotment at issue, the language still does not apply to the Cottonwood Allotment as there is no date scheduled at present for the USFS to prepare supplemental analysis on the Cottonwood AMP. (ECF No. 115 at p. 20.) This argument fails as well as it amounts to a request by the Plaintiffs to have the Court order and set a schedule for the Defendant USFS to conduct an environmental review on the Cottonwood AMP, an action which would run afoul of Section 701(a)(2) of the APA, pursuant to which agency actions "committed to agency discretion by law" are jurisdictionally exempt from judicial review. *See*, 5 U.S.C. § 701(a)(2). Here, as the Court correctly determined in its order denying Plaintiff's Motion for Preliminary Injunction, the setting of the review dates for all of the challenged allotments at issue is an action that falls within the sound discretion of the Secretary of Agriculture. Thus, the Court lacks jurisdiction to issue an order setting specific dates by which Defendant USFS must complete a NEPA review of the allotments at issue herein. *Accord*, Kempthorne, 452 F. Supp. 2d at 81-82.

[2] An AMP is a land management directive for a specific allotment within a national forest that the Forest Service has designated for livestock grazing. *See*

allotments at issue, not challenging the issuance of the grazing permits or the terms of the operating instructions thereon. This argument also lacks merit as it cannot be squared with the clear terms of the statutory riders. And, the Plaintiffs' position is directly undermined by the decision in Kempthorne.

In Kempthorne, the United States District Court for the District of Columbia determined that Congress amended "all applicable laws" to require reissuance of expired, transferred or waived grazing permits prior to the completion of otherwise required actions. *See*, Id. In support of the Court's position that the wide discretion given to the Secretary under the riders as to applies to "grazing allotments generally", the District Court cited favorably to Oregon Natural Desert Assoc. v. United States Forest Serv.,[3] 2005 WL 1459328, at p. 9 (D.Or.2005), wherein the Court in that case noted that the riders "expressly tolled NEPA requirements as they pertain to managing grazing allotments" generally.

As a grazing permit is issued pursuant to the terms of a particular allotment management plan and pursuant to the terms of the annual operating instruction (AOI) on the permit, which such terms are deemed incorporated into the grazing

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Wilderness Soc'y. v. Thomas, 188 F.3d 1130, 1133 (9th Cir.1999) (describing AMPs as "site-specific").

[3] If the Court is interested in the extensive process under which a grazing permit is issued, this opinion contains an excellent recitation of the process and how the grazing permit is part and parcel of the AOI and the relevant AMP for the allotment to which the permit is attached.

permit, it follows that the federal laws which exempt grazing allotments from supplemental analysis apply to, undermine, and dispose of the Plaintiffs' claims here as to the reach of the grazing riders. As such, contrary to what Plaintiffs assert and argue, the Defendant Forest Service has not acted arbitrarily or capriciously or abused its discretion as to supplementation.

In support of their position, Plaintiffs argue on a policy basis that their reading of the language of the 1995 Rescissions Act, Pub. L. 104-19 §504(b), 109 Stat. 194 and the 2004 Appropriations Act, Pub.L.108-108, §325, 117 Stat. 1241, 1308 compels the Court to reach a different legal conclusion than it did in its Amended Memorandum in Support of its Order Denying Plaintiff's Motion for Preliminary Injunction. To wit: Plaintiffs assert that all grazing permits and the AMPs and the NOIs which are tied to the permit are subject to supplementation review and revision whenever there is a new circumstance of information related to the grazing allotment. Plaintiffs assert in their Brief in Support of Summary Judgment that the Court's contrary interpretation in its Preliminary Injunction denial order "was not the intent of the legislation and would be contrary to the goals of NEPA." (ECF No. 115 at p. 16, fn. 8.)

However, it is the Plaintiffs' reading that is contrary to the intent of Congress as to required supplementation. As discussed above, under the clear terms of the congressional riders, the USFS was and is required to automatically

reissue the permits under the same terms and conditions as it did previously. Further, under the rider, as this Court has already correctly determined, the USFS is not legally obligated to conduct supplemental NEPA analysis every time there may be new or relevant information, as such supplementation decision is left to the sound discretion of the Secretary. *Accord*, Kempthorne, 425 F. Supp. 2d at 81; Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 373 (1989). On its face, the Plaintiffs' assertion that the grazing riders do not apply to the allotments at issue runs directly contrary to the purpose for the enactment of those riders, which such purpose was to ensure that grazing on public lands would not be jeopardized due to the lengthy federal environmental review process.

Further, the Plaintiffs' interpretation that the NEPA law itself mandates is undermined by a recent court decision involving Intervenor American Sheep Industry ("ASI") and the Idaho Wool Growers. In a decision issued on March 2, 2016, the Ninth Circuit Court of Appeals rejected ASI's argument that the USFS violated the law when it failed to supplement the FSEIS and ROD for the Payette National Forest of west-central Idaho with a 2010 study analyzing the alleged transmission of disease from domestic to bighorn sheep and critiques thereof. *See*, Idaho Wool Growers Ass'n. et al. v. Vilsack, No. 14-35445 at p. (9th Cir. 2016). For the Court's convenience, a copy of the just-cited decision is attached as Exhibit "1."

In the Idaho Wool Growers Ass'n decision, the 9th Circuit reasoned, similar to the circumstances of the present lawsuit, that requiring the USFS to supplement an EIS every time new information comes to light would "render the agency decisionmaking intractable, always awaiting updated information only to find new information outdated by the time a decision is made." *See*, Id at p. 22. The Court then held that the Forest Service did not act arbitrarily or capriciously or abuse its discretion by declining to supplement the FSEIS when the purpose proffered in support of the supplementation, i.e. the issues to be reviewed on supplementation, has already been reviewed by the agency.

Here, as discussed in more detail in the Federal Defendants' Opening Brief (ECF No. 123), the substance of the new information allegedly being brought forth by the Plaintiffs, i.e. the significance of the disease impact that domestic sheep have on bighorns,[4] was thoroughly considered by the Defendant USFS at the time of the making in 2009 of the revised Forest Plan for the Beaverhead-Deerlodge National Forest. *See, e.g.,* USFS003912 and USFS005383. Further, such information was thoroughly considered during the post-ROD issuance review

[4] Defendant Intervenor ASI notes that this type of 'new' bighorn-domestic sheep 'disease' information was also the type of 'new' information ASI unsuccessfully sued to have supplemented in Idaho Wool Growers Ass'n. (*Supra)*. The Sheep Industry notes that the use of the term 'disease' is somewhat suspect as the scientific dispute involves whether domestic sheep transfer a pathogen, not a disease, to bighorn sheep that could manifest itself into pneumonia in bighorns. *See*, Id. at p. 7-8.

process conducted by the Regional Forester at the behest of the officer reviewing the appeal of the ROD. USFS007802-7830 (Regional Forester analyzes adequacy of the amount of separation between Greenhorn bighorn sheep herd and the domestic sheep grazing on the allotments, as well as analyzes the absence of any management removals of bighorn sheep due to the presence of domestic sheep on federal lands within the Gravelly landscape).

Because Defendant USFS has already taken a 'hard look' at the issues upon which Plaintiffs seek to provide supplemental information, the Plaintiffs have failed as a matter of law to show that some duty under NEPA has been triggered that requires the Court to order supplementation in the present case. *See*, Idaho Wool Growers Ass'n (*supra*) at p. 22, *citing* N. Idaho Cmty. Action Network v. U.S. Dep't of Transp., 545 F.3d 1147, 1154-55 (9th Cir. 2008) (per curium). As such, the Court should deny the Plaintiffs' Motion for Summary Judgment. And, in turn, the Court should enter judgment in favor of the Federal Defendants on the supplemental NEPA claims.

2. Plaintiffs' NEPA violation claim as to the Greenhorn MOU is equally without legal merit.

Section IV of the Plaintiffs' Brief in Support of Summary Judgment alleges that the Beaverhead-Deerlodge Forest Plan violates NEPA because Defendant USFS allegedly failed to disclose the Greenhorn MOU until after adoption of the FEIS. (ECF No. 115 at pp. 12-15.) This claim, too, fails as a matter of law. Thus,

Plaintiffs' Summary Judgment motion must be denied and final judgment entered in favor of Defendants.

Plaintiffs make much hay on the Greenhorn MOU document, alleging that the MOU document was completely omitted from the environmental review process and, thus, deprived the public of providing input on the same. Further, Plaintiffs assert that the USFS did not publicly disclose the existence of the MOU until after adoption of the ROD. *See*, Id. However, the Plaintiffs' vociferous assertion that NEPA has been violated is undermined by the record.

The record demonstrates that the original Plaintiff in this matter, the Gallatin Wildlife Association, actually referenced and discussed the MOU in the comments submitted on the FEIS.[5] USFS000878. Plaintiff Gallatin Wildlife Association's comments as to the MOU were recognized and addressed by Defendant USFS

[5] Gallatin Wildlife Association's exact comment is as follows: "Specific Example of Privatized Special Interest Profit and Socialized Cost: The USFS subsidizes exotic sheep production in the Gravelly Mountain Range. These exotic sheep are trailed to and from these allotments in the spring and fall across a vast landscape of public lands. Thus bighorn sheep are precluded not only from the area being allotted to exotic sheep near Black Butte in the Gravelly Mountains, but also the vast landscape of the Upper Ruby, Snowcrest Range, Blacktail Wildlife Management Area (WMA), Robb-Ledford WMA, Wall Creek WMA, West Fork of the Madison, Antelope Basin, Centennial Mountains and the Red Rock Lakes National Wildlife Refuge. See the May 2002 USFS, BLM, FWP, Helle/Rebish and Rebish/Connan MOU (2002) that gives priority to exotic sheep over bighorn sheep in this area. How does the USFS and BLM justify this small special interest subsidy at the expense of the public good and the viability of native bighorns? Do exotic domestic sheep take precedence over native bighorn sheep on public lands in southwest Montana?" USFS000878.

during the environmental review process. USFS002490. Further, as noted by this Court in its Memorandum in Support of its Order Denying Plaintiff's Preliminary Injunction request, the Forest Service addressed the existence of the MOU in its responses to comments submitted on the Forest Plan final EIS. (ECF No. 56 at p.17.) As such, contrary to what Plaintiffs assert, the MOU was disclosed to the public, was addressed by Defendant USFS during the environmental review process, and the existence of the same was known to anyone who would have read the FEIS.[6]

NEPA is clear as to what is required of the USFS in the present case. As stated above, NEPA is a purely procedural statute, not a substantive outcome statute. Lands Council, 537 F.3d at 1000. The primary purpose of NEPA is to ensure that the agency undertaking environmental review has considered and evaluated the environmental consequences of its proposed action prior to taking final action. Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir.1989). The fact that the Defendant Forest Service addressed the existence of the MOU, considered its content, and provided public response on its content during the NEPA review process on the Beaverhead-Deerlodge National Forest demonstrates on its face that

[6] It is important to note that the MOU resulted from a separate environmental review process conducted by the State of Montana when considering the environmental effects of reintroducing bighorn sheep into the Greenhorn Mountains. In that EA, provisions were developed to attempt to preclude wild and domestic sheep conflicts, and those provisions are outlined in the MOU. USFS 08320-008641 at pp. 221.

Defendant USFS satisfied its NEPA obligation to consider and be fully informed as to the environmental consequences of the MOU. *Accord*, Warm Springs Dam Task Force v. Gibble, 621 F.2d 1017, 1023 (9th Cir. 1980).

It is apparent from the Plaintiffs' briefing that they would like to have had a different substantive outcome result from the environmental review on and the decision as to the adoption of the revised Forest Plan for the Beaverhead-Deerlodge National Forest. That is, Plaintiffs desire to have domestic sheep grazing fully removed from public lands within that Forest. But NEPA is not and was never intended to be an outcome-based statute or to provide an avenue to dictate an agency's policy making authority. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558, 98 S.Ct. 1197, 1219, 55 L.Ed.2d 460 (1978).

The Plaintiffs' fail to disclose claim is similar to the Plaintiffs' fail to disclose claim that was denied by the Ninth Circuit Court of Appeals in Laguna Greenbelt Inc. V. U.S. Dept. of Transp., 42 F.3d 517, 523 (9th Cir. 1994). In that case, several non-profit groups brought an ESA challenging asserting, in part, that the U.S. Department of Transportation failed disclose the growth-inducing impacts of a proposed toll-road on the University of California, Irvine's Ecological Reserve. Specifically, the plaintiffs claimed that the final EIS did not disclose that

1.7 acres of a reserve would be taken and used for the proposed toll-road right-of-way.

In rejecting the NEPA fail to disclose claim, the 9th Circuit Court noted that the final EIS did not mention the reserve by name in the document and did not even describe the 1.7 acre parcel to be taken for transportation use. However, the Court determined that the agency's failure to disclose this aspect of the final project did not warrant the Court granting relief even though a 'technical' violation had occurred.

The Court reasoned that because the Department of Transportation took into account the environmental impact of the road, that because members of the public submitted comment on the EIS which such comments alluded to the taking of the reserve, and that because the EIS discussed the road's impact on the land generally, the Department made a fully-informed decision as to the environmental impacts of the project, which is all that NEPA procedurally requires. Laguna Greenbelt, Inc. 42 F.3d at 527-28. Similar to the legal disposition of the fail to disclose claim asserted in the Laguna Greenbelt case, the Plaintiffs' fail to disclose claim fails in this present case as well. This is because, as the record demonstrates, members of the public commented on the MOU during the environmental review process and, thus, were aware of its existence. Further, like the Defendant U.S. Department of Transportation in that case, the Defendant USFS in this case was aware of the

MOU's existence and addressed its environmental impact as part of its commentary on the FEIS.

In addition, the record indicates that the challenged EIS addressed the environmental topic of the MOU, i.e. the impact of livestock grazing practices on bighorn habitat and herd health, as well as touched on a mitigating factor—not authorizing sheep to run on allotments once those allotments become vacant. USFS005383, USFS003912, and USFS004100-01. As such, similar to the Defendant Department of Transportation in Laguna Greenbelt Inc., the Defendant USFS in this case properly and thoroughly evaluated the environmental impacts of continued domestic sheep grazing within the Beaverhead-Deerlodge National Forest and the Defendant USFS was fully informed on the environmental consequences of the bighorn sheep management and mitigation provisions contained in the MOU.

The 9th Circuit Court has made clear that even in instances where a violation of NEPA's disclosure requirements might have occurred,[7] relief will not be granted if the challenged government agency was otherwise fully informed as to the environmental consequences of its final decision. *See*, Id; *see*, *also*, Warm Springs Dam Task Force, 521 F.2d at 1023 (no prejudice arose to Plaintiff as a result of the

[7] In advancing this particular argument, Defendant Intervenor the Sheep Industry does not concede that any NEPA disclosure violation transpired in the first instance as to the MOU.

NEPA violation as the challenged agency subsequently considered the very study that consultation would have revealed). Here, as the record reflects, the USFS was fully aware of and considered both the environmental impact of the MOU specifically and the environmental impact generally of domestic sheep grazing on the Beaverhead-Deerlodge National Forest both before adoption of the FEIS and during the post-ROD adoption appeals process. USFS007653. Even the Plaintiffs themselves concede that the MOU was considered by the agency after the Review Officer ordered the agency to undertake further analysis on bighorns. *See*, Plaintiffs' Resp. Br. at p. 22 (ECF No. 22). As a result, Plaintiffs have not been prejudiced in any sort of way with which NEPA is concerned. Id; *see, also*, 5 U.S.C. § 706 (The APA directs federal courts to take "due account . . . of the rule of prejudicial error").

Intervenor Defendant the American Sheep Industry is all too familiar with the rule of prejudicial error as applied in APA challenge cases, such as the APA challenge presently at issue. As noted above, in the recently decided Idaho Wool Growers Ass'n case, ASI and its Co-Plaintiffs alleged that Defendant the United States Forest Service violated NEPA by failing to carry out its NEPA imposed obligation to consult with the Agriculture Research Service (ARS) on bighorn sheep/domestic sheep interaction research before preparing the final supplemental impact statement and Record of Decision on the Payette National Forest of west-

central Idaho as required by 42 U.S.C. § 4332(2)(C). *See*, Idaho Wool Growers Ass'n, *supra* at p. 5.

The 9th Circuit recognized that Defendant USFS had failed to consult with ARS prior preparing a final environmental impact statement as the same is required by 40 C.F.R. § 1503.1(a)(1). Even so, the 9th Circuit determined that the failure to consult with ARS was harmless and was not prejudicial error under the APA. Id. at 16-20.

In reaching its decision to reject the Sheep Industry's appeal, the 9th Circuit Court considered whether the NEPA violation caused the agency not to be fully aware of the environmental consequences of the proposed action or otherwise materially affected the substance of the agency's decision to adopt the ROD and the FEIS. Id. at 16. The Court determined that because the Defendant USFS had considered the issues of casual relationship of disease transmission between the two species as part of its environmental analysis and because the allegedly omitted information did not materially affect the Forest's Services decision to adopt the FEIS and ROD, the material requirements of NEPA were not compromised. Id. at 19-20. As such, the Court reasoned that ASI and the other Plaintiffs were not prejudiced.

The 9th Circuit Court's reasoning in Idaho Wool Growers Ass'n case as to the merits of the failure to disclose and failure to supplement claims can be

juxtaposed to the present case. Even if the Defendant USFS somehow violated NEPA when addressing the MOU during its comments to public input on the EIS prior to adoption of the ROD and then directly addressing the topic of bighorn sheep management and bighorn sheep disease protection during the appeals process, such disclosure error was harmless. This is because, like the failure to consult NEPA violation in Idaho Wool Growers Ass'n, the alleged failure of the USFS to disclose the MOU did not prevent the Forest Service or the public from considering and commenting upon information on the record about the risk of transmission from disease from domestic sheep to bighorn sheep or to comment about the appropriateness of allowing domestic sheep grazing to continue within the Beaverhead-Deerlodge National Forest and the impact the same would have on bighorn sheep habitat. What is more, it can hardly be argued on this record that the USFS did not take a hard look at the environmental impacts of domestic sheep grazing on the Greenhorn Bighorn Sheep populations or habitat in the Beaverhead-Deerlodge National Forest during the environmental review process when it prepared a separate report exclusively on potential interactions between the two species. USFS007798. *Accord*, Oregon Nat. Desert Ass'n v. Shuford, No. CIV. 06-242-AA, 2007 WL 1695162, at *15-16 (D. Or. June 8, 2007) *aff'd sub nom.* Oregon Nat. Desert Ass'n v. McDaniel, 405 F. App'x 197, 2010 WL 5018556 (9th Cir. 2010) (BLM took a hard look at the effect of resource management plan, as

required by NEPA, by convening a team to review maps and other information when it later determined more information was needed, even when BLM could have provided more extensive discussion in its FEIS of its reasons for rejecting recommendations made by environmental organization).

Further, contrary to what Plaintiffs assert, there is nothing on the record that indicates that Defendant USFS limited its decision making or altered its environmental review based on the terms of the MOU. In fact, such claim is clearly undermined by the fact that Defendant USFS does not even consider the MOU to be legally binding upon the agency. *See*, Defendant USFS's Memorandum in Support at pp. 17-18 (ECF No. 123); *accord* Idaho Wool Growers Ass'n. at p. 18 (the precise mechanisms of disease transmission did not affect the Forest Service's final decision and, thus, the failure to consult with the ARS on this issue before adoption of the ROD is "immaterial").

Accordingly, as a matter of law, this Court must find, as the 9th Circuit Court so found in Idaho Wool Growers Ass'n, that any error flowing from the Forest Service's failure (if one) to disclose the MOU prior to adoption of the ROD, is harmless and Plaintiffs have suffered no prejudice as a result. Pursuant to 5 U.S.C. § 706, Summary Judgment should be awarded to Defendants on this claim.

CONCLUSION

As outlined above, the Plaintiffs have failed to demonstrate in the first instance that they have a cognizable claim. Further, Plaintiffs have failed to meet their burden on summary judgment to show as a matter of law that Defendant Forest Service violated NEPA. Thus, Plaintiffs have failed to show that the Forest Service's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Consequently Plaintiffs' Motion for Summary Judgment must be denied in full because Plaintiffs have failed to meet their burden to demonstrate that they are entitled to judgment as a matter of law on any of their claims. *See*, Fed. R. Civ. P. R. 56(a).

Correspondingly, because Plaintiffs' claims actually fail as a matter of law, this Court should grant the Defendants' Cross-Motion for Summary Judgment. In turn, this Court should issue an order dismissing with prejudice Plaintiffs' Complaint in its entirety. (ECF No. 122.)

Respectfully submitted this 23rd day of March, 2016.

/s/ James E. Brown

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is 5,954 words as counted using the word count feature of Microsoft Word, excluding the caption, table of contents, table of authorities, table of exhibits, signature blocks, certificate of compliance, and certificate of service.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of March, 2016, I electronically transmitted the foregoing *Defendant-Intervenors Sheep Industry's Combined Response Brief in Opposition to Plaintiffs' Motion for Summary Judgment and Brief in Support of Defendant United States Forest Service's Cross-Motion for Summary Judgment* to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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