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

GALLATIN WILDLIFE ASSOCIATION, *et al.*

Plaintiffs,

vs.

UNITED STATES FOREST SERVICE, *et al.*

Defendants.

Civil No. 2:15-CV-00027-BU-BMM

BRIEF OF AMICUS CURIAE IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The United States Forest Service ("USFS") issues permits authorizing livestock grazing on areas of the federal lands called grazing allotments as a means of fulfilling its multiple-use mandate. 43 U.S.C. § 1752; 36 C.F.R. § 222.3. USFS issues grazing permits that are generally valid for ten years, prepares allotment management plans ("AMPs"), and issues annual operating instructions ("AOIs") to each permittee. *Id.* Together, these three documents establish the terms and conditions for the permittee's use of the grazing allotment.

This case concerns a challenge to USFS' environmental analysis of the 2009 revised Forest Plan for the Beaverhead-Deerlodge National Forest ("Forest"). Plaintiffs allege USFS violated the National Environmental Policy Act ("NEPA") by not sufficiently disclosing the Forest Plan's impacts to bighorn sheep, and by not expressly disclosing a non-binding Memorandum of Understanding between federal and state agencies and grazing permittees. Additionally, Plaintiffs claim that USFS must provide supplemental NEPA analysis of seven AMPs because of "new information" about bighorn sheep.

Each of Plaintiffs' claims fails. The administrative record demonstrates that USFS adequately considered and disclosed the environmental impacts of domestic grazing on Forest lands, and that USFS fully informed the public of potential impacts to bighorn populations resulting from Forest Plan revisions.

II. LEGAL BACKGROUND

A. Standard of Review

Challenges regarding whether an agency complied with NEPA's procedural requirements are reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). Under the APA, an agency's decision may be overturned only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)).

This standard of review is highly deferential; only when an agency has committed a "clear error of judgment" will a reviewing court overturn the agency's decision. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997). The court's task is simply "to insure a fully informed and well considered decision, not necessarily a decision [the court] would have reached had [it] been [a member] of the decisionmaking unit of the agency." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978).

B. NEPA

The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA") was enacted to ensure that federal agencies engage in informed decisionmaking, and therefore imposes procedural requirements on federal agencies concerning the

analysis and public disclosure of the environmental effects of proposed federal actions; it does not mandate that the agency reach any particular result. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

"NEPA merely prohibits uninformed – rather than unwise – agency action." *Robertson*, 490 U.S. at 351. Reviewing courts are limited to ensuring that an agency has provided a "full and fair discussion of significant environmental impacts' so as to 'inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." *McNair*, 537 F.3d at 1001 (citing 40 C.F.R. § 1502.1).

C. NFMA

The National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et seq*., requires USFS to develop land and resource management plans – typically called "forest plans" – for units of the National Forest System. 16 U.S.C. § 1604(a). Forest plans outline broad, long-term objectives for the entire forest, and management of forest resources under these plans must account for and balance competing environmental and economic factors. *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1056 (9th Cir. 2012) (citing *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 966 (9th Cir.2003)).

In addition to managing forest resources generally, NFMA also requires USFS, in preparing forest plans to, "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan. . . ." 16 U.S.C. § 1604(g)(3)(B). USFS has stated that "the interpretation of the NFMA diversity provision is a goal rather than a concrete standard" is supported by NFMA's legislative history and relevant judicial opinions. 60 Fed. Reg. 18886, 18892 (April 13, 1995). Rather than creating a diversity standard, section 1604(g)(3)(B) directs USFS to "provide for" diversity in order to meet multiple use objectives.

III. FACTUAL BACKGROUND

By the 1930s, Montana's population of Rocky Mountain bighorn sheep was vastly reduced due to hunting, disease, and competition for forage with domestic livestock. USFS008339. Efforts to reintroduce bighorn sheep began in the 1940s by the predecessor agency to Montana Fish, Wildlife & Parks ("FWP"). USFS008339; *see* USFS008626-31. [1]

In 2001, FWP initiated the efforts central to this case by reintroducing bighorn sheep to the Greenhorn Mountains in order to help restore biodiversity to

[1] Plaintiffs format their citations to the administrative record according to the document and page numbers of the individual documents. *Amici* cite the record according to the Bates numbers on each page of documents in the record. Here, Plaintiffs are citing USFS008409-10.

produce the "public benefit" of "providing potentially huntable wildlife and watchable wildlife." USFS008090.

As a result of these reintroduction efforts, in 2002, FWP, the Bureau of Land Management ("BLM"), USFS, and the permittees for the allotments (Rebish and Helle Partnership, and Rebish and Konen Partnership) entered into a Memorandum of Understanding ("MOU" or "Greenhorn MOU"), in which all parties agreed that bighorn reintroduction would not preclude domestic sheep grazing on the allotments at issue in this case. USFS008219-23.[2]

Because commingling between bighorn and domestic sheep can result in the transmission of diseases that pose serious risks to the survival of the species, *see, e.g.*, USFS008643, the MOU provides mechanisms to limit and prevent commingling, which may be carried out by FWP or the permittees. USFS008220-21.

Following a thorough environmental analysis and the signing of the MOU, FWP gave its final approval to the proposal to reintroduce bighorn sheep to the Greenhorn Mountains in May 2002. USFS008195-97. Following this approval, FWP transplanted sixty-nine bighorns to the Greenhorn Mountains in 2003 and 2004. USFS008630.

[2] To the extent Plaintiffs challenge the 2002 MOU, any challenge is beyond the six-year statute of limitations. 28 U.S.C. § 2401(a).

USFS issued its Final Environmental Impact Statement ("FEIS") for the 2009 Revised Beaverhead-Deerlodge Forest Plan ("Forest Plan") in January 2009. USFS004870-6340. The FEIS discussed numerous potential environmental impacts on the area resulting from the Forest Plan, including the impact of domestic livestock operations on wildlife. USFS005383- 93. Specifically, with respect to bighorn sheep, USFS considered how vegetation would impact migration corridors (USFS003866), the amount of winter range closed to motorized travel (USFS003918), and the decision not restock sheep allotments that become vacant (USFS004093, USFS4100-01). USFS also noted that FWP regularly monitors bighorn populations for possible disease transmission from domestic sheep. USFS003912.

USFS issued its Record of Decision ("ROD") approving changes to the Forest Plan on January 14, 2009. USFS003348-98. Plaintiffs challenged USFS' approval of the Forest Plan, claiming, *inter alia*, it did not sufficiently protect bighorn sheep or prevent disease transmission from domestic livestock. USFS007653-54.

The Reviewing Officer rejected Plaintiff's administrative appeal, finding the Forest Plan "adequate to provide for the persistence of bighorn sheep, consistent with the 1982 [National Forest Management Act] diversity requirements." USFS007653. However, given the contentious nature of, and public interest in,

FWP's reintroduction efforts, the Reviewing Officer instructed the Regional Forester to consider whether details about bighorn sheep management should be addressed through a Forest Plan amendment. USFS007654.

Citing a lack the lack of bighorn removals to address conflicts with domestic sheep and geographical separation of domestic sheep from bighorn populations, officials at the Beaverhead-Deerlodge National Forest concluded that continuing coordination with FWP and the terms of AMPs sufficiently addressed bighorn management in the Forest. USFS007830.

IV. ARGUMENT

A. USFS' Management of Bighorn Sheep in the Beaverhead-Deerlodge National Forest is a Reflection of NFMA's Multiple-Use Mandate.

In carrying out its obligation to "provide for diversity of plant and animal communities" in the national forests, USFS must ensure that management decisions concerning diversity are "based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan. . . ." 16 U.S.C. § 1604(g)(3)(B). Here, USFS addressed issues that might affect bighorn sheep viability, including potential impacts from livestock grazing, and implemented management actions to balance these competing uses.

In the State of Montana's draft environmental analysis, released February 16, 2001, FWP explains that reintroducing bighorn sheep to the Greenhorn

Mountains is necessary to both help restore biodiversity in the areas, as well as bring about the "public benefit [of] providing potentially huntable wildlife and watchable wildlife." USFS008090. Indeed, "[e]stablishing a [bighorn] sheep population numerically sufficient to support recreational hunting (i.e. limited special permits) is a *primary goal* of [reintroduction]." USFS008089 (emphasis added).

FWP stated these goals of restoring biodiversity and providing the "public benefit" of a bighorn sheep population large enough to provide for hunting and recreational viewing of the species, in its status update for reintroduction efforts between February 2003 and January 2010. USFS008277.

B. The Forest Service Adequately Justified its Choice of Methodology and Fulfilled its Obligations Under the Viability Regulations.

Plaintiffs allege USFS' viability analysis for bighorn sheep violates NEPA, arguing that the agency has failed to explain its chosen methodology and how that methodology will ensure the viability of bighorns in the Forest. Pls.' Br. at 9-12.[3] Even assuming Plaintiffs can insert a viability argument into their NEPA claims, Plaintiff's arguments fail. Significantly, Plaintiffs do not allege that USFS has

[3] As Federal Defendants note in their cross-motion for summary judgment, plaintiffs originally pled these claims as violations of NFMA, but now bring their arguments under NEPA. Dkt. No. 123 at 9. Amici agree with Federal Defendants that Plaintiffs have waived all NFMA claims by bringing such claims under NEPA, and failing to address NFMA in their brief, but believe that amici's interests are best served by addressing the substantive issues Plaintiffs raise, not the legal issue of whether Plaintiff has waived its claims. Amici refer the Court to Federal Defendants' argument on the waiver issue. *Id.*

failed to ensure bighorn viability *in fact*; rather, Plaintiffs claim that USFS has not adequately explained its decision to use a "habitat-as-proxy" methodology to ensure bighorn viability. Pls.' Br. at 6; *Gallatin Wildlife Ass'n v. USFS*, 2015 WL 4528611 at *5 (D. Mont. July 27, 2015) ("*GAW*").

As explained fully below, ample evidence in the administrative record supports USFS' use of a "habitat-as-proxy" methodology to "provide for diversity of plant and animal communities" in the Forest. *See* 36 C.F.R. § 219.19; 16 U.S.C. § 1604(g)(3)(B).

1. Legal Background of the Viability Regulations.

NFMA directs USFS to develop regulations that ensure forest plans "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. §1604(g)(3)(B). Pursuant to this directive, USFS promulgated the 1982 forest planning rule. 36 C.F.R. Part 219 (2000); 47 Fed. Reg. 43026, 43037 (Sept. 30, 1982).[4]

The planning rule addressed viable populations of existing native and desired non-native vertebrate species. 36 C.F.R. § 219.19 (2008). Bighorn sheep were classified as sensitive species in February 2011, USFS008654, and courts

[4] A planning rule promulgated in 2000 was in effect when the Beaverhead-Deerlodge Forest Plan was approved. 36 C.F.R. part 219; 74 Fed. Reg. 67062 (Dec. 18, 2009). Although the 2000 rule superseded the 1982 rule, it allowed USFS to use the 1982 rule for forest plan revisions, which USFS did here. *See* 36 C.F.R. § 219.35(b) (2010); 74 Fed. Reg. at 67073. The 2000 rule has been superseded by the 2012 planning rule. 77 Fed. Reg. 21162 (Apr. 9, 2012)

have held that sensitive species are subject to the viability regulations. *Oregon Natural Resources Council v. Lowe*, 836 F. Supp 727, 733 (D. Or. 1993 (noting USFS' interpretation of the viability regulation as "requiring additional attention to certain 'sensitive species.'"); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 759 (9th Cir. 1996).

The habitat-as-proxy methodology is based on the scientific principle that by preserving adequate acreage of a species' habitat, the survival and viability of that species can be reasonably assured. *See McNair*, 537 F.3d at 997; *Inland Empire*, 88 F.3d at 763; *GAW*, 2015 WL 4528611 at *5. Because it rests on the assumption that maintaining an acreage of habitat necessary for a species' survival ensures viability of that species, the test for determining whether use of a habitat-as-proxy approach is permissible is "whether it reasonably ensures that the proxy results mirror reality." *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 933 (9th Cir. 2010) (citing *Gifford Pinchot Task Force v. United States Fish and Wildlife Service*, 378 F.3d 1059, 1066 (9th Cir.2004)).

Questions of whether USFS has complied with the viable population regulation under 36 C.F.R. § 219.19 are reviewable under the Administrative Procedure Act ("APA"), where the reviewing court is limited solely to determining whether the agency's interpretation of its viability regulation is arbitrary and capricious. 5 U.S.C. § 706(2)(A); *Inland Empire*, 88 F.3d at 760. Courts have

adopted this narrow standard of review because of the substantial deference that must be afforded to the expertise of USFS in determining what management activities are most appropriate to carry out its statutory and regulatory duties. *Inland Empire*, 88 F.3d at 760.

Courts are most deferential to agency decisions when questions of scientific methodology are involved. *Id*. (citing *Inland Empire Public Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1993). Indeed, courts are highly reluctant to dictate the particular methodology the Forest Service must use to assess population viability. *Sierra Club v. Marita ("Marita II")*, 46 F.3d 606, 619-20 (7th Cir. 1995) (holding that the Forest Service's failure to use "conservation biology" methodology when conducting population viability analysis was not arbitrary and capricious).[5] In short, a reviewing court will uphold the Forest Service's interpretation of its regulatory requirement to ensure viable populations "unless it is plainly erroneous or inconsistent with the regulation." *Inland Empire*, 88 F.3d at 760 (internal citation omitted).

An agency's decision as to which methodology is most appropriate to a particular set of facts is entitled to deference. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989) ("[A]n agency must have discretion to rely on the

[5] The Ninth Circuit has also held that USFS is not required to conduct on-the-ground analysis or observation to fulfill its statutory mandates, and may instead rely on scientific modeling. *McNair*, 537 F.3d at 991-92.

reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); *GAW*, 2015 WL 4528611 at *5.

Significantly, the Ninth Circuit has "repeatedly approved 'the Forest Service's use of the amount of suitable habitat for a particular species as a proxy for the viability of that species,'" and its use of "habitat as a proxy to measure a species' population." *Conservation Cong. v. U.S. Forest Serv*., 371 F. App'x 723, 726 (9th Cir. 2010) (internal citations omitted).

The reviewing court will defer to the Forest Service's expertise and hold that the use of the habitat-as-proxy methodology is not arbitrary and capricious, provided that the agency "describe[s] the quantity and quality of habitat that is necessary to sustain the viability of the species in question and explain[s] its methodology for measuring this habitat." *McNair*, 537 F.3d at 997-98. Courts have held the Forest Service's use of the habitat-as-proxy approach to be arbitrary and capricious only in rare instances where, for example, the factual record clearly indicated that the agency's habitat standard and measurements were erroneous. *See e.g., Idaho Sporting Cong. V. Rittenhouse*, 305 F.3d 957, 967-68, 972-73 (9th Cir. 2002).

2. USFS' Decision to Use the Habitat-As-Proxy Methodology is Supported by the Administrative Record and Entitled to Deference.

None of the factors on which courts, in limited circumstances, invalidated an agency's use of the habitat-as-proxy methodology are present in this case. Thus the Court should defer to USFS' decision to use the habitat-as-proxy methodology to ensure bighorn sheep viability. The record indicates that, not only did USFS provide adequate justification for use of the habitat-as-proxy methodology, but use of the methodology has produced viable populations of bighorns in the Greenhorn Mountains. More importantly, the record indicates that the "proxy results mirror reality," *Tidwell*, 599 F.3d at 933, given that actual, viable bighorn populations are present in the Greenhorn Mountains today. *See* USFS008664-65 (May 16, 2011 FWP memorandum documenting an increased number of bighorns from the previous year); USFS008683 (map of confirmed bighorn sightings from 2001-2015).

FWP indicated in its draft environmental analysis for the proposed bighorn reintroduction that the habitat in which bighorns would be released was "selected based on habitat suitability, distance from domestic sheep operations and other potentially conflicting land uses, . . . and estimated carrying capacity." USFS008089. In its draft environmental analysis, FWP expressly rejected a proposal to reintroduce bighorns in the Gravelly and Snowcrest Mountain Ranges, noting:

> [T]here are domestic sheep that graze in the Gravelly Mountains so that the potential for disease transmission from domestic sheep to bighorn sheep is too great. Also, all the domestic sheep that graze in the Gravelly Mountains trail through the middle of the Snowcrest Mountains so that the potential for disease transmission to bighorns exists here also.

USFS008097.

It was therefore appropriate for USFS to assume that the area of the Greenhorn Mountains selected for reintroduction would ensure that species' viability, as it provides suitable year-round bighorn habitat and protects bighorn populations from the primary threat to their survival—namely, disease transmission resulting from contact between bighorn and domestic sheep populations. USFS008090; USFS008643 ("The primary risk factor for bighorns is all-age epizootic dieoffs, generally associated with domestic sheep.").

Indeed, preventing possible disease transmission resulting from commingling of domestic and bighorn sheep has been at the heart of the discussion since the proposal to reintroduce bighorns was first considered. Domestic livestock producers announced concerns over the spread of diseases such as *Pasteurella* as early as 1997, during a public meeting that took place before any formal proposal for reintroduction was on the table. USFS008082. Livestock producers also reiterated such concerns throughout the process by submitting comments during public notice periods. USFS008141-42.

The administrative record further demonstrates that USFS was well aware of the threat to bighorn viability from disease transmission resulting from commingling of bighorn and domestic sheep, and this concern was documented in the FEIS. USFS005383. In the FEIS, USFS accounted for issues affecting bighorn viability, including impacts to the species from livestock grazing, USFS003912; how to best manage vegetation to provide migration corridors for the species, USFS 003866; imposing motorized travel restrictions in areas of bighorn winter range, USFS003918; and the preferred alternative provides that domestic sheep allotments which become vacant will not be re-stocked, USFS004093 and 004100-01. The FEIS also documents the fact that FWP—which is chiefly-responsible for managing bighorn populations—routinely monitors bighorns for diseases that are possibly contracted through commingling with domestic sheep. USFS005383. Comments submitted by FWP during the NEPA process were "silent on changing sheep grazing," USFS003912, which is likely due to the fact that there has been little need to remove bighorns as a result of commingling with domestic sheep, and adequate separation exists between bighorn sheep populations and domestic sheep on grazing allotments in the Gravelly Mountains in the Forest's report to the Chief of the Forest Service. USFS007830.

In short, the extensive coordination between the Forest, FWP, and domestic sheep producers and managing concerns over bighorn-livestock conflicts on an allotment-by-allotment basis provides sufficient direction for managing bighorn populations in the Forest. *Id*.

3. Access to Domestic Sheep Grazing Allotments is not Necessary to Ensure Bighorn Viability.

Nowhere in the administrative record is there support for Plaintiff's assertion that bighorn sheep must be allowed to enter areas currently designated as domestic sheep grazing allotments in order to ensure bighorn viability. *See* Pls.' Br. at 10-11. Less than twelve percent (roughly 55,000 acres) of the nearly 470,000 acres of the Gravelly landscape within the Forest are within the seven grazing allotments at issue in this case. USFS007816.

Given that FWP estimates that the Greenhorn Mountains—where bighorn reintroduction efforts have been focused—could support *at most* 150 to 200 bighorn sheep, the area provides ample habitat for ensuring bighorn viability. USFS008089.[6] Notably, none of the lethal removals of bighorns carried out by FWP to prevent the spread of disease following confirmed or suspected contact

[6] Contrary to Plaintiff's allegations, 125 animals is not the minimum population size necessary to ensure viability of the species, but is the lower end of a range reflecting the *maximum* number of bighorns that could be reintroduced without causing damage to the area's resources or hardship to the animals. *See* USFS008089 (FWP noted "[t]he Greenhorn Mountains are estimated to support 150 to 200 bighorns," and thus expressed its "intent to reintroduce a population in the [area] that does not exceed 200 sheep.").

between bighorn and domestic sheep have been conducted on lands managed by USFS. USFS008679-80.

C. The Greenhorn MOU is Consistent With NEPA

1. USFS Disclosed the Greenhorn MOU During the NEPA Process.

To satisfy NEPA's procedural, public disclosure requirements, an EIS must contain "a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Ctr. for Biological Diversity v. USFS*, 349 F.3d 1157, 1166 (9th Cir. 2003). A proper NEPA analysis "foster[s] both informed decision-making and informed public participation." *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001). NEPA review "must concentrate on the issues that are truly significant to the action rather than amassing needless detail." *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1136 (9th Cir. 2010) (citing 40 C.F.R. § 1500.1(b)). Additionally, "NEPA only requires agencies to discuss impacts in proportion to their significance." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1102 (9th Cir. 2012) (citing 40 C.F.R. § 1502.2(b)).

Plaintiffs allege USFS violated NEPA by "failing to include any mention of the MOU in its NEPA analysis." Pls.' Br. at 13. Plaintiff's allegation lacks evidentiary support in the administrative record.

First, in addition to the fact that the need for cooperative agreements has been contemplated from the earliest stages of the planning process for bighorn reintroduction, Plaintiffs Gallatin Wildlife Association had *actual knowledge* of the Greenhorn MOU, as evidenced by the Association's Sept. 16, 2003 comments to the FEIS and USFS' response to those comments. USFS000878; USFS002490. Additionally, FWP submitted comments to the FEIS mentioning the MOU, to which USFS also responded. USFS00844; USFS001789.

Plaintiffs also had the opportunity to participate in the development of the Greenhorn MOU itself. For example, the issues and management objectives that were translated into the specific terms of the Greenhorn MOU were discussed during an October 2001 public meeting held by FWP, during which the interests of various stakeholders were represented. USFS008149; USFS008167-68. Development of the Greenhorn MOU itself was a topic on the agenda at a subsequent public FWP meeting held in May 2002. USFS008196; *see* USFS008173 (agenda). During the course of the MOU's development, FWP expressed its desire "to be sure any comment came before it was signed." USFS008196. Indeed, FWP did not give its final approval to the plan to reintroduce bighorn sheep until the May 2002 meeting, basing its approval on its completed environmental analysis and development of the Greenhorn MOU. USFS008196-97.

Because the Greenhorn MOU has been included at all stages of the environmental analysis for the bighorn reintroduction plan, it does not constitute "relevant information" which USFS failed to disclose. Pls.' Br. at 14 (citing *WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 927-28 (9th Cir. 2015)). The *WildEarth Guardians* decision on which Plaintiffs rely is easily distinguishable from this case. There, USFS relied on data concerning impacts of snowmobiles on big game wildlife and winter range that the plaintiffs were unable to review and could not comment on, thus limiting their ability to participate in the NEPA process. *WildEarth Guardians*, 790 F.3d at 926-28.

In contrast, the management concepts underlying the Greenhorn MOU and the MOU itself have been central to the discussion at all relevant stages, and Plaintiffs had ample opportunity to participate—and did participate—in the development of the Greenhorn MOU and to comment on it during the NEPA process.

"NEPA only requires agencies to discuss impacts in proportion to their significance," *Blank*, 693 F.3d at 1102 (citing 40 C.F.R. § 1502.2(b)), which is precisely what USFS did here. The Greenhorn MOU does not limit USFS' ability to manage the Forest or constrain its decisionmaking authority. To have included any additional discussion of it would have resulted in the addition of "needless detail" to the NEPA process without contributing to NEPA's goal of ensuring

informed decisionmaking. *Allen*, 615 F.3d at 1136. The absence of such a discussion does not render USFS' NEPA documentation insufficient. *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998) (holding that a court "may not fly-speck the document and hold it insufficient [under NEPA] on the basis of inconsequential, technical deficiencies.").

2. The Greenhorn MOU Does Not Unlawfully Constrain USFS' Decisionmaking Authority.

Plaintiffs claim the Greenhorn MOU "purports to prohibit USFS from making any changes to grazing on the Allotments" and "purports to unlawfully constrain USFS's ability to protect bighorns and to ensure their viability at the Forest Plan level." Pls.' Br. at 13. On the contrary, the Greenhorn MOU is simply a voluntary, nonbinding agreement between the permittees, FWP, and federal land management agencies developed to set forth a plan to handling incidents of bighorn sheep commingling with domestic sheep before such interaction occurs. USFS008256-60.

Despite the existence of the Greenhorn MOU, USFS' regulatory authority to modify or cancel the permittees' grazing permits to address changing circumstances necessitating such modification or cancellation remains in full force. 36 C.F.R. § 222.4(a)(3)-(8).[7] The Greenhorn MOU also explicitly states that it

[7] These regulations authorize USFS to "[m]odify the terms and conditions of a [grazing] permit to conform to current situations brought about by law, . . . or other management needs," to

does not create any enforceable rights against the United States, and that it is subject to termination, in whole or in part, by any of the parties at any time. USFS008259.

In terms of the practical implications of the Greenhorn MOU, it is worth noting that none of the permittees who are parties to it have employed the MOU's authorization to lethally remove bighorns that come into contact with domestic sheep. USFS008679-80.[8]

3. The Greenhorn MOU is a Central Component of the Bighorn Management and is Necessary to Ensure Bighorn Viability.

The purpose of the Greenhorn MOU was to "address concerns raised by the Grazing Permittees," including "disease transmission and interbreeding . . . between bighorn sheep and domestic sheep," and concerns regarding potential adjustments to their permits to graze domestic sheep resulting from bighorn reintroduction efforts. USFS008219. Because of the severe risk associated with bighorn sheep commingling with domestic livestock, it was necessary for USFS, FWP, and domestic sheep producers to mutually agree how to best prevent such commingling, and thus protect the Greenhorn mountain bighorn populations.

"[m]odify the seasons of use, numbers, kind, and class of livestock allowed or the allotment to be used under the permit, because of resource condition, or permittee request," as well as for a permittee's failure to adhere to the terms of his/her grazing permit.

[8] Plaintiffs have also misstated which land management agency is responsible for issuing final authorization to lethally remove bighorn sheep. Plaintiffs state that USFS issues "kill permits," Pls.' Br. at 3, 18, but the Greenhorn MOU actually vests FWP with the authority to permit lethal removal of bighorns, USFS008548.

Plaintiff's concerns over the authorization for domestic sheep grazing permittees to lethally remove bighorn sheep located too close to domestic sheep under the terms of the Greenhorn MOU allotments do not reflect the reality of the situation. Although the Greenhorn MOU does explain that FWP (not USFS) will issue the permittees a "kill permit for bighorn sheep" in order to "prevent contact between bighorn sheep and domestic sheep," this kill permit does not give domestic sheep grazing permittees unfettered discretion to kill bighorns. USFS008220. Numerous conditions are placed on the authorization to lethally remove bighorns including:

- Only the permittees or their herders may lethally remove bighorns;
- Lethal removal is only available "on [the permittees'] federally-managed, Gravelly domestic sheep allotments" or the permittees private property or leased lands;
- Only "[b]ighorns close to domestic sheep on federally-managed Gravelly domestic sheep allotments, or on Grazing Permittees' private and leased lands *where potential for contact is imminent* may be killed";
- For bighorn sheep close to domestic sheep, but beyond one-half mile, the permittees are obligated to "make every effort to contact FWP personnel to address the situation before killing bighorn sheep." To facilitate this communication between the permittees and FWP, the Greenhorn MOU provides that FWP will provide each permittee with a satellite phone.
- When lethal removal of a bighorn is required, the permittee is obligated to inform FWP within 24 hours of the incident and must "field dress[] and preserve[] [the carcass] in as practical a manner as the circumstances will allow, to prevent spoilage."
- Permittees must leave the entire carcass—including the head and horns—of a lethally-removed bighorn intact for collection by FWP.

- The *person* who carried out the lethal removal must take a representative of FWP to the location of the kill.
- Finally, the authorization to lethally remove bighorn sheep that stray too close to domestic sheep is only available while the permittee's domestic sheep are actually on a federally-managed allotment or the permittee's private or leased property.

USFS008220-21.

Furthermore, the record demonstrates that bighorn sheep are rarely—if ever—subject to lethal removal as a result of the terms of Greenhorn MOU. USFS008280-82.; USFS008679-80; USFS008681-82. Indeed, FWP is chiefly responsible for lethal removals of bighorns. *Id*. From the time of reintroduction through 2015, seventy-four percent of *all* bighorn mortalities in the Greenhorn Mountains resulted from lethal removal by FWP. *Id*. Of the sixteen lethal removals of bighorn sheep carried out since bighorns were reintroduced, none have been carried out by domestic sheep permittees, and none have occurred on lands managed by USFS. *Id*. Additionally, not a single bighorn sheep has been lethally removed due to its proximity to domestic sheep allotments since spring 2008. USFS008679.

D. Plaintiffs Have Not Sufficiently Justified their Claim that NEPA Supplementation is Required.

An agency's duty to prepare supplemental NEPA analysis is triggered whenever there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Marsh*,

490 U.S. at 372 (citing 40 C.F.R. § 1502.9(c)(1)(ii)). However, "[a]n agency need not supplement [a NEPA document] every time new information comes to light after the [NEPA document] is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Id.* at 373. The Supreme Court has held that "supplementation [of NEPA analysis] is necessary only if there remains major Federal action to occur. . . ." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004).

Congress uses appropriation bill riders to ensure ranchers use of public land for grazing purposes. H.R.Rep.113-145 part 1, 3 (2013). Because of the vast number of public lands grazing allotments across the country, Congress has enacted legislation to protect the federal grazing program providing that any grazing permit that expires prior to completion of its NEPA analysis must be reissued "on the same terms and conditions" as the expired permit pending NEPA compliance. Rescissions Act of 1995, Pub. L. 104-19, § 504(b), 109 Stat. 194, 212.

To strengthen these protections, Congress has passed appropriation bill riders for more than a decade allowing expired grazing permits and leases to renew before environmental analyses were complete. H.R.Rep.113-145 part 1, 3 (2013).

Section 325 of Public Law 108-108, 117 Stat. 1241, 1307 (2004), is an example of this type of rider. The rider states in relevant part:

> The terms and conditions contained in the expired, transferred, or waived permit or lease shall continue in effect under the renewed permit or lease until such time as the Secretary of the Interior . . . completes processing of such permit or lease in compliance with all applicable laws and regulations, at which time such permit or lease may be canceled, suspended or modified, in whole or in part, to meet the requirements of such applicable laws and regulations.

Pub. L. No. 108-108 § 325, 117 Stat. at 1307. The rider expressly authorized continuing an expired permit or lease under the same terms and conditions until the agency processed the permit as compliant with applicable laws.

In 2013 and 2014, Congress considered passing legislation to permanently improve grazing permit and lease management. Grazing Improvement Act, H.R.657, 113 Cong. (2013); Grazing Improvement Act, S. 258, 113 Cong. (2013); *see also* H.R.Rep.113-145 part 1 (2013); S. Rep. 113-166 (2014). The grazing permit rider in the National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3023(1) (2014), used language from the Senate version of the grazing improvement bill. *Compare* S. Rep. 113-166, 14 (2014) *with* Pub. L. No. 113-291 § 3023(1) (2014). Section 3023 of the Defense Appropriation Act amended FLPMA, permanently changing the law. The new rider states in pertinent part:

> Section 402 of the Federal Land Policy and Management Act . . . is amended . . . by adding . . . "(2) Continuation of terms under new

> permit or lease.—The terms and conditions in a grazing permit or lease that has expired, or was terminated due to a grazing preference transfer, shall be continued under a new permit or lease until the date on which the Secretary concerned completes any environmental analysis and documentation for the permit or lease required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and other applicable laws.

Pub. L. No. 113-291 § 3023(1). Section 3023 of the defense appropriation act was a "bipartisan agreement" that "represent[ed] a balanced approach to public lands management." 160 Cong. Rec. H8625 (daily ed. Dec. 04, 2014) (statement by Rep. Hastings).

By enacting these appropriations riders, "Congress amended 'all applicable laws' to require reissuance of expired, transferred or waived grazing permits prior to completion of otherwise required actions." *Great Old Broads for the Wilderness v. Kempthorne*, 452 F. Supp. 2d 71, 81 (D.D.C. 2006). The riders "change[] the relevant environmental analysis that applies to grazing permits from a condition precedent into a potential condition subsequent; the analysis still has to occur, but for the time being, not prior to renewal of the permits." *W. Watersheds Project v. BLM*, 629 F. Supp. 2d 951, 970 (D. Ariz. 2009).

The above legislation applies to the seven allotments and allotment management plans challenged in this case.[9] Thus, when USFS reissued permits for

[9] USFS issued AMPs for the seven allotments between 1968 and 2001: 1968 (Black Butte, (USFS000405); 1979 (Barnett, USFS000087; Poison Basin, USFS000303); 1980 (Coal Creek,

grazing on these allotments in 2006 and 2008 (USFS 000010, USFS000347) it was required to do so under the same terms and conditions as the expired permits, and USFS is not required to conduct supplemental NEPA analysis for the original allotment management plans. *See Kempthorne*, 452 F. Supp. 2d at 81.

In denying Plaintiff's motion for a preliminary injunction, the Court found that the 1995 Rescission Act and the 2004 Appropriations Act preclude the need for supplemental NEPA analysis. *GAW*, 2015 WL 4528611, at *8-10.

Because Plaintiffs have not advanced any new arguments concerning the inapplicability to this case of the Acts cited by the Court, or the National Defense Authorization Act for Fiscal Year 2015, and have not demonstrated the existence of new, significant information warranting NEPA supplementation, Plaintiff's allegation that USFS violated NEPA by not performing supplemental NEPA analysis fails. Pls.' Br. at 15-21.

Plaintiffs cite *Oregon Natural Desert Association v. Sabo*, 854 F. Supp. 2d 889, 922-24 (D. Or. 2012), to support their claim that NEPA supplementation is required because the legislation discussed above does not preclude supplementation when there are new circumstances. Pls. Br. at 16 n.8. However, *Sabo* is distinguishable from this case because there, the court held that NEPA supplementation was required for reissued grazing permits despite the

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USFS000123); 1988 (Lyon/Wolverine, USFS000249); 1991 (Fossil/Hellroaring, USFS000182); 2001 (Cottonwood, USFS000668).

Appropriations Act rider because plaintiffs had shown that grazing was causing potentially irreversible harm to sensitive species and their habitat, both of which were located on the allotments. *Sabo*, 854 F. Supp. 2d at 923-24. In contrast, here, bighorn sheep are not present on any of the challenged allotments, and Plaintiffs have not demonstrated that domestic sheep grazing is causing potentially irreversible harm to bighorns or their habitat.

Reintroduction efforts have limited bighorn sheep populations to the Greenhorn Mountains to maintain the separation of bighorn and domestic sheep. USFS008142, USFS008196, USFS008548. Indeed, Plaintiffs acknowledge the lack of overlap between bighorn sheep habitat and domestic allotments by noting the Greenhorn Herd is located "only six miles" from domestic sheep allotments. Pls.' Br. at 3 (citing USFS008371, USFS007816); *see also* Pls.' Br. at 10-11 (noting that bighorn sheep cannot occupy the same habitat as domestic sheep and are subject to removal when observed in the vicinity of domestic sheep allotments).

Additionally, USFS completed compliance reports for all seven allotments, and none show non-compliance with Forest Plan direction. *See e.g.*, USFS000119-22, USFS000176-79, USFS000238-41, USFS000288-91, USFS000343-46, USFS000444-47, USFS000699-702 (Compliance Reports for 2015).

Finally, NEPA analysis for six of the seven challenged allotments is scheduled to occur in 2019. USFS000004-05. The fact that USFS has not set a

date for NEPA analysis of the Cottonwood Allotment, USFS000005, does not require USFS to conduct supplemental NEPA analysis, as "the Secretary of Agriculture has sole discretion to determine the priority and timing for completing NEPA analysis." *GAW*, 2015 WL 4528611, at *10 (citing *Kempthorne*, 452 F. Supp. 2d at 81).

V. CONCLUSION

Key facts in the administrative record demonstrate that USFS has fully complied with applicable law, adequately disclosed relevant information during the NEPA process, and has fulfilled the requirements regarding viable populations of bighorn sheep.

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Therefore, for the reasons set forth above, the Court should grant summary judgment in favor of Federal Defendants on all claims and deny Plaintiffs' motion for summary judgment on all claims.

Respectfully submitted: March 23, 2016.

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CERTIFICATE OF SERVICE

I, William P. Driscoll, certify that, on this date, the foregoing Brief of Amicus Curiae in Support of Federal Defendants' Cross-Motion for Summary Judgment was electronically filed. Notice of this filing will be sent to counsel of record for all parties by operation of the Court's Electronic Case Filing system pursuant to Local Rule 1.4(c)(2). Parties and their counsel may access this filing through the Court's Electronic Case Filing system.

Dated: March 23, 2016 /s/ William P. Driscoll