

Lauren M. Rule (ISB # 6863)
ADVOCATES FOR THE WEST
PO Box 1612
Boise ID 83701
(208) 342-7024
lrule@advocateswest.org

Attorney for Plaintiff Western Watersheds Project

Jennifer R. Schemm (OSB #97008)
602 "O" Avenue
La Grande, OR 97850
(541) 962-0860
jschemm@oregontrail.net

Attorney for Plaintiffs Hells Canyon Preservation Council and The Wilderness Society

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT,)
)
 Plaintiff,)
)
 and)
)
 HELLS CANYON PRESERVATION COUNCIL)
 and THE WILDERNESS SOCIETY,)
)
 Co-Plaintiffs;)
)
 v.)
)
 UNITED STATES FOREST SERVICE,)
 BUREAU OF LAND MANAGEMENT, and)
 SECRETARY OF INTERIOR KEN SALAZAR)
)
 Defendants.)
 _____)

Case. No. 07-151-BLW

**BRIEF IN SUPPORT OF
PLAINTIFFS' EMERGENCY
MOTION FOR TRO AND/OR
PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs Western Watersheds Project, Hells Canyon Preservation Council, and The Wilderness Society file this emergency motion for injunctive relief seeking an immediate closure of the Bureau of Land Management's ("BLM") Partridge Creek allotment—which is scheduled to be grazed October 15—to protect the struggling bighorn sheep populations that inhabit the Salmon River canyon. The Partridge Creek allotment is sandwiched between Forest Service allotments that have been closed to domestic sheep grazing for three years because of the risk of disease transmission from domestic sheep to bighorn sheep; but BLM refuses to take similar action, thus threatening the only remaining native bighorn sheep in the state with disease.

Recent scientific analysis shows that the Partridge Creek allotment contains extensive bighorn sheep habitat and is within the home range of the Salmon River canyon bighorn population. Recent telemetry locations and other observations of bighorn sheep show that they consistently use habitat near or on the Partridge Creek allotment. The Forest Service determined that such information warranted closure of the adjacent allotments to protect bighorn sheep while it conducted long-term environmental analyses, but BLM is taking the opposite approach. By refusing to close this allotment while it assesses the impacts to bighorn sheep from continued grazing, BLM is violating the National Environmental Policy Act ("NEPA") and the Federal Land Policy and Management Act ("FLPMA"), and is threatening these native bighorn sheep with imminent irreparable harm. Thus, the Court should grant Plaintiffs' motion and immediately enjoin grazing on this allotment until BLM completes its environmental analysis.

STATEMENT OF FACTS

Partridge Creek Allotment

The Partridge Creek allotment occurs on BLM land along the south side of the Salmon

River seven miles east of Riggins. It is just north of the Shorts Bar, Hershey Lava, and French Creek allotments of the Payette National Forest, and directly across the river from the Allison-Berg allotment of the Nez Perce National Forest, which have been closed to domestic sheep for several seasons. *See Fifth Declaration of Lauren Rule, Exs. 1 & 2* (filed herewith).¹ Like much of the Salmon River canyon, the Partridge Creek allotment contains very steep, rugged terrain that provides high quality winter and summer bighorn habitat. *Ex. 3.* Based on the Forest Service's recent analysis, this allotment falls within occupied habitat of the Salmon River bighorn population. *Ex. 4.*

Telemetry studies initiated two years ago show a group of eleven bighorn rams consistently using habitat on the Allison-Berg allotment directly across the river from the Partridge Creek allotment. *Ex. 5.* This ram group consists of almost half of the total 26 rams in the entire Main Salmon River population. *Id. at p.2.* Other observations of bighorns have occurred in the Salmon River canyon near the Partridge Creek allotment by fisherman, outfitters, and biologists. *See Exs. 6-10; Suppl. Declaration of Curt Mack (Dckt. No. 90).* Bighorns on the north side of the Salmon River can easily access the Partridge Creek allotment by swimming across the river or crossing the Partridge Creek bridge. *See Ex. 11 at p.40; Declaration of Victor Coggins ¶¶ 18, 22 (Dckt. No. 9); Fifth Declaration of Victor Coggins ¶ 12 (filed herewith).*

Bighorns have also been reported on the south side of the river on or near the Partridge Creek allotment. *Ex. 5; Ex. 8 at p.2, 4; Ex. 9 at p.1.* Telemetry data from the current study indicates a bighorn ram was on the Partridge Creek allotment on several occasions in 2008 and 2009, and other collared bighorns also crossed the river. *Ex. 5 at p.3.* Given the good habitat there, it is likely that uncollared bighorns use the south side of the river as well.

¹ Hereafter all Exhibit references are to exhibits attached to the Fifth Rule Declaration.

Under the current grazing permit, BLM authorizes 833 domestic sheep to graze the 9,166 acre Partridge Creek allotment in two seasons: April 11 to July 15 and again October 15 to November 30. *Ex. 12.* For the 2009 grazing year, BLM authorized 833 sheep to graze April 11 to July 15, 2009 and 635 sheep to graze October 15 to December 15, 2009. *Ex. 13.*

Plaintiffs and the Nez Perce Tribe are extremely concerned about the new data showing bighorn sheep consistently near or on the Partridge Creek allotment. The Salmon River canyon population of bighorn sheep is the only remaining native population of bighorns in Idaho and has experienced significant declines. *Ex. 14 at p.3-24.* The Main Salmon River bighorn herd has declined 70% in the last twenty years. *Ex. 8 at p.2.* This population is currently well below viable levels and any further die-offs from disease could easily extirpate it. *See Ex. 15 at pp. 1, 5; Fifth Coggins Decl. ¶ 17; Third Declaration of Michael Schlegel ¶ 7 (Dckt. No. 71).*

Because of these concerns, Plaintiffs and the Nez Perce Tribe contacted BLM numerous times this spring and summer to discuss closing the Partridge Creek allotment to domestic sheep, but BLM has refused to take such action. *See e.g. Ex. 15.* Plaintiffs then petitioned the Secretary of Interior to close the allotment due to the high risk to bighorn sheep, but the Secretary has failed to close the allotment. *Ex. 16.²* Plaintiffs are thus forced to bring this injunction motion to protect the native bighorn sheep in the Salmon River canyon.

Forest Service and BLM Analysis of Bighorn Sheep and Domestic Sheep Conflicts

The Forest Service and BLM both recognize that domestic sheep pose a very large threat to bighorn sheep due to the risk of disease transmission. *See e.g. Ex. 11 at pp.16, 41; Ex. 14 at p. 4-148; Ex.17 at pp. 3-10 to 3-14; Exs. 18-20.* The Forest Service has closed all or part of six

² The petition requested that the Secretary respond by September 15 or petitioners would presume he was denying the petition. The Secretary has not responded, and BLM has told Plaintiffs and the Nez Perce Tribe that grazing will occur starting October 15.

domestic sheep allotments as well as a major trailing route on the Payette and Nez Perce National Forests for the past three years because of the proximity of bighorn sheep to those areas. As explained by the Payette National Forest Supervisor, there was an urgent need to close these areas because of the “need to prevent contact between domestic sheep and bighorn sheep and reduce the risk of potential disease transmission from domestic sheep to bighorn sheep.” *Ex. 21 at p.1*. The Payette National Forest is conducting an analysis to develop a long-term strategy for managing domestic sheep and bighorn sheep, but until that analysis is complete, the Forest must **ensure** separation of the species to maintain the environmental status quo. *Id.*

Likewise, the Nez Perce National Forest has closed the Allison-Berg allotment for several grazing seasons because of new information about bighorn sheep on and near the allotment, and initiated an environmental analysis to consider risks to bighorn sheep. *Exs. 22-24*. Like the Payette, it prescribed non-use for the allotment during the time needed to complete the environmental analysis to **ensure** separation of the species. *Exs. 22 & 24*.

The Forest Service stated in its analysis for the Payette National Forest that even limited contact between the species is a risk to bighorn sheep viability; and that because of the severe consequences, risk of contact must be absent or extremely low—i.e. approach a “zero percent probability.” *Ex. 17 at pp.3-28 to 3-29*. Any risk of contact could lead to disease transmission that could decimate the already struggling populations of bighorn sheep in these areas. *See Fifth Coggins Decl. ¶ 17; Third Coggins Decl. ¶¶ 19-22 (Dckt. No. 51); Third Schlegel Decl. ¶ 7 (Dckt. No. 71)*. This result would be especially detrimental to these last remaining native bighorns because, as this Court has already recognized, “the loss of that herd would be particularly devastating to the genetic diversity of bighorns.” *November 13, 2007 Order at 7 (Dckt. No.103)*. Because of the precarious status of these herds, Region 4 of the Forest Service

has decided to designate Rocky Mountain bighorn sheep as a sensitive species. *See Ex. 25.*

For more than ten years, BLM has also known about the need to keep the species separated because of the risk of disease transmission, and recommended that domestic sheep grazing and trailing should be discouraged in the vicinity of native bighorn sheep ranges. *Ex. 19.* These Guidelines recommended a nine mile buffer between domestic sheep and bighorn sheep to create effective separation between the species, which is similar to recommendations from the Western Association of Fish and Wildlife Agencies. *Id.; Ex. 20; Fifth Coggins Decl. ¶ 18.*

The Cottonwood Field Office of the BLM, which is responsible for the Partridge Creek allotment, noted in the analysis for its new Resource Management Plan (“RMP”) that the Salmon River bighorn populations have been “greatly reduced” compared to historic levels, that disease from domestic sheep is the primary threat to bighorns, and that the Partridge Creek allotment is **high risk** for disease transmission. *Ex. 14 at pp. 3-24, 4-148.* The Cottonwood Office acknowledged that it needed to do further analysis of the conflicts between domestic and bighorn sheep on four allotments within that Field Office, including the Partridge Creek allotment, which the agency would complete in a supplemental EIS. *Ex. 26 at p.11.* BLM, however, is not taking action—like the Forest Service has—to close the high risk Partridge Creek allotment to domestic sheep to protect the native bighorn population in the vicinity pending this analysis. *Id.*

Best Management Practices Proposed for the Partridge Creek Allotment

The permittee for the Partridge Creek allotment is Carlson Livestock, which also grazes the Allison-Berg allotment. Carlson Livestock and Idaho Department of Fish and Game (“IDFG”) recently negotiated “Best Management Practices” (“BMPs”) for several allotments grazed by Carlson Livestock, including the Partridge Creek allotment. *Ex. 9.* This agreement is similar to one signed this past spring. *Ex. 8.* BMPs, however, have never been proven effective

at keeping the species separate, which is why the Forest Service and bighorn experts have repeatedly refused to rely on them. *See Exs. 21, 24, 27-28, 33; Fifth Coggins Decl. ¶¶ 3-7.* Furthermore, these agreements are voluntary and unenforceable and there is no assurance they will be implemented fully or properly.

The current BMP agreement was developed pursuant to new legislation by the State of Idaho, which **required** IDFG to develop agreements with willing permittees and certify that the agreement would reduce risk of disease transmission to an acceptable level, either because it was acceptable to bighorn sheep viability or because the relevant bighorn populations were already exposed to disease. Idaho Code § 36-106(e)(5)(E). The BMPs here were negotiated between the attorney for Carlson Livestock and the State, and went through several edits to obtain an agreement satisfactory to the permittee. *Ex. 31.* Thus, these BMPs are the result of negotiations and are not based solely on biological expertise; nor have they undergone public comment, peer review, or any environmental analysis. *Fifth Coggins Decl. ¶ 5.*

The Partridge Creek allotment BMPs are like those in previous proposals, including using two herders and several guard dogs, counting marker sheep every day and counting individual sheep every ten days, contacting IDFG within 24 hours if bighorn sheep are seen near domestic sheep and killing bighorn sheep suspected of making contact with domestics, and removing or killing stray domestic sheep. *Ex. 9.* This plan is similar to ones rejected by the Payette and Nez Perce Forests because they do not ensure separation of the species. *See Exs. 21, 23-24, 27-28, 33.*

Even IDFG does not state that the Partridge Creek BMPs will ensure separation or protect bighorn viability, only that they will reduce risk of disease transmission to an acceptable level based on other factors, such as that these bighorns have already been exposed to disease. *Ex. 9, compare to Ex. 32 (removed language from draft stating that plan would be acceptable for*

bighorn viability). Even if this population has been exposed to disease, it does not mean these animals are immune from further disease transmission. Contact with domestic sheep could still cause additional outbreaks and die-offs within the population. *Fifth Coggins Decl.* ¶ 6.

Given the rugged terrain, the long distances traveled by bighorn sheep, the prevalence of stray domestic sheep, and the attraction between bighorn sheep and domestic sheep, it is very difficult to ensure that the species do not come into contact or even know if contact has occurred. *Fifth Coggins Decl.* ¶¶ 7-16. Bighorns in the Hells Canyon and Salmon River canyon populations have been documented traveling many miles and crossing large rivers. *Ex. 11 at p. 25, 40; Ex. 17 at p.3-21, Fifth Coggins Decl.* ¶ 12; *Fourth Coggins Decl.* ¶¶ 6-8 (*Dckt. No. 64*). Young bighorn rams in particular make extensive movements in the fall when they are in the rut. *Ex. 11 at 44*. These unpredictable movements make it difficult to track bighorn sheep.

It is also not unusual for domestic sheep to stray from their band, and such episodes have occurred numerous times this year and in the past with Carlson Livestock on both the Allison-Berg and Partridge Creek allotments. *See Exs. 30, 34*. In one instance this spring, six domestic sheep strayed from the Partridge Creek allotment and crossed the bridge over the Salmon River, coming onto the Allison-Berg allotment within ¼ mile of bighorn sheep. *Ex. 30 at 13-14*. This straying occurred despite the BMP agreement that was in place in spring 2009. *Ex. 8*.

Because of the prevalence of stray domestic sheep in the Partridge Creek area, which poses a significant risk to bighorns using the same habitat, BLM is authorizing installation of a new cattleguard, gates, and fencing for the Partridge Creek bridge to attempt to prevent domestic sheep from crossing the bridge. BLM is not conducting any environmental analysis for this project, instead claiming it is categorically excluded from NEPA. *Ex. 35*.

Also this past spring, a radio-collared bighorn ram was detected near domestic sheep on

the Carlson Livestock private inholding within the Allison-Berg allotment. IDFG was notified and located the bighorn ram, which appeared sick. IDFG attempted to capture the ram right away before it could return to its herd and potentially infect other bighorns. However, the ram eluded IDFG biologists for several weeks and mixed with other bighorns from its herd before IDFG finally killed it. *See Exs. 29 & 36.*

By continuing to authorize grazing across the Partridge Creek allotment, BLM is creating a substantial risk to bighorn sheep that BMPs cannot alleviate. The only way to ensure separation is to remove domestic sheep from occupied bighorn habitat, as the Forest Service has done with the adjacent allotments.

ARGUMENT

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of hardships tips in his favor, and that an injunction is in the public interest. *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2008). By authorizing domestic sheep grazing on the high risk Partridge Creek allotment prior to completing a new environmental analysis, BLM is violating NEPA and FLPMA and creating imminent harm to native bighorn sheep. Given the hardships involved and the great public interest in preserving these populations of bighorn sheep, the balance of equities and public interest strongly favor an injunction.

I. BLM HAS VIOLATED NEPA AND FLPMA.

Plaintiffs challenge BLM's ongoing authorization of grazing on the Partridge Creek allotment pursuant to the November 2003 permit renewal and 2009 annual authorization, the Secretary of Interior's denial of Plaintiff's petition seeking to close the Partridge Creek allotment, and BLM's authorization of the cattleguard, gates, and fencing for the Partridge Creek

bridge using a CE. These actions are final agency actions challengeable under the Administrative Procedure Act (“APA”). *See e.g. Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002) (challenging grazing permits as final agency actions); *Western Watersheds Project v. Dyer*, 2009 WL 484438, at *22 (D. Idaho Feb. 26, 2009) (holding BLM annual grazing authorizations were final agency actions); *Gardner v. BLM*, --F. Supp.2d--, 2009 WL 1743674, at *13 (D. Or. June 15, 2009) (indicating that denial of petition to close ORV routes would be final agency action reviewable under APA, citing *Sierra Club v. Clark*, 756 F.2d 686, 688-89 (9th Cir. 1985)). Because these actions are arbitrary, capricious, and contrary to NEPA and FLPMA, they must be set aside under the APA. 5 U.S.C. § 706(2).

A. BLM Is Violating NEPA By Authorizing Grazing On The Partridge Creek Allotment Before Completing New NEPA Analysis.

NEPA requires federal agencies to prepare an environmental impact statement for every major federal action that may significantly affect the environment to consider the direct, indirect, and cumulative impacts of that action. 42 U.S.C. § 4332 (2)(C). It also requires agencies to prepare a new or supplemental analysis when significant new information arises or a material change of circumstances occurs. 40 C.F.R. § 1502.9(c)(1)(ii); *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 561-62 (9th Cir. 2006).

NEPA regulations state that agencies must complete an EIS early in the planning process so that it will contribute to the decision-making process and not simply justify a decision already made. 40 C.F.R. §§ 1501.2, 1502.5. Furthermore, the agency must not make any commitment of resources pending the NEPA analysis that would prejudice the decision making process, such as taking an action that would cause environmental harm or limit the choice of reasonable alternatives available to the agency. *Id.* §§ 1502.2(f); 1506.1(a).

The Ninth Circuit has affirmed 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 impair the decision making process and prejudice consideration of alternative actions. *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988); *Metcalf v. Daley*, 214 F.3d 1135, 1142-43 (9th Cir. 2000); *Anderson v. Evans*, 371 F.3d 475, 501 n.25 (9th Cir. 2004); *WildWest Institute v. Bull*, 547 F.3d 1162, 1168 (9th Cir. 2008). These cases have held that an agency cannot take actions that could irreversibly impair the environment before assessing the impacts of those actions and any reasonable alternatives. *Connor*, 848 F.2d at 1446-1451 (sale of oil and gas leases); *Metcalf*, 214 F.3d at 1143 (contract for whale hunt); *Anderson*, 371 F.3d at 501 n.25 (permit to kill whale). NEPA emphasizes up-front environmental analysis so that an agency does not act on incomplete information, “only to regret its decision after it is too late to correct.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (quoting *Marsh v. ONRC*, 490 U.S. 360, 371 (1989)).

Here, BLM renewed the term grazing permit for the Partridge Creek allotment in November 2003 and annually authorizes grazing on the allotment for both spring and fall seasons, most recently in a February 2009 billing statement. *Exs. 12-13*. BLM has never assessed in any site-specific NEPA analysis the impacts to bighorn sheep from grazing this allotment. New information from the last couple years concerning conflicts between bighorn and domestic sheep and disease transmission as well as data showing that bighorns regularly use habitat on or near the Partridge Creek allotment demonstrates the need for new analysis.

BLM even admits that it must conduct a supplemental analysis to assess this new information, and has stated that it is initiating an EIS to study the impacts to bighorn sheep of grazing the Partridge Creek allotment as well as three other domestic sheep allotments within the Cottonwood Field Office. *Ex. 26 at p.11*. Yet BLM also stated that it will continue to authorize

grazing in the same manner as previously while it completes this EIS. *Id.*

The authorization of grazing for this fall and in subsequent seasons before completing a new analysis violates NEPA and contradicts Ninth Circuit law. BLM must not take any action before it **completes** its analysis that could cause adverse effects to the environment or preclude any alternative actions—i.e. cannot make any irreversible commitment of resources. Continuing to authorize grazing on the Partridge Creek allotment could cause irreversible damage to the Main Salmon River bighorn population if even one domestic sheep makes contact with a bighorn. *See Ex. 15 at pp.1, 5; Ex. 17 at 3-28 to 3-29.* Any further losses of bighorns from this population, especially a ram, could permanently impair the population, rendering BLM's analysis meaningless. *Id.; Fifth Coggins Decl. ¶ 17.* Furthermore, if this population of bighorns is extirpated, there will be a loss of genetic diversity from the only remaining native animals in the state. BLM must protect the near-by bighorn sheep rather than endanger the entire population while it conducts its analysis so that the bighorns do not die off in the meantime.

The Forest Service has taken this very position with regard to its long-term analyses and interim allotment management. Both the Payette and Nez Perce Forests are undertaking NEPA analyses looking at management of domestic sheep allotments within bighorn habitat, and in the interim have closed several allotments that are high risk for contact between domestic and bighorn sheep in order to **ensure** separation of the species and protect the “environmental status quo” for bighorns. *Exs. 21-24.*³

³ To the extent BLM relies on the BMP plan to continue to authorize grazing on the Partridge Creek allotment, such reliance is misplaced and unlawful. This plan has never undergone its own NEPA analysis to assess its environmental impacts, including analyzing alternative actions, soliciting public input, and addressing opposing scientific viewpoints. 40 C.F.R. §§ 1502.14, 1503.1, 1506.6, 1502,9(b); *Kern v. BLM*, 284 F.3d 1062, 1073 (9th Cir. 2002) (agency may not tier to Guidelines that have not undergone NEPA analysis themselves). Furthermore, as

BLM must close the high risk Partridge Creek allotment until it completes its new NEPA analysis to ensure separation of the species so that it does not cause any irreversible damage to the Salmon River bighorn population, which would nullify any alternatives aimed at protecting that population. By continuing to authorize domestic sheep grazing on the Partridge Creek allotment prior to the completion of its analysis, BLM is violating NEPA.

B. BLM Is Violating NEPA By Authorizing Installation Of New Gates and Fencing For The Partridge Creek Bridge Without Any NEPA Analysis.

BLM is avoiding completing any NEPA analysis for the installation of a new cattleguard, gates, and fencing on the Partridge Creek bridge by claiming that this activity falls within a categorical exclusion (“CE”). *See Ex. 35*. An agency can use a CE only when an activity will have no individual or cumulatively significant effects. 40 C.F.R. §§ 1508.4, 1508.27(b)(7). *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027 (9th Cir. 2007). Under BLM’s Department Manual, it can use a CE when the action would not have highly controversial environmental effects, involve unresolved conflicts over alternative uses of resources, or have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects. 516 DM 2.3(A) & App. 2.3, 2.6.

Furthermore, an agency may not segment an action into smaller components to avoid doing an EA or EIS; it must consider connected actions and cumulative actions within the same analysis. 40 C.F.R. §§ 1508.25(a), 1508.27(b)(7); *Sierra Club v. Bosworth*, 510 F.3d at 1028. Actions are connected if they will not proceed unless other actions are taken previously or simultaneously, or are interdependent parts of a large action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a)(1)(ii), (iii). When actions are inextricably intertwined

discussed above and below, these BMPs do not ensure separation of the species and are not even enforceable and thus are not sufficient to protect the bighorns in the interim.

such that the first activity depends on the second for its justification and would only proceed if the second action also proceeds, they are connected actions that must be assessed together. *See Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985) (logging road and timber sale were connected actions); *Barnes v. Babbitt*, 329 F. Supp.2d 1141, 1162 (D. Ariz. 2004) (range improvements were connected to grazing authorization); *Baykeeper v. U.S. Army Corps of Engineers*, 2006 WL 2711547, at *9-11 (E.D.Cal. 2006) (dredging project connected to Port Development Plan); *Shoshone-Pauite Tribe v. United States*, 889 F. Supp. 1297, 1308-10 (D. Idaho 1994) (creation of training range connected to establishment of wing at Air Force base).

Here, the installation of the new cattleguard, gates, and fencing for the Partridge Creek bridge is connected to the grazing authorization for the Partridge Creek allotment and thus the two activities must be considered together in an environmental analysis. The only reason for the bridge project is because of the grazing of domestic sheep on the Partridge Creek allotment. *See Ex. 35*. As in *Barnes v. Babbitt*, without the grazing, there would be no need for the bridge improvements, and thus the activities are connected. *Barnes*, 329 F. Supp.2d at 1162.

Moreover, the use of the CE for the bridge project is also improper because the project involves unresolved conflicts over the use of the Partridge Creek allotment for domestic sheep grazing, is directly related to this grazing, and these activities may have cumulatively significant impacts. Thus, BLM must assess these cumulative impacts in one analysis to consider how effective the cattleguard, gates, and fencing will be at separating the domestic and bighorn sheep if it continues to authorize grazing on the Partridge Creek allotment. This bridge is used by the general public and other landowners in addition to Carlson Livestock so there is no guarantee the gates will remain closed, and bighorn sheep could still cross the bridge or swim the across the river. *See Fifth Coggins Decl.* ¶ 12. BLM violated NEPA by rushing this project through with a

CE rather than fully analyzing it in conjunction with the grazing.

C. BLM Has Violated FLPMA By Continuing To Authorize Grazing On The Partridge Creek Allotment This Fall.

BLM and the Secretary of Interior have violated FLPMA and its implementing regulations by authorizing grazing on the Partridge Creek allotment this fall and denying Plaintiffs' petition to close this allotment despite significant new information showing a high risk to bighorn sheep from grazing this allotment.

FLPMA calls for the public lands to be managed on the basis of multiple use and sustained yield to protect, among other values, scientific, ecological, and environmental values and to provide food and habitat for wildlife. 43 U.S.C. § 1701(a)(7), (a)(8). When managing for multiple use, BLM must consider all resources, including range and wildlife, and must coordinate management of various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output. *Id.* § 1702(c).

FLPMA also mandates that BLM “**shall** . . . take any action necessary to prevent unnecessary or undue degradation of the lands.” *Id.* § 1732(b) (emphasis added). This provision requires that BLM prevent any degradation that is excessive or would unduly harm the public lands and its resources. *Mineral Policy Center v. Norton*, 292 F. Supp.2d 30, 42-43 (D.D.C. 2003); *see also Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1129, 1136 (10th Cir. 2006) (noting BLM's duty to protect the environment under FLPMA provisions 1701(a)(8) and 1732(b), and that order closing ORV trails complied with BLM's statutory mandate to prevent unnecessary or undue degradation). Authorizing an activity that is likely to lead to death of bighorn sheep, either through disease transmission or the intentional killing of bighorns that are

suspected of making contact with domestic sheep, and further declines of the last native bighorn population in Idaho is not consistent with the requirements to prevent permanent impairment of the environment and excessive or undue harm to public land resources.

Furthermore, BLM's regulations state that when the agency determines that resources on the public lands require immediate protection because "continued grazing use poses an imminent likelihood of significant resource damage," the authorized officer "**shall** close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use." 43 C.F.R. § 4110.3-3(b) (emphasis added). The use of the term "shall" in both of the above provisions demonstrates that they are mandatory actions. *United States v. Monsanto*, 491 U.S. 600, 607 (1988); *Center for Biological Diversity v. Norton*, 254 F.3d 833, 837 (9th Cir. 2001).

Once BLM determined that this allotment presented a high risk of disease transmission, it had a duty to close the allotment to prevent significant damage to the Salmon River bighorn population. As the Forest Service has stated, any risk of contact could lead to disease transmission, which would decimate this herd further and could lead to its extirpation. *Ex. 17 at pp. 3-28 to 3-29; see also Ex. 15 at pp. 1, 5; Fifth Coggins Decl. ¶ 17*. Given the consistent sightings of bighorn sheep on or in close proximity to the Partridge Creek allotment, as well as the problem of domestic sheep straying from their band that has consistently occurred with this permittee, there is a high risk of contact between the species. *Exs. 5, 30, 34*.

The agencies and bighorn experts all recognize that BMPs do not ensure separation of the species, which is the only effective way to prevent contact. *Exs. 21, 23-24, 33; Fifth Coggins Decl. ¶¶ 3-19; Third Schlegel Decl. ¶¶ 12-13 (Dckt. No.71)*. Just this past spring, BMPs did not prevent six domestic sheep from straying from the Partridge Creek band. *Ex. 8, Ex. 30 at p. 18*. If not for the Nez Perce Tribe field crew chasing these domestic sheep back to the allotment, they

could easily have made contact with the near-by bighorns and no one would have known. *Ex. 30 at p.18*. Furthermore, when a bighorn was detected near domestic sheep, it was not possible to capture and kill that animal before it made contact with other bighorns. *Exs. 29, 36*. Even the BMP of killing a bighorn sheep that is seen near domestic sheep is significant damage to a population that has declined by 70% in the past 20 years and is currently below viable population levels. *Ex. 8 at p.2; Ex. 15 at 1, 5; Third Schlegel Decl ¶ 7; Fifth Coggins Decl. ¶ 17*.

Finally, FLPMA requires that when BLM revises a land use plan, it coordinate planning and management activities with management programs of other Federal agencies and Indian tribes. 43 U.S.C. § 1712; *see also* 43 C.F.R. § 1610.3-2(b) (guidance and resource management plans shall be consistent with resource related policies and programs of other Federal agencies and Indian tribes). BLM's revised RMP recognizes the high risk of the Partridge Creek allotment to bighorn sheep and the need for further environmental analysis, but allows grazing to continue anyway. *Ex. 14 at p. 4-148, Ex. 26 at p.11*. The continuation of this grazing is inconsistent with the Forest Service's closures of its adjacent high risk allotments and the Nez Perce Tribe's program to protect bighorn sheep in the Salmon River canyon. In fact, BLM is actually thwarting the Forest Service's and Tribe's efforts to protect those bighorns. Such inconsistent planning contradicts the requirements of FLPMA and its regulations.

BLM **must** prevent permanent impairment, undue harm, and the imminent likelihood of significant damage to bighorn sheep in the Salmon River canyon under FLPMA. 43 U.S.C. §§ 1702(c), 1732(b); 43 C.F.R. § 4110.3-3(b). It also must make its planning decisions consistent with policies and programs of other Federal agencies and Indian tribes. 43 U.S.C. § 1712; 43 C.F.R. § 1610.3-2(b). The only way to accomplish these mandates is to close the Partridge Creek allotment. Thus, BLM's 2009 annual grazing authorization for the Partridge Creek

allotment and the Secretary's denial of Plaintiffs' petition violate FLPMA.

II. IRREPARABLE HARM WILL LIKELY OCCUR TO BIGHORN SHEEP.

A preliminary injunction is necessary here to avoid irreparable harm to bighorn sheep that is likely to occur in the form of death of bighorn sheep, either due to disease transmitted from domestic sheep or intentional killing of bighorns that may have had contact with domestic sheep. The death of any bighorn sheep from the Main Salmon River population, particularly one of the small number of rams, is irreparable because this population has suffered significant declines and is already below viable levels; any further reduction would lead toward its extirpation. *Ex. 5 at p.2; Ex. 8 at 2; Ex. 15 at 1, 5; Ex. 17 at pp. 3-28 to 3-29; Third Schlegel Decl. ¶ 7; Fifth Coggins Decl. ¶ 17.* Moreover, the Salmon River bighorns are the only remaining native bighorns in Idaho and thus loss of any individuals would eliminate important genetic diversity. *Ex. 14 at 3-24; November 13, 2007 Order at 7 (Dckt. No. 103).* Harm to these populations would impair Plaintiffs' interest in protecting bighorn sheep in Idaho. *See Declarations of Jon Marvel, Greg Dyson, and Craig Gerhke (Dckt No. 7).*

The Forest Service has already recognized that it must close allotments that are in close proximity to bighorn sheep to **ensure** separation of the species while it completes the necessary environmental analyses. *Exs. 21, 24.* BLM must likewise do the same. Allowing the Partridge Creek allotment to remain open during the time that BLM will need to complete the proper NEPA analysis will likely lead to contact or suspected contact between bighorn sheep and domestic sheep and thus death of bighorn sheep.⁴

As discussed above, bighorn sheep consistently use habitat on or directly across the river from the Partridge Creek allotment, and can easily cross from the north side to the south side of

⁴ The Nez Perce Forest has estimated that it will take almost two years to complete its EIS for the Allison-Berg allotment. 74 Fed. Reg. at 20276.

Salmon River by swimming or crossing the Partridge Creek bridge. *Ex. 5; Ex. 11 at 40; Fifth Coggins Decl. ¶ 12; First Coggins Decl. ¶¶ 18, 22 (Dckt. No. 9)*. Telemetry data shows bighorns routinely cross the river. *Ex. 5 at p.3*. The numerous instances of stray domestic sheep from this permittee's bands of sheep over the last few years demonstrate the significant risk of harm from grazing these domestic sheep in occupied bighorn sheep habitat. *Exs. 30, 34*.

The BMP plan for the Partridge Creek allotment is not sufficient to eliminate the likelihood of harm to bighorn sheep because it does not effectively separate the species. *Fifth Coggins Decl. ¶¶ 3-19*. Herders and dogs cannot keep watch over hundreds of sheep all the time and inevitably some will stray, as demonstrated this spring. *Fifth Coggins Decl. ¶¶ 7-11; Ex. 30*. Under the BMP plan, stray sheep could be missing for up to ten days before a full count of the band would detect this. *Ex. 9 at 3*. Straying is especially common in areas occupied by wolves, like the Salmon River canyon, because a wolf attack can quickly cause domestic sheep to scatter. *Ex. 9 at 3; Ex. 34*. In this steep, rugged terrain, it is difficult to find stray domestic sheep or to detect wandering bighorns. *Fifth Coggins Decl ¶¶ 10-11, 13-14*. And even when a bighorn is detected near domestic sheep, it may not be possible to kill it before it makes contact with other bighorns. *Id. ¶¶ 15-16; Exs. 29, 36*. These BMPs are not sufficient to protect bighorn sheep in occupied bighorn habitat. *Fifth Coggins Decl. ¶ 19; see also Ex. 33 (report by Forest Service bighorn expert rejecting similar BMPs proposed for Allison-Berg allotment in 2008)*.

Moreover, this plan is voluntary and unenforceable and therefore there is no guarantee it will be fully or properly implemented. In fact, when considering similar BMPs for the Allison-Berg allotment last year, Mr. Carlson indicated that some of the BMPs were not realistic or fullproof. He noted that guard dogs can be killed by wolves in the area; it is not realistic to require two herders because it is difficult to keep even one herder per band through the entire

grazing season; and that if herders spot a bighorn sheep it will be difficult for them to notify the proper authorities immediately because often the herders do not speak English. *Exs. 24, 37.*

Indeed, the BMP plan itself does not claim to ensure separation or protect the viability of this bighorn population, only to reduce risk of disease transmission to an acceptable level based on the fact that these bighorns have already been exposed to disease. *Compare Ex. 9 at p. 4 with Ex. 32 at p.4 (removed language from draft plan stating it would be acceptable for bighorn viability).* But even if this population has been exposed to disease, it does not mean these animals are immune from further disease transmission. Contact with domestic sheep could still cause additional outbreaks and die-offs within the population. *Fifth Coggins Decl. ¶ 6.*

Harm to bighorn sheep from contact with domestic sheep or intentional killing is likely to occur before BLM would be able to complete its NEPA analysis. The death of one or more bighorns from the Salmon River population would impair the entire population, and Plaintiffs' interest in protecting these animals, by further reducing the number of bighorns in an imperiled population and eliminating genetic diversity from the last native bighorns in the state.

III. BALANCE OF HARDSHIPS AND PUBLIC INTEREST FAVOR PROTECTING BIGHORNS.

As with all injunction motions, the Court must balance the hardships between parties and consider the public interest when deciding whether to issue an injunction. *Earth Island Institute v. U.S. Forest Service*, 442 F.3d 1147, 1177 (9th Cir. 2006). The public interest is a critical component of this equation. *Winter*, 129 S. Ct. at 377-78. Here, the balance of hardships and public interest weigh heavily in favor of protecting the bighorn sheep.

The Salmon River population of bighorns has been declining for years and lamb survival is very low, due mostly to disease. *Ex. 8 at 2; Third Schlegel Decl. ¶¶ 7-8.* It is already below a viable population level, and further impacts from disease could lead to its demise. *Ex. 15 at 1, 5;*

Third Schlegel Decl. ¶ 7. Even one contact between bighorn sheep and domestic sheep could threaten the entire bighorn population. *See Ex. 17 at 3-28 to 3-29; Fifth Coggins Decl.* ¶ 17. Such a result would cause the loss of genetic diversity in the last native Idaho population.

In contrast, there is no hardship to BLM from closing this allotment to comply with its own laws and regulations. In fact, it makes administration of the allotment much easier for BLM and would eliminate the need to expend funds for the Partridge Creek bridge project. The only hardship would occur to one sheep rancher that grazes the Partridge Creek allotment, and that hardship is purely economic. As the Ninth Circuit has stated repeatedly, economic hardship does not outweigh irreparable environmental harm. *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001); *Earth Island Institute*, 442 F.3d at 1177.

Moreover, the public interest also decidedly favors protecting bighorn sheep. The public has an interest in preserving the environment. *Earth Island*, 442 F.3d at 1177; *ONRC v. Goodman*, 505 F.3d 884, 898 (9th Cir. 2007). This statement is particularly true with regard to bighorn sheep, which are an iconic western species that many people value, including hunters, recreationists, wildlife viewers, and tribal members. *See Exs. 6, 38; Pinkham Decl. (Dckt. No. 39)*. Even the Forest Service acknowledged the public interest in protecting bighorn sheep from disease, noting that allotments were closed “to advance the public interest in protecting bighorn sheep from disease transmission.” *Ex. 39 at 50*. The risk to bighorn sheep in the imperiled Salmon River population from grazing domestic sheep on the Partridge Creek allotment warrants an immediate injunction closing that allotment to protect these bighorns from irreparable harm.

CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion For TRO And/Or Preliminary Injunction, and enjoin use of the Partridge Creek allotment prior to October 15.

Dated: September 23, 2009

Respectfully submitted,

s/Lauren M. Rule
Lauren M. Rule (ISB #6863)
Attorney for Plaintiff WWP

s/ Jennifer Schemm
Jennifer Schemm (OSB # 97008)
Attorney for Plaintiffs HCPC and TWS