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

WESTERN WATERSHEDS PROJECT, and)
WILDEARTH GUARDIANS,)
)
FOUNDATION,)
)
Plaintiffs,)
)
v.)
)
U.S. FOREST SERVICE,)
)
)
Defendant.)
_____)

No. 1:17-cv-434-CWD

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

INTRODUCTION

Plaintiffs Western Watersheds Project and WildEarth Guardians file this emergency motion for injunctive relief seeking an immediate closure of the Forest Service’s Snakey Canyon and Kelly Canyon allotments—which are scheduled to be grazed starting November 6—to protect the struggling bighorn sheep population that inhabits the South Beaverhead Mountains. The Forest Service has closed other allotments that present a high risk of disease transmission from domestic sheep to bighorn sheep until the agency completes a new environmental analysis assessing the impacts and risks of grazing those allotments, but refuses to take similar action here, thus threatening the near-by small bighorn sheep population with further disease.

Recent telemetry data show bighorn sheep using habitat near and even on the two allotments, and the Forest Service’s own home range delineation for this bighorn population almost completely encompasses these allotments, demonstrating that they pose a very high risk of disease transmission from domestic sheep to bighorns. Because domestic ewes would be grazing these two allotments during the fall, when bighorn rams are looking to breed, the risk is even greater. This Court previously determined that such information warranted an injunction closing a Bureau of Land Management (BLM) allotment. *Western Watersheds Project v. BLM*, 2009 WL 3335365, No. 4:09-cv-507-BLW (D. Idaho, October 14, 2009). The Forest Service itself determined that similar situations required closure of allotments to protect bighorn sheep while it conducted environmental analyses.

By refusing to close the Snakey Canyon and Kelly Canyon allotments while it assesses the impacts to bighorn sheep from continued grazing, the Forest Service is violating the National Environmental Policy Act (“NEPA”) and the National Forest Management Act (NFMA), and is threatening these bighorn sheep with irreparable harm, warranting an injunction.

STATEMENT OF FACTS

I. Disease Transmission From Domestic Sheep to Bighorn Sheep.

Bighorn sheep experts and wildlife managers uniformly agree that domestic sheep can transmit pathogens to bighorn sheep, which usually results in pneumonic disease die-offs in bighorn herds. The Forest Service described the risk of disease transmission from domestic sheep to bighorn sheep in a 2010 environmental impact statement (EIS) assessing the use of domestic sheep allotments on the Payette National Forest. Ex. 1 at xx, 3-6 to 3-12.¹ The Payette EIS explained that domestic sheep can carry pathogens to which they are naturally immune, and transfer those pathogens to bighorn sheep if the species make contact. *Id.* at xx, 3-6 to 3-8. Bighorns are not immune to the pathogens, which results in pneumonia in the bighorn. *Id.* The bighorn then transmits the pathogen to other members of its herd, resulting in partial or complete die-offs of bighorn populations. *Id.* If bighorn ewes survive the die-off, they pass the disease to their unborn lambs, which then die within weeks of birth. *Id.* at 3-7. Poor lamb recruitment can last for several years, preventing the bighorn population from recovering. *Id.*

The Payette analysis concluded that, although there were gaps in knowledge about the exact mechanism of disease transmission and die-offs, the evidence strongly supported keeping domestic sheep and bighorn sheep separate to prevent disease transmission, particularly given the devastating impacts of disease and the lack of any science showing that bighorns can be grazed with domestic sheep without concern about disease transmission. *Id.* at xxii, 3-14. In light of that risk, the Forest Service decided to close almost 70% of the Payette National Forest to domestic sheep grazing by 2013 to protect the near-by bighorn sheep populations. Ex. 2 (Payette ROD) at 9-16. The rationale for closing allotments included the need to provide habitat

¹ All exhibits cited are those attached to the Declaration of Lauren Rule, filed herewith, unless specifically identified as attached to a different declaration.

to support a viable population of bighorn sheep, avoid or minimize impacts to bighorn sheep because they are identified as a sensitive species, and eliminate overlap of domestic sheep allotments with bighorn sheep core herd home ranges. *Id.* at 13.

Since the Payette analysis, studies have identified *Mycoplasma ovipneumoniae* as the primary pathogen transferred from domestic sheep to bighorn sheep that triggers pneumonia in the bighorns. *See* Ex. 3 (Declaration of Dr. Thomas Besser) ¶¶ 15-24; Declaration of Thomas Rinkes Exs. 2-3 (filed herewith). Additionally, studies identified various strains of *Movi*, and bighorns herds that have been infected with one strain can be re-infected with a different strain that can cause further disease and die-offs. Rinkes Decl. ¶ 32 & Exs. 2-3.

If domestic sheep and bighorn sheep are grazing the same range, the two species are likely to come in contact due to numerous factors. First, the two species are related to each other because they are in the same genus, and both are gregarious, so they are attracted to each other and will seek each other out if in the same vicinity. Ex. 4 (Declaration of Victor Coggins) ¶ 27; Ex. 5 (Declaration of David Jessup) ¶¶ 30-31; *see also Western Watersheds Project v. U.S. Forest Serv.*, 2007 WL 1729734, at *3, No. 4:07-cv-151-BLW (D. Idaho, June 13, 2007) (noting gregarious nature of, and strong attraction between, domestic sheep and bighorn sheep).

Second, bighorn sheep make long exploratory movements, called forays, traveling up to twenty miles or more from their home ranges to explore new habitat or find mates for breeding. Rinkes Decl. ¶ 21; Ex. 1 at 3-5, 3-35 to 3-40; Ex. 6 (Declaration of Tim Schommer) ¶ 33 (noting that telemetry data of Salmon River bighorns showed movements to be much greater than previously thought); Ex. 7 (article about bighorn ram travelling from northeast Oregon to north Idaho in November-December 2016); *WWP v. BLM*, 2009 WL 3335365, at *4, 5 (noting bighorns travelling long distances up and down Salmon River). Young rams in particular make

long movements in the fall during the rut to look for mates. Rinkes Decl. ¶ 22; Ex. 1 at 3-37 (“the rut occurs in November/December and produces relatively frequent and long-distance exploratory forays by rams”); *WWP v. BLM*, 2009 WL 3335365, at *4 (noting that ram traveled more than 25 miles during the rut season of mid-October to mid-December); Ex. 7. The presence of domestic ewes on the range during the bighorn rut makes contact between the species even more likely. Declaration of Gerald Walters ¶ 23 (filed herewith).

Third, domestic sheep often stray from their band, sometimes traveling many miles from the allotment, and can remain on the landscape, unattended, for weeks or months. Rinkes Decl. ¶¶ 25-26; Walters Decl. ¶¶ 17-22; Ex. 4 ¶ 24; Ex. 5 ¶¶ 34-38; Ex. 6 ¶¶ 21-28; *WWP v. U.S. Forest Serv.*, 2007 WL 1729734, at *3 (two domestic strays on allotment four months past off-date); *WWP v. BLM*, 2009 WL 3335365, at *5 (noting that stray domestic sheep can wander in bighorn territory for months). The steep rugged terrain used by both bighorn sheep and domestic sheep make it hard to spot bighorns or find stray domestics, and therefore it is unlikely contact would be observed before a disease outbreak. Walters Decl. ¶ 20; Ex. 3 ¶ 35; Ex. 6 ¶¶ 20-22, 33. These factors demonstrate the need for large spatial separation between the species. *See Idaho Wool Growers Ass’n v. Vilsack*, 816 F.3d 1095, 1101 (9th Cir. 2016) (“[T]he Forest Service found that large distances between domestic and bighorn sheep are necessary to assure protection of bighorns from disease, as bighorn sheep travel long distances across rugged terrain; domestic sheep are known to stray from their herds, remaining on allotments at unpermitted times; and bighorn and domestic sheep are attracted to each other and seek out each other’s company.”).

These same factors make it unreasonable to rely on best management practices (BMPs), such as using herders and dogs with domestic bands and calling the agency if a bighorn is spotted, to keep the species separated on the range. The Payette EIS included an Appendix

written by its national bighorn sheep expert Tim Schommer that explained why the agency would not rely on BMPs to maintain separation. Ex. 1 at App. F. This Court recognized the same principal with regard to a near-by BLM allotment. *WWP v. BLM*, 2009 WL 3335365, at *7. The Court agreed with experts from the Nez Perce Tribe and Oregon Department of Fish and Wildlife that no science existed to show BMPs are effective at maintaining separation in rugged terrain. *Id.* at *5, 7; *see also* Rinkes Decl. ¶ 29; Walters Decl. ¶¶ 20, 22; Ex. 6 ¶¶ 21-22, 33, 37; (bighorn experts stating that BMPs are not effective). Indeed, even if a bighorn is spotted, it may be impossible to capture and remove it to prevent it from returning to its herd after it has made contact with a domestic sheep. *See* Ex. 8 (failed attempt to capture and remove sick bighorn).

For all of these reasons, bighorn sheep experts agree that large spatial separation between domestic and bighorn sheep is necessary to prevent disease transmission between the species. Ex. 3 ¶¶ 34-36; Ex. 4 ¶ 42; Ex. 6 ¶¶ 30-34; Ex. 9 at 2 (letter from The Wildlife Society and American Association of Wildlife Veterinarians stating “effective temporal and spatial separation of domestic sheep and goats from wild sheep [is] the only currently available management solution for preventing or minimizing disease transmission.”); Ex. 10 at 4 (BLM Guidelines stating “[c]urrently, physical separation of domestic sheep or goats from wild sheep is the only effective means to reduce the potential for pneumonia-type disease transmission.”).

II. Closures of Domestic Sheep Allotments to Protect Bighorns.

The Forest Service closed five allotments on the Payette National Forest and one allotment on the adjacent Nez Perce National Forest while it conducted NEPA analyses for those allotments to prevent harm to the near-by bighorn populations pending the environmental review; and this Court upheld those closure decisions because they were supported by the science. *See WWP v. U. S. Forest Serv.*, 2007 WL 1729734; *WWP v. U.S. Forest Serv.*, 2007

WL 3407679, No. 07-cv-151-BLW (D. Idaho, Nov. 13, 2007); Ex. 11 at 2 (notice of intent to prepare NEPA analysis for Allison-Berg allotment, stating that allotment was put in non-use for resource protection due to risk to bighorns until analysis is completed).

The Forest Service finished its analysis for the Payette National Forest and closed all or part of nineteen allotments to domestic sheep grazing due to their risk to bighorn sheep. Ex. 2 at 9-10. This Court and the Ninth Circuit Court of Appeals upheld that decision. *Idaho Wool Growers Ass'n v. Vilsack*, 7 F. Supp. 2d 1085 (D. Idaho 2014); *aff'd* 816 F.3d 1095 (9th Cir. 2016). The Forest Service has yet to finish the NEPA analysis for the Allison-Berg allotment and thus that allotment remains in non-use. The agency recognized for both forests that BMPs would not ensure separation and thus closure of allotments was necessary. Ex. 1 App. F; Ex. 11 at 2; *see also WWP v. BLM*, 2009 WL 3335365, at *5 (noting Forest Service determined it was unlikely BMPs for Allison-Berg allotment would be successful in keeping the species separate).

BLM has also closed allotments that posed a high risk to bighorn sheep. Initially it refused to close the Partridge Creek allotment, which was adjacent to the high-risk allotments on the Payette and across the Salmon River from the Allison-Berg allotment. This Court, however, ordered an emergency closure of that allotment, finding it presented a high risk of harm to bighorn sheep populations and there was no evidence that the proposed BMPs would be effective at keeping domestic and bighorn sheep separate. *WWP v. BLM*, 2009 WL 3335365. BLM then undertook a NEPA analysis for that and three other domestic sheep allotments, which all remained closed in the interim—two under voluntary non-use and two under closure orders. Ex. 12 at 1. The result of that analysis was the 2017 decision to close three of the four allotments to domestic sheep grazing to prevent potential transmission of disease to bighorn sheep. *Id.* at 1-2.

BLM specifically declined to rely on BMPs rather than close the allotments because the

allotments were within or close to bighorn core home range, and BMPs “would likely be ineffective at significantly reducing the potential for contact between bighorn sheep and domestic sheep.” Ex. 13 at 2-7 to 2-8. The agency noted that “[n]o known studies, research, or peer reviewed literature has documented the effectiveness of BMPs preventing contact and disease transmission when domestic sheep or goats grazed within or adjacent to occupied bighorn sheep habitats.” Ex. 13 at 2-7; *see also id.* App. C-2 to C-4 (evaluating BMPs).

BLM also terminated its agreement with the Sheep Station and closed the Bernice allotment in eastern Idaho in 2012 due to “the potential of irreparable harm to bighorn sheep population in the south Lemhi Range” while BLM completed an EIS and land use plan revision. Ex. 14. This allotment provided bighorn sheep habitat and presented a relatively high risk of contact between domestic and bighorn sheep because use of the allotment November 23 to February 5 overlapped winter habitat use by bighorns in the Lemhi range, and there had been problems with domestic sheep straying from this allotment. *Id.*; Rinkes Decl. ¶¶ 26-27.

Based on the modeling and analysis performed for the Payette EIS, which BLM also used for its Partridge Creek analysis, the Forest Service initiated risk of contact analyses for the rest of Forest Service Region 4. Ex. 15. The agency first identified the core herd home range for each bighorn sheep population and then conducted a foray analysis to determine the likelihood that an individual bighorn would intersect an allotment during a foray. *Id.* The result of the analysis determined the risk of contact assigned to each allotment on each forest. *Id.* If an allotment fell within the core herd home range of a bighorn population, it was considered an overlap allotment and “would normally pose an unacceptable risk.” *Id.* At 11. The Forest Service finished delineating the core herd home ranges for bighorn populations in Idaho in July 2015, and completed a draft risk of contact analysis for Idaho in summer 2016. Exs. 16-17.

III. South Beaverhead Bighorn Sheep Population.

The South Beaverhead bighorn population occurs at the south end of the Beaverhead Mountains in eastern Idaho, close to the Montana border. Ex. 18 at 146. Historical accounts indicate that bighorn were plentiful and widely distributed in this area, but were extirpated from most of the South Beaverheads by the early 1900's. Ex. 19 at 58. To boost the population, forty-one bighorn sheep were re-introduced into the area from 1976-1982. *Id.* However, the population remains very small—one of the smallest in Idaho—with counts fluctuating over the last fifteen years: 26 in 2002, 17 in 2005, 30 in 2007, 13 in 2014, and 36 in 2016. *Id.* at 61; Ex. 17 at 3. These numbers show a decline since the mid-1990's and are well below a viable population despite habitat that could support about 275 bighorns. Ex. 16 at 5; Ex. 19 at 59; Rinkes Decl. ¶ 17; Walters Decl. ¶¶ 9, 13, 28. The small size of the population and low lamb recruitment indicate that disease is affecting this population. Rinkes Decl. ¶¶ 17, 19; Walters Decl. ¶ 13. No hunting of this population will be allowed until it increases in size. Ex. 19 at 59.

The South Beaverhead Mountains contain extensive summer and winter habitat for bighorn sheep that is open and continuous, allowing bighorns to move freely throughout the area. Rinkes Decl. ¶ 16; Walters Decl. ¶¶ 10-11. The animals can easily travel down the ridges from their primary summer habitat on Copper Mountain onto the Snakey Canyon and Kelly Canyon allotments where domestic sheep are grazed. Rinkes Decl. ¶¶ 16, 24; Walters Decl. ¶¶ 10-11, 15. Bighorns have been observed moving from Copper Mountain to the valleys below in a matter of hours before returning to the higher elevations. Walters Decl. ¶ 10. The Snakey Canyon and Kelly Canyon allotments have good winter and summer habitat, with fairly flat base areas surrounded by steep, rugged slopes. Rinkes Decl. ¶ 28; Walters Decl. ¶ 11; Ex. 16 at 6. Idaho Department of Fish and Game has designated a Bighorn Sheep Population

Management Unit for the South Beaverhead population and it encompasses the Snakey Canyon and Kelly Canyon allotments. Ex. 18 at 146.

Bighorn sheep have been documented close to and on the Snakey Canyon and Kelly Canyon allotments. Rinkes Decl. ¶¶ 14-15, 18; Declaration of Amy Haak Ex. 1; Ex. 18 at 146; Exs. 20-21. Observations and 2011-2014 telemetry data from three bighorns showed winter locations about four miles west of the allotments and spring locations about two miles west. Rinkes Decl. ¶ 18; Haak Decl. Ex. 1. More bighorn rams were collared in 2015 and data showed a ram along the western and southern borders of the allotments and just inside the Snakey Canyon allotment for several days in November 2015. Rinkes Decl. ¶¶ 18, 23; Walters Decl. ¶ 16; Ex. 21. Data from 2015-2016 also showed rams in this population moving extensively throughout the South Beaverhead Mountains. Ex. 18 at 146; Exs. 20-21. As one example, from January to March 2014 one ram moved many miles throughout the habitat, traveling more than ten miles in one five-day period in March. Haak Decl. ¶ 11 & Ex. 2. Overall, winter telemetry locations² overlapped significantly with summer locations but also included the points closest to or within the Snakey Canyon and Kelly Canyon allotments. Haak Decl. ¶¶ 9-10 & Ex. 1.

IV. Management of Snakey Canyon and Kelly Canyon Allotments.

The Snakey Canyon and Kelly Canyon allotments occur in eastern Idaho, a little west of Dubois, Idaho. Ex. 18 at 146. The Forest Service permits the Sheep Station to graze these allotments under a Memorandum of Agreement, authorizing 1200 ewes to graze the Snakey Canyon allotment from November 6 to January 2 and 1000 ewes to graze the Kelly Canyon allotment from November 20 to January 3. *Id.* at 26-27. Over the past few years, actual use of

² Winter locations were those occurring in October to March. Haak Decl. ¶ 7 & Ex. 1.

the allotments was less than authorized, grazing fewer than half the authorized number of ewes for shorter seasons. Ex. 22. Snow is the only water source on the allotments, and thus little or no grazing occurs in low snow years. *Id.*

The Sheep Station owns land east of the allotments, where it conducts agricultural research. Ex. 18 at 33-35, 146. The Forest Service allotments are not used for research, rather the Sheep Station grazes these allotments “in support of” research on its own land. *Id.* at 35. The domestic sheep that graze the allotments are owned by the University of Idaho but managed by the Sheep Station. *Id.* at 36. Unlike with private ranchers, the Forest Service does not charge the Sheep Station any fee for the grazing. *Id.* at 26.

As noted above, the South Beaverhead Mountains contain good habitat for bighorns, allowing them to move freely throughout the area, including onto and within the Snakey Canyon and Kelly Canyon allotments. Rinkes Decl. ¶¶ 16, 24; Walters Decl. ¶¶ 10-11, 15. This open habitat also makes it easy for domestic sheep from the allotments to go upslope into areas used by the bighorn population. Rinkes Decl. ¶ 28; Walters Decl. ¶¶ 11, 15. The Sheep Station has a history of domestic sheep straying from allotments in the area. Rinkes Decl. ¶¶ 25-28; Walters Decl. ¶¶ 20-22. On the near-by Bernice allotment, which has similar terrain and habitat to the Snakey Canyon and Kelly Canyon allotments, the Sheep Station had problems with domestic sheep straying and being left behind on the allotment, sometimes for months after the grazing season, which led BLM to close that allotment. Rinkes Decl. ¶¶ 26-28; Walters Decl. ¶ 20; Ex. 14. Herders on that allotment claimed they never saw bighorn sheep even though bighorns had been documented on the allotment multiple times during the same period. Walters Decl. ¶ 20.

In April 2015, the Forest Service issued a scoping notice to initiate a NEPA process for reauthorizing grazing on six allotments, including the Snakey Canyon and Kelly Canyon

allotments, with the intent of preparing an environmental assessment (EA) or environmental impact statement (EIS). Ex. 23.³ No draft or final EA or EIS has been issued yet. Later in 2015, the agency completed its delineation of bighorn core herd home ranges in Idaho, including for the South Beaverhead population. Ex. 16. The core home range for that population consisted of the area that would provide adequate habitat for a viable population of bighorn sheep, and encompassed most of the Snakey Canyon and Kelly Canyon allotments. *Id.* at 3, 5. The delineation incorporated the telemetry points through 2014 but did not consider the 2015-2016 points, some of which were closer to the allotments. Ex. 16 at 3; Ex. 21.

After doing a foray analysis for the Idaho bighorn populations, the Forest Service completed a draft risk of contact analysis in summer 2016 that identified the risk of contact for each grazing allotment. Ex. 17. The Snakey Canyon and Kelly Canyon allotments were identified as overlap allotments, meaning they overlap the core herd home range. Ex. 17 at 13. Overlap allotments present an “unacceptable risk” of contact between domestic sheep and bighorn sheep. Ex. 15 at 11. The Nicholia-Chandler allotment to the north of the Kelly Canyon allotment has been in non-use since 2014 and thus the Snakey Canyon and Kelly Canyon allotments are the only remaining active Forest Service allotments that overlap the South Beaverhead bighorn population core home range. Ex. 24; Ex. 17 at 13.

This past summer, the Sheep Station issued an EIS assessing the environmental impacts of activities it conducts on its land and other public lands it is permitted to use. Ex. 18. This EIS recognized that grazing domestic sheep on the Snakey Canyon and Kelly Canyon allotments poses a risk to bighorn sheep, but claimed that use of BMPs would be sufficient to protect the

³ The requirement to do an EA or EIS for these allotments is part of a settlement agreement. *Western Watersheds Project v. U.S. Forest Serv.*, No. 10-cv-612-ELJ-REB, ECF # 109-1, ¶ 2(d) (D. Idaho, Oct. 31, 2013).

bighorn population. *Id.* at 147-148. This fall, the Forest Service issued its annual operating instructions (AOI) to the Sheep Station to graze these two allotments, authorizing 1200 ewes to graze the Snakey Canyon allotment November 6 to January 2, and 1000 ewes to graze the Kelly Canyon allotment November 20 to January 3. Ex. 25. The AOI included BMPs to reduce the risk of contact between domestic sheep and bighorn sheep, such as using herders and dogs with the domestic sheep and contacting agency personnel upon seeing a bighorn sheep. *Id.*

Plaintiffs and other bighorn advocates have expressed concern about continuing to graze these allotments, particularly in light of recent information confirming their high risk to bighorn sheep and the agencies' unreasonable reliance on BMPs. Because the Forest Service has refused to rescind the 2017 authorization, a court injunction is necessary to protect these bighorns.

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). A sliding scale approach is used in the Ninth Circuit, where a preliminary injunction is appropriate if plaintiffs have raised serious questions going to the merits and the balance of hardships tips sharply in plaintiffs' favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

Plaintiffs are challenging the 2017 AOI issued to the Sheep Station to graze the Snakey Canyon and Kelly Canyon allotments this fall for violating NEPA and NFMA. An AOI is a final agency action that can be challenged under the Administrative Procedure Act. *Or. Natural*

Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977 (9th Cir. 2006).⁴

I. THE FOREST SERVICE VIOLATED NEPA AND NFMA.

A. The Forest Service is Violating NEPA by Authorizing Grazing on the Snakey Canyon and Kelly Canyon Allotments Before Completing its NEPA Analysis.

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 environmental analysis 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). These cases 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; *Metcalf*, 214 F.3d at 1143; *Anderson*, 371 F.3d at 501 n.25. 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)).

⁴ Plaintiffs are submitting the Declarations of Craig Gehrke and Ken Cole to support their standing in this case.

This Court recognized that principal in its decision regarding the Partridge Creek allotment, finding that Plaintiffs were likely to succeed on a similar NEPA claim because irreversible damage to bighorn sheep was possible pending completion of an EIS. *WWP v. BLM*, 2009 WL 3335365, at *6. The Court noted that, well before the EIS was completed, bighorns could become infected and pass the infection on to other bighorns along the Salmon River, causing large-scale losses. *Id.* See also *Or. Natural Desert Ass'n v. Sabo*, 854 F. Supp. 2d 889, 922-24 (D. Or. 2010) (finding Forest Service violated NEPA by authorizing grazing pending completion of NEPA analysis where grazing was causing harm to sensitive species which could be irreversible). In line with these cases, the Forest Service and BLM closed a number of domestic sheep allotments that posed a risk to bighorn sheep in central Idaho pending completion of NEPA analyses to avoid harm to the bighorn herds in the interim. See *WWP v. U.S. Forest Serv.*, 2007 WL 3407679, at *1; Ex. 11 at 2; Ex. 12 at 1.

Rather than take similar action here, the Forest Service has continued to authorize grazing on the Snakey Canyon and Kelly Canyon allotments while it undertakes its NEPA analysis despite: (1) telemetry data from 2015-2016 showing bighorn rams traveling extensively across the habitat; (2) a ram in Nov. 2015 very close to and within the allotments; (3) good, continuous bighorn habitat in the South Beaverhead Mountains, including on the Snakey Canyon and Kelly Canyon allotments, that makes it easy for bighorns to move onto the allotments or for domestic sheep to stray off the allotments; (4) strong natural attraction between bighorn sheep and domestic sheep; and (5) authorizing domestic ewes to graze during the fall bighorn rut, making attraction and risk of contact even greater. These factors create a high risk of contact between domestic sheep and bighorn sheep. Rinkes Decl. ¶¶ 20-30; Walters Decl. ¶¶ 14-24. Because of the small size and poor lamb recruitment for the South Beaverhead bighorn population, further

exposure to disease could lead to its extirpation and would certainly prevent recovery of this population to a viable level. Rinkes Decl. ¶¶ 31-33; Walters Decl. ¶¶ 25-28.

The Forest Service's reliance here on BMPs to minimize risk of contact is unreasonable when the overwhelming consensus of bighorn experts and wildlife managers is that BMPs have not proven effective at keeping the species separate in the type of terrain at issue here. *See supra* p. 5; Ex. 24 at 3-4. This Court agreed that relying on BMPs to allow grazing of the BLM's Partridge Creek allotment was unreasonable when all the evidence indicated that BMPs are not effective. *WWP v. BLM*, 2009 WL 3335365, at *7. Since then, both agencies have refused to rely on BMPs rather than close allotments that pose a high risk to bighorns, reiterating the lack of any science showing BMPs are effective. *See* Ex. 1 at App. F; *WWP v. BLM*, 2009 WL 3335365, at *7; Ex. 13 at 2-7 to 2-8. There is no evidence that BMPs would be more reliable for the Snakey Canyon and Kelly Canyon allotments, particularly given the history of domestic sheep straying off Sheep Station allotments. Rinkes Decl. ¶¶ 25-30; Walters Decl. ¶¶ 20-22. The only way to ensure against irreversible damage to the South Beaverhead bighorn population pending completion of NEPA is to close the Snakey Canyon and Kelly Canyon allotments.

B. The Forest Service Has Violated NMFA by Continuing to Authorize Grazing on the Snakey Canyon and Kelly Canyon Allotments this Fall.

The 2017 AOI for the Snakey Canyon and Kelly Canyon allotments must be consistent with the Targhee Forest Plan. 16 U.S.C. § 1604(i); *Buckingham v. Sec'y of the U.S. Dep't of Agric.*, 603 F.3d 1073, 1077 (9th Cir. 2010). Forest-wide direction in the Plan includes:

Wildlife biodiversity is maintained or enhanced by managing for a diverse array of habitats and distribution of plant communities. Targhee Forest Plan III-15.

Provide habitat to support the wildlife and hunting goals of the States of Idaho and Wyoming. Targhee Forest Plan III-15.

Maintain viable populations of all native and desired nonnative wildlife, fish, and

plant species in habitats distributed throughout their range on National Forest System land. Targhee Forest Plan App. A-10.

Develop and implement management objectives for populations and/or habitat of sensitive species. Targhee Forest Plan App. A-10.

Manage sensitive species habitat as directed in the Forest Service Manual. Targhee Forest Plan App. A-18.

Direction specific to the Medicine Lodge portion of the Forest, where the Snakey Canyon and Kelly Canyon allotments are located, includes:

Assess opportunities to modify grazing allotment boundaries and permits to more effectively use natural barriers, change grazing patterns, adjust seasons of use, administratively close some additional areas, etc, to further separate winter domestic sheep grazing in the Medicine Lodge portion of the subsection from bighorn sheep. Targhee Forest Plan III-40.

To better manage bighorn sheep habitat, the Kelly Canyon and Snakey Canyon winter sheep allotments in the Medicine Lodge portion of the subsection on the Dubois Ranger District, will be phased out on an opportunity basis (Process Papers L and N). In addition, the winter sheep grazing permit will be phased out on the Nicholia-Chandler S&G allotment. An opportunity is defined as a suitable or favorable time to abolish or close an allotment because of nonuse violations, term permit waivers where the permit is waived back to the government, resource protection, or permit actions resulting in cancellation of the permit. If opportunities do not arise, then efforts will be made to relocate or accommodate sheep to other areas. When all winter sheep allotments in that portion of the subsection have been vacated, they will be closed. The intent of closing these individual allotments as they become vacated is to provide an opportunity to minimize conflicts between domestic and bighorn sheep (S). Targhee Forest Plan III-40.

Bighorn sheep are a sensitive species within Forest Service Region 4. Ex. 2 at 13. Thus, the Forest Service has a heightened duty to protect bighorn sheep and ensure it maintains viable populations throughout their range on the Forest. The core herd home range analysis stated that a viable population is more than one hundred animals, and habitat in the South Beaverheads could support about 275 bighorn sheep, yet the population has been 36 animals or below for years and is too small to hunt. Ex. 16 at 5; Ex. 19 at 59, 61. Continuing to authorize domestic

sheep to graze the Snakey Canyon and Kelly Canyon allotments not only creates a risk of extirpation for the South Beaverhead bighorn herd, but also is likely preventing this bighorn population from reaching a viable level, achieving management objectives, and reaching a size that would allow for hunting—all of which is inconsistent with the Targhee Forest Plan.

Indeed, the Forest Service determined that closing allotments near bighorn sheep populations and within bighorn core home ranges was necessary to comply with viability and sensitive species direction in the Payette Forest Plan. Ex. 2 at 13. Failure to do so here is inconsistent with the same direction in the Targhee Forest Plan. Furthermore, in the twenty years since the 1997 Targhee Forest Plan, the Forest Service has failed to take any action to phase out use of these allotments or relocate the domestic sheep to other areas to minimize conflicts with bighorn sheep, and instead has renewed its agreement with the Sheep Station and authorized grazing every year. Cf. Ex. 14 (BLM refusing to renew Sheep Station agreement for Bernice allotment due to conflicts with bighorn sheep). By once again authorizing the same grazing for 2017, the Forest Service is acting inconsistently with the Targhee Forest Plan.

II. IRREPARABLE HARM WILL LIKELY OCCUR TO BIGHORN SHEEP.

The South Beaverhead bighorn population is very small with low lamb recruitment, well below a viable population size, and disease is likely the limiting factor. Ex.16 at 5; Ex. 19 at 61, Rinkes Decl. ¶¶ 17, 19; Walters Decl. ¶¶ 9, 13, 28. Continuing exposure to disease, particularly new strains of the *Movi* pathogen, would likely lead to the population's demise, and would certainly prevent it from increasing to a self-sustaining size that is less susceptible to extirpation. Rinkes Decl. ¶¶ 31-33; Walters Decl. ¶¶ 25-28.

Domestic sheep on the Snakey Canyon and Kelly Canyon allotments create a risk of disease transmission due to the high risk of contact between these sheep and bighorns in the

South Beaverhead population. Rinkes Decl. ¶¶ 20, 30-31; Walters Decl. ¶¶ 14, 24. This bighorn population uses habitat in close proximity to the allotments, and its core home range almost completely encompasses the allotments. Rinkes Decl. ¶¶ 14-15, 18, 24; Walters Decl. ¶¶ 11, 15-16; Haak Decl. Ex. 1; Ex. 16 at 3; Ex. 18 at 146. The habitat is open and continuous, allowing bighorns to move freely throughout the area and down onto the allotments. Rinkes Decl. ¶¶ 16, 24; Walters Decl. ¶¶ 10-11, 15. Recent telemetry data shows bighorn rams moving extensively throughout the South Beaverhead habitat, particularly in fall and winter, including a ram in November 2015 that was on and just west of the Snakey Canyon and Kelly Canyon allotments for several days. Haak Decl. Exs. 1-2; Ex. 18 at 146; Exs. 20-21. The propensity of rams to foray in the fall during the rut, and the strong attraction between bighorn sheep and domestic sheep, make the likelihood of contact between bighorn rams and domestic ewes grazing the allotments this fall even greater. Rinkes Decl. ¶¶ 20-22; Walters Decl. ¶¶ 23-24; *supra* pp. 3-4.

It is unreasonable to rely on BMPs to prevent contact between the species when such measures have never proven effective, particularly on neighboring Sheep Station allotments. Bighorn sheep experts as well as the Forest Service and BLM have stated that BMPs are not effective at maintaining separation between the species in steep, rugged terrain. *See supra* p. 5. Bighorn sheep are hard to spot on the landscape, even when herders are looking for them, and capture of any bighorns that are located to prevent their return to their herd is not always successful. Walters ¶ 20; Ex. 8. Moreover, domestic sheep often stray from their band and can remain unattended in bighorn habitat for weeks or months. Walters Decl. ¶¶ 17-21; *supra* p. 4. The Sheep Station's neighboring Bernice allotment had problems with stray domestic sheep despite the use of BMPS, which led to the allotment's closure to reduce the risk to bighorn sheep. Rinkes Decl. ¶¶ 25-27; Walters Decl. ¶¶ 20-21. Because the Snakey Canyon and Kelly

Canyon allotments have similar terrain and habitat, there is no evidence that similar BMPs would be effective there. Rinkes Decl. ¶¶ 28-30; Walters Decl. ¶ 22.

Plaintiffs were hopeful that, in light of new telemetry data from 2015-2016 showing extensive bighorn ram movement throughout the habitat, with one ram on the allotments in November 2015, the agencies would finally take the opportunity to close the Snakey Canyon and Kelly Canyon allotments this year. However, despite recognizing the risk of contact between domestic sheep using the allotments and the South Beaverhead bighorn population, the Forest Service authorized grazing on these allotments, relying on unproven BMPs to maintain separation between the species. Ex. 18 at 147-48; Ex. 25. Plaintiffs are thus forced to bring legal action to stop the use of these allotments because closing these allotments is necessary to prevent contact and disease transmission and allow this bighorn population to recover to a viable level. Rinkes Decl. ¶ 33; Walters Decl. ¶ 29.

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

Finally, the Court must balance the hardships between parties and consider the public interest when deciding whether to issue an injunction. *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006), *abrogated in part by Winter*, 555 U.S. at 21-22; *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765-67 (9th Cir. 2014). The public interest is a critical component of this equation, and the public has an interest in preserving the environment. *Alliance for the Wild Rockies*, 632 F.3d at 1138; *Earth Island Inst.*, 442 F.3d at 1177. The balance of hardships and public interest strongly weigh in favor of enjoining grazing on the Snakey Canyon and Kelly Canyon allotments in 2017-2018.

Given the small size and poor lamb recruitment of the existing South Beaverhead bighorn sheep population, even one contact with a domestic sheep from the Snakey Canyon or Kelly

Canyon allotment would threaten this bighorn population. Rinkes Decl. ¶¶ 31-33; Walters Decl. ¶¶ 25-29. The public has a great interest in preserving this iconic western species that so many people value, including hunters, recreationists, and wildlife enthusiasts. Loss of the South Beaverhead bighorn population would be a significant hardship to Plaintiffs as well as to the public at large. *See* Declaration of Craig Gehrke ¶¶ 9-11; Declaration of Ken Cole ¶¶ 30-37.

In contrast, closing these allotments would cause very little hardship to the Forest Service or the Sheep Station. In fact, the Forest Service would benefit from closing them given that it costs money to administer them and the agency receives no payment from the Sheep Station. Ex. 18 at 26. The Sheep Station also would have little hardship. It has no ownership interest in the domestic sheep that graze the allotments; it does not use these allotments for research purposes but simply to “support” its research on other lands; and it cannot even graze these allotments much in low snow years, thus their use is not critical. *Id.* at 35-36; Ex. 22.⁵ In fact, over the last few years, the number of domestic sheep grazing the allotments and the seasons of use have been significantly less than authorized. Ex. 22. The risk to this imperiled bighorn sheep population from grazing domestic sheep on the Snakey Canyon and Kelly Canyon allotments far outweighs any hardship to the agencies from closing them, warranting an injunction.

CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion and enjoin use of the Snakey Canyon and Kelly Canyon allotments prior to November 6.

⁵ This lack of hardship also demonstrates that the Court should waive a bond requirement or require only a nominal bond if it grants Plaintiffs’ Motion. All Plaintiffs here are public interest organizations that cannot afford the expense of more than a nominal bond. This Court has discretion to request mere nominal security where requiring more would effectively deny access to judicial review. *Cal. ex rel. Van De Kamp v. Tahoe Reg’l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999).

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Respectfully submitted,

s/Lauren M. Rule

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