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**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,)
)
 Defendant.)
 _____)

Case. No. 07-151-BLW

**BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

INTRODUCTION

Plaintiffs Western Watersheds Project, Hells Canyon Preservation Council, and The Wilderness Society seek immediate injunctive relief ordering the Payette National Forest to implement the closure of the Grassy Mountain, Vance Creek, and Hershey Lava domestic sheep grazing allotments as required under the amended Payette Forest Plan. Despite the Forest Service's extensive scientific analysis resulting in a decision to close those allotments beginning in 2012 to protect Rocky Mountain bighorn sheep, the agency is authorizing domestic sheep grazing on the allotments for this year in misguided reliance on a Congressional appropriations rider. Contrary to the Forest Service's interpretation, the plain language of the rider is clear that the Payette National Forest should have implemented the allotment closures that were put in place by the Record of Decision amending the Payette Forest Plan and the permit modification for these allotments. By acting inconsistently with its own Forest Plan, the Forest Service is violating the National Forest Management Act.

The Forest Service's decision to authorize grazing on these allotments this year, contrary to its own analysis and Forest Plan, puts the Hells Canyon and Salmon River Canyon populations of bighorn sheep at risk of significant and irreparable harm. As this Court is well aware from the prior rounds of litigation in this case as well as the case involving BLM's Partridge Creek allotment, contact between domestic sheep and bighorn sheep usually leads to death of the bighorn sheep from pneumonia and often creates large die-offs within bighorn populations that persist for years. As explained below and in the accompanying declaration by bighorn sheep expert Tim Schommer, domestic sheep use on these three allotments puts bighorn sheep in the Little Salmon River Canyon at risk of disease transmission, which could then lead to large die-offs in the Main Salmon River Canyon and Hells Canyon meta-populations. These populations

are already below viable levels and any additional harm would devastate them.

Because Plaintiffs are likely to win on the legal merits of their claim, they respectfully request that the Court order the Forest Service to comply with its Forest Plan and close the Grassy Mountain, Vance Creek and Hershey Lava allotments prior to the July 10 turn-out of domestic sheep to avoid irreparable harm to these important and imperiled bighorn sheep populations.

STATEMENT OF FACTS

Procedural Background

This litigation began in 2007, when Plaintiffs challenged annual grazing authorizations issued by the Payette and Nez Perce National Forests that put bighorn sheep populations at risk of disease transmission from domestic sheep. *See* Complaint (Docket No. 1). The Chief of the Forest Service had already determined that the Payette National Forest needed to amend its revised Forest Plan to address conflicts on the Forest between domestic sheep and bighorn sheep and insure the viability of bighorn sheep populations. Declaration of Lauren M. Rule Ex. EE (Docket No. 16). The Forest Service recognized the threat that domestic sheep posed to bighorn sheep on the Payette National Forest due to disease transmission, and a panel of expert scientists determined that several allotments and trailing routes were creating a high risk to bighorn sheep. Rule Decl. Ex. A (Docket No. 13). Yet the Forest Service took no action to protect bighorn sheep while it worked on its Supplemental Environmental Impact Statement (SEIS) for the revised Forest Plan.

In spring 2007, Plaintiffs filed this litigation and a preliminary injunction motion to enjoin grazing that year on these high risk allotments and trailing routes, as well as on a high risk allotment across the Salmon River on the Nez Perce National Forest. *See* Amended Complaint

(Docket No. 4); Preliminary Injunction Motion (Docket No. 7). Plaintiffs discussed in their briefing, supported by numerous exhibits and declarations from bighorn sheep experts, the risk of disease transmission from domestic sheep to bighorn sheep. Preliminary Injunction Brief, Declarations and Exhibits (Docket Nos. 7-16).

Plaintiffs explained that domestic sheep can transmit deadly bacteria to bighorn sheep when the two species come in contact. Pl. Opening PI Brief at 5-7 (Docket No. 7). Bighorn sheep, which are not immune to the bacteria like domestic sheep, usually die from respiratory disease not long after contact with domestic sheep. *Id.* In the interim, they can transmit the bacteria to other members of a bighorn herd, creating large die-offs within bighorn populations. *Id.* These die-offs may persist for years as the few female bighorns that do not die from the bacteria continue to carry it and pass it on to their lambs, causing poor lamb survival in the population for several years. *Id.* at 7. Such die-offs have decimated bighorn populations in many western states, keeping bighorn numbers far below historic levels. *Id.* at 2. Within the past few years, many of the states surrounding Idaho—Montana, Wyoming, Utah, Nevada, and Washington—have all experienced severe die-offs in bighorn populations, and domestic sheep are known or suspected as the cause in many of these die-offs. Sixth Declaration of Lauren M. Rule Exs. A-B (filed herewith).

Bighorn sheep habitat consists of very steep, rugged terrain, and the animals' summer range often covers large areas at higher elevations. Pl. Opening PI Brief at 12, 13 (Docket No. 7). Despite the difficult terrain, bighorns can travel many miles in a short time, and young rams in particular have been known to move long distances during exploratory movements and when looking to mate. *Id.* at 3, 8. Bighorns and domestic sheep are related—they are in the same genus—and both species are highly social and gregarious. *Id.* at 7. Thus, domestic sheep and

bighorns tend to be attracted to each other, making it likely that they will come in contact when they are near each other in the wild. *Id.* The gregarious nature of bighorn sheep and their ability to travel great distances in a short period of time means the potential for spreading disease can be very far reaching. *Id.* at 7-8.

For all of these reasons, the two species cannot effectively be separated when domestic sheep are grazing in bighorn sheep habitat. Scientists and wildlife managers believe that disease transmitted by domestic sheep is one of the primary factors that has caused die-offs in the Hells Canyon and the Salmon River Canyon bighorn populations and is keeping these populations at depressed levels, well below viable population sizes. *Id.* at 4-5.

As a result of Plaintiffs' injunction motion, the Forest Service agreed to immediately close five high risk allotments on the Payette National Forest but it refused to close the Salmon River sheep driveway or the Allison-Berg allotment on the Nez Perce National Forest. *See* Forest Service filings at Docket Nos. 28-30. One of the grazing permittees challenged the decision to close two of the allotments, but this Court upheld the closures, finding that the Forest Service's decision to close these allotments was not unreasonable given the high risk of disease transmission to bighorn sheep that had been documented using areas in and around the allotments. June 13, 2007 Memorandum Decision and Order (Docket No. 54). The Court declined to rule at that time on Plaintiffs' challenge to the Salmon River sheep driveway or the Allison-Berg allotment because they would not be used until fall and winter, respectively.

In September 2007, Plaintiffs pursued their motion to close the Salmon River sheep driveway in light of bighorn sheep sightings within a few miles of the Driveway. Pl. Brief on Sheep Driveway (Docket No. 64). The permittees subsequently agreed not to use the Driveway in 2007 and instead trucked their sheep back to their private land. *See* Docket Nos. 67-69.

Plaintiffs also renewed their motion to close the Allison-Berg allotment in October 2007, and again the Forest Service agreed to close that allotment while it completed an SEIS after several bighorn sheep were seen on or near the allotment that fall. *See* Docket Nos. 71-72, 94. The permittee for that allotment challenged the Forest Service's decision but this Court again upheld it due to the risk to the native Salmon River bighorn population. November 13, 2007 Memorandum Decision and Order (Docket No. 103). In a related case, Plaintiffs challenged the Bureau of Land Management's 2009 authorization of grazing on the adjacent Partridge Creek allotment, and this Court ordered that allotment closed until BLM finishes an SEIS. *Western Watersheds Project v. BLM*, case no. 09-507-BLW (Docket Nos. 5, 22-23).

In the course of these proceedings, Plaintiffs filed extensive briefs, exhibits, and declarations from bighorn sheep experts with each motion, discussing the risk to the Hells Canyon and Salmon River Canyon bighorn populations from leaving these areas open to domestic sheep use. *See* Docket Nos. 7-16, 51, 64, 71-72, 148-153. They also explained why best management practices such as use of extra herders and dogs and other measures were not sufficient to keep the species separate, and physical separation was the only way to ensure protection of bighorn sheep. All of these allotments plus the Salmon River sheep driveway remained closed during the Forest Service's SEIS processes. In July 2010, the Payette National Forest issued its Final SEIS and Record of Decision (ROD) amending its Forest Plan to address the conflicts between domestic sheep and bighorn sheep on the Forest.¹ Sixth Rule Decl. Ex. C.

Payette SEIS and ROD

The SEIS and ROD amending the Payette Forest Plan were the product of extensive scientific analysis as well as input from Tribes, the States of Idaho, Oregon and Washington, and

¹ The Nez Perce National Forest and the BLM are still working on their SEISs and thus the Allison-Berg and Partridge Creek allotments remain closed.

the public. SEIS at xvi, xix. The Forest Service issued the Draft SEIS in September 2008 assessing several alternative actions and setting forth its recommended closures of domestic sheep allotments to provide habitat to support viable bighorn sheep populations. SEIS at xv-xvi. It received more than 14,000 comments on the Draft. SEIS at xvi. Based on these comments, the Forest Service undertook further scientific analysis in coordination with population and disease modeling experts from the University of California at Davis and issued an Update to the Draft SEIS in January 2010, which analyzed five additional alternative actions. SEIS at xiii, xvi. The agency received almost 12,000 public comments on the Update. *Id.*

During this same time, Region 4 of the Forest Service designated Rocky Mountain bighorn sheep as a Forest Service Sensitive species in July 2009 due to its imperiled status and the threats it faces. Sixth Rule Decl. Ex. D. Finally, the Forest Service issued the Final SEIS and ROD in July 2010 assessing fourteen alternative actions ranging from not closing any domestic sheep allotments to closing the entire forest to domestic sheep grazing. SEIS at xvi, ROD at 31.

The Final SEIS discussed the bighorn herds within the Hells Canyon and Salmon River Canyon meta-populations. SEIS at 3-5 to 3-6. The Salmon River bighorn sheep meta-population, within the borders of the Payette National Forest, occupies habitat along the Main Salmon River, South Fork Salmon River, Upper Main Salmon River, and Big Creek. SEIS at 3-6. The SEIS noted that observations of bighorn sheep had also been made in the Little Salmon River Canyon over the last three years, suggesting site fidelity to this area as well. However, the area had not been regularly surveyed so not enough information was available to determine how many animals may reside there. *Id.*

The Final SEIS also contained a thorough discussion of the scientific evidence of disease

transmission from domestic sheep to bighorn sheep as well as the history of die-offs in the Hells Canyon and Salmon River Canyon meta-populations. SEIS at 3-6 to 3-18. Data from Idaho Department of Fish and Game suggest significant long-term decline in population trends for several of the Salmon River populations, including the Main Salmon River. SEIS at 3-18. The SEIS noted the severe ramifications that can occur when even limited contact is made between the two species, and cited as an example contact that involved a single domestic sheep and resulted in a disease epidemic that affected three interconnected populations of bighorn sheep in Colorado. SEIS at 3-14, 3-73. Because the Hells Canyon and Salmon River Canyon bighorn meta-populations are interconnected, risk of disease outbreak affecting multiple populations is likely. SEIS at 3-4 to 3-5, 3-73, 3-91.

The Final SEIS contained several scientific analyses that were used to compare the alternative actions. First, it delineated bighorn sheep summer and winter source habitat on the Payette National Forest based on important habitat characteristics for bighorn sheep. SEIS at 3-22 to 3-26. Summer source habitat occurs throughout the forest, including on the Grassy Mountain, Vance Creek, and southern portion of the Hershey Lava allotments. SEIS at 3-25.

Next, it assessed the risk of contact between domestic sheep and bighorn sheep. In the first step of this analysis, the Forest Service delineated the core home range for each bighorn herd using telemetry and observational data and a complex scientific model. SEIS at 3-26 to 3-34. The Hells Canyon herds have telemetry data on 400 animals collected from 1997 to 2008. SEIS at 3-27. For the Salmon River Canyon bighorn meta-population, the Main Salmon/South Fork herd is the only herd with telemetry data, which was collected from 2008-2009 on thirty animals. SEIS at 3-27, 3-31. The SEIS contained maps of telemetry locations and home ranges for the Hells Canyon and Salmon River Canyon meta-populations. SEIS at 3-28 to 3-30, 3-34.

The Little Salmon area has not been regularly surveyed so the home range for that herd was based on telemetry data from one individual and incidental observations from the prior three years. SEIS at 3-6. The Final SEIS noted that even though there is not much data on the Little Salmon River area, recent observations suggest some animals occupy the area. SEIS at 3-53. These animals may comprise an important connectivity population between the Hells Canyon and Salmon River Canyon meta-populations. *Id.*

Based on observations of four bighorns, the SEIS showed the home range for the Little Salmon bighorns going up the Little Salmon River Canyon and ending almost adjacent to the Grassy Mountain allotment. SEIS at 3-34, 3-54, Appendix L at p. 42. In addition, subsequent sightings of bighorn ewes have occurred in the Little Salmon River Canyon in February 2010 and just recently in February 2012, confirming use of the area by bighorns. Declaration of Tim Schommer ¶ 28 (filed herewith).

In the second step of the SEIS risk of contact analysis, the agency used its data to examine how frequently, how far, and during what season bighorns are likely to foray outside of their home ranges. SEIS at 3-35 to 3-40. The data showed that most forays were less than 26 kilometers and occur within source habitat. SEIS at 3-36, 3-39. The Grassy Mountain and Vance Creek allotments are both very close to the Little Salmon herd core home range and contain a significant amount of summer source habitat. *See* SEIS at 3-25, 3-34, 3-96.

Third, the disease model was developed to provide the forest with a relative comparison tool for population persistence over time and cumulative effects, and used the most recent epidemiological science on disease spread through populations. SEIS at xvi. This model assessed the probability that a disease outbreak will occur in a bighorn herd if an individual bighorn reaches an open domestic sheep allotment. SEIS at 3-41. Because of the limited data on

the Little Salmon herd, this model assumed only four individuals are in this population based on the incidental observations of four bighorns during the prior three years. SEIS at 3-44 to 3-45.

The Forest Service used the results of the habitat, risk of contact, and disease models to compare the fourteen alternative actions. SEIS at 3-53. The Final SEIS showed that, other than alternative 7E that closed the whole forest to domestic sheep grazing, alternative 7O provided the greatest protection for bighorn sheep, followed by alternative 7N and then 7P. SEIS at 3-75.

The habitat model showed that under alternative 7P, there was only 1 kilometer distance between the core home range of the Little Salmon herd and an open domestic sheep allotment (Grassy Mountain) and twelve kilometers between the Main Salmon/South Fork herd home range and open allotments, compared to eight miles and twenty two miles respectively under alternative 7O. SEIS at 3-74. Telemetry data on the bighorns around the Payette National Forest show that rams have traveled up to 22 miles from their home ranges and ewes up to 20 miles during the summer grazing season.

Based on the three models, the SEIS stated that, aside from closing the whole forest to domestic sheep, alternatives 7O and 7N protect the most source habitat, have the lowest risk of contact (with O being lower than N) and the lowest risk of extirpation from disease outbreak (again with O being lower than N). SEIS at 3-68, 3-79. Alternative 7P was viewed as a middle-ground alternative with higher risk of contact and higher likelihood of extirpation for the Main Salmon/South Fork, Little Salmon, and Upper Hells Canyon herds compared to 7N and 7O. SEIS at 3-79 to 3-80. The SEIS noted that the risk was higher under alternative 7P because the Vance Creek and Grassy Mountain allotments were left open. SEIS at 3-80.

The Final SEIS also explained that the effectiveness of best management practices to reduce the risk of contact between domestic and bighorn sheep has not been substantiated by

research and in some cases it is questionable. SEIS at 3-103. It also requires extensive monitoring, which is costly and not always effective. *Id.* Appendix F to the SEIS is an explanation by then Forest Service national bighorn sheep expert Tim Schommer about why best management practices (BMPs) have not been successful at keeping the species separate, especially in steep rugged terrain like on the Payette National Forest. SEIS App. F.² Mr. Schommer explained the limits of each BMP, and noted that when attempting to employ BMPs in steep terrain where bighorn habitat is well connected and well distributed, like on the Payette, BMPs are often unsuccessful at maintaining separation. *Id.*

Along with the Final SEIS, the Forest Service issued its ROD for amending the Payette Forest Plan. *See* Sixth Rule Decl. Ex. C. The ROD noted that bighorn sheep are still at less than 10% of historic numbers and less than 30% of historic distribution. ROD at 6. Within the Salmon River Canyon area around the Payette National Forest, bighorn sheep numbers have decreased 47% since 1981. *Id.* Historically the Hells Canyon and Salmon River Canyon meta-populations were likely connected by suitable habitats and recently, bighorn sheep have been observed traveling from Hells Canyon to the Salmon River Canyon and back again. *Id.*

The ROD selected alternative 7O to amend the Forest Plan because it provides adequate habitat to support a viable population of bighorn sheep, complies with the Hells Canyon National Recreation Area Act, honors tribal rights, and avoids or minimizes impacts to bighorn sheep, which are a Sensitive species and need special protections under the Payette Forest Plan. ROD at 13. However, it modified alternative 7O so that it would be implemented over the course of three years. ROD at 9.

In 2011, alternative 7P would be implemented, in 2012 alternative 7N would be

² The SEIS has two appendices labeled F. The BMP analysis is the second half of the first Appendix F titled “Fish and Wildlife.”

implemented, and in 2013 and beyond alternative 7O would be implemented. *Id.* The ROD described which allotments would be closed in each year. ROD at 9-10. It noted that phasing in the closures would allow the grazing industry some time to find alternate grazing opportunities. ROD at 13. However, the ROD stated that the risk for contact under alternative 7P is acceptable for a *1-year period only*, and the same for alternative 7N. ROD at 13-14. The ROD explained that term grazing permits would be adjusted to bring them into compliance with this Forest Plan amendment. ROD at 29. No parties have judicially challenged the SEIS and ROD.

Permit Modifications

On February 15, 2011, the Payette National Forest issued permit modifications for Soulen Livestock Company, Frank Shirts Jr., and Ron Shirts based on the July 2010 ROD amending the Payette Forest Plan. Sixth Rule Decl. Exs. E-G. It issued a similar permit modification to Carlson Livestock on April 1, 2011. Sixth Rule Decl. Ex. H. The cover letter attached to the permit modification for Soulen Livestock explained that the management as described in the ROD for Alternative 7P would apply in 2011, management as described for Alternative 7N would apply in 2012, and management as described for Alternative 7O would apply for 2013 and all years after. Sixth Rule Decl. Ex. E.

The letter stated that this permit modification would govern grazing for the next three years (2011-2013) and that when their Term Grazing Permit expired December 31, 2013, the Forest would issue a new Term Grazing Permit for 2014 and subsequent years that incorporates all the changes from the ROD. *Id.* The letter noted that the modification incorporated changes for the 2011, 2012, and 2013 grazing seasons, which provided for continued grazing as set forth in the modification and also included an emergency response plan that must be implemented. *Id.*

The Term Permit Modification #2 was attached to the letter to Soulen Livestock

Company. *Id.* It stated which alternatives from the ROD would apply in 2011, 2012, and 2013 and listed the specific allotment areas that would be closed to livestock use each of those years. *Id.* For 2012, the permit modification closed the Grassy Mountain, Vance Creek, and Hershey Lava allotments in addition to the areas closed in 2011. *Id.* Parts of two additional allotments were to be closed in 2013.³ *Id.* It also prohibited domestic sheep trailing in or through the areas closed to grazing. *Id.*

The emergency response plan was attached to the permit modification. *Id.* This plan came into effect if bighorn sheep were located in or within 10 kilometers of an open allotment or if domestic sheep strayed from their band or were found within unauthorized areas, with the intent of trying to reduce the risk of contact between the species and disease transmission. *Id.* The Soulen Livestock permit modification was signed by all parties on February 15, 2011. *Id.*

2012 Appropriations Rider

In 2011, Alternative 7P took effect. However, the domestic sheep industry was not happy about the result of the Payette National Forest's analysis and decision. Worried that similar results would occur in bighorn sheep habitat on public lands across the West, and instead of judicially challenging the ROD, they began lobbying Congress, and in particular Representative Simpson from Idaho, to protect domestic sheep grazing on federal lands. *See* Second Declaration of Craig Gehrke ¶ 4 & Ex.1 at pp. 1, 2 (filed herewith).

Plaintiffs, the Nez Perce Tribe, and hunting and environmental groups countered with their support of bighorn sheep, and in particular the Payette's decision. *See id.* ¶ 5 & Exs. 2-7. They noted the widespread importance of bighorn sheep, the risk of disease transmission, and the cutting edge scientific analysis conducted by the Payette National Forest. *Id.* They urged

³ The remaining allotment areas to be closed in 2013 are permitted to Frank Shirts Jr.

Representative Simpson and other politicians not to exert any political influence that blocked the Payette National Forest from implementing its ROD, putting numerous bighorn sheep populations at risk to favor just two grazing permittees. *Id.*

When Congress passed the 2012 omnibus appropriations bill, numerous riders were attached to the bill. 2012 Consolidated Appropriations Act, Pub. L. No. 112-74 (Dec. 23, 2011). One of the riders pertained to domestic sheep grazing on Forest Service and BLM land and conflicts with bighorn sheep. Pub. L. No. 112-74, Div. E, § 431 (attached at Sixth Rule Decl. Ex. I). The rider contained separate provisions for the Forest Service and BLM, and also provided for voluntary closure of allotments or the waiver of grazing permits back to the agencies to reduce conflicts between domestic sheep and bighorns. *Id.*

With regard to the Forest Service, the rider stated that:

Notwithstanding any other provision of law or regulation (other than the Endangered Species Act of 1973 and regulations issued under such Act), none of the funds made available by this Act or made available by any other Act for fiscal year 2012 only may be used to carry out—

(1) any new management restrictions on domestic sheep on parcels of National Forest System land (as defined in the Forest and Range and Renewable Resources Planning Act of 1974 (16 U.S.C. 1609(a))) with potential domestic sheep and bighorn sheep (whether native or nonnative) contact *in excess of the management restrictions that existed on July 1, 2011*; or

(2) any other agency regulation for managing bighorn sheep populations on any allotment of such National Forest System land if the management action will result in a reduction in the number of domestic livestock permitted to graze on the allotment or in the distribution of livestock on the allotment.

Pub. L. No. 112-74, Div. E, § 431 (emphasis added). Plaintiffs have been informed that Representative Simpson plans to renew this rider in 2013 and perhaps beyond. Second Gehrke Decl. ¶ 8. All or parts of five additional allotments on the Payette National Forest—the Josephine, Bear Pete, Victor Loon, Lake Fork and Jughandle allotments—are to be closed in

2013 and beyond under the Payette Forest Plan. ROD at 10.

The Forest Service is authorizing domestic sheep grazing on the Grassy Mountain, Vance Creek and Hershey Lava allotments in 2012 contrary to the direction in the July 2010 amendment to the Payette Forest Plan and the February 2011 Soulen Livestock grazing permit modification closing those allotments to domestic sheep use in 2012 and beyond. Sixth Rule Decl. Ex. J; Second Gehrke Decl. ¶ 7.⁴ The Forest Service has misinterpreted the rider to preclude closure of those allotments despite the fact that the restrictions on grazing and trailing in those allotments in 2012 existed before July 1, 2011.

ARGUMENT

I. PRELIMINARY INJUNCTION STANDARDS.

Under Rule 65, the Court may issue a preliminary injunction pending resolution of Plaintiffs' claims on the merits. Fed. R. Civ. P. 65; *University of Texas v. Camenish*, 451 U.S. 390, 395 (1981). The test for injunctive relief under Rule 65 balances considerations of plaintiffs' likelihood of prevailing on the merits, the respective harms to the parties, and the public interest. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

A plaintiff seeking injunctive relief must establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). Courts must balance the competing claims of injury and must consider the effect on each party of the granting or

⁴ Plaintiffs have been informed that the Forest Service will not issue its formal 2012 grazing authorization until late spring. Plaintiffs are proceeding with their injunction motion now in order to allow for timely litigation of it prior to the July 10 permitted grazing season. The Forest Service has made clear publicly and to Plaintiffs that it plans to implement Alternative 7P in 2012 rather than Alternative 7N in its grazing authorization for 2012.

withholding of the requested relief. *Id.* at 24.

Actions that cause harm to natural resources are often the subject of injunctive relief, as “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1299 (9th Cir. 2003) (quoting *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987)).

II. THE FOREST SERVICE IS VIOLATING NFMA.

A. The 2012 Grazing Authorization is Inconsistent with the Payette Forest Plan.

The Forest Service’s authorization of domestic sheep grazing on the Payette National Forest for the 2012 season violates NFMA’s requirement to act consistently with the Payette Forest Plan. 16 U.S.C. § 1604(i). Specifically, NFMA requires that all permits, contracts, and other instruments for the use and occupancy of National Forest lands, including grazing authorizations, “shall be consistent with” Forest Plans. 16 U.S.C. § 1604(i); *Buckingham v. Secretary of the U.S. Dept. of Agric.*, 603 F.3d 1073, 1077 (9th Cir. 2010) (noting that grazing permits, AMPs, and AOIs all must be consistent with the applicable Forest Plan); *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 934 (9th Cir. 2010) (grazing authorizations must comply with Forest Plan). Here, the Forest Service’s authorization of grazing in 2012 is not consistent with the amended Payette Forest Plan.

It is undisputed that the July 2010 ROD amended the Payette Forest Plan. *See* ROD at 9 (stating “[t]his decision amends the 2003 Payette Land and Resource Management Plan”); *see also* SEIS at 1-4 to 1-5 (discussing purpose and need for “Final SEIS and Amendment to the Forest Plan”); Sixth Rule Decl. Ex. J (Forest Service press release stating that 2010 decision to

implement modified Alternative 7O amended 2003 Forest Plan). The ROD itself stated that “Forest Plan direction as amended will apply to all projects that have decisions made on or after the implementation of this ROD Because this Forest Plan amendment specifically addresses rangeland suitability for domestic sheep and goat grazing, action will be necessary to bring the Term Grazing Permits into compliance with this phase of the Forest Plan amendment process.” ROD at 29. In accordance with this requirement, the Forest Service modified the Term Grazing Permit for Soulen Livestock, as well as the other permittees, before the 2011 grazing season to be in compliance with the Forest Plan amendment. Sixth Rule Decl. Exs. E-H.

It is also undisputed that the Forest Service is acting directly contrary to the amended Forest Plan by authorizing domestic sheep grazing on allotments that the ROD closed to grazing in 2012 and beyond to protect bighorn sheep. The Forest Service is authorizing grazing in 2012 under Alternative 7P of the Forest Plan rather than Alternative 7N. Alternative 7P allows grazing on the Grassy Mountain, Vance Creek and southwestern portion of the Hershey Lava allotments, when the ROD and permit modification specifically closed those areas to domestic sheep beginning in 2012. Sixth Rule Decl. Ex. J (press release); ROD at 10 (noting all of Grassy Mountain, Vance Creek, and Hershey Lava allotments unsuited for domestic sheep grazing beginning in 2012); Sixth Rule Decl. Ex. E (permit modification #2 noting no authorization of domestic sheep to be in all of Grassy Mountain, Vance Creek, and Hershey Lava allotments, among others, in 2012). The ROD stated that the risk to bighorn sheep from leaving these allotments open was acceptable *for a 1-year period only*. ROD at 13. Thus, the 2012 authorization of grazing on those three allotments is inconsistent with the amended Forest Plan, in violation of NFMA—and is putting bighorn sheep populations at risk.

B. The 2012 Appropriations Rider does not Apply Here.

The Forest Service is authorizing grazing in 2012 on allotments that are closed under the Payette Forest Plan to protect bighorn sheep by relying on the language in the 2012 Rider. *See* Sixth Rule Decl. Exs. I-J. This reliance is misplaced, however, because the plain language of the rider shows that it does not apply here.

The rider states that the Forest Service cannot spend appropriated funds to carry out any *new* management restrictions on domestic sheep on National Forest land with potential domestic sheep and bighorn sheep contact *in excess of the management restrictions that existed on July 1, 2011*. Pub. L. No. 112-74, Div. E, § 431(a)(1). Thus, the rider does *not* prevent the Forest Service from carrying out management restrictions on domestic sheep grazing that existed prior to July 1, 2011. The restrictions on domestic sheep grazing on the Grassy Mountain, Vance Creek, and Hershey Lava allotments already existed on July 1, 2011.

The plain meaning of the word “restriction” is a limitation. *See* Webster’s New World Dictionary 2nd ed. Any kind of management direction that limits the use of National Forest land or the grazing of livestock on National Forest land is a management restriction. The July 2010 Forest Plan amendment and February 2011 permit modification for Soulen livestock both were management restrictions on domestic sheep grazing.

A Forest Service Land and Resource Management Plan—or Forest Plan—governs management of a National Forest, and all activities authorized by the Forest Service for the use and occupancy of National Forest lands must be consistent with those plans. 16 U.S.C. §§ 1604(a), (i). Under NFMA, the Forest Service must identify in Forest Plans the suitability of lands for resource management. *Id.* § 1604(g). The regulations implementing NFMA state that “[p]lans guide all natural resource management activities and establish management standards

and guidelines for the National Forest System. They determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management,” including the suitability of lands for livestock grazing. 36 C.F.R. §§ 219.1, 219.20 (1999); *see also* Forest Service Handbook 2209.13 chpt. 90, § 91 (attached to Sixth Rule Decl. at Ex. K) (stating that land and resource management plans identify the suitability of National Forest lands for grazing and establish programmatic direction for grazing activities, and that site-specific grazing authorizations must be consistent with Forest Plan direction). In this way, the Forest Service designates which lands will be managed for grazing and which lands are restricted from livestock use because they are unsuitable. 36 C.F.R. § 219.20.

The July 2010 amendment to the Payette Forest Plan did just that, designating as unsuited for domestic sheep and goat grazing certain lands on the Payette National Forest and identifying the total acres of suitable rangelands. ROD at 9-10. As such, the amendment constituted a management restriction, or limitation, on domestic sheep grazing on the Payette National Forest by designating which lands were unsuitable for livestock grazing in 2011, 2012, 2013 and beyond.

Furthermore, Term Grazing Permits are also management restrictions on grazing. The NFMA regulations state that all grazing and livestock use on National Forest System lands must be authorized by a grazing permit, the permits must contain certain requirements, and the Forest Service can cancel or suspend a permit if the permittee does not comply with those requirements. 36 C.F.R. §§ 222.3, 222.4; *see also* Forest Service Handbook 2209.13, chpt. 90, § 94.2 (stating that a grazing permit is the instrument that authorizes grazing on certain National Forest lands, and contains specific terms and conditions for grazing use). Permits generally direct what areas

are authorized for grazing, the number of livestock permitted, and when grazing can occur, as well as other relevant terms and conditions. Thus, Term Grazing Permits also constitute management restrictions on livestock grazing on National Forest lands.

Here, the February 2011 permit modification #2 for Soulen Livestock restricts what allotment areas are permitted for livestock use in 2011, 2012, and 2013, with Grassy Mountain, Vance Creek and Hershey Lava allotments not authorized for use in 2012 or 2013. Sixth Rule Decl. Ex. E. It also stated that “[n]o domestic sheep are authorized on lands deemed unsuited” and “[d]omestic sheep trailing is not authorized in or through areas deemed unsuited for domestic sheep and goat grazing,” and noted that the July 2010 ROD identified which allotment areas are unsuited for grazing starting in 2011. *Id.*

Accordingly, the July 2010 ROD amending the Payette Forest Plan and the February 2011 permit modification for Soulen Livestock both were management restrictions—i.e. limitations—on domestic sheep grazing, identifying which lands were unsuited for grazing, and therefore not authorized for livestock use, in 2011, 2012, and 2013. Because those restrictions existed before July 1, 2011, the 2012 rider does not apply, as stated explicitly in the rider itself. Pub. L. No. 112-74, Div. E, § 431. The Forest Service’s interpretation is contrary to the plain language of the rider. Thus, it should not be upheld to allow the agency to turn its back on the thorough scientific analysis conducted in the SEIS and act inconsistently with its own Forest Plan, putting bighorn sheep populations at risk.

III. IMMEDIATE RELIEF IS NEEDED TO AVOID IRREPARABLE HARM.

Plaintiffs have demonstrated that the Forest Service is violating NFMA, and thus have satisfied the first prong for a preliminary injunction. As discussed below and in the accompanying expert declaration, Plaintiffs also will likely suffer irreparable harm absent

injunctive relief due to the risk of disease impairing bighorn sheep populations in the Hells Canyon and Salmon River Canyon areas, satisfying the second prong for a preliminary injunction.

As discussed thoroughly in Plaintiffs' prior filings in this case as well as the accompanying declaration of bighorn expert Tim Schommer, domestic sheep pose a grave risk to bighorn sheep when the two species come in contact. Domestic sheep can transmit deadly bacteria to bighorns, leading to respiratory disease that often spreads through bighorn populations, causing large die-offs and poor lamb survival for years. *See* Plaintiffs' Opening PI Brief at 5-9, Declaration of William Foreyt ¶¶ 3-15, Declaration of Victor Coggins ¶¶ 13-14, Declaration of Lloyd Oldenburg ¶¶ 20-25 (Docket Nos. 7-9, 11). The Forest Service recognized the threat of disease transmission from domestic sheep to bighorn sheep in its SEIS. SEIS at 3-6 to 3-12.

The risk of disease transmission is heightened by the social nature of these related species as well as their movements. Bighorns can make long distance movements in short periods of time, especially young rams that are making exploratory movements or males looking for females during the rut. *See* Coggins Decl. ¶¶ 18-20, Fourth Declaration of Victor Coggins ¶¶ 6-8 (Docket No. 64), Declaration of Curt Mack ¶ P (Docket No. 51), Second Declaration of Keith Lawrence ¶ 15 (Docket No. 87). Rams and ewes from the Hells Canyon populations have traveled more than twenty miles, and can cover six to ten miles in a matter of hours. Coggins Decl. ¶¶ 18-20, Fourth Coggins Decl. ¶¶ 6-8; Sixth Rule Decl. Ex. L (map of movements of Hells Canyon ram in Feb-July 2010).

Recent monitoring of the Main Salmon River bighorn population documented even greater movement by these animals than previously believed, with bighorns regularly moving up

and down the Salmon River Canyon and between herds. Schommer Decl. ¶¶ 14-15; Third Declaration of Keith Lawrence ¶ 16 (Docket No. 159). One ram moved more than twenty five miles during the fall of 2008. Third Lawrence Decl. ¶ 16.

Domestic sheep will also stray from their bands and can move long distances and survive on their own for many months. *See* Coggins Decl. ¶¶ 52-55; Fourth Coggins Decl. ¶ 15; Third Lawrence Decl. ¶¶ 35-36. If a bighorn and domestic sheep come in proximity to each other, they will likely make contact due to their gregarious natures. Coggins Decl. ¶¶ 15-16.

The bighorn populations in Hells Canyon and the Salmon River Canyon have experienced many die-offs and currently are at depressed levels, which scientists attribute largely to disease from domestic sheep. SEIS at 3-14, 3-18; Schommer Decl. ¶¶ 13, 16-20, 32, 44-45; Coggins Decl. ¶¶ 27-33; Declaration of Keith Lawrence ¶¶ 7-8 & Ex. C (Docket No. 71); Third Lawrence Decl. ¶¶ 4-5, 10-11. Several of the Hells Canyon herds have very low numbers and are in danger of extirpation, while the Salmon River populations in and around the Payette National Forest have decreased 47% since 1981. SEIS at 3-4, 3-15, 3-16; Sixth Rule Decl. Ex. M at p. 9 (showing 2010 estimated populations of Hells Canyon herds).

Many of these populations have experienced poor lamb production and survival for years, keeping the populations at low numbers; and unless this trend is reversed, the populations will likely decline further, putting them at risk of extirpation. Schommer Decl. ¶¶ 17-20. The Salmon River meta-population is the last native population of bighorn sheep in Idaho, making them especially important due to their genetic diversity. SEIS at 3-6; Schommer Decl. ¶¶ 12, 46. Plenty of suitable habitat exists on the Payette National Forest to support larger bighorn sheep populations, and thus habitat does not appear to be limiting the size or distribution of bighorn populations. SEIS at 3-51; Oldenburg Decl. ¶ 19. Instead, “[d]isease transmission from

domestic sheep is the single most important hurdle to bighorn sheep restoration and viability on the [Payette National] Forest.” Schommer Decl. ¶ 20.

By failing to implement the next phase of the 2010 ROD, and instead allowing grazing and trailing on the Grassy Mountain, Vance Creek, and Hershey Lava allotments, the Forest Service is putting bighorn sheep at an increased, and unacceptable, level of risk, as explained by former Forest Service national bighorn sheep expert Mr. Tim Schommer. Schommer Decl. ¶¶ 25, 33-42. The SEIS and 2010 ROD stated specifically that alternative 7P created a higher risk to bighorns because it left open the Grassy Mountain and Vance Creek allotments, and this risk was acceptable *for the 2011 season only*. SEIS at 3-80, ROD at 13. As discussed in the Schommer declaration, because of the close proximity of these allotments to known bighorn sheep locations, especially in the Little Salmon River Canyon, and the dire consequences that would likely occur from contact between domestic and bighorn sheep, these allotments must be closed in 2012. Schommer Decl. ¶¶ 26-33, 44-47.

The SEIS noted that four bighorn sheep were observed in the Little Salmon River Canyon during the prior three years, and mapped their home range based on those observations. SEIS at 3-6, 3-34. It stated that this area has not been regularly surveyed but these incidental observations suggest bighorns have established site fidelity to the Little Salmon River Canyon and occupy the area. SEIS at 3-6, 3-53. Mr. Schommer further describes the use of the Little Salmon River Canyon by bighorn sheep since 2008, including movements of a young ram up and down the canyon for two months in 2008 before he mixed with goats and was killed, sightings of a ewe in February 2010, and another very recent ewe sighting in February of this year. Schommer Decl. ¶¶ 27-28. He also noted that documented use of this area by bighorns occurs very close to the Grassy Mountain allotment. *Id.* ¶¶ 26-33; *see also* SEIS at 3-54, 3-96,

Appendix L at p. 42.

As explained in the prior rounds of litigation and the Schommer declaration, documentation of bighorns in an area, either through telemetry or incidental observations, strongly indicates that more bighorns are using the area. Schommer Decl. ¶ 29; Third Declaration of Victor Coggins ¶¶ 3-10 (Docket No. 51); Fourth Coggins Decl. ¶ 5; Declaration of Curt Mack ¶¶ I, X (Docket No. 51). The Allison-Berg allotment is a prime example. Prior to the initiation of the telemetry study on the Main Salmon River bighorn herd, there were only a few incidental observations of bighorn sheep on or near the Allison-Berg allotment. *See* Second Lawrence Decl. ¶¶ 9-13. Yet after just one year of the study, telemetry data showed a group of eleven bighorn sheep consistently using the allotment. Third Lawrence Decl. ¶ 15 & Exs. 8-10. Bighorns from this group also used the BLM Partridge Creek allotment across the Salmon River on numerous occasions, where no bighorn sheep had previously been documented. Third Lawrence Decl. ¶ 16 & Exs. 7-10. Thus, similar to the Allison-Berg and Partridge Creek allotments, it is likely that more bighorn sheep are using the Little Salmon River Canyon than have been documented. Schommer Decl. ¶ 29.

It is also likely that bighorns using the Little Salmon River Canyon are also using the Grassy Mountain and Vance Creek allotments. These allotments contain good summer source habitat and are close to the documented locations and core home range of bighorns in the Little Salmon River Canyon, with the Grassy Mountain allotment virtually adjacent to bighorn sightings. Schommer Decl. ¶¶ 27-31; SEIS at 3-34, 3-54, Appendix L at p. 42. These allotments are well within the range a bighorn can travel or a stray domestic sheep could wander. *See* Coggins Decl. ¶¶ 18-20, 52-55; Fourth Coggins Decl. ¶¶ 6-8; Mack Decl. ¶ P. Because there is no barrier to movement of bighorn or domestic sheep between the Little Salmon River Canyon

and the summer habitat on these allotments, there is “an unacceptable risk of contact” between the species. Schommer Decl. ¶¶ 30-31; Third Lawrence Decl. ¶¶ 15-16 (noting that even the Salmon River was not a barrier to bighorns, which were crossing the river to access habitat on the BLM Partridge Creek allotment).

Furthermore, like with the Salmon River sheep driveway, the trailing of several domestic sheep bands through the Grassy Mountain allotment creates additional risk of contact with bighorns in the area. *See* Second Coggins Decl.; Fourth Coggins Decl (discussing danger to bighorns from using Salmon River Sheep Driveway); Sixth Rule Decl. Ex. N at pp. 4-5 (2011 AOI discussing trailing to Hershey Lava and from Vance Creek allotments through Grassy Mountain allotment).

Such contact would likely have devastating effects to the bighorn populations on the Payette National Forest. The bighorn habitat in the Little Salmon River Canyon is continuous with habitat in the Main Salmon River Canyon. Schommer Decl. ¶¶ 15, 30-31. Furthermore, bighorn populations within the Hells Canyon and Salmon River meta-populations are interconnected, with significant movement of bighorns between herds within each meta-population and even between the two meta-populations. SEIS 3-4 to 3-5, 3-73, 3-91; Schommer Decl. ¶¶ 14-15; Coggins Decl. ¶¶ 19-20, 43; Mack Decl. ¶¶ M, O; Third Lawrence Decl. ¶¶ 13-14. The Forest Service noted that bighorns have recently been observed traveling from Hells Canyon to the Salmon River Canyon and back again, and that the Little Salmon River bighorn population could provide connectivity between the meta-populations. ROD at 6; SEIS at 3-53.

As seen in Hells Canyon bighorn populations, a disease outbreak can spread through a meta-population and keep herds at low numbers and low lamb survival for years. Schommer Decl. ¶¶ 16, 18, 32, 44-47. As stated by bighorn expert Tim Schommer:

“[b]ecause of the known presence of bighorn sheep in close proximity to active domestic sheep allotments (Grassy Mountain and Vance Creek), mapped bighorn sheep habitat within and adjacent to these active domestic sheep allotments, and the continuous nature of bighorn habitat between the Little Salmon River and the Main Salmon River, continued grazing on the Grassy Mountain and Vance Creek allotments as described in Alternative 7P, past the 2011 grazing season, poses an unacceptable level of risk to bighorn sheep populations on the Payette National Forest.”

Id., ¶ 33. The consequences of a disease outbreak to these already-depressed populations, especially the “unique and irreplaceable” native Salmon River populations, are so dire that “any potential for contact [between domestic and bighorn sheep] is too much.” *Id.*, ¶ 46.

Finally, the use of best management practices (BMPs) are not sufficient to maintain separation of the species, as discussed many times in this litigation. Schommer Decl. ¶¶ 48-51; Third Coggins Decl. ¶¶ 16-18; Fourth Coggins Decl. ¶¶ 10-14; Fifth Declaration of Victor Coggins ¶¶ 3-19 (Docket No. 149); Third Lawrence Decl. ¶¶ 35-36. The SEIS also recognized that BMPs have not been proven effective, especially in steep, rugged terrain like that on the Payette National Forest. SEIS at 3-103 and App. F (excerpt by Tim Schommer on BMP effectiveness).

Documentation of Forest Service monitoring efforts implemented in 2009-2011 show that BMPs are unreliable on the Payette National Forest. First, sporadic monitoring for bighorn sheep to detect presence on or near allotments does not guarantee that bighorns are not using the area. Monitoring on the Payette allotments occurred at each site only one or two days during the entire grazing season and, given their mobility and their large summer home ranges, bighorns could have easily used the areas at other times. *See* Sixth Rule Decl. Exs. O-P (2010 and 2011 monitoring records). Furthermore, the Forest Service admits that the difficulty spotting bighorn sheep in steep, rugged terrain makes on-the-ground presence/absence surveys unreliable. Sixth Rule Decl. Ex. Q at p. 9, Ex. R at p. 3. Helicopter surveys also are not reliable to detect all

bighorns, even in areas they are known to occupy. Sixth Rule Decl. Ex. Q at p. 8, Ex. R at p. 3.

Second, monitoring of domestic sheep is also ineffective at ensuring no straying will occur. Even though Forest Service personnel were supposed to track domestic sheep bands on the Payette allotments regularly during the grazing season, they admitted it was more difficult than expected to find and track sheep bands and sometimes they could not locate the bands at all. Sixth Rule Decl. Ex. R at p. 3, Ex. S at p. 2; *see also* Ex. T at pp. 3, 6, 20, 33, 37, 40 (monitoring forms stating could not find sheep on Grassy Mountain and other allotments). Summaries from the end of the 2009 season noted numerous domestic sheep that were unaccounted for during mid-season or final counts on many allotments. Sixth Rule Decl. Ex. S at pp. 13-20. The Forest Service stated that monitoring indicated “straying sheep from all monitored bands.” Sixth Rule Decl. Ex. R at p. 3.

Field notes also showed that herders and dogs were not always with the sheep bands, and wolves were observed on several allotments, including “mucho lobo” on the Grassy Mountain allotment, increasing the chance that domestic sheep would scatter or stray. Sixth Rule Decl. Ex. Q at 13 (noting that wolf attacks create the most significant risk for stray domestic sheep because they cause sheep to scatter), Ex. T at pp. 2, 5, 10, 12, 16, 25, 30, 43 (herder and dogs not with band on Grassy Mountain and other allotments) & pp. 4, 33, 34 (wolf sightings on Grassy Mountain and Price Valley allotments). This monitoring information confirms that BMPs are not effective at ensuring separation of bighorn and domestic sheep. The only way to prevent irreparable harm to bighorn sheep is to close the Grassy Mountain, Vance Creek and Hershey Lava allotments this year, as the July 2010 ROD directed.

As explained by the Forest Service’s former national bighorn sheep expert, the additional protections to bighorn sheep from closing the Grassy Mountain and Vance Creek allotments are

“substantial,” and leaving these allotments open in 2012 poses an “unacceptable level of risk to bighorn sheep populations on the Payette National Forest.” Schommer Decl. ¶¶ 33, 39. It is “important to the survival of the bighorn sheep on the Payette National Forest to implement Alternative 7N for the 2012 grazing season”—i.e. close the Grassy Mountain and Vance Creek allotments—“and continue the full implementation of the ROD under [Alternative] 7O by 2013.” Schommer Decl. ¶ 42.

IV. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST FAVOR AN INJUNCTION.

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. The balance of hardships and public interest strongly weigh in favor of enjoining grazing on the Grassy Mountain, Vance Creek and Hershey Lava allotments until the Forest Service complies with its Forest Plan by closing these allotments to domestic sheep.

The Hells Canyon and Salmon River Canyon populations of bighorn sheep have been declining for years and lamb survival is low, due mostly to disease. SEIS at 3-4, 3-14 to 3-18; Schommer Decl. ¶¶ 13, 17-20, 32, 44-45; Coggins Decl. ¶¶ 27-33. Many of these populations are already below a viable population level, and further impacts from disease could lead to their demise. Schommer Decl. ¶¶ 20, 46; Coggins Decl. ¶¶ 30-33, 44-46. Even one contact between bighorn sheep and domestic sheep could lead to a disease outbreak that threatens the entire bighorn meta-population. Schommer Decl. ¶¶ 16, 46. Such a result in the Salmon River Canyon bighorns would cause the loss of genetic diversity in the last native Idaho population. Schommer Decl. ¶ 46. The harm to bighorn sheep would harm Plaintiffs’ aesthetic, scientific, and

recreational interests in protecting and enhancing bighorn sheep populations in the Hells Canyon and Salmon River Canyon areas. *See* Second Gehrke Decl. ¶¶ 1-3; Declarations of Greg Dyson and Jon Marvel (Docket No. 7).

In contrast, the Forest Service cannot claim any harm from this injunction as it is obligated to follow all laws and regulations in its management of National Forest lands. Barring grazing until the agency corrects its interpretation of the 2012 rider and complies with its duties under NFMA will only help it fulfill its responsibility to act consistently with its Forest Plan and protect viability of bighorn sheep.

Likewise, the commercial interest of the sole livestock permittee that would be affected by an injunction in 2012—Soulen Livestock—does not tilt the balance of hardships because economic hardship does not outweigh the potential irreparable damage to the Hells Canyon and Salmon River Canyon bighorn sheep populations. *Earth Island*, 442 F.3d at 1177. Soulen Livestock is permitted to use all or parts of ten grazing allotments on the Payette National Forest for its domestic sheep, and an injunction would close only three of those allotments. *See* Sixth Rule Decl. Ex. N (AOI showing list of allotments). This company has extensive private lands and permits for grazing allotments on other federal lands as well. It grazes 6,526 sheep AUMs and 5,850 cattle AUMs on the Minnie, Cove Creek, Dry Lake, Crane Creek, Paddock Valley, Sunnyside, Hard Creek, and Big Creek allotments on BLM lands in southwestern Idaho. *Found at* <http://www.blm.gov/ras/>.

Furthermore, Soulen Livestock has known since July 2010 that these allotments would be closed in 2012. Thus, it cannot claim surprise or undue harm from this injunction as it had plenty of notice about the closures and ample opportunity to make adjustments to its grazing practices to accommodate for these closures. In fact, the whole purpose of the three-year phased

in approach was to give permittees time to find alternate grazing areas. ROD at 13. The hardship to Soulen Livestock of closing the Grassy Mountain, Vance Creek and southwestern 25% of the Hershey Lava allotments does not outweigh the hardship to bighorn sheep from a disease outbreak, particularly when the permittee knew of these closures well in advance.

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); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (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, as seen through the declarations that Plaintiffs and the Nez Perce Tribe submitted in this litigation as well as the letters from a wide variety of groups sent to Representative Simpson opposing the 2012 rider. *See* Second Gehrke Decl. ¶ 5 and Exs. 2-7; Declarations of Raymond Lee, Craig Gehrke, Greg Dyson, Jon Marvel (Docket No. 7); Declaration of Josiah Pinkham (Docket No. 39). With a species like bighorn sheep that generates such great interest from a wide variety of groups, the harm to this species and the public far outweighs any harm to the Forest Service or the livestock permittee.

The risk of irreparable harm to bighorn sheep, the public's interest in preserving this species, and the balance of hardships all weigh strongly in favor of issuing this injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant this Motion for Preliminary Injunction, and enter the requested injunctive relief prior to July 10, 2012.

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Respectfully submitted,

s/Lauren M. Rule
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