

**Appeal No. 24-1187**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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WILDEARTH GUARDIANS, et al., Petitioners-Appellants,

v.

U.S. FOREST SERVICE, Respondent-Appellee,

and

JERRY BROWN, WAYNE BROWN, COLORADO WOOLGROWERS  
ASSOCIATION, COLORADO FARM BUREAU FEDERATION, and J. PAUL  
BROWN, Respondent-Intervenors-Appellees

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On Appeal from the United States District Court for the District of Colorado  
The Honorable Daniel D. Domenico, Civil Action No. 1:19-cv-00208-DDD

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**APPELLANTS' OPENING BRIEF  
(Oral Argument Requested)**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, Petitioners-Appellants WildEarth Guardians and Western Watersheds Project are non-profit organizations recognized by the IRS as Section 501(c)(3) public charities. They have no public shares and no corporate parents or affiliates with public shares.

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**STATEMENT OF PRIOR OR RELATED CASES**

Counsel for Petitioners-Appellants are unaware of any prior or related cases pending before this Court.

## **GLOSSARY OF ACRONYMS AND TERMS**

APA	Administrative Procedure Act
BLM	Bureau of Land Management
BMPs	Best Management Practices
CPW	Colorado Parks and Wildlife
DN/FONSI	Decision Notice/Finding of No Significant Impact
EA	Environmental Assessment
EIS	Environmental Impact Statement
FIG	Fisher-Ivy/Goose Lake Allotment
GPS	Global Positioning System
NEPA	National Environmental Policy Act
SIR	Supplemental Information Report

## **INTRODUCTION**<sup>1</sup>

Bighorn sheep are an iconic species in the western United States, valued by Native Americans, hunters, wildlife enthusiasts, and many others. But native bighorn populations are estimated at less than 10 percent of historic numbers, and many populations are small and isolated. One of the main culprits for this substantial decline is disease transferred from domestic sheep, leading to large die-offs within bighorn populations and years of high lamb mortality. The only reliable way to prevent disease transmission is to maintain substantial spatial separation between domestic sheep bands and bighorn sheep herds.

Appellants WildEarth Guardians and Western Watersheds Project (“Guardians”) brought this litigation against the Forest Service over its creation of the Wishbone domestic sheep grazing allotment because of the substantial threat the allotment poses to near-by bighorn sheep populations. According to the best available science, this new Forest Service grazing allotment creates an exponentially higher risk of disease transmission to bighorns than other allotments that federal agencies have closed to protect bighorn sheep. Yet, even after discovering the very high risk to bighorns from putting domestic sheep on this

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<sup>1</sup> Citations to the Appendix are in the format X-App-XXX–XXX, where the number before “App” refers to the volume of the Appendix, and the numbers after “App” refer to the page numbers within the Appendix.

allotment, the Forest Service forged ahead with authorizing its use.

To justify that decision, the agency concocted a number of reasons why the risk of disease transmission to bighorn sheep from domestic sheep grazing the Wishbone Allotment was really just a “Moderate Risk” and therefore was acceptable. These reasons, however, were inconsistent with information in the administrative record as well as with findings in other bighorn studies and court decisions. In fact, preliminary data documenting bighorn sheep near the Wishbone Allotment undercut several of the agency’s assumptions, and confirmed that the two largest grazing pastures within the allotment create a very high risk to bighorn sheep. Additionally, the record established that the permittees who would be authorized to graze this allotment had repeatedly failed to comply with management requirements in their permits, calling into question the Forest Service’s claim that “best management practices” would keep domestic sheep and bighorn sheep separated.

A key flaw in the Forest Service’s decision-making process was its failure to obtain important data on bighorn movements from Colorado Parks and Wildlife (“CPW”) before completing its environmental assessment (“EA”) and signing the decision creating the Wishbone Allotment. When the Forest Service did obtain that data a year later, it showed the allotment was *an even higher risk* than originally determined—with a bighorn herd’s home range directly adjacent to the two largest

pastures. Yet instead of conducting a proper supplemental analysis to objectively re-consider the danger to bighorn herds posed by the Wishbone Allotment, the agency doubled down on its claim that the allotment was not High Risk without ever disclosing to the public the results of the CPW data.

Because the Wishbone EA contained numerous assumptions and conclusions that were unsupported by the record, and failed to consider highly important data, it violated the National Environmental Policy Act (“NEPA”). To remedy this legal violation, the Forest Service must prepare a full environmental impact statement (“EIS”) that is supported by the record and open to public comment.

### **STATEMENT OF JURISDICTION**

The district court had jurisdiction over this case under 28 U.S.C. § 1331 because Guardians’ claims arose under the laws of the United States, including the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, and NEPA, 42 U.S.C. § 4321 *et seq.*

This Court has jurisdiction over this appeal because the district court issued an Order and Final Judgment resolving this case on March 7, 2024 and Guardians filed a timely notice of appeal on May 2, 2024. 28 U.S.C. § 1291; Fed. R. App. P. 4(a)(1).

## **STATEMENT OF ISSUES ON APPEAL**

1. Whether the Forest Service violated NEPA by issuing an EA that contained assumptions and conclusions unsupported by the administrative record, failed to consider important scientific data, and failed to assess all effects of the proposed action;
2. Whether the Forest Service should have prepared an EIS when creating a new domestic sheep grazing allotment adjacent to bighorn sheep populations;
3. Whether the Forest Service violated NEPA by inappropriately relying on a supplemental information report rather than completing a full supplemental NEPA analysis.

## **STATEMENT OF THE CASE**

### **I. HISTORY OF THE WISHBONE ALLOTMENT**

#### **A. Disease Transmission from Domestic Sheep to Bighorn Sheep.**

Disease transmitted from domestic sheep is one of the primary causes of the decline and continued suppression of bighorn sheep populations across the western United States, including in Colorado. II-App-71. Domestic sheep carry a pathogen, *Mycoplasma ovipneumoniae*, that can be transferred to bighorn sheep if the species come in contact. V-App-140, II-App-205. While this pathogen does not affect domestic sheep, it leads to respiratory disease in bighorns that is usually fatal. V-

App-140. A bighorn that has contracted the pathogen from a domestic sheep will transfer it to other members of the bighorn's herd, resulting in large pneumonic die-offs within bighorn populations. *Id.*

Female bighorns that survive the disease pass the pathogen to their lambs, which causes mortality in the lambs. *Id.* Bighorn herds that have experienced a disease outbreak have poor lamb survival for years or even decades after the initial die-off, preventing recovery of the population. *Id.* Infected members of a herd can also pass the pathogen to another herd, causing die-offs in near-by bighorn populations. *Id.* Thus, one domestic sheep can trigger widespread pneumonia outbreaks and die-offs within multiple bighorn sheep populations, as documented in Colorado when one domestic sheep triggered die-offs in three herds over the course of three years. II-App-28, II-App-72. To have long-term viability, scientists estimate bighorn sheep populations must be at least 100 animals, but many current populations are smaller than that. II-App-66, II-App-76, III-App-9.

The spread of disease from domestic sheep to bighorns is facilitated by the behavior of each species. The primary habitat area that a bighorn sheep herd occupies is called its home range, but individuals from a herd frequently move outside of their normal home range to disperse, find a mate, or move between habitat areas—movements that are called “forays.” V-App-140–141. Forays can be 15 miles or more, and can lead to contact with a domestic sheep or a bighorn from

a different herd. See VI-App-144 (ram forayed more than 14 miles); IV-App-181 (bighorns moving 15 miles); *W. Watersheds Project v. BLM*, No. 09-cv-507-BLW, 2009 WL 3335365, at \*4, 5 (D. Idaho Oct. 14, 2009) (at III-App-241–257) (bighorn ram moved 25 miles and interacted with multiple bighorn groups); *W. Watersheds Project v. U.S. Forest Serv.*, No. 1:17-cv-434-CWD, 2017 WL 5571574, at \*7 (D. Idaho Nov. 20, 2017) (at VI-App-102–132) (stating most bighorn forays are within 16 miles of home range).

Multiple bighorn herds often form “meta-populations,” groups of bighorn herds that have frequent contact with each other. II-App-54. This meta-population structure enhances genetic diversity within bighorn herds but also facilitates disease transmission between herds. *Id.* CPW has identified bighorn meta-populations in Colorado, and the meta-population near the Wishbone Allotment contains four herds. III-App-79, V-App-137.

In addition, domestic sheep frequently stray from their band and can remain on their own for weeks or months at a time. IV-App-202, V-App-220 (noting risk to bighorns from stray domestic sheep); IV-App-299 (stray domestic sheep were collected for several weeks after grazing season ended); *W. Watersheds Project v. BLM*, 2009 WL 3335365, at \*5 (stray sheep can wander in bighorn habitat for months). Sometimes just a few sheep stray while at other times large numbers will be separated from the main band. See e.g. IV-App-299 (discussing 54 stray



domestic sheep). The remote and rugged terrain of public lands makes it difficult to find and remove stray domestic sheep, increasing the risk of contact with nearby bighorn sheep. III-App-262–263.

The risk of bighorn sheep and domestic sheep coming into contact is exacerbated by the fact that these two species are gregarious and attracted to each other, and thus when they are “in close proximity, i.e. grazing the same habitat, they are likely to seek each other out.” *W. Watersheds Project v. U.S. Forest Serv.*, 2017 WL 5571574, at \*9; *see also* II-App-71–72, III-App-262, IV-App-208, IV-App-244, V-App-220, III-App-110 (discussing attraction between the species). This attraction between domestic and bighorn sheep heightens the risk of disease transmission.

#### **B. Addressing the Risk of Disease Transmission on Federal Lands.**

Over the past two decades, Federal agencies have increasingly grappled with how to manage domestic sheep grazing allotments that are near occupied bighorn sheep habitat. In some instances, agencies have closed domestic sheep allotments after bighorns were documented on or near the allotments, and courts have upheld those closures. *W. Watersheds Project v. U.S. Forest Serv.*, No. 07-cv-151-BLW, 2007 WL 1729734, at \*2, 4 (D. Idaho June 13, 2007) (“*WWP I*”); *W. Watersheds Project v. U.S. Forest Serv.*, No. 07-cv-151-BLW, 2007 WL 3407679, at \*1, 4 (D. Idaho Nov. 13, 2007) (“*WWP II*”). In other cases, courts have enjoined grazing

under similar circumstances when the agency failed to act. *W. Watersheds Project v. BLM*, 2009 WL 3335365, at \*4 (“*WWP III*”) (injunction closing BLM allotment); *W. Watersheds Project v. U.S. Forest Serv.*, 2017 WL 5571574, at \*13-15 (“*WWP IV*”) (injunction closing two Forest Service allotments).

The most notable example of these closures arose on the Payette National Forest in central Idaho, where the Forest Service closed almost 70% of the forest to domestic sheep grazing to protect bighorn sheep populations—a decision upheld by the District Court of Idaho and the Ninth Circuit Court of Appeals. *Idaho WoolGrowers Ass’n v. Vilsack*, 7 F.Supp.3d 1085, 1088 (D. Idaho 2014), *aff’d*, 816 F.3d 1095, 1107–10 (9th Cir. 2016). This decision relied on three peer-reviewed models, which identified bighorn habitat suitability, the probability that a bighorn would enter a domestic sheep allotment, and the likelihood of disease transmission from a domestic sheep to a bighorn herd. *Vilsack*, 7 F.Supp.3d at 1095–99.

Recognizing the need to comprehensively address the conflicts between domestic sheep and bighorn sheep across the West, the Forest Service adapted the second Payette model—the “Risk of Contact Model”—for use on other forests. II-App-231. The agency uses telemetry<sup>2</sup> and habitat data to establish a bighorn herd’s home range and the potential for a bighorn from that herd to make a foray onto an

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<sup>2</sup> Telemetry data shows actual locations of bighorn sheep in real time by tracking radio telemetry collars placed on a sample of bighorns from a population.

allotment. II-App-231–232, II-App-239. Based on the proximity of the home range and probability of a foray, the model determines the number of times per year a bighorn would contact a certain domestic sheep allotment, and the agency uses that number to estimate how frequently disease transmission would occur. *Id.*; III-App-42, V-App-183. It then uses those results to rate an allotment as Low, Moderate, or High Risk to bighorn sheep populations. III-App-49, V-App-178.

Once the Risk of Contact Model was available, other National Forests, including those in Colorado, began using it to assess the risk of domestic sheep allotments. Multiple bighorn sheep herds occupy habitat on and around the Rio Grande National Forest in southwest Colorado, with more than a half dozen at risk of contact with domestic sheep. II-App-95, VI-App-162. The Forest Service began assessing the risk to these herds, starting with analysis of the Fisher-Ivy/Goose Lake (“FIG”) Allotment in 2013. III-App-15.

Using the Risk of Contact Model, the Forest Service assessed the risk of each of the seven pastures in the FIG allotment, and all seven were rated as High Risk to bighorn sheep. III-App-37–40, III-App-42, III-App-49. Four of the pastures overlapped the home range of a bighorn herd and the other three pastures were 1, 1.5, and 2.5 miles away from the home range. III-App-32. The Forest Service converted the entire allotment to vacant status because of its High Risk to the nearby bighorn herd, rejecting the option of relying on “Best Management Practices” to

keep the species separated. III-App-57, III-App-62, III-App-67–68.

Best Management Practices (“BMPs”) are actions to try and keep domestic and bighorn sheep separated, such as using herders and dogs to control and contain domestic sheep bands, periodically counting the domestic sheep to detect if any are missing, and reporting sightings of bighorn sheep that are near domestic sheep. But courts have found no science supported these BMPs and evidence showed such measures had been ineffective. *WWP I*, 2007 WL 1729734, at \*3; *WWP III*, 2009 WL 3335365, at \*3, 5, 7; *WWP IV*; 2017 WL 5571574, at \*8–9, 13.

Many bighorn experts agree BMPs are not effective at keeping the species separated if there is not substantial spatial separation between bighorn home ranges and domestic sheep grazing allotments. III-App-260–265, III-App-280–281, IV-App-198–200. As one expert stated, even when BMPs are used, “domestic sheep inevitably stray from their band” because herders cannot keep track of every one of the hundreds of domestic sheep that are grazing, particularly in steep, rugged terrain. III-App-261–262. It is also difficult to find and remove any stray domestic sheep or spot a bighorn that may be in close proximity. III-App-262–263. The expert noted a buffer of at least nine air miles between domestic sheep and bighorn populations is needed to achieve separation. III-App-264–265.

### **C. Creation of the Wishbone Allotment.**

After closing the FIG Allotment, the Rio Grande National Forest turned to

the Snow Mesa allotments, a set of three allotments near four bighorn herds that form a meta-population—the San Luis Peak, Bellows Creek, Bristol Head, and Rock Creek herds. III-App-122, V-App-137. These herds were each estimated to have 80 animals, with the exception of the Rock Creek herd that was estimated at 20 animals. V-App-153, II-App-76, III-App-9.

The Forest Service completed a risk assessment for the Snow Mesa allotments in 2015 using the Risk of Contact Model. III-App-158. It analyzed two configurations of the allotments, but under each configuration the allotments were rated as High Risk to the bighorn herds and thus the agency proposed eliminating domestic sheep grazing on all three allotments. III-App-165–166, III-App-206, III-App-126, III-App-130. It acknowledged that BMPs are uncertain to keep domestic and bighorn sheep separate, particularly because the permittees on the Snow Mesa allotments have had problems complying with terms of their grazing permits. III-App-210, III-App-133, III-App-146; *see also* II-App-220–222, V-App-159, II-App-198–203 (noncompliance in 2011–2015).

Rather than immediately issuing a decision closing the Snow Mesa allotments, however, the Forest Service initiated a new proposed action in early 2017 to create a new allotment, called the Wishbone Allotment, to replace the Snow Mesa allotments. IV-App-33. The new allotment is southeast of the Snow Mesa allotments, and consists of seven pastures separated by varying distances. V-

App-146 (map of allotment). The Crystal and Shallow pastures are the largest and highest elevation pastures, while the remaining five pastures are smaller parcels spread along Highway 149 and other roads in a horseshoe shape. V-App-146–148, V-App-171–174.

Before completing the analysis of the Wishbone Allotment, the Rio Grande National Forest authorized the Snow Mesa permittees (Intervenors Wayne and Jerry Brown), to use the Wishbone Allotment on a trial basis in 2016 and 2017. IV-App-22, IV-App-27. The permittees violated permit conditions each year, including in 2017 when 56 stray domestic sheep remained on or near Wishbone pastures after the grazing season and it took six weeks to remove them. IV-App-146–147, V-App-240–242, IV-App-299.

Also in 2016, CPW began putting radio collars on a sample of bighorns from each of the herds around the Wishbone Allotment and collecting telemetry data to “develop a more robust understanding of habitat use and timing of use” across the range of this meta-population. III-App-108, IV-App-180. CPW expected to collect data for several years and complete a full analysis of results in 2019. IV-App-180. It sent some location data and a preliminary analysis to the Forest Service in 2017 and early 2018. IV-App-180–183, IV-App-184–190, VI-App-169–170. This preliminary analysis noted that, of the collared bighorns that were tested for *Mycoplasma ovipneumonia*, two-thirds tested positive for the pathogen. IV-App-

180. It also stated that bighorns from these herds were moving farther and less predictably than previously believed, including moving into home ranges of herds from other meta-populations. IV-App-181–182, VI-App-141–143.

#### **D. The Wishbone Analysis and Decision.**

As part of the analysis for the Wishbone Allotment, the Forest Service used the Risk of Contact Model to do a risk assessment for the Wishbone Allotment in 2017. IV-App-51 (draft), V-App-132 (final). As discussed above, the agency used the Risk of Contact Model to estimate how often a bighorn would contact the allotment, and then used that number to estimate how often a disease outbreak would occur in one of the bighorn herds. Because population recovery often takes a couple decades, the assessment explained that “disease outbreaks of every 32 years or less would result in a bighorn sheep population that . . . would be constantly exposed to ongoing disease transmission events and resultant outbreaks. . . . The population would likely be extirpated over time as a result of consistent exposure to disease.” V-App-176–177. It stated that “contact rates that result in a disease event . . . every 32 years or less is assumed to result in a High Risk to bighorn sheep long-term viability.” V-App-177.

In light of this conclusion, the Risk Assessment identified the following criteria for risk levels:

High Risk: Contact with allotment: <8 years apart  
Disease interval: <32 years  
Distance of home range to allotment: <10 miles

Moderate Risk: Contact with allotment: 8–10 years apart  
Disease interval: 32–40 years  
Distance of home range to allotment: 10–15 miles

V-App-178. For the Wishbone Allotment, the model results were:

Contact with allotment: every year  
Disease interval: 4 years  
Distance of home range to allotment: 1 mile

V-App-206, V-App-214. This translated to a High Risk for the allotment.

V-App-214.

Yet instead of rejecting the Wishbone Allotment due to its very high risk to the bighorn herds, the Forest Service claimed that the model result was inaccurate and the risk to bighorns was really only “Moderate.” V-App-214–215. It used a handful of factors to justify downgrading the risk to Moderate, including assumptions about what habitat these bighorn herds use, their seasonal movements, and barriers to their movements, as well as the assumption that BMPs would be effective on this allotment. *Id.* This was the first time the agency had used such factors to change the result of the Risk of Contact Model. *See* III-App-49, V-App-211–215.

In contrast to the FIG Risk Assessment, the agency did not determine the risk of each Wishbone pasture, nor did it consider whether the factors it used to



lower the allotment risk to Moderate applied to all pastures—particularly the Crystal and Shallow pastures. V-App-206–209, V-App-214–215; *cf.* III-App-49 (FIG assessment). The Wishbone Risk Assessment mentioned the preliminary CPW telemetry data but contained few details and little discussion about whether the data confirmed or undercut its assumptions about bighorn movements and habitat use. V-App-165–167, V-App-207–208.

The Forest Service released the Final EA/Risk Assessment in November 2017. V-App-3, V-App-132. The agency received multiple Objections<sup>3</sup> to the EA, which included concerns that the agency’s conclusion the Wishbone Allotment is only Moderate Risk to bighorn populations was flawed and not supported by the recent telemetry data. V-App-246–248, VI-App-3–12, VI-App-92–97. Even the permittees and Colorado Wool Growers Association objected, stating that controlling and managing domestic sheep on the Wishbone Allotment is difficult due to the use of multiple pastures, rough terrain, and poor forage quality, which increases the chance of stray sheep and difficulty locating and removing them. V-App-259, V-App-266–267.

Nevertheless, the Forest Service issued a Final Decision Notice and Finding

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<sup>3</sup> The Forest Service allows members of the public to object to proposed decisions after an environmental analysis is complete but before a decision is made, which requires review by a higher-level office within the agency. *See* 36 C.F.R. Part 218.

of No Significant Impact (“DN/FONSI”) in March 2018 that converted the Snow Mesa allotments to vacant status and authorized use of the new Wishbone Allotment. VI-App-145. The DN/FONSI relied on most of the same factors as the Risk Assessment to justify reducing the allotment’s bighorn risk rating from High to Moderate, and claimed that risk was “acceptable.” VI-App-149–151, VI-App-153–156, VI-App-163. It also concluded that use of the Wishbone Allotment would not have any significant environmental effects and therefore the agency did not need to complete a more comprehensive EIS. VI-App-165–166.

#### **E. Supplemental Information Report.**

After the Forest Service issued the Wishbone decision, Guardians learned that the agency had not obtained the CPW telemetry data other than the limited information CPW provided in 2017 and early 2018. Guardians then requested the data and obtained it from CPW in October 2018. I-App-129 ¶ 25. When the Forest Service discovered through this lawsuit that Guardians had the data, it too requested and obtained from CPW that same telemetry data. VI-App-173–175. It used the data, as well as updated population estimates for the bighorn herds, to re-run the Risk of Contact Model for the Wishbone Allotment. VI-App-180–182.

These additional data revealed that the home ranges of the three herds are larger than previously thought, and the home range of the Bristol Head herd is *directly adjacent to the Crystal and Shallow pastures*. VI-App-181, VI-App-193.

The result of the Risk of Contact Model also changed from the original assessment and showed this allotment *is an even higher risk* to the bighorn herds, with a 27% increase in the rate at which a bighorn sheep is likely to contact the Wishbone Allotment. VI-App-182.<sup>4</sup> Additionally, two bighorn sheep were observed on the South River pasture of the Wishbone Allotment in July 2019, undercutting the statement in the Risk Assessment that there are no known bighorn sightings on the pasture. V-App-173, VI-App-222.

The Forest Service included this new information in a Supplemental Information Report (“SIR”), but used the same factors from the original Risk Assessment to dismiss the even-higher risk and claim once again that the allotment was really just a “Moderate Risk” to the bighorn herds. VI-App-182. It also claimed the sighting of two bighorns on the South River pasture was “not significant.” VI-App-188–189. The Forest Service concluded that the new information was “within the scope of effects” considered in the EA and DN/FONSI and therefore did not warrant a full supplemental NEPA analysis. VI-App-189–190. Accordingly, the agency did not disclose the SIR to the public.

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<sup>4</sup> The Forest Service did not calculate the disease interval associated with the new contact rate, but it appears it would equate to a disease event *every 3 years*. VI-App-182 (Wishbone herd contact rate 1.27); V-App-183 (herd contact rate of 1.23 equated to disease event every 3.2 years); V-App-203 (herd contact rate of 1.29 equated to disease event every 3 years).

Guardians learned of the SIR when it received a supplement to the administrative record for this lawsuit, and despite no opportunity for public comment, Guardians and two bighorn sheep experts submitted comments on the SIR to the Forest Service. VI-App-226–267. These comments pointed out numerous problems with the analysis and conclusions, concerns about the *very* high risk to bighorn sheep from the Wishbone Allotment, and the need to complete a supplemental NEPA analysis that objectively analyzed and publicly disclosed the new information about these bighorn herds. *Id.*

## II. PROCEEDINGS BELOW

Guardians filed suit in the District of Colorado in January 2019 against the U.S. Forest Service. I-App-13. The Wishbone permittees, Wayne Brown and Jerry Brown, and the Colorado Woolgrowers Association moved to intervene in the case in May 2019 and Guardians did not oppose that motion. I-App-7. Separately, J. Paul Brown (a neighboring permittee) and the Colorado Farm Bureau Federation also moved to intervene in May 2019 and Guardians opposed that motion. I-App-7. The Court granted both motions in March 2020. I-App-9.

The Forest Service lodged the administrative record in the case in June 2019 and filed a supplement to the record in August 2019. I-App-8. Guardians filed a motion to strike portions of the supplemental record in August 2019. *Id.* The Court did not act on Guardians' motion to strike before summary judgment briefing was

completed in July 2020. I-App-10. The case was reassigned to Judge Domenico on July 31, 2020. *Id.* Almost four years later, the Court issued an Order and Judgment on March 7, 2024 against Guardians. II-App-3, II-App-24.

### **SUMMARY OF THE ARGUMENT**

The Forest Service's decision-making process for the Wishbone Allotment violated NEPA in three ways.

First, the agency's EA/Risk Assessment failed to take a "hard look" at the effects of authorizing domestic sheep grazing on the Wishbone Allotment. The Risk Assessment contained assumptions and conclusions about the risk the allotment posed to bighorn sheep that were unreasonable and unsupported by the evidence in the record. It also failed to use the best available science by not considering important data on habitat use and movements of bighorn sheep near the allotment. Furthermore, the EA/Risk Assessment did not consider the threat of an infected bighorn from one of the Wishbone herds passing disease to a herd from another bighorn meta-population, or the cumulative risk to bighorn populations on the forest from the Wishbone Allotment combined with domestic sheep grazing other areas. These flaws show the Forest Service did not take a hard look at all direct, indirect, and cumulative effects of authorizing the Wishbone Allotment.

Second, the Forest Service violated NEPA by not preparing an EIS. Several factors used to identify potentially significant impacts to the environment applied

here: (1) the uncertainty and controversy about the agency's conclusion that the allotment was only a "Moderate Risk" to bighorn sheep; (2) the precedent set by the agency's novel use of local factors to lower the risk of the allotment from "High" to "Moderate"; and (3) the cumulatively significant risk to bighorn sheep herds from domestic sheep grazing the Wishbone Allotment combined with other domestic sheep grazing in the area. These factors show the Forest Service needed to prepare an EIS before authorizing the Wishbone Allotment.

Third, the agency failed to complete a proper supplemental NEPA analysis when it obtained extensive data on bighorn locations. Instead, the agency completed an SIR to justify its prior decision rather than follow NEPA's decision-making and public participation requirements. The SIR was improper because the agency used it to correct the EA's failure to consider data that already existed. Moreover, the SIR's conclusion that the "new" data was not significant, and therefore did not warrant supplemental NEPA analysis, was unreasonable because the data was important for assessing the risk to bighorn sheep, and showed that the Wishbone Allotment was a greater risk than the prior Risk Assessment reported.

Because the Forest Service's authorization of the Wishbone Allotment violated NEPA, this Court should reverse the District Court's grant of summary judgment to the Forest Service, and vacate and remand the Wishbone EA/Risk Assessment and DN/FONSI.

## ARGUMENT

### I. STANDARD OF REVIEW

The APA provides the cause of action for Guardians' NEPA challenges here. I-App-43–44 ¶¶ 89, 93; 5 U.S.C. § 706. This Court's "review of the lower court's decision in an APA case is *de novo*," and "owe[s] no deference to the district court's decision." *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1281 (10th Cir. 2001) (quotations omitted).

Review of an agency decision falls under the arbitrary and capricious standard of the APA, which requires reversal of the decision if the agency failed to consider an important aspect of the problem, offered an explanation for its decision that is counter to the evidence in the record, failed to base its decision on consideration of the relevant factors, or made a clear error of judgment. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009). Under this standard, an agency must examine the relevant data and articulate a rational connection between the facts found and the decision made. *Id.* at 713.

As part of its review, the court must conduct a "thorough, probing [and] in-depth review" of the administrative record. *Wyoming v. United States*, 279 F.3d 1214, 1238 (10th Cir. 2002). It must not supply a reasoned basis for the agency's action that the agency itself has not given. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574–75 (10th Cir. 1994).

## II. THE WISHBONE EA VIOLATED NEPA.

The Forest Service violated NEPA because the Wishbone EA/Risk Assessment<sup>5</sup> failed to take a “hard look” at the effects of authorizing the Wishbone Allotment, which prevented informed decision-making and public involvement. *Richardson*, 565 F.3d at 703-04. The required hard look under NEPA must be objective and occur early enough to contribute to the decision-making process, “not be used to rationalize or justify decisions already made.” *Diné Citizens Against Ruining Our Env’t v. Haaland*, 59 F.4th 1016, 1030 (10th Cir. 2023); *Forest Guardians v. U.S. Fish and Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010). An agency fails to take a “hard look” if it relies on inaccurate information or unsupported assumptions to justify its decision. *Richardson*, 565 F.3d at 713–15; *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1235–37 (10th Cir. 2017). A hard look analysis must “utilize public comment and the best available scientific information.” *Ctr. for Biological Diversity v. U.S. Dept. of the Interior*, 72 F.4th 1166, 1178 (10th Cir. 2023) (“*CBD*”) (quoting *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1171 (10th Cir. 1999)).

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<sup>5</sup> The Risk Assessment is Volume II of the EA. V-App-132.



**A. The Conclusion that the Wishbone Allotment Was Not a High Risk to Bighorn Sheep Populations Was Unsupported and Inconsistent with the Administrative Record.**

The Forest Service created the Wishbone Allotment and authorized its use in 2016 before ever analyzing the risk that domestic sheep grazing the allotment posed to nearby bighorn sheep herds. IV-App-5, IV-App-22, IV-App-33, IV-App-51. When the Risk of Contact Model showed this allotment was just as high a risk to the neighboring bighorn herds as some of the Snow Mesa alternatives the agency had rejected, the Forest Service attempted to rationalize its use by claiming the allotment was really just a Moderate Risk due to “local factors” and use of BMPs. The record does not support the assertion that the “local factors” about bighorn movements and habitat substantially reduce the risk of the allotment, or that BMPs would effectively keep domestic and bighorn sheep separated. For these reasons, the EA was arbitrary and capricious.

**1. “Local Factors” Did Not Apply to the Largest Pastures.**

The Forest Service acknowledged in its EA that “Risk of Contact between Domestic and Bighorn Sheep” was one of two key issues for analyzing effects of the Wishbone Allotment. V-App-28–29. The agency used the Risk of Contact Model to quantitatively analyze this risk, which showed the Wishbone Allotment is a very high risk to three near-by bighorn herds, with just one mile between bighorn home ranges and the allotment and predicted contact with the allotment every year,

resulting in a disease event every four years. V-App-214. This level of risk was greater than that for other allotments the Forest Service determined were High Risk and must be closed to domestic sheep grazing. *See* V-App-211–213 (Snow Mesa allotments with up to 8-year disease interval); III-App-49 (three FIG pastures with disease intervals of 5.6, 11, and 22 years). As noted above, the Wishbone Risk Assessment itself showed that the risk would be “Moderate” only if bighorn home range was at least *ten miles* from the allotment, predicted contact was once every *8–10 years*, and the disease interval was *32 years* or more. V-App-178. A disease interval less than 32 years would result in a low probability of population viability. V-App-176–177.

In order to authorize use of the Wishbone Allotment, the agency claimed that “local factors” reduced the allotment’s level of risk to “Moderate,” which was “acceptable” because it would “meet [the forest’s] requirement to maintain a viable population of bighorn sheep on the Rio Grande National Forest.” V-App-214–215, VI-App-153–155, VI-App-163. However, the Moderate Risk rating was based on assumptions and conclusions that were unsupported by the record.

The key flaw with the Forest Service’s reliance on its “local factors” is that the factors did not apply to the two largest pastures in the Wishbone Allotment—the Crystal and Shallow pastures. Because a large portion of the grazing season for the Wishbone Allotment occurs on those two pastures, it was irrational to conclude

that the local factors would significantly reduce the risk of the allotment.

The Forest Service's "local factors" included the following:

- The bighorn herds move higher in elevation and away from the Wishbone Allotment during the grazing season;
- The Wishbone Allotment has less overlap between bighorn habitat and domestic sheep range than the Snow Mesa allotments;
- Existing topographical barriers such as the Rio Grande River, Highway 149 and several subdivisions will keep bighorns off the Wishbone Allotment.
- The length of grazing season for the Wishbone pastures are less than what the Risk of Contact Model used so foray probabilities are less;

V-App-214–215; VI-App-153–155.<sup>6</sup> But these justifications are not rationally related to the Crystal and Shallow pastures, which are contiguous and make up almost two-thirds of the grazing area in the Wishbone Allotment. V-App-149, V-App-171–173 (totaling more than 6,500 acres compared to about 3,800 acres for the other five pastures combined).

The majority of the Shallow pasture and the entire Crystal pasture consist of steep, high elevation, remote terrain that is far from any road. V-App-146–147. In fact, the Crystal pasture overlaps or is near allotments that were part of the rejected Snow Mesa alternatives. V-App-144–146, V-App-211–213. Because the Crystal

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<sup>6</sup> The DN/FONSI dropped the Risk Assessment factor that there was no direct overlap between the Wishbone Allotment and bighorn home ranges, likely because the Forest Service had rejected a Snow Mesa alternative action (and closed three FIG pastures) even though there was no direct overlap. V-App-214, VI-App-153–155, V-App-212, III-App-32.

pasture is far from any roads, sheep are moved single file up a steep trail for two miles to access the Crystal pasture from the Shallow pasture. V-App-173. The Crystal pasture is authorized for the most domestic sheep use of all the Wishbone pastures. V-App-171–174.

In contrast, the other five pastures in the Wishbone Allotment are smaller, lower elevation, flatter, and very close to main roads and the Rio Grande River compared to Shallow and Crystal. V-App-146–148. The domestic sheep will be moved between these five smaller, low elevation pastures by walking along heavily used roads. V-App-174.

#### Seasonal Migrations

The Crystal and Shallow pastures are on the western side of the allotment, closest to the Bristol Head bighorn herd (S53). V-App-147. The Risk of Contact Model showed this herd is at the highest risk from the Wishbone Allotment. V-App-228. The Risk Assessment stated that the bighorns from this herd use lower elevation areas near Highway 149 from fall through spring and move to higher elevations in summer. V-App-166. It claimed that these movements bring them closer to the Snow Mesa allotments and *away from the Wishbone Allotment* during the summer grazing season. *Id.* But that assertion is true only for the lower elevation Wishbone pastures near Highway 149—South River, Sixmile Flats and Deep Creek. V-App-146–147. Moving higher in elevation toward the Snow Mesa

allotments means moving *toward* the Crystal and Shallow pastures in summer. *Id.*

The preliminary telemetry data CPW sent to the Forest Service confirmed this fact. In July 2017, one of the radio collared rams from this herd was documented moving north to within a half mile of the Shallow pasture. IV-App-184–186. This movement was “concerning” to the CPW biologist who sent the information to the Forest Service. IV-App-184. Given that only nine of the 80 animals in the herd (and only three rams) had radio collars, it is likely that other bighorns from this herd made similar movements. In July and August 2017, domestic sheep were grazing the Crystal and Shallow pastures. IV-App-27. CPW had previously stated in a letter to the Forest Service that the Shallow pasture provided “overall range and production areas for bighorn sheep.” II-App-223.

In discussing the Bristol Head bighorn herd, the Risk Assessment focused on the South River pasture, and noted that recent telemetry data showed a bighorn within a half mile of that pasture, but it failed to discuss the Shallow and Crystal pastures and the July 2017 telemetry location of the bighorn within a half mile of the Shallow pasture. V-App-207, IV-App-184. The DN/FONSI also ignored that information. VI-App-155. The statements in the Risk Assessment and DN/FONSI that seasonal migrations to higher elevations move bighorns *away* from the Wishbone Allotment in summer are inaccurate for the Bristol Head bighorns, which move toward the two largest pastures at the same time that domestic sheep

are grazing those pastures.

### Overlap of Bighorn Habitat and Domestic Sheep Range

The next “local factor” asserted that there was less overlap of bighorn habitat and domestic sheep range on the Wishbone Allotment than on the Snow Mesa allotments. V-App-214, VI-App-154–155. Again, the Forest Service lumped together all Wishbone pastures and all Snow Mesa allotments, but in reality, the Crystal and Shallow pastures appear to have a similar amount of overlap as several of the allotments in the Snow Mesa alternatives (Ouray, Miners, and Table), and more than the lower elevation Wishbone pastures. V-App-144–148. A significant amount of overlap occurs near the southern edge of the Crystal and Shallow pastures, which is closest to the Bristol Head bighorn herd and where the bighorn ram was documented in July 2017. V-App-147, IV-App-184. The Forest Service never discussed whether this factor differed between pastures.

### Barriers to Movement

Similarly, it is the lower elevation Wishbone pastures that occur along major roads, the Rio Grande River and near subdivisions, which allegedly would deter bighorns from moving onto the pastures. V-App-215, VI-App-154.<sup>7</sup> Only the

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<sup>7</sup> Even for the lower elevation pastures, this factor is questionable in light of the evidence of bighorns on roads, moving through a subdivision, and swimming across large rivers. *See e.g.* V-App-161, V-App-193, III-App-52 (showing bighorns on or crossing roads); IV-App-186 (telemetry map indicated bighorn

southeastern edge of the Shallow pasture is near a road, with the majority of that pasture and the entire Crystal pasture found in steep, high elevation terrain far from the alleged “barriers” to bighorn sheep movement. V-App-147. In fact, bighorn summer habitat extends north from the eastern end of the Bristol Head herd home range and into the southern portions of the Shallow and Crystal pastures, facilitating movement of bighorns throughout this habitat in summer, when those pastures are grazed. *Compare* V-App-156 (map showing bighorn summer habitat), V-App-147 (map of Shallow and Crystal pastures).

#### Forays

The last local factor related to bighorn movements claimed that forays by individual bighorns from the three herds would be less probable than what the Risk of Contact Model used and would generally occur in October, outside of the grazing season. V-App-214, VI-App-153–154. However, the home ranges of two bighorn herds were only a mile from some of the Wishbone pastures so it would not require a “foray” for bighorns to move onto those pastures if they are attracted to domestic sheep there. V-App-147–148.

Furthermore, the assumption about forays was not supported by the early

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passed through subdivision near Wishbone pastures); *WWP I*, 2007 WL 1729734, at \*2; *WWP III*, 2009 WL 3335365, at \*4; *Vilsack*, 816 F.3d at 1108 (all noting bighorns swimming across large rivers in Idaho).

CPW telemetry data, which documented bighorns from all three of these herds making more extensive, and less predictable, movements than previously known—and showing a Bristol Head ram moving close to the Shallow pasture in July 2017. IV-App-181, IV-App-184–190. Neither the Risk Assessment nor DN/FONSI considered whether the preliminary telemetry data validated the agency’s assumption that movements outside of home range are rare and usually in October.

The Risk Assessment stated that CPW collaborated in the creation of the Wishbone Allotment and concurred that it would help create separation between the species compared to the Snow Mesa allotments. V-App-215. The comments in the record from CPW admit, however, that “[t]he potential for contact between domestic and bighorn sheep remains while domestics are grazed in the Crystal/Shallow pastures and trailed through Wagon Wheel Gap.” IV-App-154. This comment occurred even before the bighorn ram from the Bristol Head herd was documented moving close to the Shallow pasture in July 2017. IV-App-184.

The Forest Service’s use of these “local factors” to summarily claim the Wishbone Allotment was only “Moderate Risk” was irrational. The agency never discussed whether the factors applied to each pasture nor whether the early telemetry data supported the factors, and the record shows the agency’s conclusions did not apply to the Crystal and Shallow pastures. “Conclusory statements regarding impacts without adequate discussion do not meet the required



‘hard look’ under NEPA.” *CBD*, 72 F.4th at 1178.

## **2. Reliance on Best Management Practices Was Unreasonable.**

In addition to the record not justifying use of the local factors, it also fails to support the Forest Service’s reliance on “project design features,” or BMPs, to reduce the risk rating for the Wishbone Allotment. V-App-214–215, VI-App-155–156. Not only have experts refuted the effectiveness of these BMPs to keep domestic and bighorn sheep separate, but the permittees here have repeatedly violated their grazing permit terms and conditions and admitted that it would be difficult to manage their sheep on the Wishbone pastures.

In prior cases, courts have determined that reliance on BMPs similar to those here was unreasonable because there was no evidence they would be effective. In *WWP I*, the court rejected reliance on BMPs because the evidence showed they had not worked in the past, including evidence of two stray domestic sheep wandering the allotment for at least four months. 2007 WL 1729734, at \*3. Similarly, in *WWP III*, the court held that reliance on BMPs was unreasonable because there was no science supporting them, and all the evidence indicated they would be ineffective at keeping domestic sheep separate from bighorns. 2009 WL 3335365, at \*3, 5, 7. And in *WWP IV*, the court again rejected even more stringent BMPs because the record “contain[ed] no supporting science for [them].” 2017 WL 5571574, at \*8–9, 13.

The record here contains further expert opinions explaining that BMPs are not effective at keeping the species separated if there is not substantial spatial separation (i.e. many miles) between bighorn home ranges and domestic sheep grazing allotments. III-App-260–265, III-App-280–281, IV-App-197–199. Given the very close proximity of the bighorn home ranges and the Wishbone pastures, combined with the natural attraction between the species, there is no science supporting the effectiveness of BMPs for the Wishbone Allotment.

Moreover, reliance on BMPs is even more unreasonable here because these permittees have had problems complying with their permit terms. When they were grazing the Snow Mesa and other allotments, numerous problems arose with herding, trailing, stray management, and salt placement, leading to stray sheep and cattle, grazing in unauthorized areas, and grazing after the authorized season. III-App-133, III-App-146, II-App-220–222, V-App-159.

When they were first authorized to use the Wishbone Allotment in 2016 and 2017, problems again arose. In 2016, some of the permittees' sheep breached fences and grazed on private land for a week, two dead sheep were left in a pasture, areas were heavily grazed, and a salt block, which could act as an attractant to bighorn sheep, was left behind. IV-App-146–147. In 2017, things were much worse. The herder left the domestic sheep unattended in the Crystal pasture; salt was again left behind on a pasture; and most troubling, *56 sheep strayed from*

*the band and were not recovered until six weeks after the grazing season ended.* V-App-240–242, IV-App-299. A few of these stray sheep had died but most were still alive, and found in multiple locations inside and outside of the Wishbone pastures between September 15 and October 27. V-App-241–242. These stray sheep could easily have come in contact with a bighorn from one of the neighboring herds.

Disregarding the permittees' compliance problems, the Forest Service stated that BMPs would be effective on the Wishbone Allotment because of the requirement for two herders and the location of the allotment near roads and subdivisions. V-App-215, VI-App-156. But again, the largest pastures that will be used for a significant portion of the grazing season—Crystal and Shallow—are remote, high elevation areas away from roads, which is the type of terrain where BMPs have not been successful. *See* III-App-261–265, III-App-281. The Forest Service admitted that public assistance spotting strays in high visibility areas would not apply to the more remote Crystal and Shallow pastures. VI-App-152. Thus, BMPs are unlikely to reduce the high risk posed by the Crystal and Shallow pastures.

Even the Wishbone permittees and Colorado Wool Growers Association admitted the allotment is hard to manage, increasing the risk of stray domestic sheep. V-App-259, V-App-267. The permittees noted the problems in 2017, and the difficulties with this allotment:

Two of the seven pastures were grazed to their limit or beyond, showing significant impact. This would raise the concern that there isn't enough acreage to support the current number of sheep. Anticipating adjustment on the amount of time spent in each of the pastures, we may well be pushing the allotment to its limit and beyond, leading to unforeseen problems. The theory of running a band of sheep through several smaller pastures may not work. The risk of straying of a few to large numbers will be increased.

On a small pasture problems are accelerated. The sheep will need to be kept in a tighter group and away from the boundaries. This will reduce the available feed and make the sheep harder to control. Our concerns are having manageable terrain and sufficient feed. On East Bench, Six Mile and Collier the terrain should not be a problem. On South River, North Shallow and Crystal Basin the terrain becomes more of a problem.

V-App-259.

The Colorado Wool Growers Association reaffirmed the difficulties:

After a difficult and challenging grazing season with the new allotments, it's apparent that this is not a workable option for the permittees. . . . New grazing patterns, difficult terrain, and poor forage conditions greatly increase the management responsibilities of the permittee, and significantly contribute to problems such as increased strays, and difficulty in locating and herding strays.

V-App-266–267. Yet, despite the clear problems with managing and controlling domestic sheep on this allotment and the likelihood of stray sheep, the Forest Service continued to assert in the DN/FONSI that BMPs would be effective simply because there would be two herders and the public might happen to spot a stray sheep or a bighorn near the lower elevation pastures. VI-App-156. Even if only a few strays occur during a season, it can take weeks to find and remove them, as

demonstrated in 2017, allowing plenty of time for contact with a bighorn sheep from one of the near-by herds. The record does not support the conclusion that BMPs would effectively reduce the risk of the Wishbone Allotment.

An agency's methodology to estimate effects of an action must be rational and consistent with the record to satisfy the "hard look" standard under NEPA. *Haaland*, 59 F.4th at 1036–37 (unreasonable methodology to estimate effects violated NEPA). Furthermore, information in an EA must "be of high quality" and supported by "[a]ccurate scientific analysis." *Id.* at 1039 (quoting 40 C.F.R. § 1500.1(b)).<sup>8</sup> Where an agency makes unsupported assumptions when assessing effects of an action, and those assumptions were important to the ultimate decision, it defeats NEPA's goals of ensuring informed agency decisions and adequate disclosure to allow meaningful public participation. *See WildEarth Guardians*, 870 F.3d at 1235–37 (EIS was arbitrary and capricious where it relied on irrational assumption about coal supply that was not supported by data in the record); *Richardson*, 565 F.3d at 713–15 (NEPA violation where record did not support BLM's conclusion that impacts to aquifer from gas wells would be minimal); *Or. Natural Desert Ass'n v. Jewell*, 840 F.3d 562, 569–70 (9th Cir. 2016) (reliance on inaccurate data and unsupported assumptions in EIS violated NEPA).

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<sup>8</sup> The NEPA regulations in effect in 2018 apply to the claims here.

Here, the Forest Service’s conclusion that the local factors and BMPs would reduce the risk of the Wishbone Allotment to “Moderate” was unreasonable and unsupported by the record, in violation of NEPA. Not only did that conclusion rely on assumptions that were inconsistent with the record and ignored important data, but the agency offered no science to show the factors would reduce the risk enough to go from a 4-year disease interval to a 32-year disease interval needed to meet the “Moderate Risk” criteria that was the basis for the agency’s decision. VI-App-163. Anything less than a 32-year disease interval would not meet the agency’s “requirement to maintain a viable population of bighorn sheep on the Rio Grande National Forest.” V-App-176–177, VI-App-163. Because the Forest Service’s unsupported “Moderate Risk” conclusion was “key to the ultimate decision” to authorize use of the Wishbone Allotment, the agency’s flawed analysis defeated NEPA’s purposes and renders the Wishbone EA and DN/FONSI arbitrary and capricious. *WildEarth Guardians*, 870 F.3d at 1237.

**B. The Forest Service Did Not Use the Best Available Science.**

An agency’s “hard look” analysis in an EA “must utilize ‘public comment and the best available scientific information.’” *CBD*, 72 F.4th at 1178 (quoting *Dombeck*, 185 F.3d at 1171); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1244 (10th Cir. 2004) (“agencies must use the ‘best available scientific information’ when

assessing environmental impacts”). Here, the Forest Service violated this duty by not using all of the telemetry data CPW had collected on the three bighorn herds.

The telemetry data on bighorn movements was crucial information for assessing the risk of the Wishbone Allotment. CPW had stated that telemetry data would be “highly beneficial” to “develop a more robust understanding of habitat use and timing of use” by these bighorns because ground surveys only detect a small sample of animals, especially during summer when bighorns are scattered across summer ranges. III-App-108. Other telemetry studies on bighorn populations revealed that the animals move much farther and more extensively than what experts had known. *See WWP III*, 2009 WL 3335365, at \*4; *WWP IV*, 2017 WL 5571574, at \*8–9 (both discussing telemetry data). The CPW telemetry data likewise showed bighorns from the Wishbone herds moving farther and less predictably than previously known—including moving near Wishbone pastures and connecting with other herds. IV-App-180–182, IV-App-184–190, VI-App-169–170, VI-App-140–143.

Despite receiving from CPW the preliminary report and some limited data in 2017, the record does not contain any requests from the Forest Service to CPW for additional data until February 7, 2019. VI-App-171. Importantly, the Forest Service’s request came almost eleven months *after* the Decision Notice was signed. VI-App-167 (decision signed March 23, 2018). Therefore, the agency did

not have the bulk of the telemetry data for its Risk Assessment. It noted in the assessment that an analysis would be conducted in the future after more GPS collar data was collected, but failed to explain why it did not at least obtain and consider all the data that had already been collected. V-App-165.<sup>9</sup>

The failure to consider all of the telemetry data CPW had collected violated NEPA because this information was critical for the agency's decision-making process. First, telemetry data is used to determine the home ranges of bighorn herds, and when the Forest Service finally did obtain data from CPW, it showed the home range of the Bristol Head herd was significantly larger than estimated in the Risk Assessment *and directly adjacent to the Crystal and Shallow pastures*. VI-App-193. Second, many of the Forest Service's "local factors" relied on assumptions about movements and habitat use of bighorns from these herds, such as seasonal migrations, forays, barriers to movement, and use of fragmented habitat. V-App-214–215, VI-App-153–155. Analysis of the telemetry data set was needed to validate, or invalidate, those assumptions.

Just the limited data CPW sent to the Forest Service called into doubt some of those assumptions and showed these bighorns are not as predictable as the

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<sup>9</sup> In contrast, around the same time the Forest Service finished the Wishbone Risk Assessment, it postponed an EIS for J. Paul Browns' allotments to the south in order to complete a telemetry study on the Weminuche bighorn populations. I-App-117 ¶ 24; *infra* pp. 40–41 (citing Weminuche EIS website).



Forest Service claimed. Some of the initial findings included the following:

- Concerning movements by bighorns toward Wishbone pastures. IV-App-184 (within 0.5 miles of South River and Shallow pastures).
- Connections between herds and with other meta-populations. IV-App-181–182, IV-App-187, VI-App-139–143.
- Transitory movements between high and low elevation areas in winter, spring, and summer, including moving through forested (non-habitat) areas. IV-App-182.
- Movements of more than 15 miles by individual bighorns. IV-App-181.

This early data prompted CPW to state that “[p]reliminary examination of the GPS collar data has shown that the extent of bighorn movements within RBS22 is greater than maybe once previously thought.” IV-App-181.

Given these early warning signs that the agency’s “local factors” were not as valid as assumed, and may not justify a “Moderate Risk” rating for the allotment, the Forest Service had a duty to analyze the data CPW had collected since January 2016 in the EA/Risk Assessment. *Richardson*, 565 F.3d at 714 (agency must examine the relevant data when assessing impacts). By not requesting and examining this data, the Forest Service failed to use the best available science, which in turn defeated NEPA’s twin goals of ensuring the agency’s decision was fully informed, and that the agency had disclosed to the public all information relevant to that decision. *CBD*, 72 F.4th at 1178; *Richardson*, 565 F.3d at 703–04.

**C. The Forest Service Did Not Take a Hard Look at All Impacts.**

The third problem with the Wishbone analysis was that it did not take a hard

look at all effects of authorizing the allotment by ignoring threats to other bighorn populations on the forest. An agency must consider all direct, indirect, and cumulative impacts of a proposed action. 40 C.F.R. § 1508.25(c).

Evidence in the record indicates bighorns from the three herds near the Wishbone Allotment interact with herds from adjacent meta-populations. VI-App-141–143, V-App-157, V-App-160–162, V-App-221, VI-App-163. The CPW telemetry data confirmed interaction among the Wishbone herds as well as between the Bristol Head herd and two other meta-populations. VI-App-139–143. These three meta-populations contain 20% of the total bighorn sheep in Colorado. VI-App-143. The DN/FONSI considered whether bighorns from other meta-populations would foray onto Wishbone pastures, but ignored the threat that an infected bighorn from the Wishbone herds could spread disease to another meta-population. VI-App-157–160. This threat is very real as the Bristol Head herd has the highest risk of contact with the Wishbone Allotment and also is the herd with recent connections to two other meta-populations. V-App-228, VI-App-141–142.

Moreover, the Forest Service recognized that a potential for contact between domestic and bighorn sheep exists for 6–8 bighorn herds on or near the Rio Grande National Forest due to domestic sheep grazing National Forest, BLM, state, or private land. II-App-95, VI-App-162. In fact, some of these herds occur near the active grazing allotments of Intervenor J. Paul Brown. *See* I-App-66 & n.4 (citing

Weminuche Grazing EIS at <https://www.fs.usda.gov/project/?project=37578>). The Forest Service failed to consider that the potential risk from the Wishbone Allotment combined with the risk from other domestic sheep grazing National Forest, BLM, state, or private land might have a cumulatively significant effect on one or more bighorn sheep populations. *Cf.* V-App-78 (Wishbone EA cumulative effects discussion) *with* II-App-183–190 (Payette EIS cumulative effects analysis).

The Forest Service violated NEPA by failing to consider all reasonably foreseeable direct, indirect, and cumulative effects of authorizing the Wishbone Allotment. *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1179–80 (10th Cir. 2002) (failure to address indirect impacts to species outside vicinity of project violated NEPA); *Diné Citizens Against Ruining Our Env’t v. Bernhardt*, 923 F.3d 831, 851–54 (10th Cir. 2019) (failure to address cumulative impacts from other reasonably foreseeable actions violated NEPA).

The aggregate impact of relying on unsupported “local factors” and ineffective BMPs, and ignoring important data and impacts to other herds on the forest, severely undercuts the Forest Service’s conclusion that the Wishbone Allotment poses only a “Moderate Risk” to bighorn sheep viability. These significant flaws with the Forest Service’s analysis violated NEPA and render the Wishbone EA and DN/FONSI arbitrary and capricious.

### III. THE FOREST SERVICE WAS REQUIRED TO PREPARE AN EIS FOR THE WISHBONE ALLOTMENT.

“NEPA obligates federal agencies to consider every significant aspect of the environmental impact of a proposed action.” *CBD*, 72 F.4th at 1178 (internal quotation omitted). Under NEPA, an EIS is required if a federal action *may* significantly affect the environment. *Id.* at 1188. If an agency issues a “Finding of No Significant Impact” (“FONSI”) and thus decides not to prepare an EIS, a court must review whether that conclusion was arbitrary and capricious. *Id.* As documented previously in Colorado, a single contact between a domestic sheep and a bighorn sheep can lead to die-offs in multiple bighorn populations, which certainly shows the Wishbone Allotment may have a significant effect on the environment. II-App-28, II-App-72.

To assess the significance of an action, an agency should consider the “context” and “intensity” of the proposed action. *Id.*; 40 C.F.R. § 1508.27. The context of the action includes the affected region, the affected interests, and the locality, as well as short and long-term effects. 40 C.F.R. § 1508.27(a). The intensity factors relate to the severity of any impact, and include (1) the degree to which the possible effects on the environment are highly uncertain or involve unique or unknown risks; (2) the degree to which the effects on the environment are likely to be highly controversial; (3) the degree to which the action may establish a precedent for future actions with significant effects or represents a

decision in principle about a future consideration; and (4) whether the action is related to other actions with individually insignificant but cumulatively significant impacts. *Id.* § 1508.27(b)(4)–(7). All of these factors apply here.

The Degree of Effects are Highly Uncertain and Controversial

The Wishbone Risk Assessment was the first time the Forest Service used “local factors” to change the result of the Risk of Contact Model. Because it is highly uncertain whether these novel factors would actually reduce the risk that the Wishbone Allotment poses to bighorn sheep from High to Moderate, there is a substantial dispute about the effects of the action, warranting an EIS.

Where the degree, or extent, of an action’s effects are highly uncertain, a decision to forego an EIS is arbitrary and capricious. *Nat’l Parks & Conservation Ass’n v Babbitt*, 241 F.3d 722, 732–36 (9th Cir. 2001) (“NPCA”) (uncertainty about the extent of action’s effects necessitated preparation of EIS), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *Anderson v. Evans*, 371 F.3d 475, 489–92 (9th Cir. 2004) (impact of whale hunt on local whale population and local ecosystem was highly uncertain, requiring EIS); *San Luis Valley Ecosystem Counsel v. U.S. Fish and Wildlife Serv.*, 657 F.Supp.2d 1233, 1246 (D. Colo. 2009) (decision not to prepare EIS was arbitrary where failure to evaluate efficacy of mitigation measures showed impacts of action were uncertain).

Likewise, if the impacts of an action are “highly controversial,” meaning a substantial dispute exists as to the size, nature, or effect of the action, an EIS is needed. *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002). A substantial dispute occurs when the record casts substantial doubt on the adequacy of the agency’s methodology and data. *Biodiversity Conservation Alliance v. U.S. Forest Serv.*, 765 F.3d 1264, 1275 (10th Cir. 2014); *see also NPCA*, 241 F.3d at 736 (substantial dispute exists when evidence in the record “casts serious doubt upon the reasonableness of an agency’s conclusions.”). Although public opposition alone does not denote controversy, if public comments raise substantial questions concerning the agency’s conclusions about the effects of the project, the effects are highly controversial. *Middle Rio Grande Conservancy Dist.*, 294 F.3d at 1229.

Here, the effects of authorizing the Wishbone Allotment were highly uncertain and highly controversial. As discussed above, it was highly uncertain whether the “local factors” and BMPs would drastically lower the risk of contact between bighorn sheep and domestic sheep using the Wishbone Allotment to change the predicted 4-year disease interval to the 32-year disease interval necessary for a “Moderate Risk” rating and long-term viability of the bighorn herds. *See supra* pp. 23–36. Public comments disputed the use of the local factors, noting that the early telemetry data contradicted the agency’s assumptions, and

attached relevant science, court decisions, and expert opinions that contained information countering the Moderate Risk rating for the allotment. III-App-229–286, IV-App-146–148, IV-App-158–179, V-App-246–251, VI-App-3–12, VI-App-21–91, VI-App-92–97, VI-App-102–132. The Forest Service never provided scientific support showing the allotment would meet the Moderate Risk criteria, particularly the 32-year disease interval needed for bighorn viability, stating only that the local factors make the Wishbone Allotment less risky than the Snow Mesa allotments, and move the risk from high toward moderate. V-App-214–215, VI-App-153–156.

The Forest Service quickly dismissed the highly uncertain and highly controversial factors in its FONSI. It stated that the Risk Assessment analyzed risk to bighorn sheep and noted uncertainties with the Risk of Contact Model, but those uncertainties did not translate into highly uncertain effects. VI-App-165–166. However, it never acknowledged the significant uncertainties about lowering the allotment risk from High to Moderate, which showed the degree of effect to bighorn sheep was highly uncertain. *Id.* The FONSI did acknowledge there was controversy about “the degree to which the proposed action lowers the risk of contact between” domestic and bighorn sheep, but simply stated that the EA discussed effects and disclosed the rationale for finding a moderate risk. VI-App-165. It failed to explain why the significant disputes about that rationale and the

level of risk to bighorns did not warrant an EIS. *Id.*

The record here casts serious doubt on the adequacy of the agency's methodology and data, and reasonableness of its conclusions, regarding the risk the Wishbone Allotment posed to bighorn sheep, showing a high level of uncertainty and a substantial dispute about the effects of authorizing the Wishbone Allotment that triggered the need for an EIS. *Middle Rio Grande Conservancy Dist.*, 294 F.3d at 1229 (substantial dispute about effects required EIS); *NPCA*, 241 F.3d at 732–37 (uncertainty and controversy about effects of action required EIS); *Anderson*, 371 F.3d at 489–92 (uncertainty about effects required EIS); *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 870–71 (9th Cir. 2020) (dispute over agency's assertions and conclusions about effects of project required EIS).

An EIS would have allowed a more in-depth analysis of whether the local factors applied to each pasture and whether the telemetry data validated the agency's assumptions. *W. Watersheds Project v. BLM*, 721 F.3d 1264, 1274 (10th Cir. 2013) (EIS requires greater depth of discussion and analysis than EA). Indeed, “[p]reparation of an EIS is mandated where uncertainty may be resolved by further collection of data” because “[t]he purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action.” *NPCA*, 241 F.3d at 732 (internal quotation omitted).



The Forest Service should have completed an EIS that incorporated the full telemetry data set to reduce the uncertainty about the validity of the local factors and the risk of the allotment.

#### Precedent for Future Actions

This action may establish a precedent for future actions because the Forest Service may use a similar approach to lower risk ratings for other allotments, thereby authorizing domestic sheep use in other high-risk areas across many western states. Prior to the Wishbone Allotment, the Forest Service had eliminated domestic sheep grazing in areas that the Risk of Contact Model rated as High Risk. *See Vilsack*, 816 F.3d at 1101 (Payette allotments); III-App-62 (FIG allotment); III-App-130 (Snow Mesa allotments). The Wishbone decision was the first time since the Risk of Contact Model was adopted by the Forest Service that the agency used “local factors” to change the Model’s results to justify grazing a High Risk allotment.

The FONSI stated that the Wishbone decision will not set a precedent because it is specific to that allotment and future actions would have their own site-specific analysis. VI-App-166. However, the approach used by the Forest Service to downgrade risk to bighorn sheep from High to Moderate based on a variety of assumptions will set a precedent for the agency to use a similar approach with other allotments, creating a significant risk to bighorn populations. *Klamath-*

*Siskiyou Wildlands Ctr. v. BLM*, No. 1:23-cv-519-CL, 2024 WL 2941529, at \*16–17 (D. Or. May 4, 2024) (intensity factor applied where BLM’s interpretation of land use plan and approach to NEPA for plan amendment would set precedent for other actions that could be significant).

In fact, Intervenor J. Paul Brown noted the Wishbone decision would influence the decision on his and other allotments in the region, and the District Court agreed that “there is a reasonable possibility that analysis and decisions applicable to the Wishbone Allotment will be applied to other allotments.” I-App-49, 52–53; I-App-59, 62, 64; I-App-265. These statements belie the Forest Service’s assertion that the Wishbone decision will not set a precedent.

#### Cumulatively Significant Impacts

Finally, the cumulative risk to bighorn sheep that are on or near the Rio Grande National Forest from other domestic sheep grazing, combined with grazing the Wishbone Allotment, could be significant. As discussed above, infected bighorns from the Wishbone herds could transmit disease to bighorn herds in other meta-populations. *Supra* p. 40. In addition, domestic sheep grazing other Forest Service allotments (such as J. Paul Brown’s allotments), BLM land, state land, or private land could infect one or more bighorn herds on the forest. *Supra* pp. 40–41. Yet the Forest Service failed to consider that the potential risk from the Wishbone Allotment, combined with the risk from other domestic sheep grazing on or near

the forest, might have a cumulatively significant effect on one or more bighorn sheep populations. V-App-78, VI-App-157–160.

The Forest Service’s conclusion in the DN/FONSI that there are no past, present, or future actions that would add to the project’s effects was arbitrary and capricious. VI-App-166. The agency failed to “identify and meaningfully analyze” the cumulative risk to bighorn sheep populations from other domestic sheep grazing combined with the risk from the Wishbone Allotment, which creates “substantial questions about whether the action will have a cumulatively significant environmental impact,” necessitating an EIS. *Bark*, 958 F.3d at 871–73. *See also Alliance for the Wild Rockies v. Gassman*, 678 F.Supp.3d 1249, 1293–95 (D. Mont. 2023) (failure to consider logging on state and private land near federal logging project raised substantial questions about potential for cumulatively significant impacts on grizzly bear).

Because these four intensity factors applied, the Forest Service should have prepared an EIS. A disease outbreak in a bighorn sheep herd caused by contact with a domestic sheep from the Wishbone Allotment would certainly be a significant effect, and the FONSI’s conclusion that there is *no* potential for that to occur was arbitrary and capricious. *CBD*, 72 F.4th at 1188.

#### **IV. THE FOREST SERVICE FAILED TO PROPERLY SUPPLEMENT ITS NEPA ANALYSIS.**

The Forest Service attempted to rectify its failure to consider the telemetry

data in the initial Risk Assessment by obtaining the data, re-running the Risk of Contact Model, and reporting the results in a Supplemental Information Report (“SIR”). VI-App-172. Despite the data showing that the home range of the Bristol Head bighorn herd was directly adjacent to the Crystal and Shallow pastures, and that the model showed the risk of contact was *27% higher* than what the EA/Risk Assessment found, the Forest Service claimed that information was not significant and therefore it did not need to complete a proper supplemental NEPA analysis. That conclusion was arbitrary and capricious.

An agency must supplement its NEPA analysis if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1). An agency may prepare an SIR “for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS.” *Pennaco Energy, Inc. v. U.S. Dept. of Interior*, 377 F.3d 1147, 1151 (10th Cir. 2004) (quoting *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000)). An SIR does not follow NEPA procedures, including public participation requirements. Therefore, if the new information is significant, an agency “must prepare a supplemental EA or EIS; SIRs cannot serve as a substitute.” *Idaho Sporting Cong.*, 222 F.3d at 566.

Moreover, SIRs cannot serve to provide an analysis that was missing from

the original EA or EIS. *Id.* If the Forest Service could correct deficiencies in an EA or EIS by means of an SIR or another non-NEPA procedure, it would render regulations and agency rules governing the supplementation of NEPA documents superfluous. *Id.* at 567 (citing 40 C.F.R. § 1502.9(c)(4), Forest Service Handbook 1909.15 Chs. 20, 40).

Accordingly, an agency may not address deficiencies in an EA by using an SIR to analyze information that the agency knew or should have known at the time it prepared the original EA; rather, it can use an SIR only to analyze the significance of new information that did not exist at the time of the decision. *Friends of the Clearwater v. McAllister*, 214 F.Supp.2d 1083, 1087–88 (D. Mont. 2002), *aff'd* 58 Fed. Appx. 686 (9th Cir. 2003); *Rock Creek Alliance v. U.S. Forest Serv.*, 703 F.Supp.2d 1152, 1180-81 (D. Mont. 2010); *Monroe County Bd. Of Commissioners v. U.S. Forest Serv.*, No. 4:23-cv-00012, 2023 WL 2683125, at \*5–6 (S.D. Ind. March 29, 2023). Using an SIR to justify a decision already made averts the decision-making and public participation procedures that are the heart of NEPA. *Idaho Sporting Congress*, 222 F.3d at 567–68; *Rock Creek Alliance*, 703 F.Supp.2d at 118.

The SIR here was used precisely to fix a deficiency in the EA without going through proper NEPA procedures. The SIR analyzed data collected between January 2010 and July 4, 2018, which means the vast majority pre-dated the March

23, 2018 DN/FONSI and was not new information. VI-App-175, VI-App-167. The Forest Service was aware this important data existed but failed to obtain and analyze it for the Wishbone Risk Assessment. Using the SIR to fix this lapse in the EA “defeats the purpose and intent of NEPA to allow the public opportunity to participate in the decision-making process.” *McAllister*, 214 F.Supp.2d at 1089.

Additionally, the Forest Service’s conclusion that the new information was not significant and thus did not require supplemental NEPA analysis was also arbitrary and capricious. VI-App-189–190; *Pennaco*, 377 F.3d at 1151 (purpose of SIR is to assess the significance of new information to determine if it warrants supplemental NEPA analysis). The data analyzed in the SIR documented locations and movements of bighorn sheep from the three herds near the Wishbone Allotment—information directly relevant to determining the home range of these herds, their movements and habitat use in relation to the allotment pastures, and the risk of contact between bighorns and domestic sheep. *See* VI-App-180–181, VI-App-192–225. The SIR also revealed a sighting of two uncollared bighorn sheep on the Wishbone South River pasture in July 2019, information that contradicted the Risk Assessment’s statement that there were no known instances of bighorns on that pasture. VI-App-188, V-App-173.

The Forest Service authorized use of the Wishbone Allotment only because it determined the allotment was “Moderate” rather than “High” Risk to bighorn

sheep, and information about locations, movements, and habitat use of these bighorn herds was key to making that determination. V-App-214–215, VI-App-153–155, 163. Accordingly, the “new” data analyzed in the SIR was certainly significant information that the Forest Service should have analyzed in a proper supplemental NEPA analysis. *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937–38 (9th Cir. 2010) (new information about sage grouse habitat warranted supplemental NEPA); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 687 F.Supp.3d 1053, 1087 (D. Mont. 2023) (new information about grizzly bear mortalities warranted supplemental NEPA).

Rather than acknowledging the significance of the data and the need to do supplemental NEPA, the Forest Service went ahead and conducted a whole new analysis in the SIR, re-determining the home ranges of the bighorn herds and re-running the Risk of Contact Model. VI-App-180–183, VI-App-193. This analysis determined the Bristol Head bighorn herd’s home range was substantially larger than previously assumed, and directly adjacent to the Crystal and Shallow pastures. VI-App-193. It also showed the risk of contact between bighorns and domestic sheep was *27% higher* than the previous modeling showed, resulting in an estimate of bighorns contacting the allotment 1.26 times per year, which is much higher than the contact rates for many of the Snow Mesa and FIG allotments that the agency closed. VI-App-182, V-App-186, V-App-189, V-App-191, V-App-196, V-

App-199, V-App-201 (Snow Mesa allotments); III-App-49 (FIG pastures). Yet even after these damning results, the Forest Service concluded the “new” information did not warrant a supplemental NEPA analysis. VI-App-190. It claimed the allotment was still just a “Moderate Risk” to the bighorn herds due to the same local factors, asserting the new information was “within the scope of effects considered in the original analysis” even though it showed the level of risk was considerably higher. VI-App-182–190.

By using the SIR to conduct this assessment, the Forest Service subverted one of NEPA’s primary goals—public participation. The D.C. Circuit recently held that use of an SIR was unlawful because it prevented public comment on new data and the agency’s analysis of that data. *City of Port Isabel v. FERC*, --F.4th--, 2024 WL 3659344, at \*7–8 (D.C. Cir. Aug. 6, 2024). Thus, the SIR “deprived petitioners and the public of an adequate ‘springboard for public comment.’” *Id.* at \*8 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). Without an opportunity to comment on a draft supplemental analysis, the public was not able to comment “at a meaningful time.” *Id.* (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989)). Similarly here, the Forest Service was able to avoid addressing public comments that questioned its analysis and conclusions.

For instance, Guardians and two bighorn sheep experts submitted comments



on the SIR after it was completed, criticizing many aspects of the analysis and noting the 1.27 contacts/per year is extremely high risk. VI-App-226–267. One concern was that the Forest Service determined the bighorn home ranges by encircling 90% of the bighorn telemetry locations and excluding the outer 10%, but the Risk of Contact Model required including 95% of locations and only excluding the outer 5%. VI-App-180, VI-App-227–231, VI-App-243–244, II-App-246. Because this difference influences the accuracy of the home range and foray analysis, the agency must document its rationale for not including 95% of telemetry locations in its home range determination. II-App-246, VI-App-227–231, VI-App-243–244. The Forest Service never addressed this issue or any of the other detailed comments because the public was not able to comment “at a meaningful time.” *City of Port Isabel*, 2024 WL 3659344, at \*8.

The data obtained from CPW, as well as the sighting of two bighorns on the South River pasture in summer, was significant new information that showed the allotment was an even higher risk to bighorn sheep—especially the Crystal, Shallow, and South River pastures. The CPW study is now complete and a supplemental analysis could consider all of the data that was collected. The Forest Service continues to violate NEPA by not analyzing that information in a proper supplemental NEPA analysis that allows for objective decision-making and informed public participation.

## V. VACATUR IS THE PROPER REMEDY.

If the Court finds the Wishbone EA and DN/FONSI violated NEPA, the proper remedy is remand to the agency and vacatur of the decision. 5 U.S.C. § 706(2)(A) (courts *shall* set aside agency action found to be arbitrary and capricious); *High Country Conservation Advoc. v. U.S. Forest Serv.*, 951 F.3d 1217, 1228 (10th Cir. 2020) (typical remedy for a NEPA violation is “remand to the district court with instructions to vacate the agency action”); *Bernhardt*, 923 F.3d at 859 (remanding and vacating EAs and FONSI). Of the two permittees who were authorized to graze the Wishbone Allotment, one lost his permit in 2020 due to noncompliance and the other has not grazed the allotment since 2020. Because no grazing has occurred on the allotment for the past four years, vacating the decision would have little disruptive consequence. *Allied-Signal v. Nuclear Regul. Comm’n*, 988 F.2d 146, 150 (D.C. Cir. 1993).

## CONCLUSION

For the foregoing reasons, the Court should reverse the District Court’s judgment and vacate and remand the Wishbone EA/Risk Assessment and DN/FONSI.

## REQUEST FOR ORAL ARGUMENT

Guardians believes that oral argument would be beneficial because this case involves complex factual and legal issues under NEPA.

Respectfully submitted, August 23, 2024

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Tenth Circuit Rule 32(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 16.86 in 14-point font size and Times New Roman.

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## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) the required hard copies sent to the court are an exact copy of the ECF submission;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Defender Antivirus, version 1.417.241.0, last updated August 21, 2024, and according to the program are free of viruses.

Date: August 23, 2024

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**ATTACHMENT 1**

District Court Order on APA Petition  
Filed 03/07/2024

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Daniel D. Domenico**

Civil Action No. 19-cv-00208-DDD

WILDEARTH GUARDIANS; and  
WESTERN WATERSHEDS PROJECT,

Petitioners,

v.

U.S. FOREST SERVICE, a federal agency of the United States Department of Agriculture,

Respondent,

and

WAYNE BROWN;  
JERRY BROWN;  
THE COLORADO WOOL GROWERS ASSOCIATION;  
J. PAUL BROWN; and  
THE COLORADO FARM BUREAU FEDERATION,

Respondent-Intervenors.

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**ORDER ON APA PETITION**

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Petitioners are non-profit organizations dedicated to conservation of public lands in the American West. They bring this case to challenge the U.S. Forest Service's decision authorizing the use of certain public lands in Colorado for domestic sheep grazing. Petitioners argue that the U.S. Forest Service violated several federal statutes in making this decision which allegedly places wild sheep populations at undue risk of disease transmitted by the domestic sheep. They therefore seek vacatur of the Service's decision. But because the Service did not act arbitrarily and capriciously in allowing such grazing, petitioners' request is denied.

## BACKGROUND

### I. Domestic and Bighorn Sheep

For nearly 100 years, the Forest Service has authorized livestock grazing in the Rio Grande National Forest in southwestern Colorado. This includes grazing of domestic sheep. But domestic sheep pose risks to the native, wild bighorn sheep populations. WA1206.<sup>1</sup> In fact, disease transmission from native sheep to wild bighorn sheep, particularly pneumonia-causing bacteria such as *Pasteurella*, may be the “primary factor limiting bighorn sheep populations.” *Id.* Some wild herds have suffered large die-offs due to such disease transmission, and some herds in the Rio Grande National Forest are currently afflicted with pneumonia caused by a bacterium common to domestic sheep. *Id.* Bacteria, including *Pasteurella*, can also pass from mother to lamb, leading to reduced lamb survival, causing long-lasting negative effects on a herd. Transmission of pneumonia from domestic sheep to bighorn sheep requires “very close contact” of fewer than 60 feet. *Id.* While the scientific literature “supports the potential” for disease transmission from domestic to wild populations, not all bighorn pneumonia die-offs are attributable to domestic sheep. WA03964.

In large part due to these concerns about disease, the Forest Service has designated bighorns as a “Sensitive Species,” meaning that there is concern for the long-term viability of the bighorns in the Rocky Mountain region. WA03963. To reduce the potential for disease transmission, the Forest Service tracks various bighorn herds and seeks to avoid allowing domestic herds to contact the wild herds. WA1316. To this end,

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<sup>1</sup> The court has followed the parties’ convention of citing to the administrative record as labeled. *See* Docs. 22, 23.



since 2010, the Forest Service has vacated twenty domestic sheep grazing “allotments.” WA05677.

## **II. The Wishbone Allotment, Snow Mesa Allotment, and Related Wild Herds**

In 2012, the Forest Service began analyzing the potential impacts of domestic sheep grazing on four existing allotments. WA5219-20. Due to the close proximity of one of those allotments—the Fisher-Ivy/Goose allotment—to wild herds (within 1-2.5 miles), the Forest Service deemed the allotment “high risk,” vacated that allotment, and disallowed domestic grazing on it. WA1806-18. Two years later, the Forest Service turned to another set of allotments: the Snow Mesa allotments. WA2116. The Forest Service similarly found that the continued grazing on these allotments presented a “high risk” of disease transmission. WA2299, 2325, 2330. But instead of just vacating those allotments, the Forest Service proposed both vacating those allotments and replacing them with a new allotment: the Wishbone Allotment. WA2693. That allotment has three bighorn sheep herd neighbors: the Central San Juan Population, the Weminuche Population, and the San Juan West Population. *See* Doc. 36 at 10-11. The herds’ proximity to the Wishbone Allotment ranges from four (or perhaps fewer) to twelve-plus miles. WA03979-80, 5673-74, 05640.

## **III. The Forest Service’s Environmental Assessment and Finding of No Significant Impact Regarding the Wishbone Allotment**

To assess the risk that domestic sheep would intermingle with wild herds—and therefore potentially spread disease to the wild herds—if allowed to graze on the Wishbone Allotment, the Forest Service used a “four-step viability analysis process” and a “Risk of Contact Tool.” WA1317, 4057-60, 3872. The Risk of Contact Tool or Risk of Contact Model is a computer model that takes various inputs—including

estimated core herd ranges, “ram and ewe foray rates, a summer source habitat model representing suitable summer habitat, and domestic sheep allotment boundaries” to estimate the likelihood that domestic and wild sheep will cross paths. WA03988. According to the Forest Service, this tool is but one of a number used to assess the risk of comingling. *Id.* And the model has some deficiencies, according to the Forest Service, including an inability to account for existing “on the ground” knowledge of particular herds’ grazing patterns. WA3989-98.

Based on that computer model alone, the risk of comingling was deemed “high” for purposes of the Wishbone Allotment. But to fill in some of the gaps that the model may miss, the Forest Service relied on its “qualitative” assessment of “local factors.” These factors, at least for purposes of the Wishbone Allotment, included:

- The temporal separation due to the domestic sheep grazing duration, including through limitations on the number of days allowed for domestic grazing on the Wishbone Allotment;
- Spatial separation through habitat fragmentation and landscape configuration, including due to the fact that bighorn and domestic populations were separated by a highway and a river;
- Spatial separation due to limited overlap between the bighorn summer source habitat and the domestic sheep capable range. This is due in part to the computer model’s purported inability to account for “finer scale information” of where exactly domestic sheep would graze within the wider allotment;
- Spatial separation due to bighorn sheep seasonal movements, based in part on local knowledge of the particular bighorn

herds at issue—information not accounted for by the computer model; and

- “Project design features,” including active monitoring of the grazing herds to avoid stray sheep from venturing toward wild herds.

WA5668-71.

Based on these additional considerations, the Forest Service found that the Wishbone Allotment presented a “moderate,” rather than a “high,” risk of disease transmission and decided to approve the allotment. WA 4033, 5668. Approval of this allotment amounted to a compromise between the lowest risk alternative (simply banning grazing on the Snow Mesa allotments) and the highest risk alternative, which, according to the Forest Service, was to do nothing at all and to allow continued grazing on the Snow Mesa allotments. WA4040-41. The Forest Service therefore concluded that the Wishbone Allotment plan allowed for the “continued long-term persistence” of local bighorn sheep “while also providing public land grazing opportunities for local livestock producers.” WA4041.

Given these findings, the Forest Service issued a draft Environmental Assessment and Finding of No Significant Impact for public review and comment. Those drafts attracted numerous objections, however. WA5448-611. One organization disputed the Forest Service’s assessment that the five aforementioned “local factors” would reduce the risk of disease spread. WA5447-49. Another group maintained that the Risk of Contact Model—which concluded that the risk of contact was “high”—should have formed the exclusive basis for the Forest Service’s decision and that the reliance on local factors was “arbitrary.” WA5565-69. Nevertheless, the Forest Service issued its final Environmental Assessment (the “Assessment”) and Finding of No Significant Impact (the “Finding”)

in March 2018. WA5660. A few months later in October 2018, petitioners sought and obtained additional bighorn telemetry data from the state of Colorado. Doc. Doc. 35 at 9.

## DISCUSSION

### I. NEPA Background

“In NEPA, Congress codified rules designed to focus both agency and public attention on the environmental effects of proposed actions and thereby facilitate informed decisionmaking by agencies and allow the political process to check those decisions.” *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677, 690 (10th Cir. 2015) (cleaned up). “The Act does so in two ways: First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Id.* (cleaned up). “The Supreme Court has made clear that ‘NEPA itself does not mandate particular results, but simply prescribes the necessary process.’” *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

“Under NEPA, federal agencies must prepare an Environmental Impact Statement (‘EIS’) whenever they undertake ‘major Federal actions significantly affecting the quality of the human environment.’” *Id.* (quoting 42 U.S.C. § 4332(C)). To determine whether an agency action will have such a “significant” effect, the agency first generates an Environmental Assessment (“EA”). *Id.*; 40 C.F.R. § 1501.3 (effective to September 13, 2020).<sup>2</sup> “Distilled to its essence, the EA is a rough-cut, low-budget

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<sup>2</sup> After this case was filed, the Council for Environmental Quality issued substantially different federal regulations governing NEPA. *See generally*, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 43304-01, 2020 WL

EIS designed to show whether a full-fledged EIS—which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project—is necessary.” 784 F.3d at 690 (cleaned up).

If, in the horribly acronym-laden jargon of NEPA law, the EA leads the agency to conclude that no EIS is required, the agency then creates a “finding of no significant impact” or “FONSI.” *Id.* at 682. After preparing the FONSI, the agency may move forward with the proposed action. *WildEarth Guardians v. Conner*, 920 F.3d 1245, 1251 (10th Cir. 2019). “Because NEPA provides no private cause of action, challenges to an EA or FONSI must be brought under the Administrative Procedure Act (APA), which instructs us to review whether an agency’s action was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,’ 5 U.S.C. § 706(2)(A).” *Id.* (cleaned up).

“An agency’s decision to issue a FONSI and not prepare an EIS is a factual determination which implicates agency expertise.” 784 F.3d at 691 (internal quotation and citations omitted). “As a general principle, the judiciary’s role in the NEPA context is merely to ensure that the federal agency takes a hard look at the environmental consequences of its actions.” *Id.* (internal quotation omitted). The petitioners bear the burden of proof to show that the decision violated the APA, and there is a “presumption of validity” for the decision. *Id.* Aside from the procedural requirements, however, NEPA and the APA also impose a substantive requirement: if the conclusion that there would be no

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4001797 (July 16, 2020). Those new regulations govern “any NEPA process begun after September 14, 2020,” but also allow an agency to “apply the regulations in this subchapter to ongoing activities and environmental documents begun before September 14, 2020.” 40 C.F.R. § 1506.13 (effective September 14, 2020). Because this case and all relevant agency decisions in this case predate the effective date of those new regulations, the Court has applied the regulations in effect prior to September 14, 2020 to the relevant agency actions here.

significant effect on the environment represents a “clear error of judgment,” the court must reverse it. *Id.*

## II. Motion to Strike

As a threshold issue, petitioners have moved to strike certain documents filed as a supplement to the administrative record. Doc. 24. That included a “Supplemental Information Report,” or SIR, on telemetry data conducted by the Service in 2019, after the commencement of this lawsuit and after the Service made its Wishbone Allotment Assessment and Finding.

“Generally, the agency’s action must be reviewed on the basis articulated by the agency and on the evidence and proceedings before the agency at the time it acted.” *Sierra Club v. Fed. Highway Admin.*, 2018 WL 1695402, at \*3 (D. Colo. Apr. 6, 2018) (quoting *Am. Mining Congress v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985)). But in NEPA cases, “courts repeatedly endorse SIRs as a method for analyzing new circumstances and determining whether they reveal significant new impacts requiring formal NEPA review.” *ForestKeeper v. La Price*, 270 F. Supp. 3d 1182, 1224 (E.D. Cal. 2017) (collecting cases). Such supplemental reports are appropriate where the information reviewed in the report was “new and unknown” at the time a prior agency action was taken. *Id.* And an agency need not start the environmental assessment process anew with every change in a project. *Price Rd. Neighborhood Ass’n, Inc. v. U.S. Dep’t of Transp.*, 113 F.3d 1505, 1510 (9th Cir. 1997).

As discussed further below, the Service did not act arbitrarily or capriciously when it issued its Assessment and Finding based on the information before it at the time. I have come to this conclusion based on the information provided in the administrative record as it existed when the assessment was made and without relying on the Supplemental Information Report. The Service also did not act arbitrarily or capriciously

by failing to consider the additional telemetry data in March 2018 that was later addressed in that supplemental report. Given all this, there is no need to strike the supplemental information from the record, but the court will also deem petitioners' additional documentation, including comments on the supplemental report, a part of the record as well. *See* Docs. 28-1, 28-2. The motion to strike is therefore denied.

### **III. The Wishbone Assessment and Finding Were Not Arbitrary or Capricious**

Petitioners argue that the Forest Service's Environmental Assessment and Finding of No Significant Impact were arbitrary and capricious for three main reasons: the Forest Service "relied on unsupported assumptions;" the Forest Service failed to examine and disclose relevant data, including telemetry data held by the state of Colorado; and the Forest Service "failed to consider all effects of the action." Doc. 33 at 20-31.

#### **A. Reliance on "Local Factors"**

As to the first argument, petitioners argue that the Forest Service should have relied exclusively on the computer model—which indicated that the plan created a "high" risk of exposure between domestic and wild herds—rather than to rely on the additional "local factors" to conclude that the risk of exposure was "medium." According to petitioners, this reliance on local factors amounted to unsupported, ad hoc rationalizations for the plan.

Petitioners' broader suggestion that the Risk of Contact computer model is the end-all-be-all for assessing the risk of contact between domestic and wild herds is unpersuasive. As the scientific literature indicates, such models may fail to "account for habitat connectivity as well as habitat type." WA4475. And, as at least one other court has

acknowledged, the risk of contact model is but “one data point for analyzing the risk of disease transfer” that has various limitations. *WildEarth Guardians v. Bail*, 2021 WL 1550567, at \*4 (E.D. Wash. Apr. 20, 2021). The Forest Service’s decision to rely on other factors not captured by the model, standing alone, was not arbitrary and capricious.

Nor were the findings based on consideration of those additional factors. First, the Service considered the fact that grazing in the Wishbone Allotment would occur during a 78-day period in the summer, less than half of the assumed grazing season inputted into the computer model. WA5668. Petitioners counter that the Forest Service should have run the model for that shorter period in the first place. Doc. 39 at 12. But the cited user guide suggests that the model can only be run for “winter” and “summer” seasons—presumably 180 days each or thereabouts. There is no indication that the model could be run granularly down to a 78-day period between June and September. It was therefore reasonable to assume that the model’s initial results, based on a 180-day period, overstated the risk of contact. And as the Service notes, telemetry data supported its finding that the bighorn migrations would not overlap with the time when domestic sheep would graze the Wishbone allotment. WA4142-43, 4246-47. While there may have been some debate regarding the exact positioning of wild herds during the proposed 78-day grazing season, that alone does not render the Service’s reliance on this factor to be arbitrary, capricious, or illogical.

Second, the Service downgraded the model’s risk assessment because it failed to analyze the effect of “habitat fragmentation,” including by highways and rivers. Those obstacles, the reasoning goes, would at least reduce the likelihood of contact between herds. And as the Service notes, the Rio Grande River flows highest, or near its highest, during the period when the domestic sheep would graze the Wishbone Allotment.



WA5668-69. Petitioners respond that there is some data suggesting that bighorns do cross that river and do cross the highway. But the Service did not conclude that these habitat obstacles *precluded any* contact between the herds, only that they would reduce the likelihood. That finding was not irrational, arbitrary, or capricious.

Third, the Service found that there was only a 34% overlap between the bighorn summer source habitat and the domestic sheep range on the Wishbone Allotment. Petitioners do not dispute this finding but argue that the Service needed to do a more granular pasture-by-pasture analysis to be able to rely on this factor to reduce the risk assessment. Petitioners provide no authority for such a requirement, nor do they explain in detail why an allotment-level assessment would be arbitrary or capricious. This argument, therefore, is unpersuasive.

Fourth, the Service concluded that there would be further spatial separation of the herds because the migration of local herds were fairly predictable and did not overlap with the grazing season. WA5670. In particular, the Service found that the local wild herds moved away from the Wishbone Allotment (including to higher elevations) during the summer when domestic sheep would be allowed to graze. Petitioners quibble with some of the underlying data supporting this finding, including the suggestion that “a single year of data is not sufficient to show a predictable pattern.” Doc. 39 at 16. But it was not unreasonable for the Service to conclude that local herds at least *tend to* migrate to higher-elevation pastures away from the Wishbone Allotment when domestic sheep will be grazing based on telemetry data and a survey of one such herd. WA 3651-59, 3770-78, 5374-75.

Finally, the Service found that certain “design features”—including limiting grazing for particular pastures and requiring two herders for

the allotment to limit strays—would further reduce the risk of contact. WA3595-97. Petitioners argue that intervenors did not comply with similar design features in years past, leading to incidents of stray sheep. Doc. 39 at 17-18. But prior noncompliance or incomplete compliance does not render reliance on this factor arbitrary and capricious, and the Service has made efforts to shore up compliance.

To summarize, the Service’s reliance on these five local factors to conclude that the risk of contact would be reduced to “moderate” was not arbitrary or capricious. Petitioners finally argue that the Service failed to explain *how* these factors reduced the risk from “high” to “moderate.” But the record shows that the Service explained in detail why each factor reduced that risk. There is always some level of subjectivity in a relative “risk rating,” but any such subjectivity does not render such a rating to be arbitrary or capricious, even if reasonable minds could disagree on the exact level of risk.

### **B. Failure to Rely on Later Telemetry Data**

Petitioners next argue that the Forest Service failed to consider telemetry data of the Central San Juan bighorn herds when making its decision. While the Service relied on some preliminary data from the state, it did not wait to review all data that had been collected, or would be collected in the near future, before issuing its Assessment and Finding. The Service says it could not access all of that data in time, a point that Petitioners dispute.

As petitioners note, the Tenth Circuit has “recognized that agencies must use the ‘best available scientific information’ when assessing environmental impacts” under NEPA, at least for purposes of Environmental Impact Statements. *Lee v. U.S. Air Force*, 354 F.3d 1229, 1244 (10th Cir. 2004) (finding that the agency was not required to carry out its own

study for purposes of an Environmental Impact Statement and that it had relied on the best available information). But an “agency’s obligation in regard to incomplete or unavailable information is governed by the CEQ regulations.” *Id.* at 1241 (citing 40 C.F.R. § 1502.22 (effective to September 13, 2020)). One such regulation, 40 C.F.R. § 1502.22, governs cost-benefit analyses for Environmental Impact Statements, which the Service did not produce here. *Env’t Prot. Info. Ctr. V. Blackwell*, 389 F. Supp. 2d 1174, 1188 n.8 (N.D. Cal. 2004) (noting that § 1502.22 does not apply to EAs “on its face” and that the regulation, to the extent it can serve as guidance as to EAs should not “apply with full force.”)

Petitioners have cited no apparent authorities governing what the Service was required to do, particularly in the face of incomplete, unavailable, or non-public information, before preparing an EA and FONSI. To the contrary, petitioners’ cited authorities relate to environmental impact statements, or other statutes entirely.<sup>3</sup> *See Lee*, 354 F.3d 1241-44 (addressing this issue in the context of what must be included in an EIS); *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 451 F.3d 1183, 1189 (10th Cir. 2006) (affirming dismissal of NEPA claim but reversing claim under the National Forest Management Act claim based on “best available science” language found in regulations implementing that separate act); *Blackwell*, 389 F. Supp. At 1188 (noting that regulation cited in *Lee*, on its face, does not apply to preparation of an EA).

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<sup>3</sup> While the petition contains a claim under the National Forest Management Act, none of petitioners’ briefing appears to reference that act or that claim. *See* Doc. 36 at 18 n.5 (Service pointing out this fact); Doc. 39 (petitioners’ reply failing to address this issue). While this claim and arguments in favor of it may not be truly “waived” as the Service suggests, such arguments appear to have been forfeited. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012).

Even under the more onerous standard applicable to Environmental Impact Statements, agencies need only seek out such information if it “is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant.” 40 C.F.R. § 1502.22(a) (effective to September 13, 2020). And such “costs” include “costs in terms of time (delay) and personnel.” *Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 155 (D.D.C. 2014) (quoting 51 Fed. Reg. 15,622 (April 25, 1986)).

Applied here, the Service complied with NEPA despite failing to wait for and seek out all of the telemetry data that petitioners later obtained from the state, even under the more demanding standard for Impact Statements. As petitioners note, Colorado Parks and Wildlife began collecting this telemetry data in January 2016, and there appeared to be some information sharing of this data between the Service and the state. *See* WA3779-85 (emails from state officials to Service officials apparently regarding portions of this telemetry data). But it also appears that the data was not even finalized (to the extent such ongoing tracking data of bighorns is ever truly “finalized”) until after the Service issued its EA and FONSI in March 2018, as alleged by petitioners. Doc. 1 (petition alleging that “data collection from these telemetry collars is continuing, and CPW stated that a full analysis of results is anticipated in 2019”). It appears that petitioners obtained at least *some* of this data in October 2018, but only after filing an open records request with the state. Doc. 35 at 9. And the Service did not obtain a more complete dataset until 2019 (consistent with the petition’s allegation) and only after signing a confidentiality agreement with the state. WA5847, 5880.

Given all this, the Service did not act arbitrarily or capriciously in failing to obtain all current and *future* data before making its decision. Petitioners cite no specific authority for what the Service had to do

before preparing an Assessment. And the Service did rely on preliminary telemetry data in preparing its Assessment. Petitioners' suggestion that the Service had to wait until "all" telemetry data was finalized has little support in the record or in the legal authorities that petitioners cite. Vacatur on this ground therefore is inappropriate.

### **C. Failure to Consider All Effects**

Petitioners also argue that the Service "failed to consider all effects of the action." Doc. 33 at 30-31. Agencies must consider direct, indirect, and cumulative impacts in making its decisions under NEPA, at least those "to be considered in an environmental impact statement." 40 C.F.R. § 1508.25(c) (effective to September 13, 2020). At least one other circuit has applied this standard to Assessments as well as Environmental Impact Statements. *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 602 (9th Cir. 2010). In any event, "establishing an area of potential effects requires a high level of agency expertise, and as such, the agency's determination is due a substantial amount of discretion." *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1091 (10th Cir. 2004).

Here, petitioners argue that the Assessment failed to address (or improperly dismissed) risks to neighboring bighorn populations. But the central concern animating the entire Assessment was evaluating such risks, which the Assessment did address. *See* Doc. 36 at 26-28. Petitioners appear to counter that the Assessment did not consider two specific "indirect" effects: disease transmission to the Central San Juan herds, and "future increased risk to the Central San Jaun herds if they grow in size." Doc. 39 at 23. But, again, the Service did not ignore these potential effects; instead, it only came to a different conclusion about the risks of these effects than petitioners would have preferred. That does not

amount to arbitrary or capricious action, and vacatur is not appropriate on this ground either.

#### **IV. Failure to Prepare an Environmental Impact Statement**

Petitioners also argue that the Forest Service was required to prepare an Impact Statement rather than just an Environmental Assessment and Finding of No Significant Impact. Doc. 33 at 15-20. As noted above, before issuing a FONSI for the Wishbone Allotment plan, the Forest Service was required to conclude that the plan would “not have a significant effect on the human environment.” *Conner*, 920 F.3d at 1261 (quoting former 40 C.F.R. § 1508.13). Under the regulations in effect when the Forest Service made its decision, a “significant” effect hinged on the “context” of the effect and the “intensity” of the effect. 40 C.F.R. § 1508.27 (effective to September 13, 2020). The relevant context includes the geographic effect of the agency action and the short- and long-term effects of such action. *Id.* § 1508.27(a). The “intensity” analysis implicates a variety of factors, including:

- the degree to which the effects on the environment are likely to be highly controversial;
- the degree to which the possible effects on the environment are highly uncertain or involve unique or unknown risks;
- the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; and
- whether the action is related to other actions with individually insignificant but cumulatively significant impacts.

*Id.* § 1508.27(b)(4)-(7). But the ultimate question, even after assessing these factors, is whether the Forest Service acted “arbitrarily and capriciously” in determining that the Wishbone allotment would not have a

“significant” impact on the environment.

Petitioners argue that all four of these factors suggest that the Wishbone Allotment plan would cause a “significant” impact requiring issuance of an EIS. As to the first “highly controversial” factor, “even in the absence of substantial public opposition, an action may be ‘highly controversial’ if there is a substantial dispute as to the size, nature, or effect of the action. 920 F.3d at 1263 (quotation and citation omitted). The mere existence of scientific debate, however, does not render a proposed action highly controversial. *Indiana Forest All., Inc. v. U.S. Forest Serv.*, 325 F.3d 851, 861 (7th Cir. 2003). And the Service’s own assessment that an action is not highly controversial is owed deference “if it is made after a hard look at the controversy and rationally related to the data.” *Id.*

The agency action, although disputed, did not rise to the level of “highly controversial.” There was a dispute, of course, before the Service issued its Assessment and Finding. But the disputed effects of the action here are much smaller than those cited in the cases that petitioners cite. *E.g., Norton*, 294 F.3d at 1230-31 (addressing the loss of a critical habitat designation for an endangered species). And petitioners’ disputes with the Services’ methodology, standing alone, do not render the agency action highly controversial or in violation of the APA. *Utah Shared Access All. v. U.S. Forest Serv.*, 288 F.3d 1205, 1212 (10th Cir. 2002) (“The fact that the Service did not employ a particular method of analysis in its study . . . does not render its Environmental Assessment inadequate.”).

As to the uncertainty of the risk, the risk here is not so uncertain as to require an Environmental Impact Statement. Though there is some difference in survey data over the years, that alone does not render the uncertainty so high as to require an EIS. *See Friends of Animals v. U.S. Bureau of Land Mgmt.*, 2017 WL 5247929, at \*8 (D. Wyo. Mar. 20, 2017).

There is little uncertainty that domestic sheep pose at least some risk of disease transfer to bighorns if they come into contact. And while there are some disputes as to what level of risk the Wishbone Allotment plan will impose, those disputes do not rise to the level of “highly” uncertain. *See id.* at \*10.

Next, petitioners argue that the Wishbone Allotment plan will establish a precedent because it is the first time the Service failed to exclusively rely on the Risk of Contact Model to assess the risk of disease spread among sheep.<sup>4</sup> But as the Service points out, this Assessment is non-binding by nature and specific to a relatively small geographic region in Colorado, weighing against requiring an EIS. *Oregon Wild v. United States*, 107 F. Supp. 3d 1102, 1114 (D. Or. 2015). The court does not see how this plan will create a precedent sufficient to warrant an EIS, and petitioners cite no specific authority suggesting that it would.

Finally, petitioners argue that the cumulative risk from grazing from *other* allotments, coupled with grazing on the Wishbone Allotment, “could be significant.” Doc. 33 at 25. Petitioners fail to identify what other allotments pose such a risk and sidestep this issue on reply. Doc. 39 at 25. In any event, the Service has vacated a number of allotments to help alleviate such a risk.

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<sup>4</sup> Petitioners raised a related argument on reply that the Service’s reliance on local factors in addition to the Risk of Contact Model amounted to an arbitrary change in policy and practice. *See* Doc. 39 at 6-10. Because this argument was raised for the first time on reply, it is forfeited. *See Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000). In any event, the Service did explain why it relied on local factors in addition to the Risk of Contact model: that model failed to account for local knowledge specific to the region and herds at issue, all as outlined above. That is a sufficiently “rational explanation” for any purported departure from prior procedure. *See WildEarth Guardians v. U.S. E.P.A.*, 770 F.3d 919, 941 (10th Cir. 2014) (rejecting argument that agency acted arbitrarily due to purported inconsistent positions).



The ultimate question is whether, after considering these factors, the Service’s finding that the Wishbone Allotment plan would not cause “significant” environmental effects was arbitrary and capricious. *Conner*, 920 F.3d at 1262. The factors all weigh toward concluding that the decision was not arbitrary and capricious. The Service therefore was not required to prepare an Environmental Impact Statement.

#### **V. Failure to Perform a Supplemental Assessment**

Petitioners last argue that the Service’s use of a Supplemental Information Report to address the later telemetry data violated NEPA. Petitioners contend that the Service was required to prepare a supplemental Environmental Assessment in light of the telemetry data.

At least under Ninth Circuit precedent, NEPA requires issuance of a supplemental Environmental Assessment when “there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Earth Island Inst. v. United States Forest Serv.*, 87 F.4th 1054, 1069 (9th Cir. 2023) (quoting 40 C.F.R. § 1502.9(d)(1)(ii) (effective post-September 14, 2020)). Supplemental Information Reports may be used to inform the assessment of whether a supplemental Environmental Assessment must be issued. *Id.* Supplementation is not required if the agency takes a “hard look” at the new information and “determines that the impact will not be significantly different from those it already considered.” *Id.* The same arbitrary and capricious standard applies to a decision not to supplement an assessment. *Id.*

Here, the Service did not act arbitrarily or capriciously in determining, in light of more complete telemetry data, that a supplemental assessment was not necessary. The Service re-ran its Risk of Contact Model with the new data and determined that there was a “27% increase in modeled contact” based on the results of that model alone. WA5888.

But, in light of the same local factors that reduced the risk assessment for purposes of the Assessment, the Service concluded that there was no significantly increased environmental risk warranting another full-blown assessment. WA5889. Much of petitioners' argument is that the supplemental information report serves as a post-hoc rationalization for the Service's original assessment, further suggesting that it only confirms what the Service concluded in the first place.

Indeed, many of petitioners' arguments as to this issue stand in strong tension with one another. For example, they argue that the supplemental information report cannot be considered because it serves as an untimely justification of the original Assessment. But it appears that the Service created the report in part based on demands made by petitioners that the Service consider later-created telemetry data held, in confidence, by a third party. Petitioners have also argued that all this information was available to the Service, yet they also claim that *they* could not access the telemetry data because it included information "collected through July 4, 2018," several months after the issuance of the Assessment and Finding. Doc. 39 at 31. These countervailing demands that petitioners hope to place on the Service far exceed those imposed by NEPA and the APA. The Service therefore did not act arbitrarily or capriciously in determining, after taking a hard look at the new telemetry data, that a supplemental assessment was not warranted.

### CONCLUSION

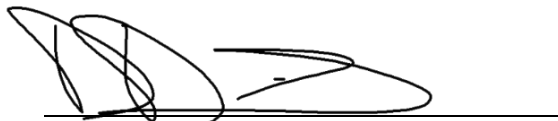
Petitioners' Motion to Strike, Doc. 24, is **DENIED**.

The Court finds that the Service's actions were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and that the Service did not violate NEPA or the APA. The court

therefore **AFFIRMS** the Service's actions.

DATED: March 7, 2024

BY THE COURT:

A handwritten signature in black ink, appearing to read "Daniel D. Domenico", is written over a horizontal line. The signature is stylized with loops and a long horizontal stroke at the end.

Daniel D. Domenico  
United States District Judge

**ATTACHMENT 2**

District Court Judgment  
Filed 03/07/2024

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-00208-DDD

WILDEARTH GUARDIANS; and  
WESTERN WATERSHEDS PROJECT,

Petitioners,

v.

U.S. FOREST SERVICE, a federal agency of the United States Department of  
Agriculture,

Respondent,

and

WAYNE BROWN;  
JERRY BROWN;  
THE COLORADO WOOL GROWERS ASSOCIATION;  
J. PAUL BROWN; and  
THE COLORADO FARM BUREAU FEDERATION,

Respondent-Intervenors.

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FINAL JUDGMENT

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In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to and in accordance with Fed. R. Civ. P. 58(a) and the Order on APA Petition, filed March 7, 2024, by the Honorable Daniel D. Domenico, United States District Judge, and incorporated herein by reference as if fully set forth, it is hereby

ORDERED that the Court finds that the Service's actions were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and that the Service did not violate NEPA or the APA. The court therefore AFFIRMS the Service's actions.

DATED at Denver, Colorado this 7th day of March, 2024.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

*s/ Robert R. Keech* \_\_\_\_\_

Robert R. Keech,  
Deputy Clerk