Appeal No. 24-1187

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

APPELLANTS' REPLY BRIEF
(Oral Argument Requested)

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GLOSSARY OF ACRONYMS AND TERMS

APA	Administrative Procedure Act
BLM	Bureau of Land Management
BMPs	Best Management Practices
CPW	Colorado Parks and Wildlife
CWGA	Colorado Woolgrowers Association
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

The point of the National Environmental Policy Act (NEPA) is to create an analysis that contributes to an agency's decisionmaking process, not to rationalize or justify decisions already made. *Diné Citizens Against Ruining Our Env't v. Haaland*, 59 F.4th 1016, 1030 (10th Cir. 2023). The process that occurred for the Wishbone Allotment was the exact opposite. The Forest Service decided to create, and even authorized use of, this allotment *before* conducting any analysis, and then as each subsequent analysis showed an increasingly high risk of disease transmission to bighorn sheep, the agency rationalized the decision it had already made by sidestepping the data to downgrade the allotment's risk rating to moderate.

The agency's response continues this tactic, relying on post-hoc explanations and improperly using post-decisional information. But these litigation positions are not supported by the record, and completely ignore a key issue raised by Appellants ("Guardians") regarding the disease interval needed to maintain viable bighorn populations. Accordingly, the Wishbone Environmental Assessment (EA) and Decision were arbitrary and capricious, the agency should have prepared an Environmental Impact Statement (EIS), and its use of a Supplemental Information Report (SIR) violated NEPA.

ARGUMENT[1]

I. THE WISHBONE EA AND DECISION WERE ARBITRARY, CAPRICIOUS, AND VIOLATED NEPA.

A. The Conclusion that the Wishbone Allotment Was an "Acceptable" Risk to Bighorn Sheep Was Unreasonable and Unsupported by the Administrative Record.

The Forest Service authorized use of the Wishbone Allotment only because it concluded the risk to bighorn sheep was "moderate," which was "acceptable" because it would meet the agency's "requirement to maintain a viable population of bighorn sheep on the [forest]." V-App-214–215; VI-App-153–156, 162–163. The analysis behind this conclusion was flawed in many ways and unsupported by the record, leading to a decision that was arbitrary, capricious, and violated NEPA.

1. The Forest Service Failed to Tie its Moderate Risk Rating to Bighorn Sheep Viability.

The biggest hole in the Forest Service's response brief is the same hole that occurred in the Wishbone EA and Decision—the failure to connect the dots between the moderate risk rating and the parameters needed to ensure healthy, viable bighorn sheep populations. Guardians discussed this point repeatedly in its opening brief, but the Forest Service completely ignored it. Guardians Br. at 13–

[1] Citations to Appellants' Appendix are [volume]-App-[page]; citations to Federal Appellees' Appendix are US-App-[page]; and citations to Intervenor Colorado Woolgrowers' ("CWGA") Appendix are Int-App-[page].

14, 24, 36, 44–45; Fed. Br. at 24–51.

The Forest Service's brief admits that the agency must ensure viability of bighorn sheep on the Rio Grande National Forest. Fed. Br. at 5, 13 (citing US-App-35, 151–155; V-App-11). It notes that the purpose of the proposed action was to reduce the risk of contact between domestic and bighorn sheep "to an acceptable level in order to minimize potential interspecies disease transmission" and "manage for healthy bighorn populations;" and that through this proposed action, the agency "expects bighorn sheep to remain viable on the forest." Fed. Br. at 6, 7 (citing V-App-18; US-App-155). The Forest Service concluded "moderate risk is acceptable and consistent with agency directives." Fed. Br. at 13 (citing US-App-154). But like the EA and Decision, the agency's brief never grapples with the parameters the agency itself identified as necessary for maintaining healthy and viable bighorn populations.

As Guardians explained, the Wishbone Risk Assessment, which is part of the EA, identified the criteria used to rate the risk of an allotment:

	High Risk	Moderate Risk	Wishbone Results
Distance of home range to allotment	<10 miles	10-15 miles	1 mile
Contact with allotment	< 8 years apart	8-10 years apart	Every year
Disease Interval	<32 years	32-40 years	4 years

Guardians Br. at 14 (citing V-App-178, 206, 214). The disease interval criterion

specifies how often a population contracts disease, and is key to assessing bighorn viability because population recovery from a disease event can take decades. V-App-174. The Risk Assessment explained that disease outbreaks 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, and that population would likely be extirpated over time as a result of consistent exposure to disease. V-App-176–177. Therefore, the Risk Assessment assumed that contact rates leading to disease events every 32 years or less will "result in a High Risk to bighorn sheep long-term viability and a Low Probability of Population Persistence and Viability." V-App-177. Accordingly, managing for a disease interval less than 32 years is *not* managing for healthy, viable bighorn populations.

Despite Guardians' focus on this key issue, the Forest Service never acknowledges these criteria in its brief or cites to anything in the record explaining whether the "local factors" will reduce the risk enough to achieve the 32-year disease interval needed to maintain healthy and viable bighorn populations. In fact, the words "disease interval" never appear in the agency's brief even though that is the crux of determining long-term viability.

That omission completely undercuts the conclusion that the Wishbone Allotment is an acceptable, or moderate, risk to bighorns. Due to the extremely close proximity of the bighorn herds' home ranges to the Wishbone pastures and

the suitable bighorn habitat in the area, the Risk of Contact model estimated a bighorn from one of these herds would contact the allotment every year, **resulting in a disease outbreak every 4 years.** V-App-206, 214. The Forest Service provided no rationale to show the local factors would reduce the risk enough that the predicted disease interval would go from 4 years to 32+ years.

The agency simply asserts the risk to bighorns is "moderate" without tying that conclusion to any of the risk criteria, especially the 32-year disease interval needed for long-term viability of bighorn populations. Without this connection, its conclusion that "a moderate risk is acceptable" was arbitrary, capricious, and violated NEPA. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 713–15 (10th Cir. 2009) (agency must articulate a rational connection between the facts found and the decision made); *CBD v. U.S. Dep't of the Interior,* 72 F.4th 1166, 1178 (10th Cir. 2023) ("conclusory statements regarding impacts without adequate discussion" violates NEPA); *W. Watersheds Project v. Vilsack*, No. 23-8081, 2024 WL 4589758, at *14 (10th Cir. Oct. 28, 2024) (failure to consider relevant factors and explain conclusion violated NEPA).

2. Reliance on "Local Factors" to Claim the Allotment was Moderate Risk was Unreasonable.

The second reason the Wishbone EA and Decision were unreasonable stems from the Forest Service's reliance on "local factors" to claim the allotment is just moderate risk. Even assuming these factors may slightly lower the risk of some

pastures, the Crystal and Shallow pastures remain a high risk to bighorn sheep and thus the allotment as a whole is not a moderate risk.

The Forest Service first claims that Guardians is insisting on a pasture-by-pasture risk determination but did not raise that argument during the NEPA process. Fed. Br. at 25–27. That characterization of Guardians' argument is wrong. Guardians is not asserting the agency had a legal duty to run the Risk of Contact Model for each pasture (although it conducted such an analysis for the Fisher-Ivy/Goose Allotment, *see* III-App-42, 49). Rather, Guardians asserts that it was unreasonable to conclude the entire allotment was a moderate risk when the local factors the Forest Service relied upon do not apply to the two largest pastures.

a. Guardians did not forfeit this argument.

The Forest Service was certainly on notice that Guardians and others contended lowering the risk rating of the Wishbone Allotment from high to moderate was unsupported by facts and science, which is all that was required during the administrative process.

To satisfy exhaustion requirements, a plaintiff must present its claim "in sufficient detail to allow the agency to rectify the alleged violation." *Forest Guardians v. U.S. Forest Serv*, 495 F.3d 1162, 1170 (10th Cir. 2007) (citing *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899-900 (9th Cir. 2002); *Kleissler v. U.S. Forest Serv.*, 183 F.3d 196, 202 (3d Cir. 1999)). While a party's comments

must alert the agency to its position to allow the agency to give the issue meaningful consideration, its subsequent arguments in court do not have to be "precisely the same" as those raised in comments. *Id.*; *Appalachian Power Co. v. EPA*, 135 F.3d 791, 817–18 (D.C. Cir. 1998); *see also WWP v. Vilsack*, 2024 WL 4589758, at *9, n.8 (plaintiffs had not forfeited claim because they just offered a further explanation); *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (arguments can be "more fully developed" in court proceedings). "[A]lerting the agency in general terms will be enough if the agency has been given 'a chance to bring its expertise to bear to resolve [the] claim.'" *McNair*, 629 F.3d at 1076 (quoting *Dombeck*, 304 F.3d at 900). Moreover, a plaintiff has not waived a claim if other commenters brought it to the agency's attention. *Forest Guardians*, 495 F.3d at 1170; *Sierra Club v. Bostick*, 787 F.3d 1043, 1048 (10th Cir. 2015).

Guardians' claim is that the Forest Service's moderate risk rating for the Wishbone Allotment was unreasonable because it was based on assumptions that were unsupported by scientific and factual evidence, which violated NEPA. I-App-41–42. Guardians' arguments related to the Crystal and Shallow pastures are not a new claim, they simply explain why reliance on the local factors to reduce the risk of the allotment was unreasonable and unsupported by the evidence. Plenty of comments put the agency on notice that the moderate risk rating for the allotment was unsupported and unreasonable.

Appellants' comments expressed concern about relying on factors that have no scientific basis to reduce the risk rating for the allotment from high to moderate, noting in particular key facts about the Crystal and Shallow pastures that create a high potential for contact and resulting disease outbreaks. IV-App-158–161; IV-App-168–169. Other comments similarly disputed the agency's rationale for downgrading the risk, IV-App-174–178; V-App-246–248, relying in part on the data showing a bighorn very near the Shallow pasture in summer. V-App-246. Colorado Parks and Wildlife's ("CPW") comments also noted potential for contact between the species while domestic sheep are grazing the Crystal/Shallow pastures. IV-App-154. Likewise, Appellants' objections to the Wishbone EA and Decision consisted entirely of reasons why the moderate risk rating was unjustified. VI-App-3–12. Another objection raised similar arguments and included facts about proximity of bighorn sheep to the Shallow and Crystal pastures. VI-App-92–96.

These comments and objections clearly disputed the agency's rationale for downgrading the risk of the allotment and urged the agency to re-do the Risk Assessment. Accordingly, Guardians did not waive its claim that the agency's conclusion the Wishbone Allotment is a moderate risk was unreasonable and unsupported.

b. The Forest Service's argument about the Crystal and Shallow pastures ignores evidence in the record.

The Forest Service states that the local factors "apply on the Crystal and Shallow pastures, even if to a lesser degree," but then fails to address many of the points Guardians raised in its opening brief countering that position. Fed. Br. at 30–32; Guardians' Br. at 23–30. Because many of the local factors do not apply to those pastures at all, it was unreasonable for the Forest Service to downgrade the risk of the entire allotment.

The agency does not dispute the arguments Guardians made that: (1) the Crystal and Shallow pastures have more overlap of bighorn habitat with domestic sheep range than the other Wishbone pastures, and as much as several of the closed Snow Mesa allotments; (2) the supposed barriers to bighorn movements into Wishbone pastures do not exist for the Crystal and Shallow pastures; and (3) the 2017 CPW telemetry data undercut the assumption that bighorns would only foray onto the pastures in October. Guardians Br. at 28–30; Fed. Br. at 30–32. Accordingly, the agency does not refute Guardians' point that these three "local factors" do not reduce the risk of the Crystal and Shallow pastures.

With regard to the fourth local factor concerning seasonal movements, the Forest Service states that maps show the home range of the Bristol Head bighorn herd is at a higher elevation than the Crystal and Shallow pastures and thus bighorns will not move toward those pastures when moving to higher elevations in

summer. Fed. Br. at 31 (citing US-App-40, 48-49). That statement misrepresents bighorn habitat use, and ignores the telemetry information the Forest Service received from CPW before issuing the EA.

In fall through spring, bighorns from the Bristol Head herd are at low elevations along Highway 149, close to the South River pasture, as recognized in the Risk Assessment. V-App-166. When moving to higher elevations in summer—toward the Snow Mesa allotments—that path can take them toward the Crystal and Shallow pastures, as confirmed by movements of a radio-collared ram. IV-App-184–186. That ram was near the South River pasture in spring and then moved north to within 0.5 mile of the Shallow pasture in July 2017, which was "concerning" to a CPW biologist, but the Forest Service ignores that information. *See* Guardians Br. at 27 (citing IV-App-184–186); Fed. Br. at 31.

The Forest Service also misleadingly states that maps show less summer bighorn habitat in the Crystal and Shallow pastures than in the Snow Mesa Allotment. Fed. Br. at 31 (citing US-App-40, 37, 49). But the cited maps actually show that the *overlap* of bighorn summer habitat with domestic sheep range on the Crystal and Shallow pastures is more extensive than the overlap on the other Wishbone pastures, and similar to the amount on the Table, Miners, and Ouray allotments that the agency rated as high risk to bighorns. US-App-37–38, 40–41.

The Forest Service next relies on the telemetry data obtained from CPW in

2019 to try and bolster its argument that the Crystal and Shallow pastures are not high risk. Fed. Br. at 31–32. Not only is it improper to rely on data and rationalizations that post-date the administrative record for the original decision, *Richardson*, 565 F.3d at 704, 714; *CBD*, 72 F.4th at 1178, but the data itself supports Guardians' argument. The data shows bighorns moving toward and remaining just outside the Crystal and Shallow pastures during the summer grazing season. VI-App-197–198.

The agency highlights the lack of telemetry locations within the two pastures, Fed. Br. at 32, but it is inaccurate to assume that lack of locations means no use. The data shows movements for only a small number of bighorns from each herd, including just nine total animals and only three rams from the 80-member Bristol Head herd. V-App-153, 166. The data does not include movements of the other 70 members of the herd, so it is inaccurate to claim this entire herd is only using the areas documented by a few animals.

Moreover, Intervenors' claim that there are no known contacts with domestic sheep or disease transmission events for these herds is refuted by the CPW report that stated ten of the fifteen bighorns tested for disease in 2016–2017 were positive for *Mycoplasma ovipneumoniae*, the bacteria transmitted by domestic sheep that leads to respiratory disease in bighorns. CWGA Br. at 5, 10, 15; Farm Bureau Br. at 9; IV-App-180. And field surveys indicated a significant

decline in lamb ratios during the summer months, which "may be an indicator of disease related mortality occurring in lambs." IV-App-181. This information is strong evidence that these herds have previously contracted disease from domestic sheep that continues to impact lamb survival.[2]

Finally, the agency relies on the 2019 SIR, which noted the telemetry points are not next to the typical domestic sheep grazing areas on the Crystal and Shallow pastures. Fed. Br. at 32 (citing VI-App-186, 217). But this post-hoc analysis cannot support the earlier 2017 EA or 2018 Decision. *Richardson*, 565 F.3d at 704, 714.

The Forest Service's conclusion that the "allotment as a whole" is moderate risk was unreasonable when the pastures used for almost 45% of the grazing season are high risk.[3] If bighorns are likely to contract disease from domestic sheep using the Crystal and Shallow pastures, that risk is not reduced just because the other pastures are a lower risk. It only takes one contact with a domestic sheep to cause a bighorn herd die-off and years of poor lamb recruitment. Guardians Br. at 4–5. It is very likely a disease event will occur more than once every 32 years if

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[2] CWGA proclaims that CPW was fully supportive of the Wishbone Allotment. CWGA Br. at 19, 27 (citing IV-App-153–154). But the cited CPW comment letter was written prior to the June 2017 report and July 2017 telemetry findings so does not reflect CPW's position after those findings. IV-App-180–188.

[3] The Risk Assessment stated Crystal and Shallow pastures would be grazed for 35 and 8 days respectively, but the Decision lowered that to 30 and 5 days. V-App-173–174; VI-App-153. 35 days of a 78-day season is 44.8% of the season.

domestic sheep graze the Crystal and Shallow pastures.

c. Reliance on best management practices that were unproven was unreasonable.

The Forest Service and Intervenors rely heavily on the assumption that "project design features" will be effective at reducing the risk of disease transmission to moderate, but that reliance is also unreasonable. Fed. Br. at 33–36; CWGA Br. at 5, 7; Farm Bureau Br. at 24–25, 26.

The Forest Service claims that the situation here is different from the bighorn sheep cases cited by Guardians, where courts rejected reliance on best management practices ("BMPs") to keep domestic and bighorn sheep separate because there was no science supporting the effectiveness of those practices. Fed. Br. at 35–36; Guardians Br. at 31. Yet the same principle applies—there is no scientific evidence showing the BMPs here will be effective at maintaining separation, it is simply the agency's *expectation* that they will work. Fed. Br. at 34 (Forest Service "*expects* design features . . .to be effective," and increased visibility and accessibility of the pastures is "*expected* to improve compliance" with BMPs) (emphasis added); Fed. Br. at 35 (leveraging public to help monitor provides "additional *confidence* in the design features") (emphasis added). Just like in Guardians' cited cases, the agency believes the practices will work but lacks scientific support for that belief.

In fact, the evidence in the record shows that the Forest Service's

expectation was not reasonable. First, the trial grazing periods in 2016 and 2017 are strong evidence that the BMPs may not be effective. The agency claims that so many domestic sheep strayed in 2017 because there was only one herder whereas two herders were used in 2016. Fed. Br. at 35. Yet even with two herders in 2016, sheep strayed from the South River pasture and grazed on private land for a week. IV-App-146–147. And in 2017, the permittees and the Forest Service simply disregarded the requirement for two herders in the 2017 Annual Operating Instructions (AOI), which was identical to language in the 2016 AOI. Int-App-034, 039 (both AOIs stated that "One herder will get supplies while the other stays with the sheep."). Accordingly, the Forest Service's point merely proves that the BMPs related to herders are not effective.

Second, the Forest Service touts the public alerts to the agency about the domestic strays in 2017, Fed. Br. at 35, but even with those alerts the 56 stray sheep were not all recovered until *six weeks* after the grazing season ended. V-App-240–242; IV-App-299. Most of those stray sheep were still alive and found in multiple locations inside and outside of Wishbone pastures between September 15 and October 27, giving them ample time to make contact with bighorn sheep. V-App-241–242. And the agency even admitted that public assistance spotting stray domestic sheep is not likely on the large, remote Crystal and Shallow pastures. VI-App-152. Thus, the accessibility and visibility of some pastures does not ensure

that all stray sheep would be detected or that any strays would be removed quickly.

Third, the Forest Service completely ignores the comments in the record from the permittees and CWGA noting the difficulty managing domestic sheep on the Wishbone Allotment, particularly on the South River, Shallow, and Crystal pastures, and the likelihood of stray sheep. Guardians Br. at 33–34 (quoting comments at V-App-259, 266–267); Fed. Br. at 33–37. These comments certainly call into question the agency's expectation that BMPs for the Wishbone Allotment will be effective, but the agency does not even address them. Regardless of who the permittee is, these management challenges will still exist. *See* Fed. Br. at 36 (noting permit cancellations).

Indeed, the assumption that two herders can fully keep track of 2,000 domestic sheep for two and a half months, and accurately count them on the range to detect any missing sheep, borders on ridiculous. Int-App-076–077 (1000 ewe/lamb pairs authorized for June 15-September 1). As one bighorn sheep expert with decades of experience explained, even with two herders:

> The herders simply cannot be expected to always have an eye on every member of the band or always locate bighorn sheep that are on the allotment. . . . Two herders per domestic sheep band simply cannot ensure a domestic sheep will not stray. . . . Neither can two herders ensure that a bighorn sheep will not come in contact with the band, particularly when domestic sheep are foraging.

III-App-262. The same applies here—two herders cannot ensure a band of 1000 ewe/lamb pairs will not have any stray sheep or will not make contact with a

bighorn, especially on the larger, remote Crystal and Shallow pastures. The record in this case does not show the BMPs will effectively reduce the risk of contact between species.

Because the Forest Service relied on inaccurate information and unsupported assumptions to justify its moderate risk rating, it failed to take a hard look at the impacts of its proposed action, in violation of NEPA. *Richardson*, 565 F.3d at 713–15 (NEPA violation where record did not support conclusion about project's impacts); *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1235–37 (10th Cir. 2017) (reliance on irrational assumption unsupported by data in the record violated NEPA); *Or. Natural Desert Ass'n v. Jewell*, 840 F.3d 562, 569–70 (9th Cir. 2016) (reliance on inaccurate data and unsupported assumption violated NEPA).

3. The Forest Service's Failure to Obtain the Telemetry Data for the EA Analysis Violated NEPA.

In response to Guardians' argument that the Forest Service should have obtained the CPW telemetry data for the Wishbone Risk Assessment, the agency claims that the data was unavailable and unessential. Both assertions are incorrect.

The Forest Service states several times that it had no duty to postpone its analysis and decision to wait for CPW to complete its telemetry study. Fed. Br. at 37–38, 40. Guardians' position, however, is that the agency should have requested the data that CPW *had already collected* prior to the Wishbone decision. The Forest Service tries to claim that data was unavailable because CPW considered

the data confidential. Fed. Br. at 16, 40. That defense is unavailing—CPW was willing to enter into an agreement and hand over the data when the Forest Service finally requested it, and also provided the data to Guardians in response to a public records request. US-App-173–175; VI-App-173.

There is no evidence the existing data was unavailable to the Forest Service: the only request for the data in the record is from February 2019—almost a year after the Wishbone Decision was signed, and the agency never claims it requested the data before then. VI-App-171; Fed. Br. at 37–42. The Forest Service also blames Guardians for not submitting the data, Fed. Br. at 42, but Guardians did not get the data from CPW until October 2018, seven months after the Wishbone Decision was signed. I-App-129; VI-App-167. Given that the Forest Service and CPW "collaborated" on creating the Wishbone Allotment, Fed. Br. at 7, 10, 39; CWGA Br. at 9–10, the Forest Service's failure to obtain CPW's data was unreasonable.

Next, the Forest Service claims the telemetry data was not essential but this claim is also belied by the record. Several of the "local factors" were based on assumptions about bighorn movements (barriers to movement, forays, seasonal movements), which the agency believed were predictable and consistent. *Supra* pp. 9–10; Fed. Br. at 38. CPW's telemetry study was designed to document bighorn habitat use and movements, and preliminary data indicated that bighorns from

these herds move farther, more extensively, and less predictably than the Forest Service had assumed. III-App-108; IV-App-180–190. In fact, 2017 data documented a bighorn ram *moving toward* and within 0.5 mile of the Shallow pasture during the summer grazing season, which CPW found "concerning." IV-App-184. This data undercut the agency's assumption that in summer bighorns *move away* from the Wishbone pastures, and clearly indicated that obtaining the rest of the existing data was critical to assess the validity of the agency's local factors.[4]

Accurate information about movements and locations of bighorns from these herds *was* "essential to a reasoned choice among alternatives," Fed. Br. at 41, because it showed whether the local factors justifying the moderate risk rating were valid. If the Forest Service had obtained all the existing telemetry data before its Decision, it might have determined the Wishbone Allotment was not moderate risk and selected a different alternative, or altered the Wishbone pastures. Instead, by the time it obtained the data, the die had been cast and the agency was not going to rescind the Decision.

By failing to request and incorporate this data in the EA, the Forest Service did not use the "best available scientific information," and the public could not

[4] When the agency did obtain the data, it showed bighorns directly adjacent to the Crystal and Shallow pastures during the entire grazing season. VI-App-196–197.

consider this data in their comments on the project, in violation of NEPA. *CBD*, 72 F.4th at 1178; *Northern Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011) (failure to include data in analysis meant agency did not take a hard look at impacts and the data was not available for public comment).

B. The EA did not Analyze Indirect and Cumulative Impacts.

As the Forest Service acknowledges, it must consider direct, indirect, and cumulative effects in its EA. Fed. Br. at 43 (citing 40 C.F.R. § 1508.25); *see also* 36 C.F.R. §§ 220.4(f), 220.7(b)(3)(iv) (Forest Service regulations describing analysis of direct, indirect, and cumulative effects). Because Forest Service direction requires maintaining viable populations of bighorn sheep on the forest, and a key issue analyzed in the Wishbone EA was risk of contact between domestic and bighorn sheep that could potentially lead to disease transmission and herd die-offs, it was critical to assess *all* threats of disease transmission to bighorn populations. V-App-19, 28; VI-App-163.

However, the Wishbone EA did not analyze the threat of an infected bighorn from one of the herds near the Wishbone Allotment transmitting disease to a bighorn from an adjacent meta-population. Guardians Br. at 40. Two isolated statements in the Wishbone Risk Assessment and a couple sentences in the Decision that mention connectivity between meta-populations does not constitute an analysis of how that connectivity could impact those other populations if

Wishbone bighorns are exposed to disease. Fed. Br. at 43–44 (citing US-App-50, 114, 167–168); *see Haaland,* 59 F.4th at 1039–44 (failure to adequately analyze indirect and cumulative effects); *Davis v. Mineta,* 302 F.3d 1104, 1123 (10th Cir. 2002) (graphs and maps did not constitute analysis of cumulative effects), *abrogated on other grounds by Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019). The very real possibility of an infected bighorn from the Bristol Head herd interacting with a bighorn from the meta-population to the south (Weminuche) or to the west (San Juan West) could lead to significant die-offs in multiple bighorn herds, yet the Forest Service did not analyze that risk or its impact on bighorn viability.

The agency claims Guardians forfeited this argument because it was not raised in comments or objections, Fed. Br. at 43, but Guardians and another party stated the need to consider the allotment's threat to these other bighorn meta-populations. VI-App-6; VI-App-95–96. Furthermore, it was the CPW telemetry data that highlighted the connections between meta-populations, but the Forest Service did not fully disclose that data in the EA. VI-App-141–143. Notably, one objection did raise the issue based on a personal communication with CPW. VI-App-96 (noting that CPW confirmed connection between meta-populations and complaining about failure to consider that issue in the Risk Assessment). While the public was not privy to the data showing connections between Wishbone bighorns

and two other meta-populations, the Forest Service was and should have considered that threat in its analysis. VI-App-141–143.

Similarly, a few statements in the Decision about other vacated allotments and the status of the Central San Juan bighorn meta-population do not substitute for an analysis of the combined threat to bighorns from the Wishbone Allotment and domestic sheep grazing other National Forest, BLM, State, or private land. Fed. Br. at 45 (citing US-App-167). The Forest Service should have disclosed other domestic sheep grazing that occurs near the Central San Juan, San Juan West, and Weminuche bighorn meta-populations and analyzed the risk to those meta-populations from the Wishbone Allotment combined with that other grazing. *Compare* II-App-183–190 *with* V-App-78 (Payette and Wishbone cumulative effects discussions); *WWP v. Vilsack*, 2024 WL 4589758, at *12–14 (failure to analyze combined effects of actions); *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 872–73 (9th Cir. 2020) (mentioning other projects was not analysis of their cumulative effects); *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1104–06 (9th Cir. 2016) (same). By failing to consider these cumulative effects of authorizing the Wishbone Allotment, the Forest Service violated NEPA.

II. AN EIS WAS REQUIRED.

Guardians' opening brief pointed to four factors showing that the Forest Service should have prepared an EIS for the Wishbone Allotment. Guardians Br. at

42–49 (citing 40 C.F.R. § 1508.27(b)(4)–(7); *see also* 36 C.F.R. § 220.7(b)(3)(iii) (adopting factors from 40 C.F.R. § 1508.27)). The Forest Service's attempts to refute these factors largely skirt around Guardians' arguments.

First, with respect to the "highly uncertain" and "highly controversial" factors, the Forest Service focuses on the point that there is no scientific dispute or uncertainty that domestic sheep can transmit disease to bighorn sheep. Fed. Br. at 48–51. Guardians agrees there is no dispute or uncertainty about what the effect is—risk of disease transmission; the dispute and uncertainty are about the *extent* of that effect—how much risk of disease transmission the allotment creates.

Guardians pointed to multiple cases that found an EIS was required where there was uncertainty or scientific dispute about the *amount or extent* of harm an action could cause, but the Forest Service does not address these cases or this point. Guardians Br. at 43–44, 46 (citing cases); Fed. Br. at 48–51. Other cases follow this same reasoning. *See e.g., Env't Defense Ctr. v. BOEM*, 36 F.4th 850, 880–82 (9th Cir. 2022) (uncertainty about extent of impacts to marine life from chemicals used in off-shore oil drilling); *Hausrath v. U.S. Dep't of the Air Force*, 491 F.Supp.3d 770, 802–03 (D. Idaho 2020) (uncertainty and dispute about extent of noise impacts to community and wildlife); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, No. 1-23-cv-1163-CL, 2024 WL 2941529, at *15–16 (D. Or. May 24, 2024) (uncertainty about extent of effects on spotted owl, and scale and timing of effects

from timber harvest). Uncertainty and dispute about how much risk to bighorns will occur from authorizing the Wishbone Allotment warrants an EIS.

The Forest Service also claims Guardians is improperly challenging the agency's methodology for assessing the risk of the Wishbone Allotment. Fed. Br. at 48–49. But again, the Forest Service ignores cases holding that a substantial dispute about an agency's methodology and the reasonableness of its conclusions warrants an EIS. Guardians Br. at 44, 46 (citing cases); Fed. Br. at 48–51. As this Court has stated, 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) (cleaned up); *see also Hausrath*, 491 F.Supp.3d at 802 (controversy existed where plaintiffs identified problems in agency methodology and data assessing effects). The significant dispute about the Forest Service's methods, data, and conclusion to reduce the risk rating of the allotment to moderate also warrants an EIS.

The third factor triggering the need for an EIS is that the Wishbone Decision will set a precedent for future decisions about domestic sheep allotments. While it may be true that future decisions would have their own site-specific analysis, Fed. Br. at 51–53, the Wishbone Decision sets a precedent for the methodology used to rate the risk of an allotment. The Forest Service will likely again use "local factors" to alter the Risk of Contact results for other allotments. Even the District

Court and Intervenor Farm Bureau agreed that the Wishbone analysis and decision would be applied to other allotments—statements the Forest Service ignores. Guardians Br. at 48 (citing I-App-49, 52–53, 59, 62, 64, 265). A more thorough EIS should be used to analyze a process that could influence future allotment decisions.

Finally, with regard to the potential for cumulatively significant effects due to potential disease transmission to other bighorn meta-populations and transmission from domestic sheep grazing other near-by lands, the Forest Service again points to the same few disjointed statements in the Wishbone EA and Decision, as well as information from a 2010 report. Fed. Br. at 54. But as explained above, this information does not equate to a meaningful analysis of potentially significant cumulative effects to bighorn sheep populations on the Rio Grande National Forest. *Supra* pp. 19–21.

III. THE FOREST SERVICE USED THE SIR TO IMPROPERLY AVOID SUPPLEMENTAL NEPA ANALYSIS.

In response to Guardians' argument that the Forest Service cannot use an SIR to provide an analysis that was missing from the original EA, Guardians Br. at 50–51, the agency argues that the telemetry data was not available when it prepared the EA. Fed. Br. at 57. As explained above, the record contains no evidence that the data was "unavailable," and instead shows that CPW provided the data once the Forest Service requested it. *See supra* p. 17. Using the SIR to

analyze data that existed before the Wishbone Decision was signed violates NEPA. *See* Guardians Br. at 50–51 (citing cases).

The Forest Service also argues that the SIR reasonably concluded the new information was within "the scope of effects" considered in the original analysis. Fed. Br. at 56, 60 (citing VI-App-189–90). It is unclear what this statement means. The "new" telemetry data certainly pertained to the same effect considered in the EA—risk of disease transmission from domestic sheep to bighorn sheep. The relevant question is whether the new data was "significant" for assessing that effect. 40 C.F.R. § 1502.9(c)(1)(ii); *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1151 (10th Cir. 2004).

The agency's argument that the new information was not significant is arbitrary and capricious. New data on locations and movements of these bighorns was critically important for re-assessing the herds' home ranges as well as the assumptions about movements and habitat use that were the basis of the "local factors." Thus, the data was significant for assessing the risk to bighorns from the Wishbone Allotment, warranting a supplemental NEPA analysis. Guardians Br. at 52–53.

Instead, the Forest Service prepared an SIR that actually confirmed the significance of the information: the SIR showed the Bristol Head bighorn herd's home range directly adjacent to the Crystal and Shallow pastures, and a 27%

higher risk of contact between the species. Fed. Br. at 58. Rather than recognizing that this information undermined the analysis and conclusions in the EA and Decision, the SIR doubled down on the local factors even though the new data confirmed the local factors did not apply to the Crystal and Shallow pastures, and also undercut assumptions about the South River pasture. VI-App-197–198 (bighorns moving toward and remaining next to Crystal and Shallow pastures during grazing season); VI-App-222 (bighorn sighting on South River pasture during grazing season). The agency included other new, post-hoc rationalizations in the SIR, such as a claim that the specific grazing areas *within* the Crystal and Shallow pastures were farther from the bighorns to try and downplay the significance of the new home range delineation. VI-App-217.

By keeping such key information within the SIR, the public did not have an opportunity to comment on the new data or the new analysis—subverting NEPA's goal of allowing public participation in agency decisionmaking. *Idaho Sporting Congress*, 222 F.3d at 567–68; *City of Port Isabel v. FERC*, 111 F.4th 1198, 1210–11 (D.C. Cir. 2024).

IV. PARTIAL VACATUR IS WARRANTED.

Remand and vacatur is the standard remedy for violations of NEPA. *High Country Conservation Advoc. v. U.S. Forest Serv.*, 951 F.3d 1217, 1228 (10th Cir. 2020). Vacating the Decision that authorized the Wishbone Allotment is

appropriate here because the agency's errors were serious and there would be *no* disruptive consequences from that action. *Allied-Signal v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir 1993). There are no active grazing permits for the Wishbone Allotment because both permits were cancelled in the past four years. Fed. Br. at 20, 36.[5] However, contrary to Intervenor Farm Bureau's claim, Farm Bureau Br. at 14, 36, the case is not moot because the Forest Service could authorize another permittee to graze the Wishbone Allotment in the future.

Guardians seeks just partial vacatur here, requesting that this Court vacate only the portion of the EA and Decision relating to the Wishbone Allotment. *See Cook Inletkeeper v. Raimondo*, 541 F.Supp.3d 987, 989 (D. Alaska 2021) ("Partial vacatur is also an acceptable form of relief under the APA") (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010)). The analysis and decision at issue here also converted the Snow Mesa allotments to vacant status, Fed. Br. at 60 n.15, but no one has challenged that portion of the analysis or decision and thus that portion should not be vacated.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court, hold

[5] Surprisingly, the prior permittees' brief does not reveal that their permits were cancelled and incorrectly indicates they will still graze the allotment. CWGA Br. at 10.

the Snow Mesa/Wishbone EA and Decision unlawful, and remand and vacate the portion of the EA and Decision that authorized the Wishbone Allotment.

Respectfully submitted, December 6, 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 6,496 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;

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Date: December 6, 2024

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