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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

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

WILDEARTH GUARDIANS and
WESTERN WATERSHEDS PROJECT,

Petitioners,

v.

U.S. FOREST SERVICE, a federal agency of the U.S. 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.

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW OF AGENCY ACTION

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INTRODUCTION

The Wishbone domestic sheep allotment presents a High Risk of disease transmission to nearby bighorn sheep herds—a much higher risk than that posed by other domestic sheep allotments that have been closed to domestic sheep grazing. Despite this risk, the Forest Service authorized use of the allotment by asserting that “local factors” showed the risk to bighorn sheep was only Moderate. The agency claims this Court must defer to its methods and therefore uphold the analysis and decision for the Wishbone allotment. Such deference is not due, however, when the application of those methods is irrational and inconsistent with prior actions, such as occurred here.

Contrary to Defendants’ assertions, the administrative record does not support the agency’s “local factors” to show the Wishbone allotment poses only a Moderate Risk to bighorn sheep. Instead, the record shows that the best available science supports the conclusion that this allotment—particularly the three largest pastures—poses a very high risk to bighorn sheep, and the Forest Service has not demonstrated how its local factors reduce that risk. Thus, the agency’s analysis and decision to authorize use of the Wishbone allotment are arbitrary and capricious.

Furthermore, Defendants’ response arguments concerning the risk of this allotment and use of “local factors” to downplay that risk only reinforce the substantial dispute and uncertainty about the allotment’s potential effect on multiple bighorn populations. The *potential* for significant effects to not only the Central San Juan bighorn herds but also bighorn populations adjacent to the Central San Juan herds requires preparation of an Environmental Impact Statement (EIS).

Finally, the Forest Service cannot excuse its improper use of a Supplemental

Information Report (SIR) by pointing the finger at Petitioners. Rather than admit that the agency should have fully analyzed the existing telemetry data in its NEPA analysis, Federal Defendant blames Petitioners for not giving it the data. Yet Petitioners did not obtain the data until months after the Wishbone decision was issued. The data provide significant information that must be incorporated into a new analysis that complies with NEPA's public disclosure and participation requirements.

ARGUMENT

I. THE WISHBONE ANALYSIS AND DECISION VIOLATED NEPA.

Defendants' responses rely heavily on the principle that the Court should simply defer to the Forest Service's conclusions about the risk of the Wishbone allotment to bighorn sheep because they are scientific determinations. Yet an agency's decisions do not warrant deference when they are inconsistent with prior practices or are irrational and unsupported by the record. In those instances, the agency's action is arbitrary and capricious. As explained below, the Forest Service points to nothing in the record that provides the necessary explanation and support for its Wishbone decision.

A. The Forest Service Failed to Explain Why it Acted Inconsistently with Prior Risk Analyses.

When an agency changes its policy and practices without acknowledging and explaining that change in position, such a change is arbitrary and capricious. *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125-26 (2016). "Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) (quoting *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986)); see also *Sorenson Communications, Inc. v.*

FCC, 567 F.3d 1215, 1223 (10th Cir. 2009) (agency must provide a rational explanation when it departs from an existing regulation or position). “An unexplained deviation from past practice can render an agency’s decision arbitrary and capricious. . . .” *WildEarth Guardians v. U.S. E.P.A.*, 770 F.3d 919, 941 (10th Cir. 2014).

As Petitioners’ opening brief noted, the Forest Service’s actions regarding the Wishbone allotment are inconsistent with its prior practices analyzing the risk of domestic sheep allotments, particularly its use of the Risk of Contact Model, and it offered no explanation for the departures. Pet. Opening Br. at 8-11, 21-22 (ECF No. 33). The agency first used the Risk of Contact Model on the Payette National Forest, where it determined that a rate of .08 bighorn contacts per year or less, with a disease interval of at least 46 years, was the appropriate risk level to ensure bighorn population viability. WA06001; Payette ROD at 10, 14, found at: <https://www.fs.usda.gov/payette>. The Payette decision closed allotments even when they were miles away from bighorn core home range and had no bighorn locations on them. WA05962-63, 05967, 06003.

When the Rio Grande National Forest first used the Risk of Contact Model for the Fisher/Ivy/Goose (FIG) allotment, it determined the risk of contact and expected disease interval for each of the seven pastures in the allotment. WA01811. Three of the pastures were 1-2.5 miles from bighorn core home range, while the other four pastures overlapped core home range. WA1801. The three non-overlapping pastures had bighorn herd contact rates of .18 or more contacts per year, and expected disease intervals of 22 years or less. WA01818. These three pastures were rated as High Risk because “[e]ven without direct overlap, high contact rates exist from the short foray distance to each pasture.” *Id.* The Forest Service stated: “The Risk of Contact Analysis

accurately quantifies in great detail, the degree of risk the allotment poses to bighorn sheep. The analysis goes above and beyond just the allotment analysis and examines the degree of risk on a pasture specific basis. The allotment and each pasture within the allotment is given a risk rating quantifying the degree of risk . . . The Risk of Contact determined that the degree of risk on the FIG Allotment is High.” WA02101. The Forest Service converted the entire allotment to vacant status. WA02099.

When initially assessing the Snow Mesa allotments, the Forest Service likewise used the Risk of Contact Model to determine the risk of contact and disease interval for each allotment under two alternative actions (these allotments were not separated into pastures). WA02420-36. Based on those results, the agency determined each allotment was High Risk under both alternatives. *Id.* The Forest Service did not use “local factors” to change the risk rating. *Id.* Notably, allotments that did not overlap any bighorn core home range but had annual herd contact rates of .47 to .59 and disease intervals of 6.8 to 8.4 years were rated as High Risk with “low probability of long-term herd persistence.” WA02422-27, 02430-36. The agency proposed to discontinue domestic sheep grazing on the allotments. WA02284.

For Wishbone, the Forest Service changed tactics in two key respects. First, although this allotment consists of seven distinct pastures, the agency did not evaluate the risk of each pasture, as it did for the FIG allotment. *Cf.* WA01811 *with* WA04030. Nor did the agency provide any explanation for why it did not assess the risk of each pasture when the pastures vary in size, location, and habitat—and thus undoubtedly would vary in risk of contact with bighorn sheep. WA03970-72, 03995-98, 04030-33.

Second, after completing the Risk of Contact analysis and finding High Risk for

the Wishbone allotment, with a contact rate of .98 and a 4-year disease interval, the Forest Service did not base its decision on that quantitative analysis, as it did for the Payette, FIG, and Snow Mesa allotments. WA04030. Instead, it created “local factors” to subjectively reduce the risk rating to Moderate without explaining why it was changing its practice or pointing to any scientific support for this approach. WA04032-33, 04038-39. The agency claims it used similar factors for the Snow Mesa allotments, Fed. Def. Br. at 16 (ECF No. 36), but the only “local factors” mentioned for those allotments are that bighorns use habitat on or adjacent to them and that project design criteria have not been successfully implemented there. WA04035-37.¹ No discussion occurred about seasonal movements of bighorn sheep, overlap of bighorn habitat and domestic sheep range, length of grazing season, or habitat barriers and fragmentation to “validate” or “invalidate” the Snow Mesa risk ratings. *Cf. id. with* WA04038-39; Fed. Def. Br. at 8.

In its response brief, the Forest Service offers a post-hoc explanation for its introduction of the “local factors” by claiming that the Risk of Contact Model guidance allows for use of local, site-specific data as part of the analysis process. Fed. Def. Br. at 8, 15-16. But the guidance refers to using local data to refine the *inputs* to the model, not to adjust the *output* (results) of the model. For instance, habitat information used in the model “should be reviewed for site relevance and modified as necessary based on local conditions. . . .” WA03891. In addition, default values in the model for the foray analysis can be altered if site-specific, scientifically derived data are available.

WA03886, 03891, 03895. *See also* WA03944-45 (discussing use of local data on

¹ The statement that project design features have not been successfully implemented directly contradicts Intervenor Colorado Wool Growers Association’s (CWGA) assertion about the effectiveness of such measures. CWGA Br. at 8. (ECF No. 37).

habitat, herd size, and herd sex ratio to adjust default values used as inputs to model). Even the length of grazing season can be adjusted when running the model. WA03945. As Federal Defendants admit, the model is *executed* using site-specific information to derive site-specific results. Fed. Def. Br. at 16; WA03948. The model guidance clearly allows for use of local, site-specific information to refine the data put into the model; it does not suggest using such information to adjust the results of the model.

Finally, the local factors would not apply to all seven Wishbone pastures equally given the distinct differences in pasture sizes, locations, remoteness, and habitat value. In fact, as discussed below, most of the factors would not apply to the largest pastures on the allotment—Crystal and Shallow—which account for almost half of the grazing season. *See infra* pp. 8-15. Yet because the Forest Service did not conduct a pasture-specific analysis for Wishbone like it did for FIG, it did not assess to what extent these local factors would reduce the risk of each pasture, instead using a generalized allotment-wide approach to hide pasture-specific details. WA04032-33, 04038-39. The lack of a rational explanation for the Forest Service’s inconsistent practices undercuts Defendants’ claims of deference.

B. The Forest Service’s Reliance on Local Factors Was Irrational.

The agency asserts that its local factors were well-supported by the record, Fed. Def. Br. at 23, but a close look at the record shows the opposite. Although review under the arbitrary and capricious standard is narrow in scope, it is still a “probing, in-depth review.” *Sorenson Communications*, 567 F.3d at 1221. A court will not “accept conclusory statements in lieu of a meaningful explanation.” *ZZYYM v. Pompeo*, 958 F.3d 1014, 1030 (10th Cir. 2020). Petitioners show below that use of each local factor

was flawed.

1. Spatial Separation

Defendants' response briefs and the Wishbone Risk Assessment state that there is "spatial separation" between domestic sheep on the Wishbone allotment and bighorn sheep, but that conclusion is based on a flawed calculation of bighorn home ranges. See, e.g., Fed. Def. Br. at 8, 14, 20, 22; CWGA Br. at 9; WA04032, 04038.

When calculating the bighorn core herd home ranges for use in the Risk of Contact Model, the agency used 90% of bighorn locations to determine the home ranges. Fed. Def. Br. at 5, n.3; WA03978, 04061, 05887. But the Risk of Contact Model states that home ranges should be based on 95% of bighorn locations. WA03887. The model's foray analysis will be incorrect if the core home ranges are based on a different percent of locations. *Id.* The User Guide states that "[t]he rationale for any change to this value (95%) should be documented. Additional changes to other portions of the model will be required to account for changes" to the percent of bighorn locations determining the core home ranges. *Id.* The Wishbone Risk Assessments did not document the rationale for using 90% of bighorn locations rather than 95%, nor even acknowledge that 95% is the value normally used. WA03978, 05887.

This difference is important because, as the User Guide states, a larger percent of locations will lead to a larger home range, which ultimately affects the risk of contact estimate. *Id.* The core home ranges of the Bristol Head and Bellows Creek herds are very close to many of the Wishbone pastures, and using 95% of bighorn locations to determine the home ranges could very well have shown overlap of home ranges with these pastures, eliminating the "spatial separation" the agency repeatedly touts.

WA04056, 05899-900. Such overlap “indicates interspecies contact is already likely occurring,” and automatically designates an allotment as High Risk. WA03896, 04063. The unexplained use of 90% of bighorn locations rather than 95% to determine home ranges undermined the entire Risk of Contact analysis and skewed the results. See ECF No. 28-1 at 3-6; ECF No. 29-2 at 2-3 (comments on SIR discussing this issue).

2. Temporal Separation

Defendants’ “temporal separation” argument suffers two flaws. First, they claim that a shorter grazing season than the default season used in the Risk of Contact Model justified lowering the risk. Fed. Def. Br. at 17; CWGA Br. at 11-12. Yet the model guidance specifically stated that a different season length could and should be factored into the model. WA03945. The guidance acknowledged that length of grazing season could affect the model results and therefore this parameter should be adjusted *when running the model*. *Id.* The Forest Service did not explain why it did not follow that guidance and account for the shorter grazing season within the Risk of Contact Model.

Second, the Forest Service argues that the record supports its claim of a “consistent temporal pattern” of bighorns moving away from the allotment to higher elevations during the summer. Fed. Def. Br. at 17-18. But the cited materials do not support this pattern. Federal Defendants’ first two citations refer to a bighorn ram from the Bristol Head herd moving north in July 2017. *Id.* at 18 (citing WA04031, 03779). This ram did move north in the summer, *toward the Crystal and Shallow pastures*, ending up only a half-mile from the Shallow pasture—which was “concerning” to a Colorado Parks and Wildlife (CPW) biologist. WA03779-80. This ram certainly did not support the “consistent pattern” of bighorns moving away from the allotment in summer.

The Forest Service also cites the CPW preliminary report on the telemetry data to argue the data showed a larger wintering area north of the allotment than currently documented. Fed. Def. Br. at 18 (citing WA04246-47). It is unclear how that fact relates to bighorn summer movements. The key point of the report was that the movement of these animals is less predictable and more extensive than previously thought, with elevational movements “occurring in winter, spring, and summer.” WA04246-47. Federal Defendants’ citations do not support the proposition that bighorns move in a consistent pattern away from the Wishbone pastures in summer.

3. Habitat Barriers and Fragmentation

The Forest Service again offers a post-hoc explanation to try to bolster its use of this factor. It now argues the Rio Grande River, Highway 149 and subdivisions act as barriers to bighorn movement only during the grazing season. Fed. Def. Br. at 18-19. Unsurprisingly, the agency offers no support for this contention.

It claims that low river flows that allow bighorns to cross the Rio Grande River occur outside the grazing season, but only cites to Petitioners’ standing declaration, which showed the river during “peak spring runoff.” Fed. Def. Br. at 19 & n. 8 (citing Ratner Decl. ¶ 18). Furthermore, the Forest Service cites nothing to establish that bighorns cannot cross the river during high flows. Fed. Def. Br. at 19. Given that bighorn sheep regularly cross the Salmon and Snake Rivers in Idaho, which are far larger than the Rio Grande River any time of year, it is irrational to assume bighorn cannot cross the Rio Grande River during summer. See Pet. Opening Br. at 24 (citing cases noting bighorns crossing Snake and Salmon Rivers). The Forest Service’s attempt to refute Petitioners’ evidence of bighorns on or crossing Highway 149 and

moving through subdivisions is equally weak. The agency cites nothing to show these documented movements do not occur during the grazing season and offers no reason why bighorns would not make such movements in summer. Fed. Def. Br. at 19.²

The Forest Service barely addresses Petitioners' argument that the Risk of Contact Model already accounted for habitat fragmentation, responding only in a footnote. Fed. Def. Br. at 19-20, n.9. This is a critical point, however, that severely undercuts use of this factor. The model incorporates habitat suitability into the foray analysis (model input) to determine the likelihood of a bighorn making a foray onto an allotment. The User Guide for the model noted specifically that bighorn suitable habitat, connecting habitat, and non-habitat should be reviewed and modified as necessary based on local conditions before inputting them into the model. WA03891.

Here, the Forest Service used habitat mapping "developed and tested" by CPW to identify bighorn suitable habitat, connectivity areas, and non-habitat for the model. WA04061. The model assumed that bighorn sheep are 34 times more likely to be in source habitat than non-habitat, and six times more likely to be in source habitat than connectivity areas. WA04061-62. Based on the "known bighorn sheep preferences for each of the three habitat classes," the model estimated how frequently and how far bighorns will travel outside their home ranges, and used this to calculate the probability of a bighorn reaching an allotment. WA04062. Therefore, based on the site-specific habitat mapping from CPW, the model already accounted for habitat fragmentation when determining the risk of contact for the allotment. The Forest Service's use of this

² Notably, none of the three "barriers" occur between the Crystal/Shallow pastures and the Bristol Head or San Luis Peak bighorn herd home ranges and thus, this factor would have little application to those pastures. WA03970, 04056.

same parameter to lower the risk rating after the model was run double-counts this factor and thus was unreasonable. See WA05669 (Decision Notice discussing factor).

4. Overlap of Bighorn Habitat and Domestic Sheep Range

The Forest Service's response to this factor again highlights the problem with the agency's allotment-wide analysis. It may be true that there is only 34% overlap between bighorn summer source habitat and domestic sheep range on the allotment as a whole, Fed. Def. Br. at 20, but individual pastures on the allotment have different levels of overlap. The Crystal and Shallow pastures have more overlap than the other Wishbone pastures, but the Forest Service did not assess each pasture. WA03971-72. In fact, the Crystal and Shallow pastures appear to have about as much bighorn habitat/domestic sheep range overlap as allotments or pastures rated as High Risk. See WA03968-69, 04035-37 (Table, Miners, and Ouray allotments under Alternatives 3 and 4), WA01800-01, 01818 (Ivy Creek and Fisher Creek pastures). If the agency had conducted a pasture-specific analysis for Wishbone as it did for FIG, it likely could not have used this factor to reduce the risk of the Crystal and Shallow pastures.

5. Bighorn Seasonal Movements

For this factor, the Forest Service reiterates the point about these herds making predictable movements away from the Wishbone allotment in summer. Fed. Def. Br. at 21-22. It claims this pattern was based on years of monitoring and preliminary telemetry data, but the citations provided do not support this statement. The first citation discusses a herd from the Weminuche population, not one of the herds closest to Wishbone, and the next two citations are to data collected *after* the Wishbone decision. WA03651-59, 05729-35, 05767-76. Two other citations, WA03988-95 and

WA04038-39, refer to the Wishbone Risk Assessment, which included the same conclusory statements about seasonal movements but did not contain the underlying data to support those statements. The final citation is to a 2017 survey, but a single year of data is not sufficient to show a predictable pattern. WA03770-78.

The preliminary telemetry data also undercut this factor. Data from just a small sample of animals showed unexpected and lengthy movements in various seasons. WA03779-85, 04245-47. One ram from the Bristol Head herd moved north to higher elevations in summer, as the Forest Service states, but that movement took him *toward* the Crystal and Shallow pastures, thus contradicting the assumption that bighorns move away from the Wishbone allotment in summer. WA03779-81. In fact, Intervenor CWGA acknowledges that domestic sheep will be in the higher-elevation pastures in summer when bighorns are at higher elevations, and domestics will be in the lower-elevation pastures in spring when bighorns are also at lower elevations. CWGA Br. at 9.

The Forest Service acknowledges that the Crystal and Shallow pastures create a potential for contact between the species but claims that grazing in those pastures would be “limited in duration.” Fed. Def. Br. at 21. However, those two pastures account for almost half of the grazing season, with the Crystal pasture providing the most days of grazing on the allotment and the Shallow pasture used just before and after. WA03997-98.³ The summer movement of Bristol Head bighorns toward these two pastures creates a high risk of contact given that domestic sheep will be grazing nearby for more than a month and given the attraction between the two species.

³ The Forest Service’s brief states that Crystal will be used for 35 days but it appears the Decision Notice reduced that to 30 days. WA05668. The 30 days on Crystal combined with 8 days on Shallow would account for 49% of the 78-day grazing season. *Id.*

6. Project Design Features

The final “local factor” to lower the risk rating was use of “project design features” to reduce the likelihood of stray domestic sheep and attraction of bighorn sheep. The Forest Service claims that the permittees fully complied with the Wishbone project design features in 2016, but that is incorrect. Fed. Def. Br. at 22. The record noted several violations in 2016, including grazing on private property, failure to move dead domestic sheep, and leaving salt blocks behind. WA02798-99, 03558-61, 05567.

The agency also asserts the significant problems with stray sheep that occurred in 2017 will not recur because it now requires the permittees to use two herders. Fed. Def. Br. at 22. But the 2016 and 2017 annual operating instructions for the Wishbone allotment *also* required two herders. WA03558, 03563 (both stating that one herder will get supplies while the other stays with the sheep). The fact that the permittees used only one herder in 2017 despite the requirement to have two herders just reinforces their history of noncompliance and undermines the Forest Service’s reliance on project design features. See Pet. Opening Br. at 25 (discussing history of noncompliance).

The Forest Service barely addresses the damning comments made by the permittees and CWGA concerning the difficulty managing sheep on the Wishbone allotment and the likelihood of stray sheep. Fed. Def. Br. at 23; WA05461, 05469. The agency simply notes that the problems are greater on just three of the pastures, but those three pastures are Crystal, Shallow, and South River—the largest and highest-risk pastures that account for 2/3 of the grazing season. Fed. Def. Br. at 23; WA05461, 03563. Even the Forest Service admitted that compliance with the project design

features was less likely on the more remote Crystal and Shallow pastures. WA05667.⁴

7. Combination of Factors

Finally, the Forest Service failed to explain or provide data showing how these “local factors” reduced the risk of the allotment down to Moderate when the Risk of Contact Model showed extreme High Risk. The Wishbone Risk Assessment reported the model’s results as: (1) bighorns contacting the allotment once a year, (2) a disease interval of 4 years, and (3) 1 mile between the allotment and bighorn core home range. WA04030. In contrast, the Assessment defined Moderate Risk as: (1) bighorn contact with an allotment once every 8-10 years, (2) a disease interval of 32-40 years, and (3) 10-15 miles between the allotment and bighorn core home range. WA04030, 04002. The Forest Service failed to explain how the local factors reduced the risk so significantly to achieve a Moderate Risk rating. WA04031-33, 04038-39. Tellingly, Federal Defendants’ brief does not address this issue despite Petitioners pointing it out. Pet. Opening Br. at 21-22, 26; Fed. Def. Br. at 14-23. This explanation was particularly important because, as explained above, most of the “local factors” did not apply to the Crystal and Shallow pastures that account for almost half of the grazing season.

Intervenor CWGA states that CPW supported creation of the Wishbone allotment, citing to CPW’s comments on the Proposed Action. CWGA Br. at 17-18 (citing WA02805-06). Those comments did not claim the allotment was only Low or Moderate Risk, just that it would help create separation of the species compared to the

⁴ CWGA repeatedly relies on the project design features in its brief, CWGA Br. at 8, 9-11, 16-17, 19, but those features will only assist with separation of the species if the permittees fully comply with them. Past noncompliance, including in 2016 and 2017, undermines this reliance. Moreover, experts have repeatedly stated such measures are ineffective at keeping the species separate. See Pet. Opening Br. at 4.

Snow Mesa allotments. WA02805-06. Notably, these comments were written before the Wishbone Risk Assessment was completed and before telemetry data showed a Bristol Head bighorn ram moving into close range of the Crystal and Shallow pastures in July 2017. *Id.*; WA03956, WA003779. Even without that information, CPW recognized that the Crystal and Shallow pastures created a risk of contact with bighorn sheep. WA02806. CPW's comments do nothing to establish that the Forest Service's Moderate Risk rating for the allotment was reasonable.

The lack of explanations and data in the record to support the agency's decision renders the Wishbone NEPA analysis arbitrary and capricious. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 713-15 (10th Cir. 2009); *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1235-37 (10th Cir. 2017); *High Country Conservation Advoc. v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1196-99 (D. Colo. 2014) (all overturning NEPA decisions that were irrational and not supported by the record).

C. The Forest Service Should Have Obtained and Analyzed All Existing Telemetry Data Before Issuing the Wishbone Decision.

The agency had an obligation to use the "best available science." *Lee v. U.S. Air Force*, 354 F.3d 1229, 1244 (10th Cir. 2004); *Colorado Env'tl. Coalition v. Dombeck*, 185 F.3d 1162, 1171-72 (10th Cir. 1999). To fulfil this duty, the agency "should 'seek out and consider all existing scientific evidence relevant to the decision' and 'cannot ignore existing data.'" *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 451 F.3d 1183, 1194 n.4 (10th Cir. 2006) (citing *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 436 (8th Cir. 2004)). Here, the Forest Service knew CPW's telemetry data existed and could inform the Wishbone analysis. See WA03779-85, 04245-48. The Forest Service admits it did not obtain the telemetry data for its decision-making process, but it contends now that

the data were unavailable. Fed. Def. Br. at 23-24. This position is belied by the record and the ability of both Petitioners and the Forest Service to later get the data.

The Forest Service asserts that CPW considered the data confidential, did not want it released to the public, and did not share it with the Forest Service until 2019. Fed. Def. Br. at 24. Yet nowhere does the Forest Service state it affirmatively requested the data from CPW and CPW denied that request, nor is there any such request and denial documented in the record. *Id.*; ECF No. 15-2 at 11-12 (AR Index for External Communications). The agency cannot ask this court to base its review on merely insinuated actions. *Dep't of Comm. v. New York*, 139 S.Ct. 2551, 2573 (2019) (courts are “limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record”); *Utah Env'tl. Cong. v. Bosworth*, 439 F.3d 1184, 1193 (10th Cir. 2006) (courts must examine agency decision based on information in the administrative record). When the Forest Service finally did ask CPW for the data, well after issuing the Wishbone decision, the agencies negotiated an agreement that put the data in the Forest Service’s hands. See WA05838 (data request), 05847 (agreement). Petitioners were also able to obtain the data from CPW. See Ratner Decl. ¶ 25. The record does not support the Forest Service’s claim that the data were unavailable.⁵

The agency’s suggestion that the data were too costly to obtain makes no sense when the data already existed and the Forest Service simply had to request it. Fed. Def. Br. at 23-24. This was not a situation that involved expensive *new research*. See *Lee*, 354 F.3d at 1244 (declining to require new livestock studies to replace existing

⁵ The Forest Service’s claim of unavailability is even more suspect given that the two agencies worked together during the analysis process. WA03978, 04041, 04057.

research); *Colo. Env'tl. Coalition*, 185 F.3d at 1172-73 (declining to require new lynx studies). Likewise, the agency's claim that the data were unnecessary, Fed. Def. Br. at 25, does not square with the record and its own practice. CPW stated that telemetry data were important to better understand bighorns' habitat use in summer. WA04167. The Forest Service itself recognized the telemetry data would inform its Risk Assessment, particularly seasonal habitat use and movements of bighorns in relation to the Wishbone pastures. WA03989. The agency never deemed the data unnecessary and in fact, for the nearby Weminuche allotments, it delayed the EIS to wait for data of this very nature. See Pet. Opening Br. at 28 (citing Weminuche EIS). At a minimum, the Forest Service should have obtained the data that existed at the time of its analysis.

Finally, the agency asserts that reports from CPW with preliminary findings from the data were sufficient for the Wishbone analysis. Fed. Def. Br. at 24-25. Although the Risk Assessment briefly acknowledged some of the early data, it did not discuss whether the data validated the local factors. WA03989-91, 04031-33, 04038-39. As described in Part I.B above, CPW's preliminary information showed *holes* in some of those assumptions and thus called into question the Forest Service's conclusions. Given the relevance of the data to the local factors, the agency should have analyzed all the existing data to verify if its assumptions were valid. Unlike the cases cited by the agency, obtaining the data here was important for the decision-making process and could have influenced the Forest Service's conclusions. Fed. Def. Br. at 24-25.

By not seeking out and considering existing relevant data for the Wishbone EA, the agency not only failed to use the best available science but also violated its duty to disclose to the public all information relevant to government decision-making and

environmental analysis. *Baltimore Gas & Elec. Co. v. Nat. Resources Def. Council, Inc.*, 462 U.S. 87, 100 (1983); see also 40 C.F.R. § 1500.1 (requiring high-quality information, accurate scientific analysis and public scrutiny in NEPA analyses).

D. The Wishbone EA Failed to Evaluate Indirect Effects.

Federal Defendants and Intervenor Colorado Farm Bureau (CFB) assert that the Forest Service has wide discretion to determine the scope of effects and the action area analyzed under NEPA. Fed. Def. Br. at 26; CFB Br. at 17 (ECF No. 38). While this may be true, the agency has a duty to consider all direct, indirect, and cumulative effects of a proposed action. 40 C.F.R. § 1508.25(c). “Indirect effects are effects that ‘are caused by the action and are later in time or farther removed in distance [than direct impacts], but are still reasonably foreseeable.’” *WildEarth Guardians v. U.S. Off. of Surface Mining, Reclamation & Enforcement*, 104 F. Supp. 3d 1208, 1229 (D. Colo. 2015) (finding NEPA violation where agency failed to consider indirect effects from coal combustion when approving a coal mining plan). “Agencies need not have perfect foresight when considering indirect effects When the *nature* of the effect is reasonably foreseeable but its *extent* is not, the agency may not simply ignore the effect.” *Id.* at 1230 (internal quotation omitted, emphasis in original); see also *Utahns for Better Transp.*, 305 F.3d at 1179-80 (failure to address indirect impacts to birds outside immediate vicinity of project); *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002), *abrogated on other grounds by Dine Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1104, 1276 (10th Cir. 2016) (failure to consider indirect impacts of highway construction that would occur later in time).

Here, the Forest Service failed to assess in the Wishbone Risk Assessment and

EA two reasonably foreseeable indirect effects of authorizing the Wishbone allotment: disease transmission to bighorn herds adjacent to the Central San Juan herds, and future increased risk to the Central San Juan herds if they grow in size.

First, disease transmission to herds that are farther from the Wishbone allotment is reasonably foreseeable. As Petitioners explained previously, three additional bighorn herds are within predicted foray distance of the Wishbone allotment. Pet. Opening Br. at 30 (noting herds are within 12 miles of allotment). The Forest Service dismissed considering effects to the Weminuche herd based on the FIG analysis, but that analysis supports Petitioners' argument. Fed. Def. Br. at 26-27. The agency claimed that the Ivy Creek pasture of FIG, which is almost adjacent to the South River pasture of Wishbone, was the "lowest risk" of the FIG pastures, but that statement is misleading as the FIG Risk Assessment rated *every* pasture as *High Risk* to the Weminuche herd. WA05639, 05672-73, 01818. Given how close the Wishbone South River pasture is to the FIG Ivy Creek pasture, the risk would be similar. A San Juan West bighorn herd is equally close to the Wishbone allotment. Fed. Def. Br. at 27. The Risk of Contact Model analyzes forays out to 21 miles based on known foray distances, WA04062, and thus all three adjacent bighorn populations should have been modelled for risk.

Additionally, the Forest Service asserts that it recognized the risk of Central San Juan bighorns passing disease to neighboring herds, but simply mentioning this risk as an "uncertainty" in the Risk Assessment and briefly noting the possibility of interaction between herds in the Decision Notice does not fulfill NEPA's duty to take a hard look at indirect effects of the action. Fed. Def. Br. at 27 (citing WA04045, 05677-78). The record contains ample evidence of historical and current interaction between Central

San Juan bighorn herds and herds from other populations. See Pet. Opening Br. at 30-31. Indeed, bighorns from one of the San Juan West herds (S33) were seen from a monitoring location for the Bristol Head bighorn herd. WA05735. If a person can see animals from both herds from one location, those animals are certainly close enough to interact. Even the Natural Arch bighorn population is at risk from interactions, and it is suspected that a bighorn from the Bellows Creek herd passed disease to that population in the past. WA01816. The record shows it is reasonably foreseeable a bighorn from a Central San Juan herd could pass disease to a bighorn from an adjacent herd, and the Wishbone Risk Assessment should have considered and disclosed the potential impacts to those neighboring herds from that event.

Second, it is reasonably foreseeable that the Central San Juan herds will increase in size, thereby increasing the risk of contact with domestic sheep using the Wishbone allotment. WA04139. The Forest Service claims it is unlikely the herds will significantly increase, Fed. Def. Br. at 28, but the whole point of the Forest Service's Wishbone decision was to reduce the risk of disease transmission to these herds by closing the Snow Mesa allotments and using a lower-risk Wishbone allotment. Under the agency's own reasoning, these herds should rebound from the past effects of disease and poor lamb recruitment and expand into the unoccupied suitable habitat that exists. See WA04140 (habitat capable of supporting considerably larger population of bighorn). In fact, the agency acknowledged in the FIG analysis that it expected the Weminuche bighorn population to grow and expand into unoccupied habitat. WA01788. "[O]utlining a plan of action" to take in the future if the herds grow in size does not constitute a hard look at the indirect effects (later in time) of authorizing the Wishbone

allotment. Fed. Def. Br. at 28 (citing WA05676, 04139). *WildEarth Guardians*, 104 F. Supp. 3d at 1230 (cannot ignore indirect effects where the type of the effect is reasonably foreseeable even if the extent of effect is speculative).

II. THE FOREST SERVICE NEEDED TO PREPARE AN EIS.

An EIS is required where there are substantial questions about whether an agency action will have a significant effect on the environment. *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 868 (9th Cir. 2020). To avoid completing an EIS, an agency must provide within the FONSI “a convincing statement of reasons” as to why an action’s impacts are insignificant. *Id.* at 869. The Forest Service has not met that burden here.

A. Highly Controversial and Uncertain

Defendants point to various cases for the propositions that public opposition alone or dissatisfaction with an agency’s methods is not sufficient to show an action is highly controversial. Fed. Def. Br. at 30-31; CFB Br. at 6-7. Petitioners do not rely on such contentions. Instead, Petitioners cited the applicable standard that controversy exists when there is a substantial dispute as to the size, nature, or *effect* of the action. *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002). As noted by the Forest Service, a substantial dispute exists when evidence in the record “casts serious doubt upon the reasonableness of an agency’s conclusions.” Fed. Def. Br. at 30 (citing *Nat’l Parks & Conservation Ass’n v Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010)). A court must determine whether an agency’s challenged method had a rational basis and took into consideration the relevant factors. *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1212-13 (10th Cir. 2002); *see also*

Biodiversity Conservation Alliance v. U.S. Forest Serv., 765 F.3d 1264, 1275 (10th Cir. 2014) (substantial dispute occurs when the record casts substantial doubt on the adequacy of agency’s methodology and data). Notably, to determine whether an EIS is required, an agency must consider all direct *and* indirect effects of its action. *Utah Shared Access All.*, 288 F.3d at 1214.

Here, the record casts serious doubt on the adequacy of the agency’s analysis and data, and the reasonableness of its conclusions, regarding the key effect from authorizing the Wishbone allotment: risk of disease transmission to bighorn sheep. See WA02294-95, 05236-37 (risk of contact between species was one of two key issues analyzed in the EA). As discussed above, the Forest Service’s subjective conclusion that the allotment was only Moderate Risk was based on use of “local factors” that were highly disputed individually and lacked any scientific basis to support the conclusion that the combination of these factors would lower the risk enough to meet the contact-rate and disease-interval criteria for Moderate Risk. The agency also failed to incorporate relevant data and to consider all reasonably foreseeable indirect effects.

Public comments and objections pointed out many of these flaws and attached relevant science, court decisions, and expert opinions to dispute the Moderate Risk rating for the Wishbone allotment. WA02810-25, 02832-37, 05448-50, 05476-85, 05565-70. WA02598-602, 02605-49, 02652-53, 05451-54, 05494-564, 05575-605. In sum, the record evidence casts serious doubt on the reasonableness of the agency’s analysis and conclusions regarding effects of authorizing the Wishbone allotment.

Defendants go to great length to distinguish the facts of the cases Petitioners cited, but the holdings of those cases are on point. Fed. Def. Br. at 32-34; CFB Br. at 7-

9. An action is highly controversial where the record shows a significant dispute about the extent of potential impacts due to varying, inadequate, or incomplete analyses. *Middle Rio Grande Conservancy Dist.*, 294 F.3d at 1229; *Babbitt*, 241 F.3d at 736-37; *San Luis Valley Ecosystem Couns. v. U.S. Forest Serv.*, 2007 WL 1463855, at *10, No. 04-cv-1071-MSK (D. Colo. May 17, 2007). A recent case is even more on point, finding a timber project “highly controversial” where Plaintiffs had provided scientific information disputing the agency’s assertions and conclusions about the effects of the proposed forest thinning activities, similar to the scientific dispute at issue here. *Bark*, 958 F.3d at 870-71. This dispute is of “substantial consequence” because the Forest Service concluded the allotment’s risk to bighorn sheep was “acceptable” *only* because it reduced the risk to Moderate. *Bark*, 958 F.3d at 871; WA05660, 05664-65, 05678.

The Forest Service’s argument that the effects of its action are not highly uncertain is similarly unavailing. The risk to bighorn sheep from domestic sheep is indeed well-known and scientifically-supported. Fed. Def. Br. at 35. And while disease transmission to bighorn sheep leads to predicable results—pneumonia die-offs and poor lamb survival—the likelihood, frequency, and extent of such transmission is highly uncertain under the facts here. The “trusted” tool used by the Forest Service to “accurately assess the degree to which an allotment could affect bighorn sheep” is the Risk of Contact Model, which showed the Wishbone allotment was High Risk. Fed. Def. Br. at 35; WA04030. Instead of relying on this trusted tool, however, the Forest Service created new local factors to subjectively reduce the risk of the allotment to Moderate. The questionable use of these factors creates substantial uncertainty about the Forest Service’s Moderate Risk conclusion.

Moreover, the Forest Service did not even consider the risk to neighboring bighorn populations, creating further uncertainty about the allotment's full impacts. The Wishbone Risk Assessment itself contained more than ten pages discussing all of the uncertainties inherent in the analysis. WA03965-66, 03988-95, 04041-45. These uncertainties were not minor points but went to the heart of the analysis, showing the effects of authorizing the Wishbone allotment were "highly uncertain." *Anderson v. Evans*, 371 F.3d 475, 489-92 (9th Cir. 2004).

As Petitioners pointed out, the FONSI admitted that controversies and uncertainties existed with regard to the effects of its proposed action but provided no explanation as to why those controversies and uncertainties were not sufficient to warrant an EIS. Pet. Opening Br. at 17, 18 (citing WA05680-81). The Forest Service does not even address this deficiency in its response. Fed. Def. Br. at 30-36. The lack of a rational explanation as to why those factors did not show potentially significant effects renders the FONSI arbitrary and capricious. Petitioners have shown that the key issue assessed by the agency—the degree of risk the Wishbone allotment poses to bighorn sheep—was highly controversial and highly uncertain, warranting an EIS.

B. Precedential Impact and Cumulative Impacts

Two additional significance factors weigh in favor of completing an EIS. First, this action may set a precedent for future actions. Petitioners do not contest the Forest Service's point that the agency would conduct separate site-specific NEPA analyses for future grazing authorizations. Fed. Def. Br. at 37, WA5681. The precedent set by the Wishbone decision is not the *authorization* but the *tactic* the agency used to contradict the results of the Risk of Contact Model and subjectively lower the risk rating for the

allotment. Prior to Wishbone, the Forest Service used the Risk of Contact Model as its basis for determining the risk of an allotment to bighorn sheep. See *supra* pp. 3-5. The Forest Service diverted from this practice for Wishbone by incorporating unsupported “local factors” to lower the risk, and will likely continue to use the new tactic in the future—including for the Weminuche allotments grazed by Intervenor J. Paul Brown.

Indeed, CFB Intervenor sought intervention due to the Wishbone decision’s precedential impact on other allotments. They noted the Wishbone decision would influence the decision on J. Paul Brown’s allotments, and would affect other allotments in the region. ECF No. 13-1 at 4, 7-8; ECF No. 19 at 2, 5, 7. This Court agreed that “there is a reasonable possibility that analysis and decisions applicable to the Wishbone Allotment will be applied to other allotments.” ECF No. 30 at 9. These statements belie the Forest Service’s assertion that the Wishbone decision will not set a precedent.

Second, domestic sheep grazing on other lands could pose additional risk to the same bighorn herds threatened by the Wishbone allotment, but the Forest Service failed to consider that potentially significant cumulative impact. WA05286, 05322-23, 05681. The agency suggests that Petitioners must identify other grazing allotments, but it is the agency’s duty to consider all direct, indirect, and *cumulative* effects of its action. Fed. Def. Br. at 38; 40 C.F.R. § 1508.25(c). At a minimum, the Weminuche allotments add to the risk posed by Wishbone, and other Forest Service, BLM, or private land domestic sheep grazing likely also adds to that risk. See CFB Br. at 18 (discussing Weminuche allotment analysis assessing risk to same bighorn populations); WA03946, 06016-22 (cumulative effects discussion in Payette EIS considered effects of BLM allotments and private flocks). The Forest Service claims it has vacated a number of domestic sheep

allotments in the past decade, but it fails to disclose how many allotments remain on the forest. Fed. Def. Br. at 38. The Forest Service 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.

Four of the intensity factors apply here and mandate preparation of an EIS. The Forest Service recognized the need for an EIS to assess the risk of the neighboring Weminuche allotments. See ECF No. 19 at 9 (noting that agency reversed its initial plan of issuing a FONSI for Weminuche allotments and instead stated it would prepare an EIS). The Forest Service violated NEPA by failing to take the same action here.

III. THE SIR IMPROPERLY AVOIDED A VALID SUPPLEMENTAL ANALYSIS.

Defendants claim the Forest Service’s use of the SIR was proper, but in reality, it was an end run around the agency’s flawed EA that violates NEPA. Acknowledging the deficiency in its initial Risk Assessment and EA by not incorporating the CPW telemetry data, the Forest Service re-ran the Risk of Contact Model and conducted a new assessment with the data. But rather than disclose this to the public, as it did for the first assessment, it used the SIR to hide the model’s results showing a 27% *increase* in risk over the original results for Wishbone and then make an unreasonable determination that the “new” information did not warrant supplemental NEPA analysis.

As discussed in Petitioners’ opening brief, the key problem with the SIR is that the agency is using it to plug a hole in the EA, which is improper. Pet. Opening Br. at 32-33. The Forest Service claims the SIR was not an improper post-hoc rationalization,

but the two cases it cites are inapposite. Fed. Def. Br. at 41. In the first, the court held that the SIR provided additional explanation and articulation of an analysis the agency had already completed; it was not a new analysis using data the agency had not previously considered. *Kunaknana v. U.S. Army Corps of Eng'rs*, No. 3:13-cv-00044-SLG, 2015 WL 3397150, at *4 (D. Alaska May 26, 2015). The second case was distinct as well, where the SIR was used only to address public comments that arose for the first time after the decision was issued, and the court held the SIR was not an improper post-hoc rationalization “under the facts and circumstances of this case.” *Friends of the Bitterroot, Inc. v. U.S. Forest Serv.*, 900 F. Supp. 1368, 1372 (D. Mont. 1994).

The use of the SIR here to analyze information that the agency should have incorporated into the initial Risk Assessment and EA is an improper attempt to cure that deficiency without undertaking proper decision-making and public participation procedures that are the heart of NEPA. *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 566-68 (9th Cir. 2000); *Friends of the Clearwater v. McAllister*, 214 F. Supp. 2d 1083, 1087-89 (D. Mont. 2002), *aff'd* 58 Fed. Appx. 686 (9th Cir. 2003).

The Forest Service takes aim at Petitioners for not submitting the data to the agency during the administrative process, Fed. Def. Br. at 42, but Petitioners did not receive the data from CPW until October 2018, eight months *after* the agency issued the Wishbone decision. Ratner Decl. ¶ 25; WA05682. Indeed, the data covered telemetry locations collected through July 4, 2018, so Petitioners could not possibly have obtained it prior to the March 2018 decision as the Forest Service claims. Ratner Decl. ¶ 25. Petitioners knew of the data during the analysis process due to references in the Wishbone Risk Assessment. WA03967, 03989-91, 04031, 04045. When they

surprisingly learned through a Freedom of Information Act request that the Forest Service did not actually have the data, Petitioner WWP requested and obtained it from CPW—well after the Wishbone decision was final.

Additionally, the SIR violated NEPA because the agency's conclusion that the new information was not significant, and therefore did not require supplemental NEPA analysis, was arbitrary and capricious. Defendants all claim that the Forest Service reasonably determined the new data did not change the conclusions in the prior Risk Assessment. Fed. Def. Br. at 43; CWGA Br. at 23-24; CFB Br. at 13. As explained above, however, the conclusions in the prior assessment were unsupported and irrational, and the new data only makes those conclusions more arbitrary.

Defendants rely heavily on assertions that the updated data still show bighorn core home range does not overlap any pastures, and seasonal movements reduce the risk further, but those assertions are flawed. Fed. Def. Br. at 43; CWGA Br. at 23. First, as explained above, the Forest Service improperly based the core home range designation on only 90% of bighorn locations, rather than 95% as required by the Risk of Contact Model. *Supra*, pp. 7-8; WA03887, 05887. Even using just 90% of locations, the data created larger bighorn core home range that was now directly adjacent to the Crystal and Shallow pastures; using 95% of locations would likely show overlap with those and possibly other pastures. WA05900; ECF No. 28-1 at 3-6; ECF No. 29-2 at 2-3. The data also confirmed that Bristol Head bighorn rams moved toward the Crystal and Shallow pastures in summer and remained very close to those pastures during the grazing period. WA05909-22. Because those two pastures account for a large portion of the grazing season and are the hardest to manage, with project design features being

least effective, there is a high risk of contact between domestic sheep grazing those pastures and bighorns in very close proximity. *See supra* pp. 13-14.

The SIR also failed to explain how, even though the data showed a substantially higher risk to bighorn sheep, the same local factors were still sufficient to reduce that risk all the way down to Moderate. With the new core home range and updated bighorn herd population estimates, the Risk of Contact Model showed a contact rate of 1.26 contacts per year, compared to .98 in the 2017 Risk Assessment, an increase of 27%. WA05889. Notably, the SIR did not identify the corresponding disease interval, but it would have been more frequent than the 4-year interval that resulted from .98 contacts per year. *Id.*; WA04030.⁶ The SIR relied on the same flawed local factors discussed above and again failed to explain how those factors were now sufficient to reduce the risk even further to meet the Moderate Risk criteria of one contact every 8-10 years and a 32-40 year disease interval. WA05889-93, 05896; WA04002.

Finally, dismissing as insignificant the sighting of two bighorn sheep on the South River pasture in July 2019 was also irrational. WA05895-96. The SIR repeatedly states that the telemetry data did not show any bighorns on Wishbone pastures, but only 10-15% of each herd had telemetry collars. WA05888, 05890, 05892, 04245. Bighorns observed on the South River pasture prove that the animals entered a Wishbone pasture, and very likely others have too given that several pastures are adjacent to bighorn core home range. This sighting also contradicts several of the Forest Service's local factors, including that bighorns move away from that pasture in summer, that the

⁶ The Payette EIS identified a contact rate of 1.28 contacts per year as having a disease interval of 3.7 years under the moderate probability of outbreak scenario (.25) used in the Wishbone Assessment. WA05989, 06013 (data for Alternatives 3,4,6); WA04030.

Rio Grande River and roads are barriers to bighorn sheep, and that bighorns will not use the pasture because it has little suitable habitat. WA03971, 3973. This sighting shows uncollared bighorns are using more area and at different times than what is documented by the 10-15% of bighorns with collars, which is significant information.

Comments pointed out these and other flaws with the SIR analysis, and the High Risk posed particularly by the Crystal, Shallow, and South River pastures, but the Forest Service avoided considering these comments by using the SIR. ECF Nos. 28-1, 28-2, 29-1, 29-2, 29-3. Because the telemetry data confirmed that use of the Wishbone allotment could have potentially significant effects to bighorn sheep, the Forest Service must properly supplement its NEPA analysis and cannot use the SIR as a substitute. *Idaho Sporting Cong.*, 222 F.3d at 566-68.

IV. 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”); *Dine Citizens Against Ruining Our Env’t v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019) (remanding and vacating EAs and FONSI).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court grant their petition for review, set aside the Wishbone EA and DN/FONSI, and order the Forest Service to complete an EIS before authorizing use of the Wishbone Allotment.

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