



**Objections to the
Shoshone
Land Management Plan
Draft Decision**

Submitted by:

North American Packgoat Association

March 20, 2014

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On behalf of the North American Packgoat Association, I hereby timely submit these Objections to the Shoshone Land Management Plan Draft Decision. I also request a meeting with the reviewing officer on behalf of the North American Packgoat Association to discuss the Objections herein and to aid in the resolution thereof.

Date: March 20, 2014

/s/ Andrew A. Irvine
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I. Introduction to Objections

The North American Packgoat Association (“NAPgA”) timely files objections to the Draft Record of Decision (“Draft ROD”), Final Environmental Impact Statement (“FEIS”) and revised Land Management Plan (“LMP”) of the Shoshone National Forest Land Management Plan Revision. *See* 79 Fed. Reg. 3200, 3200-01 (Jan. 17, 2014) (Notice of Availability); <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning/?cid=stelprdb5379153> (plan revision webpage). Notice of the 60-day objection filing period was published in the Denver Post on January 24, 2014. *See* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5446566.pdf. Objections are provided pursuant to the Forest Service’s pre-decisional administrative review process at 36 C.F.R. Part 219, Subpart B (2013). The objection filing period expires on March 25, 2014.

NAPgA urges the Forest Service to thoroughly consider these objections and respond in accordance with the pre-decisional administrative review process. NAPgA welcomes the opportunity to meet with the reviewing officer to discuss the issues raised in these objections and the potential resolution of such issues.

NAPgA and its numerous goatpacking-members will be affected by the management direction proposed in the Draft ROD and LMP. The proposed management direction would result in closure of one of the premier goatpacking areas in the nation and set a bad precedent for other forests to follow in managing goatpacking. These objections will better inform the Draft ROD, FEIS and further develop the efficacy of the management direction as defined by the LMP.

A. Overview of the North American Packgoat Association

The North American Packgoat Association, Inc., is an organization established specifically for promoting packing with pack goats. The organization was incorporated in March, 2001, as a 501(c)(3) non-profit organization.

NAPgA seeks to further the pursuit of goatpacking by sharing the knowledge, ideas, and experiences of its members, by promoting the use of pack goats to the public as a means of low impact wilderness transportation and recreation, by serving as an advisory group on local and national land use issues, and to engage in other activities related to educating the public about goatpacking.

B. Background on the Draft ROD, FEIS and LMP

On November 14, 2011, the Forest Supervisor for the Shoshone National Forest (“Shoshone” or “Shoshone NF”) issued Forest Order 02-14-00-12-01 concerning “Temporary Area Closure to Domestic Goat Use” (“Order”). *See* Shoshone National Forest, Order 02-14-00-12-01 (Nov. 14, 2011), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5340051.pdf (last visited Sept. 6, 2012). Pursuant to 36 C.F.R. § 261.50(a), the Order temporarily prohibited: “Possession or use of domestic goats on any National Forest System lands on the Wapiti, Clarks Fork, Greybull and Wind River Ranger Districts” as depicted on a map accompanying the Order.

In April 2012, the Shoshone NF published an analysis of the effects of disease transmission from domestic sheep and goats on the Shoshone to bighorn sheep populations occurring within and near the Shoshone. *See* Shoshone National Forest, “Risk Analysis of Disease Transmission between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep” (“Shoshone RADT Report”) (Apr. 2012), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5383002.pdf (last visited Sept. 6, 2012). The Shoshone RADT Report recommended that the Shoshone “[c]lose all occupied core native bighorn sheep habitat and the area within 26 km of the occupied core native habitat to domestic goat (includes pack goat) use.” *Id.* at 15.

In July 2012, the Shoshone NF published its Draft EIS and Draft LMP relying on the Shoshone RADT Report. *See* Shoshone National Forest, “Draft Environmental Impact Statement, Shoshone Land Management Plan Revision” (July 2012), available at <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning?cid=stelprdb5379153> (last visited Sept. 6, 2012); Shoshone National Forest, “Draft Land Management Plan, Shoshone National Forest” (July 2012), available at <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning?cid=stelprdb5379153> (last visited Sept. 6, 2012). The Draft LMP was intended to revise the Shoshone National Forest 1986 Land Management Plan (“1986 LMP”) as amended.

Comments on the DEIS and Draft LMP were requested by the Shoshone NF as required by 40 C.F.R. §§ 1502.9, 1503.1. *See* 77 Fed. Reg. 46,433 (Aug. 3, 2012) (Notice of Availability); *see also* Shoshone National Forest, Draft Plan Revision Documents, available at <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning?cid=stelprdb5379153> (last visited Sept. 6, 2012) (requesting comments). On October 10, 2012, NAPgA timely submitted comments on the DEIS and Draft LMP. Among other violations, NAPgA’s comments established that the Shoshone NF violated the Federal Advisory Committee Act (“FACA”), the National Environmental Policy Act (“NEPA”), the National Forest Management Act (“NFMA”), and the Administrative Procedure Act (“APA”) in preparing the DEIS and Draft LMP. NAPgA requested that these violations be remedied in the Draft ROD, FEIS and LMP. A copy of these comments is attached as Exhibit 1.

On January 17, 2014, the Shoshone NF published the Draft Record of Decision (“Draft ROD”), Final Environmental Impact Statement (“FEIS”) and revised Land Management Plan (“LMP”) of the Shoshone National Forest Land Management Plan Revision. *See* 79 Fed. Reg. 3200, 3200-01 (Jan. 17, 2014) (Notice of Availability); <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning/?cid=stelprdb5379153> (plan revision webpage). These documents again relied on the Shoshone RADT Report. *See* Draft ROD at 9; FEIS at 53, 224, 226, 767, 771, 782, 840. The Shoshone NF provided for a 60-day objection filing period pursuant to the Forest Service’s pre-decisional administrative review process at 36 C.F.R. Part 219, Subpart B (2013). The objection filing period expires on March 25, 2014.

The Draft ROD presents the Shoshone NF Supervisor’s decision to select Alternative G as presented in the FEIS to serve as the basis for the revised LMP for the Shoshone NF. Draft ROD at 1. Under Alternative G, “[d]omestic goats will not be allowed in core native bighorn sheep range in response to concerns over disease transmission to bighorn sheep.” *Id.* at 9. This

prohibition is repeated in the summary of Alternative G in the FEIS: “[d]omestic goats would not be allowed in core native bighorn sheep range.” FEIS at 47. In the Draft ROD and summary of Alternative G in the FEIS, the prohibition merely applies to “domestic goats,” but later in the FEIS the prohibition is expanded to include “domestic goats (including pack goats).” *See, e.g., id.* at 61 (Table 19).

NAPgA objects the Shoshone NF Supervisor’s decision to select Alternative G as presented in the FEIS and, more particularly, to the Shoshone NF Supervisor’s decision to prohibit pack goats in core native bighorn sheep range on the Shoshone NF. This decision to prohibit pack goats was made in violation of FACA, NEPA, NFMA and the APA, among other authorities. Although these violations were established and detailed in NAPgA’s comments, the Shoshone NF failed to remedy them in the Draft ROD, FEIS and LMP. As a result, NAPgA now timely files its Objections to the Draft ROD, FEIS and LMP. The Shoshone NF’s violations of FACA, NEPA, the APA and other authorities are discussed in detail below. NAPgA requests that the Shoshone NF cure these violations in accordance with the recommendations below and allow the use of pack goats in core native bighorn sheep range on the Shoshone NF.

II. Legal Background for the Objections

The Shoshone NF failed to consider the most important aspects of the problem of disease transmission from pack goats to bighorn sheep and offered explanations for its decision to close the Shoshone NF to pack goats that run counter to the evidence before it. As a result, the Shoshone NF made an uninformed decision contrary to the requirements of NEPA, 42 U.S.C. §§ 4321 et seq. The Shoshone NF also failed, under NEPA, to take a hard look at the environmental consequences of eliminating pack goats on the Shoshone NF to reduce the risk of disease transmission to bighorn sheep. In addition, as required by the APA, 5 U.S.C. §§ 701 et seq., the Shoshone NF failed to examine relevant data on pack goats and articulate a satisfactory explanation for its action to eliminate pack goats from the Shoshone NF, including a rational connection between the facts found and the choices it made when assessing the impact of goatpacking on bighorns. Finally, the Shoshone NF failed to meet the requirements of FACA, 5 U.S.C. App. 2, and a direct order of the United States District Court for the District of Idaho, prohibiting the use of illegal advisory committees.

A. NEPA prohibits uninformed agency action

In passing NEPA, Congress “recogniz[ed] the profound impact of man’s activity on the interrelations of all components of the natural environment” and set out “to create and maintain conditions under which man and nature can exist in productive harmony.” 42 U.S.C. § 4331(a). To bring federal action in line with Congress’ goals and to foster environmentally informed decision-making by federal agencies, NEPA “establishes ‘action-forcing’ procedures that require agencies to take a ‘hard look’ at environmental consequences.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir. 2011) (citing *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000)). Foremost among those procedures is the preparation of an environmental impact statement (“EIS”). *Id.*

Agencies considering “major Federal actions significantly affecting the quality of the human environment” are required to prepare an EIS. 42 U.S.C. § 4332(C). The EIS “shall

provide full and fair discussion of [the] significant environmental impacts” of the proposed action. 40 C.F.R. § 1502.1. That discussion serves two purposes:

First, it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

W. Watersheds Project, 632 F.3d at 487 (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004)). This process does not mandate particular substantive results, but “NEPA . . . prohibits uninformed . . . agency action.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). By focusing agency and public attention on the environmental effects of proposed action, “NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Marsh v. ONRC*, 490 U.S. 360, 371 (1989).

B. FACA requires balance and transparency in agency deliberations

Congress enacted FACA “to recognize the importance of having advisory committees to the Executive Branch be completely open to public observation and comment.” *Miccosukee Tribe of Indians of Florida v. United States*, 420 F. Supp. 2d 1324, 1341 (S.D. Florida 2006) (citation omitted). Congress sought to counter the fear that committees would be dominated by representatives of industry and other special interest groups seeking to advance their own agendas, and to ensure that the public could remain apprised of the existence, activities and cost of advisory committees. See *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 446 (1989) (citing 5 U.S.C. App. 2 § 2(b)).

To effectuate these purposes, FACA prohibits the establishment of “advisory committees” by federal agencies without adherence to the provisions under FACA for establishing and managing such committees. See 5 U.S.C. App. 2, § 9. These provisions ensure that advisory committees to federal agencies are transparent and adequately represent the public interest by imposing a number of requirements on advisory groups regarding such matters as advance notice of committee meetings, the keeping of public availability of minutes, and the composition of advisory group membership. See *Idaho Wool Growers Ass'n v. Schafer*, 637 F. Supp. 2d 868, 871 (D. Idaho 2009) (citing 5 U.S.C. App. 2, §§ 2, 9-14).

C. Review under the APA.

The APA, 5 U.S.C. §§ 701-706, provides for judicial review of agency actions, such as those at issue here.¹ Under the APA, a reviewing court shall “hold unlawful and set aside agency

¹ NEPA claims are subject to judicial review under the APA, 5 U.S.C. § 706(2)(A). See *Dep't of Transp. v. Pub. Citizen*, 541 U.S. at 763; *Marsh*, 490 U.S. at 375–76; *League of Wilderness Defenders-Blue Mtns. Biodiversity Project v. U.S.*, 549 F.3d 1211, 1215 (9th Cir. 2008) (the APA provides authority for the court’s review of decisions under NEPA); *W. Watersheds Project v. U.S. Forest Serv.*, 2006 WL 292010, *2 (D. Idaho) (same). Likewise, FACA claims are

action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] without observance of procedures required by law.” 5 U.S.C. § 706(2)(A), (D). Although the arbitrary and capricious standard is a “narrow one,” the court is required to “engage in a substantial inquiry” and a “thorough, probing, in-depth review.” *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971)).

Under this standard, an agency decision is to be reversed as arbitrary and capricious if the agency has “. . . entirely failed to consider an important aspect of the problem, [or] offered an explanation that runs counter to the evidence before the agency. . . .” *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). “The reviewing court should not attempt itself to make up for such deficiencies.” *Id.* (citation omitted). Most fundamentally, the agency must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle*, 463 U.S. at 53 (quotation omitted).

Where, as here, there has been a change in policy from allowing goatpacking on the Shoshone NF to eliminating goatpacking on the Shoshone, judicial review starts with the presumption that the change in policy is **not** justified by the administrative record. *Motor Vehicle*, 463 U.S. at 42. Additionally, the traditional presumption of agency expertise “‘may be rebutted if the decisions, even though based on scientific expertise, are not reasoned.’” *W. Watersheds Project v. Ashe*, No. 11-462, 2013 WL 2433370 at *5 (D. Idaho June 4, 2013) (citations omitted).

III. Objections to the Draft ROD, FEIS and LMP

Objection 1. The Shoshone NF Violated FACA and Ignored the Order of the United States District Court for the District of Idaho by Relying on the Findings and Conclusions of the RADT and Payette Principles Committees in Preparing the Draft ROD, FEIS and LMP.

In 2009, the United States District Court for the District of Idaho prohibited the Shoshone NF’s use of the findings and conclusions of two illegal advisory committees, known as the RADT Committee and Payette Principles Committee. See *Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868 (D. Idaho 2009); *Idaho Wool Growers Assoc. v. Schafer*, 2009 WL 3806371 (D. Idaho). NAPgA discussed this prohibition at length in its comments on the DEIS and Draft LMP. NAPgA Comments at 13-14.

In its comments, NAPgA instructed that “a new DEIS and subsequent final EIS and LMP must be drafted without reliance on the RADT Committee’s and Payette Principle Committee’s findings and conclusions.” *Id.* at 13. The Shoshone NF ignored NAPgA’s comments and failed

subject to judicial review under the APA, 5 U.S.C. § 706(2)(A). See *Idaho Wool Growers Ass’n*, 637 F. Supp. 2d 868, 871 n. 2 (“Forest Service concedes that claims for alleged FACA violations are to be brought under the APA”).

to prepare a Draft ROD, FEIS and LMP that do not rely on the RADT and Payette Principles Committees' findings and conclusions.

On July 1, 2009, U.S. District Court Judge B. Lynn Winmill issued a decision in *Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868 (D. Idaho 2009), attached as Exhibit 2. On November 9, 2009, Judge Winmill issued another memorandum and order clarifying that decision. *See Idaho Wool Growers Assoc. v. Schafer*, 2009 WL 3806371 (D. Idaho). Plaintiffs challenged the Forest Service's establishment and use of two committees and their reports as violations of the Federal Advisory Committee Act, NFMA, and the APA. These committees are known as the RADT Committee and the Payette Principles Committee. The reports from the RADT Committee and the Payette Principles Committee are referenced and relied upon in the Shoshone RADT Report, which forms the basis for alternatives and analysis in the FEIS and the proposed management direction in the Draft LMP. *See Shoshone RADT Report at 19-20* ("Literature Cited"); *see also id.* at 3-4, 12-13 (referencing and relying upon reports).

Judge Winmill entered an order granting plaintiffs' motion for summary judgment. In so doing, Judge Winmill wrote "[t]he issue here is whether the Forest Service's Committees violated FACA's and NFMA's procedural requirements and, if so, whether the Committees' reports should be utilized for any *future* Forest Service Decisions." *Idaho Wool Growers*, 637 F. Supp. 2d at 877. The Court ordered that "[t]he Committees' findings and/or conclusions are not to be relied upon by the Forest Service *with respect to any future agency decisions.*" *Id.* at 880 (emphasis added). This includes the Shoshone NF's FEIS and LMP at issue here.

Despite Judge Winmill's decision, the Shoshone NF still relies upon the findings and conclusions of the RADT Committee and Payette Principles Committee in the Shoshone RADT Report and DEIS. *See Shoshone RADT Report at 3-4, 12-13; FEIS at 222-23, 225* (referencing and relying on Shoshone RADT Report). And, the Shoshone NF still uses the findings and conclusions of the RADT Committee and Payette Principles Committee to develop alternatives in the FEIS and as support for its assumption that disease transmission occurs between domestic sheep or pack goats and bighorn sheep. *See FEIS at 35, 38, 40, 47, 53, 61, 222-23, 225.*

The Shoshone NF's continued use of such findings and conclusions is also prohibited by Judge Winmill's clarification memorandum and order. *See Idaho Wool Growers Assoc. v. Schafer*, 2009 WL 3806371 (D. Idaho), attached as Exhibit 3. There, Judge Winmill explained that the Forest Service should not "grandfather" RADT Committee and Payette Principles Committee findings and conclusions to support Forest Service decisions—"[s]imply put, and consistent with the Court's existing directive, the Forest Service may not rely upon the Committees' findings and/or conclusions in reaching future agency decisions – either directly or indirectly, through an end-run around the Court's mandate" *Id.* at *2. Judge Winmill stated: "[t]he Forest Service may not rely upon the Committee's findings and/or conclusions in reaching future agency decisions." *Id.* at *4. Clearly, that is what the Shoshone NF has done here.

Judge Winmill of the United States District Court for the District of Idaho ordered that "[t]he Forest Service may not rely upon the [RADT and Payette Principles] Committee's findings and/or conclusions in reaching future agency decisions." *See id.*; *see also id.* at *2 ("the

Forest Service may not rely upon the Committees' findings and/or conclusions in reaching future agency decisions – either directly or indirectly, through an end-run around the Court's mandate"). Judge Winmill's order did not simply apply to the Payette National Forest, but to the entire Forest Service. But for the Shoshone NF, the rest of the Forest Service recognizes the scope of Judge Winmill's order and has prohibited the use of documents that rely on the RADT and Payette Principles Committees.

For example, the Forest Service attempted to continue use of "A Review of Disease Related Conflicts Between Domestic Sheep and Goats and Bighorn Sheep" by Timothy J. Schommer and Melanie M. Woolever, General Technical Report RMRS-GTR-209 (May 2008), which relied in part on the findings of the RADT and Payette Principles Committees. When informed of this violation, the Forest Service's Washington Office decided: "Since GTR-209 includes findings and recommendations developed by the Payette Principles Committee, it would be inappropriate for the Forest Service to use GTR-209 in agency decisions of policy development. Given these circumstances, I am retracting GTR-209." Letter from Charles L. Myers, Deputy Chief for Business Operations, Forest Service, Washington Office, to Mr. Kent Holsinger and Ms. Laura L. Chartrand, Holsinger Law, LLC, at 1 (Aug. 7, 2009), *available at* http://www.fs.fed.us/qoi/documents/2009/CWGA_RHR_Response.pdf (last visited March 10, 2014).

The Forest Service's Washington Office acknowledged: "Judge Winmill ruled that this committee was subject to FACA requirements and the process used to form the committee did not follow FACA framework. Since the development of the Payette Principles Committee was flawed, Judge Winmill ruled that the Forest Service is not to rely on findings and/or conclusions developed by the Committee in future decision making." *Id.* While the Forest Service's Washington Office recognizes the legal implications of Judge Winmill's order, the Shoshone NF continues to operate in violation of the law.

With blatant disregard for Judge Winmill's clear order, the Shoshone RADT Report repeatedly references and relies upon the illegal RADT and Payette Principles Committees and their findings and conclusions. *See, e.g.*, Shoshone RADT Report at 3, 12-13, 19-20. In fact, parts of the Shoshone RADT Report are copied verbatim from the illegal report of the RADT Committee. The Shoshone NF erases any doubt as to its reliance on the illegal RADT and Payette Principles Committees and their findings and conclusions when it plainly admits that it has relied upon such committees and their findings and conclusions: "Because of the lack of quantitative models available to predict likelihood of disease outbreak in bighorn sheep populations due to the potential contact with domestic sheep or goats (including pack goats), the same basic outcomes, with the addition of domestic pack goats, identified by the Payette National Forest (USDA Forest Service 2006a) and used in the Payette's risk assessment, are utilized in this risk assessment." *Id.* at 12 (emphasis added).

To prepare the Shoshone RADT Report, the Shoshone NF formed the same type of biased and unbalanced committee that violated FACA on the Payette National Forest. *See* Shoshone RADT Report at 12 (discussing formation of committee). That committee then directly applied the exact risk assessment methodology that was not to be used by the Forest Service in any future agency decisions. *See id.* at 12-13.

After the Payette National Forest violated FACA by establishing and relying on the RADT and Payette Principles Committees, the Payette National Forest was forced to perform a new quantitative risk assessment to predict the risk of disease transmission from domestic sheep to bighorn sheep on the Payette National Forest. As the Payette National Forest states in its Southwest Idaho Ecogroup Land and Resource Management Plans Final Supplemental Environmental Impact Statement (“Payette NF FSEIS”): “The qualitative *Risk Analysis for Disease Transmission Between Bighorn Sheep and Domestic Sheep on the Payette National Forest* (USDA Forest Service 2006) was completely removed from the analysis and is no longer utilized in this effort. To assess the risk for contact between bighorn sheep and domestic sheep, the Payette National Forest developed a quantitative foray analysis to predict probabilities of contact.” Payette NF FSEIS at xvi, *available at* http://www.fs.usda.gov/detailfull/payette/landmanagement/planning/?cid=FSM9_033278&width=full (last visited February 26, 2014) (emphasis added).

Moreover, the Payette National Forest makes clear that “[t]he quantitative contact analysis . . . replaces the *Risk Analysis of Disease Transmission Between Domestic Sheep and Bighorn Sheep on the Payette National Forest* (risk analysis) (USDA Forest Service 2006).” *Id.* at 2-1. The Payette National Forest had to eliminate a number of the alternatives in its FSEIS on the following basis: “The most compelling reason was their reliance on the theory and data from the 2006 *Risk Analysis of Disease Transmission Between Domestic Sheep and Bighorn Sheep on the Payette National Forest*.” *Id.* at 2-4.

Thus, not only has the Shoshone NF ignored Judge Winmill’s order and NAPgA’s comments concerning the same, it has ignored the findings and actions of the very national forest that the Shoshone NF is basing its own findings and actions on, namely the Payette National Forest. The “Payette’s risk assessment,” “identified by the Payette National Forest (USDA Forest Service 2006a)” and “utilized” by the Shoshone NF is illegal and, as a result, was not even used by the Payette National Forest. Shoshone RADT Report at 12. Rather, the Payette National Forest employed a new quantitative risk assessment. Thus, the Shoshone NF’s reason for using the illegal “Payette’s risk assessment” is wrong—“Because of the lack of quantitative models available to predict likelihood of disease outbreak in bighorn sheep populations due to potential contact with domestic sheep or goats (including pack goats)” *Id.* There are quantitative models available, as demonstrated by the Payette National Forest.

The Shoshone NF’s violations of Judge Winmill’s clear order are critical because throughout the FEIS the Shoshone NF references the Shoshone RADT Report for the unsupported assumption that pack goats pose a risk for disease transmission to bighorn sheep:

- “Although the risk of disease transmission is low to very low, even one disease transmission event could be catastrophic to a core native bighorn sheep herd (USDA Forest Service 2013).” FEIS at 53; *see also id.* at 767, 771 (same).
- “Even one disease transmission event could be catastrophic to a core bighorn sheep herd. (See *Risk Analysis of Disease Transmission Between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep, Shoshone National Forest 2013.*)” *Id.* at 224.

- “However, there is no known ‘safe distance’ between the three species, so the risk of a future transmittal cannot be discounted (see Risk Analysis of Disease Transmission Between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep, Shoshone National Forest 2013).” *Id.* at 226.
- “Information from the Risk Analysis of Disease Transmission between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep Shoshone National Forest 2013 was considered for this analysis (USDA Forest Service 2013).” *Id.* at 771.
- “Available relevant information was considered for this analysis. DEIS Page 213 noted to see the Risk Analysis of Disease Transmission Between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep, Shoshone National Forest, 2012.” *Id.* at 782.
- “The Bighorn Sheep Disease Risk Assessment (USDA Forest Service 2012) prepared for the DEIS contains all of the literature used to prepare that document. The risk assessment is part of the project record.” *Id.* at 840.

Finally, the Shoshone NF Supervisor relied on the unsupported assumption that pack goats pose a risk for disease transmission to bighorn sheep from the Shoshone RADT Report in deciding in the Draft ROD that “[d]omestic goats [including pack goats] will not be allowed in core native bighorn sheep range in response to concerns over disease transmission to bighorn sheep.” Draft ROD at 9. As a result, the Draft ROD, FEIS and LMP are all tainted by the Shoshone RADT Report. That report is illegal and should not be relied upon by the Shoshone NF now or in the future.

Conclusion and Recommendation: The Shoshone NF has violated FACA and the Order of Judge Winmill, United States District Court for the District of Idaho, in its preparation of the Draft ROD, FEIS and LMP. As a result, these documents, along with the Shoshone RADT Report, are illegal and must be revised to eliminate any reliance on the findings and conclusions of the RADT and Payette Principles Committees. These violations are actionable now, without further action by the Shoshone NF. The reviewing officer must remand the Draft ROD, FEIS and LMP to the Shoshone NF so that they may be revised in compliance with FACA, NFMA and Judge Winmill’s order. This includes preparation of a new Shoshone RADT Report that does not rely on the findings and conclusions of the RADT and Payette Principles Committees, and which employs a new quantitative risk assessment.

Objection 2. The Shoshone NF Established and Utilized an Advisory Committee and its Report to Prepare the Draft ROD, FEIS and LMP in Violation of FACA.

Congress enacted FACA to ensure that advisory committees to federal agencies would be completely open to public observation and comment, and to ensure that advisory committees would be unbiased and not inappropriately influenced by the appointing authority or by any special interest. See *Miccosukee Tribe of Indians of Florida v. United States*, 420 F. Supp. 2d 1324, 1341 (S.D. Florida 2006) (citing *Alabama-Tombigbee Rivers Coalition v. Dep’t of Interior*, 26 F.3d 1103, 1106 (11th Cir. 1994)); *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 446 (1989) (citing 5 U.S.C. App. II § 2(b)); *Cummock v. Gore*, 180 F.3d 282, 284 (D.C. Cir. 1999) (citing H.R.Rep. No. 92-1017 (1972)). To effectuate these purposes, advisory committees must meet certain prescribed requirements and follow certain prescribed procedures. 5 U.S.C.

App. 2, § 10. These procedures ensure that advisory committees to federal agencies are transparent and adequately represent the public interest by imposing a number of requirements on advisory groups regarding such matters as advance notice of committee meetings, the keeping of public availability of minutes, and the composition of advisory group membership. *See Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868, 871 (D. Idaho 2009) (citing 5 U.S.C. App. II, §§ 2, 9-14).

FACA prohibits the establishment of “advisory committees” by federal agencies without adherence to the provisions under FACA for establishing and managing such committees. *See* 5 U.S.C. App. 2, § 9. The term “advisory committee” means “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is— . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees or the Federal Government . . .” 5 U.S.C. App. 2, § 3(2); *see Manshardt v. Federal Judicial Qualifications Committee*, 408 F.3d 1154, 1157 (9th Cir. 2005). Agency heads or other federal officials in creating an advisory committee shall “require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.” 5 U.S.C. App. 2, § 5(b)(2), (c).

Under FACA, no advisory committee shall be established by an agency unless such establishment is “determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.” 5 U.S.C. App. 2, § 9(a)(2). Further, no advisory committee shall “meet or take any action until an advisory committee charter has been filed . . . with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency.” 5 U.S.C. App. 2, § 9(c).

The Shoshone NF violated FACA in establishing and utilizing the advisory committee that developed the Shoshone RADT Report (“Shoshone RADT Committee”). The Shoshone RADT report states that “[w]ildlife biologists from the Wyoming Game and Fish Department . . . along with Shoshone land managers assisted in this risk assessment (WGFD, personal communication 2012b).” Shoshone RADT Report at 12. “Members of this risk assessment team” were provided certain documents and maps and then “discussed disease transmission risk factors for each bighorn sheep herd” on the Shoshone NF. *Id.* at 13. This “team” then performed a “risk assessment” by herd and decided whether the disease transmission risk from domestic sheep or goats (including packgoats) to the core native bighorn sheep herds was “very low” to “very high” due to livestock grazing on the Shoshone NF. *Id.* at 12-15. The “risk assessment team” then “all agreed” that “the risk to bighorn sheep is far too great to allow domestic goat use within core native bighorn sheep habitat.” *Id.* at 15. The risk assessment team recommended that the Shoshone NF “[c]lose all occupied core native bighorn habitat and the area within 26 km of the occupied core native habitat to domestic goat (includes pack goat) use.” *Id.* As the risk assessment team noted, “[t]his effectively closes the entire Shoshone National Forest, except the Washakie Ranger District to domestic goat use, including pack goats.” *Id.*

Under FACA, the term “advisory committee” means “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is— . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government . . .” 5 U.S.C. App. 2, § 3(2); *see Manshardt*, 408 F.3d at 1157. Here the Shoshone RADT Committee meets this definition as it was established and utilized by the Forest Service to develop advice or recommendations on disease transmission between domestic sheep and goats (including packgoats) on the Shoshone NF and it was not composed wholly of “full-time, or permanent part-time, officers or employees of the Federal Government . . .” According to the Shoshone RADT Report, this “[d]isease risk assessment meeting” included the following people: “Doug McWhiter, Tim Woolley, Bart Kroger (Cody Region, Wyoming Game and Fish Department), Greg Anderson, Jason Hunter, Stan Harter (Lander Region, WGFD), Diane Probasco, Andy Pils, and Joe Harper (Shoshone).” Shoshone RADT Report at 21.

There is no indication that the establishment of the Shoshone RADT Committee was “determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.” 5 U.S.C. App. 2, § 9(a)(2). Further, there is no indication that the proper “advisory committee charter” was filed in accordance with 5 U.S.C. App. 2, § 9(c) prior to the meeting and action of the Shoshone RADT Committee. None of the requirements of FACA appear to have been met by the Shoshone NF in establishing and forming the Shoshone RADT Committee. Advisory committees must meet certain prescribed requirements and follow certain prescribed procedures. 5 U.S.C. App. 2, § 10; *see also Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868, 871 (D. Idaho 2009) (citing 5 U.S.C. App. II, §§ 2, 9-14).

The Shoshone NF failed to “require the membership of the [Shoshone RADT Committee] to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.” 5 U.S.C. App. 2, § 5(b)(2), (c). The Shoshone RADT Committee did not include a single representative of the livestock or recreation industries. Certainly, NAPgA’s point of view was not represented on the Shoshone RADT Committee.

In its comments, NAPgA warned the Shoshone NF of its FACA violations and requested that the Shoshone NF cure them. NAPgA Comments at 13-14. The Shoshone NF ignored those comments. Now, the Shoshone NF has violated FACA and tainted the Draft ROD, FEIS and LMP.

Conclusion and Recommendation: The Shoshone NF has violated FACA by establishing and utilizing the Shoshone RADT Committee without adhering to the prescribed requirements and procedures under FACA for establishing and utilizing advisory committees. As a result, the Shoshone RADT Committee and its report are illegal and the Draft ROD, FEIS and LMP must be revised to eliminate any reliance on the findings and conclusions of the Shoshone RADT Committee. This violation is actionable now, without further action by the Shoshone NF. The reviewing officer must remand the Draft ROD, FEIS and LMP to the Shoshone NF so that they may be revised in compliance with FACA. This includes preparation of a new Shoshone RADT

Report that does not rely on the findings and conclusions of the illegal Shoshone RADT Committee.

Objection 3. In Violation of NEPA, the Shoshone NF Failed to Respond to NAPgA's Comments Concerning the Shoshone's Reliance on the Findings and Conclusions of the RADT and Payette Principles Committees.

Under NEPA, an agency preparing a final EIS “shall assess and consider comments” and “shall respond” to those comments in the final environmental impact statement. 40 C.F.R. §§ 1502.9, 1503.1, 1503.4; *see also Ctr. for Biological Diversity*, 349 F.3d at 1167-68 (requiring agency response). The Shoshone NF failed to meet this requirement when it ignored NAPgA's comments concerning the Shoshone's FACA violations.

The Shoshone NF attempted to summarize NAPgA's extensive comments concerning the Shoshone's FACA violations in the following sentence: “The final DEIS and Land Management Plan should be drafted without reliance on the Risk Assessment Disease Transmission (RADT) Committee's and Payette Principle Committee's findings and conclusions as the finding were prohibited by a previous legal decision against the Forest Service.” FEIS at 781. The Shoshone NF's response to this summary was that: “Available relevant information was considered for this analysis. DEIS Page 213 noted to see the Risk Analysis of Disease Transmission Between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep, Shoshone National Forest, 2012.” *Id.* at 782.

The Shoshone NF's response was nonresponsive, particularly considering that the content of the “Risk Analysis of Disease Transmission Between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep, Shoshone National Forest, 2012,” was the principal reason for NAPgA's comments. Of course NAPgA reviewed the Shoshone RADT Report—that is the reason NAPgA commented on it and specifically cited to it in its comments.

In its comments, NAPgA demonstrated the Shoshone NF's illegal use of the conclusions and findings of the RADT and Payette Principle Committees in the DEIS and Shoshone RADT Report. NAPgA Comments at 13-14. NAPgA instructed that “a new DEIS and subsequent final EIS and LMP must be drafted without reliance on the RADT Committee's and Payette Principle Committee's findings and conclusions.” *Id.* at 13. The Shoshone NF's response to NAPgA's comments concerning FACA does not meet the minimum requirement of NEPA

Conclusion and Recommendation: In order to comply with NEPA, the Shoshone NF must adequately respond to NAPgA's comments concerning the Shoshone's FACA violations. To accomplish this, the Shoshone NF must prepare a new Draft ROD and revise the FEIS and LMP to address NAPgA's comments.

Objection 4. The Shoshone NF's Draft ROD, FEIS and LMP Violate NEPA and the APA Because They Fail to Account for the Differences Between Pack Goats and Other Domestic Livestock.

NAPgA explained the important differences between pack goats and other domestic livestock, including domestic goats, in its comments. NAPgA Comments at 3-4. The only

indication that the Shoshone NF considered the differences between pack goats and other domestic livestock in the FEIS is the brief statement that “[p]ack goat movements may be controllable.” FEIS at 53; *see also id.* at 767 (same).

The Shoshone RADT Report expands briefly on this statement by acknowledging:

[t]he use of domestic goats as pack animals in most cases is a different use than a grazing allotment due to the amount of control that can be placed on the pack goats. Pack goats can be tethered at night to prevent straying and tied together during the day when trailing. Health certificates are more economically attainable for pack goats versus domestic sheep or goat herds and can be kept insight when in bighorn sheep habitat. Of course this all depends upon the pack goat user and the efficacy of these and other best management practices.

Shoshone RADT Report at 8.

Although the Shoshone RADT Report acknowledges that pack goats are different than herd domestic goats, the Shoshone NF fails to consider any of these differences in the Shoshone RADT Report, FEIS, LMP or Draft ROD. NEPA prohibits this type of uninformed agency action. *See Robertson*, 490 U.S. at 352 (“NEPA . . . prohibits uninformed . . . agency action.”); *Marsh*, 490 U.S. at 371 (“NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.”). These differences are critical to the Shoshone NF’s analysis of disease transmission from pack goats to bighorn sheep and must be considered by the Shoshone under NEPA.

Pack goats are inextricably bonded to their owners, which represent the “alpha goat” in the pack. This is achieved through the processes of imprinting and socialization of pack goats from birth. As a result, pack goats are not prone to straying and remain in very close proximity to the “alpha goat.” Herd domestic goats are not part of a pack and are not trained. Thus, there may be some risk of such goats straying from the herd. This is not the case for pack goats. The Shoshone NF failed to consider that pack goats do not stray in its analysis of disease transmission from pack goats to bighorn sheep.

Further, unlike herd domestic goats, pack goats are tethered or high-lined at night. This completely prevents pack goats from straying from a camp at night. Pack goats also require their owner or “alpha goat” to be present to monitor the pack. Thus, pack goats always remain in sight of their owner in bighorn sheep habitat and there is always the presence of a human in close proximity to the pack goats. This is also the case during the day when goatpackers go on day hikes. The goats go with the “alpha goat” and are thus continuously monitored at all times. This makes it extremely unlikely that a bighorn sheep would approach the pack. In the presence of wild animals, such as bighorns, pack goats are also on heightened alert and retreat to a position near the “alpha goat,” i.e., the human. None of these factors were considered by the Shoshone NF in its analysis of disease transmission from pack goats to bighorn sheep.

Perhaps most critical to the Shoshone NF's analysis of disease transmission from pack goats to bighorn sheep is the fact that not all pack goats are known to carry strains of *Pasteurella* spp. If a pack goat did not carry strains of *Pasteurella* spp. it would be impossible for that goat to transmit disease to a bighorn sheep. Thus, the risk of disease transmission from that pack goat to a bighorn sheep would be zero. Further, even if a pack goat were to carry strains of *Pasteurella* spp. and directly contact a bighorn sheep, there is no science indicating that the pack goat would transmit these bacteria to the bighorn sheep. The Shoshone NF did not consider these important factors in its analysis.

Finally, goatpackers limit their visits to the Shoshone National Forest, as well as their time on the Forest when they do visit. With only a few pack goats per goatpacker and only a few visits by goatpackers per year, for a limited amount of time, the chance that a pack goat would come into contact with a bighorn sheep is extremely unlikely. This factor was not considered by the Shoshone NF.

Here, the Shoshone NF's analysis in the FEIS is completely silent on the differences between pack goats and herd domestic goats and how those differences affect the risk of disease transmission between pack goats and bighorn sheep. These differences are critical and must be considered by the Shoshone NF. An agency decision is to be reversed as arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Shoshone NF's silence on the issue will not suffice. The agency's path must be reasonably discerned. *Id.* A court "cannot infer an agency's reasoning from mere silence or where the agency failed to address significant objections and alternative proposals." *Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994) (citing *Motor Vehicle*, 463 U.S. at 57); *see also, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947) ("[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action.").

Conclusion and Recommendation: Pack goats are very different than herd domestic goats. Likewise, the use of pack goats on the Shoshone NF is a very different use than the use of herd domestic goats on the Shoshone NF. The FEIS fails to account for these differences in the analysis of disease transmission from pack goats to bighorn sheep on the Shoshone NF. As a result, the FEIS is inadequate and the Shoshone NF's decision is uninformed. The FEIS must be revised (1) to consider pack goats separate from other domestic goats; (2) to consider the unlikelihood that pack goats carry disease; and (3) to consider the unlikelihood that pack goats would ever come in close contact with bighorn sheep on the Shoshone NF.

Objection 5. Contrary to NEPA, the Shoshone NF Failed to Consider Implementation of Mitigation Measures to Ensure the Separation of Pack Goats and Bighorn Sheep.

In its comments, NAPgA explained that under NEPA the Shoshone NF must consider and discuss mitigation measures that would allow the use of pack goats on the Shoshone NF. NAPgA Comments at 5-7, 21-22. To that end, NAPgA proposed a suite of best management practices ("BMPs") and other minimization and mitigation measures to prevent contact and possible disease transmission between pack goats and bighorn sheep on the Shoshone NF. *Id.* These measures were presented in Exhibit A to NAPgA's comments, "Proposed Best

Management Practices for Separation between Packgoats and Bighorn Sheep Developed by Charles Jennings, Land Use Committee Chair, North American Packgoat Association.” None of these practices and measures were considered in the FEIS.

For example, the FEIS fails to consider that separation between pack goats and bighorn sheep is maintained by the presence of a human with pack goats, by nighttime tethering or high-lining of pack goats, and by the nature and training of pack goats. The FEIS also failed to consider the use of GPS tracking collars on pack goats, pathogen testing, permitting for pack goat trips, designation of corridors for pack goats, and a host of other measures. Certainly, if pack goats do not carry disease and do not come into contact with bighorn sheep, there is zero risk of disease transmission from pack goats to bighorn sheep. Neither of these scenarios were considered in the FEIS. Instead of considering any of these measures, in violation of NEPA, the Shoshone NF summarily dismissed consideration of these best management practices (“BMPs”) to maintain separation between pack goats and bighorn sheep on the Shoshone NF. FEIS at 53, 767.

BMPs are mitigation measures that can be employed by goatpackers to prevent contact between pack goats and bighorn sheep. 40 C.F.R. § 1508.20 (defining “mitigation measures” to include “[a]voiding the impact” and “[m]inimizing impacts by limiting the degree or magnitude of the action and its implementation”). For a reasonable range of alternatives, the FEIS must consider implementation of BMPs and mitigation measures, rather than simply concluding that goatpacking on the Shoshone NF must be closed. 40 C.F.R. § 1502.14.

An EIS must discuss “mitigation . . . in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Robertson*, 490 U.S. at 352. An agency is required to “discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(c).” *Id.*; see also *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000) (An EIS must contain a “reasonably complete discussion of possible mitigation measures.” (quoting *Robertson*, 490 U.S. at 352)). To be sure, an agency’s final decision must “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.” 40 C.F.R. § 1505.2(c).

Without an alternative that describes and analyzes the implementation of mitigation measures to prevent contact between pack goats and bighorn sheep, instead of simply eliminating pack goats from the Shoshone NF, the FEIS contains an inadequate range of alternatives. Alternatives considering BMPs and mitigation measures are both reasonable and feasible under the circumstances, and must be analyzed in the FEIS.

With regard to the Shoshone NF’s consideration of reasonable alternatives in the FEIS, the Shoshone NF dismisses an alternative that would use BMPs to allow pack goat use on the Forest. FEIS at 53. The Shoshone NF dismissed this alternative on the basis that “there is a risk of free-ranging bighorn sheep coming into contact with pack goats.” *Id.* However, the Shoshone NF fails to explain what this risk is and how it decided that such risk exists. An agency may not rely on conclusory statements unsupported by explanatory information. *Seattle Audubon Soc’y v. Moseley*, 798 F. Supp. 1473, 1480-83 (W.D. Wash. 1992), *aff’d* 998 F.2d 699 (9th Cir. 1993).

The Shoshone NF's statement that "there is a risk" does render moot NEPA's requirement that the Forest Service consider BMPs in the Draft ROD and FEIS. Such a blanket statement does not satisfy NEPA's requirement of a "reasonably complete discussion of *possible* mitigation measures." *Okanogan Highlands*, 236 F.3d at 473 (citation omitted). If the Shoshone NF was unsure about the effectiveness of BMPs, it should have included them and analyzed them in its alternatives analysis. The necessary environmental analyses must precede, not follow, a decision that may have significant impacts on the environment. *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 733 (abrogated on other grounds by *Monsanto Co.*, 130 S. Ct. 2743 (2010)).

Basically, the Shoshone NF is saying that there is a strong likelihood that on one of the two or three goatpacking trips taken on the Shoshone NF each year, a bighorn sheep would (1) leave its herd and its summer habitat in the high country, (2) find a human and pack goat camp, (3) sneak into that camp without causing any disturbance in the pack goats and without being detected by the humans, (4) ask the pack goats to not be alarmed, to remain still and to muffle their bells and collars, (5) find a tethered goat that is infected by and shedding strains of *Pasteurella* spp., (6) make physical contact with that goat sufficient for disease transmission, and (7) sneak back out of camp and return to its herd and infect other bighorn sheep. It is a far-fetched scenario that has never happened before.

In reality, there is almost no overlap in time or space between pack goats and bighorn sheep on the Shoshone NF; bighorn sheep are not prone to leave their herd/habitat and wander into human and pack goat camps; pack goats react noisily when they are alarmed by other wildlife, including bighorn sheep; not all pack goats carry and shed strains of *Pasteurella* spp.; and it is unknown whether bighorn sheep can even be infected with strains of *Pasteurella* spp. from pack goats. The facts do not support the Shoshone NF's assumption that there is a high likelihood of disease transmission from pack goats to bighorn sheep on the Shoshone NF.

None of these facts were considered by the Shoshone NF in its dismissal of an alternative that would use BMPs to allow pack goat use on the Shoshone. NEPA mandates that federal agencies "provide legitimate consideration to alternatives that fall between the obvious extremes." *Colorado Env'tl. Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1998). More specifically, NEPA is violated when an agency dismisses the consideration of an alternative "in a conclusory and perfunctory manner that [does] not support a conclusion that it was unreasonable to consider them as viable alternatives." *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002). "The existence of reasonable but unexamined alternatives renders an EIS inadequate." *Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1095, 1101 (9th Cir. 2006).

An alternative that would use BMPs to allow pack goat use on the Shoshone NF was a reasonable alternative that the Shoshone NF failed to examine in violation of NEPA. Instead, the Shoshone NF dismissed consideration of the alternative "in a conclusory and perfunctory manner" that did not support a conclusion that it was unreasonable to consider the alternative. *Davis v. Mineta*, 302 F.3d at 1122. As a result, the Shoshone NF's FEIS is inadequate.

Conclusion and Recommendation: The Shoshone NF has violated NEPA by failing to discuss and consider mitigation measures that would allow use of pack goats on the Shoshone NF while

preventing the risk of disease transmission between pack goats and bighorn sheep. As a result, the Shoshone NF must revise the Draft ROD and FEIS to discuss and consider appropriate mitigation measures to prevent the risk of disease transmission between pack goats and bighorn sheep. Proper consideration of such measures should include consideration and adoption of an alternative to allow the use of pack goats on the Shoshone NF. This alternative should consider maintenance of the separation of pack goats and bighorn sheep on the Shoshone and, thus, complete avoidance of any potential for disease transmission between pack goats and bighorn sheep.

Objection 6. The Shoshone NF Failed to Meet Its NEPA Obligation to Ensure the Scientific Integrity of the FEIS.

In evaluating the environmental impacts of a proposed action, NEPA requires federal agencies to ensure the scientific integrity of an EIS by considering appropriate studies and data. 40 C.F.R. § 1502.24. The Shoshone NF must “insure the professional integrity, including scientific integrity, of the discussions and analyses” included in its EIS. *Id.* An agency may not rely on conclusory statements unsupported by data, authorities, or explanatory information. *Seattle Audubon Soc’y v. Moseley*, 798 F. Supp. 1473, 1480-83 (W.D. Wash. 1992), *aff’d*, 998 F.2d 699 (9th Cir. 1993). NEPA requires that an agency candidly disclose in its EIS the risks and effects of its proposed actions, and that it respond to adverse opinions held by respected scientists. *Seattle Audubon*, 798 F. Supp. at 1482 (citing *Friends of the Earth v. Hall*, 693 F. Supp. 904, 937 (W.D. Wash. 1988)).

In addition to its general obligation to respond to public comments under 40 C.F.R. § 1503.4(a), the Shoshone must specifically “discuss at appropriate points in the final [EIS] any responsible opposing view which was not adequately discussed in the draft [EIS] and . . . indicate the agency’s response to the issues raised.” *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003) (quoting 40 C.F.R. § 1502.9(b)). A failure to do so is itself a NEPA violation. *Id.* at 1168.

NAPgA raised considerable doubts about the scientific integrity of the DEIS in its comments. NAPgA Comments at 8-13, 17-19. NAPgA noted the complete lack of science indicating that pack goats transfer disease to bighorn sheep and urged the Shoshone NF to address this lack of information; to stop making gross and unsupported assumptions about disease transmission from pack goats to bighorn sheep; and to rely on the best available science. *Id.* The Shoshone NF failed to respond to NAPgA’s comments in violation of 40 C.F.R. § 1503.4(a) or to address the problems with its data and analysis on disease transmission.

Instead, the Shoshone NF adopted the principal assumption that there is “a high likelihood of disease transmission” from pack goats “to bighorn sheep and disease outbreak in local bighorn sheep herds” on the Shoshone NF. Shoshone RADT Report at 13; FEIS at 223-24. Yet, in violation of NEPA, the Shoshone NF never probed this principal assumption, relying instead on inconclusive lab tests without explaining how the lab tests showed a risk of disease transmission from domestic goats to bighorn sheep, why the lab tests applied to pack goats or why they were reflective of the completely different conditions on the Shoshone NF. *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 623 F.3d 633, 650 (9th Cir. 2010) (agency actions based on unexplained assumptions are arbitrary and capricious); *Dow Agrosciences LLC*

v. Nat'l Marine Fisheries Serv., 707 F.3d 462, 470 (4th Cir. 2013) (agency must explain why lab tests reflect nature).

The FEIS cites only two sources for the assumption that there is a catastrophic risk of “disease transmission” between pack goats and bighorn sheep on the Shoshone NF: Rudolph et al. 2003 and Foreyt et al. 2009. FEIS at 223-224. The use of the term “disease” is a misnomer. What the Shoshone NF is really referring to is the transfer of the bacterium *Pasteurella* spp. from pack goats to bighorn sheep. See FEIS at 53 (discussing transfer of *Pasteurella* spp.); see also *id.* at 767 (same); Shoshone RADT Report at 2-5 (discussing transfer of *Pasteurella* spp.). The Shoshone NF suspects that these bacteria may, first, be transmitted from domestic sheep and goats to bighorn sheep and, then, result in bighorn sheep die-offs. Shoshone RADT Report at 2-5.

An examination of the two sources cited by the Shoshone NF for the assumption that pack goats transmit disease to bighorn sheep shows that neither source involved a study of pack goats. See Rudolph et al. 2003; Foreyt et al. 2009. Rather, the Rudolph study involved a feral domestic goat, while the Foreyt study involved lungworm-infected herd domestic goats. See Rudolph et al. 2003 at 1; Foreyt et al. 2009 at 1. Neither one of these studies show that pack goats pose a threat of disease transmission to bighorn sheep on the Shoshone NF. What the studies do show is that they were both assisted and funded by the Foundation for North American Wild Sheep, which has pushed an agenda to remove pack goats from the Shoshone NF. See Rudolph et al. 2003 at 6; Foreyt et al. 2009 at 5. This assistance and funding raises questions of bias in these studies. Regardless, neither study supports the assumptions made by the Shoshone NF in the FEIS.

The conclusion of the Rudolph study was that both the feral goat and bighorn sheep at issue in the study carried *Pasteurella* spp. strains. Rudolph et al. 2003 at 1. However, the study did not show whether *Pasteurella* spp. was passed from the feral goat to the bighorn sheep or vice versa. *Id.* at 5 (“Because samples were not obtained from the animals prior to contact, the direction of transmission could not be ascertained with certainty.”).

Perhaps the most significant finding of the Rudolph study, though, was that the *Pasteurella* spp. strains carried by the feral goat at issue were not a cause of bighorn die-offs. *Id.* Rudolph states “there is no evidence that those organisms were associated with subsequent disease or deaths.” *Id.* (emphasis added). In fact, Rudolph states “we know of no other information regarding transfer of potentially lethal *Pasteurella* spp. between domestic goats and free-ranging bighorn sheep.” *Id.* (emphasis added). Despite this complete lack of evidence, Rudolph states “we believe that goats can serve as a reservoir” of *Pasteurella* spp. and recommends that interactions between goats and bighorn sheep should be avoided. *Id.*

Although the Rudolph study did not involve pack goats and was unable to provide any evidence that goats of any kind transmit disease to bighorn sheep and cause bighorn sheep die-offs, Rudolph adds: “Pack goats have gained popularity for use on public lands. We recommend that individuals with pack goats have total control of their animals when in or near bighorn sheep habitat, both while on the trail and at the campsite. Likewise, we recommend that any bighorn sheep should be driven away from goats to prevent nose-to-nose contact and that any bighorn

sheep that does come into direct contact should be removed from the herd to prevent potential transmission of disease causing organisms to other bighorn sheep.” *Id.* This recommendation does not track the outcome of the Rudolph study and was likely added to appease the group that funded the study (Foundation for North American Wild Sheep), nevertheless, not even Rudolph recommends that pack goats be removed from the Shoshone NF. Rather, Rudolph recommends prudent management. *Id.*

The Foreyt et al. 2009 study is equally unavailing. First, it should be noted that the study was not a study of the transmission of *Pasteurella* spp. from goats to bighorn sheep, rather it was a study of the transmission of lungworms from domestic goats to bighorn sheep on common pasture. *See* Foreyt et al. 2009 at 1. To that end, the study involved four herd domestic goats (not pack goats) that were infected with lungworms prior to the study. *Id.* at 2. The four domestic goats were then placed in a pen with seven captive bighorn sheep. *Id.* The animals were co-pastured together for 11 months. *Id.* During that time, the goats and bighorn sheep “freely associated with each other, including bedding together.” *Id.* at 5 (emphasis added). Besides the stress of being penned up together for 11 months, the bighorn sheep in the study also had the stress of being “captured individually with a drive net,” “physically restrained,” and having “fecal samples [] removed manually from their rectums.” *Id.* at 2. Despite all this, “[a]ll four goats (100%) and five (71%) of seven bighorn sheep remained healthy and survived the 11-mo copasturing experiment.” *Id.* at 3 (emphasis added).

The conclusion of the study was that domestic goats that are already infected with lungworms could infect bighorn sheep that share a pen and bed together for 11 months. *Id.* at 4. On the Shoshone NF, however, the concerns over bighorn sheep die-offs are not tied to lungworms, so this conclusion is of little value for the FEIS and certainly does not support the assumption that pack goats transmit *Pasteurella* spp. to bighorn sheep on the Shoshone.

According to the Foreyt study, two of the seven bighorn sheep died of bacterial pneumonia while the domestic goats were in contact with them. *Id.* at 3. The study, however, did not indicate that any of the domestic goats carried *Pasteurella* spp. or that they transmitted *Pasteurella* spp. to the bighorn sheep that died. In fact, Foreyt states in the study “the potential deleterious effect of *M haemolytica* [a.k.a. *Pasteurella* spp.] of goat origin in bighorn sheep has not been clearly documented.” *Id.* at 4. Instead, Foreyt suggests that “it is possible that *M. capillaris* [type of lungworm], or *M. capillaris* in combination with *Protostrongylus* [type of lungworm], may have been a predisposing factor in the [bighorn] deaths.” *Id.* at 5. Foreyt also suggests that pneumonia in bighorn sheep is “linked to environmental stressors in combination with bacteria and lungworms.” *Id.* at 5 (citations omitted).

Foreyt’s recommendation from the study was: “Based on results of this experimental study, bighorn sheep that occupy habitat with domestic goats are at potential risk of acquiring *Muellerius* infections, thus, increasing the potential risk of verminous pneumonia with possible concurrent or secondary bacterial pneumonia. Therefore, prudent management of bighorn sheep populations should minimize habitat sharing between the two species.” *Id.* at 5. Again, the recommendation was not for elimination of pack goats from the Shoshone NF, but for prudent management. *Id.*

The takeaway from the Rudolph and Foreyt studies is that:

- The *Pasteurella* spp. strains carried by the feral goat at issue in the Rudolph study were not a cause of subsequent bighorn sheep disease or deaths. Rudolph et al. 2003 at 5.
- Besides the information on the feral goat at issue in the Rudolph study, which was not the cause subsequent bighorn sheep disease or deaths, there is “no other information regarding transfer of potentially lethal *Pasteurella* spp. between domestic goats and free-ranging bighorn sheep.” Rudolph et al. 2003 at 5 (emphasis added). The Foreyt study indicates the same: “the potential deleterious effect of *M haemolytica* [a.k.a. *Pasteurella* spp.] of goat origin in bighorn sheep has not been clearly documented.” Foreyt et al. 2009 at 4.
- Despite being penned together and bedded together for 11 months in the Foreyt study, five out of seven bighorn sheep remained healthy and survived. *Id.* at 3. Assuming that the domestic goats in the Foreyt study actually carried strains of *Pasteurella* spp., this shows that the transmission of disease-causing *Pasteurella* spp. from domestic goats to bighorn sheep is unlikely and that such transmission does not cause subsequent bighorn die-offs. The fact that four domestic goats and five bighorn sheep cohabitated in a pen and bedded together for 11 months without either species getting sick or dying is damning to the Shoshone NF’s assumption that domestic goats (including pack goats) pose a catastrophic risk of disease transmission to bighorn sheep on the Shoshone NF.
- Neither the Rudolph study nor the Foreyt study recommends the removal of pack goats from bighorn sheep habitat on the Shoshone NF. Both studies recommend prudent management to minimize habitat sharing and contact between domestic goats (including pack goats) and bighorn sheep.

The only other reference provided in the FEIS by the Shoshone NF to support the assumption that pack goats pose a catastrophic risk of disease transmission to bighorn sheep is to the Shoshone RADT Report. FEIS at 53, 224, 226, 767, 771, 782, 840. That report, as discussed above, is biased and illegal. Besides that, the report misrepresents the science on disease transmission from domestic goats (including pack goats) to bighorn sheep and provides no support for the Shoshone NF’s assumption that that pack goats pose a catastrophic risk of disease transmission to bighorn sheep.

The only citations provided by the Shoshone NF in the Shoshone RADT Report to support its assumption that pack goats pose a risk of transmission of *Pasteurella* spp. to bighorn sheep include the following: Foreyt et al. 1996, Martin et al. 1996, Schommer and Woolever 2001, Rudolph et al. 2003, and Foreyt et al. 2009. Rudolph et al. 2003 and Foreyt et al. 2009 were discussed above and do not support the Shoshone NF’s assumption. The Shoshone’s other citations are examined here.

Specifically, the Shoshone NF states “[i]t is thought that bighorn sheep are infected with *M. haemolytica* A2 through contact with domestic sheep or goats (Foreyt et al. 1996, Martin et

al. 1996, Schommer and Woolever 2001).” The Foreyt et al. 1996 study only studied domestic sheep, not goats, so it is inapplicable to goats. Likewise, the Martin et al. 1996 study only studied domestic sheep, not goats, so it is also inapplicable to goats. So, the only other citation left is that to Schommer and Woolever 2001.

Schommer and Woolever 2001 is not a scientific paper. It is a Forest Service document intended to “describe a process for finding management solutions to the incompatibility between bighorn and domestic sheep.” Schommer and Woolever 2001 at 1 (“A Process for Finding Management Solutions to the Incompatibility Between Domestic and Bighorn Sheep”). The only information implicating goats in disease transmission to bighorn sheep in Schommer and Woolever 2001 is presented as follows” “DNA analysis in the winter of 1995-96 in Hells Canyon during a bighorn die-off revealed that a feral goat and two bighorn sheep shared a genetically identical P. multocida and P. haemolytica (Rudolph et al. 1998). The subsequent die-off resulted in the death of in excess of 260 bighorn sheep in an eight-week period. The disease spread over 30 air miles and affected six bighorn sheep herds.” *Id.* at 3.

Schommer and Woolever wrongly implicate the feral goat at issue in the subsequent disease and deaths in bighorn sheep. *See id.* at 3. The Schommer and Woolever paper cites a draft version of Rudolph et al. 2003. *Id.* at 20 (citing Rudolph et al. 1998). The conclusion of the Rudolph et al. study was that there was “no evidence” that the organisms associated with the feral goat “were associated with subsequent disease or deaths.” Rudolph et al. 2003 at 5 (emphasis added); *see also id.* (“we know of no other information regarding transfer of potentially lethal *Pasteurella* spp. between domestic goats and free-ranging bighorn sheep”). Schommer and Woolever’s implication of the feral goat is wrong and represents one of the many false assumptions found throughout the Shoshone RADT Report.² Thus, not a single citation in

² The Shoshone NF’s analysis of disease transmission from packgoats to bighorn sheep is full of inaccuracies and contradictions. For example, in the FEIS, the Shoshone NF states that “there is no known ‘safe distance’” between packgoats and bighorn sheep. FEIS at 226. The Shoshone NF cites the Shoshone RADT Report as the basis for that statement. *Id.* Yet, the Shoshone RADT Report “direct contact” between packgoats and bighorn sheep is necessary for potential disease transmission. *See* Shoshone RADT Report at 4-5 (discussing science on disease transmission); *id.* at 13 (assuming “direct contact” between species results in high likelihood of disease transmission). Even the poor “science” cited by the Shoshone indicates that “direct contact” is necessary. *See* Schommer and Woolever 2001 at 3 (“*Pasteurella* transmission requires nose-to-nose contact or transfer of mucus”). And, that is not even certain, as the two experiments penning domestic sheep with bighorn sheep for an extended period of time, did not result in transmission of *Pasteurella* spp. followed by a bighorn die-off. *See* Foreyt 1994; Foreyt et al. 2009.

The Shoshone NF’s statement that “there is no known ‘safe distance’” between packgoats and bighorn sheep is unsupported by science. It is thus unclear where the Shoshone NF came up with such a statement? Regardless, it simply is not accurate. “Direct contact” is required for disease transmission between packgoats and bighorn sheep, so any distance beyond that would appear to be “safe.” Despite this fact, and without any explanation as to why, the Shoshone NF arbitrarily established a 26 km buffer between bighorn sheep habitat and areas that could be used

the Shoshone RADT Report supports the assumption that there is a risk of disease transmission between pack goats and bighorn sheep.

Moreover, the Shoshone RADT Report overlooks the legitimate science discussed in Schommer and Woolever 2001. Schommer and Woolever state: “All ungulates, except llamas, carry some strains of *P. haemolytica* (Foreyt 1995). However, experimental exposure of bighorn sheep to elk, deer, mountain goat, cattle, llama, and domestic goats has not resulted in pneumonia in bighorn sheep (Foreyt 1992, Foreyt 1993, Foreyt 1994).” Schommer and Woolever 2001 at 3.

While the Shoshone NF attempts to implicate domestic goats in the deaths of bighorn sheep without any proof, it misses the science in the Schommer and Woolever 2001 paper, which shows that penning of domestic goats and bighorn sheep does not result in pneumonia in bighorn sheep. *See* Foreyt 1994. In the Foreyt 1994 study, *P. haemolytica* was isolated from the three domestic goats used in the experiment. *Id.* at 9. These goats were then placed together with two bighorn sheep in a pen and held there for 60 days. *Id.* at 8. Sure enough, the three domestic goats and the two bighorn sheep all survived and remained healthy. *Id.* at 9. Yet, in violation of NEPA, that information is not mentioned anywhere in the Shoshone RADT Report. *See* 40 C.F.R. § 1502.9(b) (federal agencies are required to discuss in the final EIS responsible opposing views that were not adequately discussed in the draft EIS and indicate the agency’s response to the issues raised); *W. Watersheds Project*, 632 F.3d at 493 (citing *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003)) (A final EIS that fails to disclose and discuss responsible opposing scientific views violates both NEPA and the CEQ’s regulations.).

Thus, besides the Rudolph et al. 2003 and Foreyt et al. 2009 studies, the only other science on the transmission of *Pasteurella* spp. from domestic goats to bighorn sheep that is mentioned in the Shoshone RADT Report indicates that domestic goats do not transmit disease-causing *Pasteurella* spp. to bighorn sheep. *See* Foreyt 1994. This is true even when the domestic goats are known carriers of *Pasteurella* spp. and are penned together with bighorn sheep for two months. *Id.*

None of the other science mentioned in the Shoshone RADT Report involving domestic goats concerned the transmission of *Pasteurella* spp. from domestic goats to bighorn sheep. As a result, it is not relevant to the Shoshone NF’s assumption that domestic goats present a catastrophic risk of transmission of disease-causing *Pasteurella* spp. to bighorn sheep on the Shoshone NF.

The Jansen et al. 2006 study cited by the Shoshone NF, for example, does not support the assumption that domestic goats transmit *Pasteurella* spp. to bighorn sheep. This study involved the release of 4,800 herd domestic goats near occupied bighorn sheep habitat in Arizona. Jansen et al. 2006 at 1. Jansen posits that some of these 4,800 domestic goats carried a bacterium that is associated with an ocular disease that affects domestic livestock and most wild ruminants in

by goatpackers. Shoshone RADT Report at 15. This effectively closed the entire Forest to goatpacking. *Id.*

North America. *Id.* Several months after the domestic goats were released, clinically affected bighorn sheep were observed. *Id.* at 1, 4. Jansen suggests that the domestic goats transmitted the bacterium that is associated with the ocular disease to the bighorn sheep. *Id.* at 4. The Jansen et al. study does not indicate that a single bighorn sheep was affected by *Pasteurella* spp. after the release of 4,800 domestic goats; that a single bighorn sheep contracted pneumonia and died after contacting a domestic goat; or that there was a resulting die-off of bighorn sheep following the release of the domestic goats near bighorn sheep habitat. *Id.* at 1-4. The Jansen et al. study simply is not relevant to the Shoshone NF's assumption that pack goats transmit *Pasteurella* spp. to bighorn sheep on the Shoshone NF.

Conclusion and Recommendation: Review of the science cited by the Shoshone NF to support its assumption that there is a high likelihood that pack goats will transmit disease to bighorn sheep on the Shoshone NF and that such disease will result in bighorn sheep die-offs shows that (1) the Shoshone NF failed to take a hard look at the science and (2) failed to explain or support its assumption.

The Shoshone NF's scientific analysis is inaccurate and uninformed. *See* 40 C.F.R. § 1500.1(b) ("Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."). NEPA prohibits this type of uninformed decision-making. *Robertson*, 490 U.S. at 352. "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. 360, 371 (1989). Whether or not pack goats can and do transmit disease-causing *Pasteurella* spp. on the Shoshone NF must be considered under NEPA. *See Motor Vehicle*, 463 U.S. at 43 (an agency decision is to be reversed as arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem").

None of the science cited by the Shoshone NF indicates that there is a high likelihood that pack goats will transmit disease to bighorn sheep on the Shoshone NF. The science does not show any likelihood. First, none of the science involved pack goats. Second, none of the science establishes that domestic goats transmit *Pasteurella* spp. to bighorn sheep. Third, none of the science indicates that transmission of *Pasteurella* spp. to bighorn sheep results in bighorn sheep die-offs. Finally, none of the science involves conditions similar to those on the Shoshone NF, where it is extremely unlikely that a pack goat carrying *Pasteurella* spp. would directly contact a bighorn sheep.

The Shoshone NF was required under NEPA to ensure the scientific integrity of the discussions and analyses in the FEIS by considering appropriate studies and data. 40 C.F.R. § 1502.24. The Shoshone NF failed to meet this NEPA requirement. The Shoshone NF's conclusion that there is a high likelihood that packgoats will transmit disease to bighorn sheep on the Shoshone NF resulting in bighorn sheep die-offs is unsupported by data, authorities, or explanatory information. An agency may not rely on conclusory statements unsupported by data, authorities, or explanatory information. *Seattle Audubon Soc'y v. Moseley*, 798 F. Supp. 1473, 1480-83 (W.D. Wash. 1992), *aff'd*, 998 F.2d 699 (9th Cir. 1993); *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 623 F.3d 633, 650 (9th Cir. 2010) (agency actions based on unexplained assumptions are arbitrary and capricious); *Dow Agrosciences LLC v. Nat'l*

Marine Fisheries Serv., 707 F.3d 462, 470 (4th Cir. 2013) (agency must explain why lab tests reflect nature).

Most fundamentally, the agency must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle*, 463 U.S. at 53 (quotation omitted). Here, the Shoshone NF not only failed to adequately “examine the relevant data,” it also failed to “articulate a satisfactory explanation for its action.” *Id.*; see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency decision is to be reversed as arbitrary and capricious if the agency has “. . . entirely failed to consider an important aspect of the problem, [or] offered an explanation that runs counter to the evidence before the agency . . .”).

There are no facts showing (1) that pack goats have ever transferred disease to bighorn sheep and caused a bighorn sheep die-off on the Shoshone NF or on any other lands; (2) that pack goats can transfer disease and cause a bighorn sheep die-off in a laboratory setting; or (3) that pack goats carry disease and would come into contact with bighorn sheep on the Shoshone NF. The Shoshone NF’s decision to prohibit goatpacking on the Shoshone has no basis in fact or science. Such decision is arbitrary and capricious and must be overturned. The Shoshone NF should be required to re-examine the science on disease transmission from pack goats to bighorn sheep and accurately conclude that the science does not support a decision to prohibit goatpacking on the Shoshone NF.

Objection 7. The Shoshone NF Has Banned the Use of Pack Goats from the Shoshone NF in Violation of NFMA, NEPA and the APA.

The Shoshone NF leads the reader of the Draft ROD, FEIS and LMP to believe that pack goats have decimated the population of bighorn sheep on the Shoshone NF and that the immediate and drastic action of removing pack goats from the Shoshone NF is warranted to save bighorn sheep. Yet, the Shoshone NF’s statistics tell a different story. In fact, “[r]ecent population trends for the core bighorn sheep herds have been fairly steady.” FEIS at 222. “Habitat for bighorn sheep is abundant on the Shoshone” and has actually improved over the last five years as a result of wildfires “creat[ing] ideal seasonal habitat for bighorns.” *Id.* at 223. Core bighorn sheep herds are not threatened by disease transmission from domestic sheep, as the closest domestic sheep allotments are about 80 kilometers away. *Id.* Though, “[b]oth domestic sheep and bighorn sheep have used the Shoshone for several decades,” “there are no documented cases of disease transmission from domestic sheep or goats to bighorns on the planning area.” *Id.* at 226; see also *id.* at 225 (“there is no documented case of disease transmittal from domestic sheep and goats to bighorns on the Shoshone”); *id.* at 226 (“[t]here is no documented case of disease transmittals from domestics to bighorns on the Shoshone”).

Not only is there not a single documented case of disease transmission from domestic goats (including pack goats) to bighorn sheep on the Shoshone NF, there is not a single documented case anywhere. There is no science linking disease transmission from domestic goats to bighorn sheep die-offs in the lab or in the wild. With regard to pack goats, there is

absolutely no indication whatsoever, from the lab or the wild, that pack goats have transmitted disease to bighorn sheep or that they are even capable of transmitting disease to bighorn sheep.³

Here, the Shoshone NF has developed a solution—elimination of goatpacking—to a problem that does not exist—disease transmission from pack goats to bighorn sheep on the Shoshone NF. This decision-making approach is not only arbitrary and capricious; it is also unsupported by the Forest Service’s authority. The Forest Service has no authority to eliminate goatpacking on the Shoshone NF without any indication that goatpacking is actually contributing to a problem on the Shoshone.

The Forest Service’s planning authorities required the Forest Service to manage the Shoshone for “multiple uses,” including both outdoor recreation (goatpacking) and wildlife (bighorn sheep). The Multiple-Use Sustained-Yield Act (“MUSYA”), 16 U.S.C. §§ 528-531, provides that “it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” 16 U.S.C. § 528 (emphasis added). In other words, the national forests are to be administered for “multiple use,” which includes management of outdoor recreation and range resources, along with management of wildlife. *See* 36 C.F.R. § 219.10 (“the plan must provide for ecosystem services and multiple uses, including outdoor recreation, range, . . . wildlife, and fish”); *see also* 36 C.F.R. § 219.10(a) (“The plan must include plan components, including standards and guidelines, for integrated resource management to provide for ecosystem services and multiple uses in the plan area.”).

The National Forest Management Act (“NFMA”), 16 U.S.C. §§ 472A, 476, 500, 513-516, 518, 521b, 528 (note), 576B, 594-2 (note), 1600 (note), 1601 (note), 1600-1602, 1604, 1606, 1608-1614, references the MUSYA, 16 U.S.C. §§ 528-531, and requires that plans developed for units of the National Forest System “provide for multiple use and sustained yield of the products and services obtained therefrom . . . and [must] include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness[.]” 16 U.S.C. § 1604(e)(1). “Thus, the NFMA is explicit that wildlife viability is not the Forest Service’s only consideration when developing site-specific plans for National Forest System lands.” *The Lands Council v. McNair*, 537 F.3d 981, 990 (9th Cir. 2008). Further, nothing in NFMA requires the Forest Service “to improve a species’ habitat to prove that it is maintaining wildlife viability.” *Id.* at 995.

³ What the available science does show is that bighorn sheep died when co-pastured with horses and cattle. *See* Foreyt and Lagerquist 1996. When bighorn sheep were co-pastured with horses, one of the bighorn sheep died, although the cause was undetermined. *Id.* When bighorn sheep were co-pastured with steers, a bighorn sheep died of pneumonia. *Id.* Thus, there is more evidence showing that horses and cattle are a risk for disease transmission to bighorn sheep than there is for pack goats. Yet, the Shoshone NF does nothing to terminate or control the use of horses and cattle on the Shoshone NF. The Shoshone NF’s decision to single out pack goats as a risk for disease transmission to bighorn sheep is arbitrary and capricious.

Conclusion and Recommendation: Here, the Shoshone NF is operating outside of its authorities by eliminating a use on the Forest—goatpacking—in favor of another use—wildlife. This is being done despite the fact that goatpacking has never, and does not now, pose a threat to wildlife viability. And, this is being done in contradiction of the Forest Service’s mandate to coordinate management of outdoor recreation with management of wildlife. The Shoshone NF is improperly managing the Shoshone solely for wildlife in violation of the MUSYA and NFMA. Instead, the Shoshone NF must coordinate management of outdoor recreation and wildlife. As a result, the Shoshone NF must allow goatpacking on the Shoshone to the extent it does not interfere with maintenance of wildlife viability.

Objection 8. The FEIS Does Not Properly Address Unavailable or Incomplete Scientific Information on Disease Transmission between Pack Goats and Bighorn Sheep Under NEPA.

In its comments, NAPgA explained that under NEPA the Shoshone NF was required to address the relevance of unavailable or incomplete scientific information. NAPgA Comments at 9-10. NAPgA even listed the relevant information that the Shoshone NF was required to obtain, or explain the absence of, in the FEIS. *Id.* at 17-19. The Shoshone NF ignored NAPgA’s comments and failed to address the relevance of unavailable or incomplete scientific information under NEPA.

The Shoshone NF readily acknowledges in several places in the FEIS that it lacks complete information to assess the potential effects of disease transmission between pack goats and bighorns. For example, the FEIS states that “[a]lthough scientific literature is lacking specifically for the risk of disease transmission between pack goats and bighorn sheep, some information is available for domestic goats and bighorn sheep.” FEIS at 223; *see also* DEIS at 226 (“Currently, there are no documented cases of disease transmittal from domestic sheep or goats to bighorns on the planning area.”); *id.* (“To date, there is no documented case of disease transmittals from domestics to bighorns on the Shoshone.”).

The FEIS assumes that disease transmission from pack goats to bighorn sheep is a threat to the wild sheep species. FEIS at 223, 226. However, the Forest Service provides no support for this assumption. In particular, the Forest Service fails to provide any information in the FEIS indicating that pack goats carry disease or that pack goats transmit disease. There is no discussion of, and no support showing, that pack goats and bighorn sheep are attracted to each other or would ever be prompted to interact with each other in the wild. In addition, there is no discussion of whether disease transmission from pack goats to bighorn sheep actually occurs in the wild and is proven to be a threat to the wild sheep species. *Id.*

The Shoshone NF failed to discuss the fact that there is no evidence whatsoever, be it circumstantial or otherwise, of a link between pack goats and pneumonia outbreaks within bighorn sheep populations in the wild, particularly on the Shoshone. This fact calls into question the Shoshone NF’s assumptions about disease transmission from pack goats to bighorn sheep. The Shoshone NF is required to disclose and analyze the possibility that pack goats do not carry and/or transmit disease to bighorn sheep and are not a potential cause of bighorn sheep die-offs. Otherwise, the EIS may be rendered defective. *See Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1169 (9th Cir. 2003); *Seattle Audubon Society v. Espy*, 998 F.2d

699, 704 (9th Cir. 1993); *League of Wilderness Defenders v. Zielinski*, 187 F. Supp.2d 1263 (D. Or. 2002).

Similarly, the FEIS fails to discuss not only whether pack goats actually carry disease, but also the mechanism through which pack goats transfer disease to bighorn sheep. Scientists have opposing viewpoints on the mechanism of disease transmission and the probability of disease transmission in the wild. These viewpoints are required to be addressed in the FEIS. More fundamentally, though, the Forest Service must show that pack goats are actually known to carry disease. Pack goats cannot transmit disease they do not even carry. Without this information, the FEIS and any decision to restrict or close pack goat use on the Shoshone based on the FEIS is arbitrary and capricious. *See Robertson*, 490 U.S. at 351 (“NEPA . . . prohibits uninformed . . . agency action.”); *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (an agency decision is to be reversed as arbitrary and capricious if the agency has “. . . entirely failed to consider an important aspect of the problem”).

NEPA procedures emphasize clarity and transparency of process over particular substantive outcomes. *See Pub. Citizen*, 541 U.S. at 756–57; *Robertson*, 490 U.S. at 350–51; *see also Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 n. 24 (9th Cir.2010) (“Clarity is at a premium in NEPA because the statute . . . is a democratic decisionmaking tool . . .”). Accordingly, agencies violate NEPA when they fail to disclose that their analysis contains incomplete information. *See N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir.2009); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir.2005); *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir.1983). Such required “up-front disclosures [include] relevant shortcomings in the data or models.” *Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir.2005); *see* 40 C.F.R. § 1502.22 (An agency “shall make clear” if there is “incomplete or unavailable information” in an EIS.).

When particular information “relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives,” the agency must obtain that information and include it in the EIS, unless the cost is “exorbitant or the means to obtain it are not known.” 40 C.F.R. § 1502.22. If obtaining the information is too costly or infeasible, the agency can forego its collection, providing full explanation in the EIS. *Id.* § 1502.22(b). “In that case the agency must include in the EIS: (1) A statement that the information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information; (3) a summary of relevant “existing credible scientific evidence;” and (4) the agency’s evaluation of impacts based on “theoretical approaches or research methods generally accepted in the scientific community.” *Id.*

The Shoshone NF has not included the following relevant information in the FEIS:

- Information indicating the differences between pack goats and other domestic goats;
- Information indicating that pack goats carry disease that can be transmitted to bighorn sheep;

- Information indicating that pack goats and bighorn sheep are attracted to each other and are prone to interact in the wild, even in the presence of a human;
- Information indicating that pack goats may come into contact or have come into contact with bighorn sheep on the Shoshone;
- Information indicating that BMPs and/or mitigation measures are not effective to ensure separation between pack goats and bighorn sheep on the Shoshone;
- Information indicating that pack goats may transmit or have transmitted disease to bighorn sheep on the Shoshone;
- Information indicating that bighorn sheep have contracted disease transmitted by pack goats on the Shoshone;
- Information indicating that bighorn sheep that have contracted disease transmitted by pack goats on the Shoshone have returned to their herds and infected other bighorn sheep;
- Information indicating that bighorn sheep that have contracted disease transmitted by pack goats on the Shoshone have returned to their herds and infected other bighorn sheep, which has led to a die-off;
- Information indicating that there is a risk of disease transmission from pack goats to bighorn sheep on the Shoshone;

Here, the Shoshone NF failed to take the required steps to address the incomplete or unavailable information relevant to ascertaining the possibility and consequences of disease transmission between pack goats and bighorns. The FEIS fails to contain a clear and direct statement that the required information is incomplete or unavailable. The FEIS also fails to discuss the relevance of the incomplete or unavailable information in light of evaluation of a reasonably foreseeable environmental impact. Lastly, the FEIS fails to contain the Shoshone NF's own evaluation of such impacts "based upon theoretical approaches or research methods generally accepted in the scientific community." *Id.*

Conclusion and Recommendation: Instead of honestly evaluating the range of potential scientific opinion applicable to disease transmission between pack goats and bighorns, the Shoshone NF impermissibly substituted its own assumptions on disease transmission. *See, for example,* FEIS at 223, 226. Where these assumptions have no grounding in the scientific literature concerning disease transmission, the agency has failed to ensure professional integrity, including the scientific integrity, of the FEIS, and has also failed to comply with NEPA requirements to address incomplete or unavailable scientific information. Based on this fundamental flaw in the evaluation of environmental consequences in the FEIS, the FEIS must be revised to provide further analysis, including an analysis of the incomplete or unavailable scientific information. NEPA does not permit the type of decide first, study later approach that the Shoshone NF has employed in the FEIS. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241

F.3d 722, 733 (9th Cir. 2001) (abrogated on other grounds); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990).

Objection 9. In violation of NEPA, the Shoshone NF Failed to Adequately Consider the Impact on Goatpackers of Its Decision to Close the Shoshone to Pack Goats.

The environmental effects that must be evaluated in an EIS include cultural, economic, and social effects, whether these effects are direct, indirect, or cumulative effects of the proposed action. 40 C.F.R. § 1508.8; *id.* § 1502.16. The required evaluation of environmental effects in an EIS “forms the scientific and analytic basis for the comparison[]” of alternatives that is the heart of the environmental impact statement. 40 C.F.R. § 1502.16.

NAPgA’s comments explained that the DEIS failed to discuss or analyze the impacts on goatpackers of the closure of the Shoshone NF to pack goats. NAPgA Comments at 19. In response to these comments, the Shoshone NF provided: “[t]he impacts of not allowing pack goat recreation are discussed in the species diversity and terrestrial wildlife section of chapter 3 in the FEIS.” FEIS at 904. Yet, a review of chapter 3 in the FEIS indicates that the impacts of not allowing pack goat recreation are not discussed there. Under NEPA, an agency preparing a final environmental impact statement “shall assess and consider comments” and “shall respond” to those comments in the final environmental impact statement. 40 C.F.R. §§ 1502.9, 1503.1, 1503.4. The Shoshone NF failed to meet this NEPA requirement.

In particular, the FEIS provides no discussion of the effect of eliminating goatpacking as a recreational use of the Shoshone NF. Such decision has an enormous impact on goatpackers as it terminates their use of the Shoshone. This social and economic impact on goatpackers, their families and other goatpacking enthusiasts and guides is not analyzed in the FEIS. Such impact could be enormous for goatpackers, as other National Forests may follow the Shoshone NF’s management direction and close additional Forests to goatpacking. This cumulative impact must be considered.

Further, goatpackers who use the Shoshone NF purchase goods and services in the communities surrounding the Shoshone, including Dubois, Wyoming, among other communities. The loss of goatpackers and their economic contributions to these communities must be analyzed in the FEIS.

Conclusion and Recommendation: The Shoshone NF’s FEIS completely fails to analyze the recreational, social and economic effects of eliminating goatpacking on the Shoshone NF. Such failure is a direct violation of NEPA. As a result, the FEIS must be revised to consider the recreational, social and economics impacts of eliminating goatpacking on the Shoshone NF.

EXHIBIT 1 – NAPgA Comments



Comments on the

July 2012

Draft Environmental Impact Statement

and

Draft Land Management Plan

for the

Shoshone National Forest

Land Management Plan Revision

Submitted by:

North American Packgoat Association

October 10, 2012

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I. Introduction to Comments

The North American Packgoat Association (“NAPgA”) timely submits comments on the Draft Environmental Impact Statement (“DEIS”) of the Shoshone National Forest Land Management Plan Revision and the Shoshone National Forest Draft Land Management Plan (“Draft LMP”). *See* 77 Fed. Reg. 46,433 (Aug. 3, 2012) (Notice of Availability). Comments on the DEIS and Draft LMP were requested by the Shoshone National Forest (“Shoshone”) as required by 40 C.F.R. §§ 1502.9, 1503.1. *See id.*; *see also* Shoshone National Forest, Draft Plan Revision Documents, available at <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning?cid=stelprdb5379153> (last visited Sept. 6, 2012) (requesting comments). The comment period expires on November 1, 2012. *See* 77 Fed. Reg. at 46,433.

NAPgA appreciates this opportunity to comment on the DEIS and Draft LMP. NAPgA and its numerous goatpacking-members will be affected by the management direction proposed in the draft goals and standards. The proposed management direction would result in closure of one of the premier goatpacking areas in the nation and set a precedent for other forests to follow in managing goatpacking. These comments will better inform the DEIS and further develop the efficacy of the management direction as defined by the draft goals and standards.

A. Overview of the North American Packgoat Association (“NAPgA”)

The North American Packgoat Association, Inc. is an organization established specifically for promoting packing with packgoats. The organization was incorporated in March, 2001, as a 501(c)(3) non-profit organization.

NAPgA seeks to further the pursuit of goatpacking by sharing the knowledge, ideas, and experiences of its members, by promoting the use of packgoats to the public as a means of low impact wilderness transportation and recreation, by serving as an advisory group on local and national land use issues, and to engage in other activities related to educating the public about goatpacking.

B. Background on the DEIS and Draft LMP

On November 14, 2011, the Forest Supervisor for the Shoshone National Forest issued Forest Order 02-14-00-12-01 concerning “Temporary Area Closure to Domestic Goat Use” (“Order”). *See* Shoshone National Forest, Order 02-14-00-12-01 (Nov. 14, 2011), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5340051.pdf (last visited Sept. 6, 2012). Pursuant to 36 C.F.R. § 261.50(a), the Order temporarily prohibited: “Possession or use of domestic goats on any National Forest System lands on the Wapiti, Clarks Fork, Greybull and Wind River Ranger Districts” as depicted on a map accompanying the Order. Unless rescinded, the Order is set to expire December 31, 2013.

In April 2012, the Shoshone National Forest published an analysis of the effects of disease transmission from domestic sheep and goats on the Shoshone to bighorn sheep populations occurring within and near the Shoshone. *See* Shoshone National Forest, “Risk Analysis of Disease Transmission between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep” (“Shoshone RADT Report”) (Apr. 2012), available at

http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5383002.pdf (last visited Sept. 6, 2012). This Shoshone RADT Report recommended that the Shoshone “[c]lose all occupied core native bighorn sheep habitat and the area within 26 km of the occupied core native habitat to domestic goat (includes pack goat) use.” *Id.* at 15.

In July 2012, the Shoshone National Forest published its DEIS and Draft LMP relying on the Shoshone RADT Report. *See* Shoshone National Forest, “Draft Environmental Impact Statement, Shoshone Land Management Plan Revision” (July 2012), available at <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning?cid=stelprdb5379153> (last visited Sept. 6, 2012); Shoshone National Forest, “Draft Land Management Plan, Shoshone National Forest” (July 2012), available at <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning?cid=stelprdb5379153> (last visited Sept. 6, 2012). The DEIS and Draft LMP are prepared to meet the requirements of the National Forest Management Act (“NFMA”), 16 U.S.C. § 1604, and associated regulations at 36 C.F.R. § 219. The Draft LMP is intended to revise the Shoshone National Forest 1986 Land Management Plan (“1986 LMP”) as amended.

II. Comments on the DEIS and Draft LMP

To assist the Shoshone, NAPgA’s comments refer to specific pages of the DEIS and Draft LMP that form the basis for each comment. Often, NAPgA’s comments will apply to more than one page or section of the DEIS and Draft LMP or the comments may be general comments. Comments are intended to apply to all listed pages and should be addressed in the context of each of the listed pages or in general.

NAPgA looks forward to the Shoshone’s responses to its comments. In addition to its general obligation to respond to public comments under 40 C.F.R. § 1503.4(a), the Shoshone must specifically “discuss at appropriate points in the final [EIS] any responsible opposing view which was not adequately discussed in the draft [EIS] and . . . indicate the agency’s response to the issues raised.” *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003) (quoting 40 C.F.R. § 1502.9(b)). A failure to do so is itself a NEPA violation. *Id.* at 1168. The Shoshone must also “insure the professional integrity, including scientific integrity, of the discussions and analyses” included in its EIS. 40 C.F.R. § 1502.24.

1. The DEIS Improperly Characterizes the No Action Alternative (General; DEIS at viii, xviii, 23, 30-33, 54)

The Council on Environmental Quality’s (“CEQ”) regulations implementing NEPA mandate inclusion of the “no action” alternative in every EIS. 40 C.F.R. § 1502.14(d). The “no action” alternative should describe the environmental baseline prior to the proposed changes in management direction for purposes of comparison with the alternatives in the EIS.

The “no action” alternative in the DEIS, i.e., Alternative A, is flawed with regard to its description of the environmental baseline in relation to packgoat use on the Shoshone. The management direction on the Shoshone pursuant to the 1986 LMP, as amended, did not close packgoat use on the Shoshone. Because this management direction from the 1986 LMP is being

revised in the Draft LMP, this management direction should be used for the environmental baseline in the DEIS, particularly with respect to packgoat use on the Shoshone.

The Forest Service's "temporary" closure of packgoat use on the Shoshone did not amend or revise the management direction of the 1986 LMP and was intended to be "temporary" in nature, not a permanent closure of the Shoshone to packgoats. *See* Shoshone National Forest, Order 02-14-00-12-01 (Nov. 14, 2011), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5340051.pdf (last visited Sept. 6, 2012); *see also* Forest Service Handbook ("FSH") 1909.15 § 32.12 and 36 C.F.R. § 220.6(d)(1) (discussing short-term nature of Order). Thus, the "temporary" closure of the Shoshone to packgoats is not an appropriate environmental baseline.

Moreover, the Forest Service cannot avoid proper NEPA analysis of its closure of the Shoshone to packgoat use by relying on the categorical exclusion applied for the "temporary" closure. The "temporary" closure was only intended to be "short-term" and did not undergo the NEPA analysis required for a permanent closure. NEPA does not permit the Forest Service to use a categorical exclusion intended for a "short-term" closure to satisfy the NEPA analysis required for a permanent closure.

Under NEPA, the Forest Service's "no action" alternative is required to consider the Shoshone open to packgoat use. That is the appropriate environmental baseline. In following, the DEIS must analyze any effects of any proposed management direction that would restrict or close packgoat use, or otherwise deviate from the environmental baseline.

The Forest Service must revise the DEIS so that an appropriate "no action" alternative is described and analyzed. The appropriate "no action" alternative is one that considers the Shoshone open to packgoat use. The Forest Service must then analyze the effects of restriction or closure of packgoat use on the Shoshone based on comparison to this "no action" alternative.

2. The DEIS Does Not Account for the Important Differences between Packgoats and Other Domestic Goats (General; DEIS at xviii, 30-45, 54, 213-16; Shoshone RADT Report)

The Forest Service's analysis of the potential for disease transmission between packgoats and bighorn sheep in the DEIS is fundamentally flawed because the Forest Service fails to account for the differences between packgoats and other domestic goats. Instead, the Forest Service considers all "domestic goats" to be the same. *See* DEIS at xviii (referring to "domestic goats (including pack goats)"). As the Shoshone RADT Report alludes to, "[t]here is a distinction in the use of domestic goats for packing versus use of goats on grazing allotments." Shoshone RADT Report at 8. Packgoats are very different from other domestic goats, both by breed and by use. The DEIS must account for these differences. To consider packgoats the same as other domestic goats for purposes of analyzing the risk of disease transmission to bighorn sheep on the Shoshone would be a critical error.

Packgoats are inextricably bonded to their owners, which represent the "alpha goat" in the pack. As a result, packgoats are not prone to straying and remain in very close proximity to

the “alpha goat.” Other domestic goats may not be part of a pack or may not be trained and, thus, there may be a risk of such goats straying from the herd. This is not the case for packgoats.

Further, unlike other domestic goats, packgoats may be tethered or high-lined at night. Packgoats also require their owner or “alpha goat” to be present to monitor the pack. Thus, packgoats are kept in sight in bighorn sheep habitat and there is always the presence of a human in close proximity to the packgoats, making it extremely unlikely that a bighorn sheep would approach the pack. In the presence of wild animals, such as bighorns, packgoats are also on heightened alert and retreat to a position near the alpha goat, i.e., the human.

In short, packgoats are very different than other domestic goats and the use of packgoats on the Shoshone is very different than the use of other domestic goats on the Shoshone. The DEIS wholly fails to account for these differences in the analysis of disease transmission from packgoats to bighorn sheep on the Shoshone. As a result, the DEIS must be revised to consider packgoats separate from other domestic goats and to consider the unlikelihood that packgoats carry disease and that packgoats would ever come in close contact with bighorn sheep on the Shoshone.

3. The Forest Service Fails to Consider Multiple Uses (DEIS at xviii, 30-40, 54, 213-16; Draft LMP at 46-48, 52)

The Multiple-Use Sustained-Yield Act (“MUSYA”), 16 U.S.C. §§ 528-531, provides that “it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” 16 U.S.C. § 528 (emphasis added). In other words, the national forests are to be administered for “multiple use,” which includes management of outdoor recreation and range resources, along with management of wildlife. *See* 36 C.F.R. § 219.10 (“the plan must provide for ecosystem services and multiple uses, including outdoor recreation, range, . . . wildlife, and fish”); *see also* 36 C.F.R. § 219.10(a) (“The plan must include plan components, including standards and guidelines, for integrated resource management to provide for ecosystem services and multiple uses in the plan area.”). Alternatives A through D in the DEIS, including the proposed alternative, do not manage for “multiple use” as they completely eliminate goatpacking on the Shoshone. Thus, implementation of these alternatives will violate the MUSYA. The DEIS must be revised for proper evaluation of alternatives that are consistent with the MUSYA. This includes alternatives that allow goatpacking on a part of or on the entire Shoshone.

4. The Forest Service Fails to Consider the Continuation of Goatpacking (DEIS at xviii, 30-40, 54, 213-16; Draft LMP at 46-48, 52)

The National Forest Management Act (“NFMA”), 16 U.S.C. §§ 472A, 476, 500, 513-516, 518, 521b, 528 (note), 576B, 594-2 (note), 1600 (note), 1601 (note), 1600-1602, 1604, 1606, 1608-1614, references the MUSYA, 16 U.S.C. §§ 528-531, and requires that plans developed for units of the National Forest System “provide for multiple use and sustained yield of the products and services obtained therefrom . . . and [must] include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness[.]” 16 U.S.C. § 1604(e)(1). “Thus, the NFMA is explicit that wildlife viability is not the Forest Service’s only consideration when developing site-specific plans for National Forest System lands.” *The Lands*

Council v. McNair, 537 F.3d 981, 990 (9th Cir. 2008). Further, nothing in NFMA requires the Forest Service “to improve a species’ habitat to prove that it is maintaining wildlife viability.” *Id.* at 995.

The DEIS and Draft LMP are inconsistent with NFMA because the Shoshone only considers wildlife viability and does not give any consideration to the continuation of goatpacking on the Shoshone. Further, the Shoshone’s proposed alternative in the DEIS and management direction in the Draft LMP are targeted at “benefiting” bighorn sheep and “improving” bighorn sheep habitat, which are not required under NFMA to establish that the Shoshone is maintaining wildlife viability. Consequently, the Shoshone’s proposed elimination of goatpacking to benefit bighorn sheep is unwarranted and inconsistent with NFMA. Thus, the DEIS and Draft LMP must be revised for proper evaluation of an alternatives that allow for the continuation of goatpacking on the Shoshone.

5. The DEIS Fails to Consider an Adequate Range of Alternatives (DEIS at xviii –xiii, 30-45, 54, 213-16)

NEPA requires that as part of its preparation of an EIS, an agency must “study, develop, and describe appropriate alternatives to recommended courses of action,” 42 U.S.C. § 4332 (2)(E), and discuss alternatives that it has considered, 40 C.F.R. § 1508.9. The agency’s discussion of reasonable alternatives forms the “heart” of the EA. 30 C.F.R. § 1502.14. NEPA mandates that federal agencies “provide legitimate consideration to alternatives that fall between the obvious extremes.” *Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1998). More specifically, NEPA is violated when an agency dismisses the consideration of an alternative “in a conclusory and perfunctory manner that [does] not support a conclusion that it was unreasonable to consider them as viable alternatives.” *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002). “The existence of reasonable but unexamined alternatives renders an EIS inadequate.” *Ilio’ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1095, 1101 (9th Cir. 2006) (Army’s failure to consider alternative of transforming 2d Brigade outside of Hawaii rendered EIS inadequate).

The DEIS fails to adequately study, develop and describe appropriate alternatives to the proposed course of action. The alternatives analyzed by the DEIS represent only the extremes of the spectrum of the potential actions and create all or nothing scenarios. Further, the Forest Service never addressed an intermediate solution proposed by NAPgA that would have met the stated purpose and need of the DEIS.

a. The DEIS Must Consider Implementation of Best Management Practices and Mitigation Measures for a Reasonable Range of Alternatives

For a reasonable range of alternatives, the DEIS must consider implementation of best management practices (“BMPs”) and mitigation measures, rather than simply concluding that goatpacking on the Shoshone must be closed. An EIS must describe and analyze a proper range of alternatives. 40 C.F.R. § 1502.14. This includes the requirement to rigorously explore and objectively evaluate all reasonable alternatives. *Id.* There is also a requirement to include appropriate mitigation measures. *Id.* Without an alternative that describes and analyzes the

implementation of mitigation measures to prevent contact between packgoats and bighorn sheep, instead of simply eliminating packgoats from the Shoshone, the DEIS contains an inadequate range of alternatives. Alternatives considering best management practices and mitigation measures are both reasonable and feasible under the circumstances, and must be analyzed in the DEIS.

Specifically, with regard to mitigation measures, CEQ regulations require the Shoshone to discuss possible mitigation measures when defining the scope of the EIS, in identifying the consequences of the proposed action, and in explaining the Shoshone's ultimate decision. 40 C.F.R. §§ 1502.16(h), 1505.2(c) and 1508.25(b). The regulations define "mitigation" to include the following:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action;
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action;
- (e) Compensating for the impact of replacing or providing substitute resources or environments.

40 C.F.R. § 1508.20. An EIS must include a reasonably thorough discussion of mitigation measures. Here, the DEIS fails to discuss mitigation measures.

Rather, the DEIS summarily disregards implementation of monitoring and BMPs and other mitigation measures. The Forest Service has not provided any discussion of recommended best management practices in the DEIS, nor has it included any alternatives that would implement such practices. As a result, the range of alternatives considered in the DEIS is deficient and must be revised.

NAPgA has proposed and continues to propose a suite of BMPs and mitigation measures to ensure that separation between packgoats and bighorn sheep on the Shoshone is maintained. These measures are presented in Exhibit A to these comments, "Proposed Best Management Practices for Separation between Packgoats and Bighorn Sheep Developed by Charles Jennings, Land Use Committee Chair, North American Packgoat Association." None of these practices and measures are considered in the DEIS. For example, the DEIS fails to consider that separation is maintained by the presence of a human with packgoats, by nighttime tethering or high-lining of packgoats, and by the nature and training of packgoats. The DEIS also failed to consider the use of GPS tracking collars on packgoats, pathogen testing, permitting for packgoat trips, designation of corridors for packgoats, and a host of other measures. Certainly, if packgoats do not carry disease and do not come into contact with bighorn sheep, there is zero risk of disease transmission from packgoats to bighorn sheep. Neither of these scenarios are considered in the DEIS.

The Shoshone should consider BMPs and other mitigation measures in the DEIS, rather than jumping to the conclusion that the Shoshone must be closed to packgoats. Numerous options are available to verify that packgoats do not carry disease and/or to ensure separation between packgoats and bighorn sheep. These practices must be considered in the EIS. Moreover, the EIS must include a proper range of alternatives and must discuss appropriate mitigation measures.

b. Alternatives Must Consider Strengthening Bighorn Sheep Immunity to Disease

Established epidemiology shows that disease occurs in bighorn sheep populations in the absence of contact with domestic sheep and other animals, including packgoats. These data indicate that infectious agents and other contributing factors involved in the disease process are present within bighorn sheep populations. It appears that most bighorn sheep are getting pneumonia from other bighorns because most of the herds have outbreaks of pneumonia yet are not in contact with domestic sheep or domestic goats. This indicates that the major problem is the lack of a good immune system in the bighorns. As discussed below, there are inherent risks in deciding to focus on attempting to isolate populations from all perceived transmission risks (when complete isolation is not possible); instead the focus should be on managing population immunity.

The critical component of managing infectious diseases in populations is immunity. A decision to attempt to immunologically isolate a given population from contact with potential sources of infection assumes the capacity to maintain total isolation. The wisdom of this management scheme (maintaining immunological naivety) in animal populations within the United States, when sources of infection are present in nature, is highly questionable. Two methods which provide population immunity are vaccination and/or exposure of populations through natural exposure (transmission). This latter situation is also referred to as premonition (resistance to a disease due to the existence of its causative agent in a state of physiological equilibrium in the host and/or by immunity to a particular infection due to previous presence of the causative agent).

The primary risk associated with incomplete immunologic isolation of an animal population is cycles of disease when isolation is broken as opposed to a continuum of managed population immunity through vaccines and/or natural exposure and premonition. When multiple sources of a given pathogen or group of pathogens exist, the prudent long-term health management dictates that population immunity be the primary tool. As an example of population immunity being the most effective management tool, the Lostine River herd of bighorns experienced a die-off in the 1980s, but is now considered the most viable herd in the Hell's Canyon area due to successful population immunity. Since bighorn sheep are infecting each other, building up their immune systems could have a beneficial effect on survival from many forms of disease.

Likewise, bighorn sheep face the risk of infection from sheep and other animals on and off of the Shoshone. Consequently, the elimination of packgoats on the Shoshone, even if there was evidence that packgoats carried and transmitted disease, would not eliminate the risk of disease transmission to bighorns. This fact is not adequately considered in the DEIS. It will be

impossible for the Shoshone to eliminate the risk of disease transmission to bighorns because of the numerous variables besides packgoats on the Shoshone (who are not even a known carrier or transmitter of disease). As a result, the Shoshone must analyze alternative solutions to maintaining bighorn sheep viability.

The Shoshone must also analyze the possibility that without interaction between bighorn sheep and other animals, bighorn sheep tolerance to disease may become worse, leading to more widespread die-offs, instead of fewer die-offs. Based on the analysis in the DEIS, the most prudent and most logical management action would be to work on encouraging development of immunity in bighorns. This action must be considered by the Shoshone in the EIS.

In the DEIS, the Forest Service failed to adequately consider a range of alternatives because the alternatives examined represent only the extremes of those reasonable alternatives available. *Colorado Env'tl. Coalition*, 185 F.3d at 1175. None of the alternatives considered building up bighorn sheep immunity to disease. The range of alternatives is unreasonable because a reasonable intermediate alternative was summarily rejected. *Davis v. Mineta*, 302 F.3d at 1122. As a result and in order for the EIS to comply with NEPA, alternatives which consider bighorn immunity and other long-term health concerns, must be considered in the EIS.

6. The Forest Service Fails to Meet Its NEPA Obligation to Ensure the Scientific Integrity of the DEIS (General; DEIS at xiii, 213-16; Shoshone RADT Report)

In evaluating the environmental impacts of a proposed action, NEPA requires federal agencies to ensure the scientific integrity of an EIS by considering appropriate studies and data. 40 C.F.R. § 1502.24. An agency may not rely on conclusory statements unsupported by data, authorities, or explanatory information. *Seattle Audubon Soc'y v. Moseley*, 798 F. Supp. 1473, 1480-83 (W.D. Wash. 1992), *aff'd*, 998 F.2d 699 (9th Cir. 1993). NEPA requires that an agency candidly disclose in its EIS the risks and effects of its proposed actions, and that it respond to adverse opinions held by respected scientists. *Seattle Audubon*, 798 F. Supp. at 1482 (*citing Friends of the Earth v. Hall*, 693 F. Supp. 904, 937 (W.D. Wash. 1988)).

The environmental effects that must be evaluated in an EIS include cultural, economic, and social effects, whether these effects are direct, indirect, or cumulative effects of the proposed action. 40 C.F.R. § 1508.8; *id.* § 1502.16. The required evaluation of environmental effects in an EIS “forms the scientific and analytic basis for the comparison[.]” of alternatives that is the heart of the environmental impact statement. 40 C.F.R. § 1502.16. The CEQ regulations specify the procedures that must be followed when, as here, an agency is evaluating reasonably foreseeable significant adverse effects in an EIS and there is incomplete or unavailable information. *See* 40 C.F.R. § 1502.22.

In addition to its general obligation to respond to public comments under 40 C.F.R. § 1503.4(a), the Shoshone must specifically “discuss at appropriate points in the final [EIS] any responsible opposing view which was not adequately discussed in the draft [EIS] and . . . indicate the agency’s response to the issues raised.” *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003) (quoting 40 C.F.R. § 1502.9(b)). A failure to do so is itself a NEPA violation. *Id.* at 1168. The Shoshone must also “insure the professional integrity,

including scientific integrity, of the discussions and analyses” included in its EIS. 40 C.F.R. § 1502.24.

a. The DEIS Does Not Properly Address the Relevance of Unavailable or Incomplete Scientific Information

The Forest Service readily acknowledges in several places in the DEIS that it lacks complete information to assess the potential effects of disease transmission between packgoats and bighorns. For example, the DEIS states that “[a]lthough scientific literature is lacking specifically for the risk of disease transmission between pack goats and bighorn sheep, some information is available for domestic goats and bighorn sheep.” DEIS at 213; *see also* DEIS at 215 (“Although there is no documented case of disease transmittal from domestic sheep and goats to bighorns on the Shoshone, it is possible that a risk would remain for such event.”). In situations such as this, where the relevant information for assessing impacts is incomplete or unavailable, the agency preparing the EIS must take the following steps: first, if the incomplete information relevant to reasonably foreseeable adverse effects is essential to a reasoned choice among alternatives and the overall costs of obtaining the information is not exorbitant, the agency must include that information in the EIS. Next, if the relevant information cannot be obtained because the overall costs are exorbitant or the means of obtaining the information are not known, then an agency must include in an EIS:

- (1) a statement that such information is incomplete or unavailable;
- (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant impacts on the human environment;
- (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and
- (4) the agency’s evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

40 C.F.R. § 1502.22(b).

Here, the Forest Service fails to take these required steps to address the incomplete or unavailable information relevant to ascertaining the possibility and consequences of disease transmission between packgoats and bighorns. The DEIS fails to contain a clear and direct statement that the required information is incomplete or unavailable. The DEIS also fails to discuss the relevance of the incomplete or unavailable information in light of evaluation of a reasonably foreseeable environmental impact. Lastly, the DEIS fails to contain the Forest Service’s own evaluation of such impacts “based upon theoretical approaches or research methods generally accepted in the scientific community.” *Id.*

Instead of honestly evaluating the range of potential scientific opinion applicable to disease transmission between packgoats and bighorns, the Forest Service impermissibly substituted its own assumptions on disease transmission. *See, for example*, DEIS at 213, 215. Where these assumptions have no grounding in the scientific literature concerning disease transmission, the agency has failed to ensure professional integrity, including the scientific

integrity, of the DEIS, and has also failed to comply with the requirements of the CEQ regulations to address incomplete or unavailable scientific information. Based on this fundamental flaw in the evaluation of environmental consequences in the DEIS, the DEIS should be revised to provide further analysis.

b. The DEIS Must Explain What is Being Done to Prove the Assumption that Disease Transmission from Packgoats to Bighorns is Occurring in the Wild

The DEIS assumes that disease transmission from packgoats to bighorn sheep is a threat to the wild sheep species. DEIS at 213, 215. However, the Forest Service provides no support for this assumption. In particular, the Forest Service fails to provide any information in the DEIS indicating that packgoats carry disease or that packgoats transmit disease. In following, there is no discussion of whether disease transmission from packgoats to bighorn sheep actually occurs in the wild and is proven to be a threat to the wild sheep species. *Id.*

The Forest Service failed to discuss the fact that there is no evidence whatsoever, be it circumstantial or otherwise, of a link between packgoats and recent pneumonia outbreaks within bighorn sheep populations in the wild, particularly on the Shoshone. This fact calls into question the Forest Service's assumptions about disease transmission from packgoats to bighorn sheep. The Forest Service is required to disclose and analyze the possibility that packgoats are not the link causing bighorn sheep die-offs. Otherwise, the EIS may be rendered defective. *See Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1169 (9th Cir. 2003); *Seattle Audubon Society v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993); *League of Wilderness Defenders v. Zielinski*, 187 F. Supp.2d 1263 (D. Or. 2002).

The Ninth Circuit, in its review of a Forest Service EIS that approved various timber sales, has highlighted this point. In *Center for Biological Diversity*, the Forest Service had determined that proposed logging would not have a significant adverse impact on the northern goshawk because it had concluded that the northern goshawk was a habitat generalist. Various parties, including the United States Fish and Wildlife Service and state wildlife agencies, had submitted comments and concerns to the Forest Service as a part of the scoping process and in response to the DEIS that disputed whether the northern goshawk was a habitat generalist and identified published research and scientific studies that suggested it may be a habitat specialist. *Center for Biological Diversity*, 349 F.3d at 1162-63. However, the final EIS did not respond to these comments or otherwise discuss these scientific studies and opinions. *Id.* Therefore, the court held that the EIS failed to disclose and discuss responsible opposing scientific viewpoints in violation of NEPA and the CEQ Regulations. *Id.* at 1169; *see also Sierra Club v. Bosworth*, 199 F. Supp.2d 971, 981 (N.D. Cal. 2002) (holding that an EIS must include a reasoned discussion of major scientific objections).

Similarly, here, the DEIS fails to discuss not only whether packgoats actually carry disease, but also the mechanism through which packgoats transfer disease to bighorn sheep. Scientists have opposing viewpoints on the mechanism of disease transmission and the probability of disease transmission in the wild. These viewpoints are required to be addressed in the EIS. More fundamentally, though, the Forest Service must show that packgoats are actually known to carry disease. Packgoats cannot transmit disease they do not even carry. Without this

information, the EIS and any decision to restrict or close packgoat use on the Shoshone based on the EIS will be arbitrary and capricious.

c. The Forest Service Should Not Rely on Assumptions Concerning Disease Transmission and Must Rely on Best Available Science

The DEIS assumes without any scientific basis that disease transmission from packgoats to bighorn sheep is a threat to the wild sheep species. DEIS at 213, 215. The scientific research used for the EIS needs to document that disease transmission occurs between packgoats and bighorns.

Forest Service regulations require that “best available science” be taken into account in planning. 36 C.F.R. § 219.3. In taking “best available science” into account, the Forest Service must “document how the best available science information was used to inform the assessment, the plan decision, and the monitoring program” and such documentation must “[i]dentify what information was determined to be the best available scientific information, explain the basis for that determination, and explain how the information was applied to the issues considered.” *Id.*

In the DEIS, the Forest Service makes the one-sided assumption that disease transmission from packgoats to bighorn sheep is a threat to the wild sheep species. This assumption does not rely on best available science because it fails to indicate that packgoats actually carry disease; it fails to account for the differences between packgoats and other domestic goats and sheep; it fails to account for the fact that bighorns already carry disease; it fails to account for the fact that other wildlife may transmit disease to bighorns; it fails to account for the fact that the bighorns may have a reduced immunity to disease that can be improved; and it fails to account for other interpretations of the available science. In addition, the DEIS fails to present baseline data on bighorn health. Thus far, the Forest Service has dictated that interpretation of the science must lead to separation of packgoats and bighorns on the Shoshone. Here, the best available science does not dictate such an outcome. As a result, the Forest Service must rely on best available science and revise the DEIS to indicate that separation of packgoats and bighorn sheep on the Shoshone is not supported by best available science.

d. Epidemiological Modeling is Needed to Understand How a Range of Factors Affect the Dynamics of Disease Spread Under Various Management Alternatives

The disease review in the DEIS is based on geographic characteristics of the disease in the context of interaction between domestic and wild sheep. While this is a useful and necessary component of much needed research, it in itself is not enough to make well-informed recommendations on policy alternatives. There remains limited knowledge of transmission dynamics. Clinical studies have shown bighorn sheep susceptibility to disease from contact with domestic sheep. However, epidemiologic modeling is needed to understand how contacts with domestic sheep, bighorn sheep, and other disease carriers (llamas, wild goats, birds, etc.), forage and climatic conditions, and other factors affect the dynamics of the disease spread under various management alternatives. The current disease model relied upon by the Shoshone is largely

dependent on assumptions. These assumptions need to be studied and proven to be relied upon in the EIS.

NEPA's procedures require the presentation of "complete and accurate information to decision makers and to the public to allow an informed comparison of the alternatives considered in the EIS." *NRDC v. U.S. Forest Service*, 421 F.3d at 813. Here, further modeling and additional study is needed to determine the added probability of disease transmission among bighorns and from other animals. The probability that healthy "carrier" bighorns are infecting "non-carrier" bighorns is likely high, since a large number of the bighorns on the Shoshone may be disease-carriers. Additionally, more information and study should be undertaken to determine the exact mechanism for developing pneumonia in bighorn sheep following association with domestic sheep or other animals. Further, the Shoshone must study the development of immunity to disease in bighorn sheep. All of this information should be considered and addressed by the Forest Service in the EIS.

7. The Forest Service Fails to Consider the Most Important Aspects of the Problem in the DEIS (General; DEIS at 213-16; Shoshone RADT Report)

Under the Administrative Procedure Act ("APA"), agency decisions under NEPA and NFMA will be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, judicial review of agency action seeks to determine whether an agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Utah Environmental Congress v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006).

In its DEIS, the Forest Service has failed to consider and acknowledge that the proposed alternative is unlikely to control disease transmission and is implausible. Disease could still be a factor for bighorn sheep populations on the Shoshone, regardless of the closure of the Shoshone to packgoats. The DEIS fails to address the fact that bighorn sheep themselves on the Shoshone may already carry or in fact already carry the pathogens that lead to disease. *See Shoshone RADT Report* at 3-4. Thus, bighorn sheep are at risk of contacting other bighorn sheep that carry the pathogens that can lead to diseases.

Because bighorn sheep are carriers of the pathogens that can lead to disease, contact with other bighorn sheep not only puts bighorn sheep populations at risk, but renders irrelevant packgoats as the vector for transmission of the pathogens (assuming that packgoats on the Shoshone are carriers of the pathogens). This misleads readers to believe that eliminating risk of contact on the Shoshone between packgoats and bighorn sheep will eliminate the threat of disease transmission. Under this misleading premise, the DEIS was designed to depict packgoats as the sole cause of disease transmission, which is not accurate. The alternatives and the discussion in the DEIS must acknowledge the potential futility of the alternatives and explain the need for a more comprehensive solution to the problem of disease transmission, such as the

development of a vaccine or such as the transplanting of bighorn sheep that are immune/resistant to the offending pathogens.

The DEIS also fails to consider that other animals on the Shoshone, like mountain goats, may carry the pathogens that can lead to diseases. Thus, contact between other animals, besides packgoats, and bighorn sheep may lead to disease transmission on the Shoshone. The DEIS does not discuss this possibility. In addition, the DEIS fails to acknowledge that bighorn sheep are at risk of contact with domestic sheep and other animals off the Shoshone.

Because the DEIS wholly fails to consider the risks of disease transmission from other bighorns, the risks of disease transmission off the Shoshone and risks of disease transmission from other sources, the DEIS is inadequate under NEPA. As a result, the DEIS must be revised to consider the risks of disease transmission from other bighorns, off the Shoshone and from other sources. Without analysis of these risks, it is premature to eliminate packgoats from the Shoshone.

8. The DEIS Improperly Relies on the Findings of the RADT Committee (DEIS at xiii, 213-16; Shoshone RADT Report)

On July 1, 2009, U.S. District Court Judge B. Lynn Winmill issued a decision in *Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868 (D. Idaho 2009). On November 9, 2009, Judge Winmill issued another memorandum and order clarifying that decision. See *Idaho Wool Growers Assoc. v. Schafer*, 08-394-S-BLW, Doc. 46 (D. Idaho). Plaintiffs challenged the Forest Service's establishment and use of two committees and their reports as violations of the Federal Advisory Committee Act, NFMA, and the APA. These committees are known as the RADT Committee and the Payette Principles Committee. The reports from the RADT Committee and the Payette Principles Committee are referenced and relied upon in the Shoshone RADT Report, which forms the basis for alternatives and analysis in the DEIS and the proposed management direction in the Draft LMP. See Shoshone RADT Report at 19-20 ("Literature Cited"); see also *id.* at 3-4, 12-13 (referencing and relying upon reports).

Judge Winmill entered an order granting plaintiffs' motion for summary judgment. In so doing, Judge Winmill wrote "[t]he issue here is whether the Forest Service's Committees violated FACA's and NFMA's procedural requirements and, if so, whether the Committees' reports should be utilized for any *future* Forest Service Decisions." *Idaho Wool Growers*, 637 F. Supp. 2d at 877. The Court ordered that "[t]he Committees' findings and/or conclusions are not to be relied upon by the Forest Service *with respect to any future agency decisions.*" *Id.* at 880 (emphasis added). This includes the Shoshone's EIS and LMP at issue here.

Despite Judge Winmill's decision, the Forest Service still relies upon the findings and conclusions of the RADT Committee and Payette Principles Committee in the Shoshone RADT Report and DEIS. See Shoshone RADT Report at 3-4, 12-13; DEIS at 213, 216 (referencing and relying on Shoshone RADT Report). And, the Forest Service still uses the findings and conclusions of the RADT Committee and Payette Principles Committee to develop alternatives in the DEIS and as support for its assumption that disease transmission occurs between domestic sheep or packgoats and bighorn sheep. See DEIS at 213, 215-16.

The Forest Service's continued use of such findings and conclusions is also prohibited by Judge Winmill's clarification memorandum and order. *See Idaho Wool Growers Assoc. v. Schafer*, 08-394-S-BLW, Doc. 46 (D. Idaho). There, Judge Winmill explained that the Forest Service should not "grandfather" RADT Committee and Payette Principles Committee findings and conclusions to support Forest Service decisions—"[s]imply put, and consistent with the Court's existing directive, the Forest Service may not rely upon the Committees' findings and/or conclusions in reaching future agency decisions – either directly or indirectly, through an end-run around the Court's mandate" *Id.* at 6. Judge Winmill stated: "[t]he Forest Service may not rely upon the Committee's findings and/or conclusions in reaching future agency decisions." *Id.* at 11. Clearly, that is what the Forest Service has done here. Consequently, a new DEIS and subsequent final EIS and LMP must be drafted without reliance on the RADT Committee's and Payette Principle Committee's findings and conclusions.

9. The Forest Service Improperly Relies on Findings from the Payette National Forest (General; DEIS at 213-16; Shoshone RADT Report)

In the DEIS and the Shoshone RADT Report, the Forest Service simply adopts the data and findings of the Payette National Forest to support its analysis of impacts to bighorn sheep on the Shoshone. For example, the Shoshone RADT Reports states "[a]lthough the foray distance for bighorn rams on the Shoshone is not known, the data compiled by the Payette National Forest (USFS 2006a) could be used to represent the potential foray distance on the Shoshone." Shoshone RADT Report at 13; *see also id.* at 15 (relying on findings of Payette National Forest). These findings inapplicable to the Shoshone and cannot be used on the Shoshone by law and because they are borne of flawed data and faulty modeling.

First off, the data cited to, namely "Payette National Forest (USFS 2006a)," may not be relied upon by the Forest Service pursuant to court order and as discussed above. *See Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868 (D. Idaho 2009); *Idaho Wool Growers Assoc. v. Schafer*, 08-394-S-BLW, Doc. 46 (D. Idaho).

Second, the Forest Service provides no basis for considering data collected by the Payette National Forest to be representative of bighorn sheep on the Shoshone. There is no indication that bighorn rams on the Payette are representative of bighorn rams on the Shoshone. The assumption that a 26 kilometer buffer is needed to protect foraging bighorn sheep from coming into contact with domestic goats is unsupported and not adequately explained by the Forest Service.

Third, the data compiled by the Payette National Forest and associated modeling performed by the Payette is flawed and should not be relied upon by the Shoshone. To the extent any data and modeling from the Payette is relied upon by the Shoshone, such data and modeling should be disclosed and the basis for the Forest Service's reliance on such data and modeling explained.

10. The Cumulative Impacts Analysis in the DEIS is Inadequate (General; DEIS at 216)

Once the resources affected by a project have been identified, the geographic range occupied by those resources can be used to determine the appropriate geographic range for the cumulative impact analysis. Determining the appropriate geographic limits of an EIS “requires a complicated analysis of several factors, such as the scope of the project considered, the features of the land, and the type of species in the area.” *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 958 (9th Cir. 2003). The proper scope of a cumulative impact analysis is limited to those past, present and reasonably foreseeable future actions that involve effects on a resource value that will overlap with the proposed project’s effects on that same resource value. 40 C.F.R. § 1508.7.

The CEQ Guidebook¹ suggests that the appropriate scope should be defined by determining the largest geographic area that is occupied by the resources that could be affected by the proposed action. CEQ Guidebook at 15; *see also id.* at 12 (noting that cumulative impact analysis “should be conducted on the scale of human communities, landscapes, watersheds, or air sheds.”); *Habitat Education Center, Inc.*, 381 F. Supp. 2d at 849 (“The presence of species habitat outside the project area is also a relevant consideration in determining the relevant scope of a cumulative impacts analysis for wildlife”); *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 974 (9th Cir. 2002) (Forest Service was arbitrary and capricious in using the “home range” of wildlife species as geographic area for cumulative impact analysis where Forest Service’s own scientists had concluded that habitat needs must be addressed at “landscape” level, and Forest Service failed to explain why it disregarded such information). Once the appropriate geographic boundary for a cumulative impacts analysis has been defined, actions that occur outside of that area and whose impacts on a particular resource value overlap with the anticipated effects of the proposed action on that resource value need to be considered in that analysis.

Determining which resources to consider and which actions to include in the cumulative impact analysis does not end the agency’s inquiry. The purpose of cumulative impact review is to provide “useful analysis” so that significant cumulative effects can be minimized. *See Kern*, 284 F.3d at 1075; CEQ Guidebook at 45. An agency must ensure that its cumulative impact analysis is “more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d

¹ The CEQ Guidebook, *Considering Cumulative Impacts Under the National Environmental Policy Act* (January 1997), is available at http://ceq.hss.doe.gov/publications/cumulative_effects.html (last visited Sept. 19, 2012). Courts look to the guidebook when considering a variety of cumulative impacts issues. *See e.g., Native Ecosystems*, 304 F.3d at 896 (CEQ Guidebook cited by Ninth Circuit for need to consider cumulative impacts in EAs); *American Rivers v. FERC*, 201 F.3d 1186, 1195 n.15 (9th Cir. 1999) (CEQ Guidebook cited by Ninth Circuit for need to establish baseline conditions for environmental analysis); *Habitat Education Center, Inc. v. Bosworth*, 381 F. Supp. 2d 842, 849-50 (E.D.Wis. 2005) (CEQ Guidebook cited by district court when determining proper scope of cumulative impact analysis for wildlife).

846, 868 (9th Cir. 2005); *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002); *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 810 (9th Cir. 1999).

In considering cumulative impacts, an agency must provide “some quantified or detailed information; . . . [g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *Ocean Advocates*, 402 F.3d at 868 (agency finding that dock extension at refinery would not increase oil tanker traffic did not constitute hard look required by NEPA where it relied exclusively on unsubstantiated letter from project applicant) (*citing Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379 (9th Cir. 1998)). The EIS must provide enough information concerning other area projects and their impacts to allow the decision-maker to decide whether or how to alter the proposed project to lessen cumulative environmental impacts. *City of Carmel v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1160-1161 (9th Cir. 1997).

a. The Cumulative Impacts Analysis Fails to Adequately Consider the Effects of Grazing on Lands Off the Shoshone

The DEIS fails to recognize that domestic sheep and goats may be grazed on adjacent National Forests, BLM lands and private lands. And, the Forest Service fails to adequately consider the effects of these actions in its cumulative impacts analysis. As a result of these actions, disease could still be factor for bighorn sheep populations on the Shoshone, regardless of the closure of the Shoshone to packgoats (even if packgoats were known to carry and transmit disease).

If disease transmission between domestic sheep/goats and bighorns is a factor on the Shoshone, then it is certainly a factor off the Shoshone. It is illogical to conclude that disease transmission between domestic sheep/goats and bighorns is somehow constrained by land ownership. Failing to model risk across the relevant landscape is misleading and taints the Forest Service’s analysis and conclusions regarding risk.

The analysis of risk and conclusions about disease transmission reached in the DEIS do not provide a “useful analysis” of the cumulative impacts of present and future grazing on lands off the Shoshone. The Forest Service’s “[g]eneral statements about possible effects and some risk do not constitute a hard look” at the cumulative impacts. *See Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 868 (9th Cir. 2005); *Kern*, 284 F.3d at 1075; *Muckleshoot Indian Tribe*, 177 F.3d at 810. If the Forest Service had properly considered the cumulative impacts of continued grazing on the variety of lands within and adjacent to the Shoshone, and within bighorn sheep habitat, as it was required to do, it may have altered the proposed action. The DEIS must be revised for proper consideration of cumulative impacts.

b. The Cumulative Impacts Analysis Fails to Adequately Consider the Effects of Disease Transmission by Other Animals

The Forest Service fails to consider in the DEIS that other animals on the Shoshone may be carriers and transmitters of disease. Instead, and without any scientific information supporting its assumption, the Forest Service singles out packgoats and assumes that there is risk

of disease transmission from packgoats to bighorns. The risk of disease transmission from other animals to bighorns is not considered. For an adequate NEPA analysis, the risk of disease transmission from other animals to bighorns must be considered.

For example, the Forest Service must consider and analyze the risk of disease transmission from cattle, horses, dogs, birds, and other animals that use the Shoshone. Moreover, the Forest Service must consider and analyze disease transmission from mountain goats to bighorn sheep. Unlike the situation for packgoats, there is scientific information indicating that there is a risk of disease transmission from mountain goats to bighorn sheep. *See, for example*, Carson J. Butler and Robert A. Garrott, “Climatic Variation and Age Ratios in Bighorn Sheep and Mountain Goats in the Greater Yellowstone Area,” available at http://www.gyamountainungulateproject.com/annual_report_2011/AgeRatioDynamics.pdf (last visited Sept. 18, 2012) (citing T.O. Lemke, “Origin, expansion, and status of mountain goats in Yellowstone National Park,” *Wildlife Society Bulletin* 3:532-541 (2004)) (“there is also the possibility that mountain goats will affect bighorn sheep and other ungulate populations through disease transmission”). There is also information indicating that mountain goats are out-competing bighorn sheep. *See* Cory Hatch, “Mountain goats worrisome in bighorn sheep territory” (Feb. 20, 2012), available at http://mtstandard.com/news/local/state-and-regional/mountain-goats-worrisome-in-bighorn-sheep-territory/article_2c82f2ba-5b83-11e1-92de-0019bb2963f4.html (last visited Sept. 18, 2012). Although mountain goats are known to exist on the Shoshone, the Forest Service disregards their existence and contribution to disease transmission and competition in the DEIS. Under NEPA, the effects of mountain goats on the Shoshone must be considered in the EIS.

c. The Cumulative Impacts Analysis Does Not Analyze the Impacts of Wolves on Bighorn Sheep

The DEIS fails to consider the impact of wolves on bighorn sheep, both in terms of bighorns killed by wolves and in terms of the impact on bighorn sheep movements and habitat. Wolves may be contributing to reduced populations of bighorn sheep on the Shoshone and may also be affecting bighorn sheep movements and habitat. These contributions to reduced bighorn populations must be considered in the EIS.

d. The Cumulative Impacts Analysis Does Not Consider the Impact of Hunting on Bighorn Sheep

The DEIS should discuss and analyze the impacts on bighorn sheep populations of continued hunting of bighorn sheep on the Shoshone. Hunting, particularly of healthy male bighorn sheep, reduces the population of bighorn sheep on the Shoshone and, in the case of healthy male bighorn sheep, results in the loss of a breeder that may contribute to more vital immune systems in offspring.

11. The Forest Service must Obtain Additional Information for the EIS (General; DEIS at xiii, 213-16; Shoshone RADT Report)

When particular information “relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives,” the agency must obtain that

information and include it in the EIS, unless the cost is “exorbitant or the means to obtain it are not known.” 40 C.F.R. § 1502.22. If obtaining the information is too costly or infeasible, the agency can forego its collection, providing full explanation in the EIS. *Id.* § 1502.22(b). “In that case the agency must include in the EIS: (1) A statement that the information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information; (3) a summary of relevant “existing credible scientific evidence;” and (4) the agency’s evaluation of impacts based on “theoretical approaches or research methods generally accepted in the scientific community.” *Id.*

The Shoshone has not included the following relevant information in the DEIS:

- Information indicating the differences between packgoats and other domestic goats;
- Information indicating that packgoats carry disease that can be transmitted to bighorn sheep;
- Information indicating that packgoats may come into contact or have come into contact with bighorn sheep on the Shoshone;
- Information indicating that BMPs and/or mitigation measures are not effective to ensure separation between packgoats and bighorn sheep on the Shoshone;
- Information indicating that packgoats may transmit or have transmitted disease to bighorn sheep on the Shoshone;
- Information indicating that bighorn sheep have contracted disease transmitted by packgoats on the Shoshone;
- Information indicating that bighorn sheep that have contracted disease transmitted by packgoats on the Shoshone have returned to their herds and infected other bighorn sheep;
- Information indicating that bighorn sheep that have contracted disease transmitted by packgoats on the Shoshone have returned to their herds and infected other bighorn sheep, which has led to a die-off;
- Information indicating that there is a risk of disease transmission from packgoats to bighorn sheep on the Shoshone;
- Information indicating the risk of disease transmission from other animals on and off of the Shoshone to bighorn sheep;
- Information indicating the impacts of wolves, mountain goats, and hunting on bighorn sheep populations on the Shoshone;

- Information indicating the recreational, social and economic impacts on goatpackers of a closure of the Shoshone to packgoats; and
- Information indicating the environmental justice implications of closing the Shoshone to packgoats.

12. The Analysis of Impacts on Recreation in the DEIS is Inadequate (General; DEIS at xv, 473)

The DEIS does not discuss the impact on goatpackers of the closure of the Shoshone to packgoats. The closure removes goatpacking as a recreational use of the Shoshone and thus has an enormous impact on goatpackers. Under NEPA, the EIS must analyze the impacts on goatpackers of closing the Shoshone to packgoats.

13. The Analysis of Social and Economic Impacts in the DEIS is Inadequate (General; DEIS at xvi, 576)

The DEIS fails to analyze the social and economic impacts on goatpackers and communities near the Shoshone of a closure of the Shoshone to packgoats. First and foremost, a closure would entirely remove a forest use from the Shoshone and prevent people from being introduced to goatpacking. A closure would also substantially hinder goatpacking for enthusiasts and guides, who would be forced off the Shoshone. Moreover, a decision to close the Shoshone to packgoats may create a precedent for other forests to follow, which would further curtail goatpacking across the western United States. Under NEPA, these social impacts must be analyzed in the EIS.

Further, goatpackers who use the Shoshone purchase goods and services in the communities surrounding the Shoshone, including Dubois, WY, among other communities. The loss of goatpackers and their economic contributions to these communities must be analyzed in the EIS. As a result, the DEIS must be revised to consider the social and economic impacts of closing the Shoshone to packgoats.

14. Consideration of Environmental Justice in the DEIS is Inadequate (General; DEIS at 605)

The discussion of environmental justice in the DEIS is inadequate because it wholly fails to consider the environmental justice impacts of the closure of the Shoshone to packgoats. A large portion of goatpackers are elderly and/or disabled individuals who rely upon packgoats to carry gear that they are physically unable to carry themselves. Only with the assistance of packgoats are these people able to access and enjoy the trails and backcountry on the Shoshone. A Forest Service decision to close the Shoshone to packgoats would solely and directly affect elderly and/or disabled goatpackers, and effectively remove these individuals from the Shoshone. The Forest Service's targeting of these elderly and/or disabled individuals is a significant environmental justice concern that must be addressed in the EIS.

15. The Management Direction for “Sensitive Species” is Inconsistent with Multiple-Use Management and NFMA, and Arbitrarily and Capriciously Attempts to Eliminate Packgoats from the Shoshone (Draft LMP at 46-48)

The Draft LMP provides three goals concerning bighorn sheep on the Shoshone:

3. Maintain low risk of disease transmission from domestic sheep and domestic goats to wild bighorn sheep within core bighorn sheep ranges.
4. Habitat conditions for bighorn sheep, particularly non-forested openings of various sizes and shapes that provide forage, access to winter range, escape terrain, and access to migration routes are improving.
5. Maintain and enhance bighorn sheep populations.

Draft LMP at 47. The Draft LMP also provides two standards concerning bighorn sheep on the Shoshone:

5. Domestic sheep and goat allotments will not overlap with core native bighorn sheep ranges.
6. Do not allow recreational pack goat use in core native bighorn sheep ranges, except for authorized use.

Id. at 48. This management direction is inconsistent with the MUSYA and NFMA and arbitrarily and capriciously attempts to eliminate packgoats from the Shoshone.

First, to disallow recreational packgoat use on the Shoshone is inconsistent with multiple-use management and NFMA because it completely eliminates a use from the Shoshone. The MUSYA and NFMA require that the Forest Service manage for multiple uses, instead of completely eliminating certain uses from the Shoshone. As a result, the Forest Service must consider use of packgoats on all or a portion of the Shoshone.

Second, there is no requirement under NFMA for the Forest Service to “enhance” bighorn sheep populations. By doing so, particularly to the exclusion of other uses of the Shoshone, the Forest Service is exceeding its authority. The Draft LMP should be revised to indicate that the Forest Service has no requirement to “enhance” bighorn sheep populations.

Third, the Draft LMP indicates that the Forest Service’s goal is to “[m]aintain low risk of disease transmission from domestic sheep and domestic goats.” Draft LMP at 47. This goal should be revised to account for the differences between packgoats and other domestic goats.

Further, the Forest Service must explain how continued use of packgoats on the Shoshone would not achieve this goal. Currently, packgoat use on the Shoshone is quite limited. Packgoats are also not known to stray from their owners and BMPs may be used to ensure that

packgoats do not leave the owner-controlled pack. In addition, the Forest Service does not present any scientific information showing that packgoats carry disease or that they transmit disease to bighorns. Thus, the probability that: (1) a packgoat will be on the Shoshone, (2) that a packgoat will stray from its pack, (3) that a packgoat will be carrying disease, (4) that a packgoat will come into contact with a bighorn sheep, (5) that a packgoat will transmit disease to a bighorn sheep, (6) that the bighorn sheep will contract the disease, (7) that the bighorn sheep will return to a herd, (8) that the bighorn sheep will transmit disease to other bighorns in the herd; and (9) that those bighorns will contract disease, (10) which will lead to a die-off, is zero or very, very close to zero. Considering the unlikelihood of any of these factors, all of which must be present for disease transmission and a bighorn die-off to occur, any alternative in the DEIS which closes the Shoshone to packgoats is arbitrary and capricious. As a result, the Forest Service must not close the Shoshone to packgoats or otherwise provide relevant scientific information demonstrating the substantial likelihood of all of these factors.

Fourth, with regard to “[h]abitat conditions for bighorn sheep,” the statement in the Draft LMP does not make any sense and appears to be missing a word such as “maintain.” Draft LMP at 47. Regardless, if “habitat conditions for bighorn sheep” on the Shoshone are a concern, they must be discussed in the DEIS. Specifically, the Forest Service must analyze the fact that in the last few decades, vegetation at upper elevations on the Shoshone has increased, including forested areas. This impact of this continuing trend on bighorn sheep should be analyzed in the DEIS, along with the likely contributions of climate change to this trend.

Finally, the Forest Service should explain how it will meet that standard of “[d]o not allow recreational pack goat use in core native bighorn sheep ranges, except for authorized use,” by closing the Shoshone to packgoats. What is meant by “authorized use?” That should be explained in the LMP. In addition, this standard should be revised to reflect that packgoats are not known to carry disease and are not likely to transmit disease to bighorn sheep. Based on the scientific information presented by the Forest Service in the DEIS, there is no basis for disallowing packgoat use on the Shoshone. As a result, the standard should be revised to “allow recreational pack goat use in core native bighorn sheep ranges.”

16. The Management Approach for Bighorn Sheep Must be Revised to Reflect Scientific Information and Use of BMPs (Draft LMP at 52)

The management approach for bighorn sheep in the Draft LMP provides that “[t]here is a concern about the risk of disease transmission from domestic goats used for packing to bighorn sheep.” Draft LMP at 52. The Forest Service should explain its “concern” in the Draft LMP and DEIS and indicate the scientific information supporting that concern. In particular, the Forest Service should explain the differences between packgoats and other domestic goats and discuss the unlikelihood that a packgoat would ever come into contact with a bighorn in the wild, especially when BMPs are employed to ensure that packgoats do not stray from a pack. The Forest Service should also present scientific information showing that packgoats actually carry disease and that packgoats actually transmit disease to bighorn sheep in the wild. Further, the Forest Service should discuss the risk of transmission of disease from packgoats to bighorn sheep after packgoats have been tested for pathogens and determined not to be carriers of disease and after other BMPs and mitigation measures are applied. As it stands, the management approach proposed by the Forest Service is arbitrary and capricious.

Although the Forest Service fails to establish that there is a risk of disease transmission from packgoats to bighorn sheep, it provides that “to manage that risk, guidelines are applied for domestic pack goats within the Shoshone.” Draft LMP at 52. What are these guidelines? That should be explained in the LMP. The Forest Service should also explain how the alternatives in the DEIS that would close the Shoshone to packgoats are consistent with this management approach that contemplates at least some use of the Shoshone by packgoats.

Additionally, the Forest Service provides that “[n]ew authorizations for pack goat use in core bighorn sheep ranges will not be issued until effective mitigation is available to minimize the risks of disease transmission.” Draft LMP at 52. First off, the Forest Service must establish that there is a “risk of disease transmission.” The DEIS does not establish that any risk exists, nor that packgoats are actually carriers and transmitters of disease. Second, NAPgA has suggested a host of “effective mitigation” that is available to minimize the risk of disease transmission (assuming there is actually a risk). Thus far, the Forest Service has failed to consider these measures. These measures should be considered in the EIS, and incorporated into the LMP. The alternatives in the DEIS that simply close the Shoshone to packgoats without consideration of BMPs, and mitigation measures are inconsistent with this management approach and not compliant with NEPA.

Finally, the Forest Service’s management approach provides that “[i]nformation and education will be provided to recreational goat packers on the need to avoid contact between domestic pack goats and bighorn sheep.” Draft LMP at 52. NAPgA supports the Forest Service’s management approach in this regard and offers its expertise and assistance in developing and distributing educational materials to goatpackers. The use of BMPs and mitigation measures may be employed to ensure that separation between packgoats and bighorn sheep on the Shoshone is maintained.

EXHIBIT A

Proposed Best Management Practices for

Separation between Packgoats and Bighorn Sheep

Developed by Charles Jennings, Land Use Committee Chair

North American Packgoat Association

BACKGROUND: Shoshone National Forest is currently in the process of revising the Shoshone National Forest Land and Resource Management Plan. One item proposed in this revision is the temporary closure of 4 out of the 5 Shoshone National Forest Ranger Districts to the use of packgoats. This closure is proposed primarily due to recommendations by some bighorn sheep advocacy groups/technical committees to prohibit the use of packgoats on any public land that may be used by bighorn sheep. In an effort to ensure that all National Forest users potentially harmed by this closure are given full consideration, Shoshone National Forest contacted the North American Packgoat Association (NAPgA) as the only existing representation for the packgoat community. The NAPgA consists of multiple National Forest user groups who share the common thread of using packgoats to access the wilderness. NAPgA members and packgoat users as a whole are a diverse group of people who share a love of the outdoors and wild places. The NAPgA would like to express our support for the continued conservation of these natural places including the wildlife and wildlife habitat contained within them.

The NAPgA recognizes that National Forest management decisions consist of multiple considerations that often require accommodations from all affected parties. It is our belief that the landscape scale closure of over 2 million acres (3,555 square miles) of public land based on recommendations with little or no scientific support and without consideration of reasonable management alternatives is not an acceptable form of management. We recognize that, at this time, this closure is considered temporary. We believe this is merely a difference in semantics, since this “temporary” closure circumvents the ability of anyone to collect any information regarding packgoats and their use for the final revision plan decision. This will leave the Shoshone National Forest with no new information to assess in their decision making process, and will effectively force a permanent closure.

Research conducted on domestic sheep shows that nose-to-nose contact or comingling is required for transmission of *Pasteurella* spp. that may lead to pneumonia in bighorn sheep, and that a distance as little as 10 meters prevents transmission (Lawrence et al.,2010). In general, the research conducted on domestic sheep available at this time suggests that direct contact or comingling is required for transmission. The primary recommendation for the protection of bighorn sheep from potential transmission from domestic sheep used for grazing is spatial and temporal separation. (WAFWA, 2010) While the NAPgA does not approve of the association of packgoats with domestic sheep used for grazing, the following best management practices were developed to accomplish spatial separation of packgoats and bighorn sheep. It is understood

that temporal separation during most critical periods for bighorns is accomplished by the limited time period that access is possible due to seasonal considerations.

BMP #1: All goats will be swabbed and tested to determine all serotypes of *Pasteurella* spp. being carried. These tests will be carried out as close to the access date as possible while allowing for trip planning and the time required for lab results. Only packgoats that are not carrying serotypes that could potentially be virulent to bighorn sheep will be allowed access. A lab report/health certificate showing these results will be provided for each animal accessing the forest. Forest users will not allow contact with other goats or domestic sheep in the time period between swabbing and accessing the forest.

BMP #2: All camping areas will be located outside of bighorn crucial habitat and within areas that contain physical and behavioral barriers such as severe terrain, water bodies and heavier timber. All travel along trails will be maintained in similar areas of physical and behavioral barriers whenever possible. Any trails accessing areas without these barriers will require pass-through use. Camping will be prohibited in areas that do not meet the standards necessary for enactment of all best management practices. Only trails with pass-through access that do not require camping in unapproved areas will remain open. Trails and camping areas for the period of time proposed for the temporary closure have been outlined and identified. All other areas will be temporarily closed to the use of packgoats during this data collection and assessment period.

BMP #3: All packgoats will be on leads when traveling in areas with potential for bighorn encounters, primarily on trails that pass through crucial bighorn habitat. Two of the many benefits of the use of packgoats are their desire to be with, and stay with, their human handlers and their ability to navigate difficult terrain. When presented with difficult terrain that is dangerous to goats in a string, and when directly in sheep avoidance areas such as timber or areas of high visibility outside of crucial bighorn habitat, packgoats will have a lead attached to their collar and draped on their saddle for quick and easy physical control, but will not be required to be tied together in a string. No animals will be allowed to lag behind or stray far enough to prevent gaining immediate physical control if necessary.

BMP #4: When camping, all packgoats will be in direct sight close enough for immediate physical control if necessary, or tethered in some fashion (picketing, high lining, etc.) and under supervision. All packgoats will be tethered at night. Portable electric fence will surround the tethered goats to prevent curious bighorns from attempting contact to achieve complete spatial separation. Tents will be situated around tethered goats to provide an additional deterrent to curious bighorns.

BMP#5: When travelling on trails outside of crucial habitat, packgoat users will be diligent for the presence of bighorn sheep at all times. If sheep are observed within 100 yards of the trail, travelers will stop and wait for the sheep to move away. Hazing techniques may be used to deter sheep from moving closer to the trail if necessary. When bighorns are using trails for travel, a characteristic observed in stressed animals trekking long distances to access mineral licks, packgoat users will move off the trail 100 yards. If that distance is not attainable, the user

will travel back along the trail away from the sheep and exit the trail when the 100 yard buffer distance can be reached. Travelers will stay off the trail long enough to be sure all bighorns have passed. If visibility is limited to less than 100 yards up trail, a scout will go to the trail and observe for bighorns before continuing with goats.

BMP#6: When accessing browsing areas and water, a scout will check for the presence of bighorn sheep before allowing access for goats. Whenever possible, water access will be limited to areas of unlikely bighorn use, such as areas within heavy timber away from game trails. Access to water areas with the potential for bighorn use will be limited to the time it takes the goats to drink. Browsing will be supervised at all times within distance of gaining immediate physical control of goats if necessary. The number of supervisors in attendance will reflect the number of people required to achieve physical control of all goats. Supervisors will carry “catch grain” to encourage goats to remain close and assist with gaining physical control when necessary.

BMP#7: Packgoat numbers will be limited to a maximum of two goats per person, and a maximum of 6 goats per group. These numbers represent a maximum and all users will be encouraged to implement ultralight practices and bring the least number of goats necessary.

BMP #8: In the event that a packgoat is accidentally killed or intentionally euthanized on the trail, the entire carcass of the animal will be completely removed from the forest.

BMP #9: There has been no research conducted on packgoat use in Shoshone National Forest and there is no future plan of conducting any research on the use of packgoats during the proposed temporary closure. The NAPgA will provide Garmin Astro Brand GPS tracking collars for use on lead goats. This GPS tracking data, coupled with observation data collected by packgoat users educated in the proper methodology, will provide use data to contribute to an informed management decision. The added protection of the top goat having a GPS collar allows for immediate real time tracking of animals in the unlikely event of a goat getting far enough away to be outside of visible and audible distance.

BMP#10: All goats being used will have bells attached to their collars at all times to ensure positive identification of each animal's location.

BMP#11: The NAPgA, in cooperation with Forest Service will provide educational materials and online testing for all aspects of responsible travel in bighorn sheep areas, including the specifics outlined in all best management practices. Before being granted a stock permit, packgoat users will be required to pass an exam. Exam results will be monitored and maintained by the NAPgA and provided to the Forest Service when requesting a stock permit. Additional quick reference material will be provided to help with responsible packgoat use while on the trail.

BMP#12: All packgoats allowed access will be properly bonded, reliable packers in proper condition to handle the potential travel setbacks, the longer continuous travel through crucial bighorn habitat and the speedy travel required to quickly pass through crucial bighorn areas.

The exam will contain questions intended to confirm these traits and the user will be required to attest to these traits on the stock permit.

BMP #13: In the highly unlikely event that direct contact of a packgoat and bighorn sheep is observed, a location and as much of a description as is possible of the sheep will be taken and immediately reported to the Wyoming Game and Fish Department and the Shoshone National Forest. Any biological samples that can be reasonably obtained (i.e. swab, blood sample) from the packgoat in question will be allowed to be taken by the appropriate agency.

Due to a “no risk” policy being upheld by bighorn advocacy groups, including the various agency biologists within them, these BMP’s have been developed solely by the NAPgA with the assistance of knowledgeable volunteers and scientists not associated with bighorn groups. The NAPgA recognizes that the typical BMP process involves cooperation and collaboration with all affected parties. This BMP document is provided as a proposal based on expert packgoat knowledge that would benefit from the active participation of agency bighorn experts. The intent of these best management practices is to provide access to packgoat users willing to learn and adhere to all aspects of responsible packgoat use in bighorn sheep areas. A complete prohibition of packgoats will provide no control over packgoat use, and no method of educating and monitoring packgoat users on responsible methods for accessing bighorn areas. The restrictive nature of these best management practices will act as a deterrent for those users not willing to submit to the extensive preparation and implementation of these practices, and will likely result in the same effect as a closure for most users.

Charles M. Jennings

NAPgA Land Use Chair

Literature Cited:

Lawrence, P.K., Shanthalingam, S., Dassanayake, R.P., Subramaniam, R., Herndon, C.N., Knowles Jr, D.P., Rurangirwa, F.R., Foreyt, W.J., Wayman, G., Marciel, A., Highlander, S.K., Subramaniam, S. 2010. TRANSMISSION OF MANNHEIMIA HAEMOLYTICA FROM DOMESTIC SHEEP (OVIS ARIES) TO BIGHORN SHEEP (OVIS CANADENSIS): UNEQUIVOCAL DEMONSTRATION WITH GREEN FLUORESCENT PROTEIN-TAGGED ORGANISMS. *Journal of Wildlife Diseases*. 46(3):706-717.

Western Association of Fish and Wildlife Agencies (WAFWA) Wild Sheep Working Group (WSWG). 2010. Recommendations for Domestic Sheep and Goat Management in Wild Sheep Habitat, July 21, 2007. 27 pp. <http://www.wafwa.org/html/wswg.shtml>

**EXHIBIT 2 - *Idaho Wool Growers Assoc. v. Schafer*,
637 F. Supp. 2d 868 (D. Idaho 2009)**

(Double-sided; not for publication)

637 F.Supp.2d 868

(Cite as: 637 F.Supp.2d 868)



United States District Court,
D. Idaho.
IDAHO WOOL GROWERS ASSOC., and Dr. Marie
S. Bulgin, Plaintiffs,

v.

Ed SCHAFER, in his official capacity as the Secretary of the United States Department of Agriculture, Gail Kimbell, in her official capacity as the Chief of the United States Forest Service, Suzanne C. Rainville, in her official capacity as the Forest Supervisor of the Payette National Forest, and United States Forest Service, Defendants.

No. CV-08-394-S-BLW.

July 1, 2009.

Background: Wool growers' association and doctor brought declaratory judgment action, seeking a declaration that the committees established by Forest Service to study the risk of disease transmission from domestic sheep to bighorn sheep were “advisory committees” subject to the procedural mandates of Federal Advisory Committee Act (FACA) and the National Forest Management Act (NFMA). Association filed motion for summary judgment.

Holdings: The District Court, [B. Lynn Winmill](#), Chief Judge, held that:

- (1) association's claims constituted a challenge to a “final” Forest Service action so as to obtain judicial review under Administrative Procedure Act (APA);
- (2) association had standing to pursue its declaratory judgment action;
- (3) committees were not exempt from procedural mandates of FACA and NFMA, pursuant to Unfunded Mandates Reform Act (UMRA), which provided exception to FACA's transparency requirements;

(4) committees were “advisory committees” under FACA and, thus, subject to FACA's procedural requirements;

(5) Service did not comply with FACA; and

(6) committees' reports would not be used in any future agency decision.

Motion granted.

West Headnotes

[1] United States 393 29

393 United States

393I Government in General

393k29 k. Creation and Abolition of Executive Offices in General. [Most Cited Cases](#)

Woods and Forests 411 7

411 Woods and Forests

411k7 k. Forest Commissions and Other Officers.

[Most Cited Cases](#)

Provisions of Federal Advisory Committee Act (FACA) and the National Forest Management Act (NFMA) attempt to ensure that advisory committees to federal agencies are transparent and adequately represent the public interest by imposing a number of requirements on advisory groups regarding such matters as advance notice of committee meetings, the keeping of public availability of minutes, and the composition of advisory group membership. Federal Advisory Committee Act, § 2, 5 U.S.C.A.App. 2 .

[2] Administrative Law and Procedure 15A 704

637 F.Supp.2d 868

(Cite as: 637 F.Supp.2d 868)

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(B) Decisions and Acts Reviewable

15Ak704 k. Finality; Ripeness. [Most Cited Cases](#)

To be “final,” for purposes of obtaining judicial review under Administrative Procedure Act (APA), agency action must mark the consummation of the agency's decisionmaking process, and must either determine rights or obligations or occasion legal consequences. [5 U.S.C.A. § 704](#).

[3] United States 393 29

393 United States

393I Government in General

393k29 k. Creation and Abolition of Executive Offices in General. [Most Cited Cases](#)

Woods and Forests 411 7

411 Woods and Forests

411k7 k. Forest Commissions and Other Officers. [Most Cited Cases](#)

Wool growers' association's claims, which focused on whether Forest Service's conduct attendant to the creation and operation of committees, which were established by Service to study risk of disease transmission from domestic sheep to bighorn sheep, complied with both Federal Advisory Committee Act (FACA) and National Forest Management Act (NFMA), constituted a challenge to a “final” Forest Service action so as to obtain judicial review under Administrative Procedure Act (APA); alleged decision to hold meetings without public access to those meetings or to records created as part of those meetings denied association's right of access to that information pursuant to FACA protocols. Federal Advisory Committee Act, [§ 3, 5 U.S.C.A.App. 2](#); Na-

tional Forest Management Act of 1976, [§ 2 et seq.](#), [16 U.S.C.A. § 1600 et seq.](#); [5 U.S.C.A. § 704](#).

[4] Administrative Law and Procedure 15A 124

15A Administrative Law and Procedure

15AII Administrative Agencies, Officers and Agents

15Ak124 k. Meetings in General. [Most Cited Cases](#)

United States 393 29

393 United States

393I Government in General

393k29 k. Creation and Abolition of Executive Offices in General. [Most Cited Cases](#)

Federal Advisory Committee Act (FACA) obligates the government to make open and available to the public the meetings and records of advisory committees generally. Federal Advisory Committee Act, [§ 3, 5 U.S.C.A.App. 2](#).

[5] Associations 41 20(1)

41 Associations

41k20 Actions by or Against Associations

41k20(1) k. In General. [Most Cited Cases](#)

Organizations can assert the standing of their members as well, so long as the particularized injury that standing requires is established.

[6] Declaratory Judgment 118A 300

118A Declaratory Judgment

118AIII Proceedings

118AIII(C) Parties

118Ak299 Proper Parties

637 F.Supp.2d 868

(Cite as: 637 F.Supp.2d 868)

[118Ak300](#) k. Subjects of Relief in General. [Most Cited Cases](#)

Forest Service's alleged failure to follow Federal Advisory Committee Act (FACA) and the National Forest Management Act (NFMA) when establishing committees to study the risk of disease transmission from domestic sheep to bighorn sheep already denied wool growers' association and its members their procedural rights to participate in the committees, and these denied rights constituted the requisite injury to confer standing on association, under Administrative Procedure Act (APA), to pursue its declaratory judgment action, seeking declaration that the committees were "advisory committees" subject to the procedural mandates of FACA and NFMA. Federal Advisory Committee Act, § 3, 5 U.S.C.A.App. 2; National Forest Management Act of 1976, § 2 et seq., 16 U.S.C.A. § 1600 et seq.; 5 U.S.C.A. § 702.

[7] Administrative Law and Procedure 15A
501

[15A](#) Administrative Law and Procedure

[15AIV](#) Powers and Proceedings of Administrative Agencies, Officers and Agents

[15AIV\(D\)](#) Hearings and Adjudications

[15Ak501](#) k. Res Judicata. [Most Cited Cases](#)

Public Lands 317 17

[317](#) Public Lands

[317I](#) Government Ownership

[317k17](#) k. Pasturage and Hay. [Most Cited Cases](#)

In prior action, wool growers' association sought to modify the Forest Service's grazing permits, but in subsequent action, association sought to preclude any future reliance on the reports generated by committees, which were established by Forest Service to study the risk of disease transmission from domestic

sheep to bighorn sheep, independent of the Service's prior grazing permit decisions, and these important differences rendered res judicata and/or collateral estoppel principles inapplicable.

[8] United States 393 29

[393](#) United States

[393I](#) Government in General

[393k29](#) k. Creation and Abolition of Executive Offices in General. [Most Cited Cases](#)

Woods and Forests 411 7

[411](#) Woods and Forests

[411k7](#) k. Forest Commissions and Other Officers. [Most Cited Cases](#)

Committees, which were established by Forest Service to study risk of disease transmission from domestic sheep to bighorn sheep, were not exempt from procedural mandates of Federal Advisory Committee Act (FACA) and the National Forest Management Act (NFMA) pursuant to Unfunded Mandates Reform Act (UMRA), which provided exception to FACA's transparency requirements; federal officials were in attendance during committees' meetings, but less clear was whether state officials also in attendance were "elected" officers themselves, as was required under UMRA, and governors stated that they had no recollection of designating or authorizing any state employee to act on their behalf either as a member of committees or in production of subsequent reports. Federal Advisory Committee Act, § 3, 5 U.S.C.A.App. 2; National Forest Management Act of 1976, § 2 et seq., 16 U.S.C.A. § 1600 et seq.; Unfunded Mandates Reform Act of 1995, § 204(b), 2 U.S.C.A. § 1534(b).

[9] United States 393 29

[393](#) United States

637 F.Supp.2d 868

(Cite as: 637 F.Supp.2d 868)

393I Government in General

393k29 k. Creation and Abolition of Executive Offices in General. [Most Cited Cases](#)

Committees established by Forest Service to study the risk of disease transmission from domestic sheep to bighorn sheep were “advisory committees” under Federal Advisory Committee Act (FACA) and, thus, subject to FACA’s procedural requirements; committees were established and utilized by Service, and committees’ contributions supplied the Service with information used to make subsequent policy decisions. Federal Advisory Committee Act, § 3(2), 5 U.S.C.A.App. 2.

[10] [United States 393](#) ↪29

393 United States

393I Government in General

393k29 k. Creation and Abolition of Executive Offices in General. [Most Cited Cases](#)

An “advisory committee” is established when it has been formed by a government agency, and utilized if it is amenable to strict management by agency officials, as that term is used in Federal Advisory Committee Act (FACA). Federal Advisory Committee Act, § 3(2), 5 U.S.C.A.App. 2.

[11] [United States 393](#) ↪29

393 United States

393I Government in General

393k29 k. Creation and Abolition of Executive Offices in General. [Most Cited Cases](#)

Typically, a close examination of each requirement, contrasted against the circumstances in a particular case, is warranted when determining whether a Federal Advisory Committee Act (FACA) violation occurred. Federal Advisory Committee Act, §§ 2, 5, 9–14, 5 U.S.C.A.App. 2.

[12] [United States 393](#) ↪29

393 United States

393I Government in General

393k29 k. Creation and Abolition of Executive Offices in General. [Most Cited Cases](#)

Forest Service did not comply with Federal Advisory Committee Act (FACA) when it established committees to study the risk of disease transmission from domestic sheep to bighorn sheep, in that Service did not follow the formal process for establishing advisory committees. Federal Advisory Committee Act, §§ 2, 5, 9–14, 5 U.S.C.A.App. 2.

[13] [United States 393](#) ↪29

393 United States

393I Government in General

393k29 k. Creation and Abolition of Executive Offices in General. [Most Cited Cases](#)

Because committees established by Forest Service to study the risk of disease transmission from domestic sheep to bighorn sheep did not comply with the procedural mandates of Federal Advisory Committee Act (FACA) and wool growers’ association was denied its right to participate in processes of committees, in violation of FACA, the FACA’s purposes would be advanced by limiting the future use of the committees’ reports, and thus, committees’ reports would not be used in any future agency decision. Federal Advisory Committee Act, §§ 2, 5, 9–14, 5 U.S.C.A.App. 2.

*870 [William Gerry Myers, III](#), Holland & Hart, Boise, ID, for Plaintiffs.

*871 [Deborah A. Ferguson](#), U.S. Attorney’s Office, Boise, ID, for Defendants.

637 F.Supp.2d 868

(Cite as: 637 F.Supp.2d 868)

**MEMORANDUM DECISION AND ORDER RE:
IWGA'S MOTION FOR SUMMARY JUDG-
MENT (DOCKET NO. 23)**

B. LYNN WINMILL, Chief Judge.

INTRODUCTION

The Court has before it Plaintiff **Idaho Wool Growers Association's** Motion for Summary Judgment (Docket No. 23). The Court heard oral argument on June 18, 2009. For the reasons expressed below, the Court will grant the Motion.

BACKGROUND

The Forest Service established two committees—the “RADT Committee” and the “Payette Principles Committee” (collectively “Committees”) ^{FN1}—to study the risk of disease transmission from domestic sheep to bighorn sheep. Plaintiffs **Idaho Wool Growers Association** (“IWGA”) and Dr. Marie S. Bulgin allege that the Committees (in both their formation and operation) violated the Federal Advisory Committee Act (“FACA”) and the National Forest Management Act (“NFMA”). In particular, Plaintiffs claim that they were barred from participating in the Committees, resulting in a lack of representation by anyone engaged in domestic sheep management or behavior.

FN1. The Forest Service identifies the two committees as the “Expert Panel” and the “Science Panel,” respectively.

Through this action, Plaintiffs seek (1) a declaration that the Committees were “advisory committees” subject to the procedural mandates of FACA and NFMA, and (2) an order setting aside the Committees' findings and conclusions and precluding the Forest Service's future reliance on the reports generated therefrom. Importantly, Plaintiffs are not attempting to challenge prior grazing permit decisions or, likewise, any earlier decision relating to the Land and Resource Management Plan.

ANALYSIS

[1] Under federal law, the Forest Service must establish and utilize advisory committees according to FACA's and NFMA's provisions. These provisions attempt to ensure that advisory committees to federal agencies are transparent and adequately represent the public interest by imposing a number of requirements on advisory groups regarding such matters as advance notice of committee meetings, the keeping of public availability of minutes, and the composition of advisory group membership. *See* 5 U.S.C.App. II, §§ 2, 9–14.

The Forest Services does not dispute these objectives. Still, in opposing IWGA's Motion, the Forest Services raises five arguments: (1) Plaintiffs' claims do not relate to a “final agency action” as is required under the Administrative Procedure Act (“APA”); ^{FN2} (2) Plaintiffs lack standing under the APA; (3) Plaintiffs' claims are procedurally barred consistent with the principles of res judicata and collateral estoppel; (4) the Committees are exempt from FACA/NFMA in any event; and (5) there is no basis for awarding the relief Plaintiffs' seek, even when assuming FACA's/NFMA's application. *See* Resp. to Pls.' Mot. for Summ. J., pp. 6–16 (Docket No. 26). Based upon the record supplied*872 to the Court, each of these arguments is without merit.

FN2. The Forest Service concedes that claims for alleged FACA violations are to be brought under the APA. *See* Resp. to Pls.' Mot. for Summ. J., pp. 6–7 (Docket No. 26); *see also* IWGA's Mem. in Supp. of Mot. for Summ. J., p. 5 (Docket No. 23, Att. 1) (citing cases applying APA to review of decisions under both FACA and NFMA).

I. Plaintiffs' Claims Relate to a “Final Agency Action”

[2][3] To obtain judicial review under the APA,

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Plaintiffs must challenge a final agency action. *See* 5 U.S.C. § 704. As the Supreme Court has noted, the word “action” in this context is meant “to cover comprehensively every manner in which an agency may exercise its power,” and is not particularly problematic. *See Whitman v. American Trucking Assoc.*, 531 U.S. 457, 478, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). It is the word “final” that carries more significance. To be “final,” an agency action must “mark the consummation of the agency’s decisionmaking process,” and must either determine “rights or obligations” or occasion “legal consequences.” *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).

Here, the Forest Service appears to acknowledge that the challenged conduct represents agency action, arguing, instead, that such conduct is not sufficiently “final” to warrant judicial review. Specifically, the Forest Service claims that the Committees’ formation and corresponding reports are preliminary in nature and cannot possibly affect Plaintiffs’ rights or obligations in a way that imposes any legal consequences upon Plaintiffs. *See* Resp. to Pls.’ Mot. for Summ. J., p. 7 (Docket No. 26). These arguments fail.

First, the claim that the Committees’ reports represent an initial step toward determining whether and how to amend the Forest Plan (*see id.*) misses the point. The discrete issue here is unrelated to a forthcoming final environmental impact statement and any later, “final decision,” as the Forest Service suggests. *See id.* (“The Forest Service has issued a draft environmental impact statement for public comment, and will be issuing a final environmental impact statement before making any final decisions.”). Rather, Plaintiffs’ claims appropriately focus on whether the Forest Service’s conduct attendant to the Committees’ creation and operation complied with both FACA and NFMA. It is in this latter respect that Plaintiffs’ claims are premised—not any *future* Forest Service determination.^{FN3}

FN3. Moreover, as a practical matter, case law exists, allowing litigants the ability to bring a claim under the APA challenging advisory committee conduct under FACA and/or NFMA—exactly what Plaintiffs are doing here. Indeed, both Plaintiffs and the Forest Service cite cases allowing a plaintiff to challenge the makeup and/or product of an advisory committee; implicitly acknowledging that the sponsoring entity’s conduct with respect to the at-issue advisory committee represents a final agency action. *See e.g., Idaho Farm Bureau Fed. v. Babbitt*, 900 F.Supp. 1349 (D.Idaho 1995); *Alabama–Tombigbee Rivers Coalition v. Dep’t of the Interior*, 26 F.3d 1103 (11th Cir.1994); *see also, e.g., Colorado Envtl. Coal. v. Wenker*, 353 F.3d 1221 (10th Cir.2004); *Judicial Watch, Inc. v. National Energy Policy Dev. Group*, 219 F.Supp.2d 20 (D.D.C.2002). With all this in mind, a court could view a procedural violation, under FACA, as ready for review at the time that violation is committed.

Second, the Committees’ allegedly procedurally-deficient meetings necessarily affected Plaintiffs’ legal rights—again, independent of any discretion the Forest Service may have had in accepting or rejecting the Committees’ final work-product. That is, the alleged decision to hold meetings without public access to those meetings or to the records created as part of those meetings would have denied Plaintiffs’ right of access to that information pursuant to FACA protocols. Thus, the Forest Service’s reliance on *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586 (9th Cir.2008) is distinguishable from the situation here; the *873 challenged agency action cannot realistically be described as “advisory” when any subsequent Forest Service decision does not speak uniquely to the formation of or proceedings conducted by the Committees. *See Judicial Watch*, 219 F.Supp.2d at 40 (meetings in violation of FACA

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“had a legal consequence”).

[4] FACA obligates the government to make open and available to the public the meetings and records of advisory committees generally. *See supra* at p. 871. The Forest Service's alleged failure to do so here is what Plaintiffs allege, nothing more. These circumstances constitute a challenge to a final Forest Service action.

II. Plaintiffs Have Standing Under the APA

[5][6] “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action ... is entitled to judicial review thereof.” *See* 5 U.S.C. § 702; *see also Lujan v. National Wildlife Fed.*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) (“[T]o be ‘adversely affected or aggrieved’ ..., the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint” (quoting *Clarke v. Securities Indus. Assn.*, 479 U.S. 388, 396–97, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) (emphasis in original))). Organizations like the IWGA can assert the standing of their members as well, so long as the particularized injury that standing requires is established. *See* Resp. to Pls.’ Mot. for Summ. J., p. 8 (Docket No. 26) (citing *Summers v. Earth Island Inst.*, —U.S. —, 129 S.Ct. 1142, 1149, 173 L.Ed.2d 1 (2009)).

The Forest Service argues that “Plaintiffs’ sole basis for standing is the injury to [Frank Shirts, Jr., Shirts Bros. Sheep, and Carlson Livestock Company], who are pursuing the identical lawsuit in the Shirts’ litigation.” *See* Resp. to Pls.’ Mot. for Summ. J., p. 8 (Docket No. 26). The Forest Services misunderstands the distinct relief Plaintiffs seek in *this* action and, in doing so, misdirects its argument regarding standing.

Based upon the record (and confirmed during oral argument), Plaintiffs are not seeking injunctive relief; are not seeking to overturn a final regulation; and are not seeking to set aside any previous grazing decision. *See* IWGA’s Mem. in Supp. of Mot. for Summ. J., p. 19 (Docket No. 23, Att. 1). Plaintiffs’ claims relate to the Forest Service’s alleged failure to follow the procedural requirements outlined within FACA and NFMA when forming and operating the Committees. *See* Compl., ¶¶ 77–88 (Docket No. 1). Arguing they were denied their rights to attend, observe and comment, and to access information made available to and/or prepared by/for the Committees (*see* IWGA’s Reply in Supp. of Mot. for Summ. J., p. 5 (Docket No. 32)), Plaintiffs seek only to prevent the use of the Committees’ reports going forward. According to the IWGA, it is this denial of rights that represents the predicate injury to confer standing. The Court agrees.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), the Supreme Court recognized that a person accorded a procedural right to protect his interests can assert that right or, put another way, has standing. *See id.* at 572, n. 7, 112 S.Ct. 2130 (relaxing normal requirements of redressability and immediacy when dealing with alleged violations of procedural rights). Applying this standard, this Court, in *Idaho Farm Bureau*, 900 F.Supp. 1349, not only determined that “FACA clearly accords Plaintiffs*874 the procedural rights they claim were denied to them,”^{FN4} but, equally important, that “Plaintiffs’ asserted injury, i.e. that the FACA violations resulted in a biased recommendation from the committee, [clearly] falls within the ‘zone of interests’ protected by the FACA.” *See id.* at 1364; *see also Public Citizen v. Dep’t of Justice*, 491 U.S. 440, 449, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (in comparing plaintiff’s claim to denied requests under the Freedom of Information Action, “refusal to permit [a party] to scrutinize [an advisory committee’s] activities to the extent FACA allows constitutes a sufficiently distinct injury to provide

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standing to sue.”).

FN4. The procedural rights in *Idaho Farm Bureau*, 900 F.Supp. 1349, similarly spoke to advisory committee requirements, alleging the U.S. Fish and Wildlife Service failed to “(1) prepare and file a charter; (2) chair the meeting; (3) publish notice of the meeting; and (4) prepare and maintain minutes of the meeting.” See *id.* at 1364. Additionally, this Court applied these procedural rights to the plaintiffs' individual members. See *id.*

The Forest Service claims that “only a ‘person who has been accorded a procedural right to protect his concrete interests can assert that right’ ” (see Resp. to Pls.' Mot. for Summ. J., pp. 8–9 (Docket No. 26) (citing *Summers*, 129 S.Ct. at 1151)), later implying that the IWGA and its members have not suffered “imminent and concrete harm.” See *id.* at p. 8. This argument, however, ignores the fact that the Forest Service's alleged failure to follow FACA and NFMA has already denied IWGA and its members their procedural rights to participate in the Committees. These denied rights constitute the requisite injury to confer standing here.

III. Plaintiffs' Claims are Not Barred by Res Judicata or Collateral Estoppel Principles

[7] “Res judicata ... ‘provides that a “final judgment on the merits bars further claims by parties or their privies based on the same cause of action[;]” ’ ” “[t]he related doctrine of collateral estoppel ... provides that ‘when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.’ ” See *U.S. v. Bhatia*, 545 F.3d 757, 759 (9th Cir.2008) (internal citations omitted).

The Forest Service claims that Plaintiffs should not be allowed to proceed, arguing that this Court has

already “ruled on precisely the same issues in the Shirts' litigation, brought by the same parties upon whom Plaintiffs in this case rely for standing.” See Resp. to Pls.' Mot. for Summ. J., p. 10 (Docket No. 26). IWGA naturally disagrees, countering that the “Shirts' litigation” (1) involved different claims, (2) was not decided on the merits, and (3) involves different parties. See IWGA's Reply in Supp. of Mot. for Summ. J., p. 8 (Docket No. 32). The Court agrees with IWGA.

In *Shirts Brothers Sheep v. United States*, Case No. 07–241–E–BLW & 07–151–E–BLW, the plaintiffs requested immediate injunctive relief prohibiting the Forest Service from authorizing domestic sheep grazing on identified allotments and trailing routes during 2007. See 07–151–BLW Compl., ¶ A (Docket No. 1). Although the legal vehicle for setting aside the Forest Service's decision to modify grazing permits was FACA, this Court denied the plaintiffs' motion for partial summary judgment,^{FN5} reasoning that the plaintiffs waited too long to bring their *875 claim. See 07–151 Mem. Decision and Order, pp. 2–3 (Docket No. 123).

FN5. On December 15, 2008, the plaintiffs moved this Court to reconsider its Memorandum Decision and Order denying the plaintiffs' motion for partial summary judgment. See 07–151–BLW Mot. to Reconsider. (Docket No. 126). That motion remains outstanding.

As a result, even if this Court reached the merits in *Shirts Bros.* (which it did not), it would have considered an entirely different claim for relief than the one presented here. There, the plaintiffs sought to modify the Forest Service's grazing permits; in contrast, here, Plaintiffs seek to preclude any future reliance on the reports generated by the Committees— independent of the Forest Service's prior grazing permit decisions. These important differences render res judicata and/or collateral estoppel principles in-

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applicable.^{FN6}

FN6. Further, when previously given the opportunity to consolidate this action with *Shirts' Bros.* (*Shirts' Bros.* was consolidated with *Western Watersheds Project et al. v. U.S. Forest Service*, CV-07-151-S-BLW), this Court refused to do so. See 1/8/09 Mem. Decision and Order, 2009 WL 73738 (Docket No. 18).

IV. Based Upon the Record, the Committees are Not Exempt From FACA/NFMA

[8] An exception to FACA's transparency requirements is provided under the Unfunded Mandates Reform Act of 1995 ("UMRA"), which states:

The Federal Advisory Committee Act ... shall not apply to actions in support of intergovernmental communications where—

(1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and

(2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

See 2 U.S.C. § 1534(b).

Here, the Forest Service argues that both conditions are met, therefore removing the Committees from FACA's procedural requirements and, ultimately, foreclosing Plaintiffs' claims. See Resp. to Pls.' Mot. for Summ. J., pp. 10–14 (Docket No. 26). IWGA disagrees, arguing that neither condition is

met, thus warranting FACA's application to the Committees. See IWGA's Memo. in Supp. of Mot. for Summ. J., pp. 10–12 (Docket No. 23, Att. 1).^{FN7}

FN7. Whether the Committees engaged in meetings “solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration” (the second criterion for invoking UMRA's exception) cannot be decided as a matter of law here. The Forest Service emphatically states: “[t]he management of rangeland activities, such as domestic sheep grazing, and the effects of those activities on wildlife, such as bighorn sheep, relate to the ‘implementation of Federal programs established pursuant to public law.’ ” See Resp. to Pls.' Mot. for Summ. J., p. 11 (Docket No. 26). In contrast, IWGA contends that the Committees “did not involve the development of regulations pursuant to the APA or any significant intergovernmental mandates” as UMRA's legislative history suggests is necessary. See IWGA's Memo. in Supp. of Mot. for Summ. J., p. 11 (Docket No. 23, Att. 1). The Court need not resolve this discrepancy in order to address the question of whether an exception to FACA/NFMA exists under UMRA.

IWGA correctly argues that UMRA does not exempt the Committees from FACA “because neither committee's meeting was held between ‘Federal officials and *elected officers* of State, local, and tribal governments’ or ‘their designated employees.’ ” See *id.* at p. 10 (citing *8762 U.S.C. § 1534) (emphasis in original). It is true that Federal officials were no doubt in attendance during the Committees' meetings; however, less clear is whether the *state* officials also in attendance^{FN8} were “elected” officers themselves

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(or designated employees authorized to act on their behalf) as is required under UMRA. The Forest Service's conclusory statements that such individuals “ha[ve] authority to act on behalf of elected state officials” (*see* Resp. to Pls.' Mot. for Summ. J., p. 11 (Docket No. 11)) not only lacks legal authority,^{FN9} but is belied by the Declarations of Dirk Kempthorne and James E. Risch, Idaho's elected governors during the RADT Committee and the Payette Principles Committee, respectively. Governors Kempthorne and Risch unequivocally state that they “have no recollection of designating or authorizing any State of Idaho employee to act on [their] behalf either as a member [of the Committees] or in the production of [subsequent reports].” *See* Kempthorne Decl., ¶ 9 (Docket No. 32, Att. 2); *see also* Risch Decl., ¶ 5 (Docket No. 32, Att. 3). The record does not suggest otherwise. Without more, it cannot be said that the state officials in attendance during the Committees' meetings were either elected officials themselves, or designated to act on elected officials' behalf.

FN8. As to the RADT Committee, it is undisputed that non-federal wildlife professionals from the Oregon Department of Fish and Wildlife and the Idaho Department of Fish and Game, in addition to the Wildlife Director of the Nez Perce Tribe, were in attendance. *See* IWGA's Stmt. of Mat. Facts Not in Dispute, ¶¶ 2–4 (Docket No. 23, Att. 3). As to the Payette Principles Committee, it is undisputed that non-federal scientists from the Idaho Department of Fish and Game and Agriculture, Washington State University, the British Columbia Ministry of the Environment, the California Department of Fish and Game, the Colorado Division of Wildlife, the Nevada Department of Agriculture, and the University of Idaho were in attendance. *See id.* at ¶ 12.

FN9. The Forest Service's position that “[t]he state employees at the University of

Idaho have authority to act on behalf of elected officials of the state in the conduct of research and dissemination of scientific information” (*see* Resp. to Pls.' Mot. for Summ. J., p. 13 (Docket No. 26)) is likewise without legal support.

Separately, even when adopting the Forest Service's argument, the inclusion of the British Columbia Ministry of the Environment in the Payette Principles Committee conflicts with UMRA's requirement that meetings be held “exclusively” between Federal and elected state officials for the exclusion to FACA/NFMA to apply. *See* 2 U.S.C. § 1534(b) (FACA shall not apply where “meetings are held *exclusively* between Federal officials and elected officers of State, local, and tribal governments” (emphasis added)).^{FN10} Therefore, in addition to the reasons outlined above, the Payette Principles Committee, given its list of participants, would not seem to be exempted from FACA/NFMA under UMRA's exception.

FN10. The Forest Service's retort in this respect—that Canadian provincial governments are analogous to the State, local, and tribal governments listed in UMRA (*see* Resp. to Pls.' Mot. for Summ. J., p. 12, n. 1 (Docket No. 26))—is, again, not supported by legal authority. While the Court understands that a strict interpretation of FACA may very well do more harm than good when fostering the exchange of information between intergovernmental agencies, it cannot ignore what appears to be a clear limiting requirement for applying the UMRA exception. Furthermore, erring on the side of *more* transparency through public access to advisory committee procedure, does not strike this Court as an obvious restriction on “the ability of the Executive to obtain information” (*see id.*) as the Forest Service argues.

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These factors combine to reveal that the Committees—both the RADT Committee and the Payette Principles Committee—are not exempt from FACA's/NFMA's procedural mandates. This particular determination,^{*877} however, does not translate to a finding that the Forest Service violated FACA/NFMA in coordinating and overseeing the Committees' progress. *But see infra* at pp. 879–80.

V. If FACA was Violated, Plaintiffs are Entitled to the Relief Sought

The Forest Service misunderstands the scope of Plaintiffs' case and, with it, the relief sought. According to the Forest Service:

Presumably, Plaintiffs assert that the Forest Service grazing decisions are arbitrary, capricious, or otherwise not in accordance with law because the Forest Service relied on information contained in the Risk Analysis and Science Panel review, and contend the decision should be set aside or enjoined under the APA.

See Resp. to Pls.' Mot. for Summ. J., p. 14 (Docket No. 26).^{FN11} Later, the Forest Service frames the “ultimate question in this lawsuit” as “whether the actions undertaken by the Forest Service to separate domestic and bighorn sheep were reasonable in light of the totality of information available to the Forest Service.” *See id.* at p. 19. To the contrary, the issue here is whether the Forest Service's Committees violated FACA's and NFMA's procedural requirements and, if so, whether the Committees' reports should be utilized for any *future* Forest Service Decisions. *See* IWGA's Reply in Supp. of Mot. for Summ. J., p. 2 (Docket No. 32). The relief sought has nothing to do with setting aside prior grazing permit decisions.

^{FN11}. This is nearly identical to the Forest Service's recitation of the scope of relief

sought in the *Shirts' Bros.* action. *See* 07–151–BLW Resp. To Pl. Shirts' Mot. for Partial Summ. J., p. 11 (Docket No. 117).

Now, with the benefit of refocusing the true issue, the Forest Service's own discussion of *Alabama–Tombigbee Rivers Coalition*, 26 F.3d 1103, actually endorses Plaintiffs' position rather than rejects it, when the Forest Service states:

In *Alabama–Tombigbee*, the Eleventh Circuit upheld an injunction prohibiting the agency from completing or relying on a report produced by an advisory committee in violation of FACA. *Alabama–Tombigbee* was filed before ^{FN12} the unlawful advisory committee published its report. Moreover, the injunctive relief was not directed at a final agency action that had relied on the advisory committee report, but the report itself. Plaintiffs here are seeking far more than the preclusion of the use of information that they claim was generated in violation of FACA.

^{FN12}. To the extent the Forest Service is making a temporal argument based upon when the Committees' reports were generated, that argument is rejected in that it would suggest that, so long as a violating advisory committee hurries with its report, a claim to set aside the use of that report is untimely.

See Resp. to Pls.' Mot. for Summ. J., p. 14 (Docket No. 26) (emphasis added).

Similarly, the Forest Service's reference to *Idaho Farm Bureau*, 900 F.Supp. 1349, arguably cuts against its opposition to Plaintiffs' claims for relief. *See id.* at p. 15. While the Forest Service correctly points out that, in *Idaho Farm Bureau*, this Court found that the U.S. Fish and Wildlife Service's decision to list mollusks under the Endangered Species Act should not be invalidated due to alleged FACA

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violations (*see id.*), U.S. Magistrate Judge Larry M. Boyle reasoned that the plaintiffs' delay in seeking “invalidation of the final rule listing the mollusks, *rather than simply foreclosing use of the report*” prepared by the advisory committee at issue there was fatal to the plaintiffs' case. *See Idaho Farm Bureau*, 900 F.Supp. at 1366 (emphasis added). In other words, Plaintiffs*878 here are attempting to do just what U.S. Magistrate Judge Boyle suggested is the appropriate procedure for testing advisory committee reports that violate FACA. ^{FN13}

FN13. The Forest Service's confusion over the actual relief sought here, as compared to the relief sought in *Idaho Farm Bureau*, is highlighted when it states: “In *Idaho Farm Bureau* [], *as in this case*, plaintiffs were seeking to set aside an entire agency action on the basis that information compiled by an advisory committee in violation of FACA had been utilized at some point in the decision process.” *See* Resp. to Pls.' Mot. for Summ. J., p. 15 (Docket No. 26) (emphasis added).

IWGA agrees with the Forest Service that “[s]everal courts have been reluctant to set aside final agency decisions,” but adds, again, that “IWGA does not ask this Court to invalidate a final agency decision.” *See* IWGA Reply in Supp. of Mot. for Summ. J., p. 9 (Docket No. 32) (“Curiously, the only relief that the Forest Service disputes is the ‘set aside’ of its grazing permit decisions ... which is relief that IWGA does not seek. IWGA asks this Court to set aside the findings and conclusions from the committees, the RADT and Payette Principles Reports.”). This important distinction renders the Forest Service's arguments against the relief sought not only inapplicable, but, at times, contrary to its own position. If, in fact, FACA was violated, Plaintiffs are entitled to the relief sought.

VI. FACA Applies to the Committees

[9] FACA defines an “advisory committee” as “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof ... which is ... established or utilized by one or more agencies in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government” *See* 5 U.S.C.App. II, § 3(2).

A. *The RADT Committee and the Payette Principles Committee Were Established and/or Utilized by the Forest Service*

[10] The Supreme Court has given a narrow interpretation to the words “established” and “utilized.” An advisory committee is established when it has been formed by a government agency, and utilized if it is “amenable to ... strict management by agency officials.” *See Heartwood, Inc. v. U.S. Forest Service*, 431 F.Supp.2d 28, 34 (D.D.C.2006) (quoting *Public Citizen*, 491 U.S. at 457–58, 109 S.Ct. 2558).

IWGA argues that the Committees were both established and utilized by the Forest Service. *See* IWGA Mem. in Supp. of Mot. for Summ. J., pp. 6–9 (Docket No. 23, Att. 1). Based upon the record, the Forest Service does not appear to disagree. The RADT Committee was convened and managed by the Forest Service “to provide decision makers with information about the likelihood of disease transmission from domestic sheep to bighorn sheep for specific sheep allotments on the Payette [National Forest].” *See* Defs.' Answer, ¶¶ 36 & 48 (Docket No. 10). Likewise, the Payette Principles Committee was convened and managed by the Forest Service to “clarify the science-based information regarding disease transmission and its risk of occurring on the Payette National Forest that the Forest Supervisor should consider in conjunction with the RADT analysis.” *See id.* at ¶¶ 55 & 70.

Based upon the record, therefore, the RADT Committee and the Payette Principles*879 Commit-

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tee were established and/or utilized for the Forest Service.

B. The RADT Committee and the Payette Principles Committee Were Established/Utilized to Obtain Advice or Recommendations

Although not addressed in its briefing, the Forest Service contended during oral argument that the Committees served only as a clearinghouse of information relative to the issue surrounding disease transmission from domestic to bighorn sheep populations. Any resulting distinction is immaterial when considering FACA's application. *See, e.g., Heartwood*, 431 F.Supp.2d at 34–35 (“When a committee is established to provide expert summaries or interpretation of technical data, their reports can be ‘in the interest of obtaining advice or recommendations for ... one or more agencies.’ ” ... “Even though [the committee] provided the USFS with only narrative summaries of scientific information, *and made no policy recommendations*, the [committee] drafts and the final assessment provide the framework, context and information that the USFS will rely on in making policy decisions.” (emphasis added)).

Therefore, without finding here that the Committees did not formally provide advice or recommendations to the Forest Service (*see supra* at pp. 878–79), it appears undisputed that the Committees' contributions (however they may be described) supplied the Forest Service with information used to make subsequent policy decisions. This, coupled with the reality that the Committees were established/utilized by the Forest Services identifies the Committees as advisory committees under FACA and, therefore, subject to FACA's requirements.

VII. The Forest Service did not Follow FACA's Framework

[11][12] As mentioned earlier (*see supra* at p. 871), FACA imposes a number of requirements on advisory committees. *See, e.g., 5 U.S.C.App. II, §§ 2, 5, 9–14* (records must be made available for public

inspection; charter must be filed; upcoming meetings must be announced; meetings must be held in a public place; minutes must be kept; attendance must “be fairly balanced in terms of the points of view represented” and may “not be inappropriately influenced by the appointing authority or by any special interest”). Typically, a close examination of each requirement, contrasted against the circumstances in a particular case, is warranted when determining whether a FACA violation occurred.

Here, however, the Forest Service acknowledges a FACA violation, stating in no uncertain terms: “The Forest Service *did not follow the formal process for establishing advisory committees* that would have been required if FACA applied to the Expert Panel and the Science Panel.” *See Resp. to Pls.' Mot. for Summ. J.*, pp. 16–17 (Docket No. 26) (emphasis added). Having already determined that FACA applies to the Committees (*see supra* at pp. 878–79), and consistent with the Forest Service's candid assessment of its conduct regarding the Committees' formation and operation, the Court accordingly finds that the Forest Service did not follow FACA's framework.^{FN14}

FN14. The Forest Service simultaneously points out that the Committees were nonetheless “subjected to intense public comment and scrutiny.” *See Resp. to Pls.' Mot. for Summ. J.*, p. 17 (Docket No. 26). While this may be true, any informal vetting of administrative processes cannot operate as a substitute for the actual requirements imposed by Congress in such settings.

***880 VIII. The Committees' Reports are Not to be Used in any Future Agency Decision**

[13] It cannot be overemphasized that Plaintiffs here are not attempting to undo any agency decision via this action. Instead, Plaintiffs seek to prevent the use of the Committees' reports in any future agency decision.^{FN15} The Court considers the relief sought appropriate when considering the purpose of FACA.

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FN15. In stating Plaintiffs' position as "assert[ing] that if any snippet of information relied upon by the Forest Service is suspect, then its decisions must be set aside in its entirety," the Forest Service overstates the relief sought. Had Plaintiffs sought to set aside prior grazing permit determinations, this Court's analysis likely would have more closely resembled its previous rulings in *Shirts Bros.* (*see supra* at pp. 874–75).

Congress passed FACA in part to ensure that the public could remain apprised of the existence, activities, and cost of advisory committees. *See Public Citizen*, 491 U.S. at 446, 109 S.Ct. 2558. Enacted in 1972, one goal of the Act was to prevent wasteful expenditure of public funds while countering the fear that advisory committees would be dominated by representatives of industry and other special interest groups seeking to advance their own agendas. *See id.* at 453, 109 S.Ct. 2558; *see also Cummock v. Gore*, 180 F.3d 282, 284 (D.C.Cir.1999).

Because Plaintiffs were denied their right to participate in the Committees' processes, FACA's purposes are advanced by limiting the future use of the Committees' reports. The Court's findings in this limited respect should not be simultaneously interpreted as an endorsement of Plaintiffs' position on disease transmission between domestic and bighorn sheep. Instead, the Court's findings apply to recognize the continued need for a transparent decision-making process on these (and other) important issues, which are advanced only through FACA's/NFMA's consistent, across-the-board enforcement.

The Court is also comforted by the Forest Service's position that other information is available to the Forest Service to support their prior decisions and, presumably, any future decisions, including any final environmental impact statement currently in the

works. *See* Resp. to Pls.' Mot. for Summ. J., pp. 17–19 (Docket No. 26). If, indeed, the Committees represented only a mechanism to collect and summarize all available data relevant to the issue at hand, that same, underlying information would exist to support future agency decisions as well.

Finally, the Court sees the benefit in ensuring that all reasons supporting any agency decision are not only in accordance with the laws speaking to the generation of those reasons, but also are based upon the best, most complete evidence available. Being overly-cautious on the front-end of such an analysis necessarily leads to better decision making which, in turn, buttresses any future defense of the decisions ultimately made. For this separate "ounce of prevention" rationale-efficiency-the Court will grant the limited relief Plaintiffs' seek.

ORDER

For the foregoing reasons, it is HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment (Docket No. 23) is GRANTED insofar as the RADT Committee and the Payette Principles Committee are advisory committees subject to the procedural mandates of FACA and NFMA. Moreover, the Committees' findings and/or conclusions are not to be relied upon by the Forest Service with respect to any future agency decisions. Any agency decisions reached in reliance upon the Committees' reports prior to the date of *881 this Order are expressly not affected by this Order.

D.Idaho,2009.

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**EXHIBIT 3 - *Idaho Wool Growers Assoc. v. Schafer*,
2009 WL 3806371 (D. Idaho)**

(Double-sided; not for publication)

Only the Westlaw citation is currently available.

United States District Court,
D. Idaho.
IDAHO WOOL GROWERS ASSOC., and Dr. Marie S. Bulgin, Plaintiffs,
v.

Ed SCHAFER, in his official capacity as the Secretary of the United States Department of Agriculture, Gail Kimbell, in her official capacity as the chief of the United States Fores Service, Suzanne C. Rainville, in her official capacity as the Fores Supervisor of the Payette National Forest, and United States Forest Service, Defendants.

No. CV 08–394–S–BLW.
Docket No. 39.
Nov. 9, 2009.

[William Gerry Myers, III](#), Holland & Hart, Boise, ID, for Plaintiffs.

[Deborah A. Ferguson](#), U.S. Attorney's Office, Boise, ID, for Defendants.

**MEMORANDUM DECISION AND ORDER RE: DEFENDANTS' MOTION TO CLARIFY COURT'S
ORDER**

[B. LYNN WINMILL](#), Chief Judge.

INTRODUCTION

*1 The Court has before it Defendants' Motion to Clarify Court's Order (Docket No. 39). Having carefully reviewed the record and otherwise being fully advised, the Court enters the following Memorandum Decision and Order:

BACKGROUND

On July 1, 2009, this Court granted Plaintiffs' Motion for Summary Judgment (Docket No. 23), finding (1) that the RADT Committee and the Payette Principles Committee (collectively the “Committees”) are advisory committees subject to the procedural mandates of the Federal Advisory Committee Act (“FACA”) and the National Forest Management Act (“NFMA”), and (2) that the Committees' findings and/or conclusions are not to be relied upon by the Forest Service with respect to any future agency decisions. *See* 7/1/09 Mem. Decision and Order, p. 23 (Docket No. 37).

Through their Motion to Clarify (Docket No. 39), Defendants seek the Court's clarification on three issues.

First, Defendants point out that, while the Committees' particular findings and/or conclusions can be extracted from the upcoming Final Supplemental Environmental Impact Statement (“Final SEIS”), they are nonetheless referenced and relied upon in the Draft Supplemental Environmental Impact Statement (“Draft SEIS”) as the basis

for public comment. Defendants therefore seek guidance on the Forest Service's ongoing environmental analysis for the proposed amendment to the forest plan; specifically, whether the Final SEIS and Record of Decision (“ROD”) can refer and incorporate the existing Draft SEIS or, instead, “whether a new Draft SEIS will have to be written and circulated for public comments.” *See* Mot. to Clarify, pp. 1–2, 4–7 (Docket No. 39); *see also* Reply to Mot. to Clarify, p. 2 (Docket No. 45) (“The Forest Service seeks clarification as to whether the EIS analysis process must begin with a new Draft EIS”).

Second, since the Payette Principles were established, many scientific articles have apparently relied upon them. As a consequence, Defendants request that the Court clarify “the ability of the Forest Service to rely upon these new scientific materials which have relied upon or referenced the Payette Principles. *See* Mot. to Clarify, pp. 2, 3–4 (Docket No. 39); *see also* Reply to Mot. to Clarify, p. 2 (Docket No. 45) (“The Forest Service seeks clarification as to ... whether scientific research that references the excluded studies need also to be excluded.”).

Third, in its July 1, 2009 Memorandum, the Court determined that the Unfunded Mandates Reform Act of 1995 (“UMRA”) did not exempt the Committees from either FACA's or NFMA's mandated procedural protocols. *See* 7/1/09 Mem. Decision and Order, pp. 11–15 (Docket No. 37). In particular, the Court held that “it cannot be said that the state officials in attendance during the committees' meetings were either elected officials themselves, or designated to act on elected officials' behalf” (*see id.* at p. 14); had they been so designated, an exception to FACA's transparency requirements may have applied. As a result, Defendants are now “unsure what they must do to fulfill the intergovernmental communications exception”, asking the Court to clarify its “interpretation of ‘designated employee with authority to act’ ” within the UMRA. *See* Mot. to Clarify, pp. 2, 7–11 (Docket No. 39).^{FN1}

^{FN1}. Defendants have since withdrawn its third argument. *See* Reply to Mot. to Clarify, p. 2 (Docket No. 45) (“The Forest Service will abandon its third issue concerning whether UMRA requires written authorization for ‘designated employee with authority to act’ under section 204(b)(1), as this could be construed as a request for an advisory opinion.”).

DISCUSSION^{FN2}

^{FN2}. Plaintiffs contend that Defendants' Motion to Clarify “may be construed as a Fed.R.Civ.P. 59(e) motion to alter or amend a judgment” (*see* Reply in Supp. Of Pls.' Mot. for Entry of J., p. 1 (Docket No. 41)) and, from there, raising several, related arguments: (1) a motion to alter must be filed *after* the entry of the judgment in the case; (2) there is no intervening change in controlling law; (3) there is no new evidence or expanded factual record justifying a motion to alter/amend; and (4) there is no need to correct a clear error or to prevent manifest injustice. *See id.*; *see also* Pls.' Resp. To Mot. to Clarify Court's Order pp. 3–16 (Docket No. 42). The Court views Defendants' efforts differently. It is clear that the Court's Memorandum Decision, ordering that the Committees' findings not be relied upon in future Forest Service determinations, may not be without some question in its practical application. Indeed, in attempting to *follow* (not necessarily to alter or amend) the Court's Memorandum Decision and Order, Defendants point to certain circumstances that may potentially collide with the overall thrust of the Court's ruling. It is in this light that

the Court considers Defendants' Motion to Clarify as a legitimate attempt to resolve any ambiguity in actually implementing the Court's directives—the ostensible purpose in any attempt to clarify a court's order.

A. The Effect of the Draft SEIS on any Final SEIS

*2 A “final” environmental impact statement logically follows and responds to a “draft” environmental impact statement and its corresponding public comment period. Here, the Court's July 1, 2009 Memorandum Decision and Order interrupted this progression of events as it was entered *after* the Draft SEIS and public comment period, but *before* the Final SEIS. Because (1) any forthcoming Final SEIS and ROD would typically respond to and be based upon the Draft SEIS, and (2) the Draft SEIS and subsequent public comments understandably spoke to the Committees' findings and conclusions, Defendants now question whether a new Draft SEIS is needed in light of the Court's prohibition against relying on the Committees' recommendations in any future Forest Service decisions. *See* Reply to Mot. to Clarify, p. 3 (Docket No. 45) (“The forthcoming Record of Decision could be interpreted as relying on the RADT Committee's findings and conclusions and the Payette Principles, because it will be based on the Draft SEIS and public comment period that relied extensively on the RADT Committee's work and the Payette Principles which predated the Court's order.”).

The Court's July 1, 2009 Memorandum Decision and Order was never intended to unwind prior Forest Service decisions. Additionally, the Court in no way intended to subvert the progress already made toward addressing the risk of disease transmission from domestic sheep to bighorn sheep; to the contrary, the Court strived to consider Plaintiffs' Motion for Summary Judgment prior to any Final SEIS and ROD so that the Forest Service could address and account for any procedural violations within FACA and/or NFMA before any ultimate decision on disease transmission between domestic and bighorn sheep is rendered.

With this backdrop in mind, there is no question that the Final SEIS and ROD must necessarily speak to the preceding Draft SEIS; to state, instead, that the Draft SEIS is forever “off-limits” given its incorporation of the Committees' findings and conclusions would seem to expand the relief originally sought by Plaintiffs—*i.e.*, to set aside the Committees' findings. The Court has already granted Plaintiffs' requested relief, ordering that the Committees' findings be set aside and not relied upon by the Forest Service in any future agency decisions. *See* 7/1/09 MDO, p. 23 (Docket No. 39). Therefore, the forthcoming Final SEIS and ROD may generally address and speak to the Draft SEIS.

However, the Court's recognition of the inevitable interplay between the Draft SEIS and the anticipated Final SEIS and ROD should not be interpreted as an invitation to “grandfather” the Committees findings to support any decision via the Final SEIS and ROD. Simply put, and consistent with the Court's existing directive, the Forest Service may not rely upon the Committees' findings and/or conclusions in reaching future agency decisions—either directly or indirectly, through an end-run around the Court's mandate by relying upon those portions of the Draft SEIS that relied solely, or even primarily, upon the violating Committee reports. Otherwise, the Court's Order is rendered meaningless.

*3 Again, this position has no effect on the Forest Service's use of the underlying science that may exist to

support the Committees' recommendations. *But see supra* at pp. 8–11. In fact, it was the apparent availability of such information that originally contributed to the Court's granting of Plaintiffs' Motion for Summary Judgment here:

The Court is also comforted by the Forest Service's position that other information is available to the Forest Service to support their prior decisions and, presumably, any future decisions, including any final environmental impact statement currently in the works. If, indeed, the Committees represented only a mechanism to collect and summarize all available data relevant to the issue at hand, that same, underlying information would exist to support future agency decisions as well.

See 7/1/09 MDO, pp. 22–23 (Docket No. 37).

This is unquestionably a fine line; one the Court is not equipped to resolve once-and-for-all as it is not the agency tasked with authoring the Final SEIS and ROD. Rather, it is for the Forest Service itself to determine. If, on the one hand, the Final SEIS and ROD *cannot* be drafted without relying upon those portions of the Draft SEIS that relied solely, or primarily, upon the Committees' findings and/or conclusions, it would appear that the Draft SEIS loses its effect, based on the FACA/NFMA violations.^{FN3} On the other hand, if, in responding to the Draft SEIS and public comments, the Final SEIS and ROD *can* be drafted independent of the Committees' recommendations (either directly or indirectly (*see infra* at pp. 6–7)), it would likewise appear that the Draft SEIS need not be drafted anew. Again, the Forest Service is in the best position to analyze this issue.

^{FN3}. The Court agrees with Defendants that, if a new Draft SEIS is necessary, “a significant delay to the revision to the Forest Plan, and the Forest Service's effort to develop a management plan on the Payette National Forest to protect wild bighorn sheep” would likely result. *See* Mot. to Clarify, p. 5 (Docket No. 39). However, the Court cannot ignore procedural violations for efficiency's-sake alone. When addressing the very important issue of disease transmission among sheep in Idaho, there is value (both in the short and long term) in a transparent process done correctly as has already been relayed by the Court:

Finally, the Court sees the benefit in ensuring that all reasons supporting any agency decision are not only in accordance with the laws speaking to the generation of those reasons, but also are based upon the best, most complete evidence available. Being overly-cautious on the front-end of such an analysis necessarily leads to better decision making which, in turn, buttresses any future defense of the decisions ultimately made.

See 1/7/09 MDO, p. 23 (Docket No. 37). Whether a new Draft SEIS is actually needed, however, is beyond the scope of this Memorandum Decision and Order.

B. Subsequent Scientific Materials Referencing Excluded Studies

Defendants allege that, since 2006, the “Payette Principles” compiled by the Payette Principles Panel “have become a benchmark in the scientific community for studying reduction of the potential for disease transmission between domestic sheep and bighorn sheep.” *See* Mot. to Clarify, p. 3 (Docket No. 39); *see also* Reply to Mot. to

Clarify, p. 4 (Docket No. 45). As a consequence, Defendants further allege that “[m]any, if not all, documents completed after issuance of the Payette Principles by the Forest Service and other wholly independent entities cite or rely on the Payette Principles to some extent.” *See id.* Using the “fruit of the poisonous tree” analogy, Defendants request clarification on the Forest Service’s ability to rely on these later studies, given their references to and/or reliance upon the tainted Committee findings.

At the outset, it should be mentioned that, in opposing Plaintiffs’ Motion for Summary Judgment, Defendants’ counsel indicated that the Committees served as a clearinghouse for existing research on disease transmission between sheep populations. *See infra* at p. 7. If true, it is not obvious to the Court why this same research cannot be cited and relied upon in any Final SEIS and ROD. Subsequent reports, however, drawing support from the Committee reports present another matter, thus highlighting the second component of Defendants’ Motion to Clarify.

*4 Because this Court has already determined that the Committees’ findings violate FACA and/or NFMA, it would seem inconsistent to now allow the Final SEIS and ROD to ignore this ruling by citing favorably those authorities *relying* wholly or substantially upon these same Committee findings. However, a distinction must be drawn between those later materials’ citation to, rather than reliance upon, the Committees’ conclusions. A mere citation to authority as consistent support for a given proposition should not operate to infect that authority’s ability to be referenced as justification for a certain position. In contrast, the reliance on such authority (without any independent basis for the conclusions reached) cannot overcome that underlying authority’s shortcomings. This same rationale will be applied here.

Materials generated after the Payette Principles were established will not be excluded outright. Only those materials that rely specifically upon the Payette Principles and RADT reports and provide the foundation for any subsequent recommendations should properly be excluded from the Final SEIS and ROD. Materials that only cite to the Payette Principles and RADT reports, while independently reaching conclusions that may nonetheless track the Payette Principles themselves are less problematic from the Court’s perspective and, as a result, can be relied upon by the Forest Service in later agency decisions, including the Final SEIS and ROD.

This is admittedly an imperfect result. However, it would be impractical for the Court to comment on each and every post-Payette Principles report, blessing certain ones, while excluding others; that is not the Court’s province. Rather, this decision is intended to provide direction to the Forest Service when it comes to supporting its final agency decision on the issues surrounding this action. As mentioned before, the final arbiter of the actual substance of the Final SEIS and ROD is the Forest Service, not the Court.

ORDER

Based upon the foregoing reasons, it is HEREBY ORDERED that Defendants’ Motion to Clarify Court’s Order (Docket No. 39) is GRANTED, but only to the following extents:

1. The Forest Service may not rely upon the Committees’ findings and/or conclusions in reaching future agency decisions. If the Final SEIS and ROD cannot be drafted without relying upon those portions of the Draft SEIS that relied solely, or primarily, upon Committees’ findings and/or conclusions, the Final SEIS and ROD cannot be based

upon the Draft SEIS. However, if, in responding to the Draft SEIS and public comments, the Final SEIS and ROD can be drafted independent of the Committees' recommendations, the Final SEIS and ROD can be based upon the Draft SEIS.

2. Materials relying specifically upon the Payette Principles and RADT reports and providing the foundation for any subsequent recommendations are excluded from the Final SEIS and ROD. However, materials that only cite to the Payette Principles and RADT reports, while independently reaching conclusions relating to disease transmission between domestic and bighorn sheep populations may be cited by the Forest Service in later agency decisions.

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Not Reported in F.Supp.2d, 2009 WL 3806371 (D.Idaho)

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