

treaty right to harvest. See *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1394 (9th Cir. 1985), *cert. denied*, *Sunnyside Valley Irrigation District v. United States*, 474 U.S. 1032 (1985).

The Confederated Tribes will be adversely affected by this decision. Bighorn sheep play a central role in the culture and diet of the Confederated Tribes. Historically harvested for food, clothing, tools and weapons, the decline of bighorn sheep, largely caused by disease outbreaks, has forced Tribal members to dramatically reduce their harvest of these animals. The Confederated Tribes have worked closely with Oregon's Department of Fish and Wildlife to re-introduce bighorn sheep in specific areas of eastern Oregon and to collect biological data on bighorn sheep, including disease data. The Confederated Tribes has also worked closely over the last five years with the Payette National Forest ("PNF"), as well as state and tribal managers, to correct inadequacies in the 2003 FEIS to address bighorn sheep viability threatened by disease from domestic sheep grazing on PNF land adjacent to occupied bighorn sheep habitat. The PNF's designation of lands suitable for domestic sheep grazing has the potential to reverse much of the progress that has been made in bighorn sheep recovery if it is not done in a manner that minimizes the risk of disease transmission to bighorn sheep. The modeling and analysis that the PNF relied upon in developing the FSEIS and accompanying ROD illustrates that, for disease transmission purposes, the bighorn sheep populations in Idaho, eastern Oregon and southeastern Washington are essentially one herd. Radio telemetry data demonstrate that these animals mix throughout the combined zones of these three States. The Confederated Tribes has a significant interest in maintaining disease-free, viable populations of bighorn sheep throughout this region, and the selection of any alternative that fails to do so, even on an interim basis, will have a significant adverse effect on the Confederated Tribes treaty-reserved right to hunt bighorn sheep.

STATEMENT OF REASONS FOR APPEAL

The Confederated Tribes of the Umatilla Indian Reservation would like to thank the PNF for its commitment to protection of bighorn sheep habitat in its jurisdiction and is supportive of Forest Supervisor Rainville's decision to select Alternative 7O as a long-term solution for management of domestic sheep and goat grazing to maintain habitat for viable bighorn sheep populations. The PNF's analysis of core herd home range, foray, risk of contact and disease spread represents the most comprehensive and quantitative risk assessment undertaken to date concerning disease transmission between domestic and bighorn sheep, and the use of best available science and PNF site-specific bighorn sheep data complement its strengths. The Confederated Tribes fully supports PNF's application of foray, population, and disease modeling developed by experts at the University of California-Davis. Based on this comprehensive quantitative analysis, the Confederated Tribes fully supports PNF's determination that Alternative 7O (without implementation modifications) is the only alternative that provides long-term bighorn sheep viability while maintaining domestic sheep grazing opportunities outside occupied bighorn sheep habitat where the risk of contact can be avoided.

Nevertheless, The Confederated Tribes is filing this administrative appeal to address several problematic aspects of the FSEIS and ROD related to the implementation of Alternative 7O. The Confederated Tribes is principally concerned with the decision to phase in implementation of Alternative 7O using alternatives 7N and 7P. These alternatives allow an unacceptable degree of risk of contact and disease transmission between domestic sheep and bighorn sheep and the Confederated Tribes does not believe that there is adequate justification in

the ROD or the FSEIS to delay the implementation of Alternative 7O by using two non-viable alternatives as stepping stones. The PNF has failed to support its decision that alternative 7O modified is adequately protective of viable bighorn sheep populations.

The PNF has a statutory obligation under the Multiple-Use Sustained Yield Act (“MUSYA”) of 1960 and the National Forest Management Act (“NMFA”) of 1976) to manage its lands for “multiple uses,” including range and wildlife. 16 U.S.C. §§ 528-531; 16 U.S.C. §§ 1600 *et seq.* The 1982 NFMA implementing regulations require the Forest Service to provide habitats that maintain viable populations of native and desired non-native species in the planning area, defining a “viable population” as “one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence [and] is well distributed in the planning area.” 36 CFR § 219.19. Additionally, bighorn sheep are designated as a sensitive species in Region 4, meaning the Regional Forester has determined that population viability is a special concern, imposing more stringent management responsibilities upon the Forest Service. Forest Service Manual at 2672.1. In light of this heightened responsibility, the implementation modifications to Alternative 7O render it inadequate to maintain viable bighorn sheep populations.

Under modified Alternative 7O, management for 2011 would occur as described under Alternative 7P. The ROD states that under Alternative 7P, “a disease outbreak may occur every 19 years.” ROD at 13. If a disease outbreak may occur once every 19 years, then the probability of a disease outbreak in any given year is greater than 5%. The ROD indicates that this level of risk is acceptable for a one-year period, but does not adequately explain why a 5% chance of disease outbreak is acceptable for a one-year period, but not on a long-term basis. ROD at 13. Similarly, under Alternative 7N, which would be implemented during 2012, a disease outbreak “may occur every 31 years,” meaning the risk of a disease outbreak in any given year of implementing Alternative 7N is greater than 3%. ROD at 14. The ROD states that this level of risk is acceptable for a one-year period, but does not explain the basis for this determination. ROD at 14. The Confederated Tribes believes that the selection of Alternative 7O with implementation modifications allows an unacceptable level of risk of disease transmission during the years 2011 and 2012. The PNF has failed to demonstrate how a level of risk that is considered too high to maintain viable bighorn populations for the long term is acceptable on a interim basis.

The ROD states that the risk of disease transmission will be reduced during the implementation of alternatives 7P and 7N by increased monitoring and compliance with the amended Forest Plan direction, but fails to explain how monitoring will reduce risk. Monitoring alone, without a system for actively responding to conditions of elevated risk of disease transmission, would have no effect on the risk of contact or disease transmission. Monitoring simply does not reduce the risk of contact between domestic and bighorn sheep in the absence of emergency measures designed to respond when conditions causing a high risk of contact are observed. Further, the ROD states “[n]one of the models considered the effect that implementing monitoring measures and Forest Plan direction would have on the probability of contact between the two species.” ROD at 14. If this is true, how can the conclusion follow that such measures “will decrease the risk of foray contact and potential of disease transmission and allow [the Forest Service] to safely implement Alternative 7O modified.” ROD at 14. The management

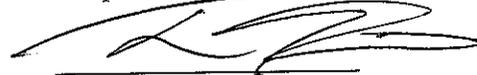
direction in the Forest Plan Amendment is too general to assure the prescribed separation between bighorn and domestic sheep, the level of intensity of monitoring (scope, scale, frequency) is not defined and there is no emergency response plan in place to respond to conditions of elevated risk on the ground. Without greater specificity as to monitoring and emergency response, it is not reasonable to assume that monitoring will mitigate for the elevated risk of foray contact and disease transmission inherent in alternatives 7N and 7P.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, the ROD and FSEIS should be remanded to the Regional Forester for reconsideration. Specifically, the Confederated Tribes requests that the decision be modified to implement Alternative 7O, without the implementation modifications identified in the ROD, starting in 2011, and with a statement that Alternative 7O is the minimum alternative that will provide for viable bighorn sheep populations on the Payette National Forest. Alternatives 7P and 7N are not consistent with the viability requirements of the NFMA regulations and should not be implemented even on a temporary basis. The Confederated Tribes also requests that the FSEIS and ROD be amended to clarify that alternatives 7P and 7N are not sufficient to provide for viable bighorn sheep populations. Finally, the Confederated Tribes requests that the management direction to the Forest Plan be expanded to provide the necessary detail for monitoring including an emergency response plan to respond to conditions of elevated risk.

Dated this 13th day of September, 2010.

Respectfully submitted,



Joe Pitt
Attorney for Appellant
Confederated Tribes of the Umatilla Indian
Reservation
Oregon State Bar # 081134