



**Western
Watersheds
Project**

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Working to protect and restore Western Watersheds

September 10, 2010

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RE: Western Watersheds Project Notice of Appeal of Record of Decision for the: Final Supplemental Environmental Impact Statement and Forest Plan Amendment Identifying Suitable Rangeland for Domestic Sheep and Goat Grazing to Maintain Habitat for Viable Bighorn Sheep Populations, Payette National Forest

Western Watersheds Project (“WWP”) has reviewed and hereby formally appeals, pursuant to 36 CFR 219.14(b) (2) and/or 36 CFR 219.35(b) provisions of the 2000 planning rule (65 FR 67514) and 2001 interpretive rule (66 FR 1864), the *Record of Decision for the: Final Supplemental Environmental Impact Statement and Forest Plan Amendment Identifying Suitable Rangeland for Domestic Sheep and Goat Grazing to Maintain Habitat for Viable Bighorn Sheep Populations, Payette National Forest* (hereinafter “ROD”) signed by Payette National Forest Supervisor Suzanne C. Rainville on July 20, 2010.

Western Watersheds Project contends that this ROD fails to adequately analyze the impacts of its decision, arbitrarily and capriciously implements management decisions that unlawfully fail to provide for bighorn sheep viability, and in general, the Forest Service's ROD falls short of the agencies fiduciary and legal responsibilities for many reasons including the following:

The Forest Service fails to provide viable habitat for bighorn sheep during the first years of its decision.

- 2010-Continue grazing as authorized in the 2010 Annual Operating Instructions for the remainder of the 2010 grazing season
- 2011-Implement management as described for Alternative 7P for one grazing season
- 2012-Implement management as described for Alternative 7N for one grazing season
- 2013-Implement management as described for Alternative 7O

The Forest is legally obliged to provide suitable habitat to ensure bighorn sheep viability. While it may be true that there is a regulatory basis for a Forester to exercise discretion in implementing particular decisions pursuant to rule in an incremental fashion with the intention to minimize potential harm or prepare forest users of a Forest decision, implementation of that discretion does not apply when to do so places the Forest's decision short of its legal mandate for a period of years.

The Forest is legally mandated to provide for bighorn sheep viability and has determined that Alternative 7E best provides for such viability, 7O was the next best while taking into account other values. It is arbitrary, capricious, and contrary to law for the Forest to implement a management regime that the Forest itself admits to fall short of its legal mandate to provide for viability even to accommodate a commercial and minimal use of the Forest resources is immediately jeopardizing bighorn viability.

Additionally, the Forest's analysis of its reasoning for incremental implementation failed to account for the fact that Forest users have had ample time to prepare for this ROD and any implications of the reduction of domestic sheep grazing on the Forest. Given the duration of this process and predictability of its outcome, if the permittees at issue failed to make prudent preparations, then any potential harm is essentially self-inflicted.

The SEIS fails to adequately analyze the environmental impacts of the ROD's incremental implementation of the SEIS's suite of alternatives in a staggered fashion over time.

The SEIS fails to adequately analyze the environmental impacts, including cumulative impacts to bighorn viability over time, of the alternatives as implemented by the ROD. The fact that the decision staggers implementation of differing alternatives incrementally over time has environmental consequences above and beyond those considered within the context of each alternative alone. Those potential impacts need to be analyzed and considered in order to be lawful under NEPA.

The SEIS relies on risk-analysis that fails to establish a scientifically supported justification as to what constitutes 'acceptable risk' to bighorn sheep viability.

In the absence of a scientifically supported determination as to what constitutes 'acceptable risk' to ensure a "viable" bighorn population, the Forest's overwhelmingly accepted scientifically supported conclusion that domestic sheep grazing as a land use threatens bighorn sheep "viability" can only lawfully support Alternative 7E, the elimination of domestic sheep grazing on the Forest.

The Forest acknowledges significant risk of contact between bighorn sheep and domestic sheep in its Record of Decision stating that:

"Under Alternative 70, we estimate that a disease outbreak may occur every 46 years, **assuming a probability** of disease outbreak given contact of 0.25. **I believe this is the appropriate risk level** for long-term management of domestic sheep and goat grazing while providing adequate habitat for bighorn sheep populations."

Emphasis Added.

"I believe this is the appropriate risk level for long-term management" is an insufficient standard by which to base management decisions. "I believe this is the appropriate risk level" accompanied by various relative determinations which project and assume unsubstantiated probabilities of contact is arbitrary, capricious, and contrary to law.

A Forest decision that is relatively more likely to provide for bighorn viability (i.e. comply with law) than another alternative is not acceptable when there exists a definitively lawful alternative (i.e. Alternative 7E) that assures compliance with the viability standard by entirely eliminating risk promulgated by Forest action.

Given the level of uncertainty amply described in the SEIS and ROD, the Forest's fiduciary responsibility and its definitive legal mandate to ensure bighorn sheep viability necessitates that it apply the precautionary decision-making standard uniquely embodied by Alternative 7E.

The SEIS relies on monitoring described as having low to moderate reliability.

The methods of monitoring described in the SEIS include:

- On-the-ground or aerial survey of bighorn sheep source habitat on and near active allotments prior to domestic sheep arrival;
- Surveys of the risk areas during the authorized grazing season;
- Use of fire lookout personnel across the Payette National Forest to monitor for the presence of bighorn sheep and straying domestic sheep and goats;
- Increased collaring of bighorn sheep will be encouraged throughout the Payette National Forest;
- Rangeland Management Specialists will work with permittees so they are able to make best use of their ability to detect any bighorn sheep that may come close to domestic sheep. The Payette National Forest will provide any bighorn sheep locations that are within proximity of the active domestic sheep grazing areas;
- Rangeland Management Specialists will strategize annually with the permittees to make the best use of their ability to reduce the likelihood of stray domestic sheep;
- The Payette National Forest will inform the permittees immediately of any known stray domestic sheep;
- New information and new technology will be provided to the permittees as it becomes available to assist them with bighorn sheep and stray domestic sheep detection;
- Monitor domestic sheep bands and scan for bighorn sheep. Focus efforts in areas of greatest risk—based on foray and habitat models and radio telemetry data; and
- To assist with location of domestic sheep bands, place at least one tracking device in each band of domestic sheep on active sheep and goat allotments.

Several of these monitoring elements are described as having low, or low to moderate, data reliability and leave the possibility that contact between domestic and bighorn sheep will remain undetected.

The SEIS fails to disclose the feasibility or funding of the monitoring requirements.

The SEIS fails to disclose whether there is an increased amount of funding needed to monitor bighorn and domestic sheep presence on the landscape. The SEIA fails to evaluate the feasibility of monitoring in maintaining separation under Alternative 70.

The Final Decision fails to adequately consider the impact/threat of Q-fever from each alternatives' permitted grazing of domestic sheep being transmitted to humans.

Western Watersheds Project and our partners' comments submitted included a request that the Forest consider the threat of Q-fever to human health and the environment. Despite our comments concerning Q-fever and the disease's persistence in domestic sheep as has been previously publicly identified as a concern, as indicated by the inclusion of a public notice on the 1996 *Southwest Montana Interagency Visitor/Travel Map (East Half)* which clearly warns:

ARS sheep flocks carry a disease organism that can be passed to humans using the area. The Q-fever disease can be serious for persons with heart conditions and women of childbearing age.

Q-fever is a highly infectious disease transmitted to humans working in the agricultural field with sheep and goats. Q-fever is considered a potential 'Bioterrorism Agent' and is extremely contagious. The most common reservoir for the disease includes domestic sheep and humans who work with sheep and are commonly infected with the disease.

Q-fever is substantial enough a concern to human health that its persistence in domestic sheep has been included as a warning on interagency public maps on landscapes on which domestic sheep grazing is a shared land-use.

Recreationists, laborers, locals, and other humans who use the public lands proposed for domestic sheep grazing in the SEIS's alternatives are likely to be impacted by Q-fever.

The SEIS fails to analyze the likelihood that humans will contract Q-fever. The SEIS fails to analyze how many recreationists, laborers, locals, or others are likely to be within proximity of domestic sheep potentially carrying Q-fever for each alternative.

The SEIS fails to adequately analyze the likely impact of Q-fever to the environment and human health.

The SEIS fails to adequately analyze the impact/threat of numerous pathogens of which domestic sheep likely serve as vectors/reservoirs.

Domestic sheep grazed on public lands serve as vectors and reservoirs for innumerable disease pathogens, many of which are contagious and can affect humans.

The SEIS failed to consider the likelihood of human exposure and potential impact of the domestic sheep permitted on the Forest contracting, harboring, and transmitted diseases including but not limited to:

Rocky Mountain Spotted Fever (Rickettsia rickettsii)

Lyme disease

Human granulocytic and monocytic ehrlichiosis

babesiosis

Relapsing fever

Colorado tick fever (CTF)

tularemia

tick paralysis

The failure of the SEIS to evaluate the likelihood of each alternative to result in exposure to each disease known or reasonably suspected to be persistent in the environment and transmittable to humans constitutes a failure of the SEIS to adequately analyze its impact to the human environment and human health.

Domestic sheep carry and spread other infectious diseases for which the above rationale regarding Q-fever and tick-borne illnesses equally applies. All diseases/pathogens known or reasonably suspected to be transmittable from domestic sheep to humans and from the environment to humans including but not limited to Transmissible *spongiform encephalopathies* (Scrapie), anthrax, and others should be included in analysis concerning the alternatives' likely impact to the human environment and human health.

The SEIS fails to adequately identify and address any proportionately high and adverse *human health or environmental* effects on minority populations and low-income populations pursuant to Executive Order 12898 (59 Fed. Register 7629, 1994)

Environmental Justice (EJ) is defined by the U.S. Environmental Protection Agency (EPA) as :

"The fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies."

With regard to the alternatives' impact to people identified by race, national origin, or income the SEIS clearly demonstrates relevance of disproportionate demographics which may be affected by the alternatives. Unfortunately, despite the SEIS admitting Environmental Justice concerns, it fails to adequately analyze what those harmful impacts may be, and entirely fails to consider the implications of the alternatives on the *human health or environment*.

Adequate analysis of the alternatives' impact to environmental justice with respect to *human health and the environment* is particularly relevant to the grazing of domestic sheep by the Forest as immigrant laborers are often exclusively and/or disproportionately selected via the H2-A visa program, a guest worker program that is directly selective of laborers who are readily identifiable as a condition of their national origin, race, *and* income.

The H2-A program is exclusively available to immigrants originating in select qualifying countries ("national origin"), almost exclusively consisting of minority participants ("race") whose application into the program is in direct relation to their underprivileged economic condition ("income").

Even in the absence of the H2-A program, it is common practice in the west to hire shepherders who are often minority, Peruvian (and other particular nationally identifiable) origin, and/or who are economically underprivileged.

The SEIS fails to collect, analyze, or disclose information about racial, economic, and national origin demographics of shepherders in violation of NEPA

An analysis and disclosure of population demographics (race, national origin, & class) affected by any federal action is mandated by NEPA and the implementation of Executive Order 12898 (EO 12898) and is necessary to avoid "disproportionately high and adverse" effects on minority and low-income populations. The analysis and disclosure required by NEPA similarly helps to provide public oversight and ensure compliance with important federal statutes including Title VI of the Civil Rights Act of 1964 (Title VI).

The SEIS fails to collect, analyze or disclose this information with particularity given the nature of the land-use at issue in violation of NEPA.

The SEIS fails to analyze whether its alternatives disproportionately, and in effect discriminatorily, subjects racial, economic, and/or national peoples (and/or individuals) to environmental and human health risks in violation of NEPA and the principles of Environmental Justice.

EO 12898 further directs each federal agency to analyze, assess, and compare the collected information to determine whether the action potentially disproportionately, and in effect *discriminatorily*, subjects racially, economically, or nationally distinct populations (or *individuals*) to environmental and human health risks.

EO 12898 Section 3-302:

(a) “[...] each federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income. To the extent practical and appropriate, Federal agencies shall use this information to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

Instead, the SEIS applies cursory and inadequate analysis about the potential effectual *economic* impact to low-income and/or minority populations should the Forest cease to provide local employment to its section on Environmental Justice. This economic analysis is necessary, but *not sufficient*, to comply with NEPA requirements to assess and analyze impacts associated with Environmental Justice concerns. To comply with EO 12898 the EA should:

- Analyze environmental effects, including *human health*, economic, and social effects on minority populations and low-income populations when such analysis is required by NEPA;
- Ensure that mitigation measures outlined or analyzed in EA's, EIS's, and ROD's, whenever feasible, address disproportionately high and adverse environmental effects or proposed actions on minority populations and low-income populations; and
- Provide opportunities for community/public input in the NEPA process, including identifying potential effects and mitigation measures in consultation with

affected communities and improving accessibility to public meetings, official documents, and notices to affected communities;

No analysis is included which considers whether Forest Service or domestic sheep grazing employees of distinct national, racial, or class origin are disproportionately, or in effect *discriminatorily*, subjected to environmental and human health risks including, but not limited to those identified in the aforementioned appeal point regarding impacts to human health and the environment.

Environmental and human health risks that are reasonably anticipated but completely omitted from disclosure and analysis in the SEIS must at least include (but are not limited to):

- Pathogens/Disease

- Q-Fever

Q-fever is a highly infectious disease transmitted to humans working in the agricultural field with sheep and goats. The most common reservoir for the disease includes domestic sheep and humans who work with sheep are commonly infected with the disease. The disease's persistence in domestic sheep that graze on public land has been previously publicly identified as a concern, as indicated by the inclusion of a warning on the 1996 *Southwest Montana Interagency Visitor/Travel Map (East Half)* which clearly states:

ARS sheep flocks carry a disease organism that can be passed to humans using the area. The Q-fever disease can be serious for persons with heart conditions and women of childbearing age.

The prevalence and persistence of Q-fever in domestic sheep constitutes an environmental and human health risk that the SEIS fails to consider/analyze in violation of NEPA.

- Insect and Environment-Borne Illness

Shepherders working on allotments and pastures are exposed to insect and environment-borne illnesses associated with high exposure to vectors found in the environment. No analysis in the SEIS evaluated the likelihood of disease transmission occurring with employees or contract workers subject to environmental justice concerns as mandated by Executive Order (EO) 12898, CEQ (1997) and its implementation via NEPA.

The EA failed to consider the likelihood of disproportionate, and in effect discriminatory, exposure occurring among racial, low-income people, and groups of particular national origin with regard to diseases including but not limited to:

- Rocky Mountain Spotted Fever (*Rickettsia rickettsii*)
- Lyme disease
- Human granulocytic and monocytic ehrlichiosis
- babesiosis
- Relapsing fever
- Colorado tick fever (CTF)
- tularemia
- Q-fever
- tick paralysis

The failure of the SEIS to evaluate the likelihood of each alternative to result in exposure to each disease known or reasonably suspected to be persistent in the environment and transmittable to humans constitutes a failure of the SEIS to adequately consider/analyze its impact to human health in violation of NEPA. The failure to consider/analyze whether particular racial, class, and national groups are disproportionately exposed to pathogens/diseases constitutes its own NEPA failure pursuant to Environmental Justice concerns as demonstrated previously.

Other Diseases/Pathogens

Domestic sheep carry and spread other infectious diseases for which the above rationale regarding Q-fever and tick-borne illnesses equally applies. All diseases/pathogens known or reasonably suspected to be transmittable from domestic sheep to humans and from the environment to humans including but not limited to Transmissible *spongiform encephalopathies* (Scrapie), anthrax, and others should be included in analysis concerning the alternatives' compliance with the principles of Environmental Justice and NEPA as mandated by EO 12898 and CEQ (1997).

Given that sheepherders are often disproportionately of distinct national origin (via the H2-A program), race, and economic status and are likewise disproportionately employed in positions directly exposed to reservoirs of Q-fever and other diseases/pathogens, the SEIS fails to adequately analyze/consider whether its alternatives are consistent with the principles of Environmental Justice as mandated by EO 12898 and CEQ (1997), and whether its alternatives are in effect discriminatory.

The SEIS fails to adequately disclose and analyze the impacts of each alternative to patterns of subsistence hunting pursuant to Executive Order 12898 (59 Fed. Register 7629, 1994)

Page 3-136 clearly discloses the relevance of potential impact to subsistence hunting of bighorn sheep to indigenous peoples affected by the alternatives saying:

Therefore, populations in the analysis area can probably be defined as minority populations according to the CEQ's definition. Given the probably presence of these populations, potential impacts to their patterns of resource and other subsistence uses are relevant. In addition, tribal interest in subsistence uses is of interest to the Nez Perce, Shoshone Bannock, and Shoshone Piute Tribes and Confederated Tribes of the Umatilla Indian Reservation.

(SEIS 3-136)

Undoubtedly subsistence hunting of bighorn sheep is of relevance given respective tribal treaties explicitly securing such right to tribal members. Unfortunately, even given the explicit acknowledgement of the relevancy of this concern in the SEIS itself and the explicit NEPA direction pursuant to EO 12898 to conduct NEPA analysis of alternatives' impact to such, the SEIS fails to provide such analysis, let alone consider the impact in its ROD. This glaring omission is a flagrant NEPA violation.

For these reasons, Western Watersheds Project respectfully requests that the reviewing officer remand this decision with instructions to re-issue the decision selecting Alternative 7E, the Forest's 'Environmentally Preferable Alternative' and the only alternative considered to be, pursuant to 40 CFR 1505.2(b) with immediate implementation.

Respectfully submitted,

 For

Jon Marvel, Executive Director