



**Western
Watersheds
Project**

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Working to protect and restore Western Watersheds

Appeal Deciding Officer

USFS Region 2

740 Simms Street

Golden, CO 8040



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Appeal Deciding Officer
USFS Region 2
740 Simms Street
Golden, CO 8040

November 4, 2011

Dear Appeal Deciding Officer,

Enclosed, please find our appeal of the Big 6 EIS and ROD from the Bighorn National Forest.

We look forward to working with the Forest Service in fulfilling the intent of NEPA, NFMA and the other statutes and regulations the Forest Service works within, through a complete and accurate analysis of the impacts of this project and better decision-making.

Sincerely,

Jonathan B. Ratner
Director – Wyoming Office

APPEAL OF DECISION ON THE BIGHORN NATIONAL FOREST

Western Watersheds Project

APPELLANT

v.

Clarke McClung
District Ranger

Mark Booth
District Ranger

David Hogen
District Ranger

RESPONDENTS

Notice of Appeal, Statement of Reasons and
Request for Relief Regarding the Big 6 FEIS and
ROD

NOTICE OF APPEAL
STATEMENT OF REASONS
RELIEF REQUESTED

DATED this 4th day of November, 2011



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NOTICE OF APPEAL

On July 26th, 3011, the District Rangers of the Bighorn National Forest District signed the applicable ROD's for the Big 6 group of allotments. This is a Notice of Appeal of that decision pursuant to 36 C.F.R. Part 215. Western Watersheds Project (WWP) have members who use and enjoy the Bighorn National Forest and the area covered by the Decision. Further, WWP submitted copious scoping comments and provided dozens of agency documents and research findings to be considered for this NEPA process as it was developed, all of which seem to have been ignored. This appeal is timely pursuant to 36 C.F.R. § 215.14.

Appellant will demonstrate that the District Rangers' decision is arbitrary and in error and not in accordance with the legal requirements of federal statutes and regulations. Consequently, Appellant requests that the ROD be withdrawn, a proper and defensible NEPA process be conducted and a new decision issued that protects our public resources.

THE APPELLANT

Western Watersheds Project is a regional, membership, non-profit conservation organization with over 2,000 members, based in Hailey, Idaho, with offices in Idaho, Montana, Wyoming, California, Arizona and Utah. WWP commented on the scoping notice and the original EIS. WWP's staff and members use the analysis area for a variety of activities, including fishing, hiking, hunting, wildlife viewing, spiritual renewal, biological and botanical research, photography, and for other forms of recreation. They will be adversely affected by the decision as proposed. WWP claims partial ownership in the public lands covered by this decision and consequently has legal standing to participate in the process and challenge those decisions it finds unacceptable.

WWP has participated in various NEPA processes and in meetings with the Bighorn National Forest regarding a variety of other projects on that National Forest and have spent considerable time and resources surveying the resources contained within the boundaries of the Forest and the project area.

WWP has invested significant time, resources and effort at each stage of the process by providing considerable input of research, analysis, agency reports, meetings, tours and communications with district personnel and FOIA requests and subsequent analyses, but even though we brought to the decision-maker's attention a number of significant issues in the underlying assumptions of the analysis, as well as specific details of the process, our input was ignored.

We incorporate by reference all of the points raised in our comments here as appeal points.

STATEMENT OF REASONS

The EIS for the Big 6 group of allotments are based on flawed and/or inadequate information. The ROD's fail to implement management that complies with the regulations under which the Forest Service operates. By selecting the Proposed Action, the Forest Service is in violation of NEPA, NFMA, CWA and the APA.

We provide our comments to the DEIS as an attachment to this appeal as specific appeal points in addition to those found below, as the issues raised in our DEIS comments were not resolved.

The following analysis details how these federal statutes and agency regulations will be violated by the project's implementation.

I. THE EIS AND ROD'S VIOLATE NFMA, NEPA

A) THE ROD'S FAILED TO ADEQUATELY IMPLEMENT DESIGN CRITERIA AND MITIGATION TO PROTECT SENSITIVE SPECIES AND INSURE VIABILITY

According to FS policy, the Forest "must develop conservation strategies for those sensitive species whose continued existence may be negatively affected by the Forest Plan or a proposed project."¹ FSM 2670.45. These strategies must contain quantifiable objectives, and must be adopted prior to implementation of projects that would adversely impact that species habitat. FSM 2622.01, 2670.45. The EIS failed to discuss these nor did the ROD's implement them. This violates NFMA and NEPA.

Obvious examples of this failure include but are not limited to water vole and bighorn sheep. Both of these species are clearly "negatively affected" by the decisions, both are FS listed Sensitive Species and neither has the Bighorn National Forest developed or implemented "conservation strategies" for these species. No "quantifiable objectives" have been developed or implemented.

Smith (2003) clearly identified domestic livestock grazing, especially in combination with a general decline in wetland habitat, as a major threat to the northern leopard frog and its habitat on the Forest. The Forest Service ignored its own Conservation Assessment and failed to ensure adequate protection of the frog and its habitat, in part by allowing no grazing within 200 meters of occupied or potential northern leopard frog breeding ponds (see, Smith 2003).

Further, the EIS and ROD's implement measures supposedly to protect various resources but fails to provide any supporting rationale as to effectiveness. "Mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly

¹ USDA Forest Service defines sensitive species as "those plant and animal species identified by a regional forester for which population viability is a concern, as evidenced by *significant current or predicted downward trends in population numbers or density, or significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution.*" (emphasis added, excerpted from USFS Official Website).

evaluated."² "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA."³ Failure to demonstrate the effectiveness of mitigation measures does not satisfy the intent of NEPA.⁴ The Forest Service is obligated to prove that mitigation will in fact be effective. The NEPA document must analyze mitigation measures in detail and explain the effectiveness of such measures.⁵ In the case of the FEIS and ROD's, the mitigation measures are discussed but effectiveness is not.

In the case of bighorn sheep, the ROD's continue to authorize domestic sheep within bighorn sheep habitat thus rendering it toxic to bighorn sheep. The minor and ineffective actions proposed in the ROD's not only do not maintain viability of the only bighorn sheep herd remaining on the Forest, it does nothing to recover this sensitive species.

For the water vole, no specific actions are taken to protect this species habitat. The default Forest Plan utilization 'guidelines' do not provide for water vole habitat.

Regulations promulgated to ensure species diversity mandate that fish and wildlife habitat be managed to maintain viable populations and the diversity of species throughout the planning area. 36 C.F.R. §§ 219.19, 219.27.

In accord with 16 U.S.C. 1604(g), which requires the promulgation of regulations that "provide for diversity of plant and animal communities" in the development and revision of Forest Plans, the 1982 regulations implementing NFMA provided specific direction concerning species viability at 26 C.F.R. 219.19:

"Fish and wildlife habitat *shall be* managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals *to insure* its continued existence is *well distributed* in the planning area. In order to insure that viable populations will be maintained, habitat must be provided to support, *at least*, a minimum number of reproductive individuals and that habitat must be well distributed *so that those individuals can interact with others in the planning area.*" (emphasis added)

According to Forest Service policy interpreting the 1982 regulations on viability, "well distributed" as used in NFMA means "a population's *unceasing presence* 'throughout its existing range in the planning area' (*Hilmon* 1982)." (emphasis added) USDA 1983 ("Wildlife Resource Planning Assistance To the Payette and Boise National Forests," Rocky Mountain Research Center, USFS).

² *Carmel-By-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989))

³ *Northwest Indian Cemetery Protective Ass'n. v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), rev'd on other grounds, 485 U.S. 439 (1988)

⁴ [*Northwest Indian Cemetery Protective Association v. Peterson*, 795 F. 2d 688 (9th Cir. 1986)].

⁵ *Northwest Indian Cemetery Protective Ass'n v. Peterson*, cited above

Having reviewed the GPS collar data for the Devils Canyon herd, it is clear that this herd does not use the Forest Service lands except on fairly rare occasions. In fact, during the reintroduction of this herd it was specifically designed not to use Forest Service lands. The Forest Service can not use this herd to pretend it has even one viable population of bighorn sheep.

Further, given that most of the Bighorn National Forest is bighorn sheep habitat, if it were not for the toxic effect of permitted domestic sheep, the Forest Service can not honestly argue that the population is “well distributed”.

Table 3-29 of the Forest Plan FEIS states that historically bighorn sheep occurred Forest-wide, but currently they exist only in “Shell Cr. watershed with <30 animals.” No mention of the Hells Canyon herd was made even though they existed in about the same numbers as when the Big 6 ROD’s were signed, because they rarely use FS lands and the FS knows that. To say the Hells Canyon herd currently helps to maintain viable populations of this species on the Forest is simply false.

Page 3-120 of the Forest Plan FEIS states “Bighorn sheep have not had a viable population on the Forest since the early 1900s, despite several reintroductions from the 1940s through 1990s. The few sheep remaining from those reintroductions, likely less than 12, would not likely expand into a viable population (considered to be 125 animals). This is largely due to continued interaction with domestic sheep on and off the Forest where disease is transmitted to the Bighorn National Forest.”

The Forest Plan clearly states that current populations are not viable and that continued permitting of domestic sheep are the primary cause for that. The Big 6 ROD’s continue to permit domestic sheep within bighorn sheep habitat, thereby rendering bighorn sheep habitat toxic to the species and disallowing viability. Therefore, the decision to continue these permitted activities violates the NFMA viability requirements. Further, the Forest’s reliance on the state’s working group ‘non-emphasis area’ status in no affects the Forest’s NFMA responsibilities.

The Forest Plan FEIS goes on to state “Revised Plan has a guideline to evaluate opportunities to improve bighorn sheep management, including those covered in Woolever and Schommer (2001), when conducting Allotment Management Plan analysis.” But the Big 6 FEIS and ROD’s failed to implement this FP Guideline.

In order to estimate impacts of management activities on fish and wildlife populations and diversity, certain species must be identified as “management indicator species” (“MIS”) for the various biological communities represented on the forest. 36 C.F.R. § 219.19. Management alternatives are to be evaluated in terms of the quality of habitat and the population trends of the MIS. *Id.* The regulations go on to require that viability be insured through the utilization of quantitative inventory analysis:

“Forest planning shall provide for diversity of plant and animal communities and tree species consistent with the overall multiple-use objectives of the planning area. Such diversity shall be considered throughout the planning process. *Inventories shall include quantitative*

data making possible the evaluation of diversity in terms of its prior and present condition. For each planning alternative, the interdisciplinary team shall consider how diversity will be affected by various mixes of resource outputs and uses, including proposed management practices.” (emphasis added)
36 C.F.R. 219.26

This requirement for insuring species viability with quantitative data is in accord with the NFMA requirement for “continuous monitoring and assessment,” 16 U.S.C. 1604(g)(3)(C), as well as the Forest Supervisor’s duty to “obtain and keep current inventory data appropriate for planning and managing” the forest’s resources. 36 C.F.R. 212(d).

“USDA Forest Service defines sensitive species as those plant and animal species identified by a regional forester for which population viability is a concern, as evidenced by *significant current or predicted downward trends in population numbers or density, or significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution.*” (emphasis added), excerpted from USFS Official Website)

Scientific studies have disclosed that a minimum viable population of most vertebrates consists of at least 7,000 breeding adults (Reed et al. 2003, 2004, see also exhibits), but the Forest has provided no data to indicate that the range of Sensitive Species are currently viable, let alone make a defensible determination that the project will not impact viability.

Take for instance the water vole, a FS Sensitive Species, significantly impacted by livestock impacts to riparian area. Looking at the various ROD’s we see the implementation of non-required “Riparian vegetation residual guidelines” that allow riparian areas to be grazed down to a 5” stubble height stating “Vegetation residue guidelines are expressed in terms of the inches of stubble height to be left, measuring longest leaf of designated Carex species, after livestock use.” It is important to note that this is merely a “guideline” not a requirement. Secondly, it is the longest leaf method which means the average stubble height at 5” longest leaf, will be 4” measured as average stubble height. The Forest Service admits that this is the case in Table 4 of the Bighorn National Forest Vegetation Grazing Guidelines (see attached). And thirdly, and most critically, there is nothing whatsoever in the NEPA analyses or BA/BE that provide any support at all for the claim that a 4” average stubble height (average stubble height is the standard method used throughout the Forest Service and BLM) provides for the habitat needs of the water vole. Further, despite the fact that bank trample or alteration is a primary factor in impacts from livestock to water vole, the Forest Service implements no alteration limit or move trigger. In fact, the ROD’s implement no further management requirements to recover this species, as require by the FS’s Sensitive Species Policy, regulations, handbooks and manuals, than the status quo.

Water vole average around 10” long, these are not the size of field mice. A 4” stubble height does not provide the overhanging cover, or a minimum of “About 75 percent cover by mid-to-late seral vegetation, dominated by willow, sedges, grasses and forbs immediately adjacent to the stream, appears to be important for water voles (Pattie 1967,

Anderson et al. 1976, Brown 1977, Ludwig 1981, Getz 1985, Reichel 1986, Anthony et al. 1987, Blankenship 1995” Water Vole – A Technical Conservation Assessment, published by the R2 of the Forest Service. The Forest ignored the needs of this species, as an example of similar situations for other Sensitive Species on the Forest.

Reading the Assessment, one sees a species with no significant movement capabilities, with very low reproduction rate, which only exist in the Bighorn National Forest, who the biologists have rated as a very high susceptibility to extinction (See R2 Sensitive Species Evaluation Form) for which the Forest is doing nothing than the status quo.

MIS species are likewise not dealt with in accordance with regulation. In order to sufficiently analyze and assess impacts to management indicator species, the Forest must gather and utilize quantitative population trend data. Although the USFS should be well aware of this duty by now, it seems as if the agency continues to rely on measures of habitat and/or inadequate population data, at best, as a proxy for actual trend data. As courts have widely held, such a reliance is not appropriate. See e.g., UEC v. Bosworth, 372 F.3d 1219, 1225 (10th Cir. 2004). In this case, the Forest does not even have data on habitat quality trends.

The MIS section fails to comply with the extensive case law regarding management and analysis of MIS species. We request that the Forest Service read through this wide range of case law and correct its analysis in order to comply with NEPA and NFMA. A review of the requirements for BA/BE’s and the manuals and handbooks applicable to this process must also be reviewed. (See Exhibits)

We also attach as an exhibit a March 21, 2001 letter from the Regional Office discussing TES species requirements after a string of losing litigation. As an attachment the RO provided checklists to help insure compliance with requirements. These requirements have not been complied with.

We also attach a wide range of FS manuals with highlighted material. In nearly every case these requirements have been ignored.

The NEPA document fails to provide any information regarding current productivity as required by NFMA in comparison with capable acres. Also the pattern of capable acres needs to be displayed to allow review of feasibility of livestock movements and use of no-capable acres. This information is vital to understand stocking rates within these allotments

B) THE EIS AND ROD’S FAILED TO COMPLY WITH FOREST PLAN REQUIREMENTS

We attach Forest-wide and MA-specific Standards and Guidelines highlighting Standards and Guidelines for which the ROD’s fails to comply and the EIS fails to provide discussion or evidence that they have been complied with.

In addition to Forest wide requires the Forest Plan requires a management zoning process, called Management Areas. This provides requirements for the emphasis of various resources in different parts of the Forest. The Bridger Teton National Forest discussed this issue in a recent NEPA process as laid out in the highlighted text of 0184 Resource Objectives_Little Greys.pdf (attached).

Reviewing the various ROD's it is very clear that the Forest ignored MA direction, despite the FEIS's statement that "Each management area has certain emphasis that will direct management activities on that piece of land." FEIS at 1-12. No difference in management is applied to any of the MA's and in MA's with a wildlife or plant emphasis such as 2.2, 3.5, 5.4 and 5.51 conflicts are not resolved in favor of the MA emphasis. These MA's cover nearly a quarter of the entire analysis area so the issue is quite significant. For instance, the Goose Geographic Area Assessment produced for the Forest Planning process states "In addition, there are conflicts with livestock occurring in this geographic area due to combined use of vegetative resources." And "In addition, elk calving may be limited in some instances due to the conflict with livestock if livestock are present in all pastures in the spring. Issues of wildlife winter range and motorized vehicle access persist in this area, as described in the Clear/Crazy assessment." (emphasis added). The EIS and ROD's failed to address these concerns despite the fact that this planning process was the time they should have been addressed. The Tensleep Geographical Area Assessment echoes these concerns. This renders the MA zoning concept meaningless and violates NFMA.

FSH 2209.13 91.1 requires:

"Under the National Forest Management Act (NFMA), project level decisions which authorize the use of specific National Forest System lands for a particular purpose like livestock grazing must be consistent with the broad programmatic direction established in the LRMP. Consistency is determined by examining whether the project level decision will implement the goals, objectives, desired conditions, standards and guidelines, and monitoring requirements from the LRMP."

No such examination has taken place in the ROD's or FEIS.

Forest Plan Guidelines Rangeland Vegetation 1, 2, 3, 4, 6, 10, 11, Guidelines Rangeland Improvement and Maintenance 6, Lynx Linkage Areas Standard 2, Non-Native and Invasive Species Standard 1, spell out what the USFS must do in its NEPA analysis for livestock grazing to comply with NFMA. Unfortunately, these Forest Plan requirements were largely ignored.

It is unclear the extent to which the USFS has conducted and/or will conduct baseline stream health surveys within the allotments. According to the USFS's Watershed Conservation Practices Handbook ("WCPH"), FSH 2509.25, management actions must be undertaken so that "stream patterns, geometry, and habitats are maintained, or improved toward robust stream health." The Forest Plan requires that the USFS "[m]aintain or improve long-term stream health. . . ." The WCPH at FSH 2509.25-05 defines stream health as, "The condition of a stream versus reference conditions for the stream type and geology, using metrics such as channel geometry, large woody debris,

substrate, bank stability, flow regime, water chemistry, and aquatic biota.” In the case of the proposed action, there is no indication that any method was used to determine stream health and ensure compliance with the WCPH or the Forest Plan.

The EIS and ROD fails to comply WCPH requirements:

In 12.1 H. the current grazing standards adopted in the proposed action do not include anything to replace Kentucky bluegrass with native deeply rooted species.

In 12.1 K. the Forest assumes that meeting the minimal stubble height requirements will somehow maintain stable banks but have provided no information or research to support this claim. No data is provided as to current conditions.

In 12.1 L. we are expected to believe that a photo will be able to determine soil compaction. This is clearly an inappropriate monitoring strategy to determine soil compaction.

In 12.4 C the Forest fails to deal with ground cover in uplands which clearly effect riparian areas. In many areas of the allotment in question livestock grazing has severely impacted groundcover and soils leading to greater runoff as the photos provided clearly show.

In 12.4 E we are expected to believe that no impacts will occur to marshy or spring areas even though these are the area’s most vulnerable to livestock grazing and to which livestock are most attracted.

If the forest reviews the soil quality manual it clearly indicates that the activity area is not the entire allotment area but the area in which the activity takes place in other words the 15% of the activity area is not the 15% of the entire allotment as the EIS considered. At a maximum it would be suitable acres. The EIS states that only 84,141 acres are considered suitable for grazing of the project area’s 400,000 acres. 15% of this totals 12,627, yet the FEIS estimates “Potential affected soils in the project area were estimated to be 15,866 acres.” which exceeds the 15%.

Under 14.2 a this clearly would be applicable to livestock grazing especially where significant soil loss due to livestock grazing has occurred.

C) THE EIS AND ROD’S FAIL TO COMPLY WITH THE SENSITIVE SPECIES POLICY

The FSM 2670.5 defines a Sensitive Species designation as when the Regional Forester determines that a species:

“for which population viability is a concern, as evidenced by:

- a. Significant current or predicted downward trends in population numbers or density.
- b. Significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution.”

This manual goes on to define the requirements the Forest Service must follow with regards to the management of Sensitive Species:

“2672.1 - Sensitive Species Management. Sensitive species of native plant and animal species must receive special management emphasis to ensure their viability and to preclude trends toward endangerment that would result in the need for Federal listing. There must be no impacts to sensitive species without an analysis of the significance of adverse effects on the populations, its habitat, and on the viability of the species as a whole. It is essential to establish population viability objectives when making decisions that would significantly reduce sensitive species numbers.”

The EIS admits that the only bighorn sheep herd that actually uses the Forest is not viable, yet it continues to authorize domestic sheep within bighorn sheep habitat thereby disallowing viability let alone species recovery.

A fundamental flaw in this NEPA process is the failure to incorporate Best Available Science (BAS) in the management of bighorn sheep. While the Forest Service does make attempts to reduce disease transmission potential, it fails to take into consideration the fact that current science requires at least a 9 mile buffer surrounding big horn sheep use areas and habitats to reduce potential for disease transmission. Secondly, the NEPA analysis fails to examine the issue that bighorn sheep are biological creatures and are not restricted to areas within the polygons generated by the habitat model. In fact, just a brief look at the results of the modeling exercise clearly shows the results are biologically invalid and impossible. The Forest Service also failed to discuss population trends and viability of the herds in question. These are the critical questions that an adequate NEPA process must answer.

While the NEPA documents mentions a review of some documents regarding bighorn sheep management, it completely fails to discuss or implement the Payette Principles or the Payette Science Review or the 2 RMRS publications regarding bighorn sheep management. The ROD is silent on the use of the Best Available Science (BAS) as required. The recent decision on the Payette National Forest provides extensive discussions and analysis of BAS in relation to BHS and its implementation for domestic sheep grazing. This information can be found at http://www.fs.fed.us/r4/payette/publications/big_horn/index.shtml

The ROD's actions to protect bighorn sheep are clearly inadequate and ineffective. Similar actions were ruled to be such and the Forest Service ordered to drop them and implement more effective measures in recent cases involving the Payette National Forest, that resulted in the recent decision.

On November 25th, 2008 the Chief of the Forest Service ordered all Regional Foresters “I ask that you seek to provide effective separation between domestic sheep and goats and

wild sheep to minimize the likelihood of disease transmission to wild sheep. This includes careful review of the Payette Principles <http://www.mwvcrc.org/bighorn/payetteprinciples.pdf> and the Western Association of Fish and Wildlife Agencies (WAFWA) June 21, 2008, report entitled: Recommendations for Domestic Sheep and Goat Management in Wild Sheep Habitat: <http://www.mwvcrc.org/bighorn/wafwawildsheepreport.pdf> .” (emphasis added)

The NEPA documents clearly indicate that this direction was ignored. Effective separation under the WAFWA Guidance and the Payette Principles requires a 9 mile buffer or effective geographic barriers. The ROD’s fails to implement this separation and the EA fails to examine an alternative that implements this and fails to even mention this or the science discussed in the Payette or WAFWA documents. This clearly violates NEPA.

The NEPA documents also failed to implement the Forest Service’s own Rocky Mountain Bighorn Sheep – A Technical Conservation Assessment which states among other things “Threats to the long-term viability of bighorn sheep in Region 2 include diseases transmitted by domestic livestock, the lack of connectivity and/or loss of genetic variability (fitness) due to habitat fragmentation, habitat loss, increased human disturbance, competition with domestic livestock, and predation on small, isolated herds. The relative importance of these threats to the persistence of bighorn sheep in Region 2 varies from area to area. However, the risk of disease outbreaks resulting from contact with domestic sheep and goats is widely believed to be the most significant threat facing bighorns in Region 2 and elsewhere across their range.”

This Conservation Assessment also states that the Forest Service needs to focus on:

- eliminating the potential for contact between bighorn sheep and domestic sheep and goats
- managing bighorns and their habitat in a metapopulation context by maintaining connectivity among subpopulations
- minimizing human disturbance in sensitive habitats (i.e., lambing and winter ranges)

As is well known, it only takes contact between one bighorn and one domestic sheep to cause a disease outbreak and corresponding crash of the population. The EIS fails to discuss what the levels of risk actually mean, nor does it discuss the use of habitat outside current herd use areas or the fact that “Extensive movement patterns by male bighorn sheep during the rutting season may increase their risk of coming into contact with domestic sheep and contribute to the perpetuation of disease in this species and significantly influence the probability of long-term persistence in isolated sheep populations (Gross et al. 2000).” Rocky Mountain Bighorn Sheep – A Technical Conservation Assessment. In addition, the actions proposed do not take into account the long-distance travels of rams.

The Conservation Assessment continues “Because disease may represent the most significant threat to bighorn sheep in Region 2, especially on national forests with domestic sheep grazing allotments in or near bighorn sheep habitat, the creation of

effective separation between bighorns and domestic sheep and goats is likely critical for preventing disease epizootics in areas where there is potential for contact. BLM Guidelines (Bureau of Land Management 1992) suggest maintaining a minimum buffer of 13.5 km (9 miles) between domestic sheep and goats and wild sheep on BLM lands to minimize the risk of contact between the two groups.” and “One of the more important activities that directly affect bighorns is domestic livestock grazing in bighorn sheep habitat. Bighorns are negatively impacted by disease transmission from domestic livestock, especially domestic sheep and goats. Areas that have been grazed by domestic sheep may not be suitable areas for wild sheep for up to four years after grazing has been discontinued (Jessup 1985). Bunch et al. (1999) suggested that domestic and wild sheep should never be allowed to occupy the same areas because of the potential for disease transmission and the risk of a major die-off.”

Likewise the EIS never conducted an analysis of the fact that complying with the NFMA viability requirement in this area must take precedence over the Forest Plan’s general domestic sheep suitability determination.

RMRS-GTR-209 states “The disease related conflict between domestic sheep and bighorn sheep was tested in the United States District Court (Oregon) in 1995. The following summarizes United States Magistrate Judge Donald C. Ashmanskas’ findings: “Scientific research supports a finding that when bighorn sheep intermingle with domestic sheep, large numbers of bighorn sheep die. While the exact reason for this result may be in question, it is clear that the die-offs occur. An incompatibility exists between the two species, and there is no way to avoid the incompatibility other than to keep the domestics and the bighorns separate” (Ashmanskas 1995).” Since that time there have been a number of other similar rulings where the Forest Service failed to implement appropriate measures to provide separation.” This same Forest Service publication continues “The scientific literature and expert panels support the conclusion that bighorn and domestic sheep/goats should not occupy the same ranges simultaneously or be managed in close proximity to each other if maintenance of a bighorn sheep population is a management objective. The literature is clear regarding the high probability of bighorn sheep dying of pneumonia following contact with domestic sheep.” It concludes by stating “In landscapes where management objectives include the maintenance or enhancement of bighorn sheep populations, the risk of potential of disease transmission between domestic sheep/goats and bighorn sheep must be addressed. The available information supports creating spatial and/or temporal separation between domestic sheep/goats and bighorn sheep as a prudent management technique to manage the risk of disease transmission. (Callan and others 1991; Coggins 1988, 2002; Coggins and Matthews 1992; Desert Bighorn Council 1990; Festa-Bianchet 1988; Foreyt 1989, 1990, 1992a, 1992b, 1994, 1995; Foreyt and Jessup 1982; Foreyt and others 1994; Garde and others 2005; Goodson 1982; Hunt 1980; Hunter 1995a; Hunter and others in prep; Jessup 1980, 1982, 1985; Kistner 1982; Martin and others 1996; Onderka 1986; Onderka and Wishart 1988; Pybus and others 1994; Ward and others 1997; Wishart 1983). Recent disease incidents involving domestic goats have resulted in the same conclusion (Garde and others 2005; Heffelfinger 2004; Jansen and others 2006).

The EIS fails to provide a science-based risk assessment, similar to the Risk Analysis of Disease Transmission Between Domestic Sheep and Bighorn Sheep on the Payette

National Forest. The determinations provided in the EIS and ROD are merely unsupported opinion.

For a review of the disease transmission issue, we request you review pages 3-10 to 3-14 of the Payette National Forest DSEIS available at:

http://www.fs.fed.us/r4/payette/publications/big_horn/DSEIS_Chapter_3_Pages_1_thru_gh_33.pdf This information, though easily available to the Forest Service, was ignored.

The FSM also requires that the Forest Service:

“2670.22 - Sensitive Species.

1. Develop and implement management practices to ensure that species do not become threatened or endangered because of Forest Service actions.
2. Maintain viable populations of all native and desired nonnative wildlife, fish, and plant species in habitats distributed throughout their geographic range on National Forest System lands.
3. Develop and implement management objectives for populations and/or habitat of sensitive species.”

We saw no evidence in the EIS that the Forest Service analyzed the effectiveness of the “management practices” proposed, how they relate to current science, or what the relation of the occupied habitat was with unoccupied habitat and habitat made unsuitable due the Forest Service’s decisions to permit domestic sheep grazing within the project area and throughout the Forest. We also found no “management objectives” for this species recovery and removal from the R2 Sensitive Species list. Other Sensitive Species such as water vole fail to be managed according to these requirements as well.

The FSM additionally requires that the Forest Service:

“2670.45 - Forest Supervisors. The Forest Supervisors:

2. Develop quantifiable recovery objectives and develop strategies to effect recovery of threatened and endangered species. Develop quantifiable objectives for managing populations and/or habitat for sensitive species.

2672.32 - Forest Plan Objectives for Sensitive Species. For sensitive species, include objectives in Forest plans to ensure viable populations throughout their geographic ranges. Once the objectives are accomplished and viability is no longer a concern, species shall not have “sensitive” status.”

We could find no evidence that any “quantifiable objectives” for the recovery of any of the Sensitive Species were developed nor were these “quantifiable objectives” discussed in the EIS. Nor did we find any evidence that the Forest Service has amended the Forest Plan to include the “objectives” required in 2672.32 even though this species was added to the Sensitive Species list nearly 5 years ago.

“2670.32 - Sensitive Species

3. Avoid or minimize impacts to species whose viability has been identified as a concern.

4. If impacts cannot be avoided, analyze the significance of potential adverse effects on the population or its habitat within the area of concern and on the species as a whole. (The line officer, with project approval authority, makes the decision to allow or disallow impact, but the decision must not result in loss of species viability or create significant trends toward Federal listing.)”

Since the Forest Service has failed to determine if the current populations are viable (and provide its scientific rationale), with the exception of the only bighorn sheep herd that uses the Forest, the calls for these species are rendered baseless, for if the populations currently are not viable from a biological and genetic standpoint then any impact whatsoever would continue impacting viability and will cause a trend towards listing.

“2670.46 - District Rangers. The District Rangers:

1. Ensure compliance with legal and biological requirements for the conservation of threatened, endangered, and proposed species in District land management and project planning; ensure compliance with procedural and biological requirements for sensitive species.
2. Identify, manage, and protect essential and critical habitats to meet legal requirements and recovery objectives for Federally listed species; identify, protect, and manage habitat necessary to meet sensitive species objectives.”

Here again the decision violates NFMA for failing to have any “objectives” to protect Sensitive Species habitat.

“2620.44 - Forest Supervisor. Each Forest Supervisor has the authority and responsibility to:

4. Evaluate the cumulative effects of proposed management on habitat capability for wildlife and fish, including endangered, threatened, and sensitive animal and plant species.

2620.45 - District Ranger. Each District Ranger has the authority and responsibility to:

2. Implement management direction and ensure that standards and objectives for wildlife and fish, including endangered, threatened, and sensitive animal and plant species are met.

2621.2 - Determination of Conservation Strategies. To preclude trends toward endangerment that would result in the need for Federal listing, units must develop conservation strategies for those sensitive species whose continued existence may be negatively affected by the forest plan or a proposed project.”

Again, we see no evidence that the Forest Service has complied with these requirements

II. THE EA VIOLATES NEPA

FSH 2209.13 Section 92.21 states “There is a two-part decision to be made for authorizing livestock grazing.

1. Whether livestock grazing should be authorized on all, part, or none of the project area.

2. If the decision is to authorize some level of livestock grazing, then what management prescriptions will be applied (including standards, guidelines, grazing management, and monitoring) to ensure that desired condition objectives are met or that movement occurs toward those objectives in an acceptable timeframe.”

This is repeated at Section 93.3f. Neither the EIS nor the ROD’s provides any rationale as to why livestock grazing should continue to be permitted except to state that the permittees want to and it helps fulfill one (of many dozens) of the Forest Plan goals. The EIS and ROD’s also failed to provide any analysis or rationale why certain areas should not be grazed such as Sensitive Species habitats or big game winter range where the Forest Plan requires that the needs of wildlife take priority over private livestock production.

This failure violates NEPA as well as NFMA.

The Forest Service mostly ignores the issue of overstocking with the excuse that stocking rates as tallied by capable acres per AUM do not reflect reality, but a number of allotments are stocked at such severe levels that at the specified Forest Plan utilization rates, the allotments don’t produce enough forage to supply the authorized AUM’s.

The only conclusion is that the Forest arbitrarily and capriciously decided that domestic livestock grazing is appropriate in the project area. That decision led to the omission of many reasonable alternatives to the proposed action, especially in light of the resource conditions and Sensitive Species management. In the case of determining the appropriateness of domestic livestock grazing within the project area it appears that the Forest simply arrived at a predecisional conclusion that current livestock numbers and seasons of use were appropriate, an action which NEPA and the APA forbid.

Further, "relevant information" was purposefully withheld from the "decision-making process", such as the wide range of riparian condition data that shows wide spread riparian degradation. The EIS is lacking in any riparian condition data for most of the riparian areas within the analysis area. This clearly violates NEPA

The management of Forest Service Lands is largely set forth in two laws, NEPA and the National Forest Management Act (NFMA). NFMA sets forth the process for determining whether or not livestock grazing is appropriate on certain parcels of land while the policy behind NEPA is to ensure environmental considerations are integrated into agency planning,⁶ and that the public be informed in agency planning decisions.⁷

"NEPA ensures the agency ...will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the

⁶ 40 C.F.R. §1501)

⁷ (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken....Accurate scientific analysis, expert agency comments, and **public scrutiny** are essential to implementing NEPA.” 40 C.F.R. §1500.1(b) (emphasis added).

relevant information will be made available to the larger [public] audience.”⁸ NEPA’s disclosure goals are “to insure the agency has fully contemplated the environmental effects of its actions and to insure the public has sufficient information to challenge the agency.”⁹ The lack of scientific or verifiable data indicating the appropriateness of the proposed action, or grazing in general, inhibits the public’s ability to challenge the agency’s determination that such use, and the amount of authorized use, is appropriate for the project area. Moreover, the process for determining the appropriateness of domestic livestock grazing on public lands is set forth in NFMA and is known as a suitability determination. The regulations promulgated to implement the National Forest Management Act define "suitability" as, “The appropriateness of applying certain resource management practices to a particular area of land, as determined by an analysis of the economic and environmental consequences and the alternative uses foregone.”¹⁰

The regulations also require that "the suitability and potential capability of National Forest System lands for grazing animals and for providing habitat for management indicator species shall be determined.”¹¹

The regulations thus require a site-specific review in which the agency determines whether grazing livestock is appropriate to particular areas, given the value of other uses diminished or foregone (e.g., wildlife, recreation, cultural, etc.). This was not done.

The meager information provided in the EIS fails to discuss the process that was used. As you well know the region has a guidance document on how to conduct capability and suitability analyses which specifically mention removing from capable acres those on sensitive or highly erosive soils, or slopes over those what cattle use and other factors. In addition, most forested vegetation types are not considered capable of supporting livestock.

NFMA requires the weighing the impacts of resource management practices is consistent with the Forest Service's mission of providing lands for multiple uses as required by NFMA and recognized in the Multiple Use Sustained Yield Act. Case law cited in the Service's guidance concludes that the "multiple use" concept as defined in law and regulations requires "a reasoned and informed decision that the benefits of grazing ... outweigh the costs" and a weighing of "the relative values of the resources" on a site-specific basis.¹² This was not done.

Only through such an analysis can the Forest determine whether or not livestock grazing is appropriate in the project area.

⁸ Idaho Sporting Congress v. Thomas, 1998 WL 89066 (9th Cir. (Idaho)). *Citing* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989).

⁹ Idaho Sporting Congress v. Thomas, 1998 WL 89066 (9th Cir. (Idaho)). *Citing* Inland Empire Public Lands Council v. United States Forest Service, 88 F.3d 754, 758 (9th Cir. 1996).”

¹⁰ 36 C.F.R. § 219.3 (emphasis added)

¹¹ Id. at § 219.20(a).

¹² National Wildlife Federation v. BLM, No. UT-06-91-01 US Dep’t of Interior, Office of Hearings & Appeals, Hearings Div.) (Rampton, J. 1993), p. 23, the "Comb Wash Allotment" decision; see Guidance, p. 6.

I would like to call your attention to the recent Order by the U.S. District Court in the matter *Western Watersheds Project v. USFS*, No. 05-cv-189-E-BLW (D. Idaho).

As that decision holds, the Forest Service must assess “capability” of forest lands for livestock grazing on a site-specific basis, before authorizing livestock grazing. That decision recognized that the Forest Plans contains a more generalized capability analysis, which should act as the starting point for more site-specific analysis at the allotment level. The arguments put forth by the FS that capability and suitability analyses are just “exercises” was clearly dismissed by the court.

In order to determine the appropriateness of domestic livestock grazing in the area and in order to comply with NEPA’s requirement to rely on the best available science¹³, the Forest should have scientifically and accurately determined those lands which are capable and suitable for livestock grazing at the site-specific level. This is necessary to account for changes in range condition that have occurred over time.¹⁴

The EIS failed to accurately and quantitatively determine how much forage (i.e. forage capacity) is currently available. This fails to account for a variety of management activities that have occurred in the project area that may have had an effect on grazing capacity, including loss of productivity from livestock grazing.

A) THE EIS FAILED TO ANALYZE PAST ACTIONS

The EIS failed to provide any review of how well past AMP’s were implemented nor how effective the actions proposed in them were nor permittee compliance. The EIS failed to examine assumptions and analyses made in previous NEPA processes to determine if current assumptions and analyses are valid and supportable. This violates NEPA.

The Forest Service is required to "disclose the history of success and failure of similar projects." *Sierra Club v. Morton*, 510 F.2d 813, 824 (5th Cir. 1975); *National Wildlife Federation v. USFS*, 592 F. Supp. 931, 943 (D. 1 Or 1984). This was not done. This violates NEPA.

B) THE EIS FAILED TO ANALYZE IMPACTS OF ACTIONS

The Watershed Conservation Practices Handbook does not allow the construction of water developments within riparian areas. The Forest put forward some lame excuse to ignore WCPH requirements

While the EIS fails to provide an honest "hard look" at riparian conditions, the information provided by FOIA clearly indicates significant riparian degradation has

¹³ NEPA requires that agencies “insure the professional integrity, including scientific integrity, of the discussions and analyses...They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions relied upon in the statement...” (40 C.F.R. 1502.24)

¹⁴ Heitschmidt, R.K., J.W. Stuth. 1991. Grazing Management: An Ecological Perspective. 297 p. Timber Press. Portland, OR.

occurred and is occurring on the allotments. But the EIS provide no rationale that would support the implementation of 4” average (5” longest leaf) stubble height for recovery. In fact the Forest Service’s own GTR-INT-263 states that for recovery and to protect habitats of Sensitive Species, such as the creeks within this allotment, a stubble height greater than 6” (average, 7”longest leaf) may be needed.

C) THE EIS GROSSLY MISREPRESENTS SCIENCE, FAILS TO IMPLEMENT BAS

None of the volumes of research and analyses which the appellants provided to the Forest Service was utilized in this process or even addressed. In fact, the EIS fails to even cite most of the sources we provided, let alone actually use them. The best available science is simply ignored as if it does not exist. This is even more of a concern because the best available science casts fundamentally serious doubt on the efficacy of projects such as this in terms of wildfire mitigation or need. This failure to even try to dispute or debunk, let alone consider or use, the best available science, much of which is produced by the Forest Service itself, is arbitrary and capricious and in violation of the NEPA, NFMA and the APA. The process likewise fails to comply with the Forest Service’s direction for the implementation of Best Available Science (BAS). See also CWA section below.

Cowley, 1999 shows a 1” POPR stubble equating with 90% utilization and a 4” stubble on equates to 68% utilization. GTR-INT-308 provides similar information. Clearly, the default 4” do not comply with this direction.

WCHP 12.1(h) requires the Forest Service to manage riparian areas that have been invaded by POPR and upland species to achieve “more mesic native plant communities”

The EIS has failed to determine what reference stream conditions are. Without this information WCPH 12.1 i can not be implemented.

The EIS and ROD does not prescribe soil compaction monitoring so the FS will never be able to implement WCPH 12.1 j.

Nowhere within the various NEPA documents did we find an analysis of the use of Best Available Science (BAS) as required by current regulations.

D) THE EIS AND BA/BE’S DETERMINATIONS ARE INSUPPORTABLE

FSM 2672.1 states in part that “There must be no impacts to sensitive species without an analysis of the significance of the adverse effects on the populations, its habitat and on the viability of the species as a whole.” The BA/BE fails to fulfill these requirements because it has, firstly, not defensibly determined that the population of the species in question is currently viable. Secondly, because the FS does not know what the condition of the various populations of the species in question are on the Forest, it can not defensibly determine the effects on these populations. For instance, if a population is near, at or below the population and demography necessary for viability, impacting individuals or habitat may have a significant impact on the population. So without this critical information, all determinations are rendered insupportable. The FS has failed to

complete viability assessments for any of the Sensitive Species, Species of Local Concern or MIS. This violates NEPA and NFMA.

FSM 2672.42 provides direction for BE's stating "Biological evaluations shall include the following:" (emphasis added) and lists seven points. The BE failed to comply with many of the requirements listed. This violates NEPA and NFMA.

We request the ARO and ADO review:

- Assessment of BE's and BA's" November 2000, USFS R5
- BE's/BA's: Suggestions for Improvements in their Preparation, USFS R5 1994
- OIG audit of documentation for projects in Region 5, USFS 2000
- OIG Evaluation Report No. 08801-10-AT January 1999

The overriding assumption guiding the conclusions in the EIS and BA/BE is that populations of species of local concern, MIS, and Sensitive Species are all currently viable. As an example, the Forest made viability determinations for countless sensitive species without obtaining, providing, or referencing any quantitative population data available for these species within the Forest.

To base management decisions and conclusions off of unsupported assumptions is entirely inappropriate and violates NEPA and the APA. Essentially, the agency has arbitrarily defined a baseline (in this case no baseline) for which to assess the significance of impacts and the effectiveness of management direction in relation to viability standards. The FS has assumed that every native species, including all sensitive species, that exist in the Forest currently have the numbers and distribution to ensure their continued existence is well distributed within the Forest. Yet the EIS, BA/BE, and other information in the administrative record provide no information on population abundances, trends, or distributions for many species of concern or even habitat condition trend data, except for general data for a few hunted species provided by the Game and Fish Department. As a result, the agency's effects and viability determinations in the BA/BE are fatally flawed as there exists no adequate context for which to base such determinations.

Further vitiating the agency's reliance on this arbitrarily established baseline is the fact that the FS itself does not reference or provide information that establishes what constitutes a minimum viable population for any species of concern on the Forest. This is of particular concern as recent scientific studies have reported that minimum viable populations of vertebrate species to consist of at least approximately 7,000 breeding adults (Reed et al. 2003, 2004 and exhibits).

This failure of the EIS and BE/BA violates NEPA and NFMA.

E) THE EIS FAILED TO ANALYZE ACTUAL FORAGE USE

While stocking rates, in terms of numbers of animals may have remained fairly steady on this allotment over the last half century, cattle weights have increased dramatically. The

following discussion updates the FS with this information and shows that cattle weights have increased markedly over the past decades and this additional forage consumption is not being accounted for by the FS in its permits and billings.

The Society for Range Management (SRM) in 1974 defined an Animal Unit “*to be one mature (1000 lb.) cow or the equivalent based upon average daily forage consumption of 26 lbs. dry matter per day.*”¹⁵ SRM also defined an Animal Unit Month as “*The amount of feed or forage required by an animal-unit for one month.*” NRCS defined the forage demand for a 1,000 pound cow as 26 pounds of oven-dry weight or 30 pounds air-dry weight of forage per day¹⁶. It is important to ensure that forage consumption rates by livestock are based on the size of animals present on the allotment and a reasoned estimate of their daily consumption rates. The following analysis provides some background and justifies a more current forage consumption rate for cow/calf pairs. When records from the permittees are made available, they can be used to determine the actual weights of cattle grazed on the allotment and the consumption rate proposed here can be adjusted to take that into account.

The University of Nevada Agricultural Experiment Station published a report on cattle production in 1943¹⁷. That report analyzed 14 years of ranch operation for eleven ranches in northeastern Nevada. At that time, a mature cow was considered one unit and a branded calf or weaner as ½ cow unit, for a combined total of 1.5 cow units per cow/calf pair. Bulls were considered 1.5 cow units. For the period 1938 – 1940, the average turnoff weight (when they left the range) of mature cows was 959 pounds, calves were 381 pounds and bulls were 1222 pounds. This means that in the 1930’s, a cow/calf pair was 1340 pounds. With breeding, supplements and hormones, weights have increased over time, for example, Anderson et al (ca 2000) calculated a 35% increase in dressed weights per animal between 1975 and 1995¹⁸.

USDA market statistics¹⁹ give the average weights of slaughter cattle for the week ending August 14, 2004 as 1251 pounds. The estimate for the same week in 2005 for slaughter cattle average weight was 1260 pounds. The USDA National Agricultural Statistics Service data for average live weight of cattle slaughtered in 2004 was 1242 pounds compared to 1187 pounds in 1995, or an increase of nearly 8.5% in those 10 years²⁰. The Livestock Monitor is a newsletter produced by the North Dakota State University Extension Service Livestock Marketing Information Center in cooperation with USDA State Extension Services²¹. The Livestock Monitor shows for the week ending August 6, 2005, live weights of slaughter cattle averaged 1258 pounds.

The potential weights of mature cows can be even larger than these numbers. For example, NRCS in its National Range and Pasture Handbook, referenced above, defines body condition scores. A body condition score of 6 which is described as “*Good, smooth*

¹⁵ Society for Range Management. 1974. A Glossary of Terms Used in Range Management.

¹⁶ NRCS. 2002. National Range and Pasture Handbook.

¹⁷ Brennan, C. A. and Fred B. Harris. 1943. Fourteen Years Cattle Production and Ranch Earning Power in Northeastern Nevada 1928 to 1941. University of Nevada Agricultural Experiment Station, Reno.

¹⁸ <http://agecon.uwyo.edu/RiskMgt/marketrisk/TheCattleCycle.pdf>

¹⁹ http://www.ams.usda.gov/mnreports/SJ_LS712.txt

²⁰ <http://www.usda.gov/nass/pubs/agr05/acro05.htm>

²¹ <http://www.ag.ndsu.nodak.edu/aginfo/lsmkt/monitor.htm>

appearance throughout. Some fat deposits in brisket and over the tailhead. Ribs covered and back appears rounded.” This body condition score relates to a pregnancy percentage of 88%, which is important as a goal for cow/calf operations as dry cows are usually culled and replaced and the weight gain of calves is important for income. According to Dr. Larry W. Olson, Extension Animal Scientist at Clemson University, a medium frame cow in body condition score 6 could easily weigh 1300 – 1400 pounds²².

Holechek et al (2001) summarized the weaning weights of calves grazed on various types of rangelands at different stocking rates. The data for the period since 1990 produced an average weaning weight of 430 pounds and a range of 382 – 475 pounds. Ray, et al (2004) gave a weaning weight of 480 pounds for calves²³. Using the current market statistics for slaughter cattle at about 1250 pounds and assuming a calf weight of 300 pounds to allow for weight gain during the grazing season, an estimate for the average weight of a cow/calf pair during the grazing season of 1,500 pounds seems reasonable.

As pointed out above, the NRCS used 26 lbs/day of oven dry weight for a 1,000 pound cow and stated this was equivalent to 30 pounds per day air-dry weight. The NRCS Range and Pasture Handbook value of 30 pounds air-dry weight would be 3% of body weight for a 1,000 pound cow. Applying this to the current weight of 1,680 pounds for a cow/calf pair, the daily forage consumption would be 50.4 lbs of air-dry forage per day, or for a month (30.4 days), 1532 pounds of forage per AUM. The EIS failed to discuss the above issue, nor did it update its forage consumption rate on this allotment to provide the forage needed for wildlife as required by the Forest Plan and to ensure the public trust is not violated by undercharging for the actual weights of cattle and calves grazed. This lack of disclosure of this important issue violates NEPA. Further, the FS is allowing far more AUM’s to be removed by livestock than what is being permitted. So even though cattle numbers may have stayed constant, forage removal has increased by ~40%. This was not analyzed in the EA which violates NEPA.

While the Forest would like to avoid dealing with this issue, for obvious reasons, other Forests have. We refer to the Dakota Prairie National Grasslands as an example. In their current Forest Plan, they are required to adjust permits based on current livestock sizes (both cattle and calves) during permit renewals.

F) THE EIS FAILED TO JUSTIFY “RANGE IMPROVEMENTS”

The EIS and ROD’s authorize the construction of many new water developments and other “range improvements”. The rationale provided is to help increase cattle distribution and to help draw animals away from areas in need of less grazing use. Unfortunately, the EIS fails to mention that all of the proposed water developments are within a few hundred yards of natural watercourses and will do little if anything to improve conditions. The EA failed to provide any information that would indicate access to water is a

²² Email correspondence with Dr. Olson dated 8/18/05.

²³ Ray, D.E., A.M. Lane, C.B. Roubicek, and R.W. Rice. 2004. Range beef herd growth statistics. In: Arizona Rancher’s Management Guide. Arizona Cooperative Extension, College of Agriculture, University of Arizona.

significantly limiting issue within the allotment. In addition, the EA failed to provide any scientific basis or other information that would indicate these actions will be effective.

Further, there was no site-specific analysis of the impacts of these water development which violates NEPA.

G) THE EIS AND ROD'S FAIL TO IMPLEMENT ADAPTIVE MANAGEMENT

In every grazing need to process the Forest Service conducts the principal need is "for greater management flexibility" but little justification for this need is provided. Virtually every so-called "tool" the Forest Service wishes to have as part of adaptive management, has been available to it for decades. Most of these tools are part of the normal hermit administration process. Again, a so-called need is to open currently vacant allotments "to facilitate the management flexibility just mentioned" but the Forest Service provides no rational basis for this so-called need.

We see in the EIS that somehow not permitting livestock grazing would result in inflexibility, as if domestic livestock (an invasive alien species) grazing is required to avoid ecosystem collapse. This is of course absurd and indicates the biased attitude of this NEPA process.

As is universal within Forest Service NEPA processes, the defining of the adaptive management process in this case is woefully inadequate. We request that you review the R2 Adaptive Management Guidance document which clearly defines the minimum level of adaptive management. We also include as an attachment a useful document written by the US Fish and Wildlife Service on how to write goals and objectives. This document meshes closely with the R2 document discussed above.

FSH 2209.13 93.3a requires:

“The team, using an interdisciplinary approach, should identify the desired rangeland conditions within the analysis area. Desired conditions should be specific, quantifiable, and focused on rangeland resources.”

The EIS and ROD's do not comply with this requirement.

FSH 2209.13 93.3c requires:

“Identification of resource management needs is simply the comparison of desired conditions with existing conditions to determine the extent and rate at which current management is meeting or moving toward those desired conditions.” (emphasis added)

The EIS failed to meet this requirement. To say conditions are “moving toward” is meaningless without this information. For instance, everyone admits these lands were basically unmanaged until about the 1950's. Given how severely degraded these lands were up through that time, it would not be surprising that things look better than 1950, but is that “moving towards” sufficient?

FSH 2209.13 93.3g defines adaptive management as:

Adaptive management is an interdisciplinary planning and implementation process that provides for: 1) identification of site specific desired conditions; 2) definition of appropriate decision criteria (constraints) to guide management; 3) identification of pre-determined optional courses of action, as part of a proposed action, from which to adjust management decisions over time; and 4) establishment of carefully focused project monitoring to be used to make adaptive adjustments in management over time.

As stated previously, the DC's laid out for benchmark areas don't meet the requirement of the FSH. Additionally, as discussed in more detail in the Quimby document, "pre-determined" means "if this... then that", not just a general 'toolbox' with everything stuffed into it. And lastly, the EIS's "monitoring plan" could hardly be called "carefully focused"

We attach the cited Quimby document with key sections highlighted. These sections need to be thoroughly reviewed as the EIS does not implement most of them.

We also include as an attachment a useful document written by the US Fish and Wildlife Service on how to write goals and objectives. This document meshes closely with the R2 document discussed above.

The falsity of the Forest Service's purported need for "flexibility" is clearly exposed in FSH 2209.13 – 92 which states: (See attached highlighted sections)

"The majority of these changes can be implemented administratively, provided the changes do not fall outside the scope of the NEPA decision. Examples of actions that may be taken without further NEPA analysis include alteration of management to respond to Biological Opinions or other ESA, Clean Water Act, or other consultation requirements; changes in specific dates of grazing, class of livestock to be grazed, grazing systems, or livestock numbers based on evaluation of monitoring results; and, implementation of the LRMP through modifications to the term grazing permit. Administrative actions to implement higher level decisions or to respond to monitoring results should be undertaken as a routine administrative action prior to initiating NEPA."

Further undermining the alternatives that were analyzed is the fact that current management and the adaptive management alternatives are basically the same. Virtually all of the actions listed under the adaptive management alternative have been available to the Forest Service for years or decades. The Forest Plan has been in effect for well over a decade. So the real difference between these alternatives is semantics. This violates NEPA.

We are expected to believe that somehow by applying the name "adaptive management" the Forest Service will now begin implementing the direction and requirements that had been in place for a long time. As we have said before the problem has not been a lack of tools, it has been the long-term failure to implement these tools that has been the problem. Nothing presented in the adaptive management alternative would lead to a

reasoned conclusion, given the past evidence of failure, that the Forest Service will do any better implementing these tools than it has in the past.

FSH 2209.13 94.2 requires:

“The evaluation of a proposed action’s environmental effects must include the potential effects of all adaptive management options that may be implemented at some future point in time. For example if one potential option is to fence off a riparian area, the effects of that fence must be evaluated even if that management option may never actually be implemented.”

This was not done in the EIS.

Again for the short or long-term monitoring we found no commitment, locations, triggers or measurable objectives.

Adaptive management is frequently abused by agencies in a number of critical ways, as has been done in this case:

- a. Failure to follow the implementation criteria contained in the literature on the use of adaptive management.
- b. Failure to properly define triggers, actions based on those triggers and timelines.
- c. Failure to properly design, fully fund and properly implement the monitoring needed for a defensible adaptive management strategy.
- d. Failure to take needed actions now by putting off needed actions for some future.

In *WWP v. USFS* in the District of Idaho, the judge ruled against the Forest Service, stating in part:

“The keystone of the (adaptive management) strategy is monitoring, yet the Forest Service stated in response to public comments on the NSEIS that a monitoring plan “will be developed and implemented through an iterative process if the Proposed Action is selected.” *See NSEIS* at p. F-31. The failure to explain the strategy and its protocols in the NSEIS violated NFMA. In the NSEIS, the Forest Service was relying heavily on the strategy to comply with Plan standards and objectives. Therefore, a full explanation of the strategy and its protocols is crucial to determining whether the NSEIS is consistent with the Plan, as required by NFMA. Without that explanation, the Court “cannot tell from the administrative record whether or not the Forest Service complied with the [Plan] standard[s].” *Native Ecosystems*, 418 F.3d at 963. As *Native Ecosystems* made clear, that lack of explanation constitutes a violation of NFMA and is arbitrary and capricious under the APA.”

“The failure of the NSEIS to fully explain the adaptive management

strategy and its protocols violated NFMA.”

These same failures are contained in the FEIS and ROD’s.

III. EIS AND ROD’S FAIL TO INSURE COMPLIANCE WITH CWA

The EIS and ROD’s make two erroneous and unsupportable assumptions. Firstly, that if a stream is not on the state’s 303d list that it is compliant with state water quality standards and is meeting all of its “beneficial uses”. This is arbitrary and contradicts with the principle that absence of evidence is not evidence of absence. It also contradicts the FS’s own data on adjacent watersheds, which found violations of state water quality standards despite the vigorous implementation of “BMP’s” as we will discuss further below. The EIS failed to provide any data supporting its claims that streams not listed on the 303d list are compliant with the CWA. Secondly, the EIS makes the assumption that by implementing BMP’s that water quality will be protected and state water quality standards will be met. This is not supported by research or the FS’s own experience. We provide a review of this research below. For the FS’s own experience, we would ask you to examine the experience on the North Tongue, which is probably the only location on any National Forest where the impacts of livestock grazing and the effects on water quality of BMP implementation have been measured quantitatively. In this case the FS collected e. coli data over dozens of streams with sampling locations chosen to correspond with pastures. After more than 5 years of data collection the results are consistent and clear: 1) e. coli levels spike within 24 hours of cattle entering a pasture and remain well above state standards and remain elevated for up to 2 months after removal and 2) application of current BMP’s resulted in no statistically significant reduction in contamination. (Contact David Beard at the Tongue Ranger District for complete details and data, I don’t have the data summaries received through FOIA with me at the moment)

Ziemer and Lisle (1993) indicated that there are no reliable data indicating that BMP’s are cumulatively effective in protecting aquatic resources.²⁴ Espinosa et al. (1997) provided evidence from case histories in granitic watersheds in Idaho that BMP’s thoroughly failed to cumulatively protect salmonid habitats and streams from severe damage from roads and logging.²⁵ In analyses of case histories of stereotypical resource degradation by stereotypical land management (logging, grazing, mining, roads) several researchers have concluded that BMP’s actually increase watershed and stream damage because they encourage heavy levels of resource extraction under the false premise that resources can be protected by BMP’s (Stanford and Ward, 1993, Rhodes et al., 1994 Espinosa et al., 1997).²⁶ Stanford and Ward (1993) termed this phenomenon the “illusion of technique.” The EIS entirely fails to address these responsible opposing

²⁴ Ziemer, R.R., and Lisle, T.E., 1993. Evaluating sediment production by activities related to forest uses--A Northwest Perspective. Proceedings: Technical Workshop on Sediments, Feb., 1992, Corvallis, Oregon. pp. 71-74.

²⁵ Espinosa, F.A., Rhodes, J.J. and McCullough, D.A. 1997. The failure of existing plans to protect salmon habitat on the Clearwater National Forest in Idaho. *J. Env. Management* 49(2):205-230.

²⁶ Stanford, J.A., and Ward, J.V., 1992. Management of aquatic resources in large catchments: Recognizing interactions between ecosystem connectivity and environmental disturbance. *Watershed Management: Balancing Sustainability and Environmental Change*, pp. 91-124, Springer Verlag, New York.

Rhodes, J.J., Espinosa, F.A., and Huntington, C., in process. Watershed and Aquatic Habitat Response to the 95-96 Storm and Flood in the Tucannon Basin, Washington and the Lochsa Basin, Idaho. Final Report to Bonneville Power Administration, Portland, Or.

views, fails to address the fact that there are even responsible opposing views regarding the effectiveness of BMP's.²⁷ Further, the EIS failed to even mention the data the Forest had collected documenting violations of state water quality standards even with the implementation of BMP's throughout the Tongue watershed and its obvious implications to the current analysis. This clearly violates NEPA.

Courts have struck down reliance upon BMP's to protect water quality when not considering key information regarding their effectiveness. In The Wilderness Society v. Bosworth, the U.S. District Court for the District of Montana ruled:

Because BMP's have not been assessed for their effectiveness against landslide events and because of a high risk of landslides is acknowledged in the Fish Bate [timber sale] preferred alternative, the Court finds it is not reasonable for the Defendants to just summarily rely on BMP's to mitigate this environmental impact. Therefore, the Court finds the FEIS conclusion that the project will have no effect on water quality to be arbitrary and capricious based on the undisputed risk of landslides in the FEIS. Accordingly, the decision is reversed and remanded.

The Wilderness Society v. Bosworth 118 F. Supp.2d 1082, 1107 (D. Mont. 2000).

In this case, the Clearwater National Forest failed to show that BMP's were effective in light of the potential for landslide events, an arbitrary and capricious act. The Forest has failed to show that BMP's will effectively protect water quality and soils. Thus, the Forest is inappropriately relying on BMP's to assess water quality and soil impacts and failing to take a hard look at the impacts to water quality and soils.

²⁷ The NEPA and the CEQ NEPA regulations are clear that federal agencies must address responsible opposing views in an EIS to ensure the agencies make well-informed decision and to ensure the public understands the impacts of major federal actions. To ensure federal agencies carry out the substantive intent of Section 101 of NEPA, as well as the procedural requirements of Section 102, the CEQ NEPA regulations specifically require federal agencies to "discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement[.]" 40 CFR § 1502.9(b). Agencies must "ensure that the [environmental impact] statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a "hard look" at environmental factors, and to make a reasoned decision." Izaak Walton League of America v. Marsh, 655 F.2d 246, 371 (D.C. Cir. 1981). See also, All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444; Andrus v. Sierra Club, 442 U.S. 347, 350 (1979). Consideration of responsible opposing views in an EIS is crucial to ensuring agencies are fully aware of the environmental trade-offs, risks, hazards, and impacts (beneficial and negative, direct, indirect, and cumulative) associated with their decisions. Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971), Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir 1972), Kleppe v. Sierra Club, 427 U.S. 390. Consideration of responsible opposing views in an EIS is also crucial to ensuring the public understands the impacts of decisions and can challenge federal agencies if necessary. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151.

Courts have held on numerous occasions that Forest Service prepared NEPA documents that fail to adequately address responsible opposing views are contrary to the intent of Congress and NEPA and violate the CEQ NEPA regulations. In Colorado Environmental Coalition v. Glickman for example, the U.S. District Court for the District of Colorado found in 1998 that the Forest Service had violated NEPA by failing to present a "reasoned analysis of the opinions of reputable scientists." Colorado Environmental Coalition v. Glickman, Civil Action No. 94-B-277 (Dist. Col. 1998), Order Issued September 25, 1998, p. 11. In Center for Biological Diversity v. United States Forest Service, the 9th Circuit Court of Appeals held that the Forest Service violated NEPA by "failing to disclose and discuss responsible opposing scientific viewpoints in the final [environmental impact] statement[.]" Center for Biological Diversity v. United States Forest Service, No. 02-16481 (9th Cir. 2003). In Sierra Club v. Bosworth, the court held that the Forest Service violated NEPA by "failing to disclose and analyze scientific opinion in support of and in opposition to the conclusion that the Phase I [salvage logging] project will reduce the intensity of future wildfires in the project area." Sierra Club v. Bosworth, 199 F. Supp. 2nd 971, 981 (N.D. Cal. 2002). See also, Seattle Audubon Society v. Espy, 998 F.2d 699, 704 (9th Cir. 1993) (finding that Forest Service was required to address in the final environmental impact statement criticisms opposing evidence upon which the final statement's management strategy rested); Seattle Audubon Society v. Lyons, 871 F.Supp. 1291, 1318 (W.D. Wash. 1994) (holding EIS must "disclose responsible scientific opinion in opposition to the proposed action, and make a good faith, reasoned response to it."); Seattle Audubon Society v. Moseley, 798 F. Supp. 1473, 1482 (W.D. Wash. 1991) ("NEPA requires that the agency candidly disclose in its EIS the risks of its proposed action, and that it respond to the adverse opinions held by respected scientists.").

The Forest seems to claim that the watershed degradation will be sufficiently mitigated by the use of BMP's. While the use of BMP's is to be encouraged, Appellants note that the use of these measures are not themselves sufficient to ensure compliance with the CWA. Northwest Indian Cemetery Protective Ass'n v. Peterson 795 F.2d 688, 697 (9th Cir. 1986) (holding that compliance with BMP's does not equate to compliance with the CWA). Indeed, the Forest assumes that the implementation of BMP's will sufficiently mitigate any problems that forest management will have on aquatic systems, but offers no proof of this assertion. Consequently, this assumption is flawed and violates the law.

A recent USDA Office of the Inspector General Report concluded that reliance on speculative mitigation measures in order to reach a FONSI significantly compromised environmental quality. OFFICE OF INSPECTOR GENERAL, U.S. DEPT' OF AGRIC., EVALUATION REPORT NO. 08801-10-AT: FOREST SERVICE TIMBER SALE ENVIRONMENTAL ANALYSIS REQUIREMENTS (1999). The OIG concluded that:

"Applicable mitigation measures contained in 10 of 12 decision notices and referenced environmental assessments reviewed, were not always implemented. In addition, mitigation measures were either omitted or incorrectly incorporated into 4 of 12 accompanying timber sale contracts. These mitigation measures are designed to reduce the adverse impacts of timber sale activities on the environment. Generally, mitigation measures were not implemented due to district personnel (a) not being familiar with the mitigation measure contained in the environmental documents, (b) not adequately monitoring actual implementation of the mitigation measures, (c) not comparing timber sale contract clauses with the applicable environmental documents and, (d) oversight. As a result, streams, wildlife habitat, heritage resources, water quality, and visual quality were or could be adversely affected. Timber sale field visits disclosed that mitigation measures designed to protect key resource areas were not adequately implemented. The measures involved mitigation of riparian areas and stream management zones, wildlife habitat, heritage resource sites, visual quality, and soils."

This clearly shows that the Forest Service failed to use Best Available Science (BAS) as it is required to.

Additionally, the NEPA process failed to discuss in any way the antidegradation requirements of the Clean Water Act.

Until the Forest is able to substantiate its proposed mitigation measures/design criteria - that they are appropriate, will be fully funded, will be implemented, and will be effective - the agency can not rely on non-mandatory BMP's to ensure compliance with the CWA and State water quality standards. This vitiates the EIS and ROD's and violates NEPA, APA and the CWA.

We also incorporate by reference our original comments on the EIS as specific appeal points as they were not adequately addressed in the FEIS

REQUEST FOR RELIEF

Pursuant to 5 USC § 555(b), we hereby request the following relief from the Appeals Deciding Officer on these issues. If the foregoing request for relief is denied in whole or in part, we are entitled to a full statement of reasons as to the grounds for denial in accordance with 5 USC § 555(e).

The EIS and ROD's fail to meet their legal requirements as laid out in the Statement of Reasons Section. Therefore the decision must be withdrawn as it is not based on high quality information and analysis, is not well-informed, and clearly errs in its assumptions and analyses. If the Forest chooses to issue a new decision, they must first be instructed conduct NEPA in accordance with CEQ NEPA regulations at 40 CFR § 1502.9 and prepare a thorough, rigorous, accurate, non-arbitrary analysis and assessment of impacts.

Further, we request the following relief:

- 1) That the Forest makes good faith efforts to work with appellants to redesign the project to reduce environmental impact, create a defensible monitoring plan and take measures to adequately protect Sensitive Species and the habitats on which they depend
- 2) That the Forest develop a defensible monitoring plan for the project area that is fully funded
- 3) That experts from the RMRS, the Regional Office and other institutions be utilized in the design criteria needed to fully protect Sensitive Species and their habitats.

CONCLUSIONS

The APA prohibits an agency from acting in an arbitrary and capricious fashion. Fair and honest procedures are also an element of complying with NEPA (40 C.F.R. 1502.1). To assure that a fair discussion occurs, agencies are required to obtain high quality information, including accurate scientific analysis (40 C.F.R.1500.1 (b)). The regulations are very explicit that: Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements (40 C.F.R. 1502.24). CEQ regulations also require that: Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency action, rather than justifying decisions already made (40 C.F.R. 1502.2(g)).

The policy behind NEPA is to ensure environmental considerations are integrated into agency planning (40 C.F.R. §1501), and that the public be informed in agency planning decisions ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken....Accurate scientific analysis, expert agency comments, and **public scrutiny** are essential to implementing NEPA." 40 C.F.R. §1500.1(b) (emphasis added). "NEPA ensures the agency ...will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be

made available to the larger [public] audience.” Idaho Sporting Congress v. Thomas, 1998 WL 89066 (9th Cir. (Idaho)). *Citing* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). NEPA’s disclosure goals are “to insure the agency has fully contemplated the environmental effects of its actions and to insure the public has sufficient information to challenge the agency (Idaho Sporting Congress v. Thomas, 1998 WL 89066 (9th Cir. (Idaho)). *Citing* Inland Empire Public Lands Council v. United States Forest Service, 88 F.3d 754, 758 (9th Cir. 1996).”

The flaws in the EIS and ROD’s identified in this appeal violate the requirement of NFMA, NEPA, APA, CWA and the Forest Plan and agency regulations. Appellant is willing to meet with the Regional Forester or the Forest Supervisor to discuss the issues raised in this Appeal, in order to attempt to resolve them, and to ensure that these areas of the Forest are managed in a way that complies with federal law.

RESPECTFULLY SUBMITTED this __4th__ Day of November, 2011.

A handwritten signature in blue ink, appearing to read "Jonathan B. Ratner". The signature is stylized and cursive, with the first name "Jonathan" written in a larger, more prominent script than the last name "Ratner".

Jonathan B. Ratner
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