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Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

GALLATIN WILDLIFE ASSOCIATION;)
WILDEARTH GUARDIANS; WESTERN)
WATERSHEDS PROJECT;)
YELLOWSTONE BUFFALO)
FOUNDATION)

Plaintiffs,

vs.

UNITED STATES FOREST SERVICE;)
LEANNE MARTEN, in her official capacity)
as Regional Forester of the United States)
Forest Service)

Defendants.

Cause No. CV-15-27-BU-BMM

FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF

INTRODUCTION

1. This case challenges the United States Forest Service's failure to protect bighorn sheep and grizzly bears in the Gravelly Mountains of the Beaverhead-Deerlodge National Forest.

2. Gallatin Wildlife Association, WildEarth Guardians, Western Watersheds Project and Yellowstone Buffalo Foundation challenge the Revised Forest Plan for the Beaverhead Deerlodge National Forest as well as seven Allotment Management Plans and Annual Operating Instructions for domestic sheep allotments in the Gravelly Mountains.

3. The Beaverhead-Deerlodge National Forest has authorized approximately 8,000 domestic sheep to graze in the heart of the Gravelly Mountains. The sheep are located in historic bighorn sheep habitat.

4. Bighorn sheep are precluded from using the Gravelly Mountains because of the domestic sheep, which transmit deadly respiratory diseases to the bighorns.

5. There are ten bighorn sheep herds on or near the Beaverhead-Deerlodge National Forest.

6. According to Montana Fish, Wildlife and Parks, the minimum viable population number for a bighorn sheep herd is 125.

7. Seven of the ten bighorn herds on or near the Beaverhead-Deerlodge National Forest have a population with less than 125 individuals.

8. The only herd of bighorn sheep in the Gravelly Mountain landscape has a population of 35 individuals. The 2010 Montana Bighorn Sheep Conservation Strategy states that domestic sheep conflicts are the major issue affecting this herd of bighorns.

9. The National Forest Management Act requires the Forest Service to have a Forest Plan in place that will maintain the viability of bighorn sheep on the Forest.

10. The Forest Service concluded that its revised Forest Plan would meet this requirement, but failed to disclose the existence of a Memorandum of Understanding it entered into with the domestic sheep producers that precluded the agency from making any changes to the domestic sheep allotments if it found that the domestic sheep were impacting the viability of bighorn sheep.

11. The Gravelly Mountains are an important corridor that can connect the Greater Yellowstone Ecosystem population of grizzly bears to the Northern Continental Divide Ecosystem population.

12. Connecting the two populations is important for the genetic health of Yellowstone's grizzly bears.

13. Grizzly bears were largely absent from the Gravelly Mountains when the Forest Service prepared NEPA analysis for the domestic sheep allotments in the 1970's and 1980's.

14. In 2013, MT FWP attempted to trap a grizzly bear after it killed domestic sheep in one of the allotments.

15. A few weeks later, a shepherd killed another grizzly bear after it repeatedly depredated on domestic sheep.

16. The Forest Service violated the National Environmental Policy Act when it failed to prepare supplemental NEPA analysis for the Allotment Management Plans after learning about the conflicts.

JURISDICTION AND VENUE

17. Jurisdiction is proper in this Court under 28 U.S.C. §§ 1331 (Federal Question) and 1346, because this action involves agencies of the United States as Defendants, and arises under the laws of the United States, the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*, the National Forest Management Act, 16 U.S.C. §§ 1600 *et seq.*, and the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*

18. An actual, justiciable controversy exists between Plaintiffs and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201-02 and 5 U.S.C. §§ 705 and 706.

19. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district and because Defendants are located in the district.

20. The Federal Government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 701.

PARTIES

21. Plaintiff Gallatin Wildlife Association is an all volunteer conservation organization that promotes the restoration, maintenance, and perpetuation of native wildlife and their habitat, including bighorn sheep. Gallatin Wildlife Association is based in Bozeman, Montana.

22. Plaintiff WildEarth Guardians is a nonprofit conservation organization with an office in Montana and six other states. WildEarth Guardians has more than 100,000 members and activists across the United States and the world. WildEarth Guardians protects and restores wildlife, wild places, wild rivers, and the health of the American West, including the Beaverhead-Deerlodge National Forest.

23. Plaintiff Western Watersheds Project is a nonprofit conservation organization based in Hailey, Idaho and with offices in eight states, including Montana. Western Watersheds Project has over 1,500 members, volunteers and supporters across the United States. As an organization and on behalf of its members, Western Watersheds Project advocates for the protection and restoration of wildlife and watersheds throughout the American West, including the Beaverhead-Deerlodge National Forest.

24. Plaintiff Yellowstone Buffalo Foundation is a nonprofit conservation organization based in Bozeman, Montana. Yellowstone Buffalo Foundation is dedicated to protecting wildlife corridors and expanding available wildlife habitat.

25. Members and staff of the plaintiff organizations use and enjoy, on a continuing and ongoing basis, the lands of the Beaverhead Deerlodge National Forest, including the domestic sheep grazing allotments that are authorized in the Gravelly mountains by the U.S. Forest Service. Plaintiffs' members hike, fish, hunt, camp, photograph, and engage in other recreational activities in the domestic sheep allotments at issue in this case. The Plaintiffs' members derive aesthetic, recreational, inspirational, educational, and other benefits from their activities in these allotments on a regular and continuing basis and intend to do so frequently in the future.

26. The above-described aesthetic, recreational, inspirational, educational, and other interests of the Plaintiffs have been, are being, and, unless the relief prayed for is granted, will continue to be adversely and irreparably injured if domestic sheep grazing is allowed to proceed in the Gravelly Mountains. These are actual, concrete injuries to Plaintiffs, caused by Defendants' failure to comply with NEPA, NFMA, and the APA. The above-named injuries would be redressed by the relief requested in this Complaint.

27. Defendant U.S. Forest Service is an administrative agency within the U.S. Department of Agriculture, and is responsible for the lawful management of our National Forests, including the Beaverhead-Deerlodge National Forest.

28. Defendant Leanne Marten is the Regional Forester for Region One of the United States Forest Service. In that capacity, she is charged with ultimate responsibility for ensuring that decisions made at the National Forest level in the Northern Region, including the Beaverhead-Deerlodge National Forest, are consistent with applicable laws, regulations, and official policies and procedures. She is the highest official and representative of Defendant U.S. Forest Service in the District of Montana.

FACTUAL BACKGROUND

29. The Gravelly Range of southwest Montana is located within the Greater Yellowstone Ecosystem on the Beaverhead-Deerlodge National Forest.

30. The U.S. Forest Service has authorized approximately 8,000 domestic sheep to graze across 55,000 acres of land in the heart of the Gravelly Mountains.

31. While the neighboring Madison and Tobacco Root Mountains just into the sky with dramatic and awe-inspiring peaks, the broad and gentle ridges of the Gravelly Range offer a more subtle and contemplative beauty.

32. The seven domestic sheep allotments being challenged here are literally on top of the Gravelly Range at elevations that sometimes exceed 10,000 feet.

33. NEPA analysis for the seven allotments has either not been completed or is outdated.

- Black Butte NEPA Complete: None
- Cottonwood NEPA Complete: 2000
- Posion Basin NEPA Complete: 1979
- Lyon Wolverine NEPA Complete: 1988
- Hellroaring NEPA Complete: 1991
- Coal Creek NEPA Complete: 1980
- Barnett NEPA Complete: 1979

34. The Forest Service informed Plaintiffs it would complete new NEPA analysis on the allotment management plans for the seven domestic sheep allotments over a decade ago.

The Greater Yellowstone Ecosystem

35. The region from Yellowstone National Park to the Yukon Territory of Canada is widely recognized as a vital stronghold for the world's remaining wildlands and biodiversity, and the Greater Yellowstone Ecosystem is a significant component of this region.

36. The Greater Yellowstone Ecosystem encompasses millions of acres across southwest Montana, eastern Idaho, and northwest Wyoming, including two national parks, seven national forests, a dozen wilderness areas, and the headwaters of several of the United States best known rivers. Over seventy-five percent of the Greater Yellowstone Ecosystem consists of federal, public lands.

37. The Greater Yellowstone Ecosystem is one of the few remaining places in the United States where nearly all the species of plants and animals that were present prior to the arrival of Europeans to North America still survive. The Greater Yellowstone Ecosystem contains the greatest concentration of large mammals in the lower forty-eight

states, and is one of the few temperate ecosystems where ecological processes such as predator-prey interactions are still in place. Elk, bison, bighorn sheep, lynx, wolves, wolverines, and grizzly bears are all found in this ecosystem.

Bighorn Sheep

38. In 1900, there were an estimated 100,000 bighorn sheep in Montana.

39. Today, Montana Fish, Wildlife and Parks estimates that fewer than 6,000 bighorn sheep remain in the state.

40. Disease transmission from domestic sheep to bighorn sheep is largely responsible for the loss of wild bighorn sheep in Montana.

41. Bighorn sheep were historically found in the Gravelly Mountains where the domestic sheep are now permitted to graze.

42. In 2002, Montana Fish, Wildlife and Parks (“FWP”) reintroduced bighorn sheep into the Greenhorn Mountains, located at the northern end of the Gravelly Mountain Range.

43. Before reintroducing the bighorns, the Beaverhead-Deerlodge National Forest and FWP entered into a Memorandum of Understanding (“Greenhorn MOU”) with the two permittees that graze domestic sheep in the Gravelly Mountains.

44. As part of the Greenhorn MOU, the Beaverhead-Deerlodge National Forest agreed not to make any changes to the permittees’ operations on the seven Gravelly allotments as a result of the reintroduction.

45. The Greenhorn MOU prohibits bighorn sheep from traveling into their historic habitat in the Gravelly Mountains where the seven domestic sheep allotments are located.

46. The Greenhorn MOU authorizes the domestic sheep producers to kill any

bighorn sheep that comes within one-quarter mile of the domestic sheep.

47. Several bighorn sheep that have left the Greenhorn Mountains have been killed.

48. Domestic sheep grazing in the Gravelly Mountains precludes MT FWP from reintroducing bighorn sheep onto their historic habitat.

49. Bighorn sheep were added to the Region 1 Forest Service list of “Sensitive” species in 2011.

50. “Sensitive” species are:

Those plant and animal species identified by a Regional Forester for which population viability is a concern, as evidenced by: a) Significant current or predicted downward trends in population numbers or density or, b) Significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution.

Revised Forest Plan at 302.

Grizzly Bears

51. Before European settlement of the American West, grizzly bears roamed from the Great Plains to the California coast, and south to Mexico, occupying almost every conceivable habitat. With westward expansion, grizzly bears were “shot, poisoned, and trapped wherever they were found.” 72 Fed. Reg. 14865, 14868 (March. 29, 2007).

52. Once over 50,000 strong in the lower forty-eight states, grizzlies were reduced to less than 1,000 bears by 1975. In a historical blink of an eye, from the 1800s to the early 1900s, humans reduced the range of grizzly bears to less than 2 percent of its former range south of Canada, limiting the bear to a few isolated populations in mountainous regions, wilderness areas, and national parks in Montana, Idaho, Wyoming and Washington.

53. In the Greater Yellowstone Ecosystem, approximately 600 bears remain in isolated habitat. The Yellowstone population of grizzly bears is listed as “threatened” under the Endangered Species Act. 75 Fed. Reg. 14496, 14496 (March 26, 2010).

54. The establishment and protection of corridors and linkage habitat between the Greater Yellowstone Ecosystem and the Northern Continental Divide Ecosystem is essential for the long-term genetic viability of Yellowstone Grizzly bears.

55. The Gravelly Mountain Range provides a vital habitat connection for the large carnivores because it is one of the only mountain ranges that can connect the Yellowstone grizzlies to those in the Northern Continental Divide Ecosystem.

56. The Forest Service has authorized domestic sheep to graze in the heart of this important corridor.

57. As grizzly bears have begun to move out of Yellowstone National Park and into the Gravelly Range, conflicts with domestic sheep have occurred.

58. Shepherders have killed grizzly bears on the allotments after they depredated on domestic sheep.

PROCEDURAL BACKGROUND

59. On January 14, 2009, the U.S. Forest Service signed the Record of Decision authorizing implementation of the Revised Forest Plan.

60. On May 14, 2009, the Gallatin Wildlife Association filed an administrative appeal of the Revised Forest Plan.

61. In July 2009, Gallatin Wildlife Association and the Regional Forester held an informal appeal resolution meeting. The appeal could not be resolved.

62. On October 30, 2009, the Reviewing Officer for the Chief of the Forest

Service denied Gallatin Wildlife Association's administrative appeal of the Revised Forest Plan.

63. On May 26, 2015 the Forest Service signed the Annual Operating Instructions for seven domestic sheep grazing allotments located in the Gravelly Mountains on the Beaverhead-Deerlodge National Forest.

STATUTORY BACKGROUND AND VIOLATIONS

The National Forest Management Act

64. The National Forest Management Act and its implementing regulations require forest plans to "provide for diversity of plant and animal communities." 16 U.S.C. §1604(g)(3)(B).

65. In 1982, the Forest Service promulgated regulations to ensure such diversity:

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 within 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.

36 C.F.R. § 219.19.

66. To meet this requirement, the Forest Service assumed that it would maintain viable populations of bighorn sheep if it maintained vegetation within its historic range of variation. *See* Forest Plan Final Environmental Impact Statement at 860.

67. This methodology is commonly known as the "habitat-as-proxy" approach and is delineated in the Forest Service document titled *Consistency in Land and Resource Management Plans: Addressing Planning Requirements for Viability Final 12/10/03*.

68. The methodology states that the habitat-as-proxy approach should not be applied to species with consistently sparse population densities or that occupy highly fragmented or isolated habitats.

69. In 2008, the Forest Service sent a letter to MT FWP stating bighorn sheep “occur in discrete populations and are prone to periodic and significant dieoffs . . . this important and valued species continues to inhabit a small fraction of its historical range, and in numbers dramatically reduced from pre-European settlement times.”

70. The viability analysis in the Environmental Impact Statement for the Revised Forest Plan did not consider the fact that bighorn sheep are not allowed in their historic range in the Gravelly mountains, even if vegetation is managed within its historic range of variation.

71. The Environmental Impact Statement for the Revised Forest Plan does not discuss the discrete populations of bighorn sheep herds in the viability analysis.

72. The Environmental Impact Statement does not discuss the population densities of bighorn herds that exist on the Beaverhead-Deerlodge National Forest.

73. During the Forest Plan revision process, Plaintiffs and MT FWP submitted several scientific studies and management papers to the Forest Service regarding domestic/bighorn sheep management.

74. The scientific studies and management papers are not included in the literature cited for the Revised Forest Plan.

75. The Forest Service did not use all currently available scientific data in its viability analysis for bighorn sheep.

The National Environmental Policy Act

76. The National Environmental Policy Act is the fundamental charter for the protection of the environment. 40 C.F.R. § 1500.1(a).

77. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. 40 C.F.R. § 1500.1(c).

78. NEPA requires that the Forest Service shall insure the professional integrity, including scientific integrity, of the discussions and analyses in its Environmental Impact Statements. 40 C.F.R. § 1502.24.

79. To this end, the agency must identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix. 40 C.F.R. § 1502.24.

80. The Environmental Impact Statement for the Revised Forest Plan does not discuss the viability analysis for bighorn sheep other than to say that it is located in the project file.

81. The viability analysis or methodology was not located in an appendix of the EIS.

82. The Forest Service did not explain its viability analysis for bighorn sheep.

83. The viability analysis did not consider the fact that bighorn sheep occur in discrete populations.

84. The viability analysis did not disclose or consider the Greenhorn MOU, or the fact that bighorn sheep are not allowed in their historic range in the Gravelly Mountains,

even if vegetation is managed within its historic range of variation.

85. The viability analysis did not consider the bighorn sheep science offered by Plaintiffs.

86. The viability analysis did not disclose comments made by the MT FWP or consider the bighorn sheep science or management papers offered by MT FWP.

87. The EIS for the Revised Forest Plan states that analysis on grazing allotments will be completed at the site-specific level.

88. Site-specific level includes allotment management plans and annual operating instructions.

89. In 2003, Plaintiffs contacted the Forest Service to determine when they would be updating their Allotment Management Plans for the grazing allotments in the Gravelly Mountains.

90. The Forest Service responded that it would be preparing NEPA analysis for the Allotment Management Plans in the next year.

91. The original NEPA analysis for the Allotment Management Plans does not include viability analysis for bighorn sheep.

92. The 2015 Annual Operating Instructions for the domestic sheep allotments does not include a viability analysis for bighorn sheep.

93. The following information triggered the Forest Service's duty to determine whether supplemental NEPA analysis should have been prepared on the Allotment Management Plans:

- The reintroduction of bighorn sheep into the Greenhorn Mountains.
- The addition of bighorn sheep as a sensitive species on the Beaverhead Deerlodge National Forest.

- The Greenhorn MOU.
- The fact that MT FWP recently indicated that it will consider reintroducing bighorn sheep onto closed domestic sheep allotments.
- The presence of grizzly bears on the domestic sheep allotments.
- Grizzly bear/domestic sheep conflicts.
- The killing of at least one grizzly bear on the domestic sheep allotments.
- The use of lime to break down sheep carcasses can significantly harm grizzly bears.

94. The Forest Service did not consider whether this information is significant such that supplemental NEPA analysis should have been prepared for the Allotment Management Plans.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The Revised Beaverhead-Deerlodge Forest Plan, Allotment Management Plans and Annual Operating Instructions for the Domestic Sheep Allotments in the Gravelly Mountains Violate the National Forest Management Act Because They Fail to Ensure the Viability of Bighorn Sheep.

95. The preceding paragraphs are incorporated by reference.

96. The Forest Service violated the National Forest Management Act by failing to ensure the Revised Beaverhead-Deerlodge Forest Plan, as implemented by the Allotment Management Plans and Annual Operating Instructions for domestic sheep allotments in the Gravelly Mountains, ensures the viability of bighorn sheep.

97. The Forest Service violated the National Forest Management Act by using the habitat-as-proxy methodology for determining the viability of bighorn sheep at the Forest Plan level. The methodology itself says that it should not be used for species that occur in

discrete and isolated populations. The authorization of domestic sheep grazing in the Annual Operating Instructions and Allotment Management Plans violates the NFMA by relying on a legally flawed Forest Plan.

98. The Forest Plan viability analysis violates the National Forest Management Act by failing to consider science and other documents provided by the Plaintiffs and Montana Fish, Wildlife and Parks regarding bighorn/domestic sheep.

SECOND CLAIM FOR RELIEF

The Revised Beaverhead-Deerlodge Forest Plan, Allotment Management Plans, and Annual Operating Instructions Violate the National Environmental Policy Act.

99. The preceding paragraphs are incorporated by reference.

100. The Forest Service violated NEPA by failing to attach the Forest Plan viability methodology to an appendix or footnote in the EIS.

101. The Forest Service violated NEPA by failing to disclose the existence of the Greenhorn MOU in its EIS for the Revised Forest Plan.

102. The Forest Service violated NEPA by failing to consider the Greenhorn MOU in its Forest Plan viability analysis.

103. The Forest Service violated NEPA by using the habitat-as-proxy methodology for bighorn sheep, even though the methodology itself said that it should not be used for species that occur in discrete and isolated populations.

104. The Forest Service violated NEPA by failing to explain its Forest Plan viability analysis for bighorn sheep.

105. The Forest Service violated NEPA by failing to thoroughly analyze the impacts of domestic sheep in its viability analysis.

106. The Forest Service violated NEPA by failing to disclose comments and

analyze studies and management papers supplied by MT FWP regarding domestic/bighorn sheep.

107. The Forest Service violated NEPA by failing to consider scientific studies supplied by Plaintiffs.

108. The Forest Service violated NEPA by failing to determine whether new information was significant such that the agency should have prepared supplemental NEPA analysis for the Allotment Management Plans.

109. The Forest Service violated NEPA by failing to prepare supplemental NEPA analysis for the Allotment Management Plans.

110. The Forest Service violated NEPA by making an irretrievable commitment of resources before completing supplemental NEPA analysis.

PRAYER FOR RELIEF

For all of the above stated reasons, Plaintiffs request that this Court award the following relief:

- A. Declare that the Revised Forest Plan, as it pertains to bighorn sheep, violates the law;
- B. Declare that the Allotment Management Plans violate the law;
- C. Declare that the Annual Operating Instructions violate the law;
- D. Vacate and set aside the Forest Plan as it relates to bighorn sheep, the seven Allotment Management Plans, the seven Annual Operating Instructions and the corresponding NEPA analysis for Forest Plan, Allotment Management Plans and Annual Operating Instructions.
- E. Enjoin domestic sheep grazing on the seven Forest Service allotments in the Gravelly Mountains of the Beaverhead-Deerlodge National Forest;
- F. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under the Equal Access to Justice Act and any other applicable statute;

G. Retain jurisdiction over this case until the agency complies with NEPA, NFMA and the APA.

H. Grant Plaintiffs any such further relief as may be requested, just, proper and equitable.

Respectfully submitted this 18th day of September, 2015.

/s/ John Meyer
JOHN MEYER

Attorney for Plaintiffs