Stuart Wilcox, *pro hac vice*
WildEarth Guardians
2590 Walnut Street
Denver, CO 80205
720.331.0385
swilcox@wildearthguardians.org

John Meyer, MT Bar No. 11206
Sarah McMillan, MT Bar No. 3634
WildEarth Guardians
P.O. Box 7516
Missoula, MT 59807
406.546.0149
jmeyer@wildearthguardians.org
406.549.3895
smcmillan@wildearthguardians.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

GALLATIN WILDLIFE ASSOCIATION ET AL., Plaintiffs vs. UNITED STATES FOREST SERVICE ET AL., Defendants HELLE LIVESTOCK ET AL., Defendant-Intervenors.	Cause No. CV-15-27-BU-BMM BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR ORAL ARGUMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

EXHIBIT INDEX

INTRODUCTION

Plaintiffs Gallatin Wildlife Association ("GWA"), WildEarth Guardians, Western Watersheds Project, and Yellowstone Buffalo Foundation seek relief from the U.S. Forest Service's ("USFS's") failure to properly analyze the impacts of domestic sheep grazing in the Beaverhead-Deerlodge National Forest ("Beaverhead-Deerlodge") on bighorn sheep, a sensitive species. AR C32 at 2. Plaintiffs respectfully request that the Court determine USFS violated the National Environmental Policy Act ("NEPA"). If the Court so determines, Plaintiffs request an opportunity to work with the Parties to fashion a binding timeline for new NEPA analyses. In the alternative, Plaintiffs request the Court issue permanent injunctive relief.

BACKGROUND

In 1900, over 100,000 bighorns lived in Montana. AR C30 at 1. Today, fewer than 6,000 bighorns remain. Id. Large declines in the species' abundance and distribution occurred during the late 1800s and early 1900s, most likely resulting from the introduction of domestic sheep carrying several diseases to which bighorns were naïve. AR E6. Unlike other ungulates whose populations declined and then rebounded, bighorn populations have seen limited recovery. Proposed Supplement 1 at 1. Present-day recovery of bighorn populations is largely limited by respiratory

disease outbreaks, which can be transmitted to bighorns via contact with domestic sheep. Id.

USFS has authorized two permittees to graze approximately 8,000 domestic sheep[1] in the Gravelly Mountains of the Beaverhead-Deerlodge. AR A10, A67.[2] The domestic sheep have an enormous footprint, spreading out across 55,000 acres in the heart of the Gravellys. See Griffin Dec. at 8-9; Hockett Dec. at 6. The sheep displace native wildlife and graze in large, unroaded, and otherwise wild areas. AR B19 at 504; Griffin Dec. at 9.

The Greenhorn Mountains are located at the northern part of the Gravelly landscape and are home to the "Greenhorn" herd of bighorns. Griffin Dec. at 8-9. The Greenhorn herd has only 31 individuals; a fraction of the 125 animals that MT FWP has determined is required for a viable population. AR C29 at 82-83. The remaining Gravelly Mountains, to the immediate south of the Greenhorns, are historic bighorn habitat. See, e.g., AR A11 at 5, C17 at 1. Bighorn Mountain is located in the Gravellys, but is flanked on nearly every side by domestic sheep. Griffin Dec. at 9. The

[1] Domestic sheep in the Gravellys alone outnumber the total bighorn population in Montana.

[2] The seven allotments are Black Butte, Cottonwood, Poison Basin, Lyon Wolverine, Hellroaring, Coal Creek, and Barnett (collectively "Allotments"). Dkt. 73 ¶ 33.

domestics preclude bighorns from recolonizing or being reintroduced onto their namesake mountain. See AR B12 at 2.

MT FWP recommends bighorn and domestic sheep be separated by a minimum distance of nine miles. AR C29 at 44. The Greenhorn herd is located just six miles from the Allotments. AR B28 at 15. Several bighorns have been killed, under the MOU, for leaving the Greenhorn area. AR C29 at 221.

In 2002, USFS, Montana Fish, Wildlife, and Parks ("MT FWP"), and the grazing permittees entered into a Memorandum of Understanding ("Greenhorn MOU" or "MOU"), which was renewed in 2008. AR C10, C17. The MOU purports to prohibit USFS from making any changes to management of the Allotments and to allow the permittees to kill bighorns near the Allotments. AR C17 at 2. This would prevent the Greenhorn herd from expanding into the Allotments. Id.

On January 14, 2009, the Regional Forester signed the Record of Decision for the Beaverhead-Deerlodge Revised Forest Plan. AR B18. The MOU was not disclosed or included in the NEPA analysis for the Forest Plan. AR B18, B19. Plaintiffs filed a timely administrative appeal challenging the Forest Plan's bighorn viability analysis. AR B21. On October 30, 2009, the Reviewing Officer for USFS denied the appeal and

affirmed the Regional Forester's decision to approve the Revised Forest Plan. AR B25.

The Reviewing Officer simultaneously directed the Regional Forester to review the planning record and determine whether an amendment was necessary to provide more comprehensive direction for the management of bighorn/domestic sheep interactions on the Beaverhead-Deerlodge. Id. More than six years later, USFS has still not made a final determination.[3]

In 2003, USFS informed GWA that it would complete revised NEPA analysis on the allotment management plans ("AMPs") for the Allotments in 2004 and 2005. Griffin Dec. at 5. In 2008, USFS informed GWA that it now planned on completing the NEPA analyses in 2011 and 2012. Griffin Dec. at 6. USFS still has not completed these analyses, despite numerous requests, newly documented wildlife conflicts, and the fact that some of the existing NEPA analyses are over 30 years old. See Dkt. 73 ¶ 33.

Plaintiffs now challenge the Revised Forest Plan and USFS's failure to consider whether to prepare, and ultimately to prepare, supplemental

[3] In 2011 USFS prepared a *draft* "Report to the Chief" indicating USFS would notify Plaintiffs of its decision on this issue. AR B28.

NEPA analyses for the AMPs before irreversibly and irretrievably committing its resources.[4]

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Judicial review of agency actions under NEPA is governed by section 706 of the Administrative Procedure Act ("APA"). ONRC Action v. BLM, 150 F.3d 1132, 1135 (9th Cir. 1998). The APA provides a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or which have been taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

> An agency action is arbitrary and capricious if
>
> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view

[4] Plaintiffs' Article III standing is established by the declarations of their members. See Hockett Dec.; Griffin Dec.; Mealer Dec.; Worobec Dec.; Russell Dec.; Osher Dec.; Kreilick Dec.; Gutkoski Dec.

or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

In addition, APA section 706(1) directs courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C.§ 706(1). This empowers courts to determine whether agency delay in coming to a decision is unreasonable.

II. STATUTORY BACKGROUND

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA

> ensures that the agency, in reaching its decision, 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 audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). NEPA "ensures that important [environmental] effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson, 490 U.S. at 349 (citations omitted). "Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. §

1500.1(a). In short, NEPA's fundamental goal is to direct federal agencies to "look before you leap." Greater Yellowstone Coal. v. Lewis, 628 F.3d 1143, 1158 (9th Cir. 2010), as amended (Jan. 25, 2011).

NEPA requires that agencies consider all impacts of their actions–the "hard look" requirement. Marsh v. ONRC, 490 U.S. 360, 374 (1989). This "hard look" occurs through the creation of environmental impact statements ("EISs") and environmental assessments ("EAs"), or, in limited circumstances, through use of categorical exclusions ("CEs"). See 40 C.F.R. §§ 1501.4, 1508.4, 1508.9, 1508.11.

USFS "must be alert to new information that may alter the results of its original environmental analysis, and continue to take a 'hard look at the environmental effects of its planned action, even after a proposal has received initial approval.'" Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557 (9th Cir. 2000) (quoting Marsh, 490 U.S. at 374). USFS must supplement NEPA analyses where "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii) (EISs); see also Native Ecosystems Council v. Tidwell, 599 F.3d 926, 937 (9th Cir. 2010) (EAs); Forest Service Handbook ("FSH") 1909.15 § 18.3 (CEs).

"An action to compel an agency to prepare [supplemental NEPA documents] ... is not a challenge to a final agency decision, but rather an action arising under 5 U.S.C. § 706(1), to 'compel agency action unlawfully withheld or unreasonably delayed.'" Dombeck, 222 F.3d at 560 (citation omitted). However, where USFS considers whether to supplement its NEPA analyses and decides not to, the Court must overturn that decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedures required by law," within the meaning of the APA. 5 U.S.C. §§ 706(2)(A), (D); see also Marsh, 490 U.S. at 375-76; Wildlands v. USFS, 791 F. Supp. 2d 979, 984 (D. Or. 2011).[5]

[5] In addition to differing *standards* of review, claims under APA sections 706(1) and 706(2) also have differing *scopes* of review. While review of Plaintiffs' claims under APA section 706(2) are generally limited to the administrative record (see Lands Council v. Powell, 395 F.3d 1019, 1029-30 (9th Cir. 2005) (listing exceptions)), review of Plaintiffs' claims that USFS failed to act under APA section 706(1) are not limited to the record "because there is no final agency action to demarcate the limits of the record." Dombeck, 222 F.3d at 560 (citation omitted). Regardless of whether the Court admits the documents from Plaintiffs' Motion to Supplement the Administrative Record (Dkt. 110, 111), it may consider them when ruling on Plaintiffs' failure to act claims.

III. USFS'S VIABILITY ANALYSIS VIOLATES NEPA BECAUSE USFS FAILED TO ADEQUATELY EXPLAIN ITS USE OF THE HABITAT-AS-PROXY METHODOLOGY AND HOW IT ENSURED THE VIABILITY OF BIGHORNS.[6]

USFS is required to maintain viable populations of bighorns in the Beaverhead-Deerlodge. Native Ecosystems Council v. Krueger, 946 F. Supp. 2d 1060, 1094 (D. Mont. 2013). Here, USFS employed the "habitat-as-proxy" or "coarse filter" methodology to meet this standard. Gallatin Wildlife Ass'n v. USFS, 2015 WL 4528611, at *5 (D. Mont. July 27, 2015). However, USFS failed to explain its use of the methodology and how it ensures bighorn viability.

"[W]hen [USFS] relies on a proxy to ensure a species' viability, it 'must both describe the quantity and quality of habitat that is necessary to sustain the viability of the species in question and explain its methodology

[6] The requirement that viable populations of native species be maintained through forest planning comes from the regulations implementing the National Forest Management Act ("NFMA"). See 36 C.F.R. § 219.19; see also 16 U.S.C. §1604(g)(3)(B) (forest plans must "provide for diversity of plant and animal communities…"). However, a NEPA violation exists "[w]here, as here, the alleged violation of [NFMA] pertains to the procedural requirements that [USFS] must comply with in order to ensure the viability of species..." Lands Council v. Cottrell, 731 F. Supp. 2d 1074, 1090 (D. Idaho 2010) (citing Tidwell, 599 F.3d at 937 ("Just as the methodology applied by [USFS] to measure habitat conditions did not meet the NFMA requirements, its flawed methodology … does not constitute the requisite 'hard look' mandated by NEPA.") (citation omitted)). Therefore, this claim is properly brought as a violation of NEPA.

for measuring this habitat.'" Native Ecosystems Council v. Weldon, 848 F. Supp. 2d 1207, 1213 (D. Mont. 2012), vacated on other grounds by Native Ecosystems Council v. Weldon, 2012 WL 5986475, at *1 (D. Mont. Nov. 20, 2012) (citation omitted). "Crucial to this [proxy] approach … is that the methodology for identifying the habitat proxy be sound." Powell, 395 F.3d at 1036 (citation omitted). Consequently, "the test for whether the habitat proxy is permissible is whether it reasonably ensures that the proxy results mirror reality." Tidwell, 599 F.3d at 933 (citation omitted). In the present case, USFS has entirely failed to describe its use of the habitat-as-proxy methodology for bighorns and whether that methodology's results reflect reality.

The habitat-as-proxy methodology "assumes that by maintaining historic patterns and size class structure that viability is likely to be maintained for species that evolved in and became adapted to those local habitat conditions even though knowledge of all the specific biological requirements of those species is not fully known." AR B19 at 473, 1056-57; see also Tidwell, 599 F.3d at 933 (citation omitted). However, USFS's sole focus on bighorn habitat is concerning because it ignores several impacts vital to bighorn viability. First, regardless of whether the Allotments are within the historic range of variation, bighorns and domestic sheep cannot

occupy the same habitat–bighorn are excluded from the Allotments, and are subject to lethal removal by permittees under the MOU if they even go near the Allotments. See AR B20 at 685, C17 at 2-3. This excludes bighorns from 55,000 acres of habitat that might otherwise appear suitable. See Hockett Dec. at 6. Second, disease spread by domestic sheep significantly limits bighorn viability independent of available habitat. See, e.g., AR C29 at 2; Proposed Supplement 1; Proposed Supplement 6 at 2-4; Proposed Supplement 7 at 2-4; Idaho Wool Growers Ass'n v. Vilsack, 7 F. Supp. 3d 1085, 1090-92 (D. Idaho 2014) (citing USFS's determination that evidence indicates domestic sheep transfer diseases to bighorns). These shortcomings are particularly concerning and worthy of adequate NEPA consideration for the Greenhorn herd, which numbers only 31 individuals, less than ¼ of the number that MT FWP estimates is necessary for a viable population. AR C29 at 82-83.

Additionally, there is no evidence in the record, and certainly nothing predating the completion of Forest Plan NEPA analysis, that USFS used a "fine filter" for bighorns to consider these factors and to complement its habitat-as-proxy analysis. See AR B19 at 95, 1059. In fact, the bighorn is conspicuously absent from the FEIS's list of species for which USFS completed fine filter analyses and from the "Effects on Wildlife Habitat of

Livestock Grazing" section of that document. AR B19 at 1057-58. This indicates that USFS did not treat bighorns as "species for which viability is, or may be a concern," and thus evaluated their viability based on habitat alone. See AR B19 at 1058.

USFS violated NEPA because its Forest Plan NEPA analysis did not explain its use of the habitat-as-proxy methodology and how it ensures bighorn viability. USFS instead rolled bighorn viability into an opaque, unexplained, "one size fits all" approach to determining viability for all wildlife. As a result, Plaintiffs, and the public at large, have been entirely precluded from evaluating the decision, meaningfully participating in the process, and determining whether USFS's ultimate viability determination is correct. See 40 C.F.R. § 1500.1(a); Robertson, 490 U.S. at 349.

IV. USFS VIOLATED NEPA BY FAILING TO DISCLOSE THE GREENHORN MOU IN ITS FOREST PLAN NEPA ANALYSIS.

In 2002, USFS entered into the Greenhorn MOU with the two permittees that graze and trail domestic sheep in the Beaverhead-Deerlodge. AR C10. The MOU applies to the Allotments and provides that:

> bighorn sheep will not cause the Agencies to adjust the operation or management of the Grazing Permittees' domestic sheep grazing operations without the Grazing Permittees consent. The Agencies agree that this includes the trailing corridor and grazing allotments.

Id. at 2. The MOU thus purports to prohibit USFS from making any changes to grazing on the Allotments. Id. USFS signed and renewed the MOU in 2008—while it was preparing the NEPA analysis for the Beaverhead-Deerlodge Forest Plan. AR C17. MT FWP sent comments to USFS stating it should be aware of the MOU during the Forest Plan NEPA process. AR B12 at 2. However, USFS violated NEPA by failing to include any mention of the MOU in its NEPA analysis.

The plain language of the MOU purports to prevent USFS from taking action to alter grazing to ensure bighorn viability. Therefore, the MOU purports to unlawfully constrain USFS's ability to protect bighorns and to ensure their viability at the Forest Plan level.[7] However, USFS failed to disclose the existence of the MOU, let alone analyze the impacts that it had on USFS's decisionmaking. See AR B18, B19.

[7] The MOU cannot preclude USFS from complying with its responsibilities under federal laws, including NEPA. See Baker v. U.S. Dep't of Agric., 928 F. Supp. 1513, 1519-21 (D. Idaho 1996) (regulations that conflict with statutory requirements must yield). The United States is also not estopped from denying the acts of its officers where in conflict with federal laws or regulations. OPM v. Richmond, 496 U.S. 414 (1990). Plaintiffs do not concede that the MOU constrained USFS's discretion and contend that any limit on free decisionmaking is in violation of NEPA. However, it seems USFS believed that the MOU did constrain its actions, and the MOU therefore should have been disclosed in USFS's Forest Plan NEPA analysis as something weighing on the agency's decision.

Instead, USFS waited to disclose the MOU's existence until after the Plaintiffs' administrative appeal of the Forest Plan was denied and the Reviewing Officer required the agency to undertake further analysis on bighorns. As a result, relevant information was not made available to the public or considered by the agency before decisions were made. See WildEarth Guardians v. Mont. Snowmobile Ass'n, 790 F.3d 920, 927-28 (9th Cir. 2015) (holding that the same Forest Plan violated NEPA by omitting critical information about big game and thus preventing the public from playing a role in the decisionmaking process); see also 40 C.F.R. § 1502.24 (requiring that USFS ensure the professional integrity, including the scientific integrity, of discussions and analyses in its EIS). As this Court has stated, "NEPA predicates the review process upon full and open disclosures of all relevant information to the public and decision makers." GWA v. USFS, 2015 WL 4528611, at *8. The failure to provide the MOU—relevant information—to the public means that the public was unable to "play a role in both the decisionmaking process and the implementation of that decision." See Robertson, 490 U.S. at 349; see also WildEarth Guardians, 790 F.3d at 927-28. As this Court stated, USFS "should have disclosed the MOU in the final EIS and without prompting by any other party." GWA v. USFS, 2015 WL 4528611, at *8.

As discussed in relation to USFS's flawed bighorn viability analysis, USFS's adherence to the MOU precludes bighorns from occupying the Allotments. Not only do domestic sheep spread diseases to bighorns that they come into contact with, but the MOU purports to allow permittees to lethally remove any bighorns that come near the Allotments, and purports to preclude USFS from changing management of the Allotments to protect bighorns. See AR B20 at 685, C17 at 2-3, C29 at 2; Proposed Supplement 1; Proposed Supplement 6 at 2-4; Proposed Supplement 7 at 2-4; Vilsack, 7 F. Supp. 3d at 1090-92. Thus, the Allotments and surrounding lands are unavailable to bighorns under the MOU. USFS must have been aware of the MOU, having renewed it *during* the Forest Plan NEPA process. However, USFS illegally failed to reference the MOU in its Final EIS, precluding the public scrutiny of its decision that is essential to NEPA and avoiding the "hard look" at environmental impacts that USFS is required to take. Marsh, 490 U.S. at 374; 40 C.F.R. § 1500.1(a).

V. USFS VIOLATED NEPA BOTH BY FAILING TO CONSIDER WHETHER NEPA SUPPLEMENTATION FOR THE AMPS WAS NECESSARY AND BY FAILING TO SUPPLEMENT THOSE ANALYSES.

USFS has thus far failed to consider whether it must supplement the NEPA analyses for any of the AMPs at issue, in spite of several significant events that have occurred since the NEPA analyses were completed. See

Dkt. 73 ¶ 33; AR A11, A21, A31, A40, A50, A82 (AMP NEPA analyses range from 1979-2000).[8]

USFS is required to supplement its NEPA analyses where "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii) (EISs); Tidwell, 599 F.3d at 937 (EAs); FSH 1909.15 § 18.3 (CEs). The policy behind requiring supplementation is that:

[8] In its decision denying Plaintiffs' motion for a preliminary injunction, the Court held that the 1995 Rescissions Act, Pub. L. 104–19 § 504(b), and the 2004 Appropriations Act, Pub. L. 108–108 § 325, "exempt *grazing allotments* whose permits were renewed between fiscal years 2004 and 2008 from the supplemental NEPA analysis requirement until ordered by the Secretary of Agriculture." GWA v. USFS, 2015 WL 4528611, at *9 (citation omitted, emphasis added). However, by its terms, the 2004 Appropriations Act *only* applies to NEPA analyses undertaken as a matter of course when *renewing grazing permits*. See Pub. L. 108-108 § 325. Plaintiffs challenge USFS's failure to consider supplementation for NEPA analyses for the AMPs and claim USFS cannot irreversibly or irretrievably commit its resources before it completes such review. See ONDA v. Sabo, 854 F. Supp. 2d 889, 922-24 (D. Or. 2012). This reading comports squarely with the purpose of this legislation; to allow USFS to *renew an exceptional number of grazing permits that expired over a short time* without completing NEPA review *on the renewals*. See ONDA v. USFS, 2005 WL 1334459, at *11 (D. Or. June 3, 2005) rev'd and remanded on other grounds, 465 F.3d 977 (9th Cir. 2006). This legislation does not excuse *all* compliance with NEPA for the Allotments. It addresses a single problem: USFS's perceived inability to complete NEPA analyses as a matter of course for *renewal of the expiring grazing permits*. Requiring supplemental NEPA where significant new circumstances exist is consistent with the purpose and language of this legislation. A contrary reading allows USFS to continually ignore information that grazing is causing harm to resources. Such a reading was not the intent of the legislation and would be contrary to the goals of NEPA.

> It would be incongruous with [NEPA's] approach to environmental protection, and with [its] manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

Marsh, 490 U.S. at 371. This policy requires USFS to "take a 'hard look' at the environmental effects of [its] planned action, even after a proposal has received initial approval." Id. at 373-74.

"It is the agency, not an environmental plaintiff, that has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions, even after release of an EIS." Dombeck, 222 F.3d at 559 (internal quotation and citation omitted). In addition, USFS "recognizes the importance of its designation of species as sensitive … to its mission of maintaining viable populations of animals." Id. (citations omitted). USFS must make a timely review of whether new sensitive species designations necessitate preparation of a supplemental NEPA document. Id.

The 2002 reintroduction of bighorns to the Beaverhead-Deerlodge and their subsequent 2011 listing as a Forest Service Sensitive Species[9] represent

[9] A "sensitive species" is one whose "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." AR B19 at 21-22.

significant new circumstances and information. AR C6, C32 at 2. In addition to the bighorn listing and the species' presence in the vicinity of the Allotments, USFS also entered into, and renewed, the Greenhorn MOU since the relevant NEPA analyses occurred. AR C10, C17. This is significant because the MOU purports to ensure that bighorns will continue to be unable to repopulate the Allotments at issue. See AR B20 at 685, AR C10 at 2 (purporting to authorize the permittees to kill bighorns that are on or near the Allotments and to bar USFS from changing management of the Allotments). The MOU thus purports to ensure that livestock grazing will continue to impact the species, which is a significant issue that is not evaluated in the NEPA analyses.[10] There is also new information related to the significance of the disease impact that domestic sheep have on bighorns. See, e.g., AR C29 at 2; Proposed Supplement 1; Proposed Supplement 6 at 2-4; Proposed Supplement 7 at 2-4; Vilsack, 7 F. Supp. 3d at 1090-92. This

[10] USFS's failure in this regard violates NEPA for the additional reason that USFS must prepare environmental analysis "before the 'go-no go' stage of a project, which is to say before 'making an irreversible and irretrievable commitment of resources.'" Ctr. for Envtl. Law & Policy v. Bureau of Reclamation, 655 F.3d 1000, 1006 (9th Cir. 2011) (citations omitted). Here, USFS entered into the Greenhorn MOU, which purports to limit USFS's discretion related to changing management of the Allotments and to allow permittees to kill bighorns that come near the Allotments; renewed several of the permits at issue; issued the 2015 annual operating instructions; promulgated the Forest Plan; and otherwise irreversibly and irretrievably committed its resources before it completed supplemental NEPA analyses. See AR C10, A69, A19, A28, A39, A49, A59, A79, A92, B18.

is significant because it identifies increased threats domestic sheep pose to bighorns. Finally, MT FWP's recent statements that it will consider reintroducing bighorns onto closed domestic sheep allotments also occurred since the NEPA documents were prepared for the Allotments. Proposed Supplement 2 at 1. This statement is significant because it indicates that MT FWP might reintroduce bighorns to the Allotments if grazing ceased.

In Dombeck, the Court explained "designation of a species as sensitive is evidence of [USFS's] recognition that the species' biological status *has* changed: that its population has declined significantly or is predicted to do so." Dombeck, 222 F.3d at 559 n.5. The Court distinguished another case where listing a species was not significant because in that case USFS had previously determined that the action in question would not harm the listed species. Id. (citing Swanson v. USFS, 87 F.3d 339, 344 (9th Cir. 1996)). Here, as in Dombeck, "before the onset of this action, [USFS] never considered the effect of the proposed" action on the sensitive species at issue. Id.; see also AR A11, A21, A31, A40, A50, A82 (NEPA analyses for the AMPs). In fact, the only AMP NEPA analysis to even mention bighorns dismissed impacts as "outside the scope" of its analysis, relying on the plainly outdated information that the species was extirpated from the area in the 1940s and 1950s. AR A82 at F-3-4.

Importantly, that AMP acknowledged that if bighorns were reintroduced and "[i]f future conflicts develop, they would be considered as 'new information' and … would be reviewed" under the section of the Forest Service Handbook addressing consideration of new information to determine whether it requires new or supplemental NEPA analyses. Id. at F-4 (citing FSH 1909.15 § 18.1). As previously discussed, conflicts exist, and USFS is thus required to consider whether to supplement its NEPA analyses for the AMPs at issue, just as it envisioned it would need to do in 2000. See, e.g., AR A82 at F-4, B20 at 685, C10 at 2. Because there is no evidence in the record that USFS considered the above-discussed information, or that it made a decision that supplemental NEPA analyses were unnecessary, USFS is in violation of NEPA. Dombeck, 222 F.3d at 558.

Even if the Court were to find that, by simply listing dates for five AMPs in its "Schedule for Allotment Review Under NEPA,"[11] USFS has adequately considered whether to complete supplemental NEPA analyses for the five AMPs, the Cottonwood AMP has no date listed. AR A1 at 4-6.

In addition, the dates provided for these allotments in the "Schedule for Allotment Review Under NEPA" are arbitrary and capricious in violation of the APA. 5 U.S.C. § 706(2)(A). These dates, standing on their

[11] This document also includes a date for Black Butte, but no NEPA analysis has ever been completed for this AMP. AR A1 at 4; Dkt 73 ¶ 33.

own, provide no reasoning as to why they were chosen and do not show that USFS has considered the factors that Plaintiffs fault USFS for failing to consider. As a result, the record contains no support for the dates provided and the decisions, to the extent that a schedule can be considered a decision, are thus arbitrary and capricious.

Finally, even if the Court were to determine that USFS made a determination as to whether supplemental NEPA analyses were required for the AMPs, some of which are over 30 years old, it violated NEPA by failing to actually supplement them. The aforementioned new circumstances and information all post-date the initial NEPA documents that were prepared for these AMPs. Because, as discussed above, these events constitute "significant new circumstances or information," USFS's failure to supplement its NEPA analyses violates NEPA. See Tidwell, 599 F.3d at 937 (EAs); FSH 1909.15 § 18.3 (CEs).

VI. AN INJUNCTION IS THE PROPER REMEDY.

For an injunction to issue, Plaintiff must normally demonstrate that:

> (1) it has suffered an irreparable injury;
> (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
> (3) a remedy in equity is warranted, considering the balance of hardships between the plaintiff and defendant; and
> (4) the public interest would not be disserved by a permanent injunction.

Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156-57 (2010) (citation omitted). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987).

a. Plaintiffs and bighorns have been and are being irreparably harmed.

i. Bighorns are being irreparably harmed

Bighorns in the Beaverhead-Deerlodge have suffered permanent harm because of domestic sheep grazing and trailing. Most experts agree that domestic sheep spread pneumonia and cause large-scale die-offs of bighorns. Bailey Dec. ¶¶ 13, 14, 15; Proposed Supplement 7 at 1. Domestic sheep have caused the extirpation of three populations of bighorns in the Beaverhead-Deerlodge. Losing populations also means a loss of genetic diversity. Even if new populations of bighorns are reintroduced into the Beaverhead-Deerlodge, populations that have disappeared are not replaceable.

Bighorns lived in the Beaverhead-Deerlodge long before humans or domestic sheep arrived. Bailey Dec. ¶ 25; AR C4 at 21. Bighorn Mountain is located in the middle of the Allotments. Griffin Dec. at 9. In the past, bighorns leaving the nearby Greenhorn Mountains were killed. AR C29 at

221. Continued domestic sheep grazing in the Beaverhead-Deerlodge is likely to cause irreparable harm to the few bighorn that remain. Today, any bighorns that attempts to go home to Bighorn Mountain may be killed under the Greenhorn MOU, signed by USFS. AR C17 at 2. The domestic sheep permittees have stated that interactions between bighorns in the Greenhorn Mountains and domestic sheep are "inevitable." AR C4 at 11, 20. USFS informed MT FWP that "[w]e are particularly concerned with the implications of long-distance forays during the breeding season and how that could affect the risk of bringing diseases/parasites back to the more stationary bighorn groups." AR C19 at 3. "[D]omestic and wild sheep are attracted to each other, and can actively seek each other out over great distances." AR C25 at 2.

MT FWP is reintroducing bighorns on Forest Service land near private land with domestic sheep. See http://fwp.mt.gov/fwpDoc.html?id=68278 (Tendoy reintroduction). MT FWP is willing to at least consider reintroducing bighorns in public land allotments where domestic sheep grazing is not occurring. Proposed Supplement 2.

USFS is required to maintain viable populations of bighorns in the Beaverhead-Deerlodge. Krueger, 946 F. Supp. 2d at 1094. Seven of the ten

populations of bighorns on or near the Beaverhead-Deerlodge do not have minimum viable population sizes as defined by MT FWP. Bailey Decl. ¶ 23. Bighorn populations that do not have minimum viable population numbers experience unique harms that place them under increased risk of extirpation. Bailey Dec. ¶ 15. The 2010 Bighorn Sheep Conservation Strategy prepared by MT FWP states that domestic sheep are a serious threat to maintaining a viable population of bighorns in the Greenhorn Mountains. AR C29 at 75, 221. This increased risk of extirpation causes irreparable harm to bighorns.

Bighorn expert, textbook author, and former University of Montana wildlife biology professor Jim Bailey has submitted an expert declaration explaining that the absence of domestic sheep is a necessary component of any viable sheep habitat. Bailey Dec. ¶¶ 13, 26. Various bands of domestic sheep are trailed through the Snowcrest Mountains each year during the spring and fall on their way to the Gravelly Mountain allotments. Dkt. 27-2 ¶ 18.

This trailing renders large portions of the Snowcrest range unsuitable for bighorns. The Allotments also render bighorn habitat unsuitable. Bailey Dec. ¶¶ 13, 27. The portion of the Gravelly and Snowcrest mountains that are managed by USFS are necessary to maintain viable populations of

bighorns. Bailey Dec. ¶¶ 15, 26, 27, 28. Domestic sheep grazing and trailing prevent viable populations of bighorns from becoming established, which is a long-lasting injury to the environment. Bailey Dec. ¶ 28.

In Lands Council v. Cottrell, the court determined that the failure to provide for species viability is irreparable. Lands Council v. Cottrell, 731 F. Supp. 2d 1028, 1055 (D. Idaho 2010). Judge Lodge determined that "[t]o hold otherwise would be to reward the Forest Service for failing to perform its statutory duty in assessing the impact of its proposed actions on the viability of species." Lands Council v. Cottrell, 731 F. Supp. 2d 1074, 1092 (D. Idaho 2010), relief from judgment granted in part by Lands Council v. Krueger, 2014 WL 6629591, at *2 (D. Idaho Nov. 21, 2014).

ii. Plaintiffs are being irreparably harmed.

In NEPA cases, a plaintiff must show that *he* is likely to suffer irreparable harm in the absence of injunctive relief. Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); Monsanto, 561 U.S. at 156-57. A plaintiff's interests can include recreational and aesthetic enjoyment of particular areas. See Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

Plaintiffs in this case have recreational interests in hiking, biking, and hunting in the Allotments in an undisturbed state. See, e.g., Kreilick Dec. §§

8-9, 15-16; Mealer Dec. ¶ 7; Osher Dec. ¶ 7; Worobec Dec. ¶¶ 5, 9. GWA member Glenn Hockett has plans to hike in the Allotments during the summer of 2016, but a domestic sheep guard dog scared him out of the area during the summer of 2015. Hockett Dec. ¶¶ 8, 9, 22. Mr. Hockett is now scared to hike in the area with his pet dog in 2016 because of the guard dogs. Id. at ¶¶ 9, 22. This causes irreparable harm to Mr. Hockett. See Brady Campaign to End Gun Violence v. Salazar, 612 F. Supp. 2d 1, 25 (D.D.C. 2009). The domestic sheep also preclude elk and other wildlife from using the area. Plaintiffs' members' aesthetic interests in using the areas to see bighorns, elk, and other wildlife will be irreparably harmed by continued domestic sheep grazing. See Hockett Dec. ¶ 19; Griffin Dec. ¶ 8; Kreilick Dec. ¶¶ 12-14; Mealer Dec. ¶¶ 10-13; Osher Dec. ¶¶ 11-14; Worobec Dec. ¶¶ 8-9.

At least one of Plaintiffs' members, a former USFS employee and firefighter, is concerned that he will die before being able to see or recreate in viable bighorn habitat in the Gravelly Mountains. Gutkoski Dec. ¶¶ 6, 12.

b. Remedies at law are inadequate.

"[T]he Supreme Court has instructed us that [e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration…" League of Wilderness Defs. v.

Connaughton, 752 F.3d 755, 764 (9th Cir. 2014) (citations omitted). The Connaughton court held that planting new trees or paying damages could not remedy the loss of mature trees to the logging project at issue. Id. Monetary damages cannot remedy Plaintiff's injuries.

c. The balance of hardships tips in Plaintiffs' favor.

Both economic and environmental interests are relevant in balancing of the hardships. Connaughton, 752 F.3d at 765. However, if "[irreparable environmental] injury is sufficiently likely, … the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco, 480 U.S. at 545. To the extent the Court thinks the injunction requested by Plaintiffs is inequitable, ordering the Parties to work together, as Plaintiffs have requested, to craft an injunction could avoid that result. This request is consistent with the fact that "[a] district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong." High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 641 (9th Cir. 2004) (citation and quotations omitted).

d. The public interest would be served by an injunction.

The Ninth Circuit has repeatedly recognized "the well-established 'public interest in preserving nature and avoiding irreparable environmental injury.'" AWR, 632 F.3d at 1138 (quoting Lands Council v. McNair, 537

F.3d 981, 998 (9th Cir. 2008) Overruled on other grounds by Am. Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009)). In McNair, 537 F.3d at 1005 (citation omitted), the Ninth Circuit stated this interest "outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim." The Ninth Circuit also recognizes "the public interest in careful consideration of environmental impacts before major federal projects go forward, and [has] held that suspending such projects until that consideration occurs 'comports with the public interest.'" AWR, 632 F.3d at 1138 (citation omitted).

In the present case, granting the requested injunction would serve the public interests in avoiding irreparable environmental injury and in careful consideration of environmental impacts before decisions are made.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court declare Defendants violated NEPA. Plaintiffs further request the Court provide the Parties an opportunity to work together to establish a binding timeline for any required NEPA analyses. In the alternative, Plaintiffs request this Court issue permanent injunctive relief from domestic sheep grazing and trailing in the Beaverhead-Deerlodge.

Respectfully submitted this 25th day of February, 2016.

/s/ Stuart Wilcox
Stuart Wilcox, *pro hac vice*
WildEarth Guardians
2590 Walnut Street
Denver, CO 80205
720.331.0385
swilcox@wildearthguardians.org

John Meyer, MT Bar No. 11206
Sarah K. McMillan, MT Bar No. 3634
WildEarth Guardians
P.O. Box 7516
Missoula, MT 59807
406.546.0149
jmeyer@wildearthguardians.org
406.549.3895
smcmillan@wildearthguardians.org

Attorneys for Plaintiffs

CERTIFICATE OF WORD COUNT

I certify that this motion is in compliance with L.R. 7.1 and the Court's scheduling order of October 27, 2015 (Dkt 81). It is 6,450 words, exclusive of the allowed omissions.

/s/ *Stuart Wilcox*
Stuart Wilcox, *pro hac vice*
WildEarth Guardians
2590 Walnut Street
Denver, CO 80205
720.331.0385
swilcox@wildearthguardians.org

CERTIFICATE OF SERVICE

I certify that on February 25th, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing, which will be served on the following CM/ECF registrants:

John Tustin
John.Tustin@usdoj.gov

Sean Duffy
Sean.C.Duffy@usdoj.gov

Robert T. Cameron
RTC@GSJW.com

Dana L. Hupp
DLH@GSHW.com

James E. Brown
thunderdomelaw@gmail.com

William P. Driscoll
wpd@franzdriscoll.com

Caroline Lobdell
clobdell@wrlegal.org

Hertha L. Lund
Lund@Lund-law.com

Alison P. Garab
Garab@Lund-law.com

/s/ *Stuart Wilcox*
Stuart Wilcox, *pro hac vice*
WildEarth Guardians

2590 Walnut Street
Denver, CO 80205
720.331.0385
swilcox@wildearthguardians.org