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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, ET AL., Plaintiffs, v. UNITED STATES FOREST SERVICE, Defendant.	Case No. 1:17-CV-00434-CWD **THE FOREST SERVICE'S RESPONSE TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER (ECF No. 3)**

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INTRODUCTION

The Court should deny Plaintiffs' request for extraordinary relief to enjoin sheep grazing on two allotments in the Targhee National Forest. Plaintiffs have not met their burden to show a likelihood of success, or even serious questions going to the merits of their claims. The balance of harms and public interest favor the Forest Service.

Plaintiffs are unlikely to succeed on their claims under the National Environmental Policy Act ("NEPA") and the National Forest Management Act ("NFMA"). Despite Plaintiff Western Watersheds Project's express agreement that grazing may continue on the Snakey Canyon and Kelly Canyon allotments *until* the Forest Service completes its environmental analysis, Western Watersheds Project now joins another plaintiff in a request to enjoin that very same grazing *while* the Forest Service completes its analysis. Not only does the Forest Service's agreement with Western Watersheds Project expressly allow grazing to continue until the environmental analysis is complete, but Congress has so mandated. The Federal Land Policy and Management Act ("FLPMA") requires the Forest Service to reissue grazing permits with the same terms and conditions of the original permits *until* the necessary environmental analysis can be completed. Furthermore, the Forest Service has acted consistently with the Targhee National Forest Plan by limiting domestic sheep grazing in the Targhee National Forest, including the area where the Snakey Canyon and Kelly Canyon allotments (the "Snakey-Kelly Allotments") are located, and maintaining the viability of the bighorn sheep populations Forest-wide. For all these reasons, Plaintiffs have not shown a likelihood of success or raised serious questions on the merits and their request for a temporary restraining order must be denied.

The balance of harms and public interest also weigh in the Forest Service's favor. The Forest Service does not dispute that it is *possible* that continued grazing on the Snakey-Kelly

Allotments might result in contact between the South Beaverhead bighorn sheep herd and domestic sheep and that contact might result in disease transmission. However, in the decades since Idaho Fish and Game reintroduced the South Beaverhead herd and the Agricultural Research Service ("ARS") has been grazing the Snakey-Kelly Allotments, that herd has not been extirpated. Nor would extirpation of that small, non-viable herd jeopardize the viability of bighorn sheep on the Targhee National Forest.

Just as the Forest Service's multiple-use mandate requires it to weigh the possibility of disease transmission to this non-viable herd that will not jeopardize the continued viability of bighorn sheep on the Targhee National Forest against the value of ARS's ongoing and important genetic research, so too must the Court consider competing interests at this preliminary injunction stage. The Court must weigh the possibility that contact between domestic sheep grazing on the Snakey-Kelly Allotments will result in disease transmission to a small, reintroduced herd against the years of research and associated resources that ARS will lose. ARS's research provides important insights into the evaluation of domestic sheep breeds for health, reproductive efficiency, value and disease. In this case, the balance of harms and public interest tip strongly in favor of allowing grazing to continue and against any injunctive relief.

BACKGROUND

A. FACTUAL BACKGROUND

1. Grazing on the Snakey-Kelly Allotments

The Snakey-Kelly Allotments are located within the Lemhi/Medicine Lodge subsection of the Targhee National Forest. (Mickelsen Decl. ¶ 3.) Pursuant to an inter-agency agreement, the Forest Service issues an annual temporary permit to the United States Department of Agriculture, Agricultural Research Service ("ARS") to graze domestic sheep on the two allotments. (*Id*. ¶ 4.) ARS has been grazing United States Sheep Experiment Station (the

"Sheep Station") sheep on the allotments from November through early January since 1924. (Taylor Decl. ¶ 8; Mickelson Decl. ¶ 5.)

a. Sheep Station Research

The mission of the Sheep Station is to develop integrated methods for increasing production efficiency of domestic sheep and simultaneously improve the sustainability of rangeland ecosystems. (Taylor Decl. ¶ 3.) It is critical to the Sheep Station's research program to mimic "rangeland-based" sheep production systems, so that the research can be applied throughout the western United States. (*Id.* ¶ 7.) The Snakey-Kelly Allotments provide the environmental variables (e.g., climatic, nutritional, spatial and terrain, predatory) that enable ARS to evaluate sheep genetic lines and disease. (*Id.* ¶ 9.) The ultimate goal of ARS's research involving the Snakey-Kelly Allotments is to develop and release genetic lines of sheep that produce safe and premium products for the consumer, while minimizing the use of natural resources and eliminating negative impacts to the landscape or wildlife. (*Id.* ¶ 10.) To preserve the integrity and applicability of the research, sheep must be subjected to the same conditions over a set period (in most cases, a lifetime). (*See id.* ¶¶ 9, 12, 18.) Continued grazing on the Snakey-Kelly Allotments is necessary to achieve ARS's research objectives (*id.* ¶ 11), which are set forth in detail in the Declaration of Dr. J. Bret Taylor. (*See id.* ¶¶ 9-20.)

b. Sheep Station Grazing Practices

Sheep Station domestic sheep are genetic resources for research and the domestic sheep industry, with genetic pedigrees going back generations. (*Id.* ¶¶ 21-22.) Therefore, each sheep is an invaluable resource and the Sheep Station is highly motivated to ensure that no sheep are lost while grazing the Snakey-Kelly Allotments. In addition to employing the best management practices dictated by the Forest Service, the Sheep Station keeps a herder with the sheep 24 hours

a day, seven days a week; counts the entire herd three times each week, and counts "marker" sheep three times each day.[1] (*Id.* ¶¶ 27, 30; Mickelsen Decl. ¶¶ 6-9.) The winter grazing conditions and open, unforested terrain also contribute to a herder's ability to prevent the sheep from becoming separated or lost. (Taylor Decl. ¶ 26, 28-30; Mickelsen Decl. ¶ 10.)

The Sheep Station's management practices also reduce (though not eliminate) the risk of contact between domestic sheep and bighorn sheep. (Mickelsen Decl. ¶ 10.) The herders monitor for bighorn sheep and the open, unforested terrain of the Snakey-Kelly Allotments allows herders to more easily scan the terrain for approaching wildlife. (*Id.*; Taylor Decl. ¶¶ 28-30.) In the event that a bighorn is sighted, the herder will haze or encourage the bighorn sheep to move away from the domestic sheep and then the herder will move the sheep to a new location in the opposite direction of the bighorn sheep. (Taylor Decl. ¶ 30.) Sheep Station staff have not observed or sighted a bighorn sheep on the Snakey-Kelly Allotments where sheep are being grazed in more than twenty years.[2]

2. Bighorn Sheep on the Targhee National Forest

There are five bighorn sheep herds located on the Targhee National Forest: (1) the South Beaverhead herd, located on the Lemhi-Medicine Lodge Ecological Subsection of the Forest (which includes the Snakey-Kelly Allotments), with approximately 36 bighorn sheep; (2) the South Lemhi herd, located on the Lemhi-Medicine Lodge Ecological Subsection of the Forest, with approximately 41 bighorn sheep; (3) the Lionhead (Hilgard) population, located on the

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[1] Each band of domestic sheep has a minimum of six black sheep. The marker sheep intermingle with the band and provide a spot reference for a herder to estimate the group's integrity. (Taylor Decl. ¶ 27.)

[2] Although, based on telemetry data, Idaho Fish and Game determined that a bighorn ram entered one of the allotments in 2015, that ram was not within visual range of the domestic sheep. (*See* Taylor Decl. ¶ 31; Mickelsen Decl. ¶ 28.)

Centennial Subsection of the Forest, with approximately 105 bighorn sheep; (4) the Targhee herd, located on the Teton Subsection of the Forest, with a population of 125 bighorn sheep; and (5) the Palisades herd, located on the Big Holes Subsection of the Forest, with an unknown population. (Mickelsen Decl. ¶ 13.)[3] The South Beaverhead herd is a relatively isolated herd and there is no evidence that it has interacted with any of the other herds on the Targhee National Forest. (Yorgason Decl. ¶¶ 7-8.)

The South Beaverhead herd was completely extirpated from the area in the early 1900s. (*Id.* ¶ 16.)[4] In 1976 and 1982, the Idaho Fish and Game reintroduced the population by translocating 41 bighorn sheep to the area. (*Id.*) Since its reintroduction, the population has never thrived. The South Beaverhead herd's population has been estimated by informal counts, ranging from a high of 60 sheep in 1995 to a low of 13 sheep in 2000. (*Id.* ¶ 17.) In 2007, the population was estimated to be 30 sheep and in 2016, the population was estimated to be 36. (*Id.*) Despite being disease free (*id.* ¶ 21), the parties agree that the South Beaverhead herd is not viable. (*See* Pls.' Br., ECF No. 3-1, at 8; Yorgason Decl. ¶ 22; ECF No. 5 ¶ 28; *Bighorn Sheep Core Herd Home Range Delineations, Idaho*, ECF No. 9-16, at 16, 19.)

B. PROCEDURAL HISTORY

In 2010, Western Watersheds Project ("WWP"), along with other plaintiffs, sued the Forest Service for "reauthorizing livestock grazing on federal land without conducting the proper environmental review under the National Environmental Policy Act (NEPA)." *W. Watersheds*

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[3] A map of the Targhee National Forest's subsections is included in Exhibit E to Robbert Mickelsen's declaration at page III-36.

[4] The herd was extirpated due to a variety of factors, including subsistence hunting, unregulated hunting, disease, human encroachment onto winter range, and unregulated livestock grazing. (Yorgason Decl. ¶ 16.)

Project, et al. v. U.S. Forest Serv., No. 4:10-CV-00612-ELJ-REB, ECF No. 1, ¶ 1 (D. Idaho). WWP expressly challenged the NEPA analysis for the Snakey-Kelly Allotments. *Id.* ¶ 94.

To resolve that lawsuit, the parties entered a settlement agreement on October 31, 2013. *Id.*, ECF No. 109-1. The Forest Service agreed to issue new grazing decisions, supported by new environmental analyses, for the Snakey-Kelly Allotments. *Id.* ¶¶ 1-2. The parties agreed that "[p]ending completion of the new environmental analysis and decision-making processes, *grazing may continue to occur on the allotments* at issue under the terms and conditions of the existing grazing permits." *Id.* ¶ 4 (emphasis added). Judge Lodge entered the settlement agreement and dismissed the action with prejudice. *Id.*, ECF No. 111.

In accordance with that agreement, the Forest Service issued a scoping notice letter for the Snakey-Kelly Allotments in 2015, informing the public that it would prepare an environmental analysis consistent with NEPA. *Id.* ¶ 2; Mickelsen Decl. ¶ 29. That environmental analysis is currently in progress. (Mickelsen Decl. ¶ 29.)

LEGAL STANDARD

A. Emergency Injunctions Are Extraordinary Remedies

An injunction "is a matter of equitable discretion" and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 32 (2008). To meet its burden, Plaintiffs must establish that (1) they are "likely to succeed on the merits," (2) they are "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [its] favor," and (4) an "injunction is in the public interest." *Id.* at 20. All four factors must be met; the test is not altered simply because a plaintiff alleges an environmental injury or a violation of NEPA. *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (*en banc*). Alternatively, "'serious questions going to the merits' and a balance of hardships that tips

sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Under either test, a plaintiff must "establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction." *Id.* at 1131 (emphasis original).

B. Standard of Review

Challenges to agency compliance with NEPA and NFMA are reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *Lands Council*, 537 F.3d at 987. Under the APA, an agency's decision may be overturned only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002) (quoting 5 U.S.C. § 706(2)(A)). This standard of review is highly deferential; an agency decision "will only be overturned if the agency committed a clear error in judgment." *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1114-15 (9th Cir. 2000).

ARGUMENT

I. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS OR RAISED SERIOUS QUESTIONS ON THE MERITS

Plaintiffs are unlikely to succeed on the merits of their claims. Plaintiffs' NEPA claim will fail because Congress unequivocally required the Forest Service to reauthorize grazing permits, pending the completion of its environmental analysis. Plaintiffs' NFMA claim will fail because the Forest Service has acted consistently with its Forest Plan by maintaining a viable bighorn sheep population across the Targhee National Forest and closing allotments to domestic sheep grazing as opportunities have arisen. Plaintiff WWP is unlikely to succeed on either claim

because it has agreed, in a settlement agreement approved by Judge Lodge, that grazing may continue on the Snakey-Kelly Allotments until the Forest Service completes its NEPA analysis.

A. The Forest Service has not violated NEPA: It is required by statute to reissue grazing permits until it completes its environmental analysis.

1. Congress required the Forest Service to reauthorize grazing under the same terms and conditions as the expired permits until the Forest Service completes its NEPA analysis.

Plaintiffs allege that the Forest Service violated NEPA by failing to conduct its NEPA analysis before authorizing grazing on the Snakey-Kelly Allotments. (Pls.' Br. at 13.) Plaintiffs are wrong. Congress has mandated that grazing continue on these allotments under the same terms and conditions of the original permits *until* the environmental analysis can be completed on a schedule determined solely by the Secretary of Agriculture.

Ordinarily, federal agencies have a duty to complete its environmental analysis before authorizing major federal action. The general rules regarding NEPA do not apply here, however, because beginning in 1995, Congress enacted the Rescissions Act and a series of appropriations riders to address environmental analysis prepared in accordance with NEPA for expiring term grazing permits. This legislation was borne out of a congressional concern that the sheer number of expiring grazing permits requiring environmental analysis would strain Forest Service resources and delay renewal of those permits to the unfair detriment of permittees. *See WildEarth Guardians v. U.S. Forest Serv.*, 668 F. Supp. 2d 1314, 1322-23 (D.N.M. 2009). The relevant language from the Rescissions Act and appropriation riders is now codified in FLPMA at 43 U.S.C. § 1752.

Under FLPMA,

> [t]he terms and conditions in a grazing permit or lease that has expired . . . *shall be continued* under a new permit or lease *until the date on which the Secretary concerned completes any environmental analysis* and documentation for the permit

> or lease required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and other applicable laws.

43 U.S.C. § 1752(c)(2) (emphasis added); *see also Klamath Siskiyou Wildlands Ctr. v. Grantham*, 642 F. App'x 742, 745 (9th Cir. 2016) ("the Federal Land Policy and Management Act provides that expired grazing permits are to remain in effect under the same terms and conditions 'until the date on which the Secretary concerned completes any environmental analysis and documentation for the permit or lease required under' NEPA"). The Secretary in his "sole discretion determine[s] the priority and timing for completing required environmental analysis of grazing allotments based on the environmental significance of the allotments and funding available." 43 U.S.C. § 1752(i). Through the enactment of the appropriation riders, and ultimately FLMPA, "Congress amended 'all applicable laws' to require reissuance of expired, transferred or waived grazing permits prior to completion of otherwise required actions." *Great Old Broads for Wilderness v. Kempthorne*, 452 F. Supp. 2d 71, 81 (D.D.C. 2006). The appropriations riders "changed the relevant environmental analysis that applies to grazing permits from a condition precedent into a potential condition subsequent; the analysis still has to occur, but for the time being, not prior to renewal of the permits." *W. Watersheds Project v. Bureau of Land Mgmt.*, 629 F. Supp. 2d 951, 970 (D. Ariz. 2009).

Congress directed the Forest Service to reauthorize the grazing under the same terms and conditions as the expired permits until the Forest Service completes subsequent NEPA analysis. 43 U.S.C. § 1752(c). The timing and priority of the NEPA analyses for the two allotments is at the sole discretion of the Secretary. *Id.* § 1752(i). Plaintiffs' NEPA claim fails. *W. Watersheds Project*, 629 F. Supp. 2d at 971-72.

2. Plaintiffs cannot show that continued grazing "would" result in an irretrievable commitment of resources.

Plaintiffs contend that an environmental analysis is required here before an "irreversible and irretrievable commitment of resources." (Pls.' Br. at 13.) Plaintiffs' argument fails for at least two reasons: (1) because FLPMA provides an exception to NEPA and "other applicable laws," 40 C.F.R. § 1506.1 and earlier Ninth Circuit caselaw do not apply; and (2) Plaintiffs have failed to show that the continuation of grazing "would" cause environmental harm or limit the choice of reasonable alternatives.

First, in accordance with the 43 U.S.C. § 1752, the Forest Service reissued the permit to ARS under the same terms and conditions as the expiring permit in June 2017. (Mickelsen Decl. ¶ 5 and Exs. B and F.) Because FLPMA provides that "terms and conditions" in an expired grazing permit "shall be continued" until the agency completes any analysis under NEPA and other laws (43 U.S.C. § 1752(c)(2)), NEPA's implementing regulations, including 40 C.F.R. § 1506.1, do not apply here. *See Great Old Broads*, 452 F. Supp. 2d at 81 (explaining that the riders amended "all applicable laws").[5]

Second, even if the Court finds that FLPMA did not supersede the NEPA regulations, Plaintiffs cannot show that the authorization of grazing on these allotments "*would* have an adverse environmental impact; or limit the choice of reasonable alternatives." 40 C.F.R. § 1506.1 (emphasis added). "Would" is defined as (1) "the past tense of will" or (2) (expressing the conditional mood) indicating the consequence of an imagined event." OXFORD ENGLISH DICTIONARIES, "would" *available at https://en.oxforddictionaries.com/definition/would* (last

[5] The Ninth Circuit cases that Plaintiffs cite do not address the effect of the revisions to FLMPA because they do not involve grazing. *See Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000); *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004); *Blue Mtns Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1210 (9th Cir. 1998).

accessed Nov. 2, 2017). The regulations do not, in contrast, use "may" or "could." "Would," in this context, thus must denote certainty – that an agency's action *will* (if it occurs) result in a particular consequence. Otherwise, an agency would be required to prove that an action *would not* have such effects before authorizing grazing in accordance with 43 U.S.C. § 1752.

Plaintiffs cannot show that the authorization *would* have such consequences because sheep grazing has been managed on these allotments by the Sheep Station for decades without the adverse consequences that Plaintiffs predict. Indeed, between the reintroduction of bighorn sheep, ending in 1982, and 2016, the herd has remained non-viable. And no bighorn sheep have even been sighted within visual proximity to the domestic sheep on these allotments. While continued grazing *may* have an adverse environmental impact, *if disease transmission occurs*, Plaintiffs cannot show that disease transmission *would* occur, if grazing continues.

B. The Forest Service has not violated NFMA: it has followed its Forest Plan.

Under the National Forest Management Act, each action taken by the Forest Service must be consistent with the applicable Forest Plan. 16 U.S.C. § 1604(i); *see also Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1092-93 (9th Cir. 2003). Here, Plaintiffs allege that the Forest Service has violated NFMA by (1) failing to "maintain viable populations" of bighorn sheep and (2) failing to take any action to phase out the use of the Snakey-Kelly Allotments. (Pls.' Br. at 16-17.) Both of these contentions are factually wrong.

As Plaintiffs and their experts recognize, "a viable population is more than one hundred animals." (Pls.' Br. 16-17.) So, with a maximum of only 60 animals in 1995 (and just 36 animals in 2016) the South Beaverhead herd is not and has never been a viable population in itself. Thus, even if the Forest Plan is interpreted to mean the Forest must maintain separate and viable populations of bighorn sheep, the Forest could not have *maintained* the South Beaverhead herd as a viable population because *it has not been* a viable population since the early 1900s.

More accurately interpreted, the Forest Plan requires the Forest to maintain a viable population of bighorn sheep across the Forest, which the Forest does. (*See* Yorgason Decl. ¶ 33.) Even without the South Beaverhead herd, the Forest would maintain three other bighorn sheep herds in each subsection of the Forest, where sheep currently occur. (*See id.*; Mickelsen Decl. ¶ 13.) The Forest has acted consistently with its Forest Plan by maintaining a viable bighorn sheep population.

Plaintiffs' second allegation (that the Forest Service has failed to take any action to phase out the use of these allotments) fares no better. The Forest Plan states that

> the Kelly Canyon and Snakey Canyon winter sheep allotments . . . will be phased out on an opportunity basis . . . An opportunity is defined as a suitable or favorable time to abolish or close an allotment because of nonuse violations, term permit waivers where the permit is waived back to the government, resource protection, or permit actions resulting in cancellation of the permit. If opportunities do not arise, then efforts will be made to relocate or accommodate the sheep to other areas.

No opportunity has arisen to close the Snakey-Canyon Allotments. (Mickelsen Decl. ¶ 19.) The Forest Service has made efforts to relocate ARS to alternative winter ranges. (*Id.*) Currently, there are no other winter allotments available on the Caribou-Targhee National Forest for domestic sheep grazing.[6] (*Id.*) Moreover, in total, the Targhee National Forest has closed 208,142 acres to domestic sheep grazing and placed 54,554 acres in nonuse, as opportunities arose. (*Id.* ¶ 24.) For the South Beaverhead herd alone, the Forest has closed or placed in nonuse five allotments, amounting to approximately 51,000 acres. (*Id.* ¶ 26.)

Wildlife viability is not the Forest Service's only consideration when developing site-specific plans for National Forest System lands. Under the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–53, the Forest Service must manage forest lands so as to provide for a

[6] The Caribou National Forest and the Targhee National Forest were administratively combined in 2000 and are currently managed together, but under separate Forest Plans. (Mickelsen Decl. ¶ 3.)

wide variety of possible uses of those lands, including outdoor recreation, rangeland grazing, timber harvesting, watershed protection, fish and wildlife conservation, and wilderness preservation. 16 U.S.C. § 1604(e)(1). The Forest Service's decision not to suspend grazing on the Snakey-Canyon Allotments while it conducts its environmental analysis was thus not arbitrary and capricious. Ultimately, those choices are "balancing risks, not certainties, with other multiple-use priorities." (Mickelsen Decl. ¶ 30.) Here, the Forest Service balanced the risk of contact and disease transmission to the South Beaverhead herd against the benefits obtained from the research conducted by ARS and concluded that the risk of contact was acceptable, in this situation. (*Id.*) The Court should defer to that judgment.

C. WWP agreed that grazing may continue on the Snakey-Kelly Allotments until the environmental analysis is complete.

In 2011, Plaintiff WWP (along with other groups) challenged the Forest Service's environmental analysis related to the Snakey-Kelly Allotments. *See W. Watersheds Project*, No. 4:10-CV-00612-ELJ-REB, ECF No. 1. The parties settled that case, and Judge Lodge entered the settlement and dismissed the case with prejudice, pursuant to the parties' stipulation.

In the settlement agreement, the Forest Service agreed to issue new grazing decisions supported by environmental analyses for the Snakey-Kelly Allotments. *Id.*, ECF No. 109-1, ¶¶ 1-2. The Forest Service agreed to commence the environmental analyses by April 2015 (*Id.* ¶ 2), and the analyses are underway (Mickelsen Decl. ¶ 29). While the Forest Service is conducting that analysis, Plaintiff WWP agreed that "[p]ending completion of the new environmental analysis and decision-making processes, *grazing may continue to occur on the allotments at issue* under the terms and conditions of the existing permits." *See W. Watersheds Project*, No. 4:10-CV-00612-ELJ-REB, ECF No. 109-1, ¶ 4 (emphasis added). Plaintiff WWP is

unlikely to succeed on the merits because it has expressly waived any challenge to grazing on the Snakey-Kelly Allotments, until new decisions have been issued.[7]

II. IRREPARABLE HARM

A. Plaintiffs' delay undercuts their claim of irreparable harm.

By delaying in bringing this motion, Plaintiffs have attempted to create a false emergency – domestic sheep have been grazing these allotments at this time of year for almost a century. The "new" telemetry data was provided to Plaintiffs in May of 2017 (ECF No. 6 ¶ 6.) The temporary permit was issued in June. (Mickelsen Decl., Ex. B.) Yet, Plaintiffs waited until just two and a half weeks before grazing was scheduled to begin to file their motion. Plaintiffs' claim of imminent, irreparable injury is undercut by their delay in bringing this action and in filing this motion. It is well established that a long delay before seeking a preliminary injunction implies a lack of urgency and little likelihood of irreparable harm. *Garcia v. Google, Inc*., 786 F.3d 733, 746 (9th Cir. 2015). Plaintiffs' delay undermines their claim of irreparable harm.

B. Plaintiffs have not shown a likelihood of immediate injury in the absence of an injunction.

The Forest Service agrees that *if* there is contact between bighorn and domestic sheep, and *if* that contact results in disease transmission, *then* there is a *risk* of extirpation of the small,

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[7] The Forest Service anticipates that it will move to dismiss Plaintiff WWP on the basis of the settlement agreement, should this litigation proceed. The Forest Service takes no position as to the appropriate judge to decide that issue. Under Paragraph 8 of the agreement, the parties agreed that "this Court" would retain jurisdiction, which may refer to Judge Lodge. *W. Watersheds Project*, No. 4:10-CV-00612-ELJ-REB, ECF No. 109-1, ¶ 8.

In that same paragraph, the parties agreed that they would meet and confer to resolve any disputes over the settlement agreement, before seeking relief from the Court. *Id.* WWP did not meet and confer before filing their complaint or request for emergency relief. Counsel for the Forest Service met and conferred in good faith with counsel for WWP, before filing this brief. Given WWP's request for emergency relief, , it is not possible for the Forest Service to wait 60 days to bring this issue to this Court's attention in addressing WWP's likelihood of success.

non-viable, translocated South Beaverhead herd. Thus, the parties agree that *if* there is harm, it will be irreparable, but disagree as to the likelihood of that harm. Under *Winter,* "plaintiffs must demonstrate a likelihood of irreparable harm – not just a possibility." *Winter,* 555 U.S. at 21; *see also Associated Gen. Contractors of California, Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991) ("A plaintiff must . . . demonstrate *immediate* threatened injury as a prerequisite to preliminary injunctive relief.") (emphasis added).

Plaintiffs cannot demonstrate irreparable harm without first quantifying the risk of contact. (*See* ECF No. 9-2 at ROD-12 ("Determining the probability that a bighorn will reach an occupied allotment and that contact between the species will result in disease transmission is problematic.").) Plaintiffs' declarations allege that contact is "likely." But that belief is not supported by the current healthy status of the herd, the Idaho Fish and Game telemetry data and history of observations in these allotments, or the facts cited by Plaintiffs.

First, the evidence does not support the Plaintiffs' opinion that the South Beaverhead herd is diseased. (ECF No. 5 ¶ 13 ("In my opinion, disease transmission from domestic to bighorn sheep is preventing the bighorn population from recovering"); ECF No. 4 ("I believe that this population has likely been exposed to diseases from domestic sheep that has caused and continues to cause depressed recruitment). Based on testing conducted by Idaho Fish and Game, the South Beaverhead herd is disease-free. (Yorgason Decl. ¶ 21.) That the herd is disease free suggests either that there has been no recent contact between the South Beaverhead herd and domestic sheep or that any such contact has not resulted in disease transmission.

Second, based on the telemetry and observation data from 2002 to 2015, bighorn sheep have not crossed over into the boundary of the Snakey-Kelly Allotments, with one exception. (Yorgason Decl. ¶¶ 26-28.) In November 2015, a radio collared ram made a longer distance

foray and crossed over into the Snakey allotment area. (*Id.* ¶ 28.) The telemetry data showed the ram entered the Snakey allotment at the top of Peterson Canyon and exited the allotment soon thereafter. (*Id.*) Although domestic sheep were on the allotment at that time, Sheep Station personnel did not observe the bighorn ram and no contact was observed. (*Id.*; Taylor Decl. ¶ 31.) Moreover, the Sheep Station has grazed these allotments since 1924 and since the reintroduction of the South Beaverhead herd in 1982, it has not yet been extirpated. (*See* Taylor Decl. ¶ 8.)

Third, Plaintiffs contend that because best management practices "are insufficient to *prevent* new contacts," the risk of contact is high. (ECF No. 4 ¶ 29.) But just because best management practices are insufficient to *prevent* contact, that does not make contact *likely*. The sheep authorized to graze on the Snakey-Kelly Allotments are domestic sheep used for research purposes. (Mickelsen Decl. ¶ 9.) As such, these sheep are more intensively managed than a traditional range operation. (*Id.*) The sheep are continually monitored for disease and sickness and sick sheep are removed from the herd. (*Id.*) The management practices employed by ARS, along with the unforested, open, flat terrain, reduce the risk of contact (although they do not eliminate this risk). (*Id.* ¶¶ 12, 30; Yorgason Decl. ¶ 32; Taylor Decl. ¶¶ 28-29.)

The motivation of the Sheep Station to account for its animals and separate them from bighorn sheep is also different than the motivation of other permittees. For example, most permittees "conduct a 100% count of all domestic sheep" at the beginning and end of the grazing season, to approximate how many sheep have been killed or lost. (ECF No. 9-1 at F-4.) If a sheep is killed or lost, the permittee loses the value of that one sheep. In contrast, the Sheep Station counts all of the sheep three times *per week* to ensure none have been lost. If the Sheep

Station loses a sheep, it loses not only the value of the sheep, but also the value of that genetic line, which requires decades to develop and refine. (Taylor Decl. ¶¶ 21-22.)[8]

Finally, an injunction against the Forest Service will not eliminate the possibility of irreparable harm. Domestic sheep will continue to graze on private and Bureau of Land Management land within the South Beaverhead herd's range. (Yorgason Decl. ¶ 32.)

C. The consequences of contact here are distinguishable from other Forest Service decisions.

As Plaintiffs point out, the Forest Service has, in other National Forests, closed or placed in non-use allotments to protect bighorn sheep, while it completes its environmental analyses. But, as in this case, the Forest Service must consider all the facts, risks, and potential consequences before deciding whether to authorize grazing.

On the Payette National Forest, the Forest Service suspended grazing while completing the Payette EIS (ECF No. 9-1) and Payette ROD (ECF No. 9-2). There, the Forest Service was responding to a risk of disease transmission that jeopardized the entire population of bighorn sheep on the Payette National Forest:

> The Chief of the Forest Service found that "the viability of bighorn sheep populations within the Hells Canyon area, and across the Payette [National Forest], appears to be threatened by allowing continued grazing of domestic sheep in or near occupied bighorn sheep habitat. . . .Transmission of disease to bighorn sheep on the Payette [National Forest] that are part of the Hells Canyon population *will place the entire Payette [National Forest] population at substantial risk*."

W. Watersheds Project v. U.S. Forest Serv., No. 07-CV-151-BLW, 2007 WL 1729734, at *1 (D. Idaho, June 13, 2007) (emphasis added). So, although the *risk* of disease transmission on the Payette National Forest was similar to the risk of disease transmission facing the Targhee

[8] Plaintiffs point to an incident in 2010, when the Sheep Station lost sheep on the Bernice Allotment. (ECF No. 4 ¶¶ 25-28.) That loss was the result of a herder who was not vigilant. (Taylor Decl. ¶ 34.) To avoid future similar losses, ARS instituted an annual intensive herder training program in 2013, described in detail in the Declaration of Dr. J. Bret Taylor. (*See id.*)

National Forest, the *consequences* of that disease transmission were much different. On the Payette National Forest, continued grazing of the subject allotments risked extirpation of the entire population of bighorn sheep on the Payette National Forest. Whereas here, disease transmission to the South Beaverhead herd "will not jeopardize the viability of the bighorn sheep population on the Targhee National Forest nor result in a trend toward listing the species under the Endangered Species Act." (Mickelsen Decl. ¶ 30; Yorgason Decl. ¶ 15.)

The consequences of suspending grazing while the Forest Service conducts its environmental analysis are also different. The Payette National Forest's decision to suspend grazing had the potential to cause economic harm to permittees and may have required relocation of their sheep to feedlots. Here, in contrast, a decision to suspend grazing would result in more than mere economic harm. It would jeopardize years of research, evaluating the ecology of respiratory disease under rangeland conditions and evaluating genetic lines for health, performance, longevity, wool quality and meat quality. (*See* Taylor Decl. ¶¶ 9, 11-20.) That would harm more than a single permittee; it would impact advancements for the entire sheep industry and benefits to the general public.

III. THE BALANCE OF HARMS AND PUBLIC INTEREST WEIGH AGAINST AN INJUNCTION

Plaintiffs must prove that enjoining the Projects would on balance serve the public interest. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009) (Analysis of the balance of equities and public interest merge when the Government is the opposing party.). Here, the risk of contact and disease transmission to the South Beaverhead herd must be balanced with the benefits of the Sheep Station's research into sheep production, health, breed improvement and development, and genome explorations, and rangeland science and ecology. (Taylor Decl. ¶ 23; Mickelsen Decl. ¶ 30.)

The Forest Service recognizes the risk of contact and disease transmission. Recognizing this risk, the Forest Service has taken many steps to reduce the risk of contact and protect this particular herd. (Mickelsen Decl. ¶¶ 9-10.) Taken together, the low incidence of bighorn sheep use of the Snakey-Kelly Allotments, as shown by the telemetry data, along with ARS's sheep management practices and the open terrain (that allows for better bighorn observation and easier management of domestic sheep) reduce the risk of contact and potential for disease transmission. (*Id.* ¶ 30.) And *even if* disease transmission to the South Beaverhead herd occurs, it will not jeopardize the viability of the bighorn population on the Targhee National Forest. (*Id.*)

That reduced risk of contact and the potential consequence of disease transmission, must be balanced with the other uses of the Targhee National Forest and the benefits obtained from those uses – here, the research. If ARS is not permitted to graze the Snakey-Kelly Allotments, years of research will be jeopardized, including a project evaluating U.S. meat-breed sires for health, performance, and carcass value and quality, a project evaluating U.S. wool-breed sires for health, reproductive efficiency, longevity and wool quality, and a project directed at understanding ecology of respiratory disease in domestic and bighorn sheep in rangeland conditions. (Taylor Decl. ¶¶ 9, 11.) The value, relevance, and success of this research depends upon the ability to repeat seasonal grazing in the same areas each year and in a manner that mimics sheep grazing systems throughout the western United States. (*Id.* ¶¶ 12, 18.) Each of these projects is in their final year, which is critical for maintaining a scientifically valid replication. (*Id.* ¶¶ 13, 18.)

These research projects have been approved by ARS, Office of Scientific Quality Review, which initiated appropriation of funds for the research. The approval of these projects is based on the determination that stated number of sires, breeding ewes, production environment,

and years for the experiment are appropriate to complete the objectives. (*Id.* ¶¶ 14, 19.) Loss of the final year of data prevent the Sheep Station completing its mandated research in accordance with the designated use of appropriated funds. (*Id.* ¶¶ 15, 20.)

In addition to the direct and immediate harm that ARS will suffer, the sheep industry and general public will also be harmed by the loss of this research. Grazing on public lands in the western United States is an important component of the nation's food security infrastructure, public land management strategies, and rural livelihood. The research conducted by ARS will have long term benefits to the development of healthy, natural, and safe consumer products. (Taylor Decl. ¶ 10.)

The Forest Service has not disregarded the potential risks in deciding to allow ARS to graze the Snakey-Kelly Allotments, but instead weighed those potential risks against the benefits gained by taking those risks. The Court must likewise balance the *possibility* of contact and the *possibility* of disease transmission from domestic sheep to the South Beaverhead heard, with the *certainty* of jeopardizing the integrity and applicability of years of research performed by ARS. Here, the balance of harms favors allowing the Sheep Station to turn out their sheep on November 21, 2017.

CONCLUSION

For the reasons stated above, Plaintiffs have failed to show a likelihood of success or raise serious questions going to the merits and so the Court's inquiry may end there. Even if the Court finds serious questions going to the merits of the case, the balance of harms tips in favor of allowing the Sheep Station to turn out their sheep on November 21, 2017, and allowing grazing to go forward while the Court considers the merits of Plaintiffs' claims on a full record. Plaintiffs' request for a temporary restraining order should be denied.

Respectfully submitted this 3rd day of November, 2017.

BART M. DAVIS
UNITED STATES ATTORNEY
By:

/s/ Christine G. England
CHRISTINE G. ENGLAND
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 3, 2017, the foregoing **FOREST SERVICE'S RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER** was electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following person(s):

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