



**Objections to the
Shoshone
Land Management Plan
Draft Decision**

Submitted by:

North American Packgoat Association

March 20, 2014

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On behalf of the North American Packgoat Association, I hereby timely submit these Objections to the Shoshone Land Management Plan Draft Decision. I also request a meeting with the reviewing officer on behalf of the North American Packgoat Association to discuss the Objections herein and to aid in the resolution thereof.

Date: March 20, 2014

/s/ Andrew A. Irvine _____
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I. Introduction to Objections

The North American Packgoat Association (“NAPgA”) timely files objections to the Draft Record of Decision (“Draft ROD”), Final Environmental Impact Statement (“FEIS”) and revised Land Management Plan (“LMP”) of the Shoshone National Forest Land Management Plan Revision. *See* 79 Fed. Reg. 3200, 3200-01 (Jan. 17, 2014) (Notice of Availability); <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning/?cid=stelprdb5379153> (plan revision webpage). Notice of the 60-day objection filing period was published in the Denver Post on January 24, 2014. *See* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5446566.pdf. Objections are provided pursuant to the Forest Service’s pre-decisional administrative review process at 36 C.F.R. Part 219, Subpart B (2013). The objection filing period expires on March 25, 2014.

NAPgA urges the Forest Service to thoroughly consider these objections and respond in accordance with the pre-decisional administrative review process. NAPgA welcomes the opportunity to meet with the reviewing officer to discuss the issues raised in these objections and the potential resolution of such issues.

NAPgA and its numerous goatpacking-members will be affected by the management direction proposed in the Draft ROD and LMP. The proposed management direction would result in closure of one of the premier goatpacking areas in the nation and set a bad precedent for other forests to follow in managing goatpacking. These objections will better inform the Draft ROD, FEIS and further develop the efficacy of the management direction as defined by the LMP.

A. Overview of the North American Packgoat Association

The North American Packgoat Association, Inc., is an organization established specifically for promoting packing with pack goats. The organization was incorporated in March, 2001, as a 501(c)(3) non-profit organization.

NAPgA seeks to further the pursuit of goatpacking by sharing the knowledge, ideas, and experiences of its members, by promoting the use of pack goats to the public as a means of low impact wilderness transportation and recreation, by serving as an advisory group on local and national land use issues, and to engage in other activities related to educating the public about goatpacking.

B. Background on the Draft ROD, FEIS and LMP

On November 14, 2011, the Forest Supervisor for the Shoshone National Forest (“Shoshone” or “Shoshone NF”) issued Forest Order 02-14-00-12-01 concerning “Temporary Area Closure to Domestic Goat Use” (“Order”). *See* Shoshone National Forest, Order 02-14-00-12-01 (Nov. 14, 2011), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5340051.pdf (last visited Sept. 6, 2012). Pursuant to 36 C.F.R. § 261.50(a), the Order temporarily prohibited: “Possession or use of domestic goats on any National Forest System lands on the Wapiti, Clarks Fork, Greybull and Wind River Ranger Districts” as depicted on a map accompanying the Order.

In April 2012, the Shoshone NF published an analysis of the effects of disease transmission from domestic sheep and goats on the Shoshone to bighorn sheep populations occurring within and near the Shoshone. *See* Shoshone National Forest, “Risk Analysis of Disease Transmission between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep” (“Shoshone RADT Report”) (Apr. 2012), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5383002.pdf (last visited Sept. 6, 2012). The Shoshone RADT Report recommended that the Shoshone “[c]lose all occupied core native bighorn sheep habitat and the area within 26 km of the occupied core native habitat to domestic goat (includes pack goat) use.” *Id.* at 15.

In July 2012, the Shoshone NF published its Draft EIS and Draft LMP relying on the Shoshone RADT Report. *See* Shoshone National Forest, “Draft Environmental Impact Statement, Shoshone Land Management Plan Revision” (July 2012), available at <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning?cid=stelprdb5379153> (last visited Sept. 6, 2012); Shoshone National Forest, “Draft Land Management Plan, Shoshone National Forest” (July 2012), available at <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning?cid=stelprdb5379153> (last visited Sept. 6, 2012). The Draft LMP was intended to revise the Shoshone National Forest 1986 Land Management Plan (“1986 LMP”) as amended.

Comments on the DEIS and Draft LMP were requested by the Shoshone NF as required by 40 C.F.R. §§ 1502.9, 1503.1. *See* 77 Fed. Reg. 46,433 (Aug. 3, 2012) (Notice of Availability); *see also* Shoshone National Forest, Draft Plan Revision Documents, available at <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning?cid=stelprdb5379153> (last visited Sept. 6, 2012) (requesting comments). On October 10, 2012, NAPgA timely submitted comments on the DEIS and Draft LMP. Among other violations, NAPgA’s comments established that the Shoshone NF violated the Federal Advisory Committee Act (“FACA”), the National Environmental Policy Act (“NEPA”), the National Forest Management Act (“NFMA”), and the Administrative Procedure Act (“APA”) in preparing the DEIS and Draft LMP. NAPgA requested that these violations be remedied in the Draft ROD, FEIS and LMP. A copy of these comments is attached as Exhibit 1.

On January 17, 2014, the Shoshone NF published the Draft Record of Decision (“Draft ROD”), Final Environmental Impact Statement (“FEIS”) and revised Land Management Plan (“LMP”) of the Shoshone National Forest Land Management Plan Revision. *See* 79 Fed. Reg. 3200, 3200-01 (Jan. 17, 2014) (Notice of Availability); <http://www.fs.usda.gov/detail/shoshone/landmanagement/planning/?cid=stelprdb5379153> (plan revision webpage). These documents again relied on the Shoshone RADT Report. *See* Draft ROD at 9; FEIS at 53, 224, 226, 767, 771, 782, 840. The Shoshone NF provided for a 60-day objection filing period pursuant to the Forest Service’s pre-decisional administrative review process at 36 C.F.R. Part 219, Subpart B (2013). The objection filing period expires on March 25, 2014.

The Draft ROD presents the Shoshone NF Supervisor’s decision to select Alternative G as presented in the FEIS to serve as the basis for the revised LMP for the Shoshone NF. Draft ROD at 1. Under Alternative G, “[d]omestic goats will not be allowed in core native bighorn sheep range in response to concerns over disease transmission to bighorn sheep.” *Id.* at 9. This

prohibition is repeated in the summary of Alternative G in the FEIS: “[d]omestic goats would not be allowed in core native bighorn sheep range.” FEIS at 47. In the Draft ROD and summary of Alternative G in the FEIS, the prohibition merely applies to “domestic goats,” but later in the FEIS the prohibition is expanded to include “domestic goats (including pack goats).” *See, e.g., id.* at 61 (Table 19).

NAPgA objects the Shoshone NF Supervisor’s decision to select Alternative G as presented in the FEIS and, more particularly, to the Shoshone NF Supervisor’s decision to prohibit pack goats in core native bighorn sheep range on the Shoshone NF. This decision to prohibit pack goats was made in violation of FACA, NEPA, NFMA and the APA, among other authorities. Although these violations were established and detailed in NAPgA’s comments, the Shoshone NF failed to remedy them in the Draft ROD, FEIS and LMP. As a result, NAPgA now timely files its Objections to the Draft ROD, FEIS and LMP. The Shoshone NF’s violations of FACA, NEPA, the APA and other authorities are discussed in detail below. NAPgA requests that the Shoshone NF cure these violations in accordance with the recommendations below and allow the use of pack goats in core native bighorn sheep range on the Shoshone NF.

II. Legal Background for the Objections

The Shoshone NF failed to consider the most important aspects of the problem of disease transmission from pack goats to bighorn sheep and offered explanations for its decision to close the Shoshone NF to pack goats that run counter to the evidence before it. As a result, the Shoshone NF made an uninformed decision contrary to the requirements of NEPA, 42 U.S.C. §§ 4321 et seq. The Shoshone NF also failed, under NEPA, to take a hard look at the environmental consequences of eliminating pack goats on the Shoshone NF to reduce the risk of disease transmission to bighorn sheep. In addition, as required by the APA, 5 U.S.C. §§ 701 et seq., the Shoshone NF failed to examine relevant data on pack goats and articulate a satisfactory explanation for its action to eliminate pack goats from the Shoshone NF, including a rational connection between the facts found and the choices it made when assessing the impact of goatpacking on bighorns. Finally, the Shoshone NF failed to meet the requirements of FACA, 5 U.S.C. App. 2, and a direct order of the United States District Court for the District of Idaho, prohibiting the use of illegal advisory committees.

A. NEPA prohibits uninformed agency action

In passing NEPA, Congress “recogniz[ed] the profound impact of man’s activity on the interrelations of all components of the natural environment” and set out “to create and maintain conditions under which man and nature can exist in productive harmony.” 42 U.S.C. § 4331(a). To bring federal action in line with Congress’ goals and to foster environmentally informed decision-making by federal agencies, NEPA “establishes ‘action-forcing’ procedures that require agencies to take a ‘hard look’ at environmental consequences.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir. 2011) (citing *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000)). Foremost among those procedures is the preparation of an environmental impact statement (“EIS”). *Id.*

Agencies considering “major Federal actions significantly affecting the quality of the human environment” are required to prepare an EIS. 42 U.S.C. § 4332(C). The EIS “shall

provide full and fair discussion of [the] significant environmental impacts” of the proposed action. 40 C.F.R. § 1502.1. That discussion serves two purposes:

First, it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. Second, it 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.

W. Watersheds Project, 632 F.3d at 487 (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004)). This process does not mandate particular substantive results, but “NEPA . . . prohibits uninformed . . . agency action.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). By focusing agency and public attention on the environmental effects of proposed action, “NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Marsh v. ONRC*, 490 U.S. 360, 371 (1989).

B. FACA requires balance and transparency in agency deliberations

Congress enacted FACA “to recognize the importance of having advisory committees to the Executive Branch be completely open to public observation and comment.” *Miccosukee Tribe of Indians of Florida v. United States*, 420 F. Supp. 2d 1324, 1341 (S.D. Florida 2006) (citation omitted). Congress sought to counter the fear that committees would be dominated by representatives of industry and other special interest groups seeking to advance their own agendas, and to ensure that the public could remain apprised of the existence, activities and cost of advisory committees. See *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 446 (1989) (citing 5 U.S.C. App. 2 § 2(b)).

To effectuate these purposes, FACA prohibits the establishment of “advisory committees” by federal agencies without adherence to the provisions under FACA for establishing and managing such committees. See 5 U.S.C. App. 2, § 9. These provisions ensure that advisory committees to federal agencies are transparent and adequately represent the public interest by imposing a number of requirements on advisory groups regarding such matters as advance notice of committee meetings, the keeping of public availability of minutes, and the composition of advisory group membership. See *Idaho Wool Growers Ass'n v. Schafer*, 637 F. Supp. 2d 868, 871 (D. Idaho 2009) (citing 5 U.S.C. App. 2, §§ 2, 9-14).

C. Review under the APA.

The APA, 5 U.S.C. §§ 701-706, provides for judicial review of agency actions, such as those at issue here.¹ Under the APA, a reviewing court shall “hold unlawful and set aside agency

¹ NEPA claims are subject to judicial review under the APA, 5 U.S.C. § 706(2)(A). See *Dep't of Transp. v. Pub. Citizen*, 541 U.S. at 763; *Marsh*, 490 U.S. at 375–76; *League of Wilderness Defenders-Blue Mtns. Biodiversity Project v. U.S.*, 549 F.3d 1211, 1215 (9th Cir. 2008) (the APA provides authority for the court’s review of decisions under NEPA); *W. Watersheds Project v. U.S. Forest Serv.*, 2006 WL 292010, *2 (D. Idaho) (same). Likewise, FACA claims are

action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] without observance of procedures required by law.” 5 U.S.C. § 706(2)(A), (D). Although the arbitrary and capricious standard is a “narrow one,” the court is required to “engage in a substantial inquiry” and a “thorough, probing, in-depth review.” *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971)).

Under this standard, an agency decision is to be reversed as arbitrary and capricious if the agency has “. . . entirely failed to consider an important aspect of the problem, [or] offered an explanation that runs counter to the evidence before the agency. . . .” *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). “The reviewing court should not attempt itself to make up for such deficiencies.” *Id.* (citation omitted). Most fundamentally, the agency must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle*, 463 U.S. at 53 (quotation omitted).

Where, as here, there has been a change in policy from allowing goatpacking on the Shoshone NF to eliminating goatpacking on the Shoshone, judicial review starts with the presumption that the change in policy is **not** justified by the administrative record. *Motor Vehicle*, 463 U.S. at 42. Additionally, the traditional presumption of agency expertise “‘may be rebutted if the decisions, even though based on scientific expertise, are not reasoned.’” *W. Watersheds Project v. Ashe*, No. 11-462, 2013 WL 2433370 at *5 (D. Idaho June 4, 2013) (citations omitted).

III. Objections to the Draft ROD, FEIS and LMP

Objection 1. The Shoshone NF Violated FACA and Ignored the Order of the United States District Court for the District of Idaho by Relying on the Findings and Conclusions of the RADT and Payette Principles Committees in Preparing the Draft ROD, FEIS and LMP.

In 2009, the United States District Court for the District of Idaho prohibited the Shoshone NF’s use of the findings and conclusions of two illegal advisory committees, known as the RADT Committee and Payette Principles Committee. See *Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868 (D. Idaho 2009); *Idaho Wool Growers Assoc. v. Schafer*, 2009 WL 3806371 (D. Idaho). NAPgA discussed this prohibition at length in its comments on the DEIS and Draft LMP. NAPgA Comments at 13-14.

In its comments, NAPgA instructed that “a new DEIS and subsequent final EIS and LMP must be drafted without reliance on the RADT Committee’s and Payette Principle Committee’s findings and conclusions.” *Id.* at 13. The Shoshone NF ignored NAPgA’s comments and failed

subject to judicial review under the APA, 5 U.S.C. § 706(2)(A). See *Idaho Wool Growers Ass’n*, 637 F. Supp. 2d 868, 871 n. 2 (“Forest Service concedes that claims for alleged FACA violations are to be brought under the APA”).

to prepare a Draft ROD, FEIS and LMP that do not rely on the RADT and Payette Principles Committees' findings and conclusions.

On July 1, 2009, U.S. District Court Judge B. Lynn Winmill issued a decision in *Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868 (D. Idaho 2009), attached as Exhibit 2. On November 9, 2009, Judge Winmill issued another memorandum and order clarifying that decision. *See Idaho Wool Growers Assoc. v. Schafer*, 2009 WL 3806371 (D. Idaho). Plaintiffs challenged the Forest Service's establishment and use of two committees and their reports as violations of the Federal Advisory Committee Act, NFMA, and the APA. These committees are known as the RADT Committee and the Payette Principles Committee. The reports from the RADT Committee and the Payette Principles Committee are referenced and relied upon in the Shoshone RADT Report, which forms the basis for alternatives and analysis in the FEIS and the proposed management direction in the Draft LMP. *See Shoshone RADT Report at 19-20* ("Literature Cited"); *see also id.* at 3-4, 12-13 (referencing and relying upon reports).

Judge Winmill entered an order granting plaintiffs' motion for summary judgment. In so doing, Judge Winmill wrote "[t]he issue here is whether the Forest Service's Committees violated FACA's and NFMA's procedural requirements and, if so, whether the Committees' reports should be utilized for any *future* Forest Service Decisions." *Idaho Wool Growers*, 637 F. Supp. 2d at 877. The Court ordered that "[t]he Committees' findings and/or conclusions are not to be relied upon by the Forest Service *with respect to any future agency decisions.*" *Id.* at 880 (emphasis added). This includes the Shoshone NF's FEIS and LMP at issue here.

Despite Judge Winmill's decision, the Shoshone NF still relies upon the findings and conclusions of the RADT Committee and Payette Principles Committee in the Shoshone RADT Report and DEIS. *See Shoshone RADT Report at 3-4, 12-13; FEIS at 222-23, 225* (referencing and relying on Shoshone RADT Report). And, the Shoshone NF still uses the findings and conclusions of the RADT Committee and Payette Principles Committee to develop alternatives in the FEIS and as support for its assumption that disease transmission occurs between domestic sheep or pack goats and bighorn sheep. *See FEIS at 35, 38, 40, 47, 53, 61, 222-23, 225.*

The Shoshone NF's continued use of such findings and conclusions is also prohibited by Judge Winmill's clarification memorandum and order. *See Idaho Wool Growers Assoc. v. Schafer*, 2009 WL 3806371 (D. Idaho), attached as Exhibit 3. There, Judge Winmill explained that the Forest Service should not "grandfather" RADT Committee and Payette Principles Committee findings and conclusions to support Forest Service decisions—" [s]imply put, and consistent with the Court's existing directive, the Forest Service may not rely upon the Committees' findings and/or conclusions in reaching future agency decisions – either directly or indirectly, through an end-run around the Court's mandate" *Id.* at *2. Judge Winmill stated: "[t]he Forest Service may not rely upon the Committee's findings and/or conclusions in reaching future agency decisions." *Id.* at *4. Clearly, that is what the Shoshone NF has done here.

Judge Winmill of the United States District Court for the District of Idaho ordered that "[t]he Forest Service may not rely upon the [RADT and Payette Principles] Committee's findings and/or conclusions in reaching future agency decisions." *See id.*; *see also id.* at *2 ("the

Forest Service may not rely upon the Committees' findings and/or conclusions in reaching future agency decisions – either directly or indirectly, through an end-run around the Court's mandate"). Judge Winmill's order did not simply apply to the Payette National Forest, but to the entire Forest Service. But for the Shoshone NF, the rest of the Forest Service recognizes the scope of Judge Winmill's order and has prohibited the use of documents that rely on the RADT and Payette Principles Committees.

For example, the Forest Service attempted to continue use of "A Review of Disease Related Conflicts Between Domestic Sheep and Goats and Bighorn Sheep" by Timothy J. Schommer and Melanie M. Woolever, General Technical Report RMRS-GTR-209 (May 2008), which relied in part on the findings of the RADT and Payette Principles Committees. When informed of this violation, the Forest Service's Washington Office decided: "Since GTR-209 includes findings and recommendations developed by the Payette Principles Committee, it would be inappropriate for the Forest Service to use GTR-209 in agency decisions of policy development. Given these circumstances, I am retracting GTR-209." Letter from Charles L. Myers, Deputy Chief for Business Operations, Forest Service, Washington Office, to Mr. Kent Holsinger and Ms. Laura L. Chartrand, Holsinger Law, LLC, at 1 (Aug. 7, 2009), *available at* http://www.fs.fed.us/qoi/documents/2009/CWGA_RHR_Response.pdf (last visited March 10, 2014).

The Forest Service's Washington Office acknowledged: "Judge Winmill ruled that this committee was subject to FACA requirements and the process used to form the committee did not follow FACA framework. Since the development of the Payette Principles Committee was flawed, Judge Winmill ruled that the Forest Service is not to rely on findings and/or conclusions developed by the Committee in future decision making." *Id.* While the Forest Service's Washington Office recognizes the legal implications of Judge Winmill's order, the Shoshone NF continues to operate in violation of the law.

With blatant disregard for Judge Winmill's clear order, the Shoshone RADT Report repeatedly references and relies upon the illegal RADT and Payette Principles Committees and their findings and conclusions. *See, e.g.*, Shoshone RADT Report at 3, 12-13, 19-20. In fact, parts of the Shoshone RADT Report are copied verbatim from the illegal report of the RADT Committee. The Shoshone NF erases any doubt as to its reliance on the illegal RADT and Payette Principles Committees and their findings and conclusions when it plainly admits that it has relied upon such committees and their findings and conclusions: "Because of the lack of quantitative models available to predict likelihood of disease outbreak in bighorn sheep populations due to the potential contact with domestic sheep or goats (including pack goats), the same basic outcomes, with the addition of domestic pack goats, identified by the Payette National Forest (USDA Forest Service 2006a) and used in the Payette's risk assessment, are utilized in this risk assessment." *Id.* at 12 (emphasis added).

To prepare the Shoshone RADT Report, the Shoshone NF formed the same type of biased and unbalanced committee that violated FACA on the Payette National Forest. *See* Shoshone RADT Report at 12 (discussing formation of committee). That committee then directly applied the exact risk assessment methodology that was not to be used by the Forest Service in any future agency decisions. *See id.* at 12-13.

After the Payette National Forest violated FACA by establishing and relying on the RADT and Payette Principles Committees, the Payette National Forest was forced to perform a new quantitative risk assessment to predict the risk of disease transmission from domestic sheep to bighorn sheep on the Payette National Forest. As the Payette National Forest states in its Southwest Idaho Ecogroup Land and Resource Management Plans Final Supplemental Environmental Impact Statement (“Payette NF FSEIS”): “The qualitative *Risk Analysis for Disease Transmission Between Bighorn Sheep and Domestic Sheep on the Payette National Forest* (USDA Forest Service 2006) was completely removed from the analysis and is no longer utilized in this effort. To assess the risk for contact between bighorn sheep and domestic sheep, the Payette National Forest developed a quantitative foray analysis to predict probabilities of contact.” Payette NF FSEIS at xvi, *available at* http://www.fs.usda.gov/detailfull/payette/landmanagement/planning/?cid=FSM9_033278&width=full (last visited February 26, 2014) (emphasis added).

Moreover, the Payette National Forest makes clear that “[t]he quantitative contact analysis . . . replaces the *Risk Analysis of Disease Transmission Between Domestic Sheep and Bighorn Sheep on the Payette National Forest* (risk analysis) (USDA Forest Service 2006).” *Id.* at 2-1. The Payette National Forest had to eliminate a number of the alternatives in its FSEIS on the following basis: “The most compelling reason was their reliance on the theory and data from the 2006 *Risk Analysis of Disease Transmission Between Domestic Sheep and Bighorn Sheep on the Payette National Forest*.” *Id.* at 2-4.

Thus, not only has the Shoshone NF ignored Judge Winmill’s order and NAPgA’s comments concerning the same, it has ignored the findings and actions of the very national forest that the Shoshone NF is basing its own findings and actions on, namely the Payette National Forest. The “Payette’s risk assessment,” “identified by the Payette National Forest (USDA Forest Service 2006a)” and “utilized” by the Shoshone NF is illegal and, as a result, was not even used by the Payette National Forest. Shoshone RADT Report at 12. Rather, the Payette National Forest employed a new quantitative risk assessment. Thus, the Shoshone NF’s reason for using the illegal “Payette’s risk assessment” is wrong—“Because of the lack of quantitative models available to predict likelihood of disease outbreak in bighorn sheep populations due to potential contact with domestic sheep or goats (including pack goats)” *Id.* There are quantitative models available, as demonstrated by the Payette National Forest.

The Shoshone NF’s violations of Judge Winmill’s clear order are critical because throughout the FEIS the Shoshone NF references the Shoshone RADT Report for the unsupported assumption that pack goats pose a risk for disease transmission to bighorn sheep:

- “Although the risk of disease transmission is low to very low, even one disease transmission event could be catastrophic to a core native bighorn sheep herd (USDA Forest Service 2013).” FEIS at 53; *see also id.* at 767, 771 (same).
- “Even one disease transmission event could be catastrophic to a core bighorn sheep herd. (See *Risk Analysis of Disease Transmission Between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep, Shoshone National Forest 2013.*)” *Id.* at 224.

- “However, there is no known ‘safe distance’ between the three species, so the risk of a future transmittal cannot be discounted (see Risk Analysis of Disease Transmission Between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep, Shoshone National Forest 2013).” *Id.* at 226.
- “Information from the Risk Analysis of Disease Transmission between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep Shoshone National Forest 2013 was considered for this analysis (USDA Forest Service 2013).” *Id.* at 771.
- “Available relevant information was considered for this analysis. DEIS Page 213 noted to see the Risk Analysis of Disease Transmission Between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep, Shoshone National Forest, 2012.” *Id.* at 782.
- “The Bighorn Sheep Disease Risk Assessment (USDA Forest Service 2012) prepared for the DEIS contains all of the literature used to prepare that document. The risk assessment is part of the project record.” *Id.* at 840.

Finally, the Shoshone NF Supervisor relied on the unsupported assumption that pack goats pose a risk for disease transmission to bighorn sheep from the Shoshone RADT Report in deciding in the Draft ROD that “[d]omestic goats [including pack goats] will not be allowed in core native bighorn sheep range in response to concerns over disease transmission to bighorn sheep.” Draft ROD at 9. As a result, the Draft ROD, FEIS and LMP are all tainted by the Shoshone RADT Report. That report is illegal and should not be relied upon by the Shoshone NF now or in the future.

Conclusion and Recommendation: The Shoshone NF has violated FACA and the Order of Judge Winmill, United States District Court for the District of Idaho, in its preparation of the Draft ROD, FEIS and LMP. As a result, these documents, along with the Shoshone RADT Report, are illegal and must be revised to eliminate any reliance on the findings and conclusions of the RADT and Payette Principles Committees. These violations are actionable now, without further action by the Shoshone NF. The reviewing officer must remand the Draft ROD, FEIS and LMP to the Shoshone NF so that they may be revised in compliance with FACA, NFMA and Judge Winmill’s order. This includes preparation of a new Shoshone RADT Report that does not rely on the findings and conclusions of the RADT and Payette Principles Committees, and which employs a new quantitative risk assessment.

Objection 2. The Shoshone NF Established and Utilized an Advisory Committee and its Report to Prepare the Draft ROD, FEIS and LMP in Violation of FACA.

Congress enacted FACA to ensure that advisory committees to federal agencies would be completely open to public observation and comment, and to ensure that advisory committees would be unbiased and not inappropriately influenced by the appointing authority or by any special interest. *See Miccosukee Tribe of Indians of Florida v. United States*, 420 F. Supp. 2d 1324, 1341 (S.D. Florida 2006) (citing *Alabama-Tombigbee Rivers Coalition v. Dep’t of Interior*, 26 F.3d 1103, 1106 (11th Cir. 1994)); *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 446 (1989) (citing 5 U.S.C. App. II § 2(b)); *Cummock v. Gore*, 180 F.3d 282, 284 (D.C. Cir. 1999) (citing H.R.Rep. No. 92-1017 (1972)). To effectuate these purposes, advisory committees must meet certain prescribed requirements and follow certain prescribed procedures. 5 U.S.C.

App. 2, § 10. These procedures ensure that advisory committees to federal agencies are transparent and adequately represent the public interest by imposing a number of requirements on advisory groups regarding such matters as advance notice of committee meetings, the keeping of public availability of minutes, and the composition of advisory group membership. *See Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868, 871 (D. Idaho 2009) (citing 5 U.S.C. App. II, §§ 2, 9-14).

FACA prohibits the establishment of “advisory committees” by federal agencies without adherence to the provisions under FACA for establishing and managing such committees. *See* 5 U.S.C. App. 2, § 9. The term “advisory committee” means “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is— . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees or the Federal Government . . .” 5 U.S.C. App. 2, § 3(2); *see Manshardt v. Federal Judicial Qualifications Committee*, 408 F.3d 1154, 1157 (9th Cir. 2005). Agency heads or other federal officials in creating an advisory committee shall “require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.” 5 U.S.C. App. 2, § 5(b)(2), (c).

Under FACA, no advisory committee shall be established by an agency unless such establishment is “determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.” 5 U.S.C. App. 2, § 9(a)(2). Further, no advisory committee shall “meet or take any action until an advisory committee charter has been filed . . . with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency.” 5 U.S.C. App. 2, § 9(c).

The Shoshone NF violated FACA in establishing and utilizing the advisory committee that developed the Shoshone RADT Report (“Shoshone RADT Committee”). The Shoshone RADT report states that “[w]ildlife biologists from the Wyoming Game and Fish Department . . . along with Shoshone land managers assisted in this risk assessment (WGFD, personal communication 2012b).” Shoshone RADT Report at 12. “Members of this risk assessment team” were provided certain documents and maps and then “discussed disease transmission risk factors for each bighorn sheep herd” on the Shoshone NF. *Id.* at 13. This “team” then performed a “risk assessment” by herd and decided whether the disease transmission risk from domestic sheep or goats (including packgoats) to the core native bighorn sheep herds was “very low” to “very high” due to livestock grazing on the Shoshone NF. *Id.* at 12-15. The “risk assessment team” then “all agreed” that “the risk to bighorn sheep is far too great to allow domestic goat use within core native bighorn sheep habitat.” *Id.* at 15. The risk assessment team recommended that the Shoshone NF “[c]lose all occupied core native bighorn habitat and the area within 26 km of the occupied core native habitat to domestic goat (includes pack goat) use.” *Id.* As the risk assessment team noted, “[t]his effectively closes the entire Shoshone National Forest, except the Washakie Ranger District to domestic goat use, including pack goats.” *Id.*

Under FACA, the term “advisory committee” means “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is— . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government . . .” 5 U.S.C. App. 2, § 3(2); *see Manshardt*, 408 F.3d at 1157. Here the Shoshone RADT Committee meets this definition as it was established and utilized by the Forest Service to develop advice or recommendations on disease transmission between domestic sheep and goats (including packgoats) on the Shoshone NF and it was not composed wholly of “full-time, or permanent part-time, officers or employees of the Federal Government . . .” According to the Shoshone RADT Report, this “[d]isease risk assessment meeting” included the following people: “Doug McWhiter, Tim Woolley, Bart Kroger (Cody Region, Wyoming Game and Fish Department), Greg Anderson, Jason Hunter, Stan Harter (Lander Region, WGFD), Diane Probasco, Andy Pils, and Joe Harper (Shoshone).” Shoshone RADT Report at 21.

There is no indication that the establishment of the Shoshone RADT Committee was “determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.” 5 U.S.C. App. 2, § 9(a)(2). Further, there is no indication that the proper “advisory committee charter” was filed in accordance with 5 U.S.C. App. 2, § 9(c) prior to the meeting and action of the Shoshone RADT Committee. None of the requirements of FACA appear to have been met by the Shoshone NF in establishing and forming the Shoshone RADT Committee. Advisory committees must meet certain prescribed requirements and follow certain prescribed procedures. 5 U.S.C. App. 2, § 10; *see also Idaho Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868, 871 (D. Idaho 2009) (citing 5 U.S.C. App. II, §§ 2, 9-14).

The Shoshone NF failed to “require the membership of the [Shoshone RADT Committee] to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.” 5 U.S.C. App. 2, § 5(b)(2), (c). The Shoshone RADT Committee did not include a single representative of the livestock or recreation industries. Certainly, NAPgA’s point of view was not represented on the Shoshone RADT Committee.

In its comments, NAPgA warned the Shoshone NF of its FACA violations and requested that the Shoshone NF cure them. NAPgA Comments at 13-14. The Shoshone NF ignored those comments. Now, the Shoshone NF has violated FACA and tainted the Draft ROD, FEIS and LMP.

Conclusion and Recommendation: The Shoshone NF has violated FACA by establishing and utilizing the Shoshone RADT Committee without adhering to the prescribed requirements and procedures under FACA for establishing and utilizing advisory committees. As a result, the Shoshone RADT Committee and its report are illegal and the Draft ROD, FEIS and LMP must be revised to eliminate any reliance on the findings and conclusions of the Shoshone RADT Committee. This violation is actionable now, without further action by the Shoshone NF. The reviewing officer must remand the Draft ROD, FEIS and LMP to the Shoshone NF so that they may be revised in compliance with FACA. This includes preparation of a new Shoshone RADT

Report that does not rely on the findings and conclusions of the illegal Shoshone RADT Committee.

Objection 3. In Violation of NEPA, the Shoshone NF Failed to Respond to NAPgA's Comments Concerning the Shoshone's Reliance on the Findings and Conclusions of the RADT and Payette Principles Committees.

Under NEPA, an agency preparing a final EIS “shall assess and consider comments” and “shall respond” to those comments in the final environmental impact statement. 40 C.F.R. §§ 1502.9, 1503.1, 1503.4; *see also Ctr. for Biological Diversity*, 349 F.3d at 1167-68 (requiring agency response). The Shoshone NF failed to meet this requirement when it ignored NAPgA's comments concerning the Shoshone's FACA violations.

The Shoshone NF attempted to summarize NAPgA's extensive comments concerning the Shoshone's FACA violations in the following sentence: “The final DEIS and Land Management Plan should be drafted without reliance on the Risk Assessment Disease Transmission (RADT) Committee's and Payette Principle Committee's findings and conclusions as the finding were prohibited by a previous legal decision against the Forest Service.” FEIS at 781. The Shoshone NF's response to this summary was that: “Available relevant information was considered for this analysis. DEIS Page 213 noted to see the Risk Analysis of Disease Transmission Between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep, Shoshone National Forest, 2012.” *Id.* at 782.

The Shoshone NF's response was nonresponsive, particularly considering that the content of the “Risk Analysis of Disease Transmission Between Domestic Sheep and Goats and Rocky Mountain Bighorn Sheep, Shoshone National Forest, 2012,” was the principal reason for NAPgA's comments. Of course NAPgA reviewed the Shoshone RADT Report—that is the reason NAPgA commented on it and specifically cited to it in its comments.

In its comments, NAPgA demonstrated the Shoshone NF's illegal use of the conclusions and findings of the RADT and Payette Principle Committees in the DEIS and Shoshone RADT Report. NAPgA Comments at 13-14. NAPgA instructed that “a new DEIS and subsequent final EIS and LMP must be drafted without reliance on the RADT Committee's and Payette Principle Committee's findings and conclusions.” *Id.* at 13. The Shoshone NF's response to NAPgA's comments concerning FACA does not meet the minimum requirement of NEPA

Conclusion and Recommendation: In order to comply with NEPA, the Shoshone NF must adequately respond to NAPgA's comments concerning the Shoshone's FACA violations. To accomplish this, the Shoshone NF must prepare a new Draft ROD and revise the FEIS and LMP to address NAPgA's comments.

Objection 4. The Shoshone NF's Draft ROD, FEIS and LMP Violate NEPA and the APA Because They Fail to Account for the Differences Between Pack Goats and Other Domestic Livestock.

NAPgA explained the important differences between pack goats and other domestic livestock, including domestic goats, in its comments. NAPgA Comments at 3-4. The only

indication that the Shoshone NF considered the differences between pack goats and other domestic livestock in the FEIS is the brief statement that “[p]ack goat movements may be controllable.” FEIS at 53; *see also id.* at 767 (same).

The Shoshone RADT Report expands briefly on this statement by acknowledging:

[t]he use of domestic goats as pack animals in most cases is a different use than a grazing allotment due to the amount of control that can be placed on the pack goats. Pack goats can be tethered at night to prevent straying and tied together during the day when trailing. Health certificates are more economically attainable for pack goats versus domestic sheep or goat herds and can be kept insight when in bighorn sheep habitat. Of course this all depends upon the pack goat user and the efficacy of these and other best management practices.

Shoshone RADT Report at 8.

Although the Shoshone RADT Report acknowledges that pack goats are different than herd domestic goats, the Shoshone NF fails to consider any of these differences in the Shoshone RADT Report, FEIS, LMP or Draft ROD. NEPA prohibits this type of uninformed agency action. *See Robertson*, 490 U.S. at 352 (“NEPA . . . prohibits uninformed . . . agency action.”); *Marsh*, 490 U.S. at 371 (“NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.”). These differences are critical to the Shoshone NF’s analysis of disease transmission from pack goats to bighorn sheep and must be considered by the Shoshone under NEPA.

Pack goats are inextricably bonded to their owners, which represent the “alpha goat” in the pack. This is achieved through the processes of imprinting and socialization of pack goats from birth. As a result, pack goats are not prone to straying and remain in very close proximity to the “alpha goat.” Herd domestic goats are not part of a pack and are not trained. Thus, there may be some risk of such goats straying from the herd. This is not the case for pack goats. The Shoshone NF failed to consider that pack goats do not stray in its analysis of disease transmission from pack goats to bighorn sheep.

Further, unlike herd domestic goats, pack goats are tethered or high-lined at night. This completely prevents pack goats from straying from a camp at night. Pack goats also require their owner or “alpha goat” to be present to monitor the pack. Thus, pack goats always remain in sight of their owner in bighorn sheep habitat and there is always the presence of a human in close proximity to the pack goats. This is also the case during the day when goatpackers go on day hikes. The goats go with the “alpha goat” and are thus continuously monitored at all times. This makes it extremely unlikely that a bighorn sheep would approach the pack. In the presence of wild animals, such as bighorns, pack goats are also on heightened alert and retreat to a position near the “alpha goat,” i.e., the human. None of these factors were considered by the Shoshone NF in its analysis of disease transmission from pack goats to bighorn sheep.

Perhaps most critical to the Shoshone NF's analysis of disease transmission from pack goats to bighorn sheep is the fact that not all pack goats are known to carry strains of *Pasteurella* spp. If a pack goat did not carry strains of *Pasteurella* spp. it would be impossible for that goat to transmit disease to a bighorn sheep. Thus, the risk of disease transmission from that pack goat to a bighorn sheep would be zero. Further, even if a pack goat were to carry strains of *Pasteurella* spp. and directly contact a bighorn sheep, there is no science indicating that the pack goat would transmit these bacteria to the bighorn sheep. The Shoshone NF did not consider these important factors in its analysis.

Finally, goatpackers limit their visits to the Shoshone National Forest, as well as their time on the Forest when they do visit. With only a few pack goats per goatpacker and only a few visits by goatpackers per year, for a limited amount of time, the chance that a pack goat would come into contact with a bighorn sheep is extremely unlikely. This factor was not considered by the Shoshone NF.

Here, the Shoshone NF's analysis in the FEIS is completely silent on the differences between pack goats and herd domestic goats and how those differences affect the risk of disease transmission between pack goats and bighorn sheep. These differences are critical and must be considered by the Shoshone NF. An agency decision is to be reversed as arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Shoshone NF's silence on the issue will not suffice. The agency's path must be reasonably discerned. *Id.* A court "cannot infer an agency's reasoning from mere silence or where the agency failed to address significant objections and alternative proposals." *Beno v. Shalala*, 30 F.3d 1057, 1073 (9th Cir. 1994) (citing *Motor Vehicle*, 463 U.S. at 57); *see also, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947) ("[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action.").

Conclusion and Recommendation: Pack goats are very different than herd domestic goats. Likewise, the use of pack goats on the Shoshone NF is a very different use than the use of herd domestic goats on the Shoshone NF. The FEIS fails to account for these differences in the analysis of disease transmission from pack goats to bighorn sheep on the Shoshone NF. As a result, the FEIS is inadequate and the Shoshone NF's decision is uninformed. The FEIS must be revised (1) to consider pack goats separate from other domestic goats; (2) to consider the unlikelihood that pack goats carry disease; and (3) to consider the unlikelihood that pack goats would ever come in close contact with bighorn sheep on the Shoshone NF.

Objection 5. Contrary to NEPA, the Shoshone NF Failed to Consider Implementation of Mitigation Measures to Ensure the Separation of Pack Goats and Bighorn Sheep.

In its comments, NAPgA explained that under NEPA the Shoshone NF must consider and discuss mitigation measures that would allow the use of pack goats on the Shoshone NF. NAPgA Comments at 5-7, 21-22. To that end, NAPgA proposed a suite of best management practices ("BMPs") and other minimization and mitigation measures to prevent contact and possible disease transmission between pack goats and bighorn sheep on the Shoshone NF. *Id.* These measures were presented in Exhibit A to NAPgA's comments, "Proposed Best

Management Practices for Separation between Packgoats and Bighorn Sheep Developed by Charles Jennings, Land Use Committee Chair, North American Packgoat Association.” None of these practices and measures were considered in the FEIS.

For example, the FEIS fails to consider that separation between pack goats and bighorn sheep is maintained by the presence of a human with pack goats, by nighttime tethering or high-lining of pack goats, and by the nature and training of pack goats. The FEIS also failed to consider the use of GPS tracking collars on pack goats, pathogen testing, permitting for pack goat trips, designation of corridors for pack goats, and a host of other measures. Certainly, if pack goats do not carry disease and do not come into contact with bighorn sheep, there is zero risk of disease transmission from pack goats to bighorn sheep. Neither of these scenarios were considered in the FEIS. Instead of considering any of these measures, in violation of NEPA, the Shoshone NF summarily dismissed consideration of these best management practices (“BMPs”) to maintain separation between pack goats and bighorn sheep on the Shoshone NF. FEIS at 53, 767.

BMPs are mitigation measures that can be employed by goatpackers to prevent contact between pack goats and bighorn sheep. 40 C.F.R. § 1508.20 (defining “mitigation measures” to include “[a]voiding the impact” and “[m]inimizing impacts by limiting the degree or magnitude of the action and its implementation”). For a reasonable range of alternatives, the FEIS must consider implementation of BMPs and mitigation measures, rather than simply concluding that goatpacking on the Shoshone NF must be closed. 40 C.F.R. § 1502.14.

An EIS must discuss “mitigation . . . in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Robertson*, 490 U.S. at 352. An agency is required to “discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(c).” *Id.*; see also *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000) (An EIS must contain a “reasonably complete discussion of possible mitigation measures.” (quoting *Robertson*, 490 U.S. at 352)). To be sure, an agency’s final decision must “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.” 40 C.F.R. § 1505.2(c).

Without an alternative that describes and analyzes the implementation of mitigation measures to prevent contact between pack goats and bighorn sheep, instead of simply eliminating pack goats from the Shoshone NF, the FEIS contains an inadequate range of alternatives. Alternatives considering BMPs and mitigation measures are both reasonable and feasible under the circumstances, and must be analyzed in the FEIS.

With regard to the Shoshone NF’s consideration of reasonable alternatives in the FEIS, the Shoshone NF dismisses an alternative that would use BMPs to allow pack goat use on the Forest. FEIS at 53. The Shoshone NF dismissed this alternative on the basis that “there is a risk of free-ranging bighorn sheep coming into contact with pack goats.” *Id.* However, the Shoshone NF fails to explain what this risk is and how it decided that such risk exists. An agency may not rely on conclusory statements unsupported by explanatory information. *Seattle Audubon Soc’y v. Moseley*, 798 F. Supp. 1473, 1480-83 (W.D. Wash. 1992), *aff’d* 998 F.2d 699 (9th Cir. 1993).

The Shoshone NF's statement that "there is a risk" does render moot NEPA's requirement that the Forest Service consider BMPs in the Draft ROD and FEIS. Such a blanket statement does not satisfy NEPA's requirement of a "reasonably complete discussion of *possible* mitigation measures." *Okanogan Highlands*, 236 F.3d at 473 (citation omitted). If the Shoshone NF was unsure about the effectiveness of BMPs, it should have included them and analyzed them in its alternatives analysis. The necessary environmental analyses must precede, not follow, a decision that may have significant impacts on the environment. *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 733 (abrogated on other grounds by *Monsanto Co.*, 130 S. Ct. 2743 (2010)).

Basically, the Shoshone NF is saying that there is a strong likelihood that on one of the two or three goatpacking trips taken on the Shoshone NF each year, a bighorn sheep would (1) leave its herd and its summer habitat in the high country, (2) find a human and pack goat camp, (3) sneak into that camp without causing any disturbance in the pack goats and without being detected by the humans, (4) ask the pack goats to not be alarmed, to remain still and to muffle their bells and collars, (5) find a tethered goat that is infected by and shedding strains of *Pasteurella* spp., (6) make physical contact with that goat sufficient for disease transmission, and (7) sneak back out of camp and return to its herd and infect other bighorn sheep. It is a far-fetched scenario that has never happened before.

In reality, there is almost no overlap in time or space between pack goats and bighorn sheep on the Shoshone NF; bighorn sheep are not prone to leave their herd/habitat and wander into human and pack goat camps; pack goats react noisily when they are alarmed by other wildlife, including bighorn sheep; not all pack goats carry and shed strains of *Pasteurella* spp.; and it is unknown whether bighorn sheep can even be infected with strains of *Pasteurella* spp. from pack goats. The facts do not support the Shoshone NF's assumption that there is a high likelihood of disease transmission from pack goats to bighorn sheep on the Shoshone NF.

None of these facts were considered by the Shoshone NF in its dismissal of an alternative that would use BMPs to allow pack goat use on the Shoshone. NEPA mandates that federal agencies "provide legitimate consideration to alternatives that fall between the obvious extremes." *Colorado Env'tl. Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1998). More specifically, NEPA is violated when an agency dismisses the consideration of an alternative "in a conclusory and perfunctory manner that [does] not support a conclusion that it was unreasonable to consider them as viable alternatives." *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002). "The existence of reasonable but unexamined alternatives renders an EIS inadequate." *Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1095, 1101 (9th Cir. 2006).

An alternative that would use BMPs to allow pack goat use on the Shoshone NF was a reasonable alternative that the Shoshone NF failed to examine in violation of NEPA. Instead, the Shoshone NF dismissed consideration of the alternative "in a conclusory and perfunctory manner" that did not support a conclusion that it was unreasonable to consider the alternative. *Davis v. Mineta*, 302 F.3d at 1122. As a result, the Shoshone NF's FEIS is inadequate.

Conclusion and Recommendation: The Shoshone NF has violated NEPA by failing to discuss and consider mitigation measures that would allow use of pack goats on the Shoshone NF while

preventing the risk of disease transmission between pack goats and bighorn sheep. As a result, the Shoshone NF must revise the Draft ROD and FEIS to discuss and consider appropriate mitigation measures to prevent the risk of disease transmission between pack goats and bighorn sheep. Proper consideration of such measures should include consideration and adoption of an alternative to allow the use of pack goats on the Shoshone NF. This alternative should consider maintenance of the separation of pack goats and bighorn sheep on the Shoshone and, thus, complete avoidance of any potential for disease transmission between pack goats and bighorn sheep.

Objection 6. The Shoshone NF Failed to Meet Its NEPA Obligation to Ensure the Scientific Integrity of the FEIS.

In evaluating the environmental impacts of a proposed action, NEPA requires federal agencies to ensure the scientific integrity of an EIS by considering appropriate studies and data. 40 C.F.R. § 1502.24. The Shoshone NF must “insure the professional integrity, including scientific integrity, of the discussions and analyses” included in its EIS. *Id.* An agency may not rely on conclusory statements unsupported by data, authorities, or explanatory information. *Seattle Audubon Soc’y v. Moseley*, 798 F. Supp. 1473, 1480-83 (W.D. Wash. 1992), *aff’d*, 998 F.2d 699 (9th Cir. 1993). NEPA requires that an agency candidly disclose in its EIS the risks and effects of its proposed actions, and that it respond to adverse opinions held by respected scientists. *Seattle Audubon*, 798 F. Supp. at 1482 (citing *Friends of the Earth v. Hall*, 693 F. Supp. 904, 937 (W.D. Wash. 1988)).

In addition to its general obligation to respond to public comments under 40 C.F.R. § 1503.4(a), the Shoshone must specifically “discuss at appropriate points in the final [EIS] any responsible opposing view which was not adequately discussed in the draft [EIS] and . . . indicate the agency’s response to the issues raised.” *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003) (quoting 40 C.F.R. § 1502.9(b)). A failure to do so is itself a NEPA violation. *Id.* at 1168.

NAPgA raised considerable doubts about the scientific integrity of the DEIS in its comments. NAPgA Comments at 8-13, 17-19. NAPgA noted the complete lack of science indicating that pack goats transfer disease to bighorn sheep and urged the Shoshone NF to address this lack of information; to stop making gross and unsupported assumptions about disease transmission from pack goats to bighorn sheep; and to rely on the best available science. *Id.* The Shoshone NF failed to respond to NAPgA’s comments in violation of 40 C.F.R. § 1503.4(a) or to address the problems with its data and analysis on disease transmission.

Instead, the Shoshone NF adopted the principal assumption that there is “a high likelihood of disease transmission” from pack goats “to bighorn sheep and disease outbreak in local bighorn sheep herds” on the Shoshone NF. Shoshone RADT Report at 13; FEIS at 223-24. Yet, in violation of NEPA, the Shoshone NF never probed this principal assumption, relying instead on inconclusive lab tests without explaining how the lab tests showed a risk of disease transmission from domestic goats to bighorn sheep, why the lab tests applied to pack goats or why they were reflective of the completely different conditions on the Shoshone NF. *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 623 F.3d 633, 650 (9th Cir. 2010) (agency actions based on unexplained assumptions are arbitrary and capricious); *Dow Agrosciences LLC*

v. Nat'l Marine Fisheries Serv., 707 F.3d 462, 470 (4th Cir. 2013) (agency must explain why lab tests reflect nature).

The FEIS cites only two sources for the assumption that there is a catastrophic risk of “disease transmission” between pack goats and bighorn sheep on the Shoshone NF: Rudolph et al. 2003 and Foreyt et al. 2009. FEIS at 223-224. The use of the term “disease” is a misnomer. What the Shoshone NF is really referring to is the transfer of the bacterium *Pasteurella* spp. from pack goats to bighorn sheep. See FEIS at 53 (discussing transfer of *Pasteurella* spp.); see also *id.* at 767 (same); Shoshone RADT Report at 2-5 (discussing transfer of *Pasteurella* spp.). The Shoshone NF suspects that these bacteria may, first, be transmitted from domestic sheep and goats to bighorn sheep and, then, result in bighorn sheep die-offs. Shoshone RADT Report at 2-5.

An examination of the two sources cited by the Shoshone NF for the assumption that pack goats transmit disease to bighorn sheep shows that neither source involved a study of pack goats. See Rudolph et al. 2003; Foreyt et al. 2009. Rather, the Rudolph study involved a feral domestic goat, while the Foreyt study involved lungworm-infected herd domestic goats. See Rudolph et al. 2003 at 1; Foreyt et al. 2009 at 1. Neither one of these studies show that pack goats pose a threat of disease transmission to bighorn sheep on the Shoshone NF. What the studies do show is that they were both assisted and funded by the Foundation for North American Wild Sheep, which has pushed an agenda to remove pack goats from the Shoshone NF. See Rudolph et al. 2003 at 6; Foreyt et al. 2009 at 5. This assistance and funding raises questions of bias in these studies. Regardless, neither study supports the assumptions made by the Shoshone NF in the FEIS.

The conclusion of the Rudolph study was that both the feral goat and bighorn sheep at issue in the study carried *Pasteurella* spp. strains. Rudolph et al. 2003 at 1. However, the study did not show whether *Pasteurella* spp. was passed from the feral goat to the bighorn sheep or vice versa. *Id.* at 5 (“Because samples were not obtained from the animals prior to contact, the direction of transmission could not be ascertained with certainty.”).

Perhaps the most significant finding of the Rudolph study, though, was that the *Pasteurella* spp. strains carried by the feral goat at issue were not a cause of bighorn die-offs. *Id.* Rudolph states “there is no evidence that those organisms were associated with subsequent disease or deaths.” *Id.* (emphasis added). In fact, Rudolph states “we know of no other information regarding transfer of potentially lethal *Pasteurella* spp. between domestic goats and free-ranging bighorn sheep.” *Id.* (emphasis added). Despite this complete lack of evidence, Rudolph states “we believe that goats can serve as a reservoir” of *Pasteurella* spp. and recommends that interactions between goats and bighorn sheep should be avoided. *Id.*

Although the Rudolph study did not involve pack goats and was unable to provide any evidence that goats of any kind transmit disease to bighorn sheep and cause bighorn sheep die-offs, Rudolph adds: “Pack goats have gained popularity for use on public lands. We recommend that individuals with pack goats have total control of their animals when in or near bighorn sheep habitat, both while on the trail and at the campsite. Likewise, we recommend that any bighorn sheep should be driven away from goats to prevent nose-to-nose contact and that any bighorn

sheep that does come into direct contact should be removed from the herd to prevent potential transmission of disease causing organisms to other bighorn sheep.” *Id.* This recommendation does not track the outcome of the Rudolph study and was likely added to appease the group that funded the study (Foundation for North American Wild Sheep), nevertheless, not even Rudolph recommends that pack goats be removed from the Shoshone NF. Rather, Rudolph recommends prudent management. *Id.*

The Foreyt et al. 2009 study is equally unavailing. First, it should be noted that the study was not a study of the transmission of *Pasteurella* spp. from goats to bighorn sheep, rather it was a study of the transmission of lungworms from domestic goats to bighorn sheep on common pasture. *See* Foreyt et al. 2009 at 1. To that end, the study involved four herd domestic goats (not pack goats) that were infected with lungworms prior to the study. *Id.* at 2. The four domestic goats were then placed in a pen with seven captive bighorn sheep. *Id.* The animals were co-pastured together for 11 months. *Id.* During that time, the goats and bighorn sheep “freely associated with each other, including bedding together.” *Id.* at 5 (emphasis added). Besides the stress of being penned up together for 11 months, the bighorn sheep in the study also had the stress of being “captured individually with a drive net,” “physically restrained,” and having “fecal samples [] removed manually from their rectums.” *Id.* at 2. Despite all this, “[a]ll four goats (100%) and five (71%) of seven bighorn sheep remained healthy and survived the 11-mo copasturing experiment.” *Id.* at 3 (emphasis added).

The conclusion of the study was that domestic goats that are already infected with lungworms could infect bighorn sheep that share a pen and bed together for 11 months. *Id.* at 4. On the Shoshone NF, however, the concerns over bighorn sheep die-offs are not tied to lungworms, so this conclusion is of little value for the FEIS and certainly does not support the assumption that pack goats transmit *Pasteurella* spp. to bighorn sheep on the Shoshone.

According to the Foreyt study, two of the seven bighorn sheep died of bacterial pneumonia while the domestic goats were in contact with them. *Id.* at 3. The study, however, did not indicate that any of the domestic goats carried *Pasteurella* spp. or that they transmitted *Pasteurella* spp. to the bighorn sheep that died. In fact, Foreyt states in the study “the potential deleterious effect of *M haemolytica* [a.k.a. *Pasteurella* spp.] of goat origin in bighorn sheep has not been clearly documented.” *Id.* at 4. Instead, Foreyt suggests that “it is possible that *M. capillaris* [type of lungworm], or *M. capillaris* in combination with *Protostrongylus* [type of lungworm], may have been a predisposing factor in the [bighorn] deaths.” *Id.* at 5. Foreyt also suggests that pneumonia in bighorn sheep is “linked to environmental stressors in combination with bacteria and lungworms.” *Id.* at 5 (citations omitted).

Foreyt’s recommendation from the study was: “Based on results of this experimental study, bighorn sheep that occupy habitat with domestic goats are at potential risk of acquiring *Muellerius* infections, thus, increasing the potential risk of verminous pneumonia with possible concurrent or secondary bacterial pneumonia. Therefore, prudent management of bighorn sheep populations should minimize habitat sharing between the two species.” *Id.* at 5. Again, the recommendation was not for elimination of pack goats from the Shoshone NF, but for prudent management. *Id.*

The takeaway from the Rudolph and Foreyt studies is that:

- The *Pasteurella* spp. strains carried by the feral goat at issue in the Rudolph study were not a cause of subsequent bighorn sheep disease or deaths. Rudolph et al. 2003 at 5.
- Besides the information on the feral goat at issue in the Rudolph study, which was not the cause subsequent bighorn sheep disease or deaths, there is “no other information regarding transfer of potentially lethal *Pasteurella* spp. between domestic goats and free-ranging bighorn sheep.” Rudolph et al. 2003 at 5 (emphasis added). The Foreyt study indicates the same: “the potential deleterious effect of *M haemolytica* [a.k.a. *Pasteurella* spp.] of goat origin in bighorn sheep has not been clearly documented.” Foreyt et al. 2009 at 4.
- Despite being penned together and bedded together for 11 months in the Foreyt study, five out of seven bighorn sheep remained healthy and survived. *Id.* at 3. Assuming that the domestic goats in the Foreyt study actually carried strains of *Pasteurella* spp., this shows that the transmission of disease-causing *Pasteurella* spp. from domestic goats to bighorn sheep is unlikely and that such transmission does not cause subsequent bighorn die-offs. The fact that four domestic goats and five bighorn sheep cohabitated in a pen and bedded together for 11 months without either species getting sick or dying is damning to the Shoshone NF’s assumption that domestic goats (including pack goats) pose a catastrophic risk of disease transmission to bighorn sheep on the Shoshone NF.
- Neither the Rudolph study nor the Foreyt study recommends the removal of pack goats from bighorn sheep habitat on the Shoshone NF. Both studies recommend prudent management to minimize habitat sharing and contact between domestic goats (including pack goats) and bighorn sheep.

The only other reference provided in the FEIS by the Shoshone NF to support the assumption that pack goats pose a catastrophic risk of disease transmission to bighorn sheep is to the Shoshone RADT Report. FEIS at 53, 224, 226, 767, 771, 782, 840. That report, as discussed above, is biased and illegal. Besides that, the report misrepresents the science on disease transmission from domestic goats (including pack goats) to bighorn sheep and provides no support for the Shoshone NF’s assumption that that pack goats pose a catastrophic risk of disease transmission to bighorn sheep.

The only citations provided by the Shoshone NF in the Shoshone RADT Report to support its assumption that pack goats pose a risk of transmission of *Pasteurella* spp. to bighorn sheep include the following: Foreyt et al. 1996, Martin et al. 1996, Schommer and Woolever 2001, Rudolph et al. 2003, and Foreyt et al. 2009. Rudolph et al. 2003 and Foreyt et al. 2009 were discussed above and do not support the Shoshone NF’s assumption. The Shoshone’s other citations are examined here.

Specifically, the Shoshone NF states “[i]t is thought that bighorn sheep are infected with *M. haemolytica* A2 through contact with domestic sheep or goats (Foreyt et al. 1996, Martin et

al. 1996, Schommer and Woolever 2001).” The Foreyt et al. 1996 study only studied domestic sheep, not goats, so it is inapplicable to goats. Likewise, the Martin et al. 1996 study only studied domestic sheep, not goats, so it is also inapplicable to goats. So, the only other citation left is that to Schommer and Woolever 2001.

Schommer and Woolever 2001 is not a scientific paper. It is a Forest Service document intended to “describe a process for finding management solutions to the incompatibility between bighorn and domestic sheep.” Schommer and Woolever 2001 at 1 (“A Process for Finding Management Solutions to the Incompatibility Between Domestic and Bighorn Sheep”). The only information implicating goats in disease transmission to bighorn sheep in Schommer and Woolever 2001 is presented as follows” “DNA analysis in the winter of 1995-96 in Hells Canyon during a bighorn die-off revealed that a feral goat and two bighorn sheep shared a genetically identical P. multocida and P. haemolytica (Rudolph et al. 1998). The subsequent die-off resulted in the death of in excess of 260 bighorn sheep in an eight-week period. The disease spread over 30 air miles and affected six bighorn sheep herds.” *Id.* at 3.

Schommer and Woolever wrongly implicate the feral goat at issue in the subsequent disease and deaths in bighorn sheep. *See id.* at 3. The Schommer and Woolever paper cites a draft version of Rudolph et al. 2003. *Id.* at 20 (citing Rudolph et al. 1998). The conclusion of the Rudolph et al. study was that there was “no evidence” that the organisms associated with the feral goat “were associated with subsequent disease or deaths.” Rudolph et al. 2003 at 5 (emphasis added); *see also id.* (“we know of no other information regarding transfer of potentially lethal *Pasteurella* spp. between domestic goats and free-ranging bighorn sheep”). Schommer and Woolever’s implication of the feral goat is wrong and represents one of the many false assumptions found throughout the Shoshone RADT Report.² Thus, not a single citation in

² The Shoshone NF’s analysis of disease transmission from packgoats to bighorn sheep is full of inaccuracies and contradictions. For example, in the FEIS, the Shoshone NF states that “there is no known ‘safe distance’” between packgoats and bighorn sheep. FEIS at 226. The Shoshone NF cites the Shoshone RADT Report as the basis for that statement. *Id.* Yet, the Shoshone RADT Report “direct contact” between packgoats and bighorn sheep is necessary for potential disease transmission. *See* Shoshone RADT Report at 4-5 (discussing science on disease transmission); *id.* at 13 (assuming “direct contact” between species results in high likelihood of disease transmission). Even the poor “science” cited by the Shoshone indicates that “direct contact” is necessary. *See* Schommer and Woolever 2001 at 3 (“*Pasteurella* transmission requires nose-to-nose contact or transfer of mucus”). And, that is not even certain, as the two experiments penning domestic sheep with bighorn sheep for an extended period of time, did not result in transmission of *Pasteurella* spp. followed by a bighorn die-off. *See* Foreyt 1994; Foreyt et al. 2009.

The Shoshone NF’s statement that “there is no known ‘safe distance’” between packgoats and bighorn sheep is unsupported by science. It is thus unclear where the Shoshone NF came up with such a statement? Regardless, it simply is not accurate. “Direct contact” is required for disease transmission between packgoats and bighorn sheep, so any distance beyond that would appear to be “safe.” Despite this fact, and without any explanation as to why, the Shoshone NF arbitrarily established a 26 km buffer between bighorn sheep habitat and areas that could be used

the Shoshone RADT Report supports the assumption that there is a risk of disease transmission between pack goats and bighorn sheep.

Moreover, the Shoshone RADT Report overlooks the legitimate science discussed in Schommer and Woolever 2001. Schommer and Woolever state: “All ungulates, except llamas, carry some strains of *P. haemolytica* (Foreyt 1995). However, experimental exposure of bighorn sheep to elk, deer, mountain goat, cattle, llama, and domestic goats has not resulted in pneumonia in bighorn sheep (Foreyt 1992, Foreyt 1993, Foreyt 1994).” Schommer and Woolever 2001 at 3.

While the Shoshone NF attempts to implicate domestic goats in the deaths of bighorn sheep without any proof, it misses the science in the Schommer and Woolever 2001 paper, which shows that penning of domestic goats and bighorn sheep does not result in pneumonia in bighorn sheep. *See* Foreyt 1994. In the Foreyt 1994 study, *P. haemolytica* was isolated from the three domestic goats used in the experiment. *Id.* at 9. These goats were then placed together with two bighorn sheep in a pen and held there for 60 days. *Id.* at 8. Sure enough, the three domestic goats and the two bighorn sheep all survived and remained healthy. *Id.* at 9. Yet, in violation of NEPA, that information is not mentioned anywhere in the Shoshone RADT Report. *See* 40 C.F.R. § 1502.9(b) (federal agencies are required to discuss in the final EIS responsible opposing views that were not adequately discussed in the draft EIS and indicate the agency’s response to the issues raised); *W. Watersheds Project*, 632 F.3d at 493 (citing *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003)) (A final EIS that fails to disclose and discuss responsible opposing scientific views violates both NEPA and the CEQ’s regulations.).

Thus, besides the Rudolph et al. 2003 and Foreyt et al. 2009 studies, the only other science on the transmission of *Pasteurella* spp. from domestic goats to bighorn sheep that is mentioned in the Shoshone RADT Report indicates that domestic goats do not transmit disease-causing *Pasteurella* spp. to bighorn sheep. *See* Foreyt 1994. This is true even when the domestic goats are known carriers of *Pasteurella* spp. and are penned together with bighorn sheep for two months. *Id.*

None of the other science mentioned in the Shoshone RADT Report involving domestic goats concerned the transmission of *Pasteurella* spp. from domestic goats to bighorn sheep. As a result, it is not relevant to the Shoshone NF’s assumption that domestic goats present a catastrophic risk of transmission of disease-causing *Pasteurella* spp. to bighorn sheep on the Shoshone NF.

The Jansen et al. 2006 study cited by the Shoshone NF, for example, does not support the assumption that domestic goats transmit *Pasteurella* spp. to bighorn sheep. This study involved the release of 4,800 herd domestic goats near occupied bighorn sheep habitat in Arizona. Jansen et al. 2006 at 1. Jansen posits that some of these 4,800 domestic goats carried a bacterium that is associated with an ocular disease that affects domestic livestock and most wild ruminants in

by goatpackers. Shoshone RADT Report at 15. This effectively closed the entire Forest to goatpacking. *Id.*

North America. *Id.* Several months after the domestic goats were released, clinically affected bighorn sheep were observed. *Id.* at 1, 4. Jansen suggests that the domestic goats transmitted the bacterium that is associated with the ocular disease to the bighorn sheep. *Id.* at 4. The Jansen et al. study does not indicate that a single bighorn sheep was affected by *Pasteurella* spp. after the release of 4,800 domestic goats; that a single bighorn sheep contracted pneumonia and died after contacting a domestic goat; or that there was a resulting die-off of bighorn sheep following the release of the domestic goats near bighorn sheep habitat. *Id.* at 1-4. The Jansen et al. study simply is not relevant to the Shoshone NF's assumption that pack goats transmit *Pasteurella* spp. to bighorn sheep on the Shoshone NF.

Conclusion and Recommendation: Review of the science cited by the Shoshone NF to support its assumption that there is a high likelihood that pack goats will transmit disease to bighorn sheep on the Shoshone NF and that such disease will result in bighorn sheep die-offs shows that (1) the Shoshone NF failed to take a hard look at the science and (2) failed to explain or support its assumption.

The Shoshone NF's scientific analysis is inaccurate and uninformed. *See* 40 C.F.R. § 1500.1(b) ("Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."). NEPA prohibits this type of uninformed decision-making. *Robertson*, 490 U.S. at 352. "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. 360, 371 (1989). Whether or not pack goats can and do transmit disease-causing *Pasteurella* spp. on the Shoshone NF must be considered under NEPA. *See Motor Vehicle*, 463 U.S. at 43 (an agency decision is to be reversed as arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem").

None of the science cited by the Shoshone NF indicates that there is a high likelihood that pack goats will transmit disease to bighorn sheep on the Shoshone NF. The science does not show any likelihood. First, none of the science involved pack goats. Second, none of the science establishes that domestic goats transmit *Pasteurella* spp. to bighorn sheep. Third, none of the science indicates that transmission of *Pasteurella* spp. to bighorn sheep results in bighorn sheep die-offs. Finally, none of the science involves conditions similar to those on the Shoshone NF, where it is extremely unlikely that a pack goat carrying *Pasteurella* spp. would directly contact a bighorn sheep.

The Shoshone NF was required under NEPA to ensure the scientific integrity of the discussions and analyses in the FEIS by considering appropriate studies and data. 40 C.F.R. § 1502.24. The Shoshone NF failed to meet this NEPA requirement. The Shoshone NF's conclusion that there is a high likelihood that packgoats will transmit disease to bighorn sheep on the Shoshone NF resulting in bighorn sheep die-offs is unsupported by data, authorities, or explanatory information. An agency may not rely on conclusory statements unsupported by data, authorities, or explanatory information. *Seattle Audubon Soc'y v. Moseley*, 798 F. Supp. 1473, 1480-83 (W.D. Wash. 1992), *aff'd*, 998 F.2d 699 (9th Cir. 1993); *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 623 F.3d 633, 650 (9th Cir. 2010) (agency actions based on unexplained assumptions are arbitrary and capricious); *Dow Agrosciences LLC v. Nat'l*

Marine Fisheries Serv., 707 F.3d 462, 470 (4th Cir. 2013) (agency must explain why lab tests reflect nature).

Most fundamentally, the agency must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle*, 463 U.S. at 53 (quotation omitted). Here, the Shoshone NF not only failed to adequately “examine the relevant data,” it also failed to “articulate a satisfactory explanation for its action.” *Id.*; see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency decision is to be reversed as arbitrary and capricious if the agency has “. . . entirely failed to consider an important aspect of the problem, [or] offered an explanation that runs counter to the evidence before the agency . . .”).

There are no facts showing (1) that pack goats have ever transferred disease to bighorn sheep and caused a bighorn sheep die-off on the Shoshone NF or on any other lands; (2) that pack goats can transfer disease and cause a bighorn sheep die-off in a laboratory setting; or (3) that pack goats carry disease and would come into contact with bighorn sheep on the Shoshone NF. The Shoshone NF’s decision to prohibit goatpacking on the Shoshone has no basis in fact or science. Such decision is arbitrary and capricious and must be overturned. The Shoshone NF should be required to re-examine the science on disease transmission from pack goats to bighorn sheep and accurately conclude that the science does not support a decision to prohibit goatpacking on the Shoshone NF.

Objection 7. The Shoshone NF Has Banned the Use of Pack Goats from the Shoshone NF in Violation of NFMA, NEPA and the APA.

The Shoshone NF leads the reader of the Draft ROD, FEIS and LMP to believe that pack goats have decimated the population of bighorn sheep on the Shoshone NF and that the immediate and drastic action of removing pack goats from the Shoshone NF is warranted to save bighorn sheep. Yet, the Shoshone NF’s statistics tell a different story. In fact, “[r]ecent population trends for the core bighorn sheep herds have been fairly steady.” FEIS at 222. “Habitat for bighorn sheep is abundant on the Shoshone” and has actually improved over the last five years as a result of wildfires “creat[ing] ideal seasonal habitat for bighorns.” *Id.* at 223. Core bighorn sheep herds are not threatened by disease transmission from domestic sheep, as the closest domestic sheep allotments are about 80 kilometers away. *Id.* Though, “[b]oth domestic sheep and bighorn sheep have used the Shoshone for several decades,” “there are no documented cases of disease transmission from domestic sheep or goats to bighorns on the planning area.” *Id.* at 226; see also *id.* at 225 (“there is no documented case of disease transmittal from domestic sheep and goats to bighorns on the Shoshone”); *id.* at 226 (“[t]here is no documented case of disease transmittals from domestics to bighorns on the Shoshone”).

Not only is there not a single documented case of disease transmission from domestic goats (including pack goats) to bighorn sheep on the Shoshone NF, there is not a single documented case anywhere. There is no science linking disease transmission from domestic goats to bighorn sheep die-offs in the lab or in the wild. With regard to pack goats, there is

absolutely no indication whatsoever, from the lab or the wild, that pack goats have transmitted disease to bighorn sheep or that they are even capable of transmitting disease to bighorn sheep.³

Here, the Shoshone NF has developed a solution—elimination of goatpacking—to a problem that does not exist—disease transmission from pack goats to bighorn sheep on the Shoshone NF. This decision-making approach is not only arbitrary and capricious; it is also unsupported by the Forest Service’s authority. The Forest Service has no authority to eliminate goatpacking on the Shoshone NF without any indication that goatpacking is actually contributing to a problem on the Shoshone.

The Forest Service’s planning authorities required the Forest Service to manage the Shoshone for “multiple uses,” including both outdoor recreation (goatpacking) and wildlife (bighorn sheep). The Multiple-Use Sustained-Yield Act (“MUSYA”), 16 U.S.C. §§ 528-531, provides that “it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” 16 U.S.C. § 528 (emphasis added). In other words, the national forests are to be administered for “multiple use,” which includes management of outdoor recreation and range resources, along with management of wildlife. *See* 36 C.F.R. § 219.10 (“the plan must provide for ecosystem services and multiple uses, including outdoor recreation, range, . . . wildlife, and fish”); *see also* 36 C.F.R. § 219.10(a) (“The plan must include plan components, including standards and guidelines, for integrated resource management to provide for ecosystem services and multiple uses in the plan area.”).

The National Forest Management Act (“NFMA”), 16 U.S.C. §§ 472A, 476, 500, 513-516, 518, 521b, 528 (note), 576B, 594-2 (note), 1600 (note), 1601 (note), 1600-1602, 1604, 1606, 1608-1614, references the MUSYA, 16 U.S.C. §§ 528-531, and requires that plans developed for units of the National Forest System “provide for multiple use and sustained yield of the products and services obtained therefrom . . . and [must] include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness[.]” 16 U.S.C. § 1604(e)(1). “Thus, the NFMA is explicit that wildlife viability is not the Forest Service’s only consideration when developing site-specific plans for National Forest System lands.” *The Lands Council v. McNair*, 537 F.3d 981, 990 (9th Cir. 2008). Further, nothing in NFMA requires the Forest Service “to *improve* a species’ habitat to prove that it is maintaining wildlife viability.” *Id.* at 995.

³ What the available science does show is that bighorn sheep died when co-pastured with horses and cattle. *See* Foreyt and Lagerquist 1996. When bighorn sheep were co-pastured with horses, one of the bighorn sheep died, although the cause was undetermined. *Id.* When bighorn sheep were co-pastured with steers, a bighorn sheep died of pneumonia. *Id.* Thus, there is more evidence showing that horses and cattle are a risk for disease transmission to bighorn sheep than there is for pack goats. Yet, the Shoshone NF does nothing to terminate or control the use of horses and cattle on the Shoshone NF. The Shoshone NF’s decision to single out pack goats as a risk for disease transmission to bighorn sheep is arbitrary and capricious.

Conclusion and Recommendation: Here, the Shoshone NF is operating outside of its authorities by eliminating a use on the Forest—goatpacking—in favor of another use—wildlife. This is being done despite the fact that goatpacking has never, and does not now, pose a threat to wildlife viability. And, this is being done in contradiction of the Forest Service’s mandate to coordinate management of outdoor recreation with management of wildlife. The Shoshone NF is improperly managing the Shoshone solely for wildlife in violation of the MUSYA and NFMA. Instead, the Shoshone NF must coordinate management of outdoor recreation and wildlife. As a result, the Shoshone NF must allow goatpacking on the Shoshone to the extent it does not interfere with maintenance of wildlife viability.

Objection 8. The FEIS Does Not Properly Address Unavailable or Incomplete Scientific Information on Disease Transmission between Pack Goats and Bighorn Sheep Under NEPA.

In its comments, NAPgA explained that under NEPA the Shoshone NF was required to address the relevance of unavailable or incomplete scientific information. NAPgA Comments at 9-10. NAPgA even listed the relevant information that the Shoshone NF was required to obtain, or explain the absence of, in the FEIS. *Id.* at 17-19. The Shoshone NF ignored NAPgA’s comments and failed to address the relevance of unavailable or incomplete scientific information under NEPA.

The Shoshone NF readily acknowledges in several places in the FEIS that it lacks complete information to assess the potential effects of disease transmission between pack goats and bighorns. For example, the FEIS states that “[a]lthough scientific literature is lacking specifically for the risk of disease transmission between pack goats and bighorn sheep, some information is available for domestic goats and bighorn sheep.” FEIS at 223; *see also* DEIS at 226 (“Currently, there are no documented cases of disease transmittal from domestic sheep or goats to bighorns on the planning area.”); *id.* (“To date, there is no documented case of disease transmittals from domestics to bighorns on the Shoshone.”).

The FEIS assumes that disease transmission from pack goats to bighorn sheep is a threat to the wild sheep species. FEIS at 223, 226. However, the Forest Service provides no support for this assumption. In particular, the Forest Service fails to provide any information in the FEIS indicating that pack goats carry disease or that pack goats transmit disease. There is no discussion of, and no support showing, that pack goats and bighorn sheep are attracted to each other or would ever be prompted to interact with each other in the wild. In addition, there is no discussion of whether disease transmission from pack goats to bighorn sheep actually occurs in the wild and is proven to be a threat to the wild sheep species. *Id.*

The Shoshone NF failed to discuss the fact that there is no evidence whatsoever, be it circumstantial or otherwise, of a link between pack goats and pneumonia outbreaks within bighorn sheep populations in the wild, particularly on the Shoshone. This fact calls into question the Shoshone NF’s assumptions about disease transmission from pack goats to bighorn sheep. The Shoshone NF is required to disclose and analyze the possibility that pack goats do not carry and/or transmit disease to bighorn sheep and are not a potential cause of bighorn sheep die-offs. Otherwise, the EIS may be rendered defective. *See Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1169 (9th Cir. 2003); *Seattle Audubon Society v. Espy*, 998 F.2d

699, 704 (9th Cir. 1993); *League of Wilderness Defenders v. Zielinski*, 187 F. Supp.2d 1263 (D. Or. 2002).

Similarly, the FEIS fails to discuss not only whether pack goats actually carry disease, but also the mechanism through which pack goats transfer disease to bighorn sheep. Scientists have opposing viewpoints on the mechanism of disease transmission and the probability of disease transmission in the wild. These viewpoints are required to be addressed in the FEIS. More fundamentally, though, the Forest Service must show that pack goats are actually known to carry disease. Pack goats cannot transmit disease they do not even carry. Without this information, the FEIS and any decision to restrict or close pack goat use on the Shoshone based on the FEIS is arbitrary and capricious. *See Robertson*, 490 U.S. at 351 (“NEPA . . . prohibits uninformed . . . agency action.”); *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (an agency decision is to be reversed as arbitrary and capricious if the agency has “. . . entirely failed to consider an important aspect of the problem”).

NEPA procedures emphasize clarity and transparency of process over particular substantive outcomes. *See Pub. Citizen*, 541 U.S. at 756–57; *Robertson*, 490 U.S. at 350–51; *see also Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 n. 24 (9th Cir.2010) (“Clarity is at a premium in NEPA because the statute . . . is a democratic decisionmaking tool . . .”). Accordingly, agencies violate NEPA when they fail to disclose that their analysis contains incomplete information. *See N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir.2009); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir.2005); *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir.1983). Such required “up-front disclosures [include] relevant shortcomings in the data or models.” *Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir.2005); *see* 40 C.F.R. § 1502.22 (An agency “shall make clear” if there is “incomplete or unavailable information” in an EIS.).

When particular information “relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives,” the agency must obtain that information and include it in the EIS, unless the cost is “exorbitant or the means to obtain it are not known.” 40 C.F.R. § 1502.22. If obtaining the information is too costly or infeasible, the agency can forego its collection, providing full explanation in the EIS. *Id.* § 1502.22(b). “In that case the agency must include in the EIS: (1) A statement that the information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information; (3) a summary of relevant “existing credible scientific evidence;” and (4) the agency’s evaluation of impacts based on “theoretical approaches or research methods generally accepted in the scientific community.” *Id.*

The Shoshone NF has not included the following relevant information in the FEIS:

- Information indicating the differences between pack goats and other domestic goats;
- Information indicating that pack goats carry disease that can be transmitted to bighorn sheep;

- Information indicating that pack goats and bighorn sheep are attracted to each other and are prone to interact in the wild, even in the presence of a human;
- Information indicating that pack goats may come into contact or have come into contact with bighorn sheep on the Shoshone;
- Information indicating that BMPs and/or mitigation measures are not effective to ensure separation between pack goats and bighorn sheep on the Shoshone;
- Information indicating that pack goats may transmit or have transmitted disease to bighorn sheep on the Shoshone;
- Information indicating that bighorn sheep have contracted disease transmitted by pack goats on the Shoshone;
- Information indicating that bighorn sheep that have contracted disease transmitted by pack goats on the Shoshone have returned to their herds and infected other bighorn sheep;
- Information indicating that bighorn sheep that have contracted disease transmitted by pack goats on the Shoshone have returned to their herds and infected other bighorn sheep, which has led to a die-off;
- Information indicating that there is a risk of disease transmission from pack goats to bighorn sheep on the Shoshone;

Here, the Shoshone NF failed to take the required steps to address the incomplete or unavailable information relevant to ascertaining the possibility and consequences of disease transmission between pack goats and bighorns. The FEIS fails to contain a clear and direct statement that the required information is incomplete or unavailable. The FEIS also fails to discuss the relevance of the incomplete or unavailable information in light of evaluation of a reasonably foreseeable environmental impact. Lastly, the FEIS fails to contain the Shoshone NF's own evaluation of such impacts "based upon theoretical approaches or research methods generally accepted in the scientific community." *Id.*

Conclusion and Recommendation: Instead of honestly evaluating the range of potential scientific opinion applicable to disease transmission between pack goats and bighorns, the Shoshone NF impermissibly substituted its own assumptions on disease transmission. *See, for example,* FEIS at 223, 226. Where these assumptions have no grounding in the scientific literature concerning disease transmission, the agency has failed to ensure professional integrity, including the scientific integrity, of the FEIS, and has also failed to comply with NEPA requirements to address incomplete or unavailable scientific information. Based on this fundamental flaw in the evaluation of environmental consequences in the FEIS, the FEIS must be revised to provide further analysis, including an analysis of the incomplete or unavailable scientific information. NEPA does not permit the type of decide first, study later approach that the Shoshone NF has employed in the FEIS. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241

F.3d 722, 733 (9th Cir. 2001) (abrogated on other grounds); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990).

Objection 9. In violation of NEPA, the Shoshone NF Failed to Adequately Consider the Impact on Goatpackers of Its Decision to Close the Shoshone to Pack Goats.

The environmental effects that must be evaluated in an EIS include cultural, economic, and social effects, whether these effects are direct, indirect, or cumulative effects of the proposed action. 40 C.F.R. § 1508.8; *id.* § 1502.16. The required evaluation of environmental effects in an EIS “forms the scientific and analytic basis for the comparison[]” of alternatives that is the heart of the environmental impact statement. 40 C.F.R. § 1502.16.

NAPgA’s comments explained that the DEIS failed to discuss or analyze the impacts on goatpackers of the closure of the Shoshone NF to pack goats. NAPgA Comments at 19. In response to these comments, the Shoshone NF provided: “[t]he impacts of not allowing pack goat recreation are discussed in the species diversity and terrestrial wildlife section of chapter 3 in the FEIS.” FEIS at 904. Yet, a review of chapter 3 in the FEIS indicates that the impacts of not allowing pack goat recreation are not discussed there. Under NEPA, an agency preparing a final environmental impact statement “shall assess and consider comments” and “shall respond” to those comments in the final environmental impact statement. 40 C.F.R. §§ 1502.9, 1503.1, 1503.4. The Shoshone NF failed to meet this NEPA requirement.

In particular, the FEIS provides no discussion of the effect of eliminating goatpacking as a recreational use of the Shoshone NF. Such decision has an enormous impact on goatpackers as it terminates their use of the Shoshone. This social and economic impact on goatpackers, their families and other goatpacking enthusiasts and guides is not analyzed in the FEIS. Such impact could be enormous for goatpackers, as other National Forests may follow the Shoshone NF’s management direction and close additional Forests to goatpacking. This cumulative impact must be considered.

Further, goatpackers who use the Shoshone NF purchase goods and services in the communities surrounding the Shoshone, including Dubois, Wyoming, among other communities. The loss of goatpackers and their economic contributions to these communities must be analyzed in the FEIS.

Conclusion and Recommendation: The Shoshone NF’s FEIS completely fails to analyze the recreational, social and economic effects of eliminating goatpacking on the Shoshone NF. Such failure is a direct violation of NEPA. As a result, the FEIS must be revised to consider the recreational, social and economics impacts of eliminating goatpacking on the Shoshone NF.

EXHIBIT 1 – NAPgA Comments

**EXHIBIT 2 - *Idaho Wool Growers Assoc. v. Schafer*,
637 F. Supp. 2d 868 (D. Idaho 2009)**

(Double-sided; not for publication)

**EXHIBIT 3 - *Idaho Wool Growers Assoc. v. Schafer*,
2009 WL 3806371 (D. Idaho)**

(Double-sided; not for publication)