

The Plight of the Packgoat:

Legal Issues Concerning Removal of Domestic Livestock from Public Lands Across the West

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What's a Packgoat?

- These goats ("packgoats") are specially raised and trained to follow their human owners and carry supplies in packs to support wilderness transportation and recreation.

Differences between Packgoats and other Domestic Goats

- Breed
- Imprinting
- Training
- Health
- Use



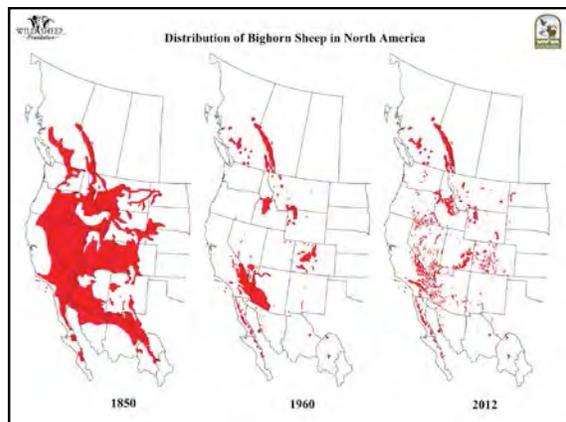
North American Packgoat Association

- Promotes "goatpacking"
- Senior citizens, disabled persons, outdoor enthusiasts



What's the Problem?

- Bighorn Sheep Distribution and Abundance
- Bighorn sheep were abundant and widely distributed across the Western United States prior to the mid-1800s
- By 1950, bighorns were extirpated from a large portion of their range
- Bighorn populations have rebounded, in large part due to translocations, but some herds experience periodic die-offs due to pneumonia



Effects of Disease on Bighorn Populations

- Bighorn sheep – New World species
- Domestic Sheep – Old World species
- Because bighorn sheep did not evolve with domestic sheep, they are thought to be susceptible to diseases carried by domestic sheep



What's the Science?

- Bighorn die-offs
- Circumstantial evidence associating die-offs with contact with domestic sheep
- Pen studies
 - Transfer of *Pasteurella* bacteria
 - Bighorns develop respiratory disease/pneumonia
- Recommendation from pen studies
 - Separation

Agency Response?

- BLM/USFS temporary closures of domestic sheep grazing allotments in Idaho
- Payette NF Revised LMP
 - Requirement to address bighorn sheep viability
 - Development of science committees
 - Payette RADT Committee
 - Payette Principles Committee
 - Committees recommend separation

Federal Advisory Committee Act

- 5 U.S.C. Appendix 2
- FACA governs the operation of federal advisory committees
- Purposes:
 - Transparency
 - Prevent wasteful expenditure
 - Public observation and comment
 - Represent public interest
 - Avoid dominance of industry and special interests
 - Avoid biased/unbalanced committees

United States
Department of
Agriculture
Forest Service
Governmental
Region
Payette National
Forest
February 8, 2006



Federal Advisory Committee Act

- FACA imposes stringent requirements on advisory committees subject to its provisions
 - Advisory committee = "any committee . . . established or utilized by [an agency] in the interest of obtaining advice or recommendations [for an agency] of the Federal Government . . ." 5 U.S.C. App. 2, § 3(2).
 - Exclusions:
 - Committee composed wholly of full time, or permanent part-time, officers or employees of the Federal Government
 - Meetings in support of "intergovernmental communications where— (1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities; and (2) such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration." UMRA, 2 U.S.C. § 1534.

FACA Requirements

- Notice of establishment of advisory committee in Federal Register, including determination that committee is in the public interest
- Advisory committee charter to be filed with head of agency and Congressional committees
- Membership to be fairly balanced
- Meetings:
 - Open to the public
 - Published notice
 - Interested persons able to participate
 - Records available for public inspection
 - Minutes of meetings to be taken
 - Designated officer to chair meetings
 - Calls meetings
 - Approves agendas

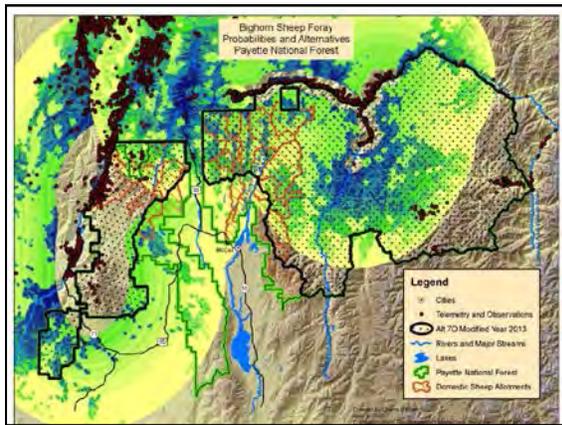
Problems on the Payette

- Payette RADT Committee
- Payette Principles Committee
- *Idaho Wool Growers Ass'n v. Schufer*, 637 F. Supp. 2d 868 (D. Idaho 2009)
 - Committees declared advisory committees subject to EACA
 - Committees not to be relied upon in future Forest Service decisions
 - Committee reports not to be used in future Forest Service decisions



Payette NF Revised LMP

- Development of Quantitative Model to assess risk of contact between domestic and bighorn sheep
 - Assumption that contact = 100% chance of disease transmission
 - Telemetry data / Foray analysis
 - Domestic sheep allotments on Payette NF closed
- IWGA and others currently involved in lawsuit against Forest Service in Ninth Circuit Federal Court of Appeals
 - Failure to consider expert agency comments and available scientific information
 - Modeling issues



Shoshone NF Revised LMP

- Notice of Intent published in Federal Register to revise Shoshone NF LMP and prepare an EIS on Sept. 24, 2010



National Environmental Policy Act (NEPA)

42 U.S.C. §§ 4321 et seq.

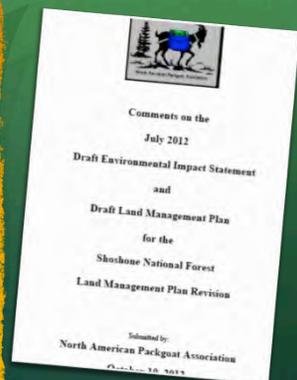
<h4>The Process</h4> <ul style="list-style-type: none"> • Scoping • Draft EIS • Final EIS • ROD 	<h4>Public Involvement</h4> <ul style="list-style-type: none"> • Scoping • Comments on Draft EIS • Objection Process (Forest Service) <ul style="list-style-type: none"> • Objections • Objection Meeting
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Scoping

- Lead agency must provide public notice of intent to begin scoping process
- “[A]n early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.” 40 C.F.R. § 1501.7.
- Practice pointers:
 - The squeaky wheel gets the grease
 - Get involved early and often

Public Comments

- Agencies must invite public comments on draft EISs. 40 C.F.R. §§ 1502.9, 1503.1-4.
- Comments are an integral part of the final EIS.
- An agency's failure to consider them and to respond to all legitimate concerns in a meaningful fashion can render an EIS inadequate.



Comments

- Recommended format:
 - Introduction: Who is filing comments; what are they filing comments on; are the comments timely?
 - Overview of who is filing comments (standing)
 - Background on the process to date - what's happened so far?
 - Short legal overview (i.e. you have to read and consider these under NEPA)
 - Comments
 - Informative/helpful tone



Issues to Comment on:

Alternatives

- "No Action" alternative
 - Required in every EIS (40 C.F.R. § 1502.14(d))
 - Describes environmental baseline
- Adequate range of alternatives
 - Agency must "study, develop, and describe appropriate alternatives" (42 U.S.C. § 4332(2)(E); 40 C.F.R. §§ 1502.14, 1508.9)

NAPgA Comments

- Flawed "No Action" alternative
 - Attempt to avoid NEPA analysis of packgoat ban
- Reasonable alternatives
 - BMPs & mitigation measures to maintain bighorn and packgoat separation
 - Consider strengthening bighorn immunity

Science Issues:

- Agency must:
 - Discuss responsible opposing views and indicate agency's response (40 C.F.R. § 1502.9(b))
 - Ensure scientific integrity of the discussions and analyses (40 C.F.R. § 1502.24)
 - Consider appropriate studies and data
 - **Not** rely on unsupported conclusory statements
- NAPgA comments:
 - All "domestic goats" are not the same
 - Packgoats are unique
 - No support for assumption that disease transmission will occur
 - What is the science?
 - What are the facts?
 - Need for epidemiological modeling

Unavailable or Incomplete Scientific Information

- If incomplete information relevant to reasonably foreseeable adverse effects is essential to a reasoned choice among alternatives and costs of obtaining the information are not exorbitant, agency must include that information in the EIS (40 C.F.R. § 1502.22)

- If relevant information cannot be obtained because costs are exorbitant or means of obtaining information are unknown, agency must include in the EIS:
 - Statement that such information is incomplete or unavailable;
 - Statement of the relevance of such information to evaluating effects;
 - Summary of existing scientific information;
 - Agency's evaluation of effects based on generally accepted theoretical/ research methods

Unavailable or Incomplete Scientific Information

- No scientific information on the risk of disease transmission between packgoats and bighorn sheep
- No documented case of disease transmittal from domestic sheep and goats to bighorns on the Shoshone
- Disease transmittal
 - How would that happen?
 - Effective contact?
 - Contact with BMPs in place?
 - Are packgoats carriers/ shedders?
 - Would the bighorn be susceptible?
 - Would the bighorn infect the herd?

Administrative Procedure Act Considerations

- Agency decisions under NEPA (and NFMA) will be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).
- Under this standard, judicial review of agency action seeks to determine whether an agency "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
- 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.'" *Id.* at 53.

NEPA/ APA Considerations

Important Aspects of the Problem

- Bighorn sheep carry disease
- Other animals carry disease
- Effects of grazing on lands off of the Shoshone NF

Modeling

- Must provide the public with "up-front disclosures of relevant shortcomings in the data or models." *Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005).
- Agency must explain how any model it develops "matches up with real-world conditions." *Dow Agrosciences, LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462 (4th Cir. 2013).



Scapegoats....? There's no evidence of risk of contact between cattle and bighorn sheep....

Yeah...?

Other Issues

- Impacts of wolves
- Impacts of hunting
- Impacts on recreation
- Social and economic impacts
- Consideration of multiple uses (MUSYA, 16 U.S.C. §§ 528-531)
- FACA?
 - How did the agency develop its scientific information?
 - By committee?

Shoshone NF Revised LMP, Final EIS, draft ROD

- Notice of Availability published on Jan. 17, 2014
- Start of 60-day objection period




Forest Service Administrative Review Processes

- Planning Rule Objections (new) – 36 C.F.R. Part 219, Subpart B
 - Plans, plan amendments and plan revisions

Others

- Project-level Objection Procedures (new) – 36 C.F.R. Part 218
- Proposed projects documented with a Record of Decision or Decision Notice
- Hazardous fuel reduction projects (HFRA)
- Project Appeals (old) – 36 C.F.R. Part 215
- Proposed projects documented with a Decision Memo and categorically excluded



Why the change?

Forest Service wanted to adopt a more collaborative approach to forest management and attempt to consider and resolve public concerns BEFORE a final decision is made—resulting in better, more informed decisions.

Objection Process

36 C.F.R. § 219, subpart B

Who can object?

- Those who have previously submitted timely, specific written comments during the public comment periods
- Objections must be based on previously submitted comments, unless objection concerns issue that arose after opportunities for comment

Who is the objection filed with?

- Reviewing officer
- Generally one level above the “responsible official” (i.e., the decision maker)
- Example: Shoshone NF LMP responsible official was Regional Forester, so objection filed with Chief’s Office

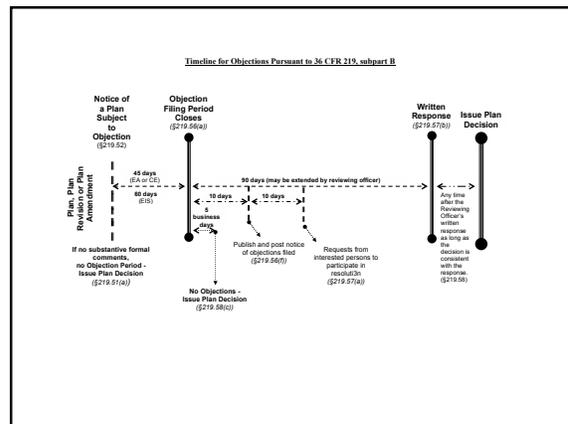
When do I file?

Details (36 C.F.R. § 219.54(c))

- 60-day objection period begins with publication of Public Notice & issuance of FEIS, revised Forest Plan, and Draft ROD
- Public Notice also posted on Plan revisions webpage and in Federal Register
- Letter also sent to those who have submitted formal comments
- Must file written objections within 60 days (no time extensions)

Details (36 C.F.R. § 219.54(c))

- Objector’s name, address, email
- Signature
- Identification of lead objector
- Name of plan revision & responsible official
- Statement of issues and/or parts of plan revision to which objection applies
- Concise statement explaining objection (including identification of legal issues) and suggesting how proposed plan decision may be improved
- Statement linking previous comments with objection



Meeting with Objectors (NAPgA Experience)

- Prior to meeting in Cody, WY, with Reviewing Officer and Shoshone NF, NAPgA was provided with:
 - Agenda
 - List of Interested Persons
 - Draft Objection Responses
 - Objection Issue & Issue Summary
 - Remedy Proposed by Objectors
 - Shoshone NF Conclusions
 - Instructions Being Considered

Meeting with Objectors (NAPgA Experience)

- 1-hour
- On the record
- With:
 - Reviewing Officer
 - Interested Persons
 - Shoshone NF
 - Public
- Focus determined by Reviewing Officer



Observations / Outcome

- Total objection period (Apr. 4 - Nov. 22) = much longer than 90 days
- Was the Objection Meeting useful?
 - Not really
 - Too late in the process for meaningful input
- Shoshone NF LMP, ROD & FEIS
 - Issued May 6, 2015
 - Domestic Sheep and Goats (including Packgoats) banned from Shoshone NF



What's Next?

Litigation...?

Thank you!
Questions?



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