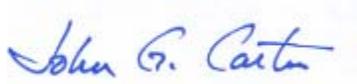


APPEAL TO HARV FORSGREN, THE REGIONAL FORESTER USDA FOREST SERVICE REGION IV, FROM A DECISION OF THE FOREST SUPERVISOR, WASATCH-CACHE NATIONAL FOREST

High Uinta Preservation Council
Utah Environmental Congress
Western Watersheds Project
Western Wildlife Conservancy
Wild Utah Project)
)
APPELLANTS)
)
v.) Notice of Appeal, Statement of
) Reasons, and Request for Relief on
Brian Ferebee) the Final Environmental Impact
Forest Supervisor) Statement for the West Fork Blacks
) Fork Allotment Management Plan
RESPONDENT)
)
)
)
)

NOTICE OF APPEAL
STATEMENT OF REASONS
RELIEF REQUESTED

DATED this 15th day of November, 2009



By _____
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NOTICE OF APPEAL

Pursuant to 36 C.F.R. Part 215, the listed Appellants appeal Wasatch-Cache National Forest (WCNF), Forest Supervisor, Brian Ferebee's Record of Decision (ROD) for the Environmental Impact Statement (EIS) for the West Fork Blacks Fork (WFBF) Allotment Management Plan authorizing domestic livestock grazing for the WFBF Allotment, signed September 30, 2009. The EIS and ROD violate the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), The Endangered Species Act (ESA), The Wilderness Act (TWA) and the Administrative Procedures Act (APA). Consequently, the Appellants request that the ROD be withdrawn and a new decision issued to correct the deficiencies identified herein.

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The High Uintas Preservation Council is a 501c3 membership conservation organization headquartered in Hyrum, Utah. HUPC and its members endeavor to preserve and restore the integrity of the High Uintas Ecosystem by fostering ecological literacy and activism, seeking community based solutions, working to affect the accountability of public decision makers in maintaining inherent biological diversity and ecological processes. HUPC encourages an expanded ecological and spiritual vision of the High Uinta Mountains.

The Utah Environmental Congress is also a non-profit organization dedicated to maintaining, protecting, and restoring the native ecosystems of Utah. The UEC has an organizational interest in the proper and lawful management of National Forests in Utah, including the Uinta-Wasatch-Cache National Forest.

Western Watersheds Project is a non-profit 501c3 membership conservation organization with over with 1400 members and with offices in 6 western states. WWP's headquarters is located in Hailey, Idaho and the group works to influence public lands management in 11 western states. The mission of Western Watersheds Project is to

protect and restore western watersheds and wildlife through education, public policy initiatives and litigation. WWP has participated in all levels of the West Fork Blacks Fork Allotment Management Plan NEPA decision process, our members use the West Fork Blacks Fork project area and are interested in the environmental health of the area. WWP's members use the WCNF, including the project area, for a variety of activities, including fishing, hiking, hunting, wildlife viewing, spiritual renewal, biological, and botanical research, photography, and for other forms of recreation. They will be adversely affected by the AMP ROD.

Western Wildlife Conservancy is a 501c3 membership-based non-profit wildlife conservation founded in 1996 and located in Salt Lake City, Utah. WWC has approximately 300 members with at least half of them living in Utah. The mission of WWC is the restoration and protection of wildlife and wildlife habitat in the intermountain West through research, education and advocacy.

The Wild Utah Project is a 501c3 conservation organization that promotes conservation biology in Utah and adjoining states. As a nonprofit organization, WUP provides scientific analysis to conservation partners, including land managers, to design and implement land use consistent with maintaining and, where needed, restoring the health and productivity of ecosystems.

BACKGROUND

The High Uintas Wilderness, established by Congress in 1984, totals approximately 460,000 acres on the Uinta-Wasatch-Cache and the Ashley National Forests and is located in Summit and Duchesne Counties in Utah. The Uinta Mountains have outstanding wilderness qualities and are geologically unique. They are the highest range in Utah and the most prominent east-west trending range in the contiguous United States. Below the main ridges, the range is divided into numerous alpine basins, dotted with picturesque lakes and meadows. Rivers descend from the basins into glacially-carved, "U" shaped canyons. Below the 10,000 foot timberline the area is forested with conifers, consisting of predominantly Englemann Spruce, subalpine fir and lodgepole pine.

The mountains rise out of the Wyoming and Uinta Basins that flank them to the north and south. Elevations range from 7,000 - 8,000 feet in the lower canyons to 13,528 feet atop Kings Peak. The High Uinta's furnish summer habitat for moose, elk, bighorn sheep and deer. A variety of mammals, fish, birds, and a few reptiles and amphibians live or potentially live in the area. The range is home to seventy-five percent of Utah's bird species. Occasionally, rare wolverines are spotted, and these mountains may still shelter Canada lynx with recent introductions into Colorado potentially traveling through or occupying the Uintas.

The EIS and ROD for the West Fork Blacks Fork Allotment Management Plan authorizes domestic livestock grazing on the West Fork Blacks Fork Allotment totaling 14,786 acres of the Wasatch-Cache National Forest. The decision permits grazing of the project area from July 6 to September 15 by 1,075 ewes and lambs with additional trailing of several thousand additional sheep through the allotment to and from adjacent allotments. A deferred grazing system has been used with four pastures since 1965. Pastures are grazed beginning with the lowest elevation pasture 1 and proceeding thru the upper pastures 2, 3 and 4. Since 1999, the upper elevation

pasture 4 has been divided into two areas 4a and 4b which are alternately rested for two year periods.



Lake EJOD in Unit 4a rapidly filling with sediment from adjacent grazed uplands – note depleted uplands dominated by bare ground causing excessive erosion with resulting loss of productivity

STATEMENT OF REASONS

The EIS and ROD for the West Fork Blacks Fork Allotment Management Plan (hereafter referred to as the WFBF AMP) authorizing grazing on the West Fork Black’s Fork Allotment on the Evanston Ranger District are based on flawed and/or inadequate information. By selecting the preferred alternative, the Forest Service is in violation of NEPA, NFMA, TWA, ESA and APA. The following analysis details how these federal regulations will be violated by the project’s implementation.

I. The EIS and ROD for the WFBF AMP Violates the National Environmental Policy Act (NEPA)

A. The Forest Service Failed to Analyze a Full Range of Alternatives

NEPA regulations require that agencies should “@igorously explore and objectively evaluate all reasonable alternatives...”¹ Furthermore, “NEPA requires that federal agencies consider alternatives to recommended actions whenever those actions ‘involve [...] unresolved conflicts among alternative uses of available resources.’² Consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process. This is reflected in the structure of the statute: while an EIS must also include alternatives to the proposed action,³ the

¹ 40 CFR 1502.14[a]

² 42 USC 4332[2][E][1982]

³ 42 USC 4332[2][C][iii][1982]

consideration of alternatives requirement is contained in a separate subsection of the statute and therefore constitutes an independent requirement.”⁴

The language and effect of the two subsections also indicate that the consideration of alternatives requirement is of wider scope than the EIS requirement. The former applies whenever an action involves conflicts while the latter does not come into play unless the action will have a significant effect. An EIS is required where there has been an irretrievable commitment of resources, but unresolved conflicts as to the proper use of available resources may exist well before that point. Thus the consideration of alternatives requirement is both independent of and broader than, the EIS requirement. Recent case law has established that consideration of alternatives that lead to similar results is not sufficient to meet the intent of NEPA.⁵

NEPA documents discuss alternatives to the proposed action, to “provide a clear basis for choice among options by the decision maker and the public.”⁶ The purpose of this requirement is “to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means.”⁷

Furthermore, the courts have taken federal agencies to task for stating a purpose and need so narrowly that only the agency’s preferred alternative could meet it, thus subverting NEPA’s clear requirement to “*rigorously explore and objectively evaluate all reasonable alternatives.*”⁸ The Seventh Circuit Court explained: “*One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence) . . . If the agency constricts the definition of the project’s purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role.*”⁹ NEPA further states that it is the responsibility of the federal government to use all practicable means to attain the widest range of beneficial uses of the environment without degradation or other undesirable and unintended consequences.¹⁰

To make a decision, the first thing an agency must define is the project’s purpose.¹¹ The federal courts cannot condone an agency’s frustration of Congressional will, and if the agency constricts the definition of the project’s purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act.¹² The WCNF declares in the WFBF AMP EIS that the Purpose and Need for the project is to accomplish the following¹³: “*Authorize livestock grazing on the West Fork Blacks Fork Allotment in a manner that will meet or move toward desired conditions identified in the Revised Forest Plan while meeting other resource*

⁴ See *id.* 4332[2][E]

⁵ See *Citizens for Environmental Quality v. United States*, 731 F.Supp. 97 0, 989 (D. Colo. 1989); *State of California v. Block*, 690 F.2d 753 (9th Cir. 1982)

⁶ 40 C.F.R. 1502.14; see also 42 U.S.C. 4332(2) (E); 40 C.F.R. 1507.2(d), 1508.9(b).

⁷ *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1974).

⁸ 40 CFR 1502.14a

⁹ *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, Page Number (C.A.7 (Ill.) 1997)

¹⁰ (NEPA, 42 U.S.C. 4231 Section 101(b)(3)).

¹¹ *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-96 (D.C.Cir.1991)

¹² 42 U.S.C. 4332(2)(E)

¹³ EIS 1-4

objectives...In addition, Public Law 104-19, commonly referred to as the “Rescissions Act” includes Section 504(a) which requires the Forest Service to establish and adhere” to a schedule for the completion of NEPA analysis for all National Forest System lands grazing allotments where such analysis is needed.”

In the EIS for the WFBF AMP, the Forest analyzed three alternatives, including the no action and proposed alternatives. These alternatives are described below:

1. Alternative A—Grazing would be suspended on the WFBF Allotment, but sheep from other allotments would be allowed to trail through the allotment¹⁴
2. Alternative B—Grazing would not be allowed in unit 4 and 875 ewes and their lambs would continue to graze the other 3 units on the allotment from July 6 through September 15¹⁵
3. Alternative C—The proposed action would provide periodic rest of the alpine unit and close the area 200 yards around Dead Horse Lake to sheep grazing. The alternative would authorize grazing to continue on the whole allotment and would continue modifications that began in 1999¹⁶.

In the case of the WCNF, No Grazing Alternatives are not accepted. This is exemplified by the statement in the ROD for the North Rich allotment, *“Alternative C eliminates livestock grazing and does not implement the Wasatch-Cache Forest Plan desired condition for the Bear and Cache-Box Elder management areas by failing to allow for livestock grazing in active allotments.”* While this quote was from the North Rich ROD, it reflects the approach across the Forest. The alternative was put in even though the Forest Service knew in advance it would never accept it.

Alternative C is essentially the No Action Alternative, continuing the status quo of deferred grazing and the system that has been in place for decades with the rest provision for Unit 4 being in force since 1999. This alternative was selected in the face of the well documented degradation and recreation conflicts occurring in the West Fork Black’s Fork while ignoring that deferment cannot restore areas – only long term rest and closure can accomplish that.

Two other alternatives were developed, but not analyzed in detail. Alternative D would return to the management that existed between 1965 and 1999. It was not analyzed because it was similar to the Proposed Action, Alternative C and did not address the effects identified as concerns caused by grazing and meet the purpose and need. Alternative E would phase out domestic sheep grazing over ten years in order to emphasize the natural values of the area. It was not analyzed because the issues in the alternative were addressed in another alternative, and because the Forest wrongly asserts that the Wilderness Act mandates that grazing continues.¹⁷ Note that this was not analyzed because it was so similar to the Proposed Action, proving that the Proposed Action will only perpetuate the damage occurring in the WFBF.

The scope and intensity of grazing in the project area that would fulfill the purpose and need of meeting or moving resource conditions toward desired conditions identified in the Revised Forest Plan (RFP) while meeting other resource objectives in

¹⁴ EIS p. 2-7

¹⁵ EIS p. 2-10

¹⁶ EIS p. 2-12

¹⁷ EIS 2-14

the project area should have been determined through this NEPA process. The Forest Service cannot arbitrarily and capriciously predetermine the manner in which grazing “will meet or move toward desired conditions identified in the Revised Forest Plan while meeting other resource objectives,”¹⁸—i.e. allowing 1075 ewes and their lambs to graze from July 6 through September 15—while failing to consider reasonable alternatives to the proposed action in violation of NEPA. The Forest Service should have derived its proposed grazing system and stocking rate from a current, site-specific capability and suitability analysis combined with a current forage capacity analysis, while incorporating the well known range science principle of long term rest for restoration, conservative utilization rates for locations continuing to be grazed and allocations of forage to watershed protection and wildlife uses.

The Forest Service claims it analyzed 3 alternatives. Clearly, since the EIS is replete with admissions of resource degradation, Alternative C, which is essentially grazing as it is currently managed, does not help the Forest achieve resource objectives and DFC. Given the fact that this management scenario has resulted in violation of the RFP, as discussed throughout the EIS and this appeal and reflected in the purpose and need for this proposal¹⁹, the Forest cannot legally choose to implement this alternative, and following the Forest’s own interpretation of which alternatives to consider, Alternative C should have been ruled out of the scope of the analysis.

Since the purpose and need of the proposed action was narrowed to “*authorize livestock grazing on the West Fork Blacks Fork Allotment*” it appears that Alternative A, the no grazing alternative, also fails to meet the purpose and need of the proposed action. And, as stated previously, following the logic provided by the Forest in the FEIS and ROD this alternative is not within the scope of the analysis because as stated above the WCNF does not accept No Grazing Alternatives as it’s proposed alternative as this is prevented by the Forest Plan.

NEPA requires the statement of purpose and need in an EIS to reflect the true purpose and need “to which the agency is responding in proposing the alternatives including the proposed action.”²⁰ The Forest’s failure to ensure that the proposed alternatives support the purpose and need is arbitrary and capricious and therefore violates the Administrative Procedures Act (APA).²¹

There is no evidence that the Forest Service evaluated the appropriateness of domestic livestock grazing in the project area and/or conducted any type of site specific analysis to determine the appropriateness of livestock grazing in the project area as stated in the purpose and need. The enclosed report Watershed Conditions Uinta Wilderness, Utah: West Fork Black’s Fork, East Fork Black’s Fork, Lake Fork, Middle Fork Beaver Creek, Burnt Fork²² shows that resource conditions are not what the Forest Service claims in its EIS. Ground cover transects in upland areas grazed by sheep in the WFBF, Lake Fork, East Fork Black’s Fork, when compared to similar areas in areas ungrazed for decades, such as Middle Fork Beaver Creek have high amounts of bare

¹⁸ EIS p. 1-4

¹⁹ EIS 1-4

²⁰ 40 C.F.R. § 1502.13

²¹ 5 U.S.C. § 706(2)(D)

²² Carter, John G. 2006. Watershed Conditions Uinta Wilderness, Utah: West Fork Black’s Fork, East Fork Black’s Fork, Lake Fork, Middle Fork Beaver Creek, Burnt Fork. October 30, 2006. Western Watersheds Project.

soil leading to loss of productivity, accelerated erosion and accelerated runoff which lead to the flashy stream flows that scour banks in the WFBF.

Table 1. Ground Cover in West Fork Black's Fork, Burnt Fork, Lake Fork, East Fork Black's Fork and Middle Fork Beaver Creek taken from WWP Report.

Location	Rock	Crust	Litter	Grass and grasslikes	Forbs	Bare Ground
WF1						50
WF2						50
WF3						50
WF4						60
WF5						60
WF6						50
WF7						70
WF12	3.5	0.0	3.6	2.1	23.3	67.5
WF14	2.1	1.4	19.1	13.1	23.8	40.5
WF15	15.0	0.9	3.6	3.4	13.6	63.5
WF16	7.3	13.6	20.5	14.1	18.8	25.7
WF17	7.1	1.4	9.4	8.8	25.3	48.1
Averages	7.0	3.4	11.3	8.3	20.9	52.9
BF1						0
MF1	1.1	8.1	10.3	61.3	19.3	0
MF3	8.2	18.5	18.0	35.0	19.9	0.1
MF4	5.8	14.5	17.6	46.9	14.9	0.4
Averages	5.0	13.7	15.3	47.7	18.0	0.2
EF1						45
EF2						75
EF3						95
EF8						60
EF9						50
EF11						40
EF13						65
EF14	14.0	17.1	7.0	8.9	13.0	40
EF15	16.9	1.8	17.5	17.9	18.1	27.8
EF23	10.5	1.6	25.6	18.1	15.1	29
Averages	13.8	6.8	16.7	15.0	15.4	52.7
LF1						70
LF2	6.6	0.8	27.8	14.0	13.9	42
LF3						55
Average						55.7

Note that the bare ground is reduced to near zero in the ungrazed watersheds, while the grazed watersheds have over 50% bare ground. The Forest Service has obfuscated around this with various mechanism including abandonment of long term alpine ground cover sites as inappropriate, blaming snow beds, gophers and using monitoring in areas less sensitive and less used by sheep such as wet meadows. Sheryl Goodrich was confronted with this at the 2002 Coalville meeting and agreed that snowbeds were minor in extent and that the areas he was showing as not damaged by sheep were actually wet meadows not used or minimally used by sheep.



Denuded bare slope in Unit 4a above the West Fork Black's Fork River showing transect location on slope. Bare ground here is 63.5%

The ROD violates various laws and regulations governing public land management, and the approved action fails to comply with the standards and guidelines set forth in the RFP for the WCNF. Therefore, the EIS and ROD fail to meet the purpose and need for the WFBF AMP.

B. The Forest Service failed to comply with the spirit of NEPA and provide high quality information and analyses, or take a “hard look”.

NEPA is “our basic national charter for protection of the environment. ...to make sure that Federal Agencies act according to the letter and spirit of the Act.” In complying with NEPA, agencies must ensure that high quality information, is made available to public officials and citizens before decisions are made and actions taken. “NEPA documents must concentrate on the issues that are truly significant to the action in question... and help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment..” (40CFR1500.1) “Environmental Impact Statements shall... be supported by evidence that agencies have made the necessary environmental analyses.” (40CFR1500.2)

Capability and Suitability

The EIS did not address the site-specific capability and suitability of the West Fork Black's Fork for sheep grazing and claimed this was not necessary as it was done in the 2003 Forest Plan Revision. A site-specific capability analysis would evaluate ALL the criteria contained in the Forest Plan. This was not done in the EIS, instead, reliance was placed on a 40 year-old determination, did not use current data and information and dismissed the issue out of hand. The elements of capability and suitability such as risk of erosion, impairment of plant community productivity and conflicts with other uses are inherent factors that need to be analyzed to reduce risks to the resource, recover damage and reduce conflicts on a project-specific basis. No site-specific determination of capability, suitability, forage availability, allocations to livestock, wildlife and watershed protection was done. This watershed consists of steep, highly erodible slopes and dense forests which limit its capability for grazing.

WWP used the Forest Service's criteria for capability in an analysis, resulting in the capable acres shown in Table 2. As can be seen wet meadows were included in capable acres, though sheep avoid these areas. The bottom line is that there are minimal capable acres in the West Fork Black's Fork and the Forest Service should have done this analysis and closed the allotment.

Table 2. Capable Acres in the West Fork Black's Fork Allotment.

Vegetation Type	Pasture 1	Pasture 2	Pasture 3	Pasture 4a	Pasture 4b	Total Capable Acres
AC (Aspen conifer)	28	0	0	0	0	28
AL (Alpine)	0	0	68	104	14	186
SF (Spruce fir)	0	0	1	0	0	1
SG (Sagebrush grass)	30	0	0	0	0	30
WM (Wet meadow)	180	180	128	66	54	609
Total Capable Acres	239	181	197	171	67	854

In surveys conducted in 2007 and 2008, plots clipped in mixed conifer showed residual herbaceous vegetation of 27 – 44 lb/acre. If, as the Forest Service claims, utilization levels are proper, then the totals before grazing could not have exceeded 100 lb/acre, which is half the level of forage production that qualifies for capable land. The Forest Service has not determined the amount of forage present, yet claims that sufficient forage is present on capable lands to support the thousands of sheep grazing and trailing thru the area.

Plant Communities, Soils, Conditions on the Ground

The EIS did not provide an objective analysis of the extent and condition of the various plant communities and soils, areas in satisfactory or unsatisfactory condition, soil erosion characteristics, the area and distribution of the various plant communities and soils from which a determination of capability and stocking rate could be made. There was no analysis of the current plant species and productivity as compared to potential composition and productivity, or with historic range surveys. There was no

range condition determination. No evidence was provided that these factors were analyzed in adequate detail during Forest Planning to allow their carryover to this project. It is at this site-specific AMP level that such determinations must be made to verify and quantify the “general suitability” and other general determinations made in the Revised Forest Plan. Using GIS technology, these analyses are clearly attainable by the Forest Service. In fact, the accompanying report does just that.



Upland area in valley bottom typical of areas grazed by sheep. High amounts of bare ground have resulted from sheep grazing, not gophers or snowbeds, with little forage remaining. Residual herbaceous vegetation at this site in 2007 was 64 lb/acre

The EIS admits that neither Alternative B or C provides recovery of vegetation, soils, and ground cover while Alternative A (No Grazing) does provide improvement in violation of the RFP. The FEIS admits that Wilderness values will continue to be compromised by Alternatives B and C, while Alternative A provides recovery of those values except for the intrusion of sheep trailing.

Recreation

Recreation continues to be impacted by the visible evidence of trailing, sights, sounds and smells of sheep under Alternatives B and C, while Alternative A provides for “*Greatly reduced impacts*”. Impacts to fisheries and spawning habitats are admitted to continue under Alternatives B and C, while Alternative A reduces those impacts. The impacts on big game are claimed to be minimal under Alternatives B and C, yet the

EIS ignores forage competition with approximately 7,000 sheep (1300 ewes trailed plus two lambs, 1075 ewes grazed plus two lambs). This forage competition would be largely eliminated for big game as well as small mammals (including snowshoe hare needed for goshawk and lynx) and birds under Alternative A. The loss of this forage and the degradation of the land constitutes a violation of TWA and the NFMA impairment provision.

Grazing Systems

The EIS did not determine the capability and capacity of the individual pastures or Units subject to its deferred grazing scheme, nor did it determine the length of time grazing could take place within each pasture based on its capable acres and current forage capacity. In fact, there appeared to be no reason for the designation of Units 1, 2 and 3 since there is no planned rotation, rest or other special management described. The EIS did not provide any evidence that the proposed scheme of rest-rotation for the alpine benches will result in any improvement in the current degraded conditions. A review of historical records for the WFBF reveals that deferred and rotation grazing schemes have been required for about 50 years. The FEIS did not analyze and disclose the results of these grazing schemes on the current conditions that prevail in the WFBF. Furthermore, range science has documented that it is stocking rate and rest, not grazing systems, that results in improvement to damaged plant communities and soils^{23,24}. Research on rest-rotation grazing and sensitive native plants has shown much greater periods of rest than one or two years are needed just to restore plant vigor of the species more sensitive to grazing^{25, 26, 27}. The EIS has failed to show that these grazing-sensitive plant species (decreasers, desirable forage plants, etc.) will be provided with adequate rest to allow their vigor and reproductive potential to be restored or maintained²⁸. Research has shown that even in the absence of livestock, recovery times are very long^{29,30,31,32}. This is in lower elevation areas with longer growing seasons than occur in the West Fork Black's Fork.

²³ Holechek, Jerry L., Hilton de Souza Gomes, Francisco Molinar and Dee Galt. 1998. Grazing intensity: critique and approach. *Rangelands* 20(5):15-18.

²⁴ Holechek, Jerry L., Hilton Gomez, Francisco Molinar and Dee Galt. 1999a. Grazing studies: what we've learned. *Rangelands* 21(2):12-16.

²⁵ Hormay, A. L. and M. W. Talbot. 1961. Rest-rotation Grazing – A New Management System for Perennial Bunchgrass Ranges. USDA Forest Service Production Research Report No. 51.

²⁶ Anderson, Loren D. 1991. Bluebunch wheatgrass defoliation, effects and recovery – A Review. BLM Technical Bulletin 91-2, Bureau of Land Management, Idaho State Office.

²⁷ Mueggler, W.F. 1975. Rate and pattern of vigor recovery in Idaho fescue and Bluebunch wheatgrass. *Journal of Range Management* 28(3):198-204.

²⁸ Mueggler, W.F. 1975. Rate and pattern of vigor recovery in Idaho fescue and Bluebunch wheatgrass. *Journal of Range Management* 28(3):198-204.

²⁹ Anderson, Jay E. and Richard S. Inouye. 2001. Landscape-scale changes in plant species abundance and biodiversity of a sagebrush steppe over 45 years. *Ecological Monographs* 71(4):531-556.

³⁰ McLean, A. and E.W. Tisdale. 1971. Recovery rate of depleted range sites under protection from grazing. *Journal of Range Management* 25:178-184.

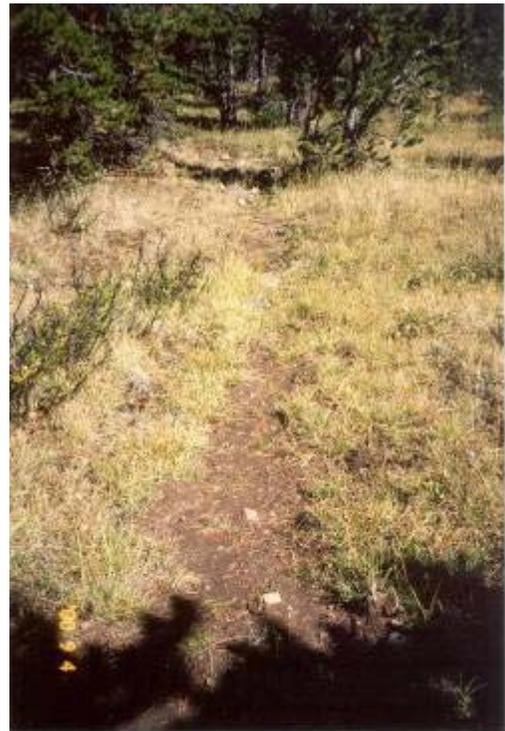
³¹ Evanko, Anthony B., and Roald A. Peterson. 1955. Comparisons of protected and grazed mountain rangelands in southwestern Montana. *Ecology* 36(1):71-82.

³² Orr, Howard K. 1975. Recovery from soil compaction on bluegrass range in the Black Hills. *Transactions of the ASAE*, 1076-1081.

High elevation areas with short growing seasons and cold temperatures may require much longer for recovery. The effects of livestock trampling on plant production, soils and nutrient cycling was not addressed^{33,34,35}. The EIS did not address the impairment to the productivity of the land that grazing and trailing these 7,000 sheep in the WFBF causes. This is a critical part of NFMA and MUSYA regarding the sustainability of use, valuation of other uses and doing so without impairment of the productivity of the land.

Damage to Wilderness Character

The EIS explains away much of the damage to trails and the consequent degradation of wilderness quality as being due to hikers and horse packers. *(The photos at right show the grazed WFBF trail and the main trail in Middle Fork Beaver Creek which has been closed to sheep for decades.)* The FEIS does not compare the number of hikers and horse packers to the number of sheep trailing up and down the trails and watershed in order to place these different levels of trampling and use into proper perspective. Nor does it take into account the numerous horseback and pack trips made by permittees to inspect and re-supply herders. It does not take into account the forage consumption by these horses or herder's horses. The attached report shows the difference in trail impacts in the West Fork Black's Fork when compared to nearby ungrazed watershed trails. These trails are the areas mostly encountered by recreational users. The differences are major and should not be downplayed when 7,000 sheep are using the area compared to about 200 hikers. The FEIS indicates about 10% of these visitors use horses. How does this use stack up against 7,000 sheep and numerous permittee horseback trips up and down the watershed? It appears there are about 30 sheep for every visitor, making sheep 30 times more likely to be responsible for



³³ Bryant, H. T., R. E. Blaser and J. R. Peterson. 1972. Effect of trampling by cattle on bluegrass yield and soil compaction of a meadowville loam. *Agronomy Journal* 64:331-334.

³⁴ Kauffman, J. Boone, Andrea S. Thorpe, and E. N. Jack Brookshire. 2004. Livestock exclusion and belowground ecosystem responses in riparian meadows of eastern Oregon. *Ecological Applications* 14(6):1671-1679.

³⁵

the trail damage and degradation of wilderness quality.

Predator Control

The EIS shows that sheep losses to predators are small and that herders have guard dogs, yet allows predator control to occur in the WFBF. Lynx, if present, could be claimed to be predators and shot or trapped by permittees or herders because sheep are present. Who is to know? The EIS reports sheep losses to predators for several years, ranging from 4 to 13 per year. During visits to the WFBF after the grazing season, dozens of sheep have been found that are left behind each year. When questioned regarding this failure to remove all sheep by the end of the permit season, the Forest Service responded that the permittees “*let the snow drive them down*”. This does not speak well for the management of sheep within their prescribed grazing period. The number of sheep encountered that have been abandoned after the grazing season greatly exceed the losses reported in the EIS. Whether these lost sheep are considered predator losses is a question that needs addressing. Certainly predator control is not addressing sloppy management and abandonment of livestock by permittees that leads to losses.

Impairment of Productivity

The EIS blames almost all bare ground and losses of plant productivity on gophers, yet the data and photos in the attached report clearly show large areas of bare soil with no gopher mounds over most of the area. The EIS has provided no population estimates or mapped the extent of gopher activity. If the Forest Service considers gophers a problem, then coyotes and other predators are needed to help keep their populations in balance as part of the Revised Forest Plan’s DFC cited in the FEIS in which “*Natural ecosystem processes are dominant. Ecosystems are influenced by natural processes with little or no intervention.*” Certainly, predator control is an intervention in natural processes and 7,000 sheep clearly a major intervention in these processes. Furthermore, if gophers are creating soil damage and bare ground and loss of vegetation productivity, then they are affecting the capability of the area to support livestock grazing without further increasing soil erosion and impairment of productivity when 7,000 sheep are grazed and trailed through the area.

Bighorn Sheep

The EIS dismisses bighorn sheep as outside the scope of the decision. “*Due to needs including analysis of both winter and summer range and maintaining adequate separation between domestic and wild sheep, an area much larger than the WFBF would need to be analyzed for wild sheep management.*” This is exactly what is needed and is what NEPA requires under its context and intensity requirements. The EIS engages in a fragmented approach not allowed under NEPA. The attached WWP report shows extensive damage to watersheds all around the WFBF that are grazed by sheep, some of which belong to the same permittees and are trailed through the West Fork Black’s Fork. Yet this was not analyzed relative to the needs of bighorn sheep, other wildlife, wilderness quality and watershed protection. Bighorn sheep are in the project area and their health and habitat needs are a serious concern. Domestic sheep

can have a devastating impact on bighorn sheep and this issue needs to be analyzed in detail here.

Stream Bank and Riparian Condition

Another issue the EIS considered inadequately is stream banks and riparian condition. The analysis attempts to blame unstable banks on every conceivable factor besides sheep, such as century-old tie-hacking, avalanche debris and lack of deep-rooted vegetation. The EIS conveniently ignored the removal of large quantities of vegetation from the watershed and soil compaction by sheep grazing and trailing. It ignored that this depleted ground cover and buffering capacity of residual vegetation, which is lost through grazing with no time for plant regrowth at the end of the season, results in accelerated flows during snow melt and storm runoff with the increased flood forces and erosion on susceptible stream banks³⁶. The Forest Service should have considered this in its analysis as additional risk factors that make superimposing 7,000 sheep an additional unacceptable burden on the ecosystem due to the increased risk of degradation. The EIS claims that tributaries of the WFBF do not suffer stream bank damage such as occurs on the WFBF main stream. Yet, in Buck Pasture in 2007 the following photo documents that scouring and downcutting is taking place. This small tributary is not affected by the claimed tie hacking, the avalanche in upper WFBF. It's watershed is grazed by sheep and they trample and graze its banks, weakening them against flood forces.

The Forest Service openly admits that the WFBF stream channel is degraded³⁷, yet does not view sheep grazing as an important causative agent of the degradation. Instead, it asserts that a 1980s avalanche far up the canyon, century-old tie hacking activities, plus lack of deep-rooted vegetation and rocks are the causes of the degradation of the stream channel. FEIS 1.8.2.3.4.

Even in the absence of contrary evidence, this hypothesis defies credulity and raises a number of obvious questions that, unfortunately, are not answered in the FEIS. We raise these questions below and examine them.

1. *How can the Forest Service be sure of the truth of this hypothesis in the absence of baseline data or historic monitoring that might eliminate sheep grazing as a cause of stream channel degradation?*³⁸

Sheep grazing and trailing, totaling several thousand sheep annually has occurred on the allotment for over 100 consecutive years beginning around the turn of the 19th-

³⁶ See Black's Fork stream flow hydrograph in the attached report.

³⁷ Section 1.8.2.3.4 of the FEIS is devoted to justifying leaving the issue of stream channel conditions, including scouring and slumping banks, out of the FEIS on the ground that it is a "non-significant issue" because it is "not relevant to the decision to be made." The facts of scouring and slumping are openly admitted.

³⁸ ROD, page 1, indicates that no site-specific analysis was completed for WFBF until recently. Yet domestic sheep grazing has occurred annually in WFBF for over 100 years. It follows that the FS is not in possession of baseline data on which to gauge the ways in which, or the degree to which, the WFBF watershed may have been affected by sheep grazing over this long period of time. It further follows that any monitoring in recent decades can only identify changes that have occurred since the 1960s. Imagine a physician examining the heart and lungs of a chronic heavy smoker of 30 years and giving him a clean bill of health on the ground that "Your heart and lungs are no worse this year than they were last year."

20th Century, yet the first studies of the condition of the watershed weren't conducted until the 1960s, and subsequent research was not conducted until the mid-1990s. (FEIS 1.2, page 1) It may be true that conditions are no worse now than they were in 1965, but how bad were they in 1965 compared to 1900? It cannot be satisfactorily argued that things are just fine now because they are no worse than before unless you know that they were just fine before. The Forest Service has arbitrarily adopted information obtained in the 1960s as providing a baseline from which to assess the conditions today. Granted, this may be the best they have, but it isn't reliable.

2. *How can it be true that natural events and conditions, such as an avalanche and lack of deep-rooted vegetation, plus tie-hacking activities, would cause significant degradation of the watershed and stream channel, but that the entirely unnatural condition of massive sheep grazing and trailing for more than 100 years would not cause significant degradation of the watershed and stream channel?*³⁹

This hypothesis is possibly true, but it is counterintuitive. It raises the evidence bar to a very high level, demanding very convincing evidence for support. It is our belief that the evidence provided in the FEIS falls far short of the level required as justification for concluding that this is a “non-significant issue” and therefore “not relevant to the decision to be made.”⁴⁰

3. *Even if it is admitted that sheep grazing and trailing are at least a partial cause of the degradation, which in our opinion cannot seriously be doubted, what justification can there be for continuing to impose this impact, even if it is not the only one, when it is the only one we have any control over?*

The FEIS repeatedly attempts to explain the degraded condition of the WFBF stream channel by reference to indirect effects from an avalanche, which produced debris flows, also to historic tie hacking/driving, and to the relatively fine-grained soils in the canyon bottom, all of which purportedly combined to produce scouring of the channel, slumping banks and a consequent dearth of overhanging vegetation. Livestock grazing, on the other hand, is excluded as an additional significant cause of these conditions with little or no justification.

For example, the FEIS states that “. . . *stream bank instability could be symptoms of natural factors . . .*” FEIS 1.8.2.3.4 Also: “*The issue of the effect of grazing on the stability of stream banks is not carried further in this NEPA analysis because almost all of the stream bank instability is associated with natural conditions.*” FEIS 1.8.2.3.4, page 21. It is important to note that “could be” a causative factor and “is associated with” do not even begin to establish a causal connection between the referenced “natural conditions” and the degradation of the WFBF stream channel.

Analogy: A person might be genetically predisposed to cardiovascular disease, and might in fact eventually die of the disease even if he doesn't quit smoking cigarettes,

³⁹ “There are several reasons stream banks are naturally unstable in certain reaches of the West Fork Blacks Fork River: lack of deep-rooted vegetation/rocks and naturally high bedload sediment supply . . . Avalanche Effects on Stream Banks . . .” FEIS 1.8.2.3.4, page 21

⁴⁰ Ibid., 1.

but surely it makes sense for him to stop smoking if he wants to live, and any physician who advises him otherwise will be risking a malpractice suit.

4. *How can tie hacking have been a cause of the degraded riparian zone and stream channel within the wilderness boundary when all available evidence, including the Wasatch-Cache's own historical research, easily obtained at the Mountain View Ranger District, including maps, indicates that there never was any tie hacking activity of any kind - no cutting and no driving - within the present-day wilderness boundary?*⁴¹

Historical research conducted by the Wasatch-Cache NF, and found in the Mountain View Ranger District Office, indicates that the closest tie hack cabin to the present day wilderness boundary in the WFBF was about a mile north of the boundary. All others were further away



than that, while ruins found within the wilderness boundary are of more recent origin than those of tie-hacker cabins and are in proximity to fences, indicating that they are ruins of line cabins used by livestock herders. Also, tie-hackers built their cabins in proximity to the stands of timber they intended to exploit, and such exploitation was only profitable where the forest consisted of relatively flat, level expansive uniform stands of lodgepole pine - conditions that do not prevail within the wilderness boundary, where the forest consists largely of other species, such as Engelmann spruce, and where the forested canyon walls are steep and irregular.⁴²

Furthermore, as stated in the Western Watersheds Project Report on WFBF, page 8 “The Forest Service has attributed the stream bank damage in the West Fork Black’s Fork to century old tie-hacking, or avalanche debris. Yet, in the East Fork Black’s Fork (see photo above), the same scouring features occur in upper elevation meadows above where any tie hacking or avalanche debris occurred. The lack of these erosional features in the ungrazed watersheds of Burnt Fork and Middle Fork Beaver Creek also

⁴¹ “Tie-hackers cleared obstructions and straightened channels to permit floating of ties to collection points.” FEIS 1.6.1.7, page 3.

⁴² Knights of the Broadax, by Joan Trego Pinkerton, 1981; available on-line at Amazon.com and at the Uinta County Library in Evanston, Wyoming.

refute these claims that grazing is not the cause of these riparian problems, but instead, it is other activities.” WWP Report, page 8.

What are we to conclude from this? Are we to suppose that the authors of the FEIS did not bother to consult information available to them on this subject or are we to suppose that they purposely ignored it? Either way, the assertion that tie-hacking/driving is in any part responsible for the degraded condition of the WFBF stream channel and riparian zone inside the wilderness cries out for proof - proof that is totally lacking in the FEIS. From this we conclude that the FEIS provides no justification for determining that the condition of the stream channel is not relevant to the decision to be made. Here there appears to be a violation of the Revised Forest Plan requirement to “maintain and/or restore overall watershed health.” RFP 2003, pg. 4-17

5. *Why does a prominent tributary stream on the east side of Buck Pasture (to mention just one example) exhibit the same scouring, slumping banks, and absence of overhanging vegetation exhibited by the main stream channel, even though it originates on high talus slopes where no historic avalanches, no historic tie hacking activity, and no pocket gopher activity is in evidence? (See photograph at right.)*



Visual inspection from the west side of the canyon is sufficient to rule out avalanches, since there is no visible avalanche chute, while the absence of tufted hairgrass meadows on the steep slope rules out pocket gophers and the historic record rules out tie hacking. The Forest Service surmises that a 1980s dam created by an avalanche at about the 10,000 foot elevation level gave way during spring runoff, releasing a huge amount of debris downstream, including boulders and trees, and that this was the chief cause of the scoured channel and collapsed banks so obvious today along the main stream. Yet this typical tributary stream exhibits these very same conditions as it crosses Buck Pasture to join the main stream.

The Forest Service seems to attempt an explanation of this discrepancy by reference to differences in soil conditions along the main stream as compared to tributary streams issuing from the high mountains on the east side of the canyon. The following excerpts from the FEIS are relevant in this connection:

“Bank slumping appears to be the results of a gravity failure process . . . Stream banks that have deep-rooted vegetation such as sedges and willows or large boulders will not erode as easily as banks with shallow-rooted vegetation and gravel/cobble banks. The stream banks in the meadows along the West Fork Blacks Fork have very little boulder-size rock, but mostly have a layer of fine-grained soil with sedges and or willows

holding the stream banks in place. Below this layer is a relatively weak layer of gravel and cobble. When deep-rooted sedges or willows grow in the fine-grained soil above this layer, then the stream bank forms about a one-foot overhang on the outside meander. Stream banks on higher, drier landforms within the meadow do not have deep-rooted willows or sedges and are very susceptible to bank erosion where these landforms are located along the stream.” 1.8.2.3.4, page 23

“Slumping Stream Banks - The WFBF stream banks show many areas where stream banks are sloughing into the stream. The sloughing stream banks are along the edge of the large sedge-type wetland meadows. During the 2006 field review these large wetlands were covered by dense sedge and wiregrass growing on fine-grained soil with water six inches on the surface or within the spongy vegetative mass under the sedge and wiregrass leaves. Bank slumping appears to be the results of a gravity failure process.” FEIS 1.8.2.3.4, page 23

While the text does not explicitly say so, assuming these excerpts to supply the true explanation for channel scouring, slumping stream banks and lack of overhanging vegetation along the main stream, it would be reasonable to infer that the same suite of causes explain similar phenomena exhibited by the tributary streams issuing from the slopes above the east side of the canyon. The problem is that the proximal causative factors of pocket gophers (which might denude the land, causing excessive erosion and increased sediment load) are not present on the talus slopes above where some of these streams originate, and are absent from the dense forested slopes immediately below. Furthermore, as already noted, there is no evidence of historic avalanches along these streams, let alone dams created by avalanches. And finally, there surely was no tie-hacking activity on these steep forested slopes, nor were there any tie-drives on these relatively small streams. In the absence of these causative agents, even given fine-grained soil lacking large rocks to anchor plant roots, one has no reason to expect these small tributary streams to exhibit the degraded conditions of the main stream. Yet they do! Perhaps this is why the Forest Service adds the following curious statement that is seemingly inconsistent with everything else: “Another indication that sheep have very little effect on stream banks is that the small tributary streams have dense vigorous vegetation growing along them and show very little sign of sheep grazing.” FEIS 1.8.2.3.4, page 24. This statement might be true of the tributary streams in wet meadows where they flow through the forest, but it is manifestly not true of them everywhere in the bottom meadows of Buck Pasture. (See accompanying photograph) Furthermore, the occasional clump of willows never exceeds three feet in height and inspection at the end of the grazing season shows that all of the growth ends of the stems have been bitten off.

Summary: The fact that these five incisive questions have no answers in the FEIS suggests that the Forest Service did not take the requisite hard look at the problem of WFBF riparian zone and stream channel degradation, and did not make a serious effort to determine its causes, before deciding that it is a non-significant issue not relevant to the decision to be made. Because of this failure of due diligence, we believe that the findings of the FEIS, as well as the decision contained in the ROD, are arbitrary and capricious under the National Environmental Policy Act. (EIS) (42 U.S.C. 4332).

Colorado Cutthroat Trout

Another example of the failure to take a hard look is in regards to the Colorado cutthroat trout. The EIS reports that, *“The overall trend for cutthroat trout appears to be flat.”* (EIS p. 3-61). However, inspection of Table 3-20 reveals a comparison between 1994 and 2005 sample periods at two locations. At Sample Site 2, CRCT were at 360/mile in 1994 and declined to 278 in 2005. At Sample Site 4, CRCT were at 40/mile in 1994 and 10 in 2005. This is definitely not a “flat” trend. No analysis of the soil erosion and other factors relating to sheep grazing that might impact CRCT was done. In the accompanying WWP (2006) report, sediment core samples taken in the West Fork Black’s Fork indicated that sediment levels in spawning substrate were very high and would result in a predicted survival of eggs to emergence of 2.1%. Other North Slope streams, both grazed and ungrazed, were high in sediment fines with resultant low predicted survival, but not as low as the West Fork Black’s Fork. The ungrazed streams may be still slowly recovering after 20 or more years of rest, but they may also have a naturally high level of sediment fines from the highly erodible soils that occur in the upper watersheds. If these watersheds are naturally high in sediment, superimposing sheep grazing and trampling, which increase erosion into the streams, places the CRCT at further risk and threatens its viability (also a violation of NFMA).

The 1999 Conservation Agreement and Strategy for the Colorado River Cutthroat Trout provides a goal *“To maintain areas which currently support abundant Colorado River Cutthroat Trout and manage other areas for increased abundance.”* Its objective is *“To maintain and restore 383 conservation populations in 1784 stream miles and 18 populations in 652 lake acres in 14 GMUs within the historic range.”* This is to be accomplished through *“Protecting existing and restored ecosystems and restoring degraded ecosystems.”* The EIS did not fully address the current condition of CRCT habitat and how its decision would restore the CRCT habitat and populations. The EIS does admit that the selected alternative will continue the current degradation, while brook trout are increasing and CRCT apparently at a disadvantage. Certainly the Forest Service has offered no recipe to meet the intent of the Conservation Agreement and Strategy. As discussed below, this failure also violates the viability requirement of NFMA.

Canada Lynx

We know that lynx from the original reintroduced population, and their offspring, have dispersed from the reintroduction site into other parts of Colorado as well as into adjacent states. Most of the movements have been in a northerly direction. Of these dispersing lynx, at least 22 individuals have made at least 27 visits to the state of Utah and at least 33 individuals have made at least 55 visits to the state of Wyoming, as recorded by air telemetry and satellite. (See CDOW Report, Tables 4 and 6, pages 23 and 24.) The highest concentration of recorded lynx locations in Utah is in the Uintah Mountains, particularly toward the northwest part of the range in Summit County. *“The use-density surface for lynx use in Utah indicates the primary area of use being located in the Uinta Mountains.”* (CDOW Report, page 10; see also Figure 2, page 29.) The highest concentrations of recorded lynx locations in Wyoming are in the Medicine Bow National Forest, just north of the Colorado-Wyoming border

and in the northwest quadrant of the state, which is part of the GYA. (CDOW Report, page 11; see also Figure 9.)

Lynx have demonstrated an impressive ability to traverse a variety of landscape and habitat-types when dispersing, including, apparently, the Red Desert of southern Wyoming and the San Rafael Desert of central Utah. However, they have also shown a marked preference for higher elevation forested types of habitat, such as occur in the Uinta Mountains of Utah and the Medicine Bow Mountains of Wyoming, both of which extend into Colorado. This is hardly surprising, but it leads to the reasonable conjecture that many of the lynx that made it to northwest Wyoming went by way of the Uintas-Yellowstone Connection.

This connection includes the east-west trending Uinta Mountains of northeastern Utah, as well as the north-south trending Monte-Cristo and Bear River Mountains of northern Utah and southeastern Idaho. This landscape linkage has been recognized by the Forest Service as a regionally significant wildlife movement corridor for animals traveling between the GYA and the southern Rockies of Colorado.

http://www.fs.fed.us/r4/wcnf/projects/feis/sat_corridor.pdf National Forests encompassing this area include the Ashley, Uinta, Wasatch-Cache and Caribou-Targhee.

Based on Forest Service monitoring during 2000-2002, lynx have been assumed to be absent from the Uinta Mountains today. (West Fork Black's Fork grazing EIS, p. 56). In the West Fork Black's Fork AMP the Forest Service (FS) concluded that there never was a resident population of lynx in the Uintas—only occasional transients—thus sparing the agency of having to explain why lynx are not present today.

Although the Forest Service appears to be acting within the *letter* of the Endangered Species Act (ESA) in taking this stance, arguably it is not acting within the *spirit* of the ESA. Section 2(b) of the ESA states: "The purposes of this chapter are to provide a means whereby the *ecosystems* upon which endangered species and threatened species depend may be conserved....".

The first clue of this is that the FS itself identified WFBF as lying within a lynx analysis unit (LAU #34). In so doing, it acknowledged that WFBF contains lynx habitat. In fact, in the AMP EIS the Forest Service estimates the WFBF allotment to include 7,625 acres of primary lynx habitat and 27 acres of secondary lynx habitat. (There are over 50,000 acres of lynx habitat in LAU #34 alone!) By the Forest Service's own analysis, this is enough to accommodate at least one male lynx home range and one or more female lynx home ranges. ("Home ranges of lynx are generally 6-8 square miles..."⁴³) So why are there apparently no lynx on the allotment today, or anywhere else in the Uintas for that matter, excepting those that have paid a visit from Colorado in recent years? Is sufficient prey lacking?

Kevin Bunnell's three-year research on snowshoe hares indicates that the Uintas support a fairly abundant and stable hare population that compares favorably with population densities in other western states and Canadian provinces where Canada

⁴³ EIS p. 3-47

lynx are present.⁴⁴ In the AMP EIS, Bunnell's work is reported by the FS as having shown "...an average of 0.33 hares per hectare over the three year period within mature vegetation types."

While this density already compares favorably with what similar studies have shown in Colorado and Washington - states that have existing lynx populations - it appears to be a considerable underestimation given that on the very same page a chart indicates an average of 2.16 - 4.10 hares per hectare across five vegetation types. This discrepancy may be due to the first number applying only to mature vegetation types, while the latter applies to vegetation types in all stages (except for lodgepole pine, which is explicitly stated to be mature). After all, mature forest stands don't have the abundance of young twigs near ground level that hares browse on. If so, then one has to wonder why the FS chose to state the lower number applying only to mature stands. One would expect the other number be more accurate.

By contrast, a Colorado study conducted in 1998 indicated an average of 0.29 hares per hectare. Any way you look at it, it looks like the principle prey species of Canada lynx is plenty abundant in the Uintas. In addition, two preferred alternative prey species for lynx, the red squirrel and grouse, are also fairly abundant in the Uintas. The Uintas as a whole appear to support abundant prey for Canada lynx.

In the absence of countervailing evidence, abundant lynx prey in an expansive mosaic of recognized lynx habitat lying within the known historic range of the lynx supports the hypothesis that the Uinta Mountains once supported a resident population of lynx. This is the reasonable conclusion to draw - unless, that is, there is countervailing evidence. A resident population would consist of at least a few lynx being present during extended periods of perhaps decades or centuries, with ongoing reproduction. By this definition, it is reasonable to believe that the Uintas supported a resident population of lynx throughout all or most of the Holocene epoch.

Now let's look at the evidence adduced by the FS for its claim that there never was a resident population of lynx in the Uintas.

1. There are only 10 *verified* records of lynx in Utah since 1916.
2. Nearly all of the *reliable* lynx reports are from the Uinta Mountain Range along the Wyoming border.
3. Four of the records correlate to the cyclic [lynx] highs of the 1960s and 1970s.
4. There is no evidence of lynx reproduction in Utah.
5. Boreal forest habitat in Utah is remote and far from source lynx populations.
(AMP Chapter 3, page 47)

From these premises, the Fish and Wildlife Service jumps to this conclusion: "*We conclude that lynx that occur in Utah are dispersers rather than residents.*"⁴⁵ The Forest Service adds: "*Although there is no evidence of reproduction lynx in Utah, from time to time when lynx dispersed into Utah, there may have been some reproduction and*

⁴⁴ EIS p. 3-42; Ruggiero, et al. *Ecology and Conservation of Lynx in the United States*, University of Colorado Press (2000), Chapter 7, p. 185.

⁴⁵ EIS 3-48

*the animals could have been considered resident until they left the state or died out.*⁴⁶ Obviously, this doesn't concede much, for there still would not have been a resident population.

Despite the fact that the FWS employs some very fine biologists, the premises of this argument are simply too weak to support the weight of the conclusion. Given that the Uintas and surrounding forested lands contain hundreds of thousands of acres of lynx habitat, connected in places to other expanses of lynx habitat, the default position ought instead to be that there was a resident population of lynx in the Uinta Mountains during most of the Holocene epoch. Now let's examine these premises one at a time.

1. There may have only been 10 verified records of lynx occurrence in the Uintas since 1916, but there were an additional 17 reliable reports of lynx in Utah during the same period, based on physical remains (including photographs), visual sightings and track identifications, and another 10 of unknown reliability. Most of these were on the north slope of the Uintas, in or near the WFBF. Even if we discount the 10 reports of unknown reliability, we still have 17 reliable reports and 10 verified records of lynx, for a total of 27, most of which located the lynx in the Uintas!⁴⁷

What does "reliable" mean if we can't rely on these reports as being accurate? The decision to go with the lower number would seem to be based not so much on a desire for accuracy as a desire to minimize the presence of lynx in Utah. On the face of it, this would seem to be the second instance of the FS deliberately leaving out the most relevant data in order to give an impression in line with its cherished thesis that the Uintas never supported a resident lynx population (the first concerned snowshoe hare density).

2. The fact that a great many of the 27 records + reports of lynx place them near the Wyoming border adds support to the hypothesis that the north slope of the Uintas, which extends into Wyoming, contains lynx habitat and once hosted a resident population of lynx. (Exactly what percentage of the 27 lynx were found near the Wyoming border is not reported; nor is the number of reports and records of lynx just over the border in Wyoming, but still within the Wasatch-Cache National Forest.)

3. The fact that four of the verified records of lynx correlate with cyclic highs in the lynx metapopulation does nothing at all to support the hypothesis that lynx in the Uintas were transient dispersers rather than members of a resident population. This is substantiated by three considerations: (1) Possibly a resident Uinta lynx population itself was in a cyclic high when those records were made, in which case the "no lynx in the Uintas" hypothesis commits the fallacy called "begging the question" - i.e., its own plausibility depends entirely on the assumed falsity of contradictory fact. (2) The fact that only four of 27-37 lynx occurrences - one in seven - correlated with a larger lynx population cyclic high is statistically irrelevant to the question of where those four lynx came from. The conclusion suggested by the FS is that they probably immigrated to the Uintas from a distant population when the habitat for that distant population

⁴⁶ EIS 3-48

⁴⁷ Ruggiero, et al., *Ecology and Conservation of Lynx in the United States*, University Press of Colorado, (1999.) p. 210

became saturated, but no evidence is given for this conclusion. It is to be expected that some of the records and reports would correlate with a lynx population cyclic high somewhere, since cyclic highs, which occur one or two years out of 10 or 11 exhibit about the same frequency as the proportion of lynx records during the purported cyclic highs to the proportion of lynx records plus reliable reports (= 1 in 7). (3) The claim of lynx cyclic highs tends to contradict the predominant snowshoe hare story: "The predominant snowshoe hare story in this century has been that snowshoe hares are strongly cyclic in the north but show reduced or no cycles in their southern distribution."⁴⁸ And since lynx population cycles are driven by hare population cycles - especially in the northern parts of lynx range, where lynx depend more heavily on hares for food - it follows that responsive population cycling in the lynx's southern distribution would be correspondingly weakened, unless of course we assume very long distance lynx dispersal from more northerly populations, but this brings us back to (1).

4. It is true that there is no evidence of recent lynx reproduction in Utah. But so what? It is already admitted that there may be no lynx currently inhabiting the Uinta Mountains, so this has no bearing whatsoever on whether there was ever a resident lynx population in the Uintas or whether one should exist there today. Put another way, premise 4 begs the question, for it doesn't tell us why biologists have obtained no evidence of recent lynx reproduction in Utah or the Uintas.

Boreal forest habitat may in fact be remote and far from similar habitat in the Uintas. In fact, there is boreal forest habitat within 100 miles of the Uintas in both Wyoming and Colorado. And these patches of boreal forest habitat are connected to the Uintas boreal forest in both cases by high elevation terrain (See previously cited map of Regionally Significant Wildlife Corridor). Given the conclusion that FWS leaps to on the basis of these premises, it seems clear that the agency intends for this point to be understood as indicating that it would be difficult for lynx to travel to the Uintas in order to populate the range. But this once again begs the very question at issue! What if the Uintas already once harbored a resident population of lynx? The San Juan Mountains of southwestern Colorado are also remote and isolated - even more so than the Uintas from boreal forest habitat in Wyoming - yet they harbor a resident population of lynx today as a result of a recent reintroduction effort. And the Colorado population appears to be thriving, with 39 kittens documented in 2005 and some members of the population traveling into Utah and visiting the Uintas. Lynx can disperse long distances and have little difficulty swimming large rivers. One of them traveled into Utah through the Book Cliffs, and from there to the mouth of Weber Canyon, then all the way to Kanab, Utah on the southern border, then back to the Wasatch Plateau in the middle of the state in one season. The total straight-line distance this lynx traveled must have been at least 700-800 miles!

This last point introduces the importance of the Uintas-Yellowstone Connection as corridor habitat connecting other remote island populations of lynx together. How are the Colorado lynx going to be genetically connected with the Wyoming, Montana and Idaho lynx? Is it really supposed that they will remain an isolated population? Have FWS and the FS decided that they will not do what they can to foster conditions under which these populations can be genetically connected? In fact, at least one lynx from

⁴⁸ Ruggiero, et al. p. 191

Colorado has already been tracked by satellite as it traveled through the Uintas to the Bear River range and on north. Thus, the important question that the FWS and FS should be addressing is how they can best protect this Uinta corridor in order to promote genetic diversity and population stability among far flung populations of lynx in the Rocky Mountains. In this connection, it is worth noting that the ESA requires recovery of the lynx to a “significant portion of its range.” This range includes Colorado. And if nothing else, the Uintas may be vital for ensuring that the Colorado population flourishes. Yet neither FWS nor the FS seems to have considered this point.

As pointed out previously, *Marble Mountain Audubon v. Rice*⁴⁹ interprets NEPA to require the Forest Service to consider biological corridors. The standard for such a review is the same “hard look” NEPA requires of other environmental effects. That means those corridors within the analysis area and **linkages with areas adjacent to the analysis area need to be examined, plus the value of the entire analysis area as part of a larger corridor within or between ecosystems.** Friends of the Bitterroot, Inc. v. USFS⁵⁰, and Oregon Natural Resources Council v. John Lowe⁵¹ also highlight the importance of including corridors an element of consideration for an agency decision. Therefore, the Forest is required to address how the grazing and other management activities within the WFBF allotment and adjacent watersheds affect the Uinta corridor which appears to promote genetic diversity and population stability among far flung populations of lynxes in the Rocky Mountains

The Forest Service has failed to take a hard look at the potential consequences of the proposed grazing regime in the WFBF AMP for lynx (or wolverine or fisher).

C. The Forest Service has failed to conduct the economic value analysis required under NEPA, NFMA and MUSYA.

NEPA requires that agencies “Identify environmental effects and values in adequate detail so they can be compared to economic and technical analysis.” (40CFR1501) The Multiple Use Sustained Yield Act (MUSYA) defines multiple use and requirements to value resources as follows: “Multiple use means: the management of all the various surface renewable resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and condition; that some land will be used for less than all the resources; ... without permanent impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combinations of uses that will give the greatest dollar return or the greatest unit output.” (16CFR531) The National Forest Management Act (NFMA) also requires the “Consideration of the relative values of all renewable resources, including the relationship of nonrenewable resources, such as minerals to renewable resources; ...” (36CFR219)

⁴⁹No. 90-15389, D.C. No. CV89-170-EJG, Sept. 13, 1990

⁵⁰900 F. Supp. 1368, 1372 (D. Mont 1994)

⁵¹109 F.3d 521, 526 (9th Cir. 1997)

The EIS presents a brief economic analysis that only addresses the contribution of sheep grazing on the West Fork Black's Fork contribution to the Uinta County economy as \$180,000 to \$205,000 per year. There is no analysis of other values foregone as required by NEPA, NFMA and the Multiple Use Sustained Yield Act. Dr. Thomas M. Power, head of the Economics Department at Montana State University has analyzed the value of grazing and placed it in perspective with local and regional economies⁵².

Dr. Power shows that *“Livestock grazing on federal lands is generally unimportant to local economies and even less so to state and regional economies. In terms of income and numbers of jobs provided, the contribution of federal lands grazing is less than 0.1% across the West. Farm and ranch operations are increasingly reliant on nonfarm income sources to be financially feasible, while livestock grazing competes with other uses of public lands – such as clean water, recreation, wildlife habitat – that contribute to the ongoing vitality of western economies.”*

In his analysis of the economies of individual rural counties, Dr. Power showed that federal lands grazing does not contribute significantly to those economies across the west. In fact, given the high percentage of ranching families that have jobs, either full or part time outside the ranch (60 – 70%), it is ranchers that depend on the other economic sectors for their ability to persist, not federal lands grazing. Dr. Power states, *“It is not that towns depend on agriculture, but that agriculture increasingly depends on the vitality of urban and nonagricultural rural economies to provide the nonfarm income that keeps farm operations alive.”*

Dr. Power states that claims about the relative importance of federal grazing to the economies of western states can be analyzed by answering these questions:

1. *“What portion of the value produced by cattle and sheep operations is associated with feed used?”*
2. *What portion of the feed for those cattle and sheep operations comes from grazing on federal lands?*
3. *What portion of the total agricultural activity involves raising cattle and sheep?*
4. *What part of the total economy is represented by agriculture.”*

The Fish and Wildlife Service publishes statistics on wildlife related recreation. The economic benefits are summarized in the Fish and Wildlife Service *2001 National Survey of Fishing, Hunting and Wildlife-Watching Associated Recreation*⁵³. That survey showed that in Utah alone, expenditures for hunting, fishing and wildlife-associated recreation were \$1,143,408,000.00 in 2001. The States of Utah and Wyoming publish annual economic reports that present statistics for each county. Typically the annual growth in these counties exceeds the value of income from public lands ranching. These sources should have been consulted, reviewed and made part of the analysis to

⁵² Power, Thomas M. 2002. Taking Stock of Public Lands Grazing: An Economic Analysis. In: Wuerthner, George and Mollie Matteson. 2002. Welfare ranching: the subsidized destruction of the west. Island Press.

⁵³ U.S. Department of Interior, U.S. Fish and Wildlife Service, U.S. Department of Commerce and U. S. Census Bureau. 2002. 2001 National Survey of Fishing, Hunting and Wildlife-Watching Associated Recreation. 170 p.

reveal the true nature of the contribution and importance, or lack thereof, of grazing sheep on the West Fork Black's Fork.

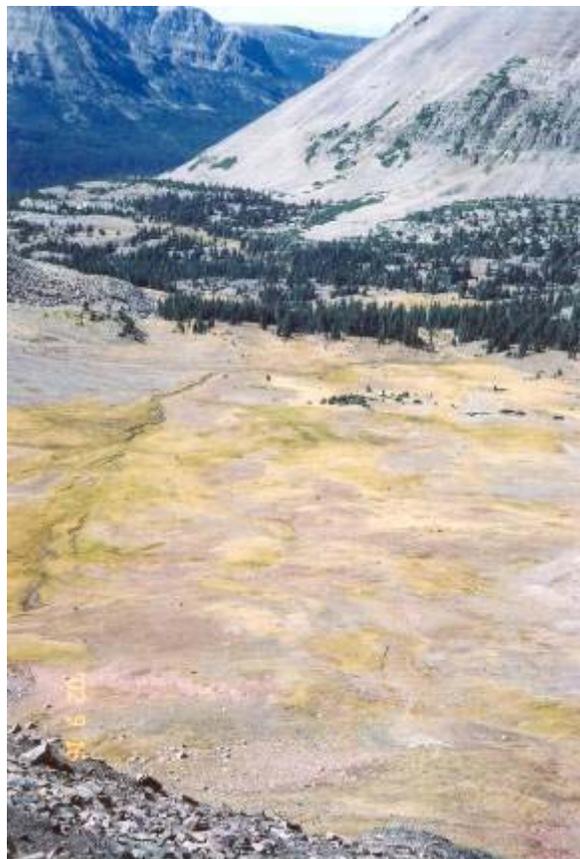
D. The Wasatch-Cache National Forest Failed to Disclose All Direct, Indirect, and Cumulative Impacts, Based its Decision on Mitigation or Adaptive Management and Failed to Take a Hard Look at the Following Issues

NEPA's disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) "to insure that the public has sufficient information to challenge the agency."⁵⁴ By focusing the agency's attention on the environmental consequences of its proposed actions, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."⁵⁵

And, the publication of a NEPA document, both in a draft and final form, provides a springboard for public comment, and assures the public that the agency has considered the environmental concerns in its decision making process.⁵⁶

Interpretations of NEPA plainly state that an agency must include in its decision making process all pertinent information.⁵⁷ The public cannot be assured that the Forest took the required "hard look" unless all pertinent information is contained in the EIS.

NEPA is an action-forcing statute. Its sweeping commitment is to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action."⁵⁸ It requires the federal agency to "consider every significant aspect of the environmental impact of a proposed action,"⁵⁹ and to ensure "that the agency will inform the public that it has indeed considered environmental concerns in its decision making process."⁶⁰



View of Lake Fork alpine basin from Red Knob Pass showing large areas of depleted uplands and bare ground from sheep grazing and little residual vegetation to control erosion and runoff. This damage was not addressed in the EIS yet is in an adjacent allotment where trailing sheep graze.

⁵⁴ Idaho Sporting Congress, 137 F.3d at 1151; Robertson, 490 U.S. at 349

⁵⁵ Robertson, 490 U.S. at 349

⁵⁶ Id

⁵⁷ Trout Unlimited v. Morton 509 F.2d 1276 (9th Circuit, 1974)

⁵⁸ Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989)

⁵⁹ Vermont Yankee Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 553 (1978)

⁶⁰ Baltimore Gas and Electric Company v. NRDC, 462 U.S. 87, 97 (1983)

NEPA documents must include all relevant information at the time the agency makes a recommendation on a proposal for federal action, not after the fact.⁶¹ A central purpose of NEPA is to force the consideration of environmental impacts in the decision making process. That process requires that the NEPA process be integrated with agency planning “at the earliest possible time.”⁶² “NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”⁶³

An EIS is rendered inadequate if it fails to include information that is “important, significant or essential” to the issues under consideration. Without the proper disclosure in the EIS of this project’s effects and the effects of past management activities in the West Fork Black’s Fork Allotment, the EIS violates NEPA.

1. The EIS failed to disclose the direct, indirect, and cumulative impacts of the proposed utilization standards

*“Mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.”*⁶⁴ “A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.”⁶⁵ Failure to demonstrate the effectiveness of mitigation measures does not satisfy the intent of NEPA.⁶⁶ The Forest Service is obligated to prove that the mitigation described will in fact be effective. The NEPA document must analyze all mitigation measures in detail and explain the effectiveness of such measures.⁶⁷ In the case of the WFBF AMP, the mitigation measures are discussed but effectiveness is not. The following example illustrates.

Utilization

The WFBF AMP EIS and ROD implement certain utilization standards and stubble heights as “mitigation” to insure that grazing in the project area complies with the Revised Forest Plan (RFP) and various other laws and regulations. These standards and mitigation measures can be found in the EIS on pages 2-1 through 2-4. However, the NEPA document offers no empirical data to support the Forest Service’s assumptions about potential positive effects of the mitigation plan, and given the fact that the Forest Service has failed to disclose which plant species will be monitored for stubble heights and utilization standards, there is no hard evidence or justification for stated assumptions that indicate resources will be managed to allow for movement towards desired future conditions identified in the RFP.

⁶¹ See *Kleppe v. Sierra Club*, 427 U.S. 390, 405-406 (1976)

⁶² 40 CFR 1501.2 (Council on Environmental Quality Regulations binding upon Forest Service)

⁶³ 40 CFR 1500.1(b)

⁶⁴ *Carmel-By-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989))

⁶⁵ *Northwest Indian Cemetery Protective Ass'n. v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), rev'd on other grounds, 485 U.S. 439 (1988)

⁶⁶ [*Northwest Indian Cemetery Protective Association v. Peterson*, 795 F. 2d 688 (9th Cir. 1986)].

⁶⁷ *Northwest Indian Cemetery Protective Ass'n v. Peterson*, cited above

For example, caution should be used with utilization standards when working with different plant communities. Existing Forest Service guidelines⁶⁸, which were used in this analysis, are based largely on minimum stubble heights in communities dominated by sedges. If the riparian area is dominated by grass species like timothy, mountain brome, streambank wheatgrass, tufted hairgrass, fowl Mannagrass, fowl bluegrass or others, adherence to the recommended stubble heights will result in 80 percent or more utilization. In these situations, eight to nine-inch stubble heights equate to about 50 percent utilization.⁶⁹ Current research is showing that reliance on sedge utilization along greenlines leads to over 90% utilization of aquatic influence zone grasses⁷⁰. Researchers have found a shift in preference from herbaceous vegetation to shrubs at about 45 percent utilization which induced excessive browsing of shrubs.⁷¹ In addition, monitoring in locations avoided by sheep such as wet meadows or saturated areas leads to underestimates of use in areas such as those described in the EIS as lacking deep rooted vegetation for stream bank protection. Where is riparian use measured? This question is not addressed in any way to discern how monitoring locations are chosen or if there are standard locations for monitoring upland or riparian use that represent the areas most used by sheep. There is no accounting for the effects of sheep bedding in over 70 different location each year. These areas suffer extreme use and loss of vegetation. Where are the bedding areas? What is their condition? How are they monitored?

While the EIS reports light use on key species based on ocular estimates, there is no quantitative measurement reported for desirable forage species used by sheep. The key species listed in the Forest Plan includes sedges and grasses, not generally preferred by sheep or that grow in wet areas avoided by sheep. Sherel Goodrich admitted that sheep avoid these wet areas during the July, 2002 meeting in Coalville. Lewis also reported that sheep avoid wet meadows and wet areas⁷². The EIS should describe the current distribution and productivity of desirable, intermediate and undesirable forage species for sheep by vegetation type on capable acres and report the use on those desirable forage species for those areas preferred by sheep. These desirable species are decreasers under livestock grazing and can be lost if they are not monitored and proper use levels and rest applied to the most preferred species, rather than lesser preferred species. The majority of the alpine benches in Unit 4 are uplands dissected by small areas of streams and wet areas. The EIS did not describe the condition of these communities accurately and clouded their current condition by mixing data for uplands, wetland and mesic areas without delineating where and how

⁶⁸ Clary, Warren P. and Bert F. Webster. 1989. *Managing Grazing of Riparian Areas in the Intermountain Region*, USDA Forest Service, Intermountain Research Station, General Technical Report INT-263, May, 1989.

⁶⁹ Marlow, Clayton B. 2001. *Notes on the Utility of Stubble Height Measurements*. Montana State University, Bozeman, MT (17 January 2001).

⁷⁰ Carter, John G. 2005. Duck Creek Allotment Monitoring Report dated 2/20/05. Western Watersheds Project.

⁷¹ Mosley, Jeffrey C., Philip S. Cook, Amber J. Griffis, and Jay O'Laughlin. 1997. *Guidelines for Managing Cattle Grazing in Riparian Areas to Protect Water Quality: Review of Research and Best Management Practices Policy*, Report No. 15, Idaho Forest, Wildlife and Range Policy Analysis Group, University of Idaho, 1997.

⁷² Lewis, Mont E. 1970. *Alpine Rangelands of the Uinta Mountains Ashley and Wasatch National Forests Region 4*. Mont E. Lewis, Range Conservationist, U.S. Forest Service.

much of each type occurred. The photos and data in the accompanying report⁷³ show the end of season “mown” appearance in these upland locations where the only standing vegetation is the wetland obligate types such as sedges that are in areas sheep do not prefer, are prostrate and unavailable, or are unpalatable species. No data for utilization was provided other than “ocular” estimates of light use reported in the EIS. It is not clear whether the Forest Service Staff were relying on non-preferred species as an indicator of sheep use, thus placing sensitive species at risk of loss.

The EIS cites utilization levels from the Forest Plan without any analysis of their appropriateness for the plant communities in the West Fork Black’s Fork, or whether their use leads to impairment of productivity, a violation of NFMA and MUSYA. Utilization levels of 50% are provided for uplands in “satisfactory condition”. These are not science-based or applicable to the current conditions or environment in the West Fork Black’s Fork. For example, the FEIS Rangeland Health contained science that supports the utilization levels for alpine areas that are provided in the table below⁷⁴. These utilization levels were in an alternative that was not selected because it was not the most practical, meaning to appellants it could reduce grazing impacts by reducing use. Then it was left in the hands of range cons to decide on lower use levels⁷⁵. The Forest Supervisor went on in the ROD to admit that these more restrictive utilization levels would result in more rapid improvements in conditions.

Table 3. Utilization Recommendations from Rangeland Health ROD

Percent Slope	Ground Cover	Key Grass Utilization %
≤10%	Satisfactory	40
	Unsatisfactory	20
>10%	Satisfactory	30
	Unsatisfactory	10

The WFBF EIS and ROD did not evaluate the 50% utilization level for alpine and high elevation areas, did not say what level of utilization corresponds to “light” use, or for that matter for “moderate” or “heavy” use. By failing to evaluate appropriate use levels for alpine and riparian areas and accepting the 50% use level and stubble height standards from the Forest Plan without scientific justification, the decision is arbitrary and capricious.

Determining percent utilization can be a time-consuming process and subject to error, depending on a variety of factors. By definition, measuring utilization requires knowing the total production for the year for the species in question. This makes a true measure of utilization difficult, especially when one considers the fact that total yearly production cannot be accurately determined before the end of the growing season. Moreover, the Forest has failed to disclose how productivity has been altered on the allotment which also constitutes a violation of the NFMA.

Nevertheless, some researchers suggest specific utilization standards. However, these standards do have impacts. The WFBF AMP EIS simply asserts that trends within the

⁷³ Carter, John G. 2006. Watershed Conditions Uinta Wilderness, Utah. West Fork Black’s Fork, East Fork Black’s Fork, Lake Fork, Middle Fork Beaver Creek, Burnt Fork. Western Watersheds Project Report.

⁷⁴ FEIS page 2-18.

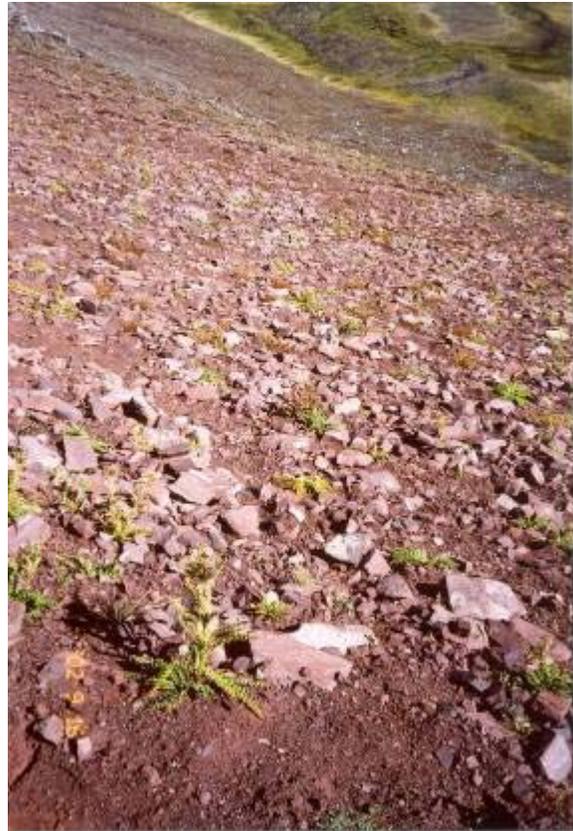
⁷⁵ Rangeland Health ROD, page 10.

project area will improve with the approved utilization standards, but the NEPA document fails to disclose the impacts from those standards. For instance, if utilization rates exceed 30 percent of the annual biomass production in mountain meadow sedge communities, production the following year might not be maintained⁷⁶. The Anderson, Hormay and Mueggler studies cited earlier in this appeal document that sensitive native plants can require up to nine years of complete rest to recover their vigor from one time heavy use. Other impacts would include bank trampling, streambank erosion, effects on plant communities and wildlife.

The applicable regulations require that an EIS discuss “[m]eans to mitigate adverse environmental impacts” of the proposed action.⁷⁷ The EIS discusses mitigation measures in part, but the EIS does not analyze the mitigation measures in detail or explain how effective the measures would

be. A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.⁷⁸ Simply stating that the proposed mitigation, i.e. stubble heights and utilization standards, will improve conditions in the project area is insufficient to meet the requirement of NEPA. The Forest failed to comply with NEPA by failing to disclose the impacts that can be expected to occur as a result of varying stubble heights and utilization rates. Adherence to the utilization standards does not automatically ensure that the applicable Forest Plan standards are being met as a review of the Annual Operating Instructions (AOIs) indicates that Forest Plan standards and guides have been in effect for many years. Yet, DFCs are still not being met. And, adherence to utilization standards does not mean impacts will not occur, but those impacts are not disclosed in the EIS.

Furthermore, since the use of utilization rates and stubble heights is very dependent on the species being considered, the Forest is required to disclose to the public which species will be monitored for compliance. Only then can the public be assured that the proposed mitigation will be effective by representing the plant species and types of



Damage to steep, highly erodible slope leading from Red Knob Pass to Lake Fork watershed. This damage is from sheep trailing across this very steep ridgetop between EFBF, WFBF and Lake Fork. Note bare soil and thistle.

⁷⁶ Clary, W. P. 1995. Vegetation and soil responses to grazing stimulation on riparian meadows. *Journal of Range Management* 48:18-25.

⁷⁷ 40 C.F.R. Sec. 1502.16(h)

⁷⁸ See *Adler v. Lewis*, 675 F.2d at 1096. The district court’s conclusion that the EISs are inadequate for this reason is sound.”

areas which sheep typically graze. NEPA requires that the public receive this information before a decision is made.

The 9th Circuit has explicitly struck down NEPA decisions that rely on unspecified future actions to mitigate or avoid environmental impacts⁷⁹, such as the statements throughout the EIS that adaptive management will be used to determine which measurement to use, based on meeting all standards or prescriptions for the allotment. The Rangeland Health EIS and Record of Decision and the Revised Forest Plan prescribe monitoring and schedules for monitoring, all of which should apply. Adaptive management should not be used as a shelter to avoid disclosing the impacts of the proposed action. If adaptive management is needed, the Forest is aware that some of the stubble height requirements and utilization standards may not be sufficient to meet standards and guidelines from the RFP.

The likelihood that the proposed mitigation measures will work should be disclosed as should the impacts from those measures. While the proposed mitigation measures may be an improvement over historic grazing practices, domestic livestock grazing with utilization standards is not without impacts. Those impacts were not disclosed in the WFBF AMP EIS.

Bighorn sheep

The EIS dismisses bighorn sheep as a non-significant issue *“Due to needs including analysis of both winter and summer range and maintaining adequate separation between domestic and wild sheep, an area much larger than the WFBF would need to be analyzed for wild sheep management.”* This is exactly what is needed and is what NEPA requires. The EIS engages in a fragmented approach not allowed under NEPA. The WWP 2006 report referenced shows extensive damage to watersheds and ridges in the East Fork Black’s Fork, West Fork Black’s Fork and Lake Fork from sheep grazing. These regional impacts to watersheds and vegetation were not analyzed within this EIS relative to the needs of bighorn sheep and other wildlife and watershed protection. Big horn sheep are in the project area and their health and habitat needs are a serious concern. Domestic sheep can have a devastating impact on big horn sheep and this issue needs to be analyzed in detail here.

*Marble Mountain Audubon v. Rice*⁸⁰ interprets NEPA to require the Forest Service to consider biological corridors. The standard for such a review is the same “hard look” NEPA requires of other environmental effects. That means those corridors within the analysis area and **linkages with areas adjacent to the analysis area need to be examined, plus the value of the entire analysis area as part of a larger corridor within or between ecosystems.** *Friends of the Bitterroot, Inc. v. USFS*⁸¹, and *Oregon Natural Resources Council v. John Lowe*⁸² also highlight the importance of including corridors as an element of consideration for an agency decision. The Uintas are a critical link to the Bear River Range Regionally Significant Corridor linking the Greater

⁷⁹ *Oregon Nat. Resources Council v. Marsh*, 52 F. 3d 1485 (9th Cir. 1995) (Elk Creek Dam III); *Oregon Nat. Resources Council v. Marsh*, 832 F. 2d 1489, 1493 (9th Cir. 1987) (Elk Creek Dam I), reversed on other grounds, 490 U.S. 360 (1989); *California v. Block*, 690 F. 2d 753 (9th Cir. 1982).

⁸⁰ No. 90-15389, D.C. No. CV89-170-EJG, Sept. 13, 1990

⁸¹ 900 F. Supp. 1368, 1372 (D. Mont 1994)

⁸² 109 F.3d 521, 526 (9th Cir. 1997)

Yellowstone Ecosystem in the north to Colorado and the southern Rockies to the south⁸³.

This means that the Forest should have considered ***ALL*** management activities occurring within the project area that may impact migrating bighorn sheep within and adjacent to the project area. For example, Bighorn sheep are highly social and once *Pasteurella* bacterium infects one member of a herd it is usually passed on to the rest of the herd within a relatively short time. Bighorn sheep, especially young rams, are highly mobile and can cover five miles in a very short time. The EIS fails to discuss the very likely possibility that roaming young rams may come into contact with domestic sheep and carry disease that could decimate entire herds of bighorn sheep that may be in the area.

The following is a review of relevant literature highlighting the dangers that domestic sheep can pose to seriously declining populations of bighorn sheep:⁸⁴

One classic example of how domestic livestock and wildlife have evolved differently and carry different diseases is the exchange of the *Pasteurella* spp. bacteria from domestic sheep (*Ovis aires*) to bighorn sheep (*Ovis canadensis*). The *Pasteurella* species that has been linked to severe die-offs of wild bighorn sheep in all of the western United States is transmitted to bighorns through contact with domestic sheep and yet has no negative effect on the domestic sheep. Bighorn sheep populations in the San Juan Mountains of Utah experienced a 98% herd reduction over an 18-year period due to *Pasteurella* related die-offs. There have also been concerns over the transmission of other types of pathogens such as scabies and assorted parasites from domestic sheep, cattle and horses to bighorn sheep and mountain goats. Bighorn sheep are highly social and once the *Pasteurella* bacterium infects one member of a herd it is usually passed on to the rest of the herd within a relatively short time.

Both bighorn sheep and mountain goats are highly susceptible to infection with lungworms (*Protostrongylus* spp.). Mountain goats have been introduced into the Uintas and we have observed them adjacent to the West Fork Black's Fork in the Uinta River drainage. These were not addressed at all. Bighorn sheep accidentally

⁸³ The WCNF map of this corridor can be found at: http://www.fs.fed.us/r4/wcnf/projects/feis/sat_corridor.pdf a map of critical lynx habitat may be found at: http://www.fs.fed.us/r4/wcnf/projects/feis/final_plot_lynx_3for.pdf

⁸⁴ Foreyt, W.J., and J.E. Lagerquist. 1996. Experimental Contact of Bighorn Sheep (*Ovis canadensis*) with Horses and Cattle, and Comparison of Neutrophil Sensitivity to *Pasteurella haemolytica* Cytotoxins. *Journal of Wildlife Disease*. 32(4):594-602. Foreyt, W.J. 1989. Fatal *Pasteurella haemolytica* Pneumonia in Bighorn Sheep after Direct Contact with Clinically Normal Domestic Sheep. *American Journal of Veterinary Research*. 50(3):341- 344. Unknown. 1945. Hybridization of Bighorn and Domestic Sheep. *Journal of Wildlife Management*. 9:82-83. Valdez, R., P.R. Krausman. 1999. *Mountain Sheep of North America*. University of Arizona Press. Tuscon. 353pp. Ward et al. 1997. *Pasteurella* spp. in Sympatric Bighorn and Domestic Sheep. *Journal of Wildlife Disease*. 33(3): 544-557.

ingest snails while they graze, which are hosts for lungworm larvae. The larvae penetrate the intestinal wall and travel to the lungs where they become adults. Lungworms lay eggs in the lungs, which hatch and the young larvae enter the air passages where they are coughed up and swallowed. The lungworm larvae are excreted in fecal pellets and seek the host snail. Larvae can remain viable in fecal material for up to 14 months. Large concentrations of the parasite cause respiratory stress and can create lesions in the lungs and bronchial passages and predispose the host sheep to pneumonia bacteria invasion. Similar species of lungworm infect both domestic sheep and goats and their wild counterparts.

These are several other interesting or rare cases of wild sheep/domestic animal interactions that have the potential to affect population dynamics. Wild bighorn sheep rams have been documented to breed with domestic sheep ewes in California in the mid 1940's. No offspring were produced but the possibility of interbreeding of the two species could have dramatic effects on both domestic and wild sheep physiology and population genetics. Also, the attraction of wild rams to domestic ewes, or domestic rams to wild ewes, during the breeding season, could lead to an increased potential for disease transmission.

Bluetongue is a disease that has been documented in wild and domestic sheep, cattle, deer, and pronghorn. This viral disease is spread through gnats that bite an infected animal and then spread the virus to subsequent hosts. To date, only two cases of bluetongue have been documented in bighorn sheep, one case in Texas in 1967, and one in Colorado in 1973. The impacts of this disease on bighorn sheep populations are not known but it is suspected that transmission of this disease would be easy between infected individuals of different species, especially if they were to be in contact for any amount of time during summer months when gnats are more prevalent.

None of these impacts are discussed in the WFBF AMP EIS. Therefore, the Forest has failed to disclose the direct, indirect, and cumulative effects of sheep grazing on this allotment and has failed to take a hard look at the approved action. Thus the EIS and ROD for the WFBF AMP violates NEPA.

The Forest Service failed to disclose the cumulative impacts of grazing the WFBF Allotment in combination with grazing in adjacent watersheds

The EIS notes in every section regarding cumulative impacts that the analysis area for cumulative effects is limited to the WFBF allotment. However, as the appellant repeatedly points out, *Marble Mountain Audubon v. Rice*⁸⁵ interprets NEPA to require the Forest Service to consider biological corridors. The standard for such a review is the same "hard look" NEPA requires of other environmental effects. That means those corridors within the analysis area and **linkages with areas adjacent to the analysis area need to be examined, plus the value of the entire analysis area as part of a larger corridor within or between ecosystems**. *Friends of the Bitterroot, Inc. v. USFS*⁸⁶, and *Oregon Natural Resources Council v. John Lowe*⁸⁷ also highlight the importance of including corridors an element of consideration for an agency decision.

⁸⁵No. 90-15389, D.C. No. CV89-170-EJG, Sept. 13, 1990

⁸⁶ 900 F. Supp. 1368, 1372 (D. Mont 1994)

⁸⁷ 109 F.3d 521, 526 (9th Cir. 1997)

Therefore, the effects of impacts from sheep grazing on soils, water quality, vegetation, and various other resources and the indirect and cumulative effects of this grazing on wildlife such as bighorn sheep, fish and other aquatic organisms, and other terrestrial forms of wildlife have not been disclosed. As the record shows, WWP has provided the Forest with ample evidence that domestic livestock grazing on the WFBF allotment as well as in adjacent watersheds has resulted in serious degradation to important ecosystem functions. Yet, the Forest has failed to acknowledge these impacts and arbitrarily and capriciously narrowed the area of cumulative impact analysis to only include the WFBF allotment. Therefore, the public and the decision maker have been denied pertinent information that would disclose exactly what regional impacts to wildlife and other resources have occurred and will continue to occur with the proposed action.

For example, the EIS failed to address the impacts of continued sheep grazing and trailing in the West Fork Black's Fork in combination with the continued grazing and trailing in nearby watersheds. These include at a minimum, East Fork Black's Fork, Lake Fork, Painter Basin, and Tungsten Basin. The Mountain View Ranger District recently released a scoping letter for authorizing continued grazing use on the Gilbert Peak and Hessie Lake, Henry's Fork Sheep Allotments, the Poison Mountain and Red Mountain Cattle allotments. In the Ashley National Forest, a scoping letter was issued in March, 2005 to authorize grazing on 22 allotments including Painter Basin and Tungsten.

NEPA and CEQ regulations are quite specific in requiring agencies to consider the cumulative effects of each alternative under consideration.⁸⁸ This direction is further specified in the Forest Service Handbook.⁸⁹ *"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.*" The interpretation of these regulations in the Forest Service Manual itself requires, "A discussion of cumulative effects resulting from the planned projects in relationship to existing conditions and other related projects".⁹⁰

Case law and court decisions further clarify the requirements for full analysis of cumulative effects. According to Fritiofson v. Alexander, 1986: "A meaningful cumulative-effects study must identify: (1) the area in which effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions – past, proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate."

According to *Neighbors of Cuddy Mountain v. United States Forest Serv.*⁹¹ an EIS is to contain: "[R]easonably thorough discussion of significant aspects of probable

⁸⁸ 40 CFR 1502.16, 1508.8, and 1508.25 (a) (2) and (c)

⁸⁹ FSH, Chapter 24

⁹⁰ FSM 2672.42(4)

⁹¹ 137 F.3d1372, 1376 (9th Cir. 1998) (holding an EIS inadequate for failing to comply with the National Forest Management Act, failing to consider cumulative effects, and insufficiently discussing mitigating measures)

environmental consequence.” ... “Where several actions have a cumulative . . . environmental effect, this consequence must be considered in an EIS.”⁹² “Cumulative impact’ is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . .”⁹³ To comply with NEPA, the Forest Service must “consider” cumulative impacts.⁹⁴ To “consider” cumulative effects, some quantified or detailed information is required.

These allotments fall into a Regionally Significant Wildlife Corridor. A map of that corridor can be found at the Wasatch-Cache National Forest website⁹⁵. The Uinta Wilderness is a critical part of this corridor, yet it was not addressed in the WFBF AMP EIS. As part of the analysis, wide-ranging species such as lynx and wolverine should be addressed. A map of lynx habitat also provided on the Wasatch-Cache National Forest website shows the Uinta Wilderness falls into primary and secondary lynx habitat⁹⁶. The EIS did not provide a detailed analysis of the impacts of sheep grazing and predator control activities on the potential for lynx or wolverine to colonize and maintain themselves or on their food base, such as snowshoe hare. How many snowshoe hares could be supported by the forage consumed by 7,000 sheep and how many lynx would that population support? These are critical question that should have been answered in the EIS.

The EIS failed to consider cumulative impacts from predator control

The EIS notes that predator control activities across the Forest and on the WFBF allotment have occurred.⁹⁷ However, the EIS fails to disclose all of the impacts associated with this activity. These effects must be disclosed. For example, the WFBF AMP EIS did not disclose the effects to predators other than coyotes as a result of inadvertent trapping, or the possibility that herders, permittees or guard dogs are killing them on sight.

It is clear from the language in the EIS that much of the predator control on NFS lands occurs in order to protect domestic livestock. It is also clear that both the FS and WS are cooperatively involved in this process. To continue to dodge the question of how much predator control is occurring as a result of domestic livestock grazing is a violation of NEPA. NEPA requires disclosure of cumulative impacts and related federal actions regardless of the entity undertaking actions resulting in those impacts.

Moreover, NEPA requires disclosure of these impacts regardless of whether or not they are significant. If they “may” be significant, the agency must disclose them to the public. Since the Forest adamantly refuses to disclose the amount of predator control occurring on individual allotments, a reasonable conclusion is that the impacts are more than minor. Moreover, it shows a complete failure to take the required “hard look” at all the impacts of livestock grazing on the WFBF Allotment.

⁹² City of Tenakee Springs v. Clough, 915 F.2d 1308, 1312 (9th Cir. 1990)

⁹³ 40 C.F.R. ñ 1508.7

⁹⁴ 40 C.F.R. ñ 1508.25(c)

⁹⁵ http://www.fs.fed.us/r4/wcnf/projects/feis/sat_corridor.pdf

⁹⁶ http://www.fs.fed.us/r4/wcnf/projects/feis/final_plot_lynx_3for.pdf

⁹⁷ 3-38 through 3-39

Predators perform important top-down ecological functions. Predators kill prey, a simple fact. However, prey put much effort into avoiding predators, and ample evidence suggests that the ensuing nonlethal interactions between predators and prey may have important consequences for ecological systems. The obvious and sometimes dramatic lethal aspects of predation can obscure the nonlethal effects of the mere presence of predators in an ecological system. In the presence of predators, prey may alter their behavior so that they are more difficult to capture, detect, or encounter. Because of the adaptive flexibility in prey behavior in response to a changing risk of predation, predators may have large impacts on ecological systems independent of actual predation. The presence or absence of top predators can affect interspecific associations by disrupting mutualistic relationships or food webs. This, in turn, may cause secondary extinctions or unanticipated ripple effects in populations of other species which markedly alters the diversity and composition of a community. The Forest failed to disclose how the removal of predators affects these relationships and ecological processes.

Predator control is a direct result of livestock grazing and the public has a right to know the direct, indirect, and cumulative impacts of predator control as they relate to the allotments in the analysis area and the cumulative effects of predator control on sheep allotments within or adjacent to the boundaries of the project area.

Finally, the WCNF should have analyzed an alternative that discontinued the use of predator control in the project area. Such an analysis would give the public a true account of the real costs associated with predator control activities on allotments in the project area.

II. The Forest Service Decision Violates NFMA

A. The Forest Service has failed to determine the suitability and capability for producing forage for grazing. By failing to apply all its capability and suitability criteria to livestock grazing in the WFBF on a site-specific basis, it violates its own Forest Plan which is also a violation of NFMA. This also violates the NEPA requirement to take a “hard look”.

NFMA states that “National forests and grasslands are suitable for a wide variety of *public uses, such as outdoor recreation, livestock grazing, timber harvest, off-road vehicle travel, or other uses except where lands are determined to be unsuited for a particular use. Lands are not suited for a particular use if that use: is prohibited by law, regulation, or Executive Order; is incompatible with the mission or policies of the National Forest System; or would result in substantial and permanent impairment of the productivity of the land.*” It further requires that “... *the suitability and potential capability of National Forest Lands for producing forage for grazing animals and for providing habitat for management indicator species shall be determined...*”

The elements of capability and suitability such as risk of erosion, impairment of plant community productivity, ground cover and conflicts with other uses are inherent factors that need to be analyzed to reduce risks to the resource, recover damage and reduce conflicts on a project-specific basis. The EIS states that the Revised Forest Plan determined the “general suitability” of areas to produce forage for grazing animals. However, no site-specific determination of capability, suitability, forage availability, allocations to livestock, wildlife and watershed protection was provided.

This watershed consists of steep erodible slopes and dense forests which limit its capability for grazing. See Table 4 for a summary of soil erosion hazard from Forest Service databases. This analysis shows that 57% of the watershed is in high erosion hazard class with 20% not yet classified.

Table 4. Soil Map Units and Erosion Hazard for the WFBF.

LTA Code	Pasture					Total	Erosion Hazard
	001	002	003	04a	04b		
102	60.0	0	0	0	0	60.0	slight
104	285.0	240.2	142.0	0	0	667.1	slight
208	88.6	0.0	0.0	0	0	88.6	slight
221	69.6	0.0	0	0	0	69.6	slight
222	772.7	503.5	380.3	0	3.1	1,659.7	slight
223	320.7	516.2	259.1	0	0.0	1,096.0	high
225	890.6	639.1	832.3	4.8	2.8	2,369.5	very high
484	63.8	0.0	0.0	0.0	0.0	63.8	very high
501	0.0	165.1	3.8	0.0	0.0	168.8	moderate to high
502	146.0	967.0	2,223.9	410.7	491.4	4,239.0	very high
503	0.0	0.0	362.1	221.3	240.3	823.7	no description
520	52.7	0.0	264.8	152.1	0.0	469.6	very high
525	0.0	0.0	307.4	832.8	383.4	1,523.6	no description
531	0.0	460.9	53.1	276.8	555.6	1,346.3	no description
Unknown	0.0	0.0	5.0	74.5	62.0	141.5	
Total	2,749.7	3,492.0	4,833.7	1,972.9	1,738.6	14,786.8	

The EIS did not provide an objective analysis (i.e. hard look) of the extent and condition of the various plant communities and soils, soil erosion characteristics, the area and distribution of the various plant communities from which a determination of capability and stocking rate could be made. There was no analysis of the current plant species and productivity as compared to potential composition or historic range surveys. There was no range condition determination. No evidence was provided that these factors were analyzed in adequate detail during Forest Planning to allow their carryover to this project. It is at this site-specific AMP level that such determinations must be made to verify and quantify the “general suitability” and other general determinations made in the Revised Forest Plan. Using GIS technology, these analyses are clearly attainable by the Forest Service.

NEPA requires that agencies “insure the professional integrity, including scientific integrity, of the discussions and analyses...They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions relied upon in the statement...”⁹⁸ The record lacks any indication that the Forest conducted any type of scientifically sound analysis of the appropriateness of the project area for domestic livestock grazing or the appropriate level of such use. WWP includes information in this appeal that shows the area is not appropriate for grazing (see attached report). FOIA requests and reviews of the project file by the appellants support this assertion. The only conclusion is that the Forest

⁹⁸ 40 C.F.R. 1502.24

Service arbitrarily and capriciously decided that domestic livestock grazing is appropriate in the project area. That decision led to the omission of many reasonable alternatives to the proposed action.

NEPA “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision- making process and the implementation of that decision.”⁹⁹ In other words, it “prohibits uninformed—rather than unwise—agency action.”¹⁰⁰ Yet, in the case of determining the appropriateness of domestic livestock grazing within the project area it appears that the Forest simply arrived at a predecisional conclusion that such use was appropriate, an action which NEPA and the APA forbid.

The management of Forest Service Lands is largely set forth in two laws, NEPA and the National Forest Management Act (NFMA). NFMA sets forth the process for determining whether or not livestock grazing is appropriate on certain parcels of land while the policy behind NEPA is to ensure environmental considerations are integrated into agency planning,¹⁰¹ and that the public be informed in agency planning decisions.¹⁰²

“NEPA ensures the agency ...will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience.”¹⁰³ NEPA’s disclosure goals are “to insure the agency has fully contemplated the environmental effects of its actions and to insure the public has sufficient information to challenge the agency.”¹⁰⁴ The lack of scientific or verifiable data indicating the appropriateness of the proposed action, or grazing in general, inhibits the public’s ability to challenge the agency’s determination that such use, and the amount of authorized use, is appropriate for the project area.

Moreover, the process for determining the appropriateness of domestic livestock grazing on public lands is set forth in NFMA and is known as a suitability and/or capability determination. The regulations promulgated to implement the National Forest Management Act define “suitability” as, “*The appropriateness of applying certain resource management practices to a particular area of land, as determined by an analysis of the economic and environmental consequences and the alternative uses foregone.*”¹⁰⁵ The regulations also require that “the suitability and potential capability

⁹⁹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)

¹⁰⁰ *Custer County Action Ass'n. v. Garvey*, 256 F.3d 1024, 1034 (10th Cir. 2001)

¹⁰¹ 40 C.F.R. §1501)

¹⁰² (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken....Accurate scientific analysis, expert agency comments, and **public scrutiny** are essential to implementing NEPA.” 40 C.F.R. §1500.1(b) (emphasis added).

¹⁰³ *Idaho Sporting Congress v. Thomas*, 1998 WL 89066 (9th Cir. (Idaho)). Citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989).

¹⁰⁴ *Idaho Sporting Congress v. Thomas*, 1998 WL 89066 (9th Cir. (Idaho)). Citing *Inland Empire Public Lands Council v. United States Forest Service*, 88 F.3d 754, 758 (9th Cir. 1996).”

¹⁰⁵ 36 C.F.R. § 219.3 (emphasis added)

of National Forest System lands for grazing animals and for providing habitat for management indicator species shall be determined.”¹⁰⁶

The regulations thus require a site-specific review in which the agency determines whether grazing livestock is appropriate to particular areas, given the value of other uses diminished or foregone (e.g., wildlife, recreation, cultural, etc.). In fact, the Forest acknowledges this in the Purpose and Need for the EIS.

Furthermore, weighing the impacts of resource management practices is consistent with the Forest Service’s mission of providing lands for multiple uses as required by NFMA and recognized in the Multiple Use Sustained Yield Act. Case law cited in the Service’s guidance concludes that the “multiple use” concept as defined in law and regulations requires “*a reasoned and informed decision that the benefits of grazing ... outweigh the costs*” and a weighing of “*the relative values of the resources*” on a site-specific basis.¹⁰⁷ Only through such an analysis can the Forest determine whether or not livestock grazing is appropriate in the project area.

In this appeal, we maintain that Forest Plan capability and suitability was a broad programmatic decision that must be validated with site-specific analysis at the project level in order to fulfill the purpose and need which included determining the “appropriateness” of livestock grazing in the project area.

There are two general types of NEPA analysis: programmatic and site-specific. Forest Service guidance states: “Planning for units of the National Forest System involves two levels of decisions. The first is the development of a Forest Plan that provides direction for all resource management programs, practices, uses, and protection measures. . . . The second level planning involves the analysis and implementation of management practices designed to achieve the goals and objectives of the Forest Plan. This level involves site-specific analysis to meet NEPA requirements for decision-making”.¹⁰⁸

Project decisions (critical decisions that change the environment) require additional NEPA and environmental law compliance ... All projects remain subject to site-specific and continuing compliance with Federal environmental law such as ESA, NEPA, CWA and CAA despite the multiple levels of disclosure. ... The courts recognize that Forest Plan EISs are “*an early stage, where the EIS is ‘merely’ programmatic.*”¹⁰⁹ The courts have also held that when a programmatic EIS “*is prepared, site-specific impacts need not be fully evaluated until a ‘critical decision’ has been made to act on site development.*”¹¹⁰

Furthermore, the purpose of the WFBF Allotment analysis and evaluation is to make site-specific decisions based on Forest Plan direction. The analysis process must include an assimilation of management direction, current issues, and site-specific data to make site specific decisions on land management¹¹¹, and the analysis of a

¹⁰⁶ *Id.* at § 219.20(a).

¹⁰⁷ *National Wildlife Federation v. BLM*, No. UT-06-91-01 US Dep't of Interior, Office of Hearings & Appeals, Hearings Div.) (Rampton, J. 1993), p. 23, the "Comb Wash Allotment" decision; see Guidance, p. 6.

¹⁰⁸ Overview of Forest Planning and Project Level Decision-making (on Forest Service Home Page)

¹⁰⁹ *Idaho Conservation League v. Mumma*, 956 F.2d at 1523.

¹¹⁰ *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1357 (9th Cir. 1994).

¹¹¹ 1909.12 FSH § 5.3., emphasis added

management practice or action must comply with Forest Service environmental policies and procedures.¹¹² The Forest *must* “*Insure that adequate consideration has been given to: site specific environmental effects (including direct, indirect, and cumulative effects).*”¹¹³

The Forest wide capability and suitability determinations are programmatic, not site-specific, yet Forest Service policy and guidance is absolutely clear that a site-specific analysis must be performed prior to implementing a specific project. The Forest Planning process never considered the suitability or capability of the WFBF Allotment at the site specific level taking into account the amount of available forage and other resource values in the area (i.e. the appropriateness of domestic livestock grazing in the area).

In order to determine the appropriateness of domestic livestock grazing in the area and in order to comply with NEPA’s requirement to rely on the best available science¹¹⁴, the Forest should have scientifically and accurately determined those lands which are capable and suitable for livestock grazing at the site-specific level. This is necessary to account for changes in range condition that have occurred over time.¹¹⁵

The EIS failed to accurately and quantitatively determine how much forage (i.e. forage capacity) is currently available. For instance the EIS states that grazing capacity information for portions of the project area is based on Range Analysis information collected during the 1960’s.¹¹⁶ This fails to account for a variety of management activities that have occurred in the project area that may have had an effect on grazing capacity, including loss of productivity from livestock grazing. The evidence provided by WWP in its 2006 report and in surveys conducted in 2007 and 2008 indicate that the grazed watersheds (WFBF, EFBF, LF) are reduced in herbaceous production in comparison to the ungrazed watershed in the Middle Fork Beaver Creek. These data indicate that productivity is about 50% in the grazed watersheds in comparison to the long term rested watershed in the MFBC. Continuing to graze these areas will maintain the impairment of productivity, a violation of NFMA.

On top of this, the Forest failed to properly allocate that forage to watershed and stream protection, wildlife habitat and food, then to livestock if available. Only through such an analysis can the Forest decide if livestock grazing is appropriate and provide for long-term rest to facilitate recovery and improvement of rangeland health as required by the Taylor Grazing Act, the Federal Land Management Policy Act (as it pertains to grazing on Forest Service Lands), and the Public Rangelands Improvement Act.¹¹⁷

The EIS explained away its need to perform a site-specific capability and suitability analysis for grazing sheep in the West Fork Black’s Fork by claiming that “Rangeland

¹¹² FSM 1950 and FSH 1909.15

¹¹³ 1909.12 FSH § 5.31.b

¹¹⁴ NEPA requires that agencies “insure the professional integrity, including scientific integrity, of the discussions and analyses...They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions relied upon in the statement...” (40 C.F.R. 1502.24)

¹¹⁵ Heitschmidt, R.K., J.W. Stuth. 1991. Grazing Management: An Ecological Perspective. 297 p. Timber Press. Portland, OR.

¹¹⁶ EIS p. 3-69

¹¹⁷ 43 U.S.C. § 1752(d) (emphasis added); 43 U.S.C. §§ 1901(b) (2), 1903(b); See id. § 1902(d)

suitability determinations for the WCNF were made during Forest Plan revision”. When the WCNF found that its own criteria described in the Revised Forest Plan Revision would have made nearly all the West Fork Black’s Fork incapable for sheep grazing, it redefined plant communities to explain away “barrens” as not really barren at all and justify a 40 year old analysis in order to increase capable acres.

In 1998, Region 4 published guidance for Forest Plan revisions¹¹⁸. That guidance included these criteria:

1. Areas with less than 30% slopes (for cattle) and less than 45% slopes (for sheep).
2. Areas producing more than or having the potential to produce an average of 200 pounds of forage per acre on an air dry basis over the planning period.
3. Areas with naturally resilient soils (not unstable or highly erodible soils).
4. Areas where ground cover is sufficient to protect soil from erosion – the minimum percentage cover will be 60% unless local data is available for use in setting more specific ground cover requirements.
5. Areas accessible to livestock (without such factors as dense timber, rock or other physical barriers).
6. Areas within one mile of water or where the ability to provide water exists.

The FEIS¹¹⁹ for the Wasatch-Cache National Forest Revised Forest Plan completed capability analysis using the following criteria.

1. Capable of producing at least 200 pounds per acre on an annual basis. Spruce, fir, pine, Douglas fir, oak and barren areas were identified as not being capable.
2. Having a dominant land slope gradient of less than 45% for sheep.
3. Within one mile of surface water.

The distance to water criteria, ground cover minimum and soil erosion hazard prescribed in the 1964 R4 Handbook and the Region 4 Guidance published in 1998 were not used in the Forest Plan capability analysis.

The attached report¹²⁰ used the WCNF current GIS layers and the three criteria above. Using the WCNF’s own minimal criteria from its RFP, only 854 of 14,787 acres or 5.8% of the area of the West Fork Black’s Fork allotment were determined as capable. See the Capability Map in Appendix 1 of that report, which illustrates the patchy and unconnected nature of the small isolated capable lands. These capable acres do not reflect soil erosion hazard or ground cover condition as should be the case by the Forest’s own criteria in its Forest Plan.

Soil map unit descriptions were obtained from the Wasatch Cache National Forest. 75.8% of the land that has been classified in the WFBF as to erosion hazard is in the high to very high soil erosion hazard class. This amounts to 56.7% of the entire

¹¹⁸ USDA. 1998. Rangeland Capability and Suitability Determinations for Forest Plan Revisions R-4 Revised 2/20/98.

¹¹⁹ USDA. 2003. Final Environmental Impact Statement Wasatch Cache National Forest. Intermountain Region Forest Service, Wasatch Cache National Forest.

¹²⁰ Carter op. cit.

allotment area¹²¹. These areas of erodible soil are shown in Appendix 1 Soil Maps of that report.

While the EIS tries to claim barren lands do not exist and those lands classified as barren produce adequate forage, its descriptions of ground cover and gopher damage are inconsistent and do not reflect the evidence provided in the data and photographs in the attached report. Using WCNF GIS coverages, most lands fell into the non-forage producing categories of barren (44%) and conifer. The photographs in Appendix 2 of the attached report illustrate the widespread nature of the barren lands and low ground cover in the WFBF, EFBF and Lake Fork (pp 9, 10, 11, 18, 20, 52, 53, 60, 61, 62, 63). Furthermore, inspection of the maps in Appendix 1 of the attached report show that the areas depicted in the vegetation maps as “barren” are coincidentally with soils and geology that are highly erodible or unstable. So, even if the Forest Service conclusion that somehow the “barren” lands are not barren anymore, consideration of soil erosion hazard and geomorphology classes that are sensitive to erosion would eliminate large areas in Units 4A and 4B that the Forest Service now includes in its capable acres based on the 1960’s surveys. Coincidentally these sensitive and erodible soils correspond to areas mapped by the WCNF as “barrens”. It is clear that the Forest Service is grasping at straws to prevent the knowledge from leaking out that it is reclassifying lands as capable after the fact to suit its predetermined purpose of justifying continued sheep grazing in these risky and damaged areas at all costs.

While the EIS claims ground cover meets Forest Criteria of 85% of potential, it apparently does so by selecting sites that are more mesic and have inherently higher ground cover. The data collected in upland, not mesic sites in the WFBF by WWP show that ground cover averages less than 50%. When the photograph of these sites are viewed in the overall context of those cited above for barren areas, it is clear that vast areas of the WFBF and adjacent grazed watersheds have high percentages of bare soil. Even sites not classified as barrens were found to be at these low levels of ground cover. Vegetation production in the rested Pasture 4B in 2001 was determined to be 151 lbs/ acre, lower than the 200 lb/acre capability threshold. For other upland locations residual vegetation was generally non-palatable species for which one could perhaps find the “light use” claimed in the EIS.

The Forest Service did not determine forage capacity of capable acres for livestock and wildlife and allocate that forage. It relied on 40 year old range surveys even though conditions have changed and the EIS documents that 53% of the sites are in unsatisfactory condition. (EIS 3-5). A 2005 report by Oprandy and Flood, cited in the EIS, reported, that some areas with low vegetation production are “*detrimentally disturbed by management actions*” which means sheep grazing.

The forage needs for domestic sheep should be based on current USDA published weights for ewes and lambs. Adult domestic sheep weigh from 165 to 440 pounds,¹²² and lambs about 129 pounds.¹²³ A low-end estimate of the weights of a sheep and two lambs grazing on these allotments would be 400 pounds (200 pounds for the ewe and 100 pounds each for two lambs). The forage consumption rate for sheep given in the

¹²¹ Wasatch-Cache National Forest. 2006. Map Unit Descriptions Soil Survey Area UT 647 North Slope Uinta Mountains.

¹²² http://www.wildlifeprairiestatepark.org/animalpages/domestic_sheep.htm

¹²³ http://www.usda.gov/nass/pubs/agr04/04_ch7.pdf

1964 R4 Range Analysis Handbook¹²⁴ was 3.3% of body weight per day consumed as air dry forage weight. Using these estimated weights of mature sheep (ewes) and lambs with two lambs per ewe and a total weight of 400 pounds would result in forage consumption of 13.2 pounds per day for each mature sheep with two lambs, or 6.6 pounds per day for a mature ewe weighing 200 pounds. Deer require 3 lbs of forage per day, while elk require 14 lbs/day. The forage consumption by sheep (excluding trailing sheep, herder's horses) is equivalent to 7,196 elk-days. Snowshoe hares and prey for goshawk also rely on herbaceous forage. The Forest Service must show that the WFBF Allotment currently produces the forage required by the number of sheep proposed while still providing foraging for wildlife and meeting the standards, guidelines, goals, and objectives of the RFP.

B. The Forest Service Failed to Analyze the Capability and Suitability of Habitat for Management Indicator and other Species, and protect biodiversity a Violation of NFMA and the ESA.

The viability requirement of the 1982 NFMA regulations, under which revision of the Wasatch-Cache National Forest Plan occurred and under which the West Fork Black's Fork EIS has proceeded, are well known, but bear repeating: *"Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area. In order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area."* 36 C.F.R. § 219.19 (emphasis added).

It is clear that in addition to ensuring there are sufficient numbers of animals to ensure viability, ensuring their distribution and mobility are also key components of ensuring viability. See, also, id. § 219.19(a)(1) (effects on mobility due to vegetation changes to be estimated). Furthermore, the Forest Service must protect critical habitat for listed species and must develop appropriate conservation measures, which includes *"designation of special areas to meet the protection and management needs of the species."* 36 C.F.R. § 219.19(a)(7).

Canada lynx are discussed above in regards to their status in the Uintas. The failure to address their habitat needs violates the viability requirement. Similarly, potential habitat for other MIS and sensitive species such as beaver, bighorn sheep, snowshoe hare, Colorado cutthroat trout were not evaluated. Neither was the habitat capability, suitability and current condition determined relative to their potential. As pointed out in an earlier section of this appeal under NEPA violations, habitat for Colorado cutthroat trout is impaired by sediment. Grazing of sheep is additive to the natural sediment sources in the West Fork Black's Fork and adjacent grazed watersheds. There was no analysis of the decision regarding its ability to maintain viability of Colorado cutthroat trout.

By failing to analyze the condition, capability and suitability of habitat, the effects of the selected alternative for MIS, the threatened lynx and other wildlife species, the Forest Service has violated NFMA. (See lynx discussion hereinbefore).

¹²⁴ Iverson, Floyd. 1964. R-4 Range Analysis Handbook.

As the Supreme Court has noted, the ESA “*require[s] agencies to afford first priority*” to saving listed species and reflects a Congressional determination that they have “incalculable” value. *TVA v. Hill*, 437 U.S. 154, 185, 187 (1978). In other words, any claim that the viability requirement does not necessarily apply to all species with certainty, which the Forest Service and/or USDA seems to be asserting recently, simply has no basis when a listed species is under consideration—its viability must be ensured and it must be given first priority. By failing to set this priority and analyze the capability and suitability of habitat for lynx, the Forest Service is not only failing to ensure the viability of the lynx, it is also failing to meet the requirements of the ESA to not jeopardize a listed species.¹²⁵

C. The specified utilization level of 50% violates NFMA by impairing productivity.

A review of the “classic” range studies, which are the long-term stocking rate and grazing system studies that provide the scientific foundation for modern range management showed that light use is closer to sustainable use, while heavy use is not¹²⁶. “Heavy”, “moderate” and “light” utilization were defined in 1961. Heavy grazing was defined as the degree of forage utilization that does not allow desirable forage species to maintain themselves. Moderate grazing was defined as the level at which palatable species can maintain themselves. Light grazing was defined as the degree of utilization at which palatable species are able to maximize their herbage producing ability. When averaged across all the long-term studies for all regions, heavy grazing was 57% use of primary forage species, moderate use was 43% and light use was 32%. In arid regions, the research showed that moderate grazing use was 35 – 45% and light use even lower%. The specified utilization level of 50% allowed in the WFBF for upland species will result in loss of productivity and is not “light use” as claimed by the Forest Service in its EIS/ROD. For example, forage selection by sheep can be 62% forbs, which is not accounted for in utilization measures using grasses, which are defined as key species in the EIS, while forbs are apparently forgotten¹²⁷. Controlling for use on the less palatable or desirable sedges and grasses will lead to much greater use on the more desirable flowering plants and can lead to their demise. Failure to accurately measure utilization on the most sensitive species in the areas most heavily or commonly grazed and allowing this level of use without analyzing its effects on sustainability, productivity and desirable forbs as well as grasses is a violation of NFMA’s impairment provision.

The effects of different livestock grazing intensities on forage plant production were studied in a ponderosa pine type in Colorado as early as the 1940’s.¹²⁸ This study showed that forage consumption at a rate of 57% produced an average of twice as much forage as a rate of 71%. An area left ungrazed by livestock for 7 years produced

¹²⁵ Appeal of the Record of Decision for the Revised Forest Plan Wasatch-Cache National Forest by Wild Utah Project, Western Watersheds Project, The Wilderness Society, Bridgerland Audubon Society, Sierra Club and Defenders of Wildlife. Appeal dated 6/25/03.

¹²⁶ Holechek, Jerry L., Hilton Gomez, Francisco Molinar and Dee Galt. 1999a. Grazing studies: what we’ve learned. *Rangelands* 21(2):12-16

¹²⁷ Holechek, Jerry L., Rex D. Pieper and Carlton H. Herbel. 2001. *Range Management Principles and Practices*. Prentice Hall.

¹²⁸ Schwan, H.E., Donald J. Hodges and Clayton N. Weaver. 1949. Influence of grazing and mulch on forage growth. *Journal of Range Management* 2(3):142-148.

three times as much forage as the 71% use area. The authors concluded that, as grazing use increased, forage production decreased. The amount of forage left ungrazed is particularly important to wildlife winter range, properly functioning riparian areas, properly functioning rangeland and watershed condition.

During that same period, Dyksterhuis, in a classic paper on the use of quantitative ecology in range management, presented examples of how stocking rates must be adjusted based on precipitation and range condition, which included a rating based on departure from the potential plant community¹²⁹. NRCS considers proper grazing management as that management that sustains the potential plant community¹³⁰. The record includes no evidence that the Forest Service analyzed stocking or utilization rates and the appropriateness of those rates on land within the project area.

The effects of conservative (30 – 35%) use vs. heavy (60 – 65%) grazing use on grasses and forbs by cattle were determined in a New Mexico study.¹³¹ Both of these pastures had experienced conservative use for over 10 years. In 1997, one pasture was changed to heavy use. This study showed that heavy stocking rates resulted in serious declines in productivity in the succeeding year. Perennial grass production was reduced by 57% and forbs by 41% in the heavily grazed pasture compared to the conservatively grazed pasture. The authors cited a number of other studies in arid environments that showed heavy stocking rates were accompanied by decreases in forage production when compared to conservative use. After drought, the ability of forage plants to recover was directly related to the standing crop levels maintained during the dry period.

Five long-term stocking rate studies from three different locations in Arizona, New Mexico and Utah documented similar patterns.¹³² In the Desert Experimental Range in Utah, a 13-year study with moderate (35%) and heavy (60%) use by sheep resulted in annual forage production of 198 lbs/acre and 72 lbs/acre. The authors recommended 25 – 30% use of all forage species. A 10-year study at the Santa Rita Range in Arizona demonstrated that perennial grass cover and yield showed an inverse relationship to grazing intensity, while burroweed, an undesirable species, increased with increasing forage use. The authors recommended a 40% use level. A 37-year study at the Jornada Experimental range in New Mexico involving conservative (33%) and moderate (45%) use showed that the lower grazing intensity resulted in greater black grama (perennial grass) cover. Lowland areas with high clay content and periodic flooding grazed at moderate intensity had higher cover of Tobosa, a perennial grass, than heavily grazed areas. They recommended 30% be used as a stocking intensity with no more than 40% removed in any year. A 10-year study at the Chihuahuan Desert Rangeland Research Center looked at four grazing intensities of 25%, 35%, 50% and 60%. Light (25%) and moderate (35%) use produced 70% more forage than 50% use

¹²⁹ Dyksterhuis, E. J. 1949. Condition and management of range land based on quantitative ecology. *Journal of Range Management* 2:104-115.

¹³⁰ USDA. 1982. Soil Survey of Rich County Utah. USDA Soil Conservation Service, Forest Service and Bureau of Land Management.

¹³¹ Galt, Dee, Greg Mendez, Jerry Holechek and Jamus Joseph. 1999. Heavy winter grazing reduces forage production: an observation. *Rangelands* 21(4):18-21

¹³² Holechek, Jerry L., Hilton Gomez, Francisco Molinar and Dee Galt. 1999a. Grazing studies: what we've learned. *Rangelands* 21(2):12-16

and more than double that achieved at 60% use. Here, the author recommended conservative stocking at 30 – 35%.

Hutchings and Stewart¹³³ suggested that 25 – 30 % use of all forage species by livestock was proper. They recommended this level because routinely stocking at capacity will result in overgrazing in half the years and necessitate heavy use of supplemental feed. Even with this system, they recognized that complete destocking would be needed in 2 or 3 out of ten years.

Holechek et al¹³⁴ concluded that the research is remarkably consistent in showing that conservative grazing at 30 – 35% use of forage will give higher livestock productivity and financial returns than stocking at grazing capacity. They also recognized that consumption by rodents and other wildlife must be taken into account as part of this utilization; otherwise, rangeland productivity would suffer even at these levels of use. Galt et al¹³⁵ recommended levels of 25% utilization for livestock and 25% for wildlife with 50% remaining for watershed protection. In none of these cases have the scientists recommended 50% utilization by livestock, as the Forest continually authorizes (i.e. take half, leave half) and they are clear that even at the lower use levels recommended, allowance for wildlife use must be included in overall use.

The take half, leave half proposition has been used by the Forest Service and BLM erroneously for decades to support 50% utilization while also ignoring the research on the amount of rest needed to sustain sensitive native plant communities. This proposition was based on Franklin Crider's study on root growth stoppage from plant top removal¹³⁶. Crider provided quantitative measurements of plant re-growth under different amounts of removal. Three perennial grasses were grown from seed in pots under ideal conditions of watering and fertilization. After sixty days of growth, these potted grasses were clipped once at intervals from 10% to 90% of the above ground biomass. Repeat clippings of the potted grasses were made every two days to return the plants to the same height as the original clipped percent. The experiment lasted thirty three days at which time root growth of controls became inhibited by the size of the pot. Crider concluded that under these ideal growing conditions, if these species of grasses had 40% or less of their aboveground biomass clipped either once or many times, then the net root mass was the same or more at the end of the experiment. This was used to make the assumption that grazing during the entire growing season at 40% or less would sustain plants from one season to the next. However, inspection of Crider's data reveals that root growth is hindered at much lower levels of removal (20% or less). Clearly, the long-term range studies cited here show that under actual field conditions, these use levels are excessive, don't take into account the amount of rest needed for recovery and will result in impairment of productivity.

Clearly, the long-term range studies cited here show that under actual field conditions, light grazing (25% or less by livestock) is most appropriate to meet the

¹³³ Hutchings, S.S. and G. Stewart. 1953. Increasing forage yields and sheep production on Intermountain winter ranges. U.S. Department of Agriculture Circular 925. 63p.

¹³⁴ Holechek, Jerry L., Hilton Gomez, Francisco Molinar and Dee Galt. 1999a. Grazing studies: what we've learned. *Rangelands* 21(2):12-16

¹³⁵ Galt, Dee, Francisco Molinar, Joe Navarro, Jamus Joseph and Jerry Holechek. 2000. Grazing capacity and stocking rate. *Rangelands* 22(6):7-11.

¹³⁶ Crider, Franklin J. 1955. Root-growth stoppage resulting from defoliation of grass. Technical Bulletin No. 1102. USDA Soil Conservation Service. 23p

Purpose and Need as defined in the EIS only if the plant communities are allowed to recover their potential and are provided with adequate rest between grazing periods as discussed earlier.

III. The Wilderness Act

The first sentence of Section 2(a) of the 1964 Wilderness Act gives the over-arching mandate. The “purpose” is “*to secure for the American people of present and future generations the benefits of an enduring resource of wilderness*” through the establishment of “a National Wilderness Preservation System” and that system “*shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment **as wilderness** and so as to provide for the protection of these areas, the preservation of their **wilderness character** . . .*”. (emphasis added).

In brief, that purpose is to keep some areas unoccupied and unmodified. And this protection is for present and future generations—for all time—in perpetuity. Congress identified a new resource—the resource of wilderness.

Congress also noted in the first sentence in Section 4(b) that: “Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the **wilderness character** of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its **wilderness character**.” (emphasis added)

This is clear direction for management of the Uinta Wilderness. The mandate is to administer all activities so that this Wilderness will remain “*unimpaired for future use and enjoyment as wilderness*”. The baseline for this non-degradation mandate is the quality of wilderness character that existed when the wilderness was designated. It is also clear that this mandate applies to the setting rather than to any particular use. The wilderness character will not be preserved if one or more element(s) of character is allowed to degrade. Wilderness character is degraded if grazing is allowed to deplete and degrade soils, plants and wildlife.

The Forest maintains throughout the EIS that it is under an obligation to continue domestic livestock grazing in the Uinta Wilderness when in fact the Forest can only allow such use when it shows that such use is compatible with the wilderness characteristics of the area. For example, in the discussion of the no grazing alternative the EIS relies on Section 4(d)(4)(2) of the Wilderness Act to assert that it must continue domestic livestock grazing on the WFBF allotment.¹³⁷

The Forest Service Manual (FSM) explains how the requirements of the Wilderness Act are to be met. The overriding management philosophy is as follows (FSM 2320.6): *The goal of wilderness management is to identify these influences, define their causes, remedy them, and close the gap (“A”) between the attainable level of purity and the level that exists on each wilderness (“X”).*

Thus, it is clear that the goal of wilderness management is to keep and improve the wild conditions of wilderness. Resorting to continued degradation of wilderness character, as highlighted throughout the EIS, and failing to disclose all of the impacts that may result from the approved action is a step backward, not forward as the

¹³⁷ EIS p. 2-1

regulation requires, especially since the decision to continue grazing is not based upon a clear showing that the amount of grazing approved is the minimum necessary.

The same section of the Manual further notes: Where a choice must be made between wilderness values and visitor or any other activity, preserving the wilderness resource is the overriding value. Economy, convenience, commercial value, and comfort are not standards of management or use of wilderness.

Preserving wilderness character is paramount and more important than continuing livestock grazing. The EIS and ROD do not recognize this fact. Rather, the Forest side-steps the issue and fails to say exactly how values such as Natural Integrity will be impacted instead referring the reader to previous sections of the EIS. It is very apparent in the discussions on vegetation, soils, water quality, and other resources that domestic sheep grazing and its associated activities are affecting the natural integrity and apparent naturalness of the area. Certainly, the report and photos provided with this appeal clearly demonstrate current and ongoing degradation due to sheep grazing, particularly in non-capable areas.

For example, see the photos of Red Knob Pass, its steep, erodible slopes which are being annually trampled and denuded with soil displacement in order to trail sheep back and forth between West Fork Black's Fork, Lake Fork and East Fork Black's Fork. (Report Appendix 2 pages 60 -63). See the accelerated erosion due to grazing the barren lands with their highly erodible soils around Lake EJOD (Report Appendix 2 page 6). The lake is being rapidly filled with sediment from the surrounding uplands with their high percent bare soil. Mont E. Lewis in his 1970 report cited earlier provided the example of a lake that had been nearly "cut in two" by the delta of an intermittent stream. As Lewis stated, "The drainage originates on the heavily grazed Kabell Ridge." There are numerous other examples of visible degradation to stream banks, uplands, forest understory that are current and ongoing that detract from wilderness values.

However, the Forest attempts to ignore these issues and focus mainly on the recreation experience by noting that affects to the recreation experience alone are not enough to do away with sheep grazing in the Uinta Wilderness while ignoring the damage that activity has caused to the natural integrity and apparent naturalness of the area. This ignores the fact that wilderness character is much more than just solitude for visitors.

Section 2(a) of the Wilderness Act is clear. The "**purpose**" (**and it is singular**) is "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness" through the establishment of "a National Wilderness Preservation System" and that system "shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment **as wilderness** and so as to provide for the protection of these areas, the preservation of their **wilderness character** . . ." (emphasis added)

It is obvious from reading the Act that grazing in wilderness areas must only be allowed where it will not result in impairment and will preserve the character of the wilderness. However the EIS is replete with admissions that the approved action will not accomplish this mandate.

For example the EIS notes that areas across the benches already have irretrievable soil loss...these areas are not expected to regain former productivity¹³⁸, and it further notes that bare soils are common in wet and dry meadows and notes that impacts along streams and other areas where sheep water are also common. The EIS also admits that impacts are occurring due to sheep bedding, trailing, and salting, yet does not propose any changes to these activities.¹³⁹ In fact, the EIS and ROD merely continue changes that began in 1999, yet somehow rationalize that effects will be different just because NEPA has been conducted—ignoring the fact that the proposed grazing system has been in effect for over 7 years.

IV. The EIS and ROD for the WFBF AMP Violates the Administrative Procedures Act (APA)

The Administrative Procedures Act (APA)¹⁴⁰ prohibits an agency from acting in an arbitrary and capricious fashion. Fair and honest procedures are also an element of complying with NEPA.¹⁴¹ To assure that a fair discussion occurs, agencies are required to obtain high quality information, including accurate scientific analysis.¹⁴² The regulations are very explicit that: Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.¹⁴³ CEQ regulations also require that: Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency action, rather than justifying decisions already made.¹⁴⁴

In the EIS for the WFBF AMP the Forest arbitrarily and capriciously predetermined the “scope and intensity of the grazing authorization proposed” while failing to consider reasonable alternatives to the proposed action in violation of NEPA. As the purpose and need point out, the Forest must first consider whether or not livestock grazing is appropriate in the project area and then determine the “scope and intensity” of such use that the land can handle on a sustainable basis. The forest failed to do this because it arbitrarily and capriciously predetermined the level of grazing that it would allow without considering productivity of the land in the project area and then tried to justify that action by claiming it didn’t have to analyze other alternatives in the EIS.

NEPA requires the statement of purpose and need in an EIS to reflect the true purpose and need “to which the agency is responding in proposing the alternatives including the proposed action.”¹⁴⁵ The Forest’s failure to ensure that the proposed alternatives support the purpose and need is arbitrary and capricious and therefore violates the Administrative Procedures Act (APA).¹⁴⁶

Furthermore, the WFBF AMP EIS and ROD violate various laws and regulations as highlighted throughout this appeal. The APA¹⁴⁷ declares that “The reviewing court shall hold unlawful and set aside any agency action, findings, and conclusions found

¹³⁸ EIS 3-14

¹³⁹ EIS p. 3-17 through 3-22

¹⁴⁰ 5 U.S.C. 706(2) (A)

¹⁴¹ 40 C.F.R. 1502.1

¹⁴² 40 C.F.R.1500.1 (b)

¹⁴³ 40 C.F.R. 1502.24

¹⁴⁴ 40 C.F.R. 1502.2(g)

¹⁴⁵ 40 C.F.R. § 1502.13

¹⁴⁶ 5 U.S.C. § 706(2)(D)

¹⁴⁷ 5 U.S.C. §706 (2)

to be (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Since the decision is not in accordance with the laws and regulations as pointed out in the statement of reasons, the EIS and ROD for the WFBF AMP violates the APA.

RELIEF REQUESTED

As shown in the Statement of Reasons, the EIS and ROD for the West Fork Black’s fork Allotment Management Plan on the Evanston Ranger District contains significant deficiencies, arrives at inaccurate conclusions, and violates numerous federal and state laws and regulations. The Western Watersheds Project hereby requests a full remand of the EIS and ROD.

Since this activity violates the NFMA, APA, NEPA, and other laws and regulations detailed throughout this appeal, we request that the Appeal Deciding Officer require the Wasatch-Cache National Forest Supervisor to develop a new or revised NEPA document that complies with all applicable laws and regulations. The Forest Supervisor should further be directed to analyze a full range of alternatives. Until such a time as the WCNF has developed and implemented an approved, legally sufficient revised AMP that meets the requirements of all state and federal laws and regulations, grazing should be discontinued in areas identified in the EIS as damaged, not satisfactory and/or not meeting standards and guidelines established in the WCNF RFP.

Furthermore, we request that the Appeal Deciding Officer require that the selected alternative for the AMP revision contain a monitoring program which includes goals, standards, and methods. The monitoring program should include a schedule and have enforcement steps (management actions) clearly defined, and it should be funded by the Forest Service and conducted by WCNF personnel rather than relying on the permittees. Given the long history of research in range and ecological sciences, definitive actions must be specified in any adaptive management process so the public can be assured that when standards are not met, specific actions with proven outcomes are employed that will lead to restoration of degraded areas.