

Secretary of Agriculture and Chief of the Forest Service Held in Contempt of Court for Use of Illegal Reports on Disease Transmission from Livestock to Bighorn Sheep

On February 23, 2016, Chief Judge B. Lynn Winmill of the United States District Court for the District of Idaho held the Secretary of Agriculture and Chief of the United States Forest Service (“Forest Service”) in contempt of court for relying on two illegal reports on disease transmission from livestock to bighorn sheep. The reports were used in the Shoshone National Forest’s recent Land Management Plan (LMP) revision to ban domestic sheep and goats from the Shoshone. The Shoshone National Forest covers nearly 2.5 million acres in northwest Wyoming.

The motion for contempt was filed by the Idaho Wool Growers Association, through its attorney, William G. Myers III of Holland & Hart, LLP, and by the North American Packgoat Association (NAPgA), through its attorney, Andrew A. Irvine of Andrew A. Irvine, P.C. Both the Wool Growers and NAPgA have expressed concern for years about the Forest Service’s use of questionable science on the alleged risks of disease transmission from domestic sheep and goats, including packgoats, to wild bighorn sheep. Although the Forest Service has previously removed domestic sheep from forests in the West, the Forest Service’s attempt to remove domestic sheep *and* goats from the Shoshone National Forest is a first.

Such attempt is particularly concerning to NAPgA, a non-profit organization established to promote hiking with goats that are specially raised and trained to follow their human owner and to carry packs into the wilderness. The goats are referred to as “packgoats,” while the recreation is called “goatpacking.” Goatpacking presents a viable alternative for recreationists, hunters and elderly and disabled persons to access the backcountry. The Forest Service, however, has decided otherwise by choosing to eliminate goatpacking on the Shoshone National Forest, one of the premier areas for such recreation in the United States.

The Forest Service’s decision to ban domestic sheep and goats on the Shoshone National Forest was based on a 2012 report by a bighorn sheep science committee established and utilized by the Forest Service to analyze the risk of disease transmission between domestic sheep and goats and bighorn sheep. To conduct its risk analysis and prepare a report, the committee, referred to as the Shoshone Risk Analysis of Disease Transmission (RADT) Committee, relied directly on the reports from two other bighorn sheep science committees that were established and utilized by the Forest Service in 2006 on the Payette National Forest in west central Idaho. These committees, known as the Payette RADT and the Payette Principles Committee, conducted a similar risk analysis of disease transmission between

domestic sheep and bighorn sheep, and produced reports known as the Payette RADT and Payette Principles Reports.

These Payette Reports were challenged in federal court in 2008 by the Wool Growers, a non-profit organization that promotes the production and consumption of lamb and wool, because the reports were prepared in violation of the Federal Advisory Committee Act (FACA) and the National Forest Management Act (NFMA). The pertinent provisions of these Acts ensure that advisory committees to federal agencies are transparent and adequately represent the public interest by requiring committee meetings and records to be open to the public, and by requiring that committee membership be fairly balanced in terms of the points of view represented, among other requirements.

Judge Winmill decided the Wool Growers' case in 2009. He determined that the Payette Committees followed none of these requirements and thereby violated FACA and NFMA. In short, the Wool Growers were denied their right to attend, observe and comment, and to access information made available to or prepared by the Payette Committees. Without the Wool Growers' representation on the Payette Committees, or that of any other livestock group, the committees were not fairly balanced.

On the Payette National Forest, the Forest Service's violations of FACA and NFMA led to unbalanced advice and recommendations from the Payette Committees that were captured in the Payette Reports. The Reports, in turn, inappropriately influenced the Forest Service's development of the Payette National Forest's LMP revision and associated ban on domestic sheep on the Payette. As a result, in two related 2009 Orders, the Court held that "the Committees' reports are not to be used in any future agency decision" and held unlawful and set aside the Payette Reports.

Years later, in 2012, as part of the Shoshone National Forest's LMP revision, the Forest Service prepared the Shoshone RADT Report which appeared remarkably similar to the Forest Service's 2006 Payette RADT Report. The Shoshone RADT Report, however, concerned not only the alleged risk of disease transmission from domestic sheep to wild bighorn sheep, but also from domestic goats, including packgoats, to wild bighorn sheep.

Being familiar with the Wool Growers' earlier case and the Court's 2009 Orders in that case, NAPgA notified the Forest Service of the Court's 2009 Orders and detailed the similarities between the 2012 Shoshone RADT Report and the 2006 Payette RADT Report. From 2012 to 2014, through the public comment and objection processes for the Shoshone LMP revision, NAPgA repeatedly notified the Forest

Service that it was acting in violation of the Court's 2009 Orders. NAPgA even provided copies of the Court's Orders to the Forest Service for its review. At a face-to-face meeting with the Forest Service in Cody, Wyoming, in October of 2014, NAPgA's attorney voiced his concerns with the 2012 Shoshone RADT Report to the Associate Deputy Chief of the Forest Service, Jane Cottrell, who refused to discuss the Forest Service's alleged violation at the meeting.

In response to NAPgA's concerns, the Forest Service instead concluded that the 2012 Shoshone RADT Report was "in no way connected" to the Payette Reports. The Forest Service's "review of the project record" found "no evidence to support" NAPgA's concerns. The Forest Service even went so far as to state that the 2012 Shoshone RADT Report and the literature cited for the Report did not mention the Payette Reports. These statements followed NAPgA's explicit detailing of each and every citation to the Payette Reports within the 2012 Shoshone RADT Report, as well as specific instructions to the Forest Service as to where the Payette Reports were referenced in the cited literature.

Despite NAPgA's best efforts to work with the Forest Service to correct the agency's violations of the Court's 2009 Orders, the Forest Service used the tainted 2012 Shoshone RADT Report as the primary justification for banning domestic sheep and goats, including packgoats, from the Shoshone as part of the Shoshone LMP revision. As a result, and to compel the Forest Service's compliance with the Court's 2009 Orders, the Wool Growers and NAPgA reluctantly filed their motion in the U.S. District Court in Idaho in June of 2015 and requested that the Court hold the Secretary and the Chief of the Forest Service in contempt of its 2009 Orders and that the Court set aside the Shoshone RADT Committee and its Report.

After briefing by the Wool Growers and NAPgA, and the Forest Service, the Court issued its recent Memorandum Decision and Order in favor of the Wool Growers and NAPgA and held the Forest Service in contempt of its 2009 Orders. As the Court indicates in its Decision and Order, the 2012 Shoshone Report not only cites to both illegal Payette Reports, but copies verbatim from the 2006 Payette RADT Report. In fact, the Court found, "when the two reports are viewed alongside each other, it becomes apparent that the author of the Shoshone report used the 2006 Payette RADT Report as a template, liberally copying text from the Payette report into his report." The Court further stated, "[p]lainly, the Shoshone report copied portions of text from the Payette report" and noted that "using the 2006 Payette RADT Report as a template was . . . a bad judgment call in light of this Court's 2009 orders."

Faced with a motion for contempt, the Forest Service switched its approach from denying use of the Payette Reports to admitting use, but arguing that such use was

permissible based on its own interpretation of the Court's Orders. The Forest Service argued that the 2012 Shoshone Report cited only those parts of the Payette reports that did not contain important findings or conclusions and that, although it copied from the 2006 Payette RADT Report, such copying was inconsequential because the Forest Service could have relied on other sources to support its conclusions about the alleged risks of disease transmission from domestic sheep and goats, including packgoats, to wild bighorn sheep. The Court was not persuaded by either argument.

In a thorough comparison of the 2012 and 2006 reports, the Court's Decision and Order pinpoints instances in which the 2012 Shoshone RADT Report cites to parts of the Payette Reports containing findings and conclusions. The Court focused particularly on the "Literature Review" section of the 2012 Shoshone Report which copied almost word for word a large, substantive paragraph from the 2006 Payette RADT Report. The 2006 Literature Review only considered alleged disease transmission from domestic sheep. The 2012 Literature Review, however, considered alleged disease transmission from domestic sheep *and* goats, but did not cite a single new source to support consideration of domestic goats, including packgoats.

As the Court found, "a common-sense reading of the *Literature Review* section shows that the Payette committee was drawing conclusions about the literature." The Shoshone repeated these conclusions about the literature, but added "goats" to the conclusions without citing to a single new source. The Court provided that the Forest Service "could not simply cut and paste findings or conclusions from the Payette reports into its report" on the Shoshone without independent and proper scientific support. Thus, the Court concluded that the literature review section of the 2012 Shoshone RADT Report was "infected by the author's reliance on the 2006 Payette RADT Report."

This tainted literature review was then used to support the principal assumption adopted by the Shoshone for its risk analysis: "Direct contact between domestic sheep *or goats (including pack goats)* and bighorn sheep results in a high likelihood of disease transmission to bighorn sheep and disease outbreak in local bighorn sheep herds." As the Court noted, there was no "further independent analysis" by the Forest Service to support this "principal assumption" in the 2012 Shoshone RADT Report.

In reliance on this principal assumption and the numerous other instances of prohibited use of the illegal Payette Reports discussed by the Court in its Decision and Order, the 2012 Shoshone RADT Report concluded that domestic sheep and goats (including packgoats) posed a catastrophic risk of disease transmission to wild bighorn sheep on the Shoshone National Forest. The Forest Service took this conclusion and lacking any scientific literature about the risk of disease transmission

between packgoats and bighorn sheep, and without a single instance of disease transmission from domestic sheep or goats to wild bighorn sheep on the Shoshone National Forest, determined that domestic sheep and goats (including pack goats) must be banned from the Forest.

Although the Forest Service attempted to discount its reliance on the 2012 Shoshone RADT Report in preparing the Shoshone LMP revision, the Court was not persuaded. Instead, the Court provided, “after reviewing the relevant portions of the LMP, the ROD, and the FEIS, the Court agrees [with the plaintiffs] that the actions taken there – mainly, banning sheep and goats on the forest – relied at least in part on the 2012 Shoshone RADT Report.” Rather than immediately holding the Shoshone LMP, Record of Decision (ROD) and Final Environmental Impact Statement (FEIS) unlawful and setting those documents aside, as requested by the Wool Growers and NAPgA, the Court deferred its ruling on this request until after a status conference with the parties.

Still, the Court’s Decision and Order are a significant win for the Wool Growers and NAPgA in their respective fights to ensure that the Forest Service properly involves the public in its decision-making and that it makes transparent, unbiased and science-based decisions in managing livestock and recreation uses on our National Forests. The Court found the Forest Service in contempt of its 2009 Orders, providing that “the Forest should have complied with this Court’s orders from the beginning, but it certainly should have reconsidered its position after [NAPgA] objected to the use of the Payette reports.” The Forest Service has been ordered to compensate the Wool Growers and NAPgA for the attorneys’ fees they incurred in upholding the law.