Case No. 17-4074

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTAH NATIVE PLANT SOCIETY and GRAND CANYON TRUST,

Plaintiffs-Appellants,

v.

U.S. FOREST SERVICE and TOM TIDWELL,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Utah
District Court Case No. 2:16-cv-00056-PMW
(Hon. Magistrate Judge Paul M. Warner)

APPELLANTS' OPENING BRIEF

ORAL ARGUMENT REQUESTED

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August 9, 2017

CORPORATE DISCLOSURE STATEMENT

Appellants, Utah Native Plant Society and The Grand Canyon Trust, are non-profit corporations that have no corporate parents and have not issued stock.

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There are no prior or related appeals.

GLOSSARY

APA	Administrative Procedure Act
FLPMA	Federal Land Policy and Management Act
MUSYA	Multiple-Use Sustained-Yield Act
NFS	National Forest System
RNA	Research Natural Area

STATEMENT OF JURISDICTION

The district court had jurisdiction under 5 U.S.C. §§ 701–706, and 28 U.S.C. § 1331. The order being appealed was issued on March 2, 2017, APP416, and a final judgment disposing of all parties' claims was entered on March 6, 2017, APP441. Appellants Utah Native Plant Society and the Grand Canyon Trust (collectively, the "Trust") filed a Notice of Appeal on May 3, 2017. APP442. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. The Administrative Procedure Act (APA) confers jurisdiction on federal courts to review a federal agency's final actions, meaning those that reflect the agency's last word on the matter in question and that determine rights and obligations. A few years ago, the State of Utah transplanted a population of mountain goats into a previously goat-free national forest, including an alpine "research natural area" in that forest, by flying them over the desert and releasing them on an adjacent parcel of state land in the lower reaches of the forest's mountains. When it became clear that the U.S. Forest Service was acquiescing to the transplant, the Trust requested that the agency take three actions: (1) prohibit more goat transplants; (2) require the State to get a permit, and (3) immediately remove the goats that had already been introduced. The Service responded and denied each request. Did the district court have jurisdiction to review these denials

as "final agency actions"?

2. When a federal agency fails to take a discrete action it is required to take, federal courts have jurisdiction to order the agency to act. The rules for Forest Service "research natural areas" require the Service to both "retain[]" those areas "in a virgin or unmodified condition" and prohibit their "occupancy." Do these rules impose a mandatory and discrete duty on the Service to prohibit the State from transplanting mountain goats to the Mount Peale Research Natural Area such that the district court had jurisdiction to review the agency's failure to do so?

STATEMENT OF THE CASE

I. Nature of the Case

When the State of Utah proposed in 2013 to use the Manti-La Sal National Forest to establish a population of mountain goats, the Forest Service voiced concerns and urged the State to hold off. APP237, APP57. The State refused, APP60, and the Service ultimately did not stop the goat introductions, tacitly allowing them to proceed.

These introductions put goats into an area of the Manti-La Sal National Forest that the Service had designated for special protection over 25 years ago. In the early 1980s, the Service had rejected the State's push to establish a goat population there, after concluding that mountain goats are not native to the forest and would irreparably damage the alpine tundra and native vegetation found in the

high peaks of the La Sal Mountains – the tallest 'sky islands' on the Colorado Plateau. APP213. To avoid similar attempts in the future, the Service nominated the summits and ridges of this area for special protection in 1986 and then created the 2,380-acre Mount Peale Research Natural Area (RNA) in 1988. APP125. This designation requires the Service to keep the RNA "in a virgin or unmodified condition" and prohibit its "occupancy." 36 C.F.R. § 251.23.

The State resurrected its goat-transplant proposal in 2013 because the State had created a problem in another national forest. APP60. Goats the State had introduced to the Tushar Mountains in the Fishlake National Forest, situated about two hundred miles to the west of the La Sals, had overrun that forest and were destroying habitat there. APP218 ("Those areas have become over-populated with goats and habitat degradation is occurring on at least one of them."); APP272 ("They do have a lot of excess goats [in] the state.").

So, in September 2013, the State attempted an end run around the Service's Mount Peale RNA designation and persistent objections to establishing mountain goats in the Manti-La Sal National Forest. The State pinpointed a small parcel of state land next to the national forest, strapped twenty mountains goats to the bottom of helicopters in the Tushar Mountains, flew them east, and released them

on the chosen state parcel.[1] The state land was in the low elevations of the La Sal Mountains, and the State knew the animals would migrate immediately into the alpine regions of the national forest. Indeed, that is what the State's introduction plans intended. APP60. And, with no fences or obstacles in their way, the goats scampered into the Manti-La Sal National Forest and the Mount Peale RNA. APP77. Without serious resistance from the Service, the State flew in another fifteen goats in 2014. APP231. Its plans aim for a population of 200 goats in the national forest. APP181.

When it learned of the State's plan, the Trust called on the Service to put its foot down and keep the goats out of the Mount Peale RNA. When that request went unheeded, the Trust and other science-based groups monitored the goats' impacts in the year following the first transplant and presented their findings of adverse effects to the Service. APP155–156. The agency did nothing in response.

The Trust then wrote the Service, formally requesting that the agency take three actions to address the situation: (1) prohibit additional introductions; (2) regulate the State's use of the national forest through the Service's permitting procedures; and (3) immediately remove the goats already in the La Sal Mountains. APP63, APP325, APP322. The letters argued that the State's actions violated the rules applicable to RNAs and that mountain goats would cause significant damage

[1] A video produced by the State about the transplants is available at https://www.youtube.com/watch?v=UGvA6ABZ-rw.

to the rare wildflowers and alpine vegetation found within the Mount Peale RNA.

The Service, through the Regional Forester and Chief, rejected all three requests. APP75–80. The Service claimed it lacked authority to prohibit additional releases or regulate the State's use of the forest. And it refused to immediately remove the mountain goats, responding instead that it would develop and implement a monitoring plan and that removal might occur in the future.

The Trust then sued the Service. The complaint's first claim challenged the three agency denials. APP23–25. The second claim contended that the Service failed to act by prohibiting the State's use and occupancy of the Mount Peale RNA so as to keep it in a "virgin or unmodified condition." APP25–27. The complaint lodged other claims that are not raised in this appeal.

On the Service's motion, the district court dismissed the complaint after concluding that subject-matter jurisdiction was lacking. APP416. On the first claim, the court ruled that the agency's denials could not be litigated under the APA, reasoning that they were not "final agency actions." APP427. On the second claim, the court found that the Trust had not pled a failure-to-act cause of action. APP437. These are the rulings the Trust appeals.

The district court's dismissal was predicated on the mistaken belief that the federal government's authority to manage how wildlife use and affect federal public lands is constrained by an obligation to cooperate with, if not defer to, the

states. APP424. But the law says otherwise. Congress has complete authority over federal public lands, and it has delegated authority to the Service over all uses of national forests. The State of Utah could not circumvent that principle by introducing mountain goats to the national forest via an adjoining state parcel.

II. Legal Background

A. The federal government has plenary power to regulate activities on and affecting public lands.

The Property Clause of the U.S. Constitution is the foundation for federal government authority over public land. It provides that Congress is to decide how all federal property is managed and used. U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States…."). This power is plenary. *Cal. Coastal Comm'n v. Granite Rock*, 480 U.S. 572, 581 (1987). The U.S. government "can prohibit absolutely or fix the terms on which its property may be used." *Light v. United States*, 220 U.S. 523, 536 (1911). In *Light*, for example, the Court affirmed the Secretary of Agriculture's authority to prohibit ranchers from pasturing cattle in a federal forest reserve without grazing permits, even when the ranchers released their cattle on neighboring private ranchlands. *Id*. at 525–26, 535–36; *see also United States v. Estate of Hage*, 810 F.3d 712, 716–20 (9th Cir. 2016) (upholding trespass claim against ranchers who grazed federal land without permits).

States have trustee power over wildlife within their borders. *See Geer v. Connecticut*, 161 U.S. 519, 529 (1896) (explaining that the states' power over wild game must be exercised in trust for public benefit) *overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322 (1979). But this power, which is not rooted in the U.S. Constitution, is constrained by federal preemption principles derived from the Supremacy Clause, U.S. Const. art. VI, cl. 2. *See Wyoming v. United States*, 279 F.3d 1214, 1226–27 (10th Cir. 2002). In *Kleppe*, the seminal case on the issue, the Supreme Court explained that states' trustee and police powers over wildlife "exist only 'in so far as (their) exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution." *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976); (quoting *Geer*, 161 U.S. at 528); *see also Gibbs v. Babbitt*, 214 F.3d 483, 499 (4th Cir. 2000) ("State control over wildlife, however, is circumscribed by federal regulatory power."). Thus, public-land laws enacted under authority of the Property Clause preempt conflicting state wildlife-management laws. *Kleppe*, 426 U.S. at 543 ("[W]here … state laws conflict with … legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede."); *Wyoming*, 279 F.3d at 1227.[2]

[2] The same is true when federal agencies act with Commerce Clause authority to protect wildlife regardless of where the animals are. *People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 1008 (10th Cir. 2017) ("[W]e likewise conclude that the regulation on nonfederal land of take

Accordingly, the federal government has complete power to manage wildlife on federal property, even when a state would choose a different management regime. Thus, in *Kleppe*, the Supreme Court upheld a federal law banning the capture and destruction of wild burros on federal land though that law conflicted with New Mexico state law. *Kleppe*, 426 U.S. at 546; *id*. at 540–41 ("[T]he 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there."). Similarly, the Supreme Court has ruled that a federal agency may cull deer populations to protect forests from over-browsing, despite objections by the State of Arizona. *Hunt v. United States*, 278 U.S. 96, 100 (1928). In *Wyoming*, this court held that the U.S. Fish and Wildlife Service had authority to prohibit Wyoming from vaccinating elk – believed to carry a disease transmittable to local livestock – on a federal wildlife refuge. 279 F.3d at 1224–27. And in *New Mexico State Game Commission v. Udall*, the Tenth Circuit reiterated the principle that a federal agency has authority to destroy animals that may be detrimental to federal land. 410 F.2d 1197, 1201 (10th Cir. 1969).

The Tenth Amendment does not change this balance. It reserves to the states "[t]he powers not delegated to the United States by the Constitution, [and] not prohibited by it to the States…." U.S. Const. amend. X. Because the Constitution

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of a purely intrastate species … under the [Endangered Species Act] is a constitutional exercise of congressional authority under the Commerce Clause.").

delegates plenary power over federal lands to the federal government, it does not reserve to the states the power to manage wildlife on those lands. *See Wyoming*, 279 F.3d at 1227.

Moreover, Property Clause authority extends to activities that endanger federal lands but are initiated on non-federal lands. *United States v. Alford*, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."); *see also Kleppe*, 426 U.S. at 546 (affirming that "regulations under the Property Clause may have some effect on private lands not otherwise under federal control"). Hence, the Tenth Circuit has affirmed a federal agency's demand that a landowner remove a fence he built on private land that harmed antelope by preventing them from grazing on federal public lands. *United States v. Lawrence*, 848 F.2d 1502, 1504, 1511–12 (10th Cir. 1988) (citing *Camfield v. United States*, 167 U.S. 518 (1897)).

Other circuit courts have similarly ruled that the federal government can regulate activities occurring on non-federal land for the purpose of protecting federal land. The Ninth Circuit has held that federal agencies have authority to protect federal lands by regulating a campfire built in a neighboring state-owned riverbed. *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979). The same goes for a snowmobile operator whose business "was predicated on dispatching snowmobiles into the National Forest" by using a county road. *United States v.*

Parker, 761 F.3d 986, 989–91 (9th Cir. 2014) ("The commercial activity here, like building a fire or launching a canoe, is one that has implications for National Forest land even if commenced on property adjacent to the forest."); *see also Burlison v. United States*, 533 F.3d 419, 432, 440 (6th Cir. 2008) (holding that federal agency had power to "impose reasonable regulations" on an easement crossing federal land (the servient estate) and observing that "[t]he power to regulate federal lands … includes the power to regulate in a manner affecting non-federal property"); *Minnesota v. Block*, 660 F.2d 1240, 1251 (8th Cir. 1981) (upholding federal law that restrained motorboat and snowmobile use on non-federal property to protect the federally owned boundary waters).

B. Authority for the Service to Regulate and Prohibit Uses of the National Forests

Three major statutes enacted under the Property Clause are relevant to the dispute in this lawsuit about the Forest Service's management of the national forests: the Organic Administration Act of 1897 (Organic Act), 30 Stat. 34 (16 U.S.C. §§ 473–482, 551; the Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528–531, which is a supplement to the Organic Act passed in 1960 (*id.* § 528); and the 1976 National Forest Management Act, 16 U.S.C. §§ 1600–1614.

The Organic Act authorizes the Forest Service "to regulate [the] occupancy and use [of national forests] and to preserve the forests thereon from destruction." 16 U.S.C. § 551. The Multiple-Use Sustained-Yield Act identifies a wide range of

purposes national forests should serve, from outdoor recreation to wildlife protection. *Id.* § 528. It also allows, but does not require, the Service to cooperate with "interested State and local governmental agencies and others in the development and management of the national forests." *Id.* § 530.

Organic Act regulations establish how the Service can allow and prohibit uses of national forests. All uses of the forests, except for certain enumerated uses that have their own regulatory processes, are considered "special uses" and require special-use authorization from the Service. 36 C.F.R. § 251.50; *id.* § 251.54 (detailing permitting process); *id.* § 261.10(a) & (k) (listing prohibitions unless special-use permit is obtained). In addition to denying a special-use-permit application, the Service can "close or restrict the use of" a national forest. *Id.* § 261.50. The agency also has authority to prohibit an activity initiated on non-federal lands when it "affects, threatens, or endangers property of the United States administered by the Forest Service." *Id.* § 261.1(a)(2).

Regulations adopted under the Organic Act authorize the Service to create research natural areas, or RNAs.

> [W]hen appropriate, the Chief shall establish a series of research natural areas, sufficient in number and size to illustrate adequately or typify for research or educational purposes, the important forest and range types in each forest region, as well as other plant communities that have special or unique characteristics of scientific interest and importance.

36 C.F.R. § 251.23. RNAs complement the many uses of forest resources by

"maintain[ing] examples of the region's natural diversity" and "serv[ing] to register and protect certain ecosystems as benchmark or reference areas." APP126.

Most uses are not allowed in RNAs. The Service is tasked with keeping RNAs "in a virgin or unmodified condition." 36 C.F.R. § 251.23. The agency can take only those measures that are required to maintain an RNA's benchmark ecological values. *Id*. (except "where measures are required to maintain a plant community which the area is intended to represent"). The Service cannot allow use or occupancy of RNAs unless authorized by the Chief of the Forest Service. *See id*. ("Within areas designated by this regulation, occupancy under a special-use permit shall not be allowed…."). The agency's Manual for Special Use Management elaborates on how the RNA rule applies:

> To preserve [RNAs] in an unmodified condition, do not allow grazing, timber cutting, road and trail development, or special uses of a permanent nature, except to serve research purposes…

Forest Service Manual 2700, Special Uses Management § 2718.14 *available at* https://www.fs.fed.us/im/directives/fsm/2700/wo_2710.docx.

The 1976 National Forest Management Act requires the Service to develop long-range plans that allocate parts of the forest for particular uses. 16 U.S.C. § 1604(a). These "forest plans" can also designate certain units of the forest for conservation, like an RNA, and can provide direction for protecting "sensitive species" identified by the Service. APP171–72. Moreover, the Service must ensure

that each individual management decision is consistent with the applicable forest plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15(b) & (d).

III. Factual Background

A. The Mount Peale Research Natural Area

Towering above Arches and Canyonlands National Parks and Utah's outdoor recreation capital of Moab, the highest peaks in the La Sal Mountains are peerless in the larger desert region known as the Colorado Plateau. The Service manages the La Sal Mountains and the surrounding forests as the 1.2 million-acre Manti-La Sal National Forest. Mount Peale is the La Sals' – and the Colorado Plateau's – highest peak at 12,721 feet.

The La Sal Mountains represent a distinct alpine environment surrounded by a sprawling desert. They are characterized by rare and highly adapted wildflowers and a vegetation community known as "alpine tundra" that have thrived in exposed, oft-freezing, wind-blown, and drought-prone conditions. APP127–28, APP132, APP155. The agency has listed several of these alpine plants, including the La Sal daisy, as "sensitive species," a designation reserved for species whose "population viability is a concern." APP283, APP179.[3]

Because of the La Sals' significance to the region and the National Forest

[3] One goal of the forest plan is to "[p]rotect, maintain, and/or improve habitat for … sensitive plants and animals." *Manti La-Sal Land and Resource Management Plan*, III-3 (1986) *available at* https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5383373.pdf.

System, the Service established the 2,380-acre Mount Peale RNA, with a boundary that is roughly at tree-line surrounding three major peaks, including Mount Peale. APP126–29. The designation process began with the agency's 1986 Forest Plan for the Manti-La Sal National Forest, in which the Service explained that:

> [Research Natural Areas] are set aside from other uses for protection of the specific features that exist and to maintain as much as possible their natural conditions (unmodified by man) so long-term changes can be monitored. The objective is on protection, research, study, observations, monitoring and educational activities that are non-destructive and non-manipulative. In Research Natural Areas unmodified conditions are maintained as a source to compare with manipulated conditions outside of these units.

Manti-La Sal Land and Resource Management Plan at III-83. In 1988, the Service issued an "Establishment Record" to complete the designation and "recognize and protect the values of [the] area…." APP126. The values recognized for protection include the native plants and vegetation communities that characterize the alpine and subalpine zones. APP133–141. The Establishment Record included a simple, mostly hands-off management prescription, requiring nothing of the Service but to "protect[] against use[s] that might jeopardize values for which the RNA is proposed." APP149.

B. The State's Introduction of Mountain Goats to the La Sal Mountains

Mountain goats live in the highest peaks of mountain ranges. They are "adapted to rugged, broken and largely inaccessible terrain," "prefer[] … steep slopes and deep canyons with cliffs, ledges, projecting pinnacles and talus," and

"remain at very high elevations all year long." APP197, 210. They are native to northern parts of North America, APP196, but had never been recorded in Utah before the State introduced them to a national forest in the northern part of the State in 1967, APP222, 196. Until the State's transplants in 2013, mountain goats had never been in the Manti-La Sal National Forest. APP196, 212, 231–32 ("The goats are not indigenous to the La Sal Mountains…."); APP181, 184; APP268 (asserting that a Utah Division of Wildlife Resources "expert stated, 'There is no evidence that they are native to the La Sal mountain range.'"). Their historical absence is probably one of the reasons that fragile alpine plants have held out there. APP231–32, 212–13.

When the State sought permission to import mountain goats to the Manti-La Sal National Forest in the early 1980s, the Service initiated a study. APP189–216. That study observed that the harm mountain goats could cause to "the very sensitive and limited" alpine tundra was "a major cause for concern," APP207, 212, and recommended that "Mountain Goats not be introduced to the Moab Ranger District [in the Manti-La Sal National Forest] at this time or in the foreseeable future." APP213.

The Service reiterated this position in its 1986 Forest Plan. The plan directs the agency to "[p]rohibit any direct wildlife habitat manipulation that will detract from those values for which the [RNA] is established." *Manti-La Sal Land and*

Resource Management Plan at III-84. Responding to a comment on the plan about mountain-goat introductions, the Service stressed that "[t]ransplanting exotic species into [an] RNA would not be appropriate." APP232. Faced with opposition, the State's proposal to introduce mountain goats faded away.

But over 30 years later, it resurfaced. In the summer of 2013, the State's Wildlife Board directed the State Division of Wildlife Resources to transplant mountain goats into the La Sal Mountains for hunting and wildlife viewing. APP60, APP221, 227–29. To carry out the transplants, the State adopted a statewide mountain goat management plan, APP228, and a site-specific, unit plan for the La Sal Mountains, APP181. The unit plan was completed in August 2013 and called for the establishment of a population of 200 goats in the La Sals. APP181. As the plans reveal, the State intended for the goats to use the Manti-La Sal National Forest and the Mount Peale RNA. APP181, 183, 186; *see also* APP60 (State letter to Service referencing "the transplant of Rocky Mountain goats to the La Sal Mountains on the Manti La Sal National Forest…"). The Service also expected goats to use the forest. APP75 ("[I]t was reasonably foreseeable that the goats might wander onto [National Forest System] land from where they were released."). Indeed, the forest surrounds the mountain tops that goats inhabit. APP241 (showing the national forest boundary in dashed green and concentrated area of use on the peaks in the forest); APP328 (showing proportion of time spent

in and around the RNA by a handful of goats whose movement had been tracked).

In contrast to its firm opposition to establishing a mountain-goat population in the Manti-La Sal National Forest in prior years, the Service's position on the State's 2013 proposal was equivocal. The Service never formally approved the introductions, but it also did not prohibit them. The agency helped the State with its transplant plans, APP237, APP384, but simultaneously told the State that introducing mountain goats "may be inconsistent with the National Forest Service policy on the Mount Peale Research Natural Area" and expressed "concern[] about possible impacts to Forest Service regionally sensitive plants," APP237.

A month later, the Service wrote the State "to clarify the Forest Service position" on the State's goat-transplant proposal. APP57. The Service "does not support the proposal," its letter said, and urged the State to reject it. APP57. This letter explained that impacting the RNA by introducing goats "appear[s] [to be] contrary to the establishment record for the Mount Peale RNA and inconsistent with Forest Service policy regarding management of RNAs, which includes maintaining natural conditions and protecting the integrity of ecological processes." *Id.* The Regional Forester also noted that the goats would exacerbate ongoing impacts to the Mount Peale RNA from drought. *Id*.

The State rebuffed the Service's request, APP60–61, and the Service did nothing in response. So, in early September 2013, the State airlifted 20 goats from

the Tushar Mountains to the La Sal Mountains, leaving them on a state parcel next to the national forest. APP258; *see also* Utah Div. of Wildlife Res., "Tushar Mountain Goat Transplant" (Fall 2013) *available at* https://www.youtube.com/watch?v=UGvA6ABZ-rw. A year later, the State put fifteen more goats in the La Sal Mountains, in the same manner and using the same State parcel. APP231.

After the initial transplant, the Service continued to offer conflicting signals. Agency staff still believed that the State's actions violated Service policies and regulations: "Introducing a non-native species into an RNA is clearly a violation of Forest Service policy." APP268. When the State asked why goats had not been prohibited in Utah's other RNAs, APP268, the Service's Deputy Regional Forester pointed out that "[f]ailure to enforce policy in the past is no excuse for ignoring the policy now and in the future," APP272. Service staff also drafted an internal agency memorandum detailing all the rules and regulations that were being violated and the adverse impacts the goats were causing, and recommending that the animals be removed. APP231–32. Still, the Service did not remove the goats, nor did it regulate or prohibit future transplants.

C. The Trust's Requests for Action and the Service's Denials

In the summer after the 2013 transplant, the Trust and other local organizations monitored the RNA to evaluate how the goats were impacting it. APP155–156. They submitted their findings to the Service in the fall of 2014.

APP153–162. This report documented that the goats were already causing damage by their digging, wallowing, and foraging within the Mount Peale RNA. APP156–159; APP285–86. Yet by late 2014, it was clear that the Service would do nothing about the goats.

As a result, the Trust formally requested – through written correspondence to both the Regional Forester and the Chief of the Forest Service – that the Service (1) prohibit the State from introducing more mountain goats to the national forest, (2) regulate the State's use and occupancy of the Manti-La Sal National Forest through the Service's permitting procedures, and (3) immediately remove the mountain goats because they are using and damaging the Mount Peale RNA in violation of RNA rules. APP63, 70–71; APP325, 331–33; APP322–23.

The Service, through the Regional Forester in May 2015 and the Chief in August 2015, denied all three requests. APP75–76; APP77–80. Both denials offered the same set of rationales. The Service claimed it could not prevent the State's goat introductions or regulate the State's use of the forest because the Service lacks authority over the land where the goats were released. APP75, APP77–78. And the Service said that it would not immediately remove the goats using the forest and RNA, but instead would develop a monitoring program to gather information about the goats and damage occurring in the RNA and coordinate additional steps with the State. APP76, APP78.

D. The Service never collected baseline data.

Before the goats were first released, the Service thought it important to document baseline conditions. The Service wanted this pre-introduction data because, without it, there would be no point of comparison for discerning through monitoring how the goats were affecting the forest and RNA. APP57, APP260. Therefore, in late August 2013, the Service asked the State to delay the introduction to provide "sufficient time to coordinate further on analyzing the impacts that goats will have on the fragile alpine ecosystem and RNA." APP57. "Without pre-transplant data on the plant species of concern," the Service argued, "we will not be able to tell what impacts the goats may have on the species of concern." *Id*. A week later, the Service reiterated that delaying the introductions "would provide the Forest Service the opportunity to better coordinate with the [State] on collection of sufficient pre-transplant data on sensitive alpine/subalpine vegetation and the development of an implementation and monitoring strategy." APP260. But the Service did not collect pre-transplant baseline data, for the State forged ahead immediately. *See* APP60–61; APP258 (explaining that goats were introduced within days).

Well over a year later, the Service was still drafting a monitoring plan. APP288, APP386–93. The reasons for that delay are unclear from the record, but it may owe partly to skepticism of agency experts about whether monitoring would

be useful at all:

> It will be difficult to convince [the State] to remove goats based on any kind of monitoring data. They have too many scapegoats on which to blame any detected change—drought, climate change, deer, elk, cows, horses, humans.

APP315; APP313 (acknowledging that "[t]here is no proven effective monitoring of goat impacts to vegetation…").

IV. Proceedings and Disposition Below

Because the Service denied the Trust's three requests for action and was doing nothing to prevent the goats from harming the Mount Peale RNA, the Trust filed suit. Two of the Trust's claims for relief are raised in this appeal. The first challenges the Service's denials, APP23–25 (Compl. ¶¶ 54–59), and the second argues that the Service failed to comply with its mandatory duties in the RNA regulation (36 C.F.R. § 251.23), APP25–27 (Compl. ¶¶ 60–65). Significant to both claims, the Service is required to prohibit occupancy of the Mount Peale RNA in order to retain the RNA "in a virgin or unmodified condition." 36 C.F.R. § 251.23; Forest Service Manual, Special Uses Management § 2718.14 ("To preserve [RNAs] in an unmodified condition, do not allow grazing, timber cutting, road and trail development, or special uses of a permanent nature….").

The Service filed a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that the district court lacked subject-matter jurisdiction. APP33–55. The district court agreed. APP416–40. The court ruled

that the first claim did not challenge "final agency actions," APP426–31, and the second claim did not properly allege that the agency failed to take a discrete action it was required to take, APP437.

SUMMARY OF ARGUMENT

The district court had jurisdiction over both claims raised on appeal.

The Trust's first claim sought the district court's review of "final agency actions" under the APA. *See* 5 U.S.C. § 704. When the Forest Service denied the Trust's three requests, the agency gave its last word on those requests, a verdict that had legal consequences for the State and the Trust.

The Service came to the conclusion that it lacked authority to prohibit additional goat introductions and to regulate the State's occupancy and use of the forest, which consummated its decisionmaking process on those two requests. After all, if the agency believed it lacked authority to act, there was nothing else it could do. And that conclusion enabled the State to carry out its goat-transplant program without repercussion, to the detriment of the Trust's interests in preserving the forest and Mount Peale RNA undisturbed by mountain goats.

By allowing the goats to occupy and harm the RNA, the Service has been violating its regulatory mandate to prohibit occupancy of RNAs and keep those areas in a "virgin or unmodified condition." 36 C.F.R. § 251.23. That harm and breach of the law prompted the Trust three years ago to request that the Service

immediately remove the goats. That Service said no to that request and chose a different course – to wait and see, a decision that, again, blessed the State's goat-transplant program and harmed the Trust by allowing goats to remain in the RNA. That too was a final agency action. And the district court thus had jurisdiction under the APA to review all three of the Service's denials.

The Trust's second claim sought the district court's review under 5 U.S.C. §706(1) of the agency's failure to act to keep mountain goats out of the Mount Peale RNA. The discrete action of excluding transplanted goats from the previously goat-free RNA is required by Forest Service regulations, which prohibit "occupancy" of RNAs and command the agency to retain them in a "virgin or unmodified" condition. Allowing the State to fly mountain goats to the La Sal Mountains so that they could clamber up to the RNA and turn its sensitive alpine tundra into habitat flouts that command. The district court accordingly had jurisdiction to compel the Service to exclude the goats from the RNA.

STANDARD OF REVIEW

Review of the district court's dismissal for lack of subject-matter jurisdiction under Rule 12(b)(1) is de novo. *Williams v. United States*, 957 F.2d 742, 743 (10th Cir. 1992).

ARGUMENT

I. The district court had subject-matter jurisdiction to review the Service's three denials.

The Trust asked the Service to (1) prohibit additional goat introductions by the State; (2) regulate the State's use of the Manti-La Sal National Forest through the special-use permitting procedures;[4] and (3) immediately remove the goats from the Manti-La Sal National Forest so that the Mount Peale RNA remains in a virgin, unmodified condition. These requests relied on the laws governing the uses of and prohibitions applicable to national forests and the Mount Peale RNA, and the harms goats are causing to the Mount Peale RNA. The Service denied all three requests. Each denial was a final agency action.

There is no dispute that all three denials are APA "agency actions," which are "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). *See* APP42–43 (raising no argument in motion to dismiss that denials were not "agency actions"). At a minimum, the denials are "orders," a term the APA defines as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory

[4] Through the permitting process, the Service could restrict or condition the State's use of the forest, thereby excluding mountain goats from the RNA and limiting damage to other parts of the national forest. *See* 36 C.F.R. § 251.56(a).

in form, of an agency in a matter….” 5 U.S.C. § 551(6).[5] A denial of “agency action,” according to the Supreme Court, “is the agency’s act of saying no to a request.” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (“*SUWA*”); *see S. Utah Wilderness All. v. Office of Surface Mining Reclamation & Enf’t*, 620 F.3d 1227, 1244 (10th Cir. 2010) (agency’s letter to plaintiff rejecting plaintiff’s request for a discrete agency action “is properly viewed as a denial”). That is what the Service did here. And those actions were final.

A. The APA’s Finality Test

Courts have jurisdiction under the APA to review “final agency action[s].” 5 U.S.C. § 704. A decision is final if two conditions are met.

First, the agency’s action “must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature.” *Bennett v Spear*, 520 U.S. 154, 177–78 (1997) (internal citation and quotation omitted). This factor is met when the agency gives its “last word on the matter” in question. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 478 (2001) (internal quotation omitted); *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 984 (9th Cir. 2006) (holding that annual operating instructions were Service’s last word authorizing grazing permit holders to graze each season).

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[5] The denials satisfy other types of “agency action.” *See* 5 U.S.C. § 551(11)(C) (defining “relief” as “action on the application or petition of … a person”); *id.* § 551(10) (defining “sanction” as “withholding of relief” and “taking … restrictive action” (or the denial thereof)).

Second, the action must determine rights or obligations, or have legal consequences. *Bennett*, 520 U.S. at 178. Phrased another way, the action is final when it "will directly affect the parties." *Franklin v. Mass.*, 505 U.S. 788, 797 (1992); *see Farrell-Cooper Mining v. U.S. Dep't of Interior*, --- F.3d ---, 2017 WL 3138368, *7 (10th Cir. July 25, 2017), (recognizing that agency decisions are final under the APA when they "inflict[] an actual, concrete injury").

Finality is to be assessed in a pragmatic way. *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1329 (10th Cir. 2007). "Even if 'the agency has not dressed its decision with the conventional procedural accoutrements of finality, its own behavior [could] belie[] the claim that its interpretation is not final.'" *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1189 (10th Cir. 2014) (quoting *Whitman*, 531 U.S. at 479). This is why "[a] communication need not be formal to constitute a final agency action," and agency letters are sufficient. *Tulsa Airports Improvement Trust v. Federal Aviation Admin.*, 839 F.3d 945, 949 (10th Cir. 2016) (applying APA finality principles to a statutory review proceeding). Flexible evaluations of finality are also consistent with the APA's "presumption in favor of judicial review of administrative action." *Kobach*, 772 F.3d at 1189 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 348 (1984)).

B. The Service took final agency when it refused to regulate and forbid goat transplants after concluding that it lacked authority to do so.

The Service denied two of the Trust's requests for the same reason – a

perceived lack of authority to act. First, while acknowledging that "[r]egulations at 36 CFR § 251.50 require that users of National Forest System (NFS) land obtain authorization from the Forest Service for certain uses of NFS land," the Service claimed that this special-use-permitting requirement was not triggered because the State "did not release the mountain goats on NFS land." APP75. Second, the agency claimed that it lacks authority to prohibit goat introductions because the State initially released goats on state land adjacent to the forest. APP77–78 ("The Forest Service does not regulate or control [the State's] activities that do not occur on NFS land, and your request … is beyond the control of the Forest Service.").

1. The Service may regulate how the State uses and impacts the forest.

The Service's lack-of-authority argument based on the goats' release point contradicts the law. The Service has authority to regulate and prohibit the goat introductions because the State airlifted them to the La Sal Mountains knowing the goats would use and threaten the Manti-La Sal National Forest and RNA.

As a matter of constitutional law, Congress has complete authority over all federal lands, including "the power to regulate and protect the wildlife living there." *Kleppe*, 426 U.S. at 540–41; *see also Hunt*, 278 U.S. at 100 ("[T]he power of the United States to … protect its lands and property does not admit of doubt, the game laws of any other statute of the state to the contrary notwithstanding.") (internal citation omitted). This remains true even if animals are released on

adjoining non-federal lands but will use federal property. *Light*, 220 U.S. at 525–26, 535–536 (regulating cattle grazing initiated on adjacent private ranchlands); *see also* 36 C.F.R. § 261.1(a)(2) (regulatory prohibitions apply when an activity "affects, threatens, or endangers property of the United States administered by the Forest Service").

Through the 1897 Organic Act, Congress delegated to the Forest Service authority over all uses of national forests. *See* 16 U.S.C. § 551. Indeed, the Organic Act "confers upon the forest service the *duty* to protect the forests from injury and trespass, and the power to condition their use and prohibit unauthorized uses." *City & Cty. of Denver v. Bergland*, 695 F.2d 465, 476 (10th Cir. 1982) (emphasis added).

In considering and denying the Trust's requests to prohibit additional goat releases and regulate the State's use of the forest, the Service posed the wrong question. The only relevant issue under governing law was whether the State would *use* the national forest to establish a new population of mountain goats. *See* 36 C.F.R. § 251.50(a) (requiring a special-use authorization before conducting a special use). It is undisputed that the goats are using the Manti-La Sal National Forest and RNA, plainly giving the Forest Service authority to regulate that use. APP77 ("The mountain goats have strayed onto adjacent NFS land, including land within the Mount Peale RNA, after they were released on non-Federal land….").

It is also undisputed that the Service and State knew the goats would use the National Forest when the State first devised its program for establishing a goat population in the La Sal Mountains. Because the goats' alpine habitat is limited to the high elevations of the Manti-La Sal National Forest, the Service said "it was reasonably foreseeable that the goats might wander onto NFS land from where they were released," APP75, which is what the State intended, APP181, APP60.[6] And the Service has predicted since 1981 that transplanting goats to the La Sal Mountains would, at the very least, threaten the Mount Peale RNA and its sensitive alpine plants. APP212–13.[7]

Because the Service has complete authority to protect national forests by regulating their occupancy and use, because there was no doubt the State's goats would use the forest once transplanted, and because there is no doubt that they are now using the forest, the Service has jurisdiction to forbid additional goat releases and regulate the State's use of the national forest, including the RNA.

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[6] APP183 (describing potential impacts to Mount Peale RNA); *id.* (acknowledging likelihood that goats would eat sensitive plants in the national forest); APP186 (explaining that the Service would help monitor how goats affect the national forest and RNA).

[7] APP57 (informing state about "[p]otential impacts to the Mt. Peale Research Natural Area," and "[a]dverse effects from goat foraging and trampling on globally rare and Forest Service sensitive alpine plant species"); APP231–32 ("The introduction of mountain goats into the La Sal Mountains has already altered ecosystem processes in the alpine and subalpine zones.").

2. The Service's denials meet both finality requirements.

Based on its errant legal reasoning, the Service unequivocally said no to these two requests by the Trust. These were final agency actions.

The Service's denial of these two requests marks the consummation of the agency's decision-making. Having determined that it lacks authority to prohibit or regulate the State's goat introductions that begin on state land, the Service has nothing more to do or consider. *See S. Utah Wilderness All.*, 620 F.3d at 1244 (holding finality requirement met because plaintiff "specifically requested a discrete agency action, and [the agency] formally denied the request."). On the two matters in question, agency officials – first the Regional Forester and then the Chief of the Forest Service – and not their subordinates, provided their last word. *See Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1243 (10th Cir. 2008) ("The fact that each letter is signed by either the Chief or Deputy Chief of the [agency division] bolsters the finality of the interpretation."). And the Service stood by its legal reasoning, however flawed, in both denials. *See id.* ("The cumulative effect of these letters demonstrates that the [agency's] interpretation of [federal law] has been definite and unqualified since its initial letter….").

Refusing to prohibit and regulate the goat introductions also satisfies the second part of the finality test: It determined rights and obligations. The Service's denials, for practical purposes, mean that the State has the right to release goats on

land next to the national forest and use and occupy the forest without obtaining a special-use permit. Had the Service agreed to take the actions the Trust requested, the State would have had to get a special-use permit or stop transplanting goats into the national forest. *See Army Corps of Eng'rs v. Hawkes*, 136 S.Ct. 1807, 1814–15 (2016) (holding that agency's Clean Water Act jurisdiction determination had legal effect because it either provided a safe harbor or confirmed that a permit is required). The denials also mean that goats will continue to damage the Mount Peale RNA, contrary to the Trust's interests. *See Farrell-Cooper Mining*, 2017 WL 3138368, *7 (agency decisions are final under the APA when they "inflict[] an actual, concrete injury"); *Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016) ("For all practical purposes, the [agency's] findings represented a de facto denial of permits for any [plaintiff] member wishing to import sport-hunted elephant trophies from Tanzania for 2014—that is, 'a result … that … directly affect[s] the parties.'") (quoting *Franklin*, 505 U.S. at 797).

Moreover, the Service's interpretation of its authority under federal law had legal consequences, for it determined what the State could do without penalty. In *Wyoming ex rel. Crank*, a federal agency construed federal law to ban those convicted of domestic violence from possessing firearms, despite a state statute attempting to expunge the convictions. 539 F.3d at 1239–40, 1243. By determining who could lawfully possess firearms, this interpretation had legal

consequences. *Id*. at 1243. And in a closely analogous case, a district court ruled:

> [T]he Chief of the Forest Service denied the Tribe's plea to close the road by telling [the Tribe] that the … Service had no authority to [do so]. That appears to be a final decision denying the [Tribe's] request, and the Court finds it likely that the Tribe will prevail on this issue.

Nez Perce Tribe v. U.S. Forest Serv., 2013 WL 5212317, *5 (D. Idaho Sep. 12, 2013). Like the agency's denial in *Nez Perce*, the Service's denial and evaluation of its legal authority over the State's use of the forest is final here.

The final-agency-action test is met. The Service's interpretation of its legal authority over uses of public lands is complete; it is not dependent on new information or additional facts. The agency's refusal to prohibit additional introductions and regulate the State's use of the forest had legal consequences for the State and directly affected the Trust's interests in protecting the RNA.

C. Denying the Trust's goat-removal request was a final agency action.

1. The two Bennett *factors are satisfied.*

The Trust's third request asked the Service to remove the transplanted goats from the La Sal Mountains immediately, asserting that "[t]ime is of the essence." APP332 ("[We] request that the Forest Service immediately (1) remove mountain goats from the La Sal Mountains…."); APP325 (asking Service to "immediately remove, or arrange for the immediate removal of, all mountain goats"); APP322 (five months earlier, requesting removal "within the next 6-8 months").

Prompt removal was important for several reasons. There was no doubt the

goats were harming and would continue to harm the Mount Peale RNA. APP232 (according to an agency expert, "[t]he introduction of mountain goats into the La Sal Mountains has already altered ecosystem processes in the alpine and subalpine zones. … They also add trampling and wallowing activities at unprecedented levels.").[8] Further, the mere occupancy of the RNA was illegal under agency rules, as Service staff and officials agreed. APP57 ("Impacts to these habitats from introduced goats appear contrary to the establishment record for the Mount Peale RNA and inconsistent with Forest Service policy regarding management of RNAs, which includes maintaining natural conditions and protecting the integrity of ecological processes").[9] Plus, the goats would reproduce and the State intended to release more animals to fulfill its 200-goat population objective. APP282 (asserting that the State was considering another release in 2015); APP221 ("Kids are normally born in mid-May to early-June").[10]

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[8] APP156–59 (describing damage observed in July 2014 caused by trampling, uprooting of vegetation, soil incisions, and wallowing); APP285–86 (same in September 2014); APP213 ("When considering … the potential ecosystem damage that could accompany Mountain Goat introduction, it is recommended that Mountain Goats not be introduced to the Moab Ranger District at this time or in the foreseeable future.")

[9] APP230 ("[The goats'] introduction is not compatible with the objectives for establishing the Mount Peale RNA. Hence, the presence of the goats violates the Code of Federal Regulations and Forest Service RNA policy per manual direction.").

[10] APP63 (explaining that "the majority of [the introduced goats] are nanny goats for reproduction"); APP322 ("Further delay will only make a solution more difficult and costly to implement, as the goats can be moved most successfully this

In response to this request, the Service not only said that it would not remove the goats immediately, but also revealed that it may never remove them. The Service chose to do something else. The agency said it would develop a monitoring program and review the results with the State to determine next steps. APP78 ("Before initiating such action [to either remove or destroy the mountain goats], the Forest Service will work with [the State] to gather and evaluate data sufficient to determine whether that action is warranted…."). The Trust did not ask the Service to take this course.[11]

On the matter in question – the Trust's request for the goats' immediate removal – the Service gave its last word. There was nothing tentative or interlocutory about the Service's denials. The agency rejected what the Trust asked for and decided on a different tack. And by doing so twice – through the Regional Forester and the Forest Service Chief – the Service hammered home the denial's finality. *See Wyoming ex rel. Crank*, 539 F.3d at 1243 (emphasizing agency held firm to its position in five letters); *Qwest Commc'ns v. F.C.C.*, 398 F.3d 1222, 1231 & n.4 (10th Cir. 2005) (finding action final when agency "repeatedly stated its interpretive conclusion" on matter).

The district court found finality lacking because the agency did not foreclose

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fall, will again multiply in the spring of 2016, and more animals may be released into the La Sals by the State of Utah in the fall of 2015.")

[11] For the reasons explained *supra* at pp. 20–21, monitoring goat impacts in the Mount Peale RNA without baseline data has little to no value.

the possibility of someday removing the goats. APP430 ("After further study, the Forest Service … may take action to remove the goats from federal land."); APP428 (holding that the Service's response was "interlocutory" because the agency was tasked with determining whether to act after gathering more information). In so holding, the court drew an analogy to preliminary jurisdictional determinations by the Army Corps of Engineers under the Clean Water Act, which were discussed in *Hawkes*, 136 S.Ct. 1807. APP427–28. But those determinations are different. They are "advisory in nature" and indicate only that the Corps may have jurisdiction. *Id.* Someone who wants the Corps' final, definitive decision may request an "approved" jurisdictional determination. *See Hawkes*, 136 S.Ct. at 1813–14.

That is not true here. There was no preliminary determination on the Trust's request for immediate removal. The Trust exercised its only option for obtaining the agency's final, definitive decision—making a request for action. In response, the Chief of the Forest Service simply said no, and that was the end of the matter. Regardless of what the Service may decide to do in the months and years ahead, it will not have removed the goats immediately.

Indeed, that the Service could do something different in the future based on new information does not unwind the finality of this denial. As the Supreme Court has observed, "[t]he mere possibility that an agency might reconsider in light of

'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal." *Sackett v. Envtl. Prot. Agency*, 566 U.S. 120, 127 (2012); *Hawkes*, 136 S.Ct. at 1814 (same).[12]

Similarly, an agency decision can be complete even if a related decision may be forthcoming. For example, this court has held that a federal agency made a final decision when it determined that the status of a particular section of land was "disputed," even though the agency had not yet resolved the underlying dispute. *HRI, Inc. v. Envtl. Prot. Agency*, 198 F.3d 1224, 1236–37 (10th Cir. 2000) (holding that definite legal consequences flow from designating the land as disputed, namely that the plaintiff had to get a permit). In *Pennaco Energy v. U.S. Dep't of Interior*, the court found that a decision that an agency had not satisfied the law's requirements was final even though no decision was made about what would satisfy those requirements. 377 F.3d 1147, 1155 (10th Cir. 2004) ("Although the [board] did not make a final determination as to what [federal law] required, [its] decision was a definitive statement of its position that the environmental analyses already prepared by the [agency] were not adequate."). And in *Cure Land v. United States Department of Agriculture*, 833 F.3d 1223, 1231 (10th Cir. 2016), the

[12] *See also Cables*, 509 F.3d at 1329–30 (holding that possible future modifications to agency's "annual operating instructions" did not rob them of finality); *Tulsa Airports Improvement Trust*, 839 F.3d at 949–50 ("Although the letter does provide [plaintiff] an opportunity to resubmit any information the [agency] had not yet considered, this invitation does not make an otherwise final decision nonfinal.").

court held that an environmental review supporting an amendment to a water-conservation program was final and could be challenged, even though the exact terms of the amendment itself were not final. *Id.* at 1231.

The Service's refusal to immediately remove the mountain goats satisfies *Bennett*'s second element too.[13] By denying the Trust's requests for immediate action, neither the Service nor the State had to remove goats in 2015 and may never do so. The denial also had an immediate and direct effect on the Trust: The Trust has concrete interests in the forest and Mount Peale RNA and yet goats are trampling, wallowing in, and eating fragile alpine plants, and the Mount Peale RNA is not retaining its virgin and unmodified condition. *See Safari Club*, 842 F.3d at 1289–90 (holding agency findings had a direct effect on the plaintiffs, since hunting opportunity plaintiffs sought would not be permitted in 2014); *Kobach*, 772 F.3d at 1192 (denial of states' request meant states' voter-registration forms would not include the proof-of-citizenship requirement the states' sought); *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d 1198, 1200–01 (10th Cir. 2014) (holding that agency's order was final because it "denied the [plaintiff's] requested

[13] A fair reading of the district court's Order shows that it did not assess *Bennett*'s second element, despite include a heading purporting to address the issue. *See* APP429. Under that heading, the court repeated its prior analysis of whether the Service had consummated its decision-making process. APP429–31 (observing that the Service's "[i]nvestigation" had only begun, might yet lead to removal of the goats, and concluding that the "agency's response to Plaintiffs was interlocutory in nature…").

relief" to declare a company's bargaining conduct unlawful and order backpay).[14]

The Service's decision to reject the Trust's request and refuse to immediately remove the goats from the Mount Peale RNA is complete and has real impact on the parties. Goats will continue to use the Mount Peale RNA as a result, and the Service will continue to violate its regulations by failing to retain the RNA "in a virgin or unmodified condition." 36 C.F.R. § 251.23. On the question of whether the Service will act promptly to comply with its regulations and protect the RNA, the Service's action is final. The district court therefore had subject-matter jurisdiction to review whether that action complied with the APA.

2. The Service is not required to cooperate with the State.

A misreading of the law plagued the district court's ruling. The district court reasoned that the Service's denial of the Trust's request for immediate removal was not complete because the agency was "required" to cooperate with the State in managing wildlife. "As described above," the court wrote, "the unique intersection between federal land management and state wildlife management *requires* the Forest Service to work cooperatively with the states." APP428 (emphasis added);

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[14] *See also Pennaco*, 377 F.3d at 1155–56 (holding that an administrative remand for further consideration had "[d]efinite legal consequences," namely that the [plaintiff's] development of oil-and-gas leases would be delayed until the agency completed "additional unspecified" environmental reviews); *HRI, Inc.*, 198 F.3d at 1236 (holding that "[d]efinite legal consequences flow from [the agency's decision], namely the requirement that [the plaintiff] apply for a [federal] permit….").

see also APP430 ("[T]he Forest Service has statutory and regulatory obligations to work cooperatively with the State."). The court's prior description of that "unique intersection" relied solely on the Multiple-Use Sustained-Yield Act for the idea that cooperation is mandatory: "MUSYA further provides," the court asserted, "that the Secretary of Agriculture is *required* 'to cooperate with interested state and local governmental agencies and others in the development and management of the national forests.'" APP424 (emphasis added) (citing and partially quoting 16 U.S.C. § 530).

The court's error here was significant. The Multiple-Use Sustained-Yield Act authorizes, but does not mandate, cooperation with states over wildlife management on federal land. The MUSYA provision the court cited and relied on does not include the words "requires" or "obligates"; it merely authorizes cooperation. It reads: "the Secretary of Agriculture is *authorized* to cooperate with interested State and local governmental agencies and others in the development and management of the national forests." 16 U.S.C. § 530 (emphasis added). That the MUSYA does not mandate cooperation is consistent with decades of judicial rulings that the federal government has plenary authority over federal lands, including the power to "regulate and protect" wildlife on those lands. *Kleppe*, 426 U.S. at 536, 540–41; *Hunt*, 278 U.S. at 100; *Wyoming*, 279 F.3d at 1226–27; *N.M. State Game Comm'n*, 410 F.2d at 1200–02.

In short, the law does not prohibit the Service from unilaterally and immediately removing, or ordering the State to remove, goats from the RNA.

II. The district court had jurisdiction to order the Service to follow its mandates for research natural areas.

In its second claim, the Trust alleges a failure-to-act cause of action based on the strict regulatory requirements that apply to the Mount Peale RNA. APP27 (Compl. ¶¶ 63, 65). Unlike in other parts of a national forest, to "retain" RNAs in a "virgin or unmodified condition," the Service is prohibited from allowing occupancy of RNA's under special-use permits. 36 C.F.R. § 251.23. The Service's failure to follow that command gave the district court jurisdiction.

When an agency fails to take a required action, the APA provides courts with jurisdiction to review and remedy that failure. 5 U.S.C. §§ 704, 551(13) (defining "agency action" to include a "failure to act"); *id.* § 706(1) (authorizing courts to "compel agency action unlawfully withheld or unreasonably delayed"). For a "failure to act" claim to proceed, a plaintiff must assert "that an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64 (emphasis in original). The Service did that here by failing to comply with regulatory mandates that forbid the agency from allowing the State's transplanted mountain goats to occupy and disturb the virgin, unmodified condition of the RNA.

A. The Service is required to keep the State's transplanted goats out of the RNA.

The first question under *SUWA* is whether the action to be compelled is a discrete one. A failure-to-act claim cannot mount a "broad programmatic attack." *SUWA*, 542 U.S. at 64.

According to the Supreme Court, a discrete action is one of the five categories of "action" under 5 U.S.C. § 551(13), namely, a "rule, order, license, sanction [or] relief," or a denial of one of these discrete listed actions. *SUWA*, 542 U.S. at 62–63. Thus, the failure to deny a "license," defined as an "agency permit … approval … or other form of permission," 5 U.S.C. § 551(8), would suffice. So too would a failure to "sanction," which includes a "requirement … of a license," or "taking other compulsory or restrictive action." *Id.* § 551(10).

Under these standards, the discrete-action element is met here. The action sought is for the Service to prohibit the State's use of the Mount Peale RNA for transplanting mountain goats. This is a defined and precise action. Applying the APA's definitions, the Service failed to take this "restrictive action" and did not deny the State a "form of permission." *See* 5 U.S.C. §§ 551(8) & 551(10)(G). Moreover, the action the Service failed to take is not a broad, programmatic agency action. It is not an action pertaining to all RNAs nationwide, or all RNAs in Utah, or all types of uses of the Mount Peale RNA. Rather, the requested action is specific to one RNA, one actor, and one use.

As for the second *SUWA* element, the RNA regulation requires the Service to prohibit the State's use of the Mount Peale RNA for mountain goat habitat. *See SUWA*, 542 U.S. at 65 (stating "demanded by law … includes, of course, agency regulations that have the force of law"). The RNA regulation imposes two complementary mandates. The agency has an obligation to "retain[] [RNAs] in a virgin or unmodified condition." 36 C.F.R. § 251.23. As the district court put it, "[t]he Service *is charged with* maintaining the Research Natural Area in its 'virgin or unmodified condition.'" APP424 (emphasis added) (citing 36 C.F.R. § 251.23). And to guarantee compliance with this affirmative mandate, the Service is prohibited from allowing occupancy of an RNA under a special-use permit. 36 C.F.R. § 251.23 ("[O]ccupancy under a special-use permit shall not be allowed…."); *see id*. § 251.50(a) (declaring all forest uses to be "special uses").

Service policies and plans make clear that these two commands oblige the Service to keep the State's transplanted goats out of the Mount Peale RNA. The agency's Special Use Management Manual explains how the regulatory commands work together:

> To preserve Research Natural Areas in an unmodified condition, *do not allow* grazing, timber cutting, road and trail development or *special uses* of a permanent nature, except to serve research purposes….

Forest Service Manual, Special Uses Management § 2718.14 (emphasis added). The Service's Research and Development Manual adds that RNAs "*may be used*

only for Research and Development, study, observation, monitoring, and those educational activities *that do not modify the conditions* for which the Research Natural Area was established." APP341 (emphasis added). The Mount Peale RNA Establishment Record calls on the Service to manage the RNA for "protection against use[s] that might jeopardize values for which the RNA is proposed." APP149. And the Manti-La Sal Forest Plan directs the Service to "[p]rohibit any direct wildlife habitat manipulation that will detract from those values for which the [Research Natural Area] is established." *Manti-La Sal Land and Resource Management Plan* at III-84.

Having predicted that transplanted goats would occupy the Mount Peale RNA and disrupt its virgin, unmodified condition, the Service was obliged to exclude the goats from the RNA from the outset. And now that the goats are occupying the Mount Peale RNA and disturbing its virgin, unmodified condition, the Service is required to remove them. *See Vietnam Veterans of Am. v. Cent. Intelligence Agency*, 811 F.3d 1068, 1076–82 (9th Cir. 2015) (holding that regulation commanding Army to provide former test subjects with "newly acquired information that may affect their well-being…" and "all necessary medical care for injury or disease that is a proximate result of their participation in research" could be enforced under 5 U.S.C. § 706(1)). The Trust's complaint alleged that the goats were occupying the RNA and harming it, and that the Service had predicted they

would. APP17–27 (Compl. ¶¶ 30, 35–37, 39–40, 43, 46, 48, 57–58, 64). That was enough to survive a motion to dismiss, and the district court erred when it held otherwise.[15]

That is true even though the agency's obligation to act depends on predicate facts—occupancy of the RNA and disruption of its virgin or unmodified condition. The required-to-act element under *SUWA* is usually fact dependent in some respect.[16] In *Wyoming v. U.S. Department of the Interior*, for example, the State of Wyoming sought to compel a federal agency to remove wild horses from public lands. 839 F.3d 938, 941–42 (10th Cir. 2016). Federal law compelled the agency to remove excess horses only if it made two determinations: (1) that an

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[15] Having concluded that the Service's motion to dismiss mounted a facial attack, APP423, the district court should have accepted the allegations in the complaint as true, *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). Regardless, the Trust offered evidence showing that the goats were occupying the RNA and had disturbed its virgin and unmodified condition. APP77 ("[T]he mountain goats have strayed onto adjacent NFS land, including land within the Mount Peale RNA, after they were released on non-Federal land…."); APP231–32 ("The introduction of mountain goats into the La Sal Mountains has already altered ecosystem processes in the alpine and subalpine zones. … They also add trampling and wallowing activities at unprecedented levels."); APP156–59 (describing damage observed in July 2014 caused by trampling, uprooting of vegetation, soil incisions, and wallowing); APP285–86 (same in September 2014). And the Trust offered evidence that the Forest expected this to happen. APP57 (warning State about "[p]otential impacts to the Mt. Peale Research Natural Area"); APP260 (describing concerns about potential impacts on "rare plants, sensitive alpine communities, and the Mt. Peale Research Natural Area…"); APP151 ("[W]e know that goats cause serious damage to vegetation.").

[16] Even an agency's failure to act in accordance with a statutory deadline—a quintessential discrete and mandatory action—involves the consideration of some facts, including whether the deadline has been triggered and whether it has expired.

overpopulation exists; and (2) that it was necessary to remove horses. *Id*. at 944. Because the agency had not made the second determination, the court held that the state had no failure-to-act claim. *Id*. Removing horses, though a discrete action, was not yet required by law. *Id*.

Comparing the strict and specific commands in the RNA regulation with those at issue in *SUWA* illustrates that both elements are satisfied here. In *SUWA*, the court considered two provisions of the Federal Land Policy and Management Act (FLPMA) and found that neither could sustain failure-to-act claims. One provision was FLPMA's requirement that all site-specific decisions conform to the applicable land use plan. *SUWA*, 542 U.S. at 67. The particular plan at issue called on the Bureau of Land Management (BLM) to conduct a "Use Supervision and Monitoring" program, which involved several tasks, including documenting resource damage, recommending corrective action, monitoring open areas, and supervising closed and restricted areas. *Id*. at 68. The Court ruled that the plan was "generally a statement of priorities" and its "Use Supervision and Monitoring" program was "not a legally binding commitment enforceable under § 706(1)." *Id*. at 71–72. The required-by-law test was not met.

The second FLPMA provision, 43 U.S.C. § 1782(c), did not contain the specificity necessary to order the agency to take a discrete action. *SUWA*, 542 U.S. at 66. That provision instructed BLM to manage certain public lands "so as not to

impair the suitability of such areas for preservation as wilderness." *SUWA*, 542 U.S. at 65. The Court ruled that this "non-impairment" language is a broad objective that "lack[s] the specificity requisite for agency action." *Id*. at 66. Wilderness "suitability," the Court reasoned, is an imprecise enough concept that to avoid impairing it entails no particular prohibitions or affirmative obligations. *Id*. The Court held that BLM had discretion to decide how this broad objective is met and that a court order would interfere with agency discretion. *Id*. at 66–67. In short, there was no discrete action that the Court could compel.

Unlike the requirements in *SUWA*, the Service has a specific obligation under the RNA regulation – maintain the Mount Peale RNA in a virgin, unmodified condition by prohibiting the State's use and occupancy of the RNA. That obligation necessarily requires the Service to forbid mountain goats – goats that did not stray into the RNA, but were airlifted by the State over the desert into the La Sal Mountains – from occupying and disturbing the RNA.

B. The district court erred by considering only one legal basis for the Trust's second claim.

The Trust's second claim relies on two legal theories for commanding the Service to take a discrete action, one arising from the Service's special-use-permitting rules (a theory not raised on appeal), and the other arising from the mandatory prohibitions in 36 C.F.R. § 251.23 discussed above. The district court's Order ruled only on the first theory and ignored the second. This was an error that

warrants reversal.

The first theory alleged that the Service was required to prohibit the State's use of the forest *outside of* the Mount Peale RNA because the State lacked a special-use permit. APP25–27 (Compl. ¶¶ 62, 64–65). This theory was based on a different set of regulatory commands that apply more broadly to the Manti-La Sal National Forest as a whole. These forest-wide prohibitions preclude: "placing, or maintaining any kind of … significant surface disturbance … on National Forest System lands without a special-use authorization … when such authorization is required" and " [u]se or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required." 36 C.F.R. § 261.10(a), (k).

Although the Trust's second claim was based both on these prohibitions covering the whole forest and the prohibitions in 36 C.F.R. § 251.23 that apply only to RNAs, the district court's Order addressed only the prohibitions covering the whole forest. *See* APP434 (characterizing the Trust's second claim as alleging that "the Forest Service is neglecting their mandatory regulatory duty to require the State to obtain a special-use permit"). The court concluded that the Service's special-use-permitting rules do not apply to the State's management of wildlife, and therefore, the State's use of the forest for establishing a mountain-goat

population was not prohibited. APP434–37.[17]

But the prohibitions in 36 C.F.R. § 261.10 and the requirement for the State to obtain a special-use permit are not relevant to whether the RNA regulation commands the Forest Service to remove goats from the RNA. That theory of relief does not turn on forest-wide prohibitions or permitting requirements, but on the command to prohibit use and occupancy of RNAs and retain them in a "virgin or unmodified condition." The district court erred by failing to rule on this question.

[17] The district court cited 36 C.F.R. § 241.2 to contend that the State does not need a permit for using the forest. APP435. Various errors plague the court's reliance on this provision. First, it was not adopted, as the district court claimed APP20, under the 1960 MUSYA, but in 1941, pursuant to the Organic Act and Transfer Act of 1905 (which transferred authority over national forests from the Department of Interior to the Department of Agriculture). 6 Fed. Reg. 1987 (Apr. 17, 1941). Second, § 241.2 does not exempt states' wildlife management from the Service's permitting requirements. Nowhere in § 241.2 are the Service's permitting rules mentioned. Third, the Service may exempt some state-regulated activities from the agency's permitting rules, but wildlife management is not exempt *per se*, and an exempted use must be regulated "in a manner that is adequate to protect National Forest System lands and resources and to avoid conflict with National Forest System programs or operations." 36 C.F.R. § 251.50(e)(2). And fourth, there are only two mandates in § 241.2, which otherwise merely restates the principle that the Service "may" cooperate with the states by entering into agreements to do so. One mandate, which has no relevance to this case, requires the Service to "cooperate with State game officials" in removing the "crop" of game, fish, fur-bearers and the like. *Id.* The other is that the Service "will formulate plans for securing and maintaining desirable populations of wildlife species" in cooperation with states. *Id.* But an instruction to cooperate with states on some wildlife planning is not a command to yield to states when consensus is lacking. On the contrary, the Constitution and case law are clear that states must yield to the federal government.

C. The district court committed a procedural error by not accepting the complaint's factual allegations as true.

A motion to dismiss contesting subject-matter jurisdiction can be presented as either a facial or a factual attack. *Holt*, 46 F.3d at 1002–03. At the pleading stage, courts reviewing a facial attack must accept the truthfulness of a complaint's factual allegations and construe the complaint in the plaintiff's favor. *Id*. at 1002; *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001). When the defendant challenges the facts on which jurisdiction is based, the general rule is that the court may consider evidence beyond the pleadings, weigh competing evidence, and make factual findings. *Holt*, 46 F.3d at 1003.

In the district court, there was confusion as to what type of jurisdictional attack the Service was making on the Trust's second claim. The motion to dismiss purported generally to levy a factual attack. APP40 ("Where [as here] a party attacks the factual basis for subject matter jurisdiction, the court does not presume the truthfulness of factual allegations in the complaint"). The Trust argued that the attack was facial, in part because the agency never specified what facts relating to which claims were being contested. APP98. The district court first agreed with the Service at oral argument that the attack was factual, APP423, but then reversed course in its Order, concluding that the "motion presents a facial attack…." *Id*.

Based on the rules governing facial attacks, the Trust's second claim should not have been dismissed. The Trust sufficiently pled a failure-to-act claim

concerning the Mount Peale RNA. The complaint alleges that: (1) the Service was obliged to maintain RNAs "in a virgin or unmodified condition" and had a discrete duty required by law (36 C.F.R. § 251.23) to prohibit the State's use of the Mount Peale RNA, APP7–27 (Compl. ¶¶ 1, 14, 17, 22, 26, 63, 65); and (2) the transplanted goats would occupy and damage the Mount Peale RNA, APP17–27 (Compl. ¶¶ 30, 35–37, 39–40, 43, 46, 48, 57–58, 64). The district court should have accepted these allegations as true in evaluating the Service's facial attack.

But it did not do so, despite proclaiming that it was "[a]ccepting Plaintiffs' factual allegations as true." APP423. Instead, the court weighed competing evidence, which characterizes a factual attack. *See* APP430 (concluding that the Service "only acknowledged that the goats *may* have an adverse impacts on the Mount Peale RNA," rather than accepting as true Plaintiffs' allegation that the goats *are* adversely impacting the RNA) (emphasis in original). In doing so, the court committed reversible error.

If the Service's motion, however, was a factual attack on jurisdiction, the district court should have converted it to a motion for summary judgment. When a court's subject-matter jurisdiction is intertwined with the merits, and a defendant's motion to dismiss raises a factual challenge, the motion must be converted to one for summary judgment. *U.S. ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 (10th Cir. 1996). Subject-matter jurisdiction and the merits are

intertwined when they "arise from the same statute," meaning that "resolution of the jurisdictional question requires resolution of an aspect of the substantive claim." *Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000).

Jurisdiction over the Trust's second claim and that claim's merits are based on the same Organic Act regulation. As a failure-to-act claim, jurisdiction requires a mandatory command to take a discrete action, and here that command is found in 36 C.F.R. § 251.23. The merits of this claim are based on the Service's breach of this same provision. APP26–27 (Compl. ¶¶ 63, 65). Thus, whether the district court had jurisdiction and whether the Trust should prevail on the merits turn on the same question: Did transplanting goats to the RNA result in occupancy of the RNA that disturbed the RNA's "virgin or unmodified condition"?

That being true, and if a factual attack was mounted, the court should have converted the Service's motion to one for summary judgment and resolved it by construing the evidence in the Trust's favor, after having provided an opportunity to develop the record, including through discovery, Fed. R. Civ. P. 56(d). *Burrell v. Burrell*, 2000 WL 1113702, *3 (10th Cir. Aug. 7, 2000) (unpublished); *see In re Wal-Mart Stores, Inc.*, 395 F.3d 1177, 1189 (10th Cir. 2005) (setting forth summary judgment standards). Thus, if this Court concludes that the Service mounted a factual attack, the district court's dismissal should be reversed, and the Service's motion should be resolved on summary judgment.

CONCLUSION

The district court erred when it concluded that it lacked jurisdiction over the claims raised on appeal. This Court should reverse, find that the district court had jurisdiction, and remand to resolve the questions on the merits that remain.

STATEMENT OF REASONS FOR ORAL ARGUMENT

Oral argument is warranted because this case concerns the State of Utah's misuse of federal property and the Forest Service's abdication of its legal duties to protect the forest and retain the Mount Peale RNA in a "virgin or unmodified condition." Resolution of these important matters of federalism will benefit from allowing the parties to present argument and answer questions beyond the briefs.

Respectfully submitted,

Dated: August 9, 2017

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND STYPE-STYLE REQUIREMENTS

This document complies with the type-volume limit of Fed. R. App. P. 37(a)(7)(B) because, excluding parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), this document contains 12,878 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in Microsoft Word 2010 in 14-point Times New Roman, a proportionally spaced typeface.

Dated: August 9, 2017

s/ Neil Levine
Neil Levine

Attorney for Appellants

ECF CERTIFICATION

I certify that all required privacy redactions have been made, paper copies required to be submitted to the clerk's office are exact copies of brief submitted electronically, and this brief has been scanned for viruses with the most recent version of Microsoft Windows Defender, and according to that software, is free of viruses.

s/ Neil Levine
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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2017, I filed this Opening Brief using the Tenth Circuit's ECF system, which will serve this filing on the following:

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ADDENDUM

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United States Constitution

U.S. Const. Art. IV § 3, cl. 2. Public Lands

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S. Const. Art. VI cl. 2. Supreme Law of Land

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Amend. X. Reserved Powers to States

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Administrative Procedure Act

5 U.S.C.A. § 551 Definitions (excerpts)

> For the purpose of this subchapter—
>
> …
>
> (4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

…

(6) ‘order’ means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

…

(8) ‘license’ includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

…

(10) ‘sanction’ includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) ‘relief’ includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

…

(13) 'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; …."

5 U.S.C.A. § 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

5 U.S.C.A. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C.A. § 704. Actions reviewable (excerpts)

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly

reviewable is subject to review on the review of the final agency action. …

5 U.S.C.A. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

1897 Organic Act

16 U.S.C.A. § 551. Protection of national forests; rules and regulations (excerpts)

The Secretary of Agriculture shall make provisions for the protection against

> destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction;…

Multiple-Use Sustained-Yield Act

16 U.S.C.A. § 530. Cooperation for purposes of development and administration with State and local governmental agencies and others

> In the effectuation of sections 528 to 531 of this title the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.

Organic Act Regulations

36 C.F.R. § 241.2. Cooperation in wildlife management.

> The Chief of the Forest Service, through the Regional Foresters and Forest Supervisors, shall determine the extent to which national forests or portions thereof may be devoted to wildlife protection in combination with other uses and services of the national forests, and, in cooperation with the Fish and Game Department or other constituted authority of the State concerned, he will formulate plans for securing and maintaining desirable populations of wildlife species, and he may enter into such general or specific cooperative agreements with appropriate State officials as are necessary and desirable for such purposes. Officials of the Forest Service will cooperate with State game officials in the planned and orderly removal in accordance with the requirements of State laws of the crop of game, fish, fur-bearers, and other wildlife on national forest lands.

36 C.F.R. § 251.23. Experimental areas and research natural areas.

> The Chief of the Forest Service shall establish and permanently record a series of areas on National Forest land to be known as experimental forests

> or experimental ranges, sufficient in number and size to provide adequately for the research necessary to serve as a basis for the management of forest and range land in each forest region. Also, when appropriate, the Chief shall establish a series of research natural areas, sufficient in number and size to illustrate adequately or typify for research or educational purposes, the important forest and range types in each forest region, as well as other plant communities that have special or unique characteristics of scientific interest and importance. Research Natural Areas will be retained in a virgin or unmodified condition except where measures are required to maintain a plant community which the area is intended to represent. Within areas designated by this regulation, occupancy under a special-use permit shall not be allowed, nor the construction of permanent improvements permitted except improvements required in connection with their experimental use, unless authorized by the Chief of the Forest Service.

36 C.F.R. § 261.10. Occupancy and use (excerpts)

> The following are prohibited:
>
> > (a) Constructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure, communication equipment, significant surface disturbance, or other improvement on National Forest System lands or facilities without a special use authorization, contract, or approved operating plan when such authorization is required.
> >
> > …
> >
> > (k) Use or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required….

36 C.F.R. § 251.50. Scope (excerpts)

> (a) All uses of National Forest System lands, improvements, and resources, except those authorized by the regulations governing sharing use of roads (§ 212.9); grazing and livestock use (part 222); the sale and disposal of timber and special forest products, such as greens, mushrooms, and medicinal plants (part 223); and minerals (part 228) are designated "special uses." Before conducting a special use, individuals or entities must submit a proposal to the authorized officer and must obtain a special use authorization

from the authorized officer, unless that requirement is waived by paragraphs(c) through (e)(3) of this section.

…

(c) A special use authorization is not required for noncommercial recreational activities, such as camping, picnicking, hiking, fishing, boating, hunting, and horseback riding, or for noncommercial activities involving the expression of views, such as assemblies, meetings, demonstrations, and parades, unless:

(1) The proposed use is a noncommercial group use as defined in § 251.51 of this subpart;

(2) The proposed use is still photography as defined in § 251.51 of this subpart; or

(3) Authorization of that use is required by an order issued under § 261.50 or by a regulation issued under § 261.70 of this chapter.

…

(e) For proposed uses other than a noncommercial group use, a special use authorization is not required if, based upon review of a proposal, the authorized officer determines that the proposed use has one or more of the following characteristics:

…

(2) The proposed use is regulated by a State agency or another Federal agency in a manner that is adequate to protect National Forest System lands and resources and to avoid conflict with National Forest System programs or operations; or ….

Manti-La Sal Land and Resource Management Plan

Forest Plan: Management Situation, Resource Elements (II-36)

Wildlife and Fish

ENDANGERED, THREATENED, AND SENSITIVE SPECIES

…

All the endangered, threatened, and sensitive plant species are protected, studied, and maintained under the guidelines set forth in the Endangered Species Act of 1973, the Forest Service Manual, National Policy and Guidelines for Sensitive Species, and the Manti-LaSal National Forest's Endangered, Threatened, and Sensitive Species Management Plan.

Forest Plan: Management Direction, Forest Management Goals (III-3)

The following goals are concise statements describing a desired condition to be achieved some time in the future. They are expressed in broad general terms and are timeless in that they have no specific date by which they are to be completed. These goal statements are the principal basis for the objectives listed later in this chapter.

…

Wildlife and Fish

…

Protect, maintain, and/or improve habitat for threatened or endangered and sensitive plants and animals.

Forest Plan: Management Direction, Management Requirements (III-83)

MANAGEMENT PRESCRIPTION RPI

(EMPHASIS IS ON RESEARCH, PROTECTION, & INTERPRETATION OF LANDS & RESOURCES)

…

The protective emphasis units are set aside from other uses for protection of the specific features that exist and to maintain as much as possible their near natural conditions (unmodified by man) so long-term changes can be monitored.

The objective is on protection, research, study, observations, monitoring and educational activities that are non-destructive and non-manipulative. In Research Natural Areas unmodified conditions are maintained as a source to compare with manipulated conditions outside of these units. Protected units that are designed normally restrict grazing by domestic livestock. Further, no timber harvest, recreation facilities, roads, trails (except for research or study purposes), water impoundment structures, special uses, surface occupancy for mining of hard rock or leasable minerals, or administrative structures (except for that needed for research or protection purposes) will be authorized.

…

MANAGEMENT UNIT DIRECTION RPI
MANAGEMENT REQUIREMENTS

MANAGEMENT ACTIVITIES	GENERAL DIRECTION	STANDARDS & GUIDELINES
…		
WILDLIFE HABITAT IMPROVEMENT AND MAINTENANCE (C02, 04, 05, AND 06)	01 Prohibit any direct wildlife habitat manipulation that will detract from those values for which the unit is established.	

Forest Service Manual

Forest Service Manual 2700, Special Uses Management § 2718.14

2718 – USE RESTRICTIONS AND LIMITATIONS

2718.14 - RESEARCH NATURAL AREAS

To preserve Research Natural Areas in an unmodified condition, do not

allow grazing, timber cutting, road and trail development, or special uses of a permanent nature, except to serve research purposes in these areas, unless otherwise provided by law (36 CFR 251.23; FSM 1010; FSM 4060).

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UTAH NATIVE PLANT SOCIETY & GRAND CANYON TRUST, Plaintiffs, v. UNITED STATES FOREST SERVICE & TOM TIDWELL, in his official capacity as Chief of the United States Forest Service, Defendants.	**MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS** Case No. 2:16-cv-56-PMW Chief Magistrate Judge Paul M. Warner

Pursuant to 28 U.S.C. § 636(c), the parties consented to have Chief United States Magistrate Judge Paul M. Warner conduct all proceedings in this case, including trial, entry of final judgment, and all post-judgment proceedings.[1] Defendants the United States Forest Service and Chief of the United States Forest Service Tom Tidwell (collectively, the "Forest Service" or the "agency") have motioned for the court to dismiss the above captioned case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.[2]

On September 22, 2016, the court held a hearing on the motion.[3] The Utah Native Plant Society and the Grand Canyon Trust (collectively, "Plaintiffs") were represented by Neil Levine and Aaron M. Paul, and the Forest Service was represented by Assistant United States Attorney Jared C. Bennett. At the conclusion of the hearing, the court took the motion under advisement. Now being fully advised, the court renders the following Memorandum Decision and Order.

[1] *See* Dkt. No. 16.
[2] *See* Dkt. No. 18.
[3] Dkt. No. 30.

BACKGROUND

In 1986, the Forest Service prepared a forest plan for the Manti-La Sal National Forest in southeastern Utah ("Forest Plan").[4] The Forest Plan included a proposal to designate the Mount Peale portion of the forest as a Research Natural Area.[5] In 1988, the Forest Service designated a 2,380-acre portion of the La Sal Mountain Range the Mount Peale Research Natural Area ("Mount Peale RNA").[6] The Mount Peale RNA includes much of the La Sal Mountain Range's highest peaks, ridges, and high alpine tundra.[7]

In 2013, the State of Utah (the "State") proposed introducing wild mountain goats onto state-owned land adjacent to the Manti-La Sal National Forest.[8] Prior to the State implementing its proposal, the Forest Service lodged several objections throughout the State's proposal process, asking the State to delay introducing the mountain goats until further research could be conducted.

In May 2013, the Forest Service sent a letter to the State requesting that the State: (1) develop a statewide management plan for introducing mountain goats and (2) develop specific population goals and objectives for the release location of the mountain goats.[9] With the help of the Forest Service, the Utah Division of Wildlife Resources ("DWR") developed a statewide mountain-goat management plan to foster goat introduction across Utah ("Statewide Goat Management Plan").[10] On June 4, 2013, the Utah Wildlife Board approved the Statewide Goat Management Plan.[11] Subsequently, in August 2013, the DWR completed a La Sal Unit

[4] Dkt. No. 2 at ¶ 21.
[5] *Id.* at ¶ 22.
[6] *Id.* at ¶ 23.
[7] *Id.* at ¶ 1.
[8] *Id.* at ¶ 2.
[9] *Id.* at ¶ 37.
[10] *Id.* at ¶ 76.
[11] *Id.* at ¶ 31.

Management Plan, which governed the State's plans to introduce mountain goats onto state-owned land in the La Sal Mountains.[12]

In a July 30, 2013 letter to the State, the Forest Supervisor for the Manti-La Sal National Forest conveyed his concerns that mountain goats "may be inconsistent with the National Forest Service policy on the Mount Peale [RNA]; and might impact three Forest Service regionally sensitive plants."[13]

Similarly, on August 21, 2013, the Regional Forester urged the Director of the DWR to reject the La Sal Unit Management Plan proposal.[14] In a letter to the Director, the Regional Forester conveyed his concern that the mountain goats might have an adverse effect on the Mount Peale RNA.[15] The letter stated: "Impacts to these habitats from introduced goats appear contrary to the establishment record for the Mount Peale RNA and inconsistent with Forest Service policy regarding management of RNAs . . . ."[16] Additionally, the Regional Forester stated that the Forest Service had "serious concern[s] that the additive pressure from current drought cycles and climate change impacts occurring throughout the southwest may impact" plant species in the area.[17] If the State was unwilling to delay introduction altogether, the Regional Forester asked the Director to delay his decision until the Forest Service and the State could further study the potential impacts of the goats on the Mount Peale RNA.[18]

In September 2013, the State disregarded the Forest Service's objections and began introducing mountain goats onto state-owned land in the La Sal Mountains.[19] In a letter to the

[12] *Id.* at ¶ 32.
[13] *Id.* at ¶ 39.
[14] *Id.* at ¶ 40; Dkt. No. 18 at Ex. A.
[15] Dkt. No. 18 at Ex. A.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Dkt. No. 2 at ¶¶ 32–35.

Forest Service, the DWR stated that it had "already been working cooperatively with the Forest Service to identify plant monitoring sites and begin monitoring potential goat habitat on the La Sal Mountains."[20] Additionally, the DWR noted that "[p]retransplant data [had] already been collected" and that the DWR was "committed to future monitoring, including the establishment of additional monitoring sites, as needed."[21] The DWR further noted:

> Four other Forest Service RNAs in Utah already support populations of Rocky Mountain goats. Three of those RNAs were established after goats were already present in the area, and goats were transplanted to one of the RNAs after the RNA was established. No negative impacts from goats have been documented on any of these RNAs.[22]

By 2014, the mountain goats had entered the Manti-La Sal National Forest and the Mount Peale RNA.[23] Since the goat introductions, the Forest Service has been attempting to monitor the mountain goats to determine the goats' impact on the Mount Peale RNA and the Manti-La Sal National Forest.[24]

Plaintiffs are non-profit organizations dedicated to the preservation of ecosystems and landscapes across the Intermountain West.[25] In the summer of 2014, Plaintiffs surveyed the Manti-La Sal National Forest and noted the "adverse impacts of the introduced mountain goats on the Mount Peale [RNA]."[26] On December 24, 2014, Plaintiffs sent the Forest Service a letter documenting their findings and demanding that the Forest Service remove the goats from Manti-La Sal National Forest.[27] Additionally, Plaintiffs argued that the Forest Service had neglected its

[20] *Id.* at ¶ 42; Dkt. No. 18 at Ex. B.
[21] Dkt. No. 18 at Ex. B.
[22] *Id.*
[23] Dkt. No. 2 at ¶ 35.
[24] *Id.* at ¶ 44; Dkt. No. 18 at Ex. A.
[25] Dkt. No. 2 at ¶¶ 7–8.
[26] *Id.* at ¶ 46.
[27] *Id.* at ¶ 47.

regulatory duty to require the State to obtain a special-use permit for use of the national forest.[28] On January 16, 2015, after meeting with the Forest Service, Plaintiffs submitted another letter to the Forest Service reiterating their concerns and requesting that the Forest Service take action.[29]

On May 12, 2015, the Forest Service responded to Plaintiffs' requests.[30] The Forest Service reminded Plaintiffs of the states' traditional role in managing wildlife populations.[31] The Forest Service acknowledged that its regulations required users of a National Forest System to obtain authorization from the Forest Service for certain uses.[32] However, the Forest Service stated that the State "did not release the mountain goats on [National Forest System] land, and therefore were not using or occupying [National Forest System] land at the time of the mountain goat release."[33] The Forest Service further reviewed Plaintiffs' adverse impact findings and concluded that Plaintiffs' findings were not dispositive.[34]

The Forest Service ultimately concluded that more research was needed to determine the impact of mountain goats on the Manti-La Sal Mountain National Forest.[35] The Forest Service stated that it had developed a "rigorous five-year monitoring plan to evaluate population trends of four rare alpine plant species, and track shifts in species composition and ground cover in the alpine zone, including the Mount Peale [RNA]."[36] The Forest Service's monitoring plan includes "recording direct impacts by grazing animals and uses motion sensing camera to

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[28] *Id.*
[29] *Id.* at ¶¶ 48–50.
[30] *Id.* at ¶ 51; Dkt. No. 18 at Ex. D.
[31] Dkt. No. 18 at Ex. D.
[32] *Id.*
[33] *Id.*
[34] *Id.* ("While the report suggests negative impacts to plants from Mountain Goat foraging, it also indicates a need for more refined data collection. In regard to your monitoring documenting trampling evidence within the Mount Peale RNA, evidence similar to that observed by GCT was documented in the area prior to goat introductions, and your trampling evidence was not clearly demonstrated to be the result of mountain goat use. In addition, your observations were not within a fixed area plot, so the density of trampling occurrences cannot be calculated, or compared to future data to establish a trend.").
[35] *Id.*
[36] *Id.*

determine animal species involved."[37] After additional fact finding, the Forest Service stated that it would work cooperatively with the State to take the appropriate course of action, including deciding "whether or not removal or reduction in population" of the mountain goats is warranted.[38]

On June 13, 2015, Plaintiffs petitioned the Chief of the Forest Service to address the State's goat introductions.[39] Plaintiffs' petition reiterated their prior demands, insisting that the Forest Service remove the goats, prohibit additional goat introductions, and require a special-use permit to regulate the State's use and occupancy of the Manti-La Sal National Forest.[40]

On August 7, 2015, the Chief of the Forest Service sent Plaintiffs a letter stating that before the agency could initiate any action, the Forest Service needed to work with the DWR "to gather and evaluate data" sufficient to demonstrate agency action was warranted.[41] The Chief reminded Plaintiffs that the Forest Service had no authority to control the State's activities on state-owned lands.[42] The Chief further stated that it "has not authorized, and has no plans to authorize, the release of mountain goats on [National Forest System] land in the La Sal Mountains."[43]

Unsatisfied with the Forest Service's response, Plaintiffs filed the above captioned lawsuit seeking declaratory and injunctive relief. Plaintiffs' complaint asserts five causes of action regarding the Forest Service's decision to allow mountain goats to be introduced onto land adjacent to the Mount Peale RNA. The Forest Service subsequently filed a motion to dismiss all five claims for lack of subject matter jurisdiction.

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[37] *Id.*
[38] *Id.*
[39] *Id.* at ¶ 52.
[40] *Id.*
[41] *Id.* at ¶ 53; Dkt. No. 18 at Ex. E.
[42] Dkt. No. 18 at Ex. E.
[43] *Id.*

STANDARD OF REVIEW

Under § 706(2)(A) of the Administrative Procedures Act ("APA"), a district court reviews an agency action to determine if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To challenge an agency action in federal court, a plaintiff must satisfy the constitutional standing requirements of Article III and the APA's statutory standing requirements. *See State of Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998). Under § 702 of the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. To obtain judicial review under § 702, the plaintiff must (1) identify a final "agency" action and (2) "demonstrate that its claims fall within the zone of interests protected by the statute forming the basis of its claims." *Catron Cty. Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990)).

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the court must dismiss a claim for lack of subject matter jurisdiction. "Subject-matter jurisdiction involves a court's authority to hear a given type of case" and the party invoking federal jurisdiction bears the burden of establishing that the court has subject matter jurisdiction. *Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir. 2004) (citations omitted). Motions to dismiss pursuant to Rule 12(b)(1) take two forms. First, a party may attack the complaint facially. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Id.* (citations omitted). Second, a party may go beyond the complaint and challenge the factual basis on which the plaintiff seeks to assert the court's subject matter jurisdiction. *Id.* at 1003. "Where a party

attacks the factual basis for subject matter jurisdiction, the court does not presume the truthfulness of factual allegations in the complaint, but may consider evidence to resolve disputed jurisdictional facts." *Radil*, 384 F.3d at 1224 (citing *Pringle v. United States*, 208 F.3d 1220, 1222 (10th Cir. 2000)).

The parties dispute whether the Forest Service's motion to dismiss is a facial or factual challenge.[44] At oral argument, the court indicated that it was inclined to treat the Forest Service's motion as a factual attack. However, upon further review, the court finds that the Forest Service's motion presents a facial attack rather than a factual attack on subject matter jurisdiction. The court has not been presented with any affidavits or other evidence not incorporated into the complaint that challenges Plaintiffs' factual assertions of subject matter jurisdiction. Rather, the parties state the same material facts but disagree as to their legal conclusions. *Zeligson v. Hartman-Blair, Inc.*, 126 F.2d 595, 597 (10th Cir. 1942) ("The writing was attached to the first amended complaint as an exhibit and its legal effect is to be determined by its terms rather than by the allegations of the pleader."). Additionally, the court finds no reason to look beyond Plaintiffs' complaint and the documents incorporated into the complaint to ascertain whether the court has subject matter jurisdiction. Nevertheless, whether the court reviews the Forest Service's motion as a facial or factual attack, the result is the same. Accepting Plaintiffs' factual allegations as true, Plaintiffs have failed to demonstrate that the APA provides the court subject matter jurisdiction over this dispute.

DISCUSSION

A host of federal laws and regulations govern the Forest Service's management of the National Forest System. Relevant to Plaintiffs' claims, the National Forest Management Act ("NFMA") requires the Forest Service to "develop, maintain, and, as appropriate, revise land and

[44] *See* Dkt. No. 20 at 1; Dkt. No. 25 at v-vi.

resource management plans for units of the National Forest System." 16 U.S.C. § 1604(a). Additionally, the Forest Service is required to designate portions of the National Forest System as Research Natural Areas. 36 C.F.R. § 251.23 ("The Chief of the Forest Service shall establish and permanently record a series of areas on National Forest land to be known as experimental forests or experimental ranges . . . ."). The purpose of a Research Natural Area is to preserve portions of the National Forest System for scientific study and educational purposes. *See id.*; *see also* Forest Service Manual § 4063.03. Once a Research Natural Area is designated, the Forest Service is charged with maintaining the Research Natural Area in its "virgin or unmodified condition." 36 C.F.R. § 251.23.

A hallmark of the Forest Service's federal land management duties is the Forest Service's obligation to work cooperatively with the states to balance the federal government's interest in land management with the state's traditional police powers. The Multiple Use and Sustained Yield Act ("MUSYA") provides that "the national forests . . . shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. MUSYA further provides that the Secretary of Agriculture is required "to cooperate with interested [s]tate and local governmental agencies and others in the development and management of the national forests." 16 U.S.C. § 530. To comply with MUSYA, the Secretary of Agriculture has adopted regulations that require Forest Service officials to: "determine the extent to which national forests or portions thereof may be devoted to wildlife protection in combination with other uses and services of the national forests, and, in cooperation with [state wildlife management entities,] . . . formulate plans for securing and maintaining desirable populations of wildlife species." 36 C.F.R. § 241.2. Additionally, the Forest Service is empowered to enter into "general or specific cooperative agreements" with the states for the management of wildlife. *Id.*

Against this regulatory backdrop, Plaintiffs' complaint challenges two different categories of unlawful agency action. First, Plaintiffs' first and fifth claims allege that the Forest Service engaged in unlawful agency action by (1) denying Plaintiffs' requests for the agency to take action and (2) allowing the State to release mountain goats into the Manti-La Sal National Forest.[45] Second, Plaintiffs' remaining claims challenge the Forest Service's failure to act. Plaintiffs argue that the Forest Service has violated federal law by failing to: (1) require the State to obtain a special-use permit to occupy the Manti-La Sal National Forest; (2) process the State's proposal for a special-use permit; and (3) conduct an environmental impact analysis of the effects of the mountain goats on the Mount Peale RNA.[46]

For the reasons that follow, the Forest Service's motion to dismiss is granted. Plaintiffs have cleverly amalgamated federal law in an attempt to find some pathway to judicial review. Pulling apart Plaintiffs' contortions, the court finds that it has no jurisdiction to review the Forest Service's action or inaction with respect to the mountain goats' occupation of the Manti-La Sal National Forest. At the core of Plaintiffs' complaint is the Forest Service's failure to act in a time frame that would satisfy Plaintiffs' sense of urgency. The Forest Service has not determined whether the goats' presence in the Manti-La Sal National Forest violates federal law or the existing Forest Plan. Nor has the Forest Service decided that it will never act on Plaintiffs' requests. The State acted and now the Forest Service is in the reactionary position attempting to determine what agency action, if any, is warranted. Accepting Plaintiffs' allegations as true, the court finds that Plaintiffs have failed to provide the court any action or inaction on behalf of the Forest Service that is reviewable under the APA.

[45] Dkt. No. 2 at ¶¶ 55, 80.
[46] *Id.* at ¶¶ 64, 69, 76.

I. Forest Service's Actions

Plaintiffs' first and fifth claims allege that the Forest Service has engaged in unlawful agency action by refusing to take action to manage the mountain goats' occupation of the Manti-La Sal National Forest. Accepting Plaintiffs' allegations as true, Plaintiffs' first and fifth claims are nonjusticiable. Specifically, Plaintiffs' first and fifth claims fail to meet the APA's final agency action requirement.

A. Forest Service Letters

Plaintiffs' first claim faults the agency for ignoring their requests to remove the mountain goats from the Manti-La Sal National Forest, prohibit further releases of mountain goats by the State, and undertake a review process under the Forest Service's special-use permit regulations to regulate the State's use and occupancy of the Manti-La Sal National Forest.[47] Plaintiffs argue that the goats' presence in the Mount Peale RNA violates Research Natural Area regulations, Forest Service Manuals, NFMA, and the Forest Plan.[48]

The APA provides the court with jurisdiction to review final decisions of an administrative agency. 5 U.S.C. § 704 ("Agency action made reviewable by statute and *final* agency action for which there is no other adequate remedy in a court are subject to judicial review."). The APA defines an "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). An agency action is considered final when two prerequisites are met. First, "the action must mark the consummation of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quotations and citations omitted). Second, the "action must be one by which rights or obligations have been determined, or from which legal consequences will flow."

[47] *Id.* at ¶¶ 55–56.
[48] *Id.* at 58.

Id. Plaintiffs' first claim, while comprehensively pled, fails to meet the APA's definition of a final agency action.

i. Forest Service's Letters Did Not Mark the Consummation of the Agency's Decision Making

Under the first prong of the APA's final agency action definition, a plaintiff must demonstrate that the agency action marked the full culmination of the agency's decision making. *Bennett*, 520 U.S. at 177–78. In other words, the challenged action may not be "merely tentative or interlocutory [in] nature." *Id.* at 178. Recently, the Supreme Court reiterated the general rule that not all agency decision making is justiciable. In *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), the U.S. Army Corps of Engineers (the "Corp") issued an "approved" jurisdictional determination that a company's land contained waters of the United States. *Id.* at 1811. Under the Clean Water Act, the Corp has a duty to determine whether a particular parcel of property contains "waters of the United States" by issuing "jurisdictional determinations." *Id.* at 1812. Jurisdictional determinations can be either preliminary or approved. *Id.*

The Court noted that an approved jurisdictional determination was final and reviewable under the APA. *Id.* at 1814–15. The Court juxtaposed the agency's approved jurisdictional determination with the agency's preliminary jurisdictional determination. The Court recognized that a preliminary jurisdictional determination is merely advisory in nature and simply indicates that a party's land may contain waters of the United States. *Id.* at 1813 (quotations and citation omitted). Conversely, an approved jurisdictional determination is issued "after extensive factfinding by the Corps regarding the physical and hydrological characteristics of the property . . . ." *Id.* True, the agency's decision to issue a preliminary jurisdictional determination and engage in investigation involves agency decision making and may be an indicator of future legal

consequences. However, until the Corp issues an approved jurisdictional determination, the agency's decision is interlocutory in nature and unreviewable under the APA. *See id.* at 1812–13.

Like the Corp's preliminary jurisdictional determinations, the Forest Service's response to Plaintiffs was nothing more than an interlocutory determination that did not mark the full culmination of the agency's decision making. As described above, the unique intersection between federal land management and state wildlife management requires the Forest Service to work cooperatively with the states. Indeed, the mountain goats' presence in the Manti-La Sal National Forest highlights the need for the Forest Service to carefully navigate the intercept of federal and state power. The Forest Service did not authorize the State to release mountain goats near the Manti-La Sal National Forest. To the contrary, the Forest Service objected on numerous occasions and asked the State to delay introducing the mountain goats until more research could be conducted.

The State, exercising its inherent authority to regulate wildlife, *see* Utah Code Ann. Title 23 Chapters 13–30, rejected the Forest Service's proposals and proceeded to release mountain goats on state-owned property in the La Sal Mountains. Now that the animals have migrated to some degree onto federal land, the Forest Service is tasked with determining whether the goats' presence violates federal law and the existing Forest Plan. To achieve this task, the Forest Service has decided that it needs to gather more information to determine whether or not agency action is warranted. Contrary to Plaintiffs' assertions, the Forest Service's letters do not mark the Forest Service's "last word" on the mountain goats' occupation of the Manti-La Sal National Forest.[49]

[49] Dkt. No. 20 at 13.

ii. The Forest Service's Letters Did Not Establish Legal Rights or Obligations

To satisfy the second prong of the final agency action definition, the agency action must be one by which rights or obligations have been determined or from which legal consequences will flow. *Bennett*, 520 U.S. at 177–78. "If an agency has issued a definitive statement of its position, determining the rights and obligations of the parties, the agency's action is final notwithstanding the possibility of further proceedings in the agency on related issues, so long as judicial review at the time would not disrupt the administrative process." *Ctr. For Native Ecosystems v. Cables*, 509 F.3d 1310, 1329 (10th Cir. 2007) (citing cases) (quotations and alterations omitted).

Plaintiffs argue that the Forest Service letters are final notwithstanding the Forest Service's ongoing monitoring efforts because potential monitoring has no bearing on whether the Forest Service has engaged in final agency action.[50] Plaintiffs contend that future monitoring will not change the fact that the agency "is not immediately removing the goats to keep the Mount Peale RNA 'in a virgin or unmodified condition.'"[51] Additionally, Plaintiffs claim that monitoring will not "reveal anything about whether the Forest Service has legal authority to prohibit or regulate the State's unpermitted goat occupation of the Manti-La Sal National Forest."[52]

Plaintiffs' arguments are unpersuasive. The APA's statutory standing requirements in many respects mirror Article III's ripeness and mootness doctrines. Indeed, the purpose of § 702's finality requirement is to avoid propelling agency action into judicial review prematurely. *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 648 F. Supp. 2d 140, 147 (D.D.C. 2009) ("[O]ne purpose of the ripeness doctrine—like the APA's final agency action requirement—is to

[50] *Id.* at 14.
[51] *Id.* (quoting 36 C.F.R. § 251.23).
[52] *Id.*

prevent courts from prematurely entangling themselves in administrative proceedings." (citing *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807 (2003)). The APA's litany of jurisdictional prerequisites is designed to protect administrative agencies from "undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004); *Defs. of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1099 (D. Ariz. 2009).

Plaintiffs seek to contravene the limitations of the APA by embroiling the court into an abstract policy disagreement before the agency has concluded what action, if any, is required. At this stage, the Forest Service's position on the mountain goats' occupation of the Manti-La Sal National Forest is pure speculation. The Forest Service has not determined that it will never act on Plaintiffs' requests. Nor has the Forest Service definitively determined that the goats present a danger to the Mount Peale RNA. The Forest Supervisor and the Regional Forester only acknowledged that the goats *may* have an adverse impact on the Mount Peale RNA.[53] Investigation is only the beginning of the decision making process. After further study, the Forest Service may determine the goats' occupation is unlawful and may take action to remove the goats from federal land.[54] Pragmatically and statutorily, the Forest Service is provided latitude to gather the appropriate information before acting—especially where the Forest Service has statutory and regulatory obligations to work cooperatively with the State. Therefore, until

[53] Dkt. No. 2 at ¶ 40; Dkt. No. 18 at Ex. A (stating that the Forest Service has "serious concern[s] that the additive pressure from current drought cycles and climate change impacts occurring throughout the southwest *may* impact" plant species in the area. (emphasis added)); Dkt. No. 2 at ¶ 39 (stating that that mountain goats "*may* be inconsistent with the National Forest Service policy on the Mount Peale [RNA]; and might impact three Forest Service regionally sensitive plants." (emphasis added)).
[54] Plaintiffs cite no authority for the proposition that the mountain goats' occupation of the Manti-La Sal National Forest per se violates federal law.

the Forest Service makes a final determination as to the goats' occupation of the Manti-La Sal National Forest, the Forest Service has not engaged in final agency action.

The court acknowledges that the APA allows the court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). However, Plaintiffs' first claim does not challenge that the Forest Service's letters constitute unreasonable delay.[55] Furthermore, the court's holding does not mean that the Forest Service's position on the goats' occupation of the Manti-La Sal National Forest is always unreviewable. Indeed, it would be nonsensical if an administrative agency could kick the proverbial can down the road by merely stating that more research must be conducted before acting. Eventually, after further research, the Forest Service will need to take a position on the goats' occupation of the Manti-La Sal National Forest. At this stage, the court is merely satisfied that the agency's response to Plaintiffs was interlocutory in nature and, therefore, unreviewable under the APA.

B. Forest Service's Purported Approval of the State's Goat Introduction

Plaintiffs' fifth claim fairs no better than their first. Plaintiffs' fifth claim alleges that the agency unlawfully "allowed the State to release mountain goats in an area that will result in the use and occupancy of the Mount Peale [RNA]."[56] Plaintiffs argue that the Forest Service's actions violated the Forest Service Organic Act, NFMA, Forest Service's regulations and manuals, and the Forest Plan.[57] To facilitate their theory, Plaintiffs point to the fact that the Forest Service offered the State resources in developing the Utah's Statewide Goat Management Plan.[58]

[55] *See* Dkt. No. 2 at ¶ 59.
[56] *Id.* at ¶ 80.
[57] *Id* at ¶¶ 80–81.
[58] Dkt. No. 20 at 17–18.

Plaintiffs' arguments are remarkable. It goes without saying that the State, not the Forest Service, has the authority to regulate wildlife on State land. *See* Utah Code Ann. Title 23 Chaps. 13–30. Plaintiffs cite no statutory or regulatory authority that would permit the Forest Service to direct state-managed wildlife activity on state land. Moreover, the Forest Service did not authorize the State to do anything.[59] To the contrary, the Forest Service repeatedly objected to the introduction of mountain goats on land adjacent the Manti-La Sal National Forest.

Furthermore, lending agency resources to the State to develop a *statewide* management plan does not serve as an implicit blessing to introduce the mountain goats on state land near the Manti-La Sal National Forest. Indeed, as Plaintiffs allege, the Forest Service immediately opposed La Sal Unit Management Plan, stating its concern that there were too many unknowns surrounding the release of mountain goats in close proximity to the Manti-La Sal National Forest. Accordingly, Plaintiffs' fifth claim fails to allege an agency action, let alone a reviewable final agency action.

II. Forest Service's Purported Failure to Follow Special-Use Permitting Regulations

Plaintiffs' second and third claims allege that the Forest Service failed to abide by the Forest Service special-use regulations. The APA empowers courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); 5 U.S.C. § 551(13) (stating that that the APA's definition of an "agency action" includes the agency's "failure to act"). Merely pointing to a general statutory duty is not enough to invoke jurisdiction under the APA. To obtain judicial review of an agency's failure to act, a plaintiff must show that the "agency failed to take a *discrete* agency action that it is *required to take*." *Norton*, 542 U.S. at 64 (emphasis in original). If a plaintiff fails to demonstrate "a specific, unequivocal command"

[59] Plaintiffs' complaint concedes this fact. *See* Dkt. No. 2 at ¶ 36 ("The Forest Service did not consent to goat introductions in to the La Sal Mountains.").

placed on the agency, the court lacks subject matter jurisdiction. *Id.* at 63 ("[O]nly agency action that can be compelled under the APA is action legally *required.*" (emphasis in original)).

Forest Service regulations prohibit the "[u]se or occupancy of National Forest System land or facilities without special-use authorization when such authorization is required." 36 C.F.R. § 261.10(k). For example, "placing[] or maintaining any kind of . . . significant surface disturbance" or "abandoning any personal property" in the National Forest System is generally prohibited without a special-use permit issued by the Forest Service. 36 C.F.R. § 261.10(a), (e); 36 C.F.R. § 251.50 ("[I]ndividuals or entities must submit a proposal to the authorized officer and must obtain a special use authorization from the authorized office . . . ."); *see also* 36 C.F.R. § 251.50(e)(2).

When an area of the National Forest System is designated a Research Natural Area, Forest Service regulations state: "occupancy under a special-use permit shall not be allowed [in Research Natural Areas] . . . unless authorized by the Chief of the Forest Service." 36 C.F.R. § 251.23. The Forest Service Manual prohibits certain activities in Research Natural Areas, including "grazing, timber cutting, road and trail development, or special uses of a permanent nature, except to serve research purposes in these areas . . . ." Forest Service Manual § 2718.14. Additionally, the Forest Plan for the Manti-La Sal National Forest prohibits "any direct wildlife habitat manipulation that will detract from those values for which the [Research Natural Area] is established." Land and Resource Management Plan, Manti-La Sal National Forest, *available at* https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5383373.pdf (last visited Mar. 1, 2017).

Plaintiffs' second claim alleges that the Forest Service is neglecting their mandatory regulatory duty to require the State to obtain a special-use permit.[60] Similarly, Plaintiffs' third claim alleges that the Forest Service was required to treat and process the State's La Sal Unit Management Plan as an application for a special-use permit.[61] Plaintiffs' claims are clever but lack legal support.

A. The Forest Service's Failure to Require State to Obtain Special-Use Permit

Plaintiffs' second claim argues that the State has abandoned personal property and placed a significant surface disturbance in the Manti-La Sal National Forest.[62] Therefore, Plaintiffs contend, the Forest Service has a mandatory regulatory duty to "prohibit special uses of the Manti-La Sal National Forest without a special use permit or approved management plan."[63] Plaintiffs' interpretation and application of the Forest Service special-use regulations is incorrect for two reasons.

First, the State did not abandon personal property. To determine whether property has been abandoned, the critical question is "whether the owner has voluntarily, intentionally, and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest." *Utah v. Rynhart*, 2005 UT 84, ¶ 14, 125 P.3d 938 (quotations and citation omitted). The State, in conjunction with the Forest Service, is actively monitoring the goats' progress in the La Sal Mountains. Therefore, there is no plausibility to Plaintiffs' allegations of abandonment.

Second, the Forest Service special-use regulations do not apply to wildlife management between the State and the Forest Service. Requiring the states to apply for a special-use permit

[60] *Id.* at ¶ 65.
[61] *Id.* at ¶ 72.
[62] *Id.* at ¶ 64
[63] *Id.* at ¶ 65.

every time state-managed wildlife enters federal land would render 36 C.F.R. § 241.2 a nullity. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quotations and citations omitted); *Black & Decker Corp. v. C.I.R.*, 986 F.2d 60, 65 (4th Cir. 1993) ("Regulations, like statutes, are interpreted according to canons of construction."). Indeed, the court must adopt an interpretation of the Forest Service regulations that "gives effect to every clause and word." *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 117 (2013) (citing *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91 (2011)). Similarly, where specific regulations govern a regulatory problem, specific prevails over general. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012).

Requiring the State to obtain a special-use permit for migrating state-managed wildlife would depredate, if not eliminate, 36 C.F.R. § 241.2's regulatory mandate. To comply with MUSYA, the Secretary of Agriculture has adopted specific regulations governing the Forest Service's shared wildlife management responsibilities with the states. Section 241.2 requires the Forest Service to: "determine the extent to which national forests or portions thereof may be devoted to wildlife protection in combination with other uses and services of the national forests, and, in cooperation with [state wildlife management entities,] . . . formulate plans for securing and maintaining desirable populations of wildlife species." 36 C.F.R. § 241.2. Additionally, the Forest Service is empowered to enter into "general or specific cooperative agreements" with the states for the management of wildlife. *Id.*

Rather than requiring the states to obtain a special-use permit, § 241.2 adopts a flexible approach which allows the Forest Service to work with the states to determine the best course of

action for wildlife management. Requiring the states to obtain a special-use permit would contravene § 241.2's regulatory structure. Moreover, § 241.2 is a specific regulatory mandate governing the Forest Service's shared wildlife management responsibilities with the states. Where a specific regulation answers a regulatory problem, specific regulations prevail over the Forest Service's general special-use regulations.

Furthermore, Plaintiffs cite no binding legal authority for the proposition that the special-use regulations apply to state-managed wildlife entering the National Forest System. Plaintiffs cite the Forest Service's approval of a special-use permit for Wyoming to engage in "winter elk management activities" on federal land.[64] This isolated agency act is not precedential and is readily distinguishable. In Wyoming, the Forest Service granted the state a special-use permit to construct and operate a winter feeding ground for elk in the National Forest System.[65] Unlike Wyoming's use of the National Forest System, the State did not request to build structures on federal land. Moreover, Wyoming's special-use permit was not granted to allow Wyoming to release elk on federal land or to govern the possibility of elk entering federal land.[66]

Moreover, aside from lacking legal support, Plaintiffs' second claim also stretches Forest Service regulations beyond feasibility. It would be a bureaucratic calamity if states had to obtain a special-use permit at any moment state-managed wildlife migrated into the National Forest System. To illustrate the court's reasoning, the following hypothetical is instructive. Let us assume that the DWR has an interest in revitalizing the State's Great Gray Owl population to

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[64] Plaintiffs also unwisely rely on *Friends of the Columbia Gorge v. Elicker*, 598 F. Supp. 2d 1136, 1156 (D. Or. 2009) which was vacated and ordered to be depublished. 2011 WL 3205773, *1 (D. Ore. July 27, 2011). As a depublished opinion, the Oregon decision cannot be used as persuasive authority and will not be considered by the court.

[65] Dkt. No. 20 at Ex. 33 ("[Wyoming Game and Fish Commission] will maintain and operate one elk tagging corral, one horse corral, one tack shed, one haystack yard containing two hay sheds, spring and trough developments including protective fencing and piping, and a feeding ground associated with their ongoing winter elk management program.").

[66] *See id.*

deal with a growing invasive rodent species. *See* Nate Carlisle, *Great Gray Owl is Confirmed in Utah For First Time in 28 Years*, THE SALT LAKE TRIB., Feb. 18, 2017, *available at* http://www.sltrib.com/home/4959794-155/great-gray-owl-is-confirmed-in (last visited Mar. 1, 2017). To achieve its goal, the State introduces Great Gray Owls all over Utah and, like birds do, some owls migrate onto federal land. Accepting Plaintiffs' interpretation of the Forest Service special-use regulations, Utah would need to anticipate the owls' migration and apply for a special-use permit on the off chance an owl entered the National Forest System. Such an undertaking would not only be unmanageable, but would disregard the Forest Service's duty to work cooperatively with the State to manage wildlife.

Accordingly, Plaintiffs have failed to allege the Forest Service neglected a specific, unequivocal command to act. Therefore, the court lacks jurisdiction over Plaintiffs' second claim.

B. Failure to Process State's Special-Use Permit

Plaintiffs' third claim alleges that the Forest Service neglected its regulatory obligation to treat the State's La Sal Unit Management Plan as an application for a special-use permit.[67] Plaintiffs allege that the "Forest Service violated its special-use permit regulations regarding the State's proposal to use and occupy the Manti-La Sal National Forest" by failing to "screen the State's proposal and reject the State's proposal during the screening process.[68]

Like Plaintiffs' second claim, the court lacks subject matter jurisdiction over Plaintiffs' third claim. As noted above, the Forest Service's special-use regulations do not govern this dispute. Moreover, even if the special-use regulations applied and accepting Plaintiffs have

[67] Dkt. No. 2 at ¶ 72.
[68] *Id.*

standing to challenge the agency's purported failure to process the State's special-use permit,[69] there is no support for Plaintiffs' conclusion that the State's La Sal Unit Management Plan is in actuality a petition for a special-use permit. The State did not ask the Forest Service permission to do anything.[70] The State released mountain goats on to state-owned land and merely apprised the Forest Service of its decision. The Forest Service cannot be challenged for failing to process a request for a permit it never received. Accordingly, Plaintiffs' third claim fails for lack of subject matter jurisdiction.

III. Violations of the NEPA

Plaintiffs' fourth claim alleges that the Forest Service "entirely or partly assisted, conducted, regulated and approved the introduction of mountain goats into the Manti-La Sal National Forest" by aiding the State in creating a Statewide Management Plan and the La Sal Unit Management Plan.[71] Therefore, Plaintiffs allege that the Forest Service violated the National Environmental Policy Act ("NEPA") by failing to conduct an environmental analysis before the mountain goat introduction.

At the outset, the court notes that Plaintiffs' pleadings are inconsistent. Plaintiffs allege that the Forest Service "did not authorize the State's use of the National Forest for establishing a goat population" while simultaneously asserting that the State "entirely or partly assisted" the State's goat introduction.[72] Disregarding Plaintiffs' pleading inconsistencies, the court finds that

[69] The court questions whether Plaintiffs have standing to challenge a procedural right allegedly denied to the State. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."). However, for purposes of resolving this motion, the court will assume Plaintiffs have standing.
[70] Dkt. No. 2 at ¶ 2 ("The Forest Service did not authorize the State's use of the National Forest for establishing a goat population.").
[71] *Id.* at ¶ 76.
[72] *Id.* at ¶¶ 2, 76.

the Forest Service has not engaged in an action let alone a major federal action that would trigger the requirements of NEPA.

NEPA requires federal agencies to prepare a "detailed statement" for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C) NEPA defines a "major federal action" to include "actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. When the federal government acts in conjunction with another entity, "[t]he requirements of NEPA apply only when the federal government's involvement in a project is sufficient to constitute major federal action." *Vill. of Los Rancho de Albuquerque v. Barnhart*, 906 F.2d 1477, 1480 (10th Cir. 1990) (quotations omitted).

For example, in *Barnhart*, New Mexico sought to construct two bridges in a rural area. *Id.* at 1478. At the beginning of the project, the Federal Highway Administration ("FHWA"), authorized federal funding for the bridges and provided several employees to aid New Mexico in preparing its environmental analysis. *Id.* at 1479. New Mexico ultimately decided to fund the project without the help of the FHWA. *Id.* Subsequently, the plaintiffs sued the FHWA claiming that the FHWA violated NEPA by approving New Mexico's environmental impact statement. *Id.* at 1480. Despite the FHWA's assistance in developing an environmental impact statement, the Tenth Circuit held that NEPA did not apply because New Mexico declined federal involvement in the project and New Mexico was not required to obtain federal permission to build the bridges. *See id.* at 1481–82. The Tenth Circuit noted, "[i]f the highway is not a federal action, then a state's decision to avoid federal involvement cannot have the paradoxical effect of establishing federal involvement." *See id.* at 1481 (quotations and citation omitted).

Like *Barnhart*, the Forest Service's involvement in developing the State's goat management plans does not have the effect of establishing major federal involvement. Aside from lending agency expertise and experience, Plaintiffs have not alleged that the Forest Service funded the State's project in any way. Additionally, the State was not required to obtain the Forest Service's permission to conduct wildlife management activities on state-owned land. Therefore, the court finds that Plaintiffs have failed to allege that the Forest Service neglected to take a discrete agency action required by NEPA. Plaintiffs' fourth claim is dismissed for lack of subject matter jurisdiction.

CONCLUSION

Based on the foregoing, the Forest Service's motion to dismiss is granted as to all causes of action.[73] The court finds that Plaintiffs' complaint fails to invoke the court's subject matter jurisdiction under the APA.

IT IS SO ORDERED.

DATED this 2nd Day of March, 2017.

BY THE COURT:

PAUL M. WARNER
Chief United States Magistrate Judge

[73] Dkt. No. 18.