Lauren M. Rule, *pro hac vice*
Oregon Bar # 015174
Andrew R. Missel, *pro hac vice*
Oregon Bar # 181793
ADVOCATES FOR THE WEST
3701 SE Milwaukie Ave., Ste. B
Portland, OR 97202
(503) 914-6388
lrule@advocateswest.org
amissel@advocateswest.org

Richard A. Dillenburg, Esq.
Arizona Bar # 013813
RICHARD A. DILLENBURG, P.C.
2173 E. Warner Rd., Ste. 101
Tempe, AZ 85284-3503
(480) 668-1924
rich@dillenburglaw.com

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Neighbors of the Mogollon Rim, Inc., Plaintiff, vs. United States Forest Service; United States Fish and Wildlife Service, Federal Defendants.	No. CV-20-00328-PHX-DLR **PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION** **Oral Argument Requested**

MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiff Neighbors of the Mogollon Rim, Inc. hereby moves to obtain an order from this Court enjoining livestock grazing and any actions to facilitate livestock grazing (including the construction of range improvements) on the Colcord/Turkey Pasture portion of the Bar X allotments in the Tonto National Forest until final judgment is entered in this case. As explained below, Plaintiff's members—who live in communities surrounded by this pasture—will suffer irreparable harm absent preliminary relief, the balance of equities tips in favor of Plaintiff, and preliminary relief is in the public interest. Plaintiff is also likely to succeed on the merits of at least one of its claims, as demonstrated by Plaintiff's memorandum in support of its summary judgment motion, ECF No. 33, and its combined reply in support of that motion/response to Federal Defendants' summary judgment motion, ECF No. 39.

This motion is supported by the memorandum below; the declarations of several of Plaintiff's members, filed as attachments to a separate docket entry; several exhibits filed as attachments to another docket entry; Plaintiff's summary judgment briefing and related filings, including Plaintiff's Statement of Facts, ECF No. 34; and the administrative records filed by Federal Defendants. Plaintiff requests that the Court hold oral argument on this motion at the earliest available time.

Given the nature of this litigation, Plaintiff's status as a small nonprofit group, *see* Second Olsson Decl. (Ex. A) ¶ 4, and the lack of any real possibility of harm to Federal Defendants from an injunction, Plaintiff requests that this Court waive any bond under Rule 65(c). *See People of the State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325–26 (9th Cir. 1985) (upholding a decision to allow a nonprofit environmental group to proceed without a bond due to the nature of the case and the possible effect of a bond on the group), *amended*, 775 F.2d 998 (9th Cir. 1985); *Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1190–91 (N.D. Cal. 2009) (holding that requiring a "small non-profit" to post a bond would "effectively deny access to judicial review," so no bond would be imposed).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

It is unfortunate that this motion even needs to be filed, but the Forest Service has left Plaintiff with no other choice: despite pending cross-motions for summary judgment in this case and the fact that the Colcord/Turkey Pasture has been grazed just *once* in the last 40 years, the Forest Service is charging ahead with allowing grazing on the Pasture this summer, threatening grave damage to Plaintiff's members. The agency did not allow use of the Pasture last year, after this case had been filed, but refused to follow the same course this year. Without preliminary relief, Plaintiff's members—whose properties are surrounded by the Pasture—will see their area overrun by cattle this summer, causing irreparable economic, recreational, and perhaps even physical harm.

The Forest Service's decision threatens not only the well-being of Plaintiff's members, but also this Court's ability to award full relief to Plaintiff after a thorough consideration of the merits of this case. The harms that will befall Plaintiff's members this summer are precisely the types of harms that Plaintiff sought to stave off by bringing this suit; because those harms cannot be fixed by a later judgment in Plaintiff's favor, relief is needed now to "preserve the [C]ourt's ability to render a meaningful decision on the merits." *Doe # 1 v. Trump*, 957 F.3d 1050, 1068 (9th Cir. 2020) (citation omitted).

The preliminary relief that Plaintiff seeks is modest. Plaintiff is not asking this Court to completely enjoin implementation of the new grazing scheme for the Bar X allotments, but rather to prevent grazing for one season on one portion of the Bar X that has been almost entirely closed to grazing for 40 years. Such relief—tailored to the circumstances of this case and preservative of the status quo—would simply "balance the equities as the litigation moves forward," which is the point of a preliminary injunction. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam).

BRIEF FACTUAL BACKGROUND

I. THE BAR X.

The Bar X consists of four separate grazing allotments that are managed together: the Bar X, Haigler Creek, Young, and Colcord Canyon Allotments. Statement of Facts

(ECF No. 34) ¶ 1 ("SOF"). The Bar X is located in the northeastern part of the Tonto National Forest, about eight miles north of Young, Arizona, in Gila County. *Id.* ¶ 2. The northernmost portion of the Bar X consists of the Colcord Canyon Allotment and the Turkey Peak Pasture, which is part of the Haigler Creek Allotment. *Id.* ¶ 5. Plaintiff will refer to this area as the "Colcord/Turkey Pasture."

The Colcord/Turkey Pasture consists of mountainous terrain and steep slopes dominated by ponderosa pine. *Id.* ¶ 6. Haigler Creek, a stream popular for fishing and recreation, cuts across the southern half of the Colcord/Turkey Pasture. *Id.* ¶ 9. The Colcord/Turkey Pasture is bounded on the north by the Mogollon Rim, a 200-mile long escarpment that forms the southern edge of the Colorado Plateau. *Id.* ¶ 10. The area is home to much wildlife, including elk, deer, and turkey. Answer (ECF No. 20) ¶ 20. The area's beauty and diverse flora and fauna attract many outdoor enthusiasts. *Id.*

The communities of Colcord Estates, Ponderosa Springs, and Ponderosa Springs Estates (collectively, the "Colcord and Ponderosa communities") comprise over 300 properties situated on private enclaves within the boundary of the Colcord/Turkey Pasture. SOF ¶ 11. Most of those homes do not have fences capable of keeping cattle out. *Id.* ¶ 12. Residents of the Colcord and Ponderosa communities report enjoying the natural beauty of the area and the recreational opportunities afforded by the Forest, including hiking, fishing in Haigler Creek, hunting, and wildlife viewing. *Id.* ¶ 13.

II. CATTLE GRAZING ON THE BAR X.

Cattle grazing has occurred on the Bar X area for over a century, FS006431, often with devastating effects on the environment. SOF ¶¶ 22–23. In 1979, the Forest Service prepared an environmental analysis ("1979 EA") in connection with its decision to alter the management of grazing on the Bar X in response to "unsatisfactory resource conditions" caused by cattle grazing. FS002601–03. Relying on "thorough on-the-ground investigation[s] concerning conditions on the Bar X" that had been synthesized in a 1978 analysis, the 1979 EA considered several management alternatives, including closing the entire Bar X to domestic livestock grazing. FS002603, FS002609–10. The Forest Service

ultimately selected an alternative in which grazing levels on the Bar X were reduced, but grazing was not altogether prohibited. SOF ¶ 25. However, the selected alternative excluded the Colcord/Turkey Pasture from grazing "due to the lack of grazing capability and severe conflicts between grazing and other resources" on that pasture. *Id.* ¶¶ 25–26.

The Bar X, LLC purchased the Bar X ranch around 2006 or 2007 and was issued a grazing permit in 2007. Answer ¶ 46. In 2010, the Forest Service began authorizing the permittee to graze at levels exceeding those set forth in the term permit: the 2010 annual operating instruction ("AOI")[1] for the Bar X authorized 162 cattle to graze year-long, 60 yearlings to graze for two-and-a-half months, and 12 bulls to graze for nine months—far more than the 130 cattle year-long allowed under the term permit. FS000007Sup, FS000010Sup. From 2012 through 2017, the Forest Service continued to authorize grazing at levels in excess (sometimes far in excess) of the term permit. SOF ¶¶ 42–49.

In 2015, the Forest Service authorized the Bar X permittee to graze the Colcord/Turkey Pasture. FS000023Sup. This was the first time since 1979 that Bar X cattle had been allowed to graze the Pasture. FD Resp. to SOF (ECF No. 38) ¶ 28. No explanation was offered in the 2015 AOI for why the Pasture had been reopened after 35 years, FS000022Sup–25Sup, nor was any analysis or public process under the National Environmental Policy Act ("NEPA") conducted prior to the authorization, FS006373.

The unexpected presence of cattle in 2015 near the Colcord and Ponderosa communities had several negative effects on Plaintiff's members[2] and visitors to the area. Several of Plaintiff's members experienced or witnessed dangerous encounters with Bar X cattle that trespassed on their properties. Jim Olsson, one of Plaintiff's board members, watched a bull nearly run over his wife on their back deck. First Olsson Decl. (ECF No.

---

[1] "Whereas the [allotment management plan] relates the directives of the applicable forest plan to the individual . . . allotment, and the grazing permit sets grazing parameters through a ten-year period, the AOI . . . conveys these . . . directives into instructions . . . for annual operations." *ONDA v. U.S. Forest Serv.*, 465 F.3d 977, 980 (9th Cir. 2006).

[2] Plaintiff is a non-membership organization; "member" is used here to refer to people in the local communities who support Plaintiff and who are the functional equivalent of members. *America Unites for Kids v. Rousseau*, 985 F.3d 1075, 1096–97 (9th Cir. 2021).

35-1) ¶ 9; Second Olsson Decl. (Ex. A) ¶ 7. Polly Adams and Michael Lemon were each charged by cattle after they tried to shoo them off their respective properties. First Adams Decl. (ECF No. 35-2) ¶ 6; Lemon Decl. (Ex. B) ¶ 7. Other residents of the Colcord and Ponderosa communities have reported similar incidents occurring in 2015. *See* Branco Decl. (Ex. C) ¶ 9 (dangerous dog-bull encounter); Allen Decl. (Ex. D) ¶ 6 (describing being charged by cattle). Plaintiff's members also saw cattle blocking roads, which could lead to accidents, especially at night. *E.g.*, Poulin Decl. (Ex. E) ¶ 10.

Dangerous encounters with cattle were not the only negative consequences of the Forest Service's decision to authorize grazing on the Colcord/Turkey Pasture in 2015. Many community members watched cattle graze over their leach fields (the drain fields for their septic systems). First Olsson Decl. ¶ 10; Price Decl. (Ex. F) ¶ 6; Branco Decl. ¶ 7; Briggs Decl. (Ex. G) ¶ 7; FS001774. This can damage septic systems by compacting the soil in the leach field, restricting airflow to the bacteria that break down sewage underneath the ground. FS003438–39; Exs. N, O, & P. Once damaged, a septic system can cost thousands of dollars to repair or replace. First Olsson Decl. ¶ 10; Ex. Q at 3.

Community members and visitors also noted a disappointing decrease in the prevalence of deer, elk, and turkey in the area in 2015. Lemon Decl. ¶ 6; Briggs Decl. ¶ 6; Poulin Decl. ¶ 7; FS001738. According to Roger Briggs, "[i]nstead of seeing wildlife, we contended with cow manure and flies." Briggs Decl. ¶ 7; *see also* First Adams Decl. ¶¶ 4, 12 (describing unpleasant smells from cow manure in 2015); Allen Decl. ¶ 6 (same); Bjornsen Decl. (Ex. H) ¶ 7 (same); Branco Decl. ¶ 7 (same). The reduction in opportunities to view wildlife, the noxious smell of cow manure, and the annoying sounds made by cattle reduced community members' enjoyment of living in the area. Bjornsen Decl. ¶ 7; First Adams Decl. ¶¶ 4–5; Briggs Decl. ¶ 7; Poulin Decl. ¶ 7.

Finally, the presence of cattle in 2015 interfered with the recreational pursuits of Plaintiff's members as well as visitors to the area. Cattle congregated in and around Haigler Creek, dropping fecal deposits that both annoyed recreationists and made them worry about possible water contamination. First Olsson Decl. ¶ 22; Poulin Decl. ¶ 9.

Hikers encountered cow manure and even cattle on trails, reducing their enjoyment of their hikes and causing them to change their routes. Allen Decl. ¶ 9; FS001738. As Michael Lemon put it, "if there was a cow with a calf on the trail, we would simply turn around and go the other way so as to not risk a bad encounter." Lemon Decl. ¶ 10.

Community members mounted a campaign to make the Forest Service aware of their concerns, sending over 120 petitions to the Forest Supervisor asking that the Colcord/Turkey Pasture remain closed to grazing. FS002156. In 2016 and 2017, the Forest Service continued to authorize grazing on the Bar X well in excess of permitted levels, but did not allow grazing on the Colcord/Turkey Pasture. FS000026Sup–35Sup.

In 2018, however, the Forest Service issued an AOI authorizing grazing on the Colcord/Turkey Pasture—again with no public input, NEPA analysis, or explanation in the AOI for reopening the Pasture to grazing. SOF ¶ 57; FS006373.

III. PREVIOUS LITIGATION AND THE SUBSEQUENT NEPA PROCESS.

Following the issuance of the 2018 AOI authorizing grazing on the Colcord/Turkey Pasture, Plaintiff filed suit against the Forest Service in this Court. Answer ¶ 57. Plaintiff alleged, *inter alia*, that the Forest Service's authorization of livestock grazing on the Bar X in 2012–2018 violated NEPA by failing to analyze the impacts of the changed grazing management. *Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv.*, No. CV-18-01111-PHX-DLR, ECF No. 1 (Apr. 11, 2018) ("*NOMR I*").

In June 2018, the Forest Service issued an amended 2018 AOI. FS000041Sup. The amended AOI reduced the level of authorized grazing to be consistent with the term permit and eliminated grazing on the Colcord/Turkey Pasture. FS000041Sup–44Sup. That same month, the Forest Service announced that it would "initiate [a] NEPA [process] and re-analyze the effects of grazing on the Bar X allotments." FS001542.

In October 2018, Plaintiff and the Forest Service entered into a settlement agreement and stipulation of dismissal of the case. Answer ¶ 59. The settlement agreement was to remain in effect until the Forest Service issued its new NEPA analysis for grazing on the Bar X. *NOMR I*, ECF No. 29 (Oct. 9, 2018). Consistent with the

parties' settlement, the 2019 AOI, like the revised 2018 AOI, allowed grazing at the levels set out in the term grazing permit and did not authorize grazing on the Colcord/Turkey Pasture. FS000049Sup–000052Sup.

Throughout the NEPA process, Plaintiff, its members, and others expressed fervent opposition to the Forest Service's proposed new grazing scheme, which would both dramatically expand grazing on the Bar X and permit grazing on the Colcord/Turkey Pasture. SOF ¶¶ 60–62, 70–72. In addition to raising concerns related to the new grazing scheme's effects on vegetation, soil, and water, Plaintiff and its members pointed out the ways in which the new scheme—in particular the opening up of the Colcord/Turkey Pasture to grazing—would negatively affect the Colcord and Ponderosa communities. *Id.* ¶ 63. Plaintiff and its members urged the Forest Service to give more consideration to a "middle-ground" alternative in which the Colcord/Turkey Pasture would remain closed to grazing while grazing would be permitted elsewhere on the Bar X. *Id.* ¶ 64.

In September 2019, the Forest Service issued a Final Environmental Assessment ("Final EA") and a Draft Decision Notice/Finding of No Significant Impact adopting the new grazing scheme analyzed during the NEPA process. Answer ¶ 105. Plaintiff (and many others) objected to the draft decision under the administrative process set out in the 36 C.F.R. part 218 regulations. FS003283. The Forest Service did not change course in response to the objections, and released a Final Decision Notice in December 2019. FS006520. (The agency also released a revised Final EA that month. FS006366.) Later that month, the Forest Service issued a new term grazing permit and released a new allotment management plan for the Bar X. Answer ¶ 107; *see also* FS006531, FS006549.

IV. THIS LAWSUIT AND THE 2021 GRAZING SEASON.

Plaintiff filed this lawsuit in February 2020. *See* Complaint (ECF No. 1). In the Complaint, Plaintiff claimed, among other things, that the Forest Service had violated NEPA by failing to give serious consideration to a "middle-ground" alternative in which the Colcord/Turkey Pasture would remain closed to grazing while grazing would be permitted elsewhere on the Bar X. *Id.* ¶¶ 113–17. Plaintiff also claimed that the agency

had violated NEPA by failing to take a "hard look" at the effects that cattle grazing on the Colcord/Turkey Pasture will have on the Colcord and Ponderosa communities. *Id.* ¶¶ 118–19, 123b, 123c. Soon after filing suit, Plaintiff learned that the Forest Service had not authorized grazing on the Colcord/Turkey Pasture for 2020. *See* Ex. K.

Earlier this year, following the completion of summary judgment briefing in this case, Plaintiff discovered through a Freedom of Information Act request that the Forest Service has authorized grazing on the Colcord/Turkey Pasture beginning on July 1, 2021. Ex. L at 2. When Plaintiff's members learned of this development, they began reaching out to Plaintiff's board members to share their concerns. Second Olsson Decl. ¶ 6. Because of their experiences in 2015, many of Plaintiff's members are fearful that the return of Bar X cattle to the Colcord/Turkey Pasture this summer will result in property damage and even personal injury unless they install fences around their properties. *E.g.*, Lemon Decl. ¶¶ 7–9, 11. However, Plaintiff's members do not *want* to install fences, for both financial and aesthetic reasons. *E.g.*, Price Decl. ¶ 6. Plaintiff's members are also concerned that, whatever decisions they make with respect to fencing, the presence of cattle on the Pasture this summer will negatively affect their recreational opportunities—particularly in Haigler Creek—and their quality of life. *E.g.*, Bjornsen Decl. ¶¶ 6, 11–12.

On March 19, 2021, Plaintiff asked the Forest Service to voluntarily forego authorizing grazing on the Colcord/Turkey Pasture this summer, as it did last year. *See* Ex. M. Plaintiff explained that allowing grazing on the Pasture this summer would cause many of the lasting harms that Plaintiff sought to avoid by bringing this lawsuit, diminishing the value of a later judgment in Plaintiff's favor. *Id.* The Forest Service did not agree to Plaintiff's proposal, prompting this motion. ECF No. 43 ¶ 3.

ARGUMENT

Aside from 2015, Bar X cattle have not grazed on the Colcord/Turkey Pasture for more than 40 years. Even after the Forest Service adopted its new grazing scheme for the Bar X in December 2019—which opened up the Colcord/Turkey Pasture to possible grazing—the agency did not actually authorize grazing on the Pasture last year. Now,

however, the Forest Service has decided to charge ahead and allow grazing on the Colcord/Turkey Pasture this summer despite the pendency of this case. If grazing is allowed to occur on the Pasture this summer, much of the threatened harm that prompted Plaintiff to file this case will occur, and a final ruling in Plaintiff's favor would not fix that harm. To prevent that from happening and preserve this Court's power to award full and meaningful relief to Plaintiff, a preliminary injunction is necessary. *See Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) (noting that preliminary injunctions are intended to "prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits" (citation omitted)).

To be entitled to a preliminary injunction, Plaintiff must show that "irreparable harm is likely to result in the absence of the injunction." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Plaintiff must also show that "a preliminary injunction is in the public interest." *Cuviello v. City of Vallejo*, 944 F.3d 816, 825 (9th Cir. 2019). The remaining two preliminary injunction factors—likelihood of success on the merits and the balance of equities—are assessed on a "sliding scale," such that a stronger showing on one factor may offset a weaker showing on the other. *Doe v. Kelly*, 878 F.3d 710, 719 (9th Cir. 2017); *see also Cottrell*, 632 F.3d at 1135 (holding that "serious questions going to the merits and a balance of [equities] that tips sharply towards the plaintiff can support issuance of a preliminary injunction" (cleaned up)).

In order to award a preliminary injunction, this Court need not find that Plaintiff has shown a likelihood of success on *all* its claims; it is enough for Plaintiff to show a sufficient likelihood of success on just *one* claim.[3] *See League of Wilderness Defs./Blue Mtns. Biodiversity Project v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014) ("We first analyze whether the . . . plaintiffs are likely to succeed on the merits of *any* of their claims . . . ." (emphasis added)). In deciding whether Plaintiff has made such a showing,

[3] This memorandum does not address the merits of Plaintiff's claims. *See* ECF No. 43 ¶ 4. Plaintiff submits that its summary judgment briefing, ECF Nos. 33 & 39, establishes that it has a sufficient likelihood of success on at least one of its claims.

this Court must keep in mind that preliminary relief is not intended "to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087 (cleaned up).

I. PLAINTIFF'S MEMBERS WILL SUFFER IRREPARABLE HARM WITHOUT A PRELIMINARY INJUNCTION.

Plaintiff must show that "irreparable harm is likely to result in the absence of the injunction." *Cottrell*, 632 F.3d at 1135. "'Irreparable [harm]' in the preliminary injunction context means an injury that cannot adequately be compensated for" at a later date. *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005). "The analysis focuses on irreparability, irrespective of the magnitude of the injury." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (cleaned up).

A. Plaintiff's Members Will Be Forced to Either Pay for Expensive, Unwanted Fencing or Risk Physical Harm and Property Damage.

Absent preliminary relief, Plaintiff's members will be put on the horns of a dilemma: pay for fencing that they do not want and may not be able to easily afford; or leave their property unfenced and risk personal injury and property damage from Bar X cattle. Because each option will likely lead to irreparable injury, Plaintiff satisfies the "irreparable harm" prong of the preliminary injunction test. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (finding injunctive relief appropriate where the parties seeking relief "were faced with a Hobson's choice"); *City of Los Angeles v. Sessions*, 2018 WL 6071072, at *3 (C.D. Cal. Sept. 13, 2018) (finding irreparable harm where the plaintiff was "faced with an impossible choice"), *aff'd sub nom. City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019).

1. Spending Money on Unwanted Fencing Amounts to Irreparable Harm, Especially for Plaintiff's Members on a Fixed Income.

If Plaintiff's members put up fencing to protect themselves and their properties, they will suffer irreparable harm from the cost of the fencing. This is especially true for Plaintiff's members who are on fixed incomes, such as Paula Adams. Second Adams

Decl. (Ex. I) ¶ 5. In addition, many members of the community do not want fencing, and they will suffer negative aesthetic and social impacts if effectively forced to install it.

The Ninth Circuit has repeatedly held that "economic harm is sufficient to constitute irreparable harm" in cases against the federal government brought under the APA "because of the unavailability of monetary damages." *City & Cty. of San Francisco v. U.S. Citizenship & Immig. Servs.*, 981 F.3d 742, 762 (9th Cir. 2020), *cert. dismissed*, 141 S. Ct. 1292 (Mar. 9, 2021); *see also East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 2021 WL 1220082, at *22 (9th Cir. Mar. 24, 2021) ("[W]here parties cannot typically recover monetary damages flowing from their injury—as is often the case in APA cases—economic harm can be considered irreparable."). Several other circuits have recognized that economic harm can be irreparable in the related context of suits brought against state entities that enjoy Eleventh Amendment immunity. *E.g.*, *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010). In each circumstance, the harm is irreparable because the plaintiff cannot recover the economic loss caused by the government *even if* the plaintiff eventually prevails on the merits. *E.g.*, *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996).

Here, many of Plaintiff's members have indicated that they will be forced to pay for fencing this summer if cattle are allowed to graze on the Colcord/Turkey Pasture. *See* Lemon Decl. ¶ 11 ("Given the threat of property damage and even personal injury from cows invading my property, I feel I will be forced, at great expense to me, to fence . . . my property if the cows return."); Branco Decl. ¶ 10 (same); Briggs Decl. ¶ 11 (same). Others have not yet decided, but have stated that they may have to put up fencing for fear of the alternative. *See, e.g.*, Bjornsen Decl. ¶ 10 ("I absolutely do not want to have to put up fencing, but I may be forced to do so to protect our property, our family, and our visitors."). Some of Plaintiff's members have received estimates for fencing or done research to determine the cost of fencing; that research suggests that a typical resident will pay on the order of $10,000 to fence their property. *See* Branco Decl. ¶ 10 ("low end" estimate of $9,831); Second Adams Decl. ¶ 5 (research showing a cost of "at least

$10,000"); Second Doolittle Decl. (Ex. J) ¶ 7 (research showing a cost of at least $9,280); Lemon Decl. ¶ 11 (research showing a cost of nearly $2,000). Collectively, then, Plaintiff's members may end up spending hundreds of thousands of dollars on fencing—money that they will never get back, even if Plaintiff ultimately prevails in this case.

For many of Plaintiff's members, having to pay for a fence will cause financial hardship. *See* Second Adams Decl. ¶ 5 ("We are both retired and live on a fixed income and this would truly cause a financial hardship."); Second Doolittle Decl. ¶ 7 (similar); Lemon Decl. ¶ 11 (similar); *see also* Second Olsson Decl. ¶ 6 (discussing how many community members "are on fixed incomes and can't afford a fence"). This harm is especially weighty and irreparable. *See, e.g.*, *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 657 (6th Cir. 1996) (upholding a finding of irreparable harm where the lower court had reasoned "that retirees, primarily because of their fixed incomes, are unable to absorb even relatively small increases in their expenses without extreme hardship"), *abrogated on other grounds by M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015).

Installing fencing would also harm many of Plaintiff's members for an entirely separate reason: they do not *want* fencing on their property, as they consider such fencing aesthetically displeasing, an impediment to neighborhood cohesion, or both. *See* Bjornsen Decl. ¶ 10 (describing a fence as an "eyesore"); Second Olsson Decl. ¶ 8 ("fences are a nuisance and an eyesore, and deprive us of the ability to walk over to our neighbor's house freely"); Poulin Decl. ¶ 8 (similar); Price Decl. ¶ 6 ("I moved from Phoenix to get away from fences!"). Fencing may also keep deer and other wildlife from crossing their property, diminishing their enjoyment of living in the area. Second Adams Decl. ¶ 6; Second Doolittle Decl. ¶ 9. A diminishment of enjoyment due to negative recreational or aesthetic impacts amounts to irreparable harm. *See California v. Trump*, 407 F. Supp. 3d 869, 902–03 (N.D. Cal. 2019) (finding that construction of a border wall would cause irreparable harm by "affect[ing] [the plaintiffs'] recreational and aesthetic interests"), *aff'd sub nom. Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. 2020), *cert. petition filed*, No. 20-685 (Nov. 17, 2020); *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife*

Serv., 657 F. Supp. 1233, 1240–41 (D. Colo. 2009) (finding irreparable harm due to "increased traffic and drill rigs" that would affect the plaintiffs' "aesthetic interests").

2. If Plaintiff's Members Do Not Install Fencing, They Will Put Their Physical Safety and Property at Risk.

If community members choose not to (or cannot) install fencing, they are likely to suffer different harms in the form of dangerous encounters with cattle and damage to their septic systems. Physical injury, of course, constitutes irreparable harm. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019). So too does the fear and anxiety that attends a dangerous encounter, even if no physical injury results. *See Chalk v. U.S. Dist. Ct. C.D. Cal.*, 840 F.2d 701, 709 (9th Cir. 1988) (discussing how "emotional and psychological" harms can be irreparable). And property damage is irreparable in this suit against federal agencies "because of the unavailability of monetary damages."[4] *City & Cty. of San Francisco v. USCIS*, 981 F.3d at 762.

The best evidence of what will happen to those people who do not or cannot fence their property is what happened in 2015—the one time in the last 40 years in which Bar X cattle have grazed on the Colcord/Turkey Pasture. That year, 230 cow/calf pairs and 19 bulls were authorized to graze the Colcord/Turkey Pasture from July 19 through September 30. FS000023Sup. As discussed *supra* pp. 3–4, Plaintiff's members experienced dangerous encounters with cattle and watched as cattle threatened the integrity of their septic systems. There is no reason to think that this summer will be any different, with only slightly fewer cattle grazing the Pasture for a longer period of time. *See* Ex. L at 2. It is therefore likely that those of Plaintiff's members who do not fence their property will suffer irreparable harm if cattle are allowed to graze the Colcord/Turkey Pasture this summer. Indeed, it is only because this harm is so inevitable that several of Plaintiff's members are reluctantly planning to install fencing. *See, e.g.*, Briggs Decl. ¶ 11 ("The last thing I want to do is fence in my front yard . . . . But in the

[4] Plaintiff's members would also not be able to recover damages from the permittee in a separate action brought under state law. *See* Ariz. Rev. Stat. Ann. § 3-1427.

event the cattle are allowed to come in on July 1, 2021, I would have to put up a fence for the protection of my grandkids and the septic system."); Branco Decl. ¶ 10 (similar).

B. Regardless of Whether They Put Up Fences, Plaintiff's Members' Recreational Opportunities Will Be Curtailed and Their Enjoyment of the Tonto National Forest Impaired.

There are several additional harms that will likely occur to Plaintiff's members absent preliminary injunctive relief regardless of what choice they make with respect to fencing. First, the presence of Bar X cattle on the Colcord/Turkey Pasture will almost certainly cause Plaintiff's members to suffer diminished enjoyment of recreational activities such as hiking, swimming, and fishing. Again, the best predictor of what will happen this year is what happened in 2015. That year, Bar X cattle congregated in and around Haigler Creek in 2015, leaving noxious fecal deposits and possibly contaminating the water. *Supra* pp. 4–5. They also lingered on and near hiking trails, forcing hikers to change course and diminishing their enjoyment of their hikes. *Supra* p. 5. Absent relief from this Court, the same things will happen this year, interfering with Plaintiff's members' enjoyment of the recreational opportunities the Colcord/Turkey Pasture has to offer. Indeed, some of Plaintiff's members may avoid engaging in certain recreational activities altogether: as Eric Bjornsen put it, "[n]o one wants to swim in a creek where cattle have left their excrement," and he and his friends and family "may not even want to swim or fish" in Haigler Creek if cows congregate there again this summer. Bjornsen Decl. ¶ 11. Such a diminishment of recreational opportunities amounts to irreparable harm, even if it is temporary or limited to a certain area. *Cottrell*, 632 F.3d at 1135.

Second, even when Plaintiff's members are attempting to relax at home, they will be harmed by the presence of Bar X cattle near their properties. As in 2015, cattle will likely drive away wildlife such as turkey, deer, and elk, reducing Plaintiff's members' opportunities to view those animals from their decks and porches—a key reason many of Plaintiff's members moved to the area. *Supra* p. 4; Briggs Decl. ¶ 6 ("This is one of the reasons we purchased this property in 1999, to get away from the city and enjoy nature."); Bjornsen Decl. ¶ 6 (similar). And Bar X cattle will again reduce Plaintiff's

members' enjoyment of their properties by leaving smelly fecal deposits nearby and making loud, irritating noises. *Supra* p. 4. All of these harms are irreparable. *E.g.*, *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 822 (9th Cir. 2018).

Finally, as in 2015, Bar X cattle will likely present a safety hazard by wandering onto Colcord Road and other roads. *See* Second Adams Decl. ¶ 8 ("I remember in 2015 the cattle being in the roadway . . . ."); FS001746 (similar); Briggs Decl. ¶ 10 ("Many of the Bar X cows are dark, and when they are on the road, you can barely see them. This creates the danger of an accident."); Price Decl. ¶ 7 (similar); Poulin Decl. ¶ 10 (similar). Any personal injury or vehicle damage resulting from a collision with cattle would be irreparable in the context of this case. *Azar*, 911 F.3d at 581.

II. THE BALANCE OF EQUITIES FAVORS PLAINTIFF.

Before awarding preliminary relief, this Court must "balance the interests of all parties and weigh the damage to each" from awarding (or not awarding) such relief. *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 994 (9th Cir. 2019) (cleaned up). Because "the balance of equities focuses on the parties," *id.* at 1004, the relevant question is whether the harm to Plaintiff from withholding relief outweighs the harm to Federal Defendants from granting relief. *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012). Specifically, what counts is the "marginal harm" flowing from the grant (or denial) of *temporary* relief. *Connaughton*, 752 F.3d at 765–66.

On Plaintiff's side of the ledger are the harms discussed above, none of which can be remedied by a later judgment in Plaintiff's favor. Even if they ultimately win, Plaintiff's members will not be able to recoup the cost of fencing. And if they do not put up fencing and suffer personal injury and/or property damage as a result, those harms will also be irreparable. Finally, an impairment of recreational opportunities and aesthetic enjoyment of the Forest cannot be undone, even if it lasts for just one season. *Cottrell*, 632 F.3d at 1135. Such harm is especially severe for Plaintiff's elderly members, *see* Second Adams Decl. ¶ 7, because they have fewer remaining opportunities than others to enjoy the Forest. *See Chalk*, 840 F.2d at 710.

On Federal Defendants' side of the ledger is very little. The injunction would merely *delay* by one year the implementation of the Forest Service's new grazing scheme on the Colcord/Turkey Pasture—which has been grazed just *once* in the past 40 years—and it would not delay the agency's implementation of its new scheme on the remainder of the Bar X. To the extent such a limited delay in implementation constitutes a harm at all, it pales in comparison to the lasting, irreparable harms Plaintiff's members will suffer without an injunction. *See Connaughton*, 752 F.3d at 765–66 (concluding that "the balance of equities tips toward the . . . plaintiffs, because the harms they face are permanent, while the [opposing parties] face temporary delay").[5]

III. PRELIMINARY RELIEF IS IN THE PUBLIC INTEREST.

Finally, Plaintiff must show that an injunction would be in the public interest. *Cuviello*, 944 F.3d at 825. "The public interest inquiry primarily addresses impact on non-parties rather than parties, and takes into consideration the public consequences in" granting an injunction. *hiQ Labs*, 938 F.3d at 1004 (cleaned up).

Granting preliminary injunctive relief would serve the public interest in several ways. First, it would ensure that careful consideration is given to the effects of opening up the Colcord/Turkey Pasture to grazing before said grazing actually occurs, as required by NEPA. The Ninth Circuit has "recognized the public interest in careful consideration of environmental impacts before major federal projects go forward, and [has] held that suspending such projects until that consideration occurs comports with the public interest." *Cottrell*, 632 F.3d at 1138 (cleaned up). The public interest in maintaining the status quo on the Colcord/Turkey Pasture is especially strong here given the outpouring of public opposition to the Forest Service's proposal to open up the Pasture to grazing. *See San Luis Ecosystem Council*, 657 F. Supp. 2d at 1242 (finding that relief would not disserve the public interest in part because "the large volume of public [NEPA] comments . . . indicates that there is a public interest in maintaining the status quo . . . .").

---

[5] Because the balance of equities tips "sharply" in favor of Plaintiff, Plaintiff need only show "serious questions going to the merits" to obtain relief. *Cottrell*, 632 F.3d at 1135.

Relatedly, a preliminary injunction would ensure that the Forest Service gives full consideration to an alternative action in which the Colcord/Turkey Pasture remains closed to grazing. "[B]ecause the public has an interest in having its environmental proposals adequately considered, the public interest weighs in favor of granting an injunction" when a plaintiff establishes a likelihood of success on a NEPA claim that an agency has failed to consider all reasonable alternatives. *Soda Mtn. Wilderness Council v. Bureau of Land Mgmt.*, 534 F. App'x 680, 683–84 (9th Cir. July 30, 2013) (unpublished).

Finally, a preliminary injunction would help ensure that the many visitors to the Colcord/Turkey Pasture do not suffer a diminishment of recreational opportunities. Areas within the Pasture—particularly Haigler Creek—are popular destinations for hiking, swimming, and fishing. *See* FD Resp. to SOF ¶ 9; FS006397–98 (portion of Final EA discussing recreation on the Bar X); FS001725 (comment from recreational visitor); FS001750 (same). Like Plaintiff's members, visitors to the area would have their recreational interests impaired by the presence of Bar X cattle on the Pasture, as cattle would drive away wildlife and interfere with recreational pursuits. *See supra* pp. 4–5.

Perhaps the only entity that might be adversely affected by Plaintiff's requested injunction is the grazing permittee.[6] But it is hard to see how the permittee would suffer a great hardship from a one-year delay in being allowed to graze a portion of the Bar X that it has grazed just once in the 14 years since it obtained a permit. In other words, it cannot be the case that the permittee has come to rely on the Colcord/Turkey Pasture, and a one-year delay in gaining access to the Pasture is a minor harm. *See Connaughton*, 752 F.3d at 765–67 (discounting economic harm to third parties from an injunction because they faced merely "temporary delay . . . in receiving a part of the . . . benefits of the project").

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's motion for a preliminary injunction.

---

[6] The permittee is not a party, so its interests are considered as part of the "public interest" prong rather than the "balance of equities" prong. *hiQ Labs*, 938 F.3d at 1004.

Dated: April 29, 2021

Respectfully submitted,

/s/ Andrew R. Missel
Lauren M. Rule, *pro hac vice*
Oregon Bar # 015174
Andrew R. Missel, *pro hac vice*
Oregon Bar # 181793
ADVOCATES FOR THE WEST
3701 SE Milwaukie Ave., Ste. B
Portland, OR 97202
(503) 914-6388
lrule@advocateswest.org
amissel@advocateswest.org

Richard A. Dillenburg, Esq.
Arizona Bar # 013813
RICHARD A. DILLENBURG, P.C.
2173 E. Warner Rd., Ste. 101
Tempe, AZ 85284-3503
(480) 668-1924
rich@dillenburglaw.com

Attorneys for Plaintiff