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10 **UNITED STATES DISTRICT COURT**
11 **EASTERN DISTRICT OF WASHINGTON**

12 WILDEARTH GUARDIANS, and
13 WESTERN WATERSHEDS
14 PROJECT,

15 Plaintiffs,

16 v.

17 KRISTIN BAIL, Okanogan-
18 Wenatchee National Forest, Forest
19 Supervisor, and U.S. FOREST
20 SERVICE,

Defendants,

S. MARTINEZ LIVESTOCK, a
Washington Corporation,
Defendant-Intervenor.

No. 2:20-cv-00440-RMP

**PLAINTIFFS' REPLY IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

NOTED FOR: April 5, 2021
With Oral Argument at 10:00 am

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INTRODUCTION

Defendants' responses rely heavily on the premise that there is no proof domestic sheep from the Wenatchee Allotments have contacted and transmitted disease to bighorn sheep, but the Forest Service and courts have not required such evidence before closing allotments elsewhere. Such proof rarely exists prior to bighorn die-offs, which is why the agency and courts have looked at the *potential* for such contact to occur and taken action where the risk is high to prevent the dire consequences of die-offs and chronic lamb mortality in a bighorn herd. Here, if further contact occurs between domestic sheep and bighorn sheep from the Cleman Mountain herd, the herd is unlikely to persist. To *prevent* such a catastrophic outcome, the Court should enjoin grazing on the high-risk allotments at issue.¹ Indeed, "Damocles's sword does not have to actually fall" before a court issues an injunction. *League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2017).

I. The Forest Service Did Not Show the Risk to Bighorns is Low.

The Forest Service's key points—that there is no proof of past contact or disease transmission from domestic sheep on the Wenatchee Allotments; site-

¹ The 2021 AOI narrows the dispute to the Nile, Rattlesnake, Manastash, and Mosquito Ridge allotments, Drake Ex. J at 3–4, but the agency refused "adaptions or changes in management" to address the new outbreak. Drake Ex. I at 2.

1 specific factors beyond the Risk of Contact model are relevant; and BMPs are
2 supposed to mitigate risks—fail to refute Plaintiffs’ evidence that demonstrates the
3 risk of disease transmission from grazing the allotments remains high.

4 First, the Forest Service focuses on the unremarkable fact that there is no
5 direct proof domestic sheep on the allotments have contacted or transmitted disease
6 to bighorn sheep in the past. Def. Br. at 10, 16–18, 24, 26, 36–37. Such proof of
7 contact is extremely rare because it is difficult to track each species on the range
8 and observe contact between them. Second Schommer Decl. ¶ 4 (filed herewith);
9 Ex. 1 at 15–16, 25–26; Ex. 3 at 3; Drake Ex. F at 8. This is particularly true on the
10 allotments here, which are forested and steep, Leroux Decl. ¶¶ 19–21; Ex. 31 at
11 32–37 (monitoring photos from allotment). Indeed, the agency admitted such
12 conditions on the allotments reduce visibility and prevent observations of all stray
13 domestics and wandering bighorns. Drake Ex. D at 140; Drake Ex. B at 134.

14 Despite these conditions and little monitoring by WDFW, Schommer Decl.
15 ¶¶ 21, 23, 58 (ECF No. 20), the agency *has* reported bighorns on the allotments
16 and noted it is “likely” that bighorns from the Yakima metapopulation would
17 “continue” traveling inside the allotments. Drake Ex. D at 134–38. Most recently,
18 in 2019, bighorns were observed just outside the boundary of the Mosquito Ridge
19 allotment during the grazing season. Ex. 32 at 6–7. If more monitoring had
20 occurred, it “would very likely” show more bighorns foraying onto the allotments
21

1 and domestics outside of allotments. Second Schommer Decl. ¶ 3. Thus, past
2 examples of commingling “likely represent just a fraction of the actual
3 commingling that occurs on the landscape.” Schommer Decl. ¶ 35.

4 While newly developed strain typing of the *Movi* pathogen can confirm that
5 domestic sheep are responsible for a bighorn disease outbreak, pinpointing a
6 specific domestic band as a source “is laborious, time-consuming, and expensive,
7 and dependent on the willingness of the owners of the potential pathogen sources
8 to permit sampling and typing of the strains of [*Movi*] carried by their animals.”
9 Besser ¶¶ 34–35. Thus, limited testing of the permittee’s sheep could not prove
10 that numerous missing strays in 2012 were not the cause of the Tieton die-off. *See*
11 Ex. 14 at 15 (results for one stray); Ex. 31 at 2 (dozens missing). In fact, the
12 source of disease outbreaks is not often traced. *See* Ex. 14 at 3 (no source in recent
13 outbreaks); *see* Ex. 3 at 3 (no “likely” source in several outbreaks). As Dr. Besser
14 noted, it is usually “impossible to identify the specific moment of transmission or
15 the specific animals involved in a [*Movi*] transmission event.” Besser Decl. ¶ 34.

16 Given these difficulties, federal agencies and courts have not required proof
17 of past contact and disease transmission to justify taking action. *See* Plf. Br. at 6–9
18 (collecting examples); *see also* Second Schommer Decl. ¶ 7 (no previous contact
19 documented before many outbreaks started). Waiting until proof of contact and
20 disease transmission arises would be futile, because once bighorns contract

1 disease, killing animals or entire herds—as the state did with the Tieton herd—is
2 the only effective way to stop disease from spreading. Ex. 2 at 10; Ex. 14 at 15;
3 Second Schommer Decl. ¶ 8. Once an outbreak arises, recovery “likely requires
4 many decades, if the herd recovers at all.” Ex. 17 at 16; Besser Decl. ¶¶ 18–19, 37.

5 Second, the Forest Service fails to grapple with Plaintiffs’ evidence and
6 expert testimony showing these allotments are high risk to bighorns due to site-
7 specific conditions, which is supported by its own Risk of Contact model results.
8 Plf. Br. at 12–16; Schommer Decl. ¶¶ 49, 52. The agency speculates that a few
9 barriers may restrict bighorn movements in isolated areas, Def. Br. at 9, but fails to
10 rebut Mr. Schommer’s expert opinion that short distances and excellent habitat
11 connectivity between the allotments and home ranges of the Swakane, Chelan
12 Butte, and Cleman Mountain herds creates a high potential for bighorns to move
13 onto the allotments within a day or two. Schommer Decl. ¶¶ 22–23, 39, 41, 43.

14 The agency also ignores that the permittee has a chronic problem with strays
15 on the allotments and that the species are naturally attracted to each other, which
16 likely makes the risk of contact even higher than the model predicted. Plf. Br. at
17 35; Ex. 9 at 73; Second Schommer Decl. ¶¶ 16–17. Moreover, because the risk of
18 contact under the model increases along with the size of herds, a subsequent
19 increase in some herds means the model results underestimate the current risk. Ex.
20 9 at 74 (doubling herd size doubles the expected contact rate); Ex. 23 at 7 & Kuk
21

1 Decl. ¶ 6 (increases in Chelan Butte, Swakane, and Cleman Mountain herds).

2 Most tellingly, the agency’s wildlife biologist did not rebut Mr. Schommer’s
3 conclusions that the model accurately concluded the risk of contact here is high,
4 particularly for the Cleman Mountain and Swakane herds. *Compare* Schommer
5 Decl. ¶¶ 48–49, 52, 61–62 *with* Kuk Decl. ¶¶ 17–28. The agency downplays the
6 importance of the model’s results but ignores the site-specific conditions described
7 by Mr. Schommer that formed the basis of his conclusion about the risk of these
8 allotments. Schommer Decl. ¶¶ 14–16, 39–55. The agency’s post hoc attempt to
9 flyspeck the model results is undercut by the agency’s own reliance on the model
10 as the best available tool to quantify risk on all forests, the Ninth Circuit’s decision
11 upholding the model, and—most importantly—the site-specific conditions that
12 confirm the model results. Plf. Br. at 7–9; Second Schommer Decl. ¶¶ 16–20.

13 Third, the Forest Service asserts without support that BMPs and other
14 measures effectively mitigate the risks from grazing. Def. Br. at 5–6, 23–24, 25–
15 26. But it does not even try to rebut most of Plaintiffs’ expert testimony and
16 evidence revealing that BMPs are ineffective, particularly under these conditions:

- 17 • *General effectiveness of BMPs*: Ex. 1 at 26 (“BMPs are not likely to be
18 effective” in forested and steep terrain where controlling sheep “is very
19 difficult”), 27 (BMPs may work in open areas with large buffers); Ex. 4
20 (there is “no scientific research that shows BMPs are effective” in such
21 terrain); Ex. 13 at 3–10 (BMPs only appropriate for low-risk allotment).
- *Measures to count and control sheep*: Ex. 1 at 25 (counting sheep gives “an
approximation of how many have been killed or lost” and marking sheep

1 “has limited effectiveness”); *id.* at 24–25 (bedding sheep is “difficult in
2 steep terrain” as predators are “very effective at killing or scattering
domestic sheep at night”); Schommer Decl. ¶ 55 (tracking and controlling
large bands is difficult here); Drake Ex. I at 2–3 (predators are a problem).

- 3
- 4 • *Stray sheep plans*: Ex. 1 at 25 (detecting strays in remote areas is difficult,
so “many strays go undetected”); Ex. 4 ¶ 28 (domestics disappear in rugged
5 terrain quickly); Ex. 31 (many reports of strays and predators here and
extensive efforts to track strays before Tieton outbreak); Schommer Decl. ¶
6 36 (strays “are very hard to find, capture, or destroy”); Second Schommer
Decl. ¶ 14 (noting strays have been found up to 35 miles away).
 - 7 • *Herders and guard dogs*: Ex. 1 at 23 (noting “limited success” with guard
8 dogs, which are designed to protect domestic sheep from predators, not
bighorn sheep); *id.* at 24 (extra herders “may be of value in open gentle
9 terrain with good visibility”); *id.* at 25 (noting that “some operators do not
report to authorities when bighorn sheep are near their domestic sheep”).
 - 10 • *Removing sick sheep*: Plf. Ex. 1 at 25 (noting that not all infected domestic
11 sheep appear sick and that this practice “does not reduce risk of contact or
disease transmission”); *see also* Drake Ex. F at 13 (WAFWA guidelines
12 explaining that even healthy domestics may carry pathogens and thus “still
pose a significant risk to wild sheep”); *see also* Besser ¶ 24 (finding in a
13 study about 90% of domestic sheep operations tested positive for *Movi*).

14 In response to this extensive evidence, the agency produces no scientific evidence
15 or expert testimony showing that BMPs are effective here nor does it counter Mr.
16 Schommer’s opinions that they are not. Kuk Decl. ¶ 25. The agency relies on the
17 WAFWA guidelines, which admit the “effectiveness of management practices to
18 reduce risk of association are not proven”—citing Mr. Schommer—and only
19 “might” help achieve separation outside of bighorn habitat or mitigate impacts of
20 straying domestics or wandering bighorns. Drake Ex. F at 13; *see also* Drake Ex.
21 G at 4 (stating BMPs should be used “to the extent that they are effective....”).

1 The Forest Service’s position on BMPs contradicts its recent admission in
2 *WWP III* that there is no science showing BMPs are effective and that court’s
3 finding that even “flawless execution of BMPs” could not prevent contact between
4 the species. *WWP v. U.S. Forest Serv.* (“*WWP III*”), No. 1:17-CV-434-CWD,
5 2017 WL 5571574, at n. 25, *13 (D. Idaho 2017). Furthermore, courts in other
6 cases—which Defendants conveniently ignore—rejected similar lists of BMPs as
7 ineffective. *Compare WWP v. U.S. Forest Serv.*, (“*WWP II*”), 2007 WL 1729734,
8 at *3 (D. Idaho June 13, 2007) (finding BMPs would not prevent contact between
9 the species) *with* Ex. 36 at 6–8 (BMP list); *compare WWP v. U.S. Forest Serv.*,
10 (“*WWP IV*”), 2009 WL 3335365, at *3–5, 7 (D. Idaho Oct. 14, 2009) *with* Ex. 37
11 at 6–9 (same). Thus, it is unreasonable for the agency to rely on BMPs.

12 In addition, the agency’s recent changes to permitted sheep numbers, trailing
13 routes, or similar conditions are also ineffective. Second Schommer Decl. ¶¶ 13–
14 15; Ex. 34 at 8–9 (finding reduced numbers were not enough to protect bighorns);
15 Ex. 31 at 2–3 (dozens of missing sheep despite reduced stocking of allotments).
16 Most notably, *any* grazing on the Nile allotment is inappropriate given its very
17 close proximity to the Cleman Mountain herd, regardless of whether sheep are
18 moved away from the highest risk area. Bail Decl. ¶ 15; Ex. 23 at 12 (allotment
19 overlaps bighorn home range); Ex. 9 at 76 (high rate of contact expected on
20 overlap allotments). Much greater spatial separation is needed to prevent contact
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1 between the species. Schommer Decl. ¶¶ 16, 53, 55 (opining that “spatial
2 separation is the only reliable means of reducing risk of disease transmission” and
3 more is needed here); Ex. 21 at 3 (urging at least 35 miles of separation here); Ex.
4 13 at 10 (requiring separation of 12.96 to 31.8 miles in other areas).

5 **II. Grazing Has Caused and Threatens Further Harm to Plaintiffs.**

6 Grazing on the Wenatchee Allotments harms Plaintiffs’ members’ use and
7 enjoyment of the Forest and their interests in observing bighorn sheep in the area.
8 ECF No. 23 (Boese Decl.), ECF No. 24 (Leroux Decl.). Such recreational and
9 aesthetic injuries are sufficient to establish standing. *See WildEarth Guardians v.*
10 *USDA*, 795 F.3d 1148, 1155 (9th Cir. 2015) (standing based on a reduced
11 likelihood of observing wildlife); *Friends of the Earth, Inc. v. Laidlaw Envtl.*
12 *Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (standing requires “not injury to the
13 environment but injury to the plaintiff”). Grazing on the allotments worsens these
14 injuries by impeding the reintroduction or expansion of bighorn herds, Ex. 14 at
15 22, Schommer Decl. ¶¶ 24, 31–32, Answer ¶ 123, and posing a substantial risk of
16 harm to existing bighorns herds. Ex. 23 at 11–13; Schommer Decl. ¶¶ 47–52.

17 The Forest Service is wrong that Plaintiffs need to prove the cause of past
18 disease outbreaks to establish standing. Def. Br. at 16–18; *see Nat. Res. Def.*
19 *Council v. U.S. E.P.A.*, 735 F.3d 873, 878 (9th Cir. 2013) (noting that a “‘credible
20 threat’ that a probabilistic harm will materialize” is sufficient to confer standing).
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1 Indeed, Plaintiffs “need not wait until the natural resources are despoiled before
2 challenging the government action leading to the potential destruction.” *Cent.*
3 *Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002).

4 Further, even if other sources were responsible for past outbreaks, “the mere
5 existence of multiple causes of an injury does not defeat redressability....”

6 *WildEarth Guardians*, 795 F.3d at 1157; *see also Barnum Timber Co. v U.S.*
7 *E.P.A.*, 633 F.3d 894, 901 (9th Cir. 2011) (plaintiff “need not eliminate any other
8 contributing causes to establish standing”). Unlike the agency in *Center for*
9 *Biological Diversity v. Export-Import Bank of the United States* that lacked
10 authority over the harmful activities, the agency here may prohibit grazing at any
11 time to reduce threats to bighorns and Plaintiffs’ members. *See* Def. Br. at 16–18
12 (citing 894 F.3d 1005, 1012 (9th Cir. 2018)); Intv. Br. at 12–13 (admitting such
13 authority). Thus, Plaintiffs have sufficiently established standing here.

14 **III. Grazing the Wenatchee Allotments is Contrary to the Forest Plan.**²

15 Plaintiffs demonstrated that grazing the Nile, Rattlesnake, Manastash, and
16 Mosquito Ridge allotments poses a high risk to bighorn herds whose viability is
17 already in question, making the challenged AOIs inconsistent with the Forest
18 Plan’s requirements to maintain viable populations, to prevent disease

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20 ² This claim does not apply to the Naches, Switchback and Eagle-Blagg allotments.

1 transmission, and to cooperate with WDFW’s reintroduction efforts. Plf. Br. at
2 21–29. The Forest Service raises three flawed defenses.

3 First, the agency claims that the Plan’s viability language cited by Plaintiffs
4 is not enforceable, Def. Br. at 19–20, but overlooks that the cited viability direction
5 is reflected in an enforceable standard: “Fish and wildlife habitat shall be managed
6 to maintain viable populations of all existing native and desired non-native
7 vertebrate species in approximately their present distribution.” Ex. 33 at 5.
8 Moreover, the agency has admitted that it must manage its lands to maintain the
9 viability of bighorns. Ex. 27 at 5; *see also* Ex. 35 at 2–3 (noting efforts to ensure
10 bighorn viability). Thus, the Court should reject the agency’s litigation position
11 that it need not ensure viability of bighorn herds. *All. for the Wild Rockies v. U.S.*
12 *Forest Serv.*, 907 F.3d 1105, 1116 (9th Cir. 2018) (rejecting post-hoc justification).

13 The permittee raises more baffling arguments that the standard’s reference to
14 “habitat” merely prevents the agency from “eliminating” bighorn habitat, and that
15 the agency can write off bighorns that were not present when the 1990 plan was
16 issued. Intv. Br. at 5. Contrary to the permittee’s argument, the Forest Plan
17 recognized bighorn sheep as a sensitive species—meaning there was already a
18 concern about their viability—and required the agency to help introduce animals to
19 underutilized habitat. Ex. 33 at 3–5; Ex. 26 at 2 (noting there is concern for the
20 viability of sensitive species). It would be absurd to interpret the Plan to mandate
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1 the agency maintain the species at less-than-viable levels or to ignore animals or
2 herds once they expanded in size or were reintroduced.³ *WWP III* rejected a
3 similar argument that the agency could write off one of multiple herds in a forest,
4 holding that a similar “viable population” standard “in no way” supported the
5 “neglect or deterioration of a population of animals (taken as a whole, or in part)
6 that the Forest Service is mandated to maintain.” 2017 WL 5571574 *12.

7 The Forest Service tries to poke holes in Mr. Schommer’s expert testimony
8 but never refutes his opinions that such high-risk allotments fail to ensure the
9 disease-free intervals “needed to maintain population viability” and that the loss of
10 a herd or a metapopulation would reduce genetic diversity, which “is important for
11 long-term viability....” Schommer Decl. ¶¶ 48–55, 29, 61–62. It also fails to
12 counter Dr. Besser’s opinion that metapopulations add “greatly” to the species’
13 resilience, which means the loss of all or part of a metapopulation would reduce
14 viability. Besser ¶¶ 20–21. In response, Mr. Kuk admits the potential for the loss
15 of one or more herds to impact viability and that the southern metapopulation herds
16 appears “at the greatest risk of decline or loss.” Kuk Decl. ¶¶ 7, 9.

17 Second, the agency provides little support to show that BMPs satisfy the
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19 ³ The permittee falsely claims that the Swakane herd was not present in 1990. Intv.
20 Br. at 5; *see* Cain Decl. Ex. A at 2 (showing that herd had 32 animals in 1990).

1 Forest Plan directive to create a plan that will prevent disease transmission to
2 bighorns. The Forest Service incorrectly argues the Forest Plan requires “measures
3 to *minimize* the risk of disease transmission,” Def. Br. at 25–26, when in fact the
4 Plan specifically states the agency must “*prevent* introduction of disease(s).”⁴ Ex.
5 33 at 6 (emphasis added). Deference is not due for interpretations that are
6 inconsistent with the plain language of the Plan. *Native Ecosystems Council v.*
7 *U.S. Forest Serv.*, 418 F.3d 953, 962–64 (9th Cir. 2005).

8 Given the extensive evidence and expert testimony that show BMPs are
9 ineffective at preventing disease transmission on high-risk allotments like these, it
10 was irrational for the agency to rely on them to “prevent” disease introduction
11 here. *See supra* 5–8 (explaining why BMPs are ineffective); Second Schommer
12 Decl. ¶ 11 (noting no science to support BMPs). Indeed, the agency has stated that
13 nonuse is “the only assured way to *prevent* domestic and bighorn sheep”
14 interaction. Ex. 34 at 9 (emphasis added). By failing to do so on the Rattlesnake,
15 Nile, Manastash, and Mosquito Ridge allotments, the agency failed to *prevent* the
16 introduction of disease to nearby bighorns. Second Schommer Decl. ¶¶ 14–15, 20.

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18 ⁴“Minimize” means “to reduce or keep to a minimum”. *See* [https://www.merriam-](https://www.merriam-webster.com/dictionary/minimize)
19 [webster.com/dictionary/minimize](https://www.merriam-webster.com/dictionary/minimize); “Prevent” means “to keep from happening or
20 existing.” <https://www.merriam-webster.com/dictionary/prevent>.

1 Finally, the agency ignores that the Forest Plan requires more than just
2 communicating with WDFW on bighorn management: the plan requires the agency
3 to cooperate in the “relocation of animals” and to “[a]dd additional animals where
4 habitat is under utilized....” Ex. 33 at 5. The agency falsely argues that Plaintiffs
5 provided no “factual support” for this claim, Def. Br. at 28, ignoring expert
6 testimony, exhibits, and *its own answer* that prove grazing on these allotments
7 prevents WDFW from reintroducing the Tieton herd. Ex. 14 at 22; Schommer
8 Decl. ¶¶ 31–32; Ex. 20; Answer ¶ 123. The agency asserts that it communicates
9 with WDFW about bighorn management, but fails to disclose that the state’s 2020
10 status report highlights that there is still a need to reduce risks from the Forest’s
11 allotments and confirms that the state can only reestablish the Tieton herd if the
12 risk from nearby allotments is “eliminated.” Drake Ex. N at 5, 10–11, 18. And the
13 permittee reveals that the agency may have opposed—rather than cooperated
14 with—the state’s reintroduction efforts in the past. Lobdell Decl. Exs. 10–11.

15 In sum, the agency failed to show—through a rational explanation supported
16 by the record—that grazing the four allotments is consistent with its duties to
17 ensure the viability of bighorn sheep, prevent the introduction of disease into
18 nearby herds, and cooperate with WDFW’s efforts to reintroduce the Tieton herd.
19 Thus, Plaintiffs are likely to prevail on their NFMA claims. *See All. for the Wild*
20 *Rockies*, 907 F.3d at 1116 (the lack of rational explanation violated NFMA).

IV. FLPMA Does Not Preclude Plaintiffs' NEPA Claims.

The Forest Service did not dispute that it must supplement the existing NEPA for the allotments due to new information or refute that grazing threatens irreversible damage to bighorns. Instead, it relies on language in FLPMA that allows the agency to renew expiring grazing permits prior to finishing new NEPA analysis over the effects of the ten-year permits. Def. Br. at 30. However, the language in FLPMA does not apply to a supplemental NEPA analysis, which addresses only significant information that arises *in between* regular NEPA analyses. 40 C.F.R. § 1502.9(d)(iii); *see* Ex. 1 (supplemental EIS assessing only bighorn/domestic sheep conflicts on grazing allotments); Ex. 13 at 3, 10 (same). In contrast, a full NEPA analysis for permit renewal is much more extensive and considers all potential impacts of grazing. *See* Drake Ex. D (covering a wide range of impacts from grazing). By assessing significant information as it arises, an agency can avoid causing irreversible harm it might otherwise not discover until years later during a regular NEPA analysis. *ONDA v. Sabo*, 854 F. Supp. 2d 889, 922–24 (D. Or. 2012) (“*ONDA IIP*”); *Gallatin Wildlife Ass’n v. U.S. Forest Serv.*, CV-15-27-BU-BMM, 2016 WL 3282047, at *12–13 (D. Mont. June 14, 2016).

Recognizing this distinction, courts have found that an agency’s discretion to decide when to prepare regular NEPA analyses for grazing permit renewals does not extend to supplemental NEPA analyses that are triggered in the interim.

1 *Compare ONDA v. U.S. Forest Serv.*, No. 3:03-CV-213-PK, 2017 WL 9535170,
2 at *7–8 (D. Or. Oct. 3, 2017) (rejecting claim to compel AMP under NFMA) *with*
3 *ONDA III*, 854 F. Supp. 2d at 923–24 (failure to prepare *supplemental* NEPA
4 violated NEPA); *Gallatin Wildlife*, 2016 WL 3282047, at *11–12 (same). The
5 agency is wrong that those cases predating the FLPMA amendment do not apply;
6 they involved very similar statutory language, so are still on point. Def. Br. at 31
7 (noting FLPMA that provides the terms in a grazing permit “shall be continued”
8 pending new NEPA); *ONDA III*, 854 F. Supp. at 922–23 (citing prior language that
9 the terms in a grazing permit “shall continue” pending new NEPA); *Gallatin*
10 *Wildlife*, 2016 WL 3282047, at *11–12 (same).

11 In contrast, cases the agency cites are inapposite because none of them found
12 that the rider bars *supplemental* NEPA challenges or claims about irreversible
13 harm pending completion of NEPA, which are the claims at issue here. *Great Old*
14 *Broads for Wilderness v. Kempthorne*, 452 F. Supp. 2d 71, 79–82 (D.D.C. 2006);
15 *W. Watersheds Project v. Zinke*, 347 F. Supp. 3d 554, 560 (D. Idaho 2018); *W.*
16 *Watersheds Project v. Bureau of Land Mgmt.*, 629 F. Supp. 2d 970, 955 (D. Ariz.
17 2009); *Concerned Friends of the Winema v. U.S. Forest Serv.*, No. 1:14-cv-00737-
18 CL, 2017 WL 5957811, at *1 (D. Or. Jan. 18, 2017).

19 Finally, the permittee misconstrues Plaintiffs’ claim, which does not argue
20 that grazing or other action subject to a supplemental NEPA process must always
21

1 stop in the interim. Intv. Br. at 11–12. In so doing, the permittee concedes that
2 FLPMA does not require the agency to authorize grazing each year, *id.* 12–13,
3 which means the agency has the discretion to ensure grazing does not irreversibly
4 harm resources before issuing AOIs each year. *WWP IV*, 2009 WL 3335365, at
5 *6; *see* Ex. 9 at 76 (recognizing such duty). Here, the agency recognizes the need
6 for supplemental NEPA but just delayed that process yet again and is likely to take
7 several more years to complete. *See* Bail Decl. ¶¶ 9–10 (new June 2022 deadline
8 for step one of process, no estimate for step two). In the meantime, it continues to
9 authorize grazing that threatens irreversible damage to bighorn herds, which poses
10 a more egregious threat than the inability to cancel a lease that was at issue in
11 *Conner v. Burford*. Intv. Br. at 12 (citing 848 F.3d 1141 (9th Cir. 1988)).

12 For these reasons, FLPMA does not preclude Plaintiffs’ NEPA claims.

13 **V. The Agency Did Not Contest that Irreparable Harm is Occurring.**

14 The Forest Service is wrong that Plaintiffs’ caution in coming to the
15 courthouse and other potential sources of harm warrant denial of an injunction.

16 As for the alleged delay by Plaintiffs, “courts are loath to withhold relief
17 *solely on that ground.*” *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir.
18 2019) (citation omitted, emphasis in original). Here, any purported delay was
19 prudent: Plaintiffs did not anticipate that the agency would drag its feet on the new
20 NEPA for so long; first attempted informal means to address the problem, Cain
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1 Decl. ¶ 10; filed suit only after their expert visited the allotments and confirmed
2 that new evidence made irreparable harm more likely and severe, Schommer Decl.
3 ¶ 16, ECF No. 1; and tried to confer about 2021 grazing plans first. Plf. Br. at n.1.

4 The Forest Service is also wrong that an injunction is unwarranted simply
5 because there are other risks to bighorn sheep. The Ninth Circuit recently rejected
6 a similar argument, explaining that the challenged action need not be “the
7 exclusive cause of the injury” and that an injunction need not “completely prevent
8 the irreparable harm....” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886
9 F.3d 803, 819, 823 (9th Cir. 2018) (citations omitted). Instead, an injunction need
10 only reduce some of the harm posed by the status quo. *Id.* at 820, 823; *see also*
11 *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 796–8 (9th Cir.
12 2005) (upholding injunction that “would pose less risk” to fish).

13 Contrary to its litigation position, the Forest Service has recognized that
14 risks from other sources are no excuse to ignore the agency’s contribution to the
15 problem. *See* Ex. 8 at 22 (rejecting such rationale); Ex. 9 at 77–78 (confirming the
16 agency is responsible for its own lands regardless of third-party risks). Experts
17 agree that domestic sheep are “the biggest threat to bighorn sheep herds near the
18 O-W Forest.” Second Schommer Decl. ¶ 9; *see also* Besser ¶¶ 26–31 (domestic
19 sheep, not other species, present the greatest risks to bighorns); Ex. 20 at 2, 4
20 (WDFW urging action on allotments despite other sources of risk).

1 That risk is particularly acute for the Cleman Mountain herd, since
2 introduction of a new strain of *Movi* “would likely eliminate most or all of its
3 members” and spread to the Umtanum herd, which is already suffering.
4 Schommer Decl. ¶¶ 29, 52, 58, 60, 62. Thus, it is crucial to stop grazing on the
5 Nile and Rattlesnake allotments that pose a “very high” risk and the Manastash
6 allotment that poses a “high risk” to the Cleman herd. *Id.* ¶ 64; Second Schommer
7 Decl. ¶¶ 20. Enjoining grazing on Mosquito Ridge is also needed to prevent
8 disease introduction to the Swakane herd, which presents a “very high” risk of
9 spreading to other herds in the metapopulation and causing “catastrophic die-offs
10 to a substantial number of bighorns....” Schommer Decl. ¶¶ 39, 50–51, 62.

11 Importantly, even just one or two contacts with domestic sheep from these
12 allotments would cause harm that is likely to persist for decades by causing
13 additional disease episodes and poor lamb recruitment in bighorn herds.
14 Schommer Decl. ¶ 56 (noting many past die-offs “began with just one or two
15 domestic sheep making contact with a bighorn”); Besser ¶¶ 18–19, 37. In other
16 bighorn cases, courts have found that similarly high risks⁵ of disease transmission
17 presented a likelihood of irreparable harm. *WWP III*, 2017 WL 5571574, *13–14;

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19 ⁵ The plain meaning of “high-risk” is “likely to result in failure, harm, or injury:
20 having a lot of risk.” <https://www.merriam-webster.com/dictionary/high-risk>

1 WWP IV, 2009 WL 3335365, at *5–7; see also *Confed. Tribes and Bands of*
2 *Yakama Nation v. U.S.*, No. CV-10-3050-EFS, 2010 WL 3434091, at *1, 4–5 (E.D.
3 Wash Aug. 30, 2010) (injunction due to risk of invasive species introduction).

4 **VI. Reducing Grazing to Protect Bighorns is in the Public Interest.**

5 The permittee introduces several declarations about the benefits of his sheep
6 business, Intv. Br. at 18–19, but they go beyond the impacts that “would occur
7 while the preliminary injunction is in place.” *League of Wilderness Defs./Blue*
8 *Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir.
9 2014). Those declarants describe the impacts from the loss of the business, but Mr.
10 Martinez does not show that is likely to occur if required to find other grazing
11 lands for two months this summer. Martinez Decl. ¶¶ 4–5. Nor does his
12 declaration state that they “will be forced to sell much of their sheep,” contrary to
13 what his brief claims.⁶ Intv. Br. at 14 (citing ¶¶ 40, 42, 43, 44).

14 Instead, he shows that an injunction will impose some logistical challenges
15 and add an unspecified amount of costs. *Cf.*, WWP IV, 2009 WL 3335365 at *2
16 (estimating more trucking and pasture costs of about \$8,000). Despite admitting
17 that he owns private lands that are available for some sheep this summer, the
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19 ⁶ The brief also touts the permittee’s record without being upfront about chronic
20 straying on the allotments. *Compare* Intv. Br. at 18–19 *with* Plf. Br. at 18–19.

1 permittee asserts these are not a “sustainable nor long-term solution”—which
2 again, is not at issue now. Martinez Decl. ¶ 42. Nor does he state it is infeasible to
3 *acquire* feed that might be needed to fill gaps this summer. *Id.* ¶ 51. Moreover,
4 his complaint about stress ignores that sheep are already subjected to extensive
5 trucking each year. *Id.* ¶¶ 23–26 (noting sheep are trucked between far flung lands
6 and some are sent to California for slaughter).

7 The permittee also asserts—without support—that an injunction will
8 *increase* disease risks to bighorns. Int. Br. at 14–15. Mr. Schommer rejects this
9 speculation, opining that “the total overall risk” to bighorns would decrease even if
10 grazing occurs at the Wenas Ranch given the greater difficulty keeping track of
11 sheep and observing bighorns on the allotments compared to the private land.
12 Second Schommer Decl. ¶¶ 21–24. Such speculative claims of increased risks do
13 not warrant denial of an injunction. *Connaughton*, 752 F.3d at 766.

14 Overall, the challenges that the permittee may face this summer do not
15 outweigh the significant public interest in protecting multiple bighorn herds that
16 have been restored to their native range. *WWP IV*, 2009 WL 3335365, at *6
17 (finding that a permittee’s profitability did not outweigh protecting bighorns).

18 CONCLUSION

19 Plaintiffs respectfully request that the Court grant their Motion and enjoin
20 use of the Nile, Rattlesnake, Manastash, and Mosquito Ridge allotments.
21

1 DATED this 26th day of March, 2021.

2 Respectfully submitted,

3 /s/Elizabeth H. Potter

4 Elizabeth H. Potter (WSB # 44988)

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