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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Neighbors of the Mogollon Rim
10 Incorporated,

11 Plaintiff,

12 v.

13 United States Forest Service, et al.,

14 Defendants.

No. CV-20-00328-PHX-DLR

ORDER

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16 Plaintiff Neighbors of the Mogollon Rim, Incorporated is a non-profit organization
17 comprised of property owners and residents of Colcord Estates, Ponderosa Springs, and
18 Ponderosa Springs Estates (“the Communities”), located on private enclaves in the Tonto
19 National Forest. Defendants are the United States Forest Service (“Forest Service”) and
20 the United States Fish and Wildlife Service (“USFWS”). Plaintiff challenges the Forest
21 Service’s new livestock grazing management plan for the Tonto National Forest Bar X
22 allotments (“Bar X”) and Heber-Reno Sheep Driveway (“Driveway”). At issue is
23 Plaintiff’s motion for a preliminary injunction (Doc. 45), which is fully briefed (Docs. 48,
24 51, 52). For the following reasons, Plaintiff’s motion is denied.¹

25 **I. Background**

26 The Bar X is located in the northeastern part of the Tonto National Forest and

27 ¹ Oral argument is denied because the issues are adequately briefed and oral
28 argument will not help the Court resolve the motion. *See* Fed. R. Civ. P. 78(b); LRCiv.
7.2(f). Neither party requested an evidentiary hearing.

1 consists of four separate grazing allotments: The Bar X, Haigler Creek, Young, and
2 Colcord Canyon. The Driveway is a roughly two-mile wide string of eight pastures
3 bisecting the Bar X. Historically, four Driveway pastures have been associated with the
4 Bar X. The northernmost portions of the Bar X are the Colcord Canyon Allotment and the
5 Turkey Peak Pasture (collectively “Colcord/Turkey Pasture”). The Communities,
6 comprising over 300 homes, are located in the Colcord/Turkey Pasture.

7 Cattle grazing has occurred on the Bar X for over a century. Studies conducted by
8 the Forest Service in the 1970s revealed that a history of severe overgrazing and poor
9 management had significant, adverse environmental effects on the Bar X. Accordingly, in
10 1979 the Forest Service reduced grazing levels on the Bar X and deauthorized grazing on
11 the Colcord/Turkey Pasture. After conducting further studies, the Forest Service increased
12 grazing levels on the Bar X in 1985 but did not reauthorize grazing on the Concord/Turkey
13 Pasture. The Forest Service noted, however, that it could reopen the Colcord/Turkey
14 Pasture in the future based on assessments of current conditions.

15 Around 2006, the Bar X, LLC purchased the Bar X Ranch and, in 2007, was issued
16 a grazing permit by the Forest Service. In 2015, the Forest Service authorized the Bar X
17 Ranch to graze the Colcord/Turkey Pasture for one year, marking the first time since 1979
18 that the area had been subject to grazing. The unexpected presence of cattle near the
19 Communities caused residents a great deal of concern, annoyance, and fear. The Forest
20 Service again authorized grazing on the Colcord/Turkey Pasture in 2018, but later retracted
21 that authorization in response to litigation brought by Plaintiff.

22 The Forest Service then initiated a National Environmental Policy Act (“NEPA”)
23 analysis to determine whether and how to modify grazing management on the Bar X. In
24 particular, the Forest Service analyzed the likely effects of permitting grazing across the
25 Bar X, including the Colcord/Turkey Pasture, as well as all four associated Driveway
26 pastures. The new scheme also would increase the maximum permitted amount of grazing
27 on the Bar X and associated Driveway pastures, while formalizing a system of adaptive
28 management, under which actual grazing levels and permitted areas could be flexibly

1 modified based on changing conditions. In December 2019, the Forest Service issued a
2 final Environmental Assessment and a Decision Notice/Finding of No Significant Impact,
3 finding that the new grazing scheme will not have a significant effect on the environment.
4 The Forest Service then issued a new term grazing permit and a new allotment management
5 plan for the Bar X, permitting grazing on the Colcord/Turkey Pasture.

6 This lawsuit followed. Plaintiff challenges the Forest Service's new grazing scheme
7 under the Administrative Procedures Act ("APA"), contending that it violates NEPA, the
8 Endangered Species Act, and the National Forest Management Act. After receipt of the
9 administrative record, the parties' submitted cross-motions for summary judgment, which
10 are fully briefed and currently under review. Pursuant to the new grazing scheme, the
11 Forest Service has authorized grazing on the Colcord/Turkey Pasture this summer,
12 beginning on July 1, 2021. Plaintiff has moved to preliminarily enjoin grazing on the
13 Colcord/Turkey Pasture pending the Court's decision on the cross-motions for summary
14 judgment.

15 **II. Legal Standard**

16 "A plaintiff seeking a preliminary injunction must establish that he is likely to
17 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
18 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in
19 the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Am.*
20 *Trucking Ass'n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). These
21 elements may be balanced on a sliding scale, whereby a stronger showing of one element
22 may offset a weaker showing of another. *See Alliance for the Wild Rockies v. Cottrell*, 632
23 F. 3d 1127, 1131, 1134-35 (9th Cir. 2011). But the sliding-scale approach does not relieve
24 the movant of the burden to satisfy all four prongs for the issuance of a preliminary
25 injunction. *Id.* at 1135. Instead, "'serious questions going to the merits' and a balance of
26 hardships that tips sharply towards the plaintiff can support issuance of a preliminary
27 injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury
28 and that the injunction is in the public interest." *Id.* at 1135. The movant bears the burden

1 of proof on each element of the test. *Envtl. Council of Sacramento v. Slater*, 184 F. Supp.
2 2d 1016, 1027 (E.D. Cal. 2000).

3 **III. Discussion**

4 The parties have rested on their cross-motions for summary judgment for purposes
5 of the likelihood of success on the merits prong. The Court currently has those motions
6 under review. For purposes of this order, however, the Court need not pass preliminary
7 judgment on the merits of Plaintiff's claims because the other preliminary injunction
8 factors do not favor relief.

9 First, Plaintiff has not made a strong showing of irreparable harm if the
10 Colcord/Turkey Pasture is grazed this summer. Notably, the Colcord/Turkey Pasture was
11 grazed in 2015 and, although it caused the residents of the Communities a great deal of
12 concern, annoyance, and fear, Plaintiff has not shown that the 2015 grazing irreparably
13 harmed the environment or recreational opportunities. It is unclear why, six years later,
14 one more summer of grazing will irreparably damage the environment or local recreational
15 opportunities when the grazing that occurred in 2015 does not appear to have had such an
16 enduring effect. Moreover, although the residents of the Communities experienced fear,
17 anxiety, and annoyance during the 2015 grazing season, it appears that these experiences
18 were at least in part attributable to the fact that the residents were caught off guard by the
19 unexpected presence of cattle. The residents will not be caught off guard this time,
20 however, as the Forest Service's decision to authorize grazing on the Colcord/Turkey
21 Pasture was made known well in advance, giving them time to prepare.

22 Plaintiff's most compelling argument for why summer grazing of the
23 Colcord/Turkey Pasture will cause irreparable harm relates to fencing. Most of the homes
24 in the Communities are (or were) unfenced. If residents want to ensure that grazing cattle
25 do not enter and/or damage their properties, they will need to erect fences, which costs
26 money. And although economic harm typically is not considered irreparable, this general
27 rule does not apply here because of the unavailability of monetary damages in APA cases.
28 *See City and Cty. of San Francisco v. USCIS*, 981 F.3d 742, 762 (9th Cir. 2020). Once the

1 residents pay for fencing, they will be out that money for good. The Court finds, however,
2 that the cost of erecting fencing does not justify preliminary injunctive relief for two
3 reasons.

4 First, although (with the exception of 2015) grazing has not been authorized on the
5 Colcord/Turkey Pasture since 1979, the Colcord/Turkey Pasture remains part of an active
6 grazing allotment in the Tonto National Forest. The Communities' residents cannot
7 reasonably expect that the Colcord/Turkey Pasture will remain off limits to grazing into
8 perpetuity. Indeed, the Forest Service initially deauthorized grazing on the Colcord/Turkey
9 Pasture in order to allow time for the area to recover from a period of mismanagement and
10 overgrazing, but it emphasized that it could reopen the area to grazing in the future based
11 on assessments of current conditions. And Arizona is an open-range state, meaning that
12 state law places the burden of preventing unwanted livestock intrusions on private property
13 owners. *See* A.R.S. § 3-1427; *Carrow Co. v. Lusby*, 804 P.2d 747, 751 (Ariz. 1990). To
14 be clear, state law does not require private property owners to erect fences. But those who
15 choose not to cannot then complain about damage caused by livestock intrusions that could
16 have been avoided or mitigated by fencing. The combined effect of the Colcord/Turkey
17 Pasture being part of an active grazing allotment and Arizona being an open-range state is
18 that residents in the Communities cannot reasonably expect that they will never have to
19 incur the expense of fencing their properties. They might not want to erect fencing now,
20 but the possible need for fencing is a prospect that property owners in the Colcord/Turkey
21 Pasture must live with, and this reality renders the expense of erecting fences less
22 compelling.

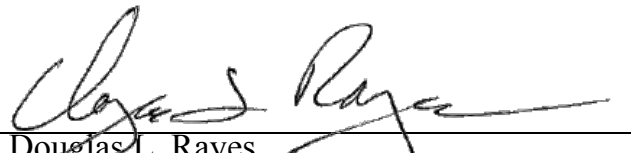
23 Second, and more importantly, the economic harm to the residents must be balanced
24 against the other equities. Here, the Bar X Ranch has explained that, due to devastating
25 drought conditions, 2018 and 2020 produced very little vegetative growth in the pastures
26 that it previously has grazed. Consequently, the Colcord/Turkey Pasture is the only un-
27 grazed pasture the Bar X Ranch can use this year. To mitigate the effects of drought, the
28 Bar X Ranch has sold off all its calves at a financial loss, but if it is unable to graze its

1 remaining herd on the Colcord/Turkey Pasture this summer, it contends that it probably
2 will need to destock its entire herd.

3 Plaintiff argues that the Bar X Ranch is exaggerating the likelihood of destocking.
4 Plaintiff suggests that Bar X Ranch could further reduce its herd size to mitigate the effects
5 of drought. But this solution does not account for the effects of further grazing on
6 previously grazed pastures, even by a smaller herd. Forest Service Supervisory Rangeland
7 Management Specialist Jeffrey Sturla explained in his declaration that, due to drought
8 conditions, previously grazed rangelands have not had a chance to recover since livestock
9 last left those pastures. Thus, if the Bar X Ranch were to graze these other pastures—as
10 Plaintiff seems to suggest—such grazing will only further stress those areas. Thus, the
11 consequence of granting a preliminary injunction likely will be either (1) forcing the Bar
12 X Ranch to destock its entire herd or (2) forcing the Bar X Ranch to further reduce its herd
13 size (possibly at another financial loss, similar to the sale of the calves) and to add stress
14 to the other Bar X pastures by grazing previously grazed areas that have not yet recovered
15 because of drought conditions. Because a preliminary injunction is an equitable remedy,
16 the Court must balance the competing harms. As between the harm to the Communities’
17 residents and the harms to the Bar X Ranch and the previously grazed and unrecovered
18 pastures, the Court finds the latter more compelling. Accordingly,

19 **IT IS ORDERED** that Plaintiff’s motion for a preliminary injunction (Doc. 45) is
20 **DENIED**.

21 Dated this 30th day of June, 2021.

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25 Douglas L. Rayes
26 United States District Judge
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