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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

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

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

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

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INTRODUCTION

1
2 It is unfortunate that this motion even needs to be filed, but the Forest Service has
3 left Plaintiff with no other choice: despite pending cross-motions for summary judgment
4 in this case and the fact that the Colcord/Turkey Pasture has been grazed just *once* in the
5 last 40 years, the Forest Service is charging ahead with allowing grazing on the Pasture
6 this summer, threatening grave damage to Plaintiff’s members. The agency did not allow
7 use of the Pasture last year, after this case had been filed, but refused to follow the same
8 course this year. Without preliminary relief, Plaintiff’s members—whose properties are
9 surrounded by the Pasture—will see their area overrun by cattle this summer, causing
10 irreparable economic, recreational, and perhaps even physical harm.

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

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

BRIEF FACTUAL BACKGROUND

I. THE BAR X.

25
26
27 The Bar X consists of four separate grazing allotments that are managed together:
28 the Bar X, Haigler Creek, Young, and Colcord Canyon Allotments. Statement of Facts

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

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

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

20 II. CATTLE GRAZING ON THE BAR X.

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

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

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

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

19 The unexpected presence of cattle in 2015 near the Colcord and Ponderosa
 20 communities had several negative effects on Plaintiff’s members² and visitors to the area.
 21 Several of Plaintiff’s members experienced or witnessed dangerous encounters with Bar
 22 X cattle that trespassed on their properties. Jim Olsson, one of Plaintiff’s board members,
 23 watched a bull nearly run over his wife on their back deck. First Olsson Decl. (ECF No.

24 _____
 25 ¹ “Whereas the [allotment management plan] relates the directives of the applicable forest
 26 plan to the individual . . . allotment, and the grazing permit sets grazing parameters
 27 through a ten-year period, the AOI . . . conveys these . . . directives into instructions . . .
 28 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).

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

8 Dangerous encounters with cattle were not the only negative consequences of the
9 Forest Service’s decision to authorize grazing on the Colcord/Turkey Pasture in 2015.
10 Many community members watched cattle graze over their leach fields (the drain fields
11 for their septic systems). First Olsson Decl. ¶ 10; Price Decl. (Ex. F) ¶ 6; Branco Decl.
12 ¶ 7; Briggs Decl. (Ex. G) ¶ 7; FS001774. This can damage septic systems by compacting
13 the soil in the leach field, restricting airflow to the bacteria that break down sewage
14 underneath the ground. FS003438–39; Exs. N, O, & P. Once damaged, a septic system
15 can cost thousands of dollars to repair or replace. First Olsson Decl. ¶ 10; Ex. Q at 3.

16 Community members and visitors also noted a disappointing decrease in the
17 prevalence of deer, elk, and turkey in the area in 2015. Lemon Decl. ¶ 6; Briggs Decl.
18 ¶ 6; Poulin Decl. ¶ 7; FS001738. According to Roger Briggs, “[i]nstead of seeing
19 wildlife, we contended with cow manure and flies.” Briggs Decl. ¶ 7; *see also* First
20 Adams Decl. ¶¶ 4, 12 (describing unpleasant smells from cow manure in 2015); Allen
21 Decl. ¶ 6 (same); Bjornsen Decl. (Ex. H) ¶ 7 (same); Branco Decl. ¶ 7 (same). The
22 reduction in opportunities to view wildlife, the noxious smell of cow manure, and the
23 annoying sounds made by cattle reduced community members’ enjoyment of living in the
24 area. Bjornsen Decl. ¶ 7; First Adams Decl. ¶¶ 4–5; Briggs Decl. ¶ 7; Poulin Decl. ¶ 7.

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

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

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

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

13 **III. PREVIOUS LITIGATION AND THE SUBSEQUENT NEPA PROCESS.**

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

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

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

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

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

14 In September 2019, the Forest Service issued a Final Environmental Assessment
15 (“Final EA”) and a Draft Decision Notice/Finding of No Significant Impact adopting the
16 new grazing scheme analyzed during the NEPA process. Answer ¶ 105. Plaintiff (and
17 many others) objected to the draft decision under the administrative process set out in the
18 36 C.F.R. part 218 regulations. FS003283. The Forest Service did not change course in
19 response to the objections, and released a Final Decision Notice in December 2019.
20 FS006520. (The agency also released a revised Final EA that month. FS006366.) Later
21 that month, the Forest Service issued a new term grazing permit and released a new
22 allotment management plan for the Bar X. Answer ¶ 107; *see also* FS006531, FS006549.

23 **IV. THIS LAWSUIT AND THE 2021 GRAZING SEASON.**

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

1 had violated NEPA by failing to take a “hard look” at the effects that cattle grazing on the
2 Colcord/Turkey Pasture will have on the Colcord and Ponderosa communities. *Id.*

3 ¶¶ 118–19, 123b, 123c. Soon after filing suit, Plaintiff learned that the Forest Service had
4 not authorized grazing on the Colcord/Turkey Pasture for 2020. *See* Ex. K.

5 Earlier this year, following the completion of summary judgment briefing in this
6 case, Plaintiff discovered through a Freedom of Information Act request that the Forest
7 Service has authorized grazing on the Colcord/Turkey Pasture beginning on July 1, 2021.
8 Ex. L at 2. When Plaintiff’s members learned of this development, they began reaching
9 out to Plaintiff’s board members to share their concerns. Second Olsson Decl. ¶ 6.

10 Because of their experiences in 2015, many of Plaintiff’s members are fearful that the
11 return of Bar X cattle to the Colcord/Turkey Pasture this summer will result in property
12 damage and even personal injury unless they install fences around their properties. *E.g.*,
13 Lemon Decl. ¶¶ 7–9, 11. However, Plaintiff’s members do not *want* to install fences, for
14 both financial and aesthetic reasons. *E.g.*, Price Decl. ¶ 6. Plaintiff’s members are also
15 concerned that, whatever decisions they make with respect to fencing, the presence of
16 cattle on the Pasture this summer will negatively affect their recreational opportunities—
17 particularly in Haigler Creek—and their quality of life. *E.g.*, Bjornsen Decl. ¶¶ 6, 11–12.

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

24 ARGUMENT

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

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

10 To be entitled to a preliminary injunction, Plaintiff must show that “irreparable
11 harm is likely to result in the absence of the injunction.” *All. for the Wild Rockies v.*
12 *Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Plaintiff must also show that “a
13 preliminary injunction is in the public interest.” *Cuviello v. City of Vallejo*, 944 F.3d 816,
14 825 (9th Cir. 2019). The remaining two preliminary injunction factors—likelihood of
15 success on the merits and the balance of equities—are assessed on a “sliding scale,” such
16 that a stronger showing on one factor may offset a weaker showing on the other. *Doe v.*
17 *Kelly*, 878 F.3d 710, 719 (9th Cir. 2017); *see also Cottrell*, 632 F.3d at 1135 (holding that
18 “serious questions going to the merits and a balance of [equities] that tips sharply towards
19 the plaintiff can support issuance of a preliminary injunction” (cleaned up)).

20 In order to award a preliminary injunction, this Court need not find that Plaintiff
21 has shown a likelihood of success on *all* its claims; it is enough for Plaintiff to show a
22 sufficient likelihood of success on just *one* claim.³ *See League of Wilderness Defs./Blue*
23 *Mtns. Biodiversity Project v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014) (“We first
24 analyze whether the . . . plaintiffs are likely to succeed on the merits of *any* of their
25 claims” (emphasis added)). In deciding whether Plaintiff has made such a showing,
26

27 ³ This memorandum does not address the merits of Plaintiff’s claims. *See* ECF No. 43
28 ¶ 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.

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

4
5 **I. PLAINTIFF’S MEMBERS WILL SUFFER IRREPARABLE HARM
WITHOUT A PRELIMINARY INJUNCTION.**

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

12
13 **A. Plaintiff’s Members Will Be Forced to Either Pay for Expensive,
Unwanted Fencing or Risk Physical Harm and Property Damage.**

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

24
25 **1. Spending Money on Unwanted Fencing Amounts to Irreparable Harm,
Especially for Plaintiff’s Members on a Fixed Income.**

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

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

3 The Ninth Circuit has repeatedly held that “economic harm is sufficient to
4 constitute irreparable harm” in cases against the federal government brought under the
5 APA “because of the unavailability of monetary damages.” *City & Cty. of San Francisco*
6 *v. U.S. Citizenship & Immig. Servs.*, 981 F.3d 742, 762 (9th Cir. 2020), *cert. dismissed*,
7 141 S. Ct. 1292 (Mar. 9, 2021); *see also East Bay Sanctuary Covenant v. Biden*, 993 F.3d
8 640, 2021 WL 1220082, at *22 (9th Cir. Mar. 24, 2021) (“[W]here parties cannot
9 typically recover monetary damages flowing from their injury—as is often the case in
10 APA cases—economic harm can be considered irreparable.”). Several other circuits have
11 recognized that economic harm can be irreparable in the related context of suits brought
12 against state entities that enjoy Eleventh Amendment immunity. *E.g., Chamber of*
13 *Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010). In each
14 circumstance, the harm is irreparable because the plaintiff cannot recover the economic
15 loss caused by the government *even if* the plaintiff eventually prevails on the merits. *E.g.,*
16 *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996).

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

1 \$10,000”); Second Doolittle Decl. (Ex. J) ¶ 7 (research showing a cost of at least \$9,280);
2 Lemon Decl. ¶ 11 (research showing a cost of nearly \$2,000). Collectively, then,
3 Plaintiff’s members may end up spending hundreds of thousands of dollars on fencing—
4 money that they will never get back, even if Plaintiff ultimately prevails in this case.

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

15 Installing fencing would also harm many of Plaintiff’s members for an entirely
16 separate reason: they do not *want* fencing on their property, as they consider such fencing
17 aesthetically displeasing, an impediment to neighborhood cohesion, or both. *See* Bjornsen
18 Decl. ¶ 10 (describing a fence as an “eyesore”); Second Olsson Decl. ¶ 8 (“fences are a
19 nuisance and an eyesore, and deprive us of the ability to walk over to our neighbor’s
20 house freely”); Poulin Decl. ¶ 8 (similar); Price Decl. ¶ 6 (“I moved from Phoenix to get
21 away from fences!”). Fencing may also keep deer and other wildlife from crossing their
22 property, diminishing their enjoyment of living in the area. Second Adams Decl. ¶ 6;
23 Second Doolittle Decl. ¶ 9. A diminishment of enjoyment due to negative recreational or
24 aesthetic impacts amounts to irreparable harm. *See California v. Trump*, 407 F. Supp. 3d
25 869, 902–03 (N.D. Cal. 2019) (finding that construction of a border wall would cause
26 irreparable harm by “affect[ing] [the plaintiffs’] recreational and aesthetic interests”),
27 *aff’d sub nom. Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. 2020), *cert. petition filed*,
28 No. 20-685 (Nov. 17, 2020); *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife*

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

3
4 *2. If Plaintiff’s Members Do Not Install Fencing, They Will Put Their
Physical Safety and Property at Risk.*

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

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

27
28 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.

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

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

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

23 Second, even when Plaintiff’s members are attempting to relax at home, they will
24 be harmed by the presence of Bar X cattle near their properties. As in 2015, cattle will
25 likely drive away wildlife such as turkey, deer, and elk, reducing Plaintiff’s members’
26 opportunities to view those animals from their decks and porches—a key reason many of
27 Plaintiff’s members moved to the area. *Supra* p. 4; Briggs Decl. ¶ 6 (“This is one of the
28 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

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

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

11 **II. THE BALANCE OF EQUITIES FAVORS PLAINTIFF.**

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

20 On Plaintiff's side of the ledger are the harms discussed above, none of which can
21 be remedied by a later judgment in Plaintiff's favor. Even if they ultimately win,
22 Plaintiff's members will not be able to recoup the cost of fencing. And if they do not put
23 up fencing and suffer personal injury and/or property damage as a result, those harms will
24 also be irreparable. Finally, an impairment of recreational opportunities and aesthetic
25 enjoyment of the Forest cannot be undone, even if it lasts for just one season. *Cottrell*,
26 632 F.3d at 1135. Such harm is especially severe for Plaintiff's elderly members, *see*
27 Second Adams Decl. ¶ 7, because they have fewer remaining opportunities than others to
28 enjoy the Forest. *See Chalk*, 840 F.2d at 710.

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

10 III. PRELIMINARY RELIEF IS IN THE PUBLIC INTEREST.

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

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

27
 28 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.

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

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

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

24 CONCLUSION

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

27 _____
 28 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.

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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