Lauren M. Rule (OSB #015174)
Elizabeth H. Potter (OSB #105482)
ADVOCATES FOR THE WEST
3701 SE Milwaukie Ave. Suite B
Portland, OR 97202
(503) 914-6388
lrule@advocateswest.org
epotter@advocateswest.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

CONCERNED FRIENDS OF THE WINEMA, KLAMATH-SISKIYOU WILDLANDS CENTER, WESTERN WATERSHEDS PROJECT, OREGON WILD, and **CENTRAL OREGON BITTERBRUSH BROADS of the GREAT OLD BROADS FOR WILDERNESS**,

Plaintiffs,

v.

DOUGLAS C. McKAY, District Ranger, Paisley & Silver Lake Ranger Districts, Fremont-Winema National Forests, **BARRY L. IMLER,** Forest Supervisor, Fremont-Winema National Forests, **U.S. FOREST SERVICE**, **LAURIE SADA**, Field Supervisor, Klamath Falls Fish and Wildlife Office, and **U.S. FISH AND WILDLIFE SERVICE**,

Defendants.

Case No. 1:19-cv-516-MC

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

ORAL ARGUMENT SET
JUNE 21, 2019 1:00 PM

MEMORANDUM IN SUPPORT OF MOTION

TABLE OF CONTENTS

Cases

GLOSSARY OF ACRONYMS

AMP	Allotment Management Plan
BA	Biological Assessment
BiOp	Biological Opinion
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FWS	U.S. Fish and Wildlife Service
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NFMA	National Forest Management Act
ROD	Record of Decision

INTRODUCTION

Defendants' Opposition to Plaintiffs' Motion For Preliminary Injunction (ECF No. 18) contends that—as a result of recent negotiations between the Forest Service and the Antelope Allotment permittee—grazing this summer will be more limited than originally authorized, as if that somehow compels denial of any injunctive relief. To the contrary, unless enjoined, the grazing this summer will force cattle to concentrate in four small "exclosures"—*i.e.*, sensitive riparian areas that are supposed to exclude livestock—that house fens and sensitive plants, where resource damage will occur quickly but take decades or millennia to fix. The injunctive relief needed is thus narrower than originally sought, but still vital to prevent irreparable harm in 2019.

Cattle are also likely to damage other fens and frog habitat while trailing dozens of miles across the Chemult Pasture to reach these far-flung exclosures. The permittee admits that it is virtually impossible to control and herd cattle on this dry and rugged landscape, making it inevitable that cattle will stray from the herd and seek water in fens and Jack Creek. Indeed, nearly a decade of monitoring confirms that cattle breached fences and grazed in unauthorized areas during *every season* from 2008 to 2018, in contravention of agency and court orders. Such chronic trespass grazing caused long-lasting damage to fens and frog habitat, and likely injured and killed individual frogs. These problems are highly likely to continue this summer due to worse-than-normal fence conditions and an unworkable new grazing plan.

Defendants' cursory response conceals these inevitable impacts and ignores nearly all of Plaintiffs' factual and legal arguments. Most notably, they do not even try to refute Plaintiffs' showing that the Forest Service's EIS and FWS's BiOp are riddled with factual and legal errors, such that Plaintiffs are likely to prevail on their challenges under NEPA, NFMA, and the ESA. Moreover, Defendants fail to show that the requested—and now narrower—injunction will cause

any harm to *anyone*, let alone the public interest. Because Plaintiffs have demonstrated that they are likely to prevail on the merits, that irreparable harm is likely to occur, and that the balance of the equities and the public interest factors tip sharply in favor of preserving the status quo by keeping the Chemult Pasture closed to grazing, the Court should grant the requested injunction.

ARGUMENT

I. Defendants Misrepresent the Scope and Effects of Grazing Planned for 2019.

Throughout their brief, Defendants make several statements that are factually incorrect or misleading. Due to the materiality of these statements to the resolution of the issues before the Court, Plaintiffs must correct four of them before addressing the injunction factors.

First, Defendants repeatedly overstate the impact that fence maintenance will have on grazing this summer. They claim that grazing will not occur if fence maintenance is not completed as required. Def. Br. at 18 at 7 (explaining that fence maintenance is a "precondition" to grazing this summer), 8 (stating that "grazing *will be* even further curtailed or disallowed in any of the four exclosures if the permittee fails to repair or maintain the fences to prescribed standards") (emphasis added). But the evidence supporting these statements—the final letter from Defendant District Ranger McKay to the permittee about the 2019 grazing plan—merely states that "[i]f fences do not meet these standards, use of the affected allotment/pastures *may be* delayed or precluded." Declaration of Douglas C. Mc Kay ("McKay Decl.") (ECF No. 19) Ex. D at 1 (emphasis added). This permissive language provides little assurance that grazing will be curtailed if maintenance is not completed.

Moreover, the agency knew or should have known when it wrote that letter and submitted its brief that it was virtually impossible for the permittee to complete maintenance on the boundary fence between the Chemult Pasture and the Tobin Pasture just days later by May 26.

See McKay Decl. Ex. D at 1 (explaining on May 17 that the boundary fence must be completed by May 26); Def. Br. (submitted on May 24); *see also* Plf. Ex. 1 at 2-17 (ECF No. 9-1 at 4) (map of allotment with yellow vertical line delineating the long boundary fence between pastures). Plaintiffs' member—Ms. Goodwin, a retired Forest Service employee who maintained fences on this allotment during her tenure—attests that as of May 22, 23, 24, 26, and June 2, 2019, fence maintenance had not begun in the several areas she visited. Second Declaration of Jayne Goodwin ("Second Goodwin Decl.") ¶¶ 5, 7–8.[1] She observed that the poor fence condition will allow cattle to easily escape the east side—where cattle may begin grazing this month—and enter habitat on the Chemult and North Sheep Pastures. *Id*. at ¶ 5; *see also* Second Simpson Decl. ¶¶ 19–24 (confirming fence problems), Ex. F (map of fences). Thus, these problems are significant and directly relate to the likely impacts of grazing, as the agency essentially admits. McKay Decl. Ex. D at 1 (explaining that maintenance is "critical" to the grazing plan's success). Thus, the agency's assurances about fence maintenance are unreliable and already falling short.

Second, Defendants claim that grazing this summer is not authorized to occur "even remotely near any" Oregon spotted frog habitat. Def. Br. at 2. This is highly misleading. Round Meadow, Dry Meadow, and Riders Camp exclosures are located just a few miles from Jack Creek habitat. McKay Decl. Ex. D at 1 (identifying exclosures where grazing is allowed); Plf. Ex. 1 at 2-17 (ECF No. 9-1 at 4) (map of exclosures and Jack Creek); Second Simpson Decl. ¶ 12 (explaining the distance between the exclosures and Jack Creek). The gate at the boundary of the Tobin Cabin where cattle will likely be let into the Chemult Pasture is also only a few miles

[1] The second declarations of Theresa L. Simpson, Jayne Goodwin, and Richard M. Dewey are filed herewith.

from Jack Creek. Second Simpson Decl. ¶ 12, Ex. F. Cattle can traverse these few miles in just a few hours making it easy for them to reach frog habitat on Jack Creek. *Id*.

Although cattle are supposed to stay within exclosures or roads on the Chemult Pasture under the 2019 grazing plan, Plaintiffs show herein that it is highly likely cattle will stray into unauthorized areas and trespass on Jack Creek. The long-term permittee explained to the agency that it is difficult to control cattle and ensure they do not stray and reach water sources:

> [c]ows are not 'herdable,' particularly the livestock that utilize the allotment. The type of cows that do well on this type of allotment are not mild, pasture cows that would be easily herded. For example, they are wily cows and are able to hide in the lodge pole/timber stands on the allotment to avoid even the most knowledgeable and experienced riders on the allotment. Further, water on this allotment is spread out. Livestock spread out to reach these various water sources.

Plf. Ex. 31 (ECF No. 9-31 at 4). As explained in more detail below, cattle have trespassed onto Jack Creek and grazed in frog habitat *every year* since the frog fence was built to keep cattle out in 2008. See, e.g., Second Simpson Decl. ¶ 13. Thus, the few miles between the exclosures and frog habitat are inadequate to keep cattle out of Jack Creek for the first time in years.

Third, Defendants' description of the grazing plan for 2019 includes several inconsistences and is not fully supported by the record. Def. Br. at 6–8, 10–15. As an initial matter, the agency states that the Term Permit and AMP allow *only* 206 cow/calf pairs to graze on the Chemult Pasture, but both actually allow more than double—494 cow/calf pairs—to graze on the Chemult Pasture. *Compare* Def. Br. at 6, 8 *with* Plf. Ex. 22 at 3 (ECF No. 9-22 at 4)[2]; Plf. Ex. 23. The AMP explains that 275 pairs are allowed to graze on the public lands section and another 219 pairs are allowed to graze the private lands within the Chemult Pasture.[3] Further

[2] The markings and pagination labeled "Ex. D" on this document should be disregarded because they are from the prior litigation.

[3] A key part of the new grazing scheme involves the permittee turning over management of these private lands to the Forest Service. Plf. Ex. 19 at 15 (ECF No. 9-19 at 16). The markings and

confusing matters, the agency does not fully account for the 494 pairs authorized under the AMP and permit. The agency approved nonuse of 204 pairs and authorized 95 pairs for the Chemult Pasture, a total of 299 pairs. McKay Decl. Ex. D at 1. This leaves 195 pairs authorized under the AMP but unaccounted for in the 2019 grazing plan. The authorization of 215 pairs for grazing on the east side pastures do not account for these, as that herd appears to be the source of the 95 pairs that will graze the Chemult Pasture. *See* McKay Decl. Ex. D at 1. While Plaintiffs hope that this is a mere drafting or translation error, they are worried that those unaccounted cattle may be slated for grazing on the private lands in the Chemult Pasture.

Finally, Defendants are wrong to suggest that Plaintiffs should have waited to file their motion until the Forest Service crafted the 2019 grazing plan on May 17. Def. Br. at 1, 11; McKay Decl. Ex. D. at 1. Plaintiffs rightly challenged the grazing scheme approved by the Forest Service for this summer, and were not included in the negotiations between the Forest Service and permittee that apparently were spurred by the injunction motion. McKay Decl. Ex. A. Had Plaintiffs waited until the agency finalized its plans on May 17, they would have had a mere four weeks to prepare their motion and fully litigate these issues to a decision before June 17, when grazing is permitted to begin under the AMP. *See* Plf. Ex. 22 at 3 (ECF No. 9-22 at 4) (explaining in footnote b that grazing may be authorized up to two weeks before the official start date of July 1 for the Chemult Pasture). This Court has repeatedly denied preliminary injunctions in similar situations where rulings are required just before the start of grazing season. *See Or. Natural Desert Ass'n v. U.S. Forest Serv.*, No. 03-381-HA, 2004 WL 1592606, at *10-11 (D. Or. 2004) (denying motion despite finding plaintiffs were likely to succeed on the merits to

---

pagination labeled "Ex. C" on this document should be disregarded because they are from the prior litigation.

avoid "inflicting a last-minute injunction" "on the eve of grazing season"); *see also Or. Natural Desert Ass'n v. U.S. Forest Serv.*, No. CIV.03-213-K, 2004 WL 1293909, at *9 (D. Or. June 10, 2004) (denying motion that was "being decided right up against the start of the grazing season").

Had Plaintiffs waited until the end of May to seek an injunction, Defendants would surely have held such a delay against them. In response to the preliminary injunction filed in the last case over this allotment, the Forest Service argued that the plaintiffs' motion that was filed on May 9, 2014—earlier than the 2019 grazing plan was complete—was a "delayed and extraordinary attempt to blow up a grazing season that has already commenced." *Concerned Friends of the Winema v. U.S. Forest Serv.*, Case No. 1:14-cv-00737-CL, ECF No. 10 (Plf. Opening Br.), ECF No. 25 at 9 (Def. Response Br. at 1) (D. Or. 2014). Thus, Plaintiffs should not be faulted for taking the necessary steps to protect their rights.

As a practical matter, the 2019 grazing plan does not undermine Plaintiffs' motion nor render it "exceedingly over-broad" as Defendants suggest. *Cf.*, Def. Br. at 2. The 2019 grazing plan authorizes grazing on four exclosures within, and trailing throughout, the Chemult Pasture. *Compare* McKay Decl. Ex. D at 1 (listing exclosures) *with* Plf. Ex. 1 at 2-17 (ECF No. 9-1 at 4) (map showing all four exclosures fall within the Chemult Pasture). Moreover, the 2019 grazing plan is governed by the Term Permit and AMP, which are the subject of this litigation and Plaintiffs' motion.[4] *Compare* Plf. Ex. 22 at 3 (ECF No. 9-22 at 4) (permitting grazing on Round Meadow, Dry Meadow, Cannon Well, and Rider's Camp through the AMP) *with* McKay Decl.

[4] Under NFMA, the Forest Service manages livestock grazing by issuing a term grazing permit, an allotment management plan ("AMP"), and an annual authorization. *Or. Natural Desert Ass'n v. Sabo*, 854 F. Supp. 2d 889, 901–902 (D. Or. 2012). The AMP describes and defines the management scheme based on the number, kind, and class of livestock that are set by the permit. *Id*. at 902. The annual authorization responds to conditions such as drought, restoration projects, water quality, and wildlife and is part of the permitting scheme. *Id*.

Ex. D at 1 (authorizing grazing within the same exclosures during 2019). Plaintiffs' requested relief to enjoin grazing on the Chemult Pasture as a whole encompasses this plan; the fact that the North Sheep pasture will not be grazed this summer just means that the injunction ordered by the Court will be narrower than Plaintiffs original sought. Plf. Br. at 2. Furthermore, Defendants claim that no grazing is authorized in the North Sheep Pasture or most of the Chemult Pasture, but none of the agency's letters actually *prohibit* grazing there or mention the North Sheep Pasture. *See* McKay Decl Exs. A–D. In light of the track record of ineffective orders, Plaintiffs remain concerned about this uncertainty. *See, e.g., Concerned Friends of the Winema v. U.S. Forest Serv.*, No. 14-CV-737-CL, 2016 WL 10637010, at *3 (D. Or. Sept. 12, 2016) (Clarke, J.) (explaining that the agency ordered cattle off the Chemult Pasture a month early due to resource concerns but the order was ineffective and cattle remained for another month), *findings and recommendations adopted*, 2017 WL 5957811 (D. Or. Jan. 18, 2017) (Aiken, J.).

Accordingly, the Court should reject the Defendants' statements about these four issues.

II. Defendants' Disregard for the Merits Highlights Plaintiffs' Likelihood of Success.

Defendants devote less than two pages at the end of their short brief to the merits of Plaintiffs' legal claims. Def. Br. at 19–21 (ECF No. 18). In it, they ignored the substance of Plaintiffs' NEPA and ESA arguments, and provided only a superficial response to Plaintiffs' NFMA argument. *Id*. This lackluster defense underscores, rather than undercuts, Plaintiffs' showing of a likelihood of success on the merits. Plf. Br. at 16–33 (ECF No. 9).

A. Plaintiffs' ESA and NEPA claims are relevant and strong.

Defendants assert that they can ignore Plaintiffs' ESA and NEPA claims on the grounds that these claims do not relate "directly to the livestock grazing authorized on the Chemult Pasture for the 2019 season." Def. Br. at 18. This is flatly wrong.

Defendants support their argument by stating that "the scope of any injunctive relief needs to be narrowly tailored to remedy the specific legal violation at issue under well-established principles of the Court's equitable discretion, and the flip-side should hold true as well." Def. Br. at 18. Certainly, the scope of an injunction should be narrowly tailored *after* the Court determines that Plaintiffs are likely to succeed on any of their legal claims and an injunction is warranted. *See League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton* ("LOWD"), 752 F.3d 755, 767 (9th Cir. 2014) ("LOWD") (determining that plaintiffs were likely to succeed on the merits *first* and remanding for the District Court to determine whether the injunction should be narrowly tailored to remedy the likely legal violations). But Defendants cite not a single case to support their theory about the "flip-side" of this principle. Even if that was true, the factual and legal issues presented in Plaintiffs' motion are inextricably intertwined and directly related to the grazing plan for 2019.

Plaintiffs' ESA claim remains highly relevant to the requested injunction. That claim challenges FWS's 2018 BiOp, which is the product of the Defendants' consultation over the effects of grazing on the allotment on Oregon spotted frogs. Plf. Ex. 5 at 1 (ECF No. 9-5 at 4). The Forest Service was required to engage in that consultation with FWS *before* issuing the Term Permit and AMP because livestock grazing on an allotment that houses hundreds of acres of habitat for spotted frogs meets the "low threshold" for consulting under the ESA. *Compare Karuk Tribe of Cal. v. U.S. Forest Serv*., 681 F.3d 1006, 1029 (9th Cir. 2012) (en banc) (highlighting the "low threshold triggering the duty to consult under the ESA") *with* Plf. Ex. 5 at 1, 4, 76–77 (ECF No. 9-5 at 4, 7, 79–80) (engaging in formal ESA consultation because grazing under the Term Permit and AMP is likely to adversely affect spotted frogs). Without a *valid* BiOp in place, the Forest Service could not have fulfilled its ESA duties when authorizing

grazing this summer on the Chemult Pasture. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108, 1127–28 (9th Cir. 2012) (explaining "an agency cannot meet its section 7 obligations by relying on a Biological Opinion that is legally flawed").

Indeed, in the previous litigation, after the frog was listed as threatened under the ESA but before FWS issued the 2015 BiOp, the agency told this Court that it would not authorize grazing on the Chemult Pasture "until ESA consultation is complete." *Concerned Friends of the Winema*, No. 14-CV-737-CL, ECF No. 50-2 (letter from the Department of Justice "confirming that the Forest Service has no intention to allow any 2015 grazing on the Chemult Pasture (which includes the Jack Creek area) until ESA consultation is complete with the U.S. Fish and Wildlife Service"), 54 at 2 (granting stay and explaining the agency would not authorize grazing on the allotment) (D. Or. January 7, 2015). This was true even though the agency did not allow grazing on Jack Creek under the existing management scheme.

The Forest Service is wrong that its specific grazing plans this summer absolve it of these ESA duties or allow it to rely on an unlawful BiOp. *Compare* Def. Br. at 10–11 (arguing ESA claims are irrelevant because there will be no harm to frogs) *with* Second Simpson Decl. ¶¶ 3-12 (explaining why trespass is likely and will harm frogs). Even if it could, the Forest Service's decisions on which the grazing plan is based explicitly relied on the 2018 BiOp. *See* Plf. Ex. 22 at 13–14 (ECF No. 9-22 at 14-15) (adopting terms and conditions of the 2018 BiOp into the AMP); Plf. Ex. 19 at 4 (ECF No. 9-19 at 5) (citing the ESA consultation to justify the ROD).

Plaintiffs' NEPA claim is similarly relevant to the requested relief. As explained above, the grazing plan this summer was necessarily issued pursuant to the Term Permit and AMP, which govern all management of the Antelope Allotment. Plf. Ex. 22 at 2. To issue the Term Permit and AMP that changed management of the allotment, the Forest Service had to comply

with NEPA, and relied on the EIS to choose a new grazing scheme to implement through the ROD. Plf. Ex. 4 at 1-3 to 1-5 (ECF No. 9-4 at 26-28); Plf. Ex. 19 at 1–2 (ECF No. 9-19 at 2–3). Furthermore, a key part of the grazing scheme analyzed in the EIS involves grazing in the four exclosures—Round and Dry Meadows, Cannon Well, and Rider's Camp. *E.g.*, Plf. Ex. 4 at 3-67 (ECF No. 9-4 at 150) (discussing the impacts of reintroducing grazing in all these areas). Indeed, "Key Issue 1" analyzed in the EIS was opening specific exclosures to grazing for the first time in years.[5] Plf. Ex. 4 at 1-7 (ECF No. 9-4 at 30). For these reasons, the EIS—and Plaintiffs' challenge to the EIS under NEPA—directly addresses and encompasses the grazing planned for 2019. Thus, Plaintiffs' likelihood of success on the merits of this NEPA claim supports the requested injunction to preserve the status quo. Plf. Br. at 29–33; *see LOWD*, 752 F.3d at 767 (ordering this Court to issue a preliminary injunction against the Forest Service sufficient to preserve the status quo where plaintiffs were likely to succeed on NEPA claims).

Defendants ignored the merits of these claims at their peril. Even a quick review of Plaintiffs' ESA and NEPA claims demonstrates their strength. Most egregiously, FWS fell well short of its duty to comply with this Court's order to fix the unlawful ESA analysis in the previous BiOp. *See Concerned Friends of the Winema v. U.S. Forest Serv.,* Case No. 1:14-cv-737-CL, 2016 WL 10637010, at *14, 16 (D. Or. Sept. 12, 2016) (noting shortcomings in BiOps included its failure to fully discuss impacts on the "survival and *recovery*" of the species) (emphasis added), *adopting findings and recommendations,* 2017 WL 5957811 (D. Or. Jan. 18, 2017). The most glaring flaw in the 2018 BiOp is its silence about the impact of grazing on the

[5] Due to the injunction in place for 2017 and 2018, the Forest Service has not authorized grazing on the Chemult Pasture, making no grazing the status quo. *See W. Watersheds Project v. Bernhardt*, No. 2:19-cv-0750-SI, ECF No. 20 at 12-13, n. 12 (D. Or. June 5, 2019) (explaining that the status quo was no grazing where the permittee had not grazed in multiple years).

recovery of the Oregon spotted frog. *See* Plf. Ex. 5 at 46–48, 58 (ECF No. 9-5 at 49–51, 61) (findings and conclusion do not mention or explain how grazing will allow for recovery). This violates black letter law that FWS must assess the effects of a proposed action on the recovery of a listed species. *See Wild Fish Conservancy v. Salazar,* 628 F.3d 513, 525, 527 (9th Cir. 2010); *Nat'l Wildlife Fed'n. v. Natl. Marine Fisheries Serv.*, 524 F.3d 917, 924, 932–3 (9th Cir. 2008).

A similarly obvious legal flaw permeates the EIS and ROD. The Forest Service rejected reduced grazing alternatives based on a facially incorrect interpretation of federal law and the Winema Forest Plan. Plf. Br. at 29–30; Plf. Ex. 19 at 1, 16–17 (ECF No. 9-19 at 2, 7–18) (stating that the agency must authorize grazing on lands deemed suitable in the Winema Plan). But neither *mandate* that grazing occur *anywhere* on the allotment or the National Forest. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 710–11 (10th Cir. 2009) (rejecting argument that an entire area of federal public lands cannot be closed to development); Plf. Ex. 30 at 4-12, 4-62, 4-67, 4-68 (ECF No. 9-30 at 14, 64, 69–70) (mentioning only that the Antelope Allotment lacked "reliable range data" and requiring the agency to consider several factors *before* determining whether to authorize grazing under the Winema Forest Plan). In similar situations, courts have informed the federal government that faulty interpretations of the law and a land use plan are an improper basis to reject no or reduced grazing alternatives during a NEPA process. *See W. Watersheds Project v. Rosenkrance*, No. 4:09-CV-298-EJL, 2011 WL 39651, at *10 (D. Idaho Jan. 5, 2011) (finding that agency's dismissal of alternatives based on argument that land use plan mandated grazing was a "mistaken understanding" of agency's authority); *W. Watersheds Project v. Salazar*, No. 4:08-CV-516-BLW, 2011 WL 4526746, at *14 (D. Idaho Sept. 28, 2011) (stating that the law did not forbid a no grazing alternative).

Given these obvious flaws in the BiOp and EIS/ROD, along with the others detailed in Plaintiffs' Motion, it is quite telling that Defendants failed to respond to Plaintiffs' arguments on the merits of these claims. Courts regularly find such a failure to respond to substantive issues warrants a ruling against the silent party. *See W. Watersheds Project v. Bernhardt*, No. 2:19-cv-0750-SI, ECF No. 20 (D. Or. June 5, 2019) (granting a temporary restraining order and finding it instructive that "Defendants have not presented any defense or challenged" the plaintiffs' likelihood of success on the merits) (Simon, J.); *Manesh v. Sun Microsystems*, No. CIV 05-30-HA, 2006 WL 3612842, at *6 (D. Or. Dec. 8, 2006) (concluding that the moving party's motion was "well-taken" where the non-moving party failed "to respond substantively to the arguments advanced by" the moving party) (Haggerty, J.). Here, the Court should similarly find that the Defendants' silence bolsters Plaintiffs' showing of a likelihood of success on the merits.

B. Defendants overlook the key aspects of Plaintiffs' NFMA claim.

Defendants also ignore virtually all of Plaintiffs' arguments that the Term Permit and AMP are unlawful because they are inconsistent with the Winema Forest Plan and thus NFMA. *Compare* Def. Br. at 27–20 *with* Plf. Br. at 22–29. These flaws permeate the entire grazing scheme—including the 2019 grazing plan—and thus are directly related to the requested relief.

Plaintiffs' simplest NFMA arguments is illustrative. *See* Plf. Br. at 24–25. The Winema Forest Plan requires the Forest Service to develop a grazing scheme that is "cost-effective" and reflects the "permittee's ability to self-monitor management and maintenance" for the allotment. Plf. Ex. 30 at 4-67 (ECF No. 9-30 at 69). But the agency chose the most expensive alternative analyzed in the EIS despite admitting the agency currently lacks funding to implement it and receiving comments from the permittee that the scheme's new fence requirements are "cost prohibitive." Plf. Ex. 4 at 3-115, 3-119, 3-120 (ECF No. 9-4 at 198, 202–203); Plf. Ex. 31 at 3–4

(ECF No. 9-31 at 5–6). The agency ignored comments—based on the permittee's years of experience grazing cattle on the allotment—that the new scheme was "unattainable on the Chemult pasture" and would actually increase impacts on resources. Plf. Ex. 31 at 3–4 (ECF No. 9-31 at 5–6). Moreover, a decade of trespass reveals the permittee and the agency are unable to effectively manage cattle there. *See Concerned Friends of the Winema*, No. 14-CV-737-CL, 2016 WL 10637010, at *2–3; Plf. Br. at 3, 7–9. As discussed further below, these issues—the permittee's inability to keep cattle in authorized areas—are at the heart of Plaintiffs' and their experts concerns about the irreparable harm that will flow from grazing this summer.

As to Plaintiffs' viability claim under NFMA, the Forest Service mounts only a superficial defense. *See* Def. Br. at 18–19. The agency first tries to mislead this Court by claiming that "the Court already made a finding relevant to this claim in dissolving the injunction" about whether the agency complied with NFMA's viability directive. *Id*. at 19. In reality, Judge Clarke expressly declined to review fully those agency actions, stating that "[t]he Court does not, in this opinion, address the validity or sufficiency of the new agency decisions." *Concerned Friends of the Winema*, No. 14-CV-737-CL, 2018 WL 7254704, at *3.

Next, the agency suggests that it may satisfy NFMA by producing *any* lengthy analysis. Def. Br. at 19 (describing, in only two sentences, that the new decisions complied with NFMA because the agency produced a "detailed analysis" that was supported by a report that was "nearly 130 pages"). But the Ninth Circuit has rejected such arguments when evaluating agency decisions under the APA. *See, e.g., Anderson v. Evans*, 314 F.3d 1006, 1023 (9th Cir. 2002) (explaining that "girth is not a measure of the analytical soundness of an" agency's decision and analysis), *opinion amended on denial of reh'g*, 350 F.3d 815 (9th Cir. 2003), *opinion amended and superseded on denial of reh'g*, 371 F.3d 475 (9th Cir. 2004). The agency is also wrong to

suggest that it has boundless discretion under NFMA, and that Plaintiffs' argument may be cast aside as merely a battle of the experts. *See* Def Br. at 19–20 (citing *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2007) (en banc), *overruled in part on other grds. by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008)). Judge Aiken rejected virtually the same argument by the Forest Service in the previous litigation, explaining that the latitude afforded to the agency under *McNair* "does not override the fundamental principle under the Administrative Procedure Act that an agency's findings and action must be rationally supported." *Concerned Friends of Winema*, 2017 WL 5957811, at *1 (D. Or. Jan. 18, 2017).

As to the substance of the Forest Service's viability analysis, even a quick review reveals it is flawed. The agency did not refute that the analysis was inadequate because it never revealed what population levels frogs and sensitive plants—which are already below healthy or sustain levels—must reach to become "viable" ones. *Compare* Plf. Br. at 25 (making argument) *with* Def. Br. at 18–20 (silence on issue); *see Concerned Friends of the Winema*, No. 14-CV-737-CL, 2016 WL 10637010, at *2 (explaining that the sensitive species designation means viability of is already a concern). Wildlife expertise is not needed to realize that the agency cannot logically conclude that grazing in habitat for these species will "maintain viable populations" without knowing to what levels those species must grow to achieve viability.

For these reasons, Defendants have failed to undercut Plaintiffs' likelihood of success on the merits of their claims.

III. Plaintiffs Have Established Irreparable Harm is Likely to Occur in Summer 2019.

The Supreme Court has explained, "environmental injury, by its nature, can seldom be remedied by money damages and is often permanent or at least of long duration; *i.e.*, irreparable." *Amoco v. Village of Gambell, AK*, 480 U.S. 531, 545(1987); *see also Bernhardt*,

No. 2:19-cv-0750-SI, ECF No. 20 (D. Or. June 5, 2019) ("stating that "[w]hen a court finds a likelihood of success on the merits of a NEPA claim coupled with likely environmental harm, the NEPA violation generally is found to rise to the level of irreparable harm supporting preliminary injunctive relief."). Here, Plaintiffs have so demonstrated that grazing under the Term Permit and AMP will quickly cause long-lasting or permanent damage to frogs, fens, and sensitive species that are of great importance to their members. Plf. Br. at 33–34.

Defendants are wrong that the 2019 grazing plan "virtually" eliminates the likelihood of this irreparable harm. *See* Def. Br. at 1. The record before the Court underscores that the Forest Service responded to this litigation by temporarily pausing its plans to open almost the entire length of Jack Creek and numerous sensitive areas to grazing for the first time in more than ten years. *See* McKay Decl. Ex A at 1 (Defendant McKay explaining to permittee that agency decided "to implement resource protection nonuse for the Antelope Allotment" this season due to the "development" of the litigation); *see also* McKay Decl. Ex. D at 1 (explaining where grazing is authorized). But this does not eliminate the likelihood of irreparable harm from the grazing allowed on the Chemult Pasture—and that irreparable harm actually increases in some respects. As the original and rebuttal declarations of Ms. Simpson, Ms. Goodwin, and Dr. Dewey show, irreparable harm is still likely to occur this summer in three main ways.

First, grazing this summer is virtually certain to result in cattle trespassing onto Jack Creek as they have every other year that grazing was not authorized there. Once there, even a few cows are likely to quickly damage frog habitat and kill and injure ESA-listed frogs. Second, grazing is likely to cause even more irreversible damage in the small riparian exclosures than Plaintiffs described in their motion because dozens of cattle will be forced to concentrate in these areas for the entire season. Third, cattle are likely to stray during grazing and trailing into other

parts of the Chemult and North Sheep Pastures in search of water sources like Jack Creek, springs, and fens, where they will cause long-lasting damage to fens and the sensitive plants within. Accordingly, the Court should reject the Defendants' superficial argument that the 2019 grazing plan eliminates any likelihood of irreparable harm.

A. Grazing on the Chemult Pasture is likely to irreparably harm spotted frogs.

To secure a preliminary injunction under the ESA, Plaintiffs "must show that that they themselves are likely to suffer irreparable harm absent" such relief and may do so by showing "irreparable harm to their own interests stemming from irreparable harm to the listed species." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 886 F.3d 803, 822 (9th Cir. 2018). Importantly, Plaintiffs need not show such harm to the entire species is likely, as harm to individuals will suffice. *Id*., 886 F.3d at 818–19 (rejecting argument that "extinction-level" threat to listed species was necessary to support an injunction); *Cascadia Wildlands v. Scott Timber*, 715 Fed. Appx. 621, 624 (9th Cir. 2017) ("In its approach to evaluating irreparable harm, the district court correctly required harm to Cascadia's interest in individual members of the marbled murrelet species as opposed to harm to the entire species itself."). Thus, Plaintiffs need only show "a reasonably certain threat of imminent harm" to support an injunction under the ESA. *Marbled Murrelet v. Pac. Lumber Co.*, 83 F.3d 1060, 1062, 1066–68 (9th Cir.1996).

Plaintiffs made this showing. Plf. Br. at 33-34. Their expert, Theresa Simpson—a wildlife biologist who worked nearly a quarter-century for the Forest Service and spent twenty-one of those years serving the Fremont-Winema Forest—details the two key reasons why. Simpson Decl. (ECF No. 10) Ex. A ¶¶ 6–10 (describing professional experience); Second Simpson Decl. ¶¶ 4–25 (opining about likelihood of irreparable harm this summer); *see also* Simpson Decl. ¶¶ 10–63 (describing frog needs and likely harm under Term Permit and AMP).

1. Cattle are likely to trespass and graze in Jack Creek.

First, cattle grazing on the Chemult Pasture will almost certainly lead to cattle straying into Jack Creek and using the same pools as frogs. Second Simpson Decl. ¶¶ 4–12; Simpson Decl. ¶¶ 16, 18–19. Ms. Simpson explains this is highly likely to occur because general allotment conditions have allowed cattle to trespass and graze within Jack Creek *every year* from 2008 to 2018 and current fence conditions exacerbate risks. *Id*. ¶¶ 13–24; *see also* Simpson Decl. ¶¶ 17, 19, 23–28, 57, 58, 60, Ex. A ¶¶ 102–106, Ex. B ¶¶ 11–15 (detailing trespass across the years). Ms. Goodwin, Plaintiffs' member, has also witnessed and documented substantial trespass on Jack Creek. Goodwin Decl. (ECF No. 12) ¶¶ 8, 12, 18, Ex. A ¶¶ 17–19.

Other evidence submitted to or produced by the Forest Service confirms that such routine trespass has occurred on Jack Creek for years. Plf. Ex. 17 at 1–2 (ECF No. 9-17 at 2–3) (agency explaining that cattle were observed "weekly" grazing "all along the excluded area of the creek" from June through the end of October 2009), 8 (agency explaining that cattle grazed outside of authorized areas, including in Jack Creek, from July to October 2013); Plf. Ex. 16 at 02905 (ECF No. 9-16 at 10) (agency documenting non-compliance with Jack Creek closure in 2011); Plf. Ex 7 at 1–5 (ECF No. 9-7 at 18) (describing trespass on Jack Creek and resulting impacts during 2013[6]), 17 (agency letter informing permittee of "repeated occurrences of livestock reaching areas along Jack Creek that are not authorized for grazing" in 2014), 25–29 (same); Plf. Ex. 18 at 1–2 (ECF No. 9-18 at 2–3) (agency report explaining that livestock were observed in Jack Creek three times in 2016 even though grazing was not authorized there). Even this Court has documented the extensive problems with trespass on Jack Creek in the previous litigation.

[6] On pages 1–2 (ECF No. 9-7 at 2–3) of this exhibit, the year 2013 inexplicably disappeared from the email's date.

Concerned Friends of the Winema, No. 14-CV-737-CL, 2016 WL 10637010, at *3 (detailing some of the history of trespass); *Or. Natural Desert Ass'n v. Sabo*, 854 F. Supp. 2d 889, 906 (D. Or. 2012) (explaining that cattle repeatedly breached fences and entered frog habitat in 2009).

Defendants ignore such evidence, and presume that the Court can or should only consider what grazing is authorized to occur this summer. Def. Br. at 10–11. This is wrong. An injunction may be based on past illegal conduct that makes it sufficiently likely that illegal conduct will continue. In *Shell Offshore, Inc. v. Greenpeace, Inc.*, the Ninth Circuit relied on similar evidence—a history of Greenpeace's illegal activities—to uphold an injunction to prevent similar illegal activities in the future. 709 F.3d 1281, 1290–92 (9th Cir. 2013). The Ninth Circuit rejected Greenpeace's arguments that the likelihood of future illegal conduct and injury was only speculative and could not be based on matters that occurred years before or involved different entities. *Id*. The Court should do the same here, and look to the ample evidence that past unauthorized grazing on Jack Creek shows it is likely, not just speculative, that trespass grazing on Jack Creek will occur again this year.

Defendants present scant evidence to support their litigation position that grazing will not graze in Jack Creek this summer. They rely solely on a few letters from District Ranger McKay to the permittee that explain where grazing may occur. Def. Br. at 10–15; McKay Decl. Ex. D at 1. But the agency's informal letters provide no certainty that cattle will stick to the areas described within. To the contrary, cattle trespass continued for years despite the Forest Service's issuance of formal, annual grazing authorizations that explained Jack Creek is in "no grazing status". *See* Plf. Ex. 16 at 01956, 02904, 03704, 05151, 10418 (ECF No. 9-16 at 3, 9, 16, 24, 32) (2011–2015 annual authorizations). Further, once that trespass happened, the Forest Service's remedial orders and notices of non-compliance proved insufficient to force the permittee to stop

cattle from reaching frog habitat. *Concerned Friends of the Winema*, 2016 WL 10637010, at *3; *see also* Second Simpson Decl. ¶ 28 (explaining it has taken "weeks to more than a month" to stop trespass in the past). Most concerningly, promises to this Court and the prior injunction have not stopped the permittee from allowing cattle to reach Jack Creek. *See Sabo*, 854 F. Supp. 2d at 899–900 (denying injunction and relying on permittee's promise to take actions "to ensure" cattle do not impact sensitive resources); Simpson Decl. ¶¶ 26, 28; Goodwin Decl. ¶ 12–14.

Although this decade of data and expert evidence indicates it is nearly certain cattle will reach Jack Creek this summer, Plaintiffs need not meet such a high bar. *See, e.g., Fox v. Peters*, 6:16-CV-01602-MC, 2016 WL 4265736, at *2-3 (D. Or. Aug. 11, 2016) (finding a likelihood of irreparable harm from imminent inadequacies in post-incarceration care based on risks that an inmate would fall or drop his medications and need assistance). For these reasons, it is likely that cattle will graze in Jack Creek regardless of whether the 2019 grazing plan allows them to.

2. Trespass cattle grazing in Jack Creek is likely to irreparably harm frogs.

Second, Defendants did not dispute that once cattle reach Jack Creek, irreparable harm to frogs and frog habitat is likely to occur. *See* Def. Br. at 10–11 (defending Plaintiffs' showing of irreparable harm based solely on an absence of *authorized* grazing within Jack Creek).

Cattle grazing in Jack Creek frog habitat harms frogs in several ways. Cattle water and loaf in Jack Creek, which provides an oasis for cattle on the dry allotment during the warm summer and fall months. Second Simpson Decl. ¶ 16; Simpson Dec. ¶¶ 16, 18–19; *see* Plf. Ex. 4 at 3-161 (explaining cattle congregate in riparian areas). Once there, cattle trample, kill, and disturb frogs when using the same pools that frogs use. Second Simpson Decl. ¶¶ 25–30; Simpson Decl. ¶¶ 16-19, Ex. A ¶¶ 108–111, 117-124 (noting observations of dead and injured frogs); *see also* Plf. Ex. 5 at 60 (ECF No. 9–5 at 64) (estimating hundreds of frogs will be killed

each year under the new grazing scheme when cattle use the same pools and cause direct mortality and injury to frogs). Such harms are more likely to occur and the effects more severe as summer progresses and pools in Jack Creek—particularly within the intermittent portion—dry up and shrink, forcing cattle and frogs to use smaller and smaller pools. Second Simpson Decl. ¶ 25; Simpson Decl. ¶¶ 14-15, 18–19, Ex. A ¶¶ 87–90; Plf. Ex. 6 at 51674 (ECF No. 9-6 at 19).

Such harms are likely to occur even when just a few cattle trespass on Jack Creek. Second Simpson Decl. ¶¶ 25–30. Plaintiffs' expert and declarant have documented numerous examples over the years of trespass cattle and frogs using the same Jack Creek pools, leading to death, injury, or disturbance. Goodwin Decl. ¶¶ 8, 12, 18, Ex. A.¶¶ 17–19; Simpson Decl. ¶¶ 17, 19, 23-28, 57, 58, 60. In one instance, Ms. Goodwin documented a dead frog floating in a Jack Creek pool that had been trampled by a cow. Goodwin Decl. ¶ 17 (including picture of dead frog). Ms. Simpson documented 380 encounters between cattle and frogs in a single pool in Jack Creek during a one-week period in 2014—a drought year that put substantial stress on the population. Simpson Decl. ¶ 57. Ms. Simpson opines similar harm is likely to occur this summer due to the high likelihood of trespass grazing on Jack Creek. Second Simpson Decl. ¶ 22–31. Even FWS admitted that it was "likely" that grazing in 2014 contributed to frogs being stranded and desiccating even though no grazing was authorized on Jack Creek that year. Plf. Ex. 5 at 44 (ECF No. 9-5 at 47); *see* Plf. Ex. 16 at 05151 (ECF No. 9-16 at 24) (explaining no grazing was authorized).

While Plaintiffs need not show species-level harm, they have demonstrated that the loss or injury of frogs in Jack Creek represents a serious threat to that population as a whole. *See Marbled Murrelet*, 83 F.3d at 1066–1068 (upholding injunction based on harm to the marbled murrelets that nested in "an isolated 440 acre stand" of old growth trees). The Jack Creek

population is small and isolated, making it "acutely vulnerable to fluctuating water levels, disease, predation, poor water quality, and extirpation from stochastic events." Plf. Ex. 6 at 51688, 51693; Second Simpson Decl. ¶ 31; Simpson Decl. Ex. A ¶ 129, Ex. B. ¶ 28. As such, "[r]educing the population by just a few individuals could be significant." Plf. Ex. 28 at 1 (ECF No. 9-28). Cattle grazing on Jack Creek likely contributed to the population's plummet to just one percent of its historic numbers since its discovery in 1996.[7] Plf. Ex. 5 at 28, 30 (ECF No. 9-5 at 31, 33) (describing population plummet); Simpson Decl. ¶¶ 10–11, 17, 23–28 (detailing how grazing harmed habitat and frogs in Jack Creek during that time); *see also* Plf. Ex. 6 at 51668, 51674-75 (ECF No. 9-6 at 13, 19–20) (grazing contributed to the species' ESA listing). The loss of this population would irreparably harm the species as a whole. Simpson Decl. Ex. B ¶ 30.

Further grazing on Jack Creek—even through trespass—presents a serious risk of pushing this population past the edge of survival. Second Simpson Decl. ¶ 31; Simpson Decl. ¶ 63. These examples of past harm and expert evidence are sufficient to show a likelihood of irreparable harm. *See e.g.*, *Nat'l Wildlife Fed'n*, 886 F.3d at 821–22 (upholding injunction based, in part, on evidence of irreparable harm from findings in earlier opinions and orders); *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994) (denying injunction but stating "[p]ast takings are indeed instructive…").

Although Defendants make no substantive arguments about irreparable harm, they do submit the Declaration of Tia Adams, a Forest Service employee, that discusses various Oregon spotted frog issues. Adams Decl. ¶¶ 10–12. Importantly, the agency is not entitled to deference

[7] In 2008, in response to the first lawsuit filed over this allotment, the Forest Service and the permittee installed the "frog fence" in an attempt to keep cattle from reaching Jack Creek. It quickly proved unsuccessful. *ONDA v. Sabo*, 854 F. Supp. 2d 889 at 901 (explaining cattle breached fence repeatedly)

concerning the views of this employee about whether an injunction should issue. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011). Accordingly, the Court should weigh her testimony against that of Ms. Simpson based on their general credibility and experience. Doing so demonstrates that Ms. Simpson, Plaintiffs' expert, has substantially more experience working on the Winema National Forest and analyzing the impacts of grazing on the Jack Creek spotted frog population. *Compare* Declaration of Tia Adams ("Adams Decl") (ECF No. 20) ¶¶ 1–4 (explaining she has about five years of experience working on this Forest, four more working on spotted frog issues, and about six other years of general professional experience) *with* Simpson Decl. Ex. A ¶¶ 6–10, 13–21 (explaining she has twenty years of professional experience with grazing and wildlife issues on the Forest and has worked professionally and personally to manage and study the Jack Creek spotted frog population since 1998 shortly after its discovery). Thus, the Court should find the testimony of Ms. Simpson that irreparable harm is likely worthy of more weight.

However, the Court need not actually weigh the biologists' opinions on this fundamental issue, because Ms. Adams presents *none*. Ms. Adams's declaration is not helpful to the resolution of the irreparable harm prong, as it merely quotes or summarizes the challenged agency documents. Adams Decl. ¶¶ 5–17. She focuses on the management criteria for *permitted grazing* within Jack Creek frog habitat, which will not occur this year, ignoring the grazing plan for 2019 and its likely impacts. *Id*. Notably, her testimony conflicts with Defendants' argument in their brief that only the 2019 grazing plan this summer—not the permitted grazing strategy for frog habitat—is relevant to Plaintiffs' motion. *See* Def. Br. at 10–11. She states Ms. Simpson does not account for the management of grazing *authorized* in Jack Creek. Adams Decl. ¶ 5. But she *never* disputes any of Ms. Simpson's opinions, and *never* supports Defendants' argument

that no irreparable harm will occur in 2019. Defendants' failure to provide expert opinions to counter Ms. Simpson renders their irreparable harm argument a mere litigation position that the Court should reject. *See Fox v. Peters*, 6:16-CV-01602-MC, 2016 WL 4265736, at *2-3 (finding likelihood of irreparable harm where defendant did not rebut evidence of harms).

B. Concentrated grazing in exclosures will irreparably harm fens.

Defendants overlook that Plaintiffs' motion demonstrates irreparable harm will occur from grazing within habitat for fens and sensitive plants *throughout* the allotment. *Compare* Def. Br. at 11–12 (suggesting that Plaintiffs' motion does not address grazing in exclosures) *with* Plf. Br. at 34; Dewey Decl. ¶¶ 21–28, 71 (ECF No. 11) (recommending that cessation of grazing on "all" fens). This includes the riparian exclosures slated for grazing in 2019. Plf. Ex. 1 at 2-17 (ECF No. 9-1 at 4) (map showing exclosures are located within the Chemult Pasture).

Indeed, Plaintiffs' expert—Dr. Dewey who served for more than twenty years as a Forest Service Botanist where he surveyed rare plants such as those found in fens throughout the Pacific Northwest—explained that the Chemult fen cluster spans approximately 112 square miles and includes meadows within Round, Dry, and Cannon meadows. Dewey Decl. ¶¶ 4–7, 25, 26; *see also* Second Declaration of Dr. Richard M. Dewey ("Second Dewey Decl.") ¶ 3 (confirming his first declaration encompasses fens in these exclosures). He became "familiar with many, if not all of the fens" on the allotment while spending more than 142 days in the field over a decade while monitoring and studying these fens before and after his retirement. Dewey Decl. ¶¶ 8, 11. Relying on his observations of the allotment, Dr. Dewey illustrates the devastating damage that cattle cause to fens and the rare plants within, which includes visible problems like bare ground and trampled vegetation and deeper ecological harm like water quality and quantity issues. Dewey Decl. ¶¶ 51–64. For these reasons, he concluded that "cattle grazing is far and away the

single largest driver of management-based fen ecosystem degradation that I have witnessed" and as such is an "indefensible resource management practice on public lands." *Id*. ¶ 51.

Defendants counter Dr. Dewey's extensive opinions by claiming that he does "not ever indicate his view that such effects are likely to be irreparable, particularly if limited to a single season of use." Def. Br. at 12 (citing Dewey Decl. ¶¶ 65-67, 71). Defendants appear not to have read the paragraphs in his declaration they cite, which explain that fens recover from damage due to cattle only across "decades, if ever." Dewey Decl. ¶¶ 66, 71; *see also* Second Dewey Decl. ¶¶ 5-8 (confirming his opinion). It makes sense that damage may be permanent or take decades to repair, as fen complexes are highly unique resources that took millennia to develop and evolve. Plf. Ex. 2 ¶¶ 37, 50. This type of harm is irreparable because it is long-lasting and irreversible to the Plaintiffs' members who want to use and enjoy this public land now—not decades after recovery may occur. *Id*. ¶ 55; 67-70; Goodwin Decl. ¶¶ 3, 7–10, 25–26 *See Amoco*, 480 U.S. at 545 (1987) (explaining that environmental injury "is often permanent or at least of long duration, *i.e*., irreparable"); *Earth Island Inst. v. Quinn*, No. 2:14-CV-01723-GEB-EF, 2014 WL 3842912, at *6 (E.D. Cal. July 31, 2014) (acknowledging irreparable harm from logging when Plaintiffs' ability to use and enjoy the area "in an unlogged/natural state would be lost for generations").

Dr. Dewey also opined that long-lasting harm occurs "quickly from just a few cattle" or "even a single cow-calf pair…." Dewey Decl. ¶¶ 65–71. His opinion about the likelihood of such harm within the exclosures set for grazing this summer is the most definitive. He explains that grazing in fens, that were protected from grazing for years—including the fens in Round Meadow, Dry Meadow, and Cannon Well—will "almost certainly lead to increased damage…." *Id*. ¶ 67; *see* Ex. 19 at 9-10 (explaining those exclosures have not been grazed in years). He also details his knowledge and unique attributes of these exclosures. Second Dewey Decl. ¶¶ 9–12.

Defendants also ignore the revealing history of grazing within the four exclosures authorized under the 2019 grazing plan: Round Meadow, Dry Meadow, Cannon Well, and Rider's Camp. Ms. Goodwin—who helped build fences to protect sensitive areas on the allotment as a Forest Service employee—illustrates how these locations have been excluded from grazing for several years or even decades because grazing there has damaged sensitive areas. Second Goodwin Decl. ¶¶ 9–14 (including photos of past damage and explaining how damage persists); *see also* Plf. Ex. 2 ¶ 52.d.iii (explaining that Round and Dry Meadows are "extremely unique"). When deciding to re-open these areas to grazing, the agency admitted that doing so would make them susceptible to damage. *See, e.g.*, Plf. Ex. 4 at 3-49, 3-67 (ECF No. 9-4 at 150) (reintroducing grazing has the potential to decrease fen condition, while Squirrel Camp, Dry Meadow, and possibly Cannon Well "have a particularly high potential of being adversely affected"); *see* Plf. Ex. 19 at 7 (ECF No. 9-19 at 8); Plf. Ex. 22 at 3 (ECF No. 9-22 at 4).

But the agency decided to do it anyway, explaining cattle would disperse and graze less throughout a much larger area across the Chemult and North Sheep Pastures, and fences would be built around sensitive springs and fens. *E.g.*, Plf. Ex. 4 at 2-12, 3-139; Plf. Ex. 19 at 9-10. However, the 2019 grazing plan undermines the dispersion theory by penning cattle within four small riparian exclosures for up to ten weeks or so, and does not require fences to be built inside of these exclosures. *See* McKay Decl. Ex. D at 1; Ex. 22 at 3 (ECF No. 9-22 at 4) (showing exclosures range from 18 to 392 acres of the 62,862 acres on the Chemult Pasture). This will allow dozens of pairs of cattle to concentrate in the wet fens and water sources where they will damage resources quickly. Second Goodwin Decl. ¶¶ 14-15; Second Dewey Decl. ¶¶ 5-8; *see also* Plf. Ex. 11 at 11 (explaining that fens and meadows "produce the vast majority of palatable forage" on the Chemult pasture and thus "experience a disproportionate level of grazing").

Contrary to Defendants' assertion, the adaptive management plan will do nothing to protect fens from irreparable harm in 2019, as it requires a year of violations for any to begin, and three years of violations before cattle are excluded from a fen. *See* Def. Br. at 12–13 (detailing plan); Second Dewey Decl. ¶ 8 (refuting efficacy of adaptive management); *see also* Second Goodwin Decl. ¶¶ 21-23 (detailing concerns about monitoring and adaptive management plans).

Defendants rely heavily on a short declaration submitted by Joseph Washington, who has substantially less academic and professional experience than Dr. Dewey. Def. Br. at 13–14; *compare* Declaration of Joseph P. Washington ("Washington Decl.") (ECF No. 21) ¶ 1 (explaining he has worked on the Fremont-Winema National Forest for less than five years, spent thirteen years with the agency in North Dakota, and earned a master's degree) *with* Dewey Decl. ¶¶ 3–4, 8 (explaining he spent more than 20 years with the Forest Service in central Oregon and the Pacific Northwest, studied the fens on the allotment for more than a decade, and earned a Ph.D. in Botany). Dr. Dewey's weightier credentials are particularly salient because Defendants get no deference for their "perspective" about fens. *See* Def. Br. at 13 (relying on the agency's "perspective"); *see also Sierra Forest Legacy v. Sherman*, 646 F.3d at 1186.

Further, Defendants much of the fact that "high-value" fens are not located in the exclosures set for grazing, but Dr. Dewey counters by explaining the unique attributes of the other fens and opining that "all the Antelope Allotment fens have value and a story to tell." Second Dewey Decl. ¶¶ 14–17. Indeed, it is the importance of these fens to Plaintiffs' members, and not the value assigned by the Forest Service's employees, that is relevant to the question of irreparable harm. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (upholding finding of irreparable harm where plaintiff organization asserted that the challenged action would "harm its members' ability to view, experience, and utilize the areas in their

undisturbed state"); *see also Big Country Foods, Inc. v. Board of Educ.*, 868 F.2d 1085, 1088 (9th Cir. 1989) (explaining party must demonstrate threat of irreparable injury "irrespective of the magnitude of the injury"). As Plaintiffs' declarations show, their concerns lie with the fen complex across the allotment, and not just those that are "high-value." Ruprecht Decl. (ECF No. 13) ¶¶ 14–15, 19, 27, 30–31, 37-39, 47 (explaining his interests in and concerns about fens—including Round Meadow and other small fens—due to his visits to the allotment); Goodwin Decl. ¶¶ 14, 16, 19, 21, 25-26 (mentioning Dry Meadow and other fens that were closed to grazing among her interests and concerns); Second Goodwin Decl. ¶¶ 9-15.

C. Trailing cattle across the allotment is likely to cause irreparable harm to other fens spread across the Chemult Pasture.

Defendants blindly assume that cattle will behave just as required while they trail across the Chemult Pasture on roads. *See* McKay Decl. Ex. D at 1 (allowing cattle to trail on roads). But Ms. Simpson's rebuttal declaration includes photos of roads on the Chemult Pasture that illustrate how narrow and windy they are in places, and explains how difficult it will be to keep cattle on the roads during trailing. Second Simpson Decl. ¶¶ 4–12. Even the long-term permittee admitted that it is essentially impossible to control and herd cattle on the allotment, as cattle escape from riders and disappear into the dense lodgepole pine. Plf. Ex. 31 (ECF No. 9-31 at 4). Thus, cattle are likely to stray in other areas on the Chemult Pasture while trailing on roads this summer. Such straying is also likely while cattle graze in exclosures due to poor fence conditions. Second Goodwin Decl. ¶¶ 3-8; Second Simpson Decl. ¶¶ 19-24; Plf. Ex. 7 at 25–26, 28, 37 (ECF No. 9-7) (noting trespass *into* exclosures, evincing problems with fences there).

Once cattle escape, the permittee and Ms. Simpson confirmed that cattle will seek out water sources throughout the allotment. Plf. Ex. 31 (ECF No. 9-31 at 5); Second Simpson Decl. ¶ 16. Indeed, as explained in more detail above, cattle have a long history of escaping and

grazing in water sources like Jack Creek that are not authorized for grazing. But fens also present an attractive water source where cattle often congregate. Simpson Decl. Ex. A ¶¶ 40–44, 46. Thus, it is likely that cattle will seek out fens that are scattered throughout the Chemult and North Sheep pasture that are located outside of exclosures. Second Dewey Decl ¶ 13; Second Goodwin Decl. ¶¶ 16-20; Plf. Ex. 12 at 103 (ECF No. 9-12 at 104); *see also* Plf. Ex. 8 at 02333–02334 (ECF No. 9-8 at 17–18) (map showing fen cluster on the Chemult District, which is concentrated on the allotment). Once there, as explained above, even just a few cattle can quickly cause damage that will be long-lasting and thus irreparable. Dewey Decl. ¶¶ 65–71; Second Dewey Decl. ¶¶ 5-8, 12, 16-17. For these reasons, cattle grazing in 2019 is also likely to irreparable harm fens and sensitive plants on the Chemult and North Sheep pastures outside of the four riparian exclosures.

IV. Defendants Did Not and Cannot Show that the Equities and Public Interest Factors Tip in Favor of Private Livestock Grazing.

The Court must also balance the equities between parties and consider the public interest when deciding whether to issue an injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Here, Plaintiffs have shown that the balance of equities and the public interest decidedly tip in favor of granting an injunction, while Defendants have presented no evidence to the contrary. *Compare* Plf. Br. at 34–35 *with* Def. Br. at 16-18.

Defendant wrongfully states that the 2019 grazing plan alleviates all potential harm under the ESA, but they do not dispute that the equities and public interest factors always tip in favor of ESA-listed species. *See Nat'l. Wildlife Fed'n*, 886 F.3d at 817. Thus, if the court finds that Plaintiffs are likely to succeed on the merits of their ESA claim, then the balancing of equities and public interest factors tip in favor of the species. *Id.*; *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (stating that the "[t]he plain intent of Congress in enacting this statute was

to halt and reverse the trend toward species extinction, whatever the cost."). Defendant mischaracterizes this presumption as Plaintiffs' "naked assertion," rather than the clear Ninth Circuit precedent that it is. Def. Br. at 16.

Regardless, the equities and public interest factors still tip in favor of the Plaintiffs, so an injunction is also warranted if the Court finds Plaintiffs are likely to succeed on the merits of their NFMA and NEPA claims as well. The Ninth Circuit recognizes the "public interest in preserving nature and avoiding irreparable environmental injury." *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008). Contrary to Defendants' view, this balance does not require Plaintiffs to make a heavy showing, because "when environmental injury is 'sufficiently likely, [] the balance of harms will usually favor the issuance of an injunction to protect the environment.'" *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988) (quoting *Amoco*, 480 U.S. at 545 (1987)); *see also* Def. Br. at 18.

Here, the equities favor preventing irreparable harm to the Oregon spotted frogs, fens, and other sensitive species rather than assisting one private company. As explained in detail above, the fens and sensitive plant communities located on the Chemult Pasture are a unique and irreplaceable part of their ecosystem. *See also* Dewey Decl. ¶¶ 8, 12, 24–30. They represent "a remarkable, regionally one-of-a-kind collective that owes its existence to a rare, fortuitous coincidence of gentle local topography and a momentous volcanic eruption 7700 years ago." Second Dewey Decl. ¶ 14. The Antelope Allotment contains the highest concentration of fens found on National Forests in the Pacific Northwest and supports "a disproportionately large fraction of rare and uncommon species" across Oregon and Washington. Dewey Decl. ¶¶ 27–28, 30; Plf. Ex. 2 ¶¶ 50, 67–70. Protecting such exceptional federal public lands treasured by so many conservation groups, members of the public, and scientists is certainly in the public

interest. *All. for the Wild Rockies*, 632 F.3d at 1138 (noting the "well-established public interest in preserving nature and avoiding irreparable environmental injury") (quotations removed); *see generally* Declarations of Ruprecht, Goodwin, Richter, Simpson, Dewey and Plf. Ex. 2.

Defendants, on the other hand, present no evidence of potential harm resulting from an injunction that would tip the balance in their favor or be against the public interest. Defendants' arguments to the contrary are primarily based on Judge Panner's opinion in prior litigation over the Chemult Pasture, *Concerned Friends of the Winema v. U.S. Forest Serv.,* (No. 1:14-CV-737-CL, 2014 WL 2611344, at *1 (D. Or. June 11, 2014), in which Plaintiffs subsequently prevailed on the merits and demonstrated that an injunction was warranted. *See Concerned Friends of the Winema*, No. 14-CV-737-CL, 2016 WL 10637010, at *3. Judge Panner's denial of a preliminary injunction is readily distinguishable for two reasons.

First, since Judge Panner ruled in 2014, the Oregon spotted frog further declined and was listed as threatened under the ESA later that year. *See* Plf. Ex. 6 (listing occurred in August 2014). Plaintiffs' motion now includes an ESA claim, under which the equities always tip in favor of protecting the species. *Nat'l Wildlife Fed'n v. NMFS*, 886 F.3d at 817 (explaining the balance of the equities and the public interest always tip sharply in favor of a listed species). Further, the agency has developed a new grazing strategy that presents substantially stronger claims on the merits that challenge new agency decisions.

Second, Judge Panner found the requested injunction was not in the public interest based on Defendants' economic arguments and actual evidence from the permittee. *Concerned Friends of the Winema*, 1:14-CV-737-CL, 2014 WL 2611344, at *6; *id*. ECF Nos. 26, 30, (D. Or. May 27, 2014). But in this litigation, the agency merely asks this Court to assume that "prohibiting grazing this season would undoubtedly harm [the permittee]", while openly

acknowledging that there is no evidence to support that assertion. Def. Br. at 18 (quoting *Concerned Friends of the Winema v. U.S. Forest Serv.*, No. 1:14-CV-737-CL, 2014 WL 2611344, at *6). Defendants and the permittee offer no declarations demonstrating or even articulating what the likely harm to the public or the permittee may be. This is a remarkable omission. *Cf., Cascadia Wildlands v. Carlton*, 341 F. Supp. 3d 1195, 1204–05 (D. Or. 2018) (declining to enjoin the Forest Service despite a likelihood of success on the merits and irreparable harm due to declarations evincing "substantial public and private vested interests in the form of signed contracts, jobs, and tax revenue, among other things, that [would] be negatively and definitely impacted if the preliminary injunction issue[d]"); *see also Oregon v. Azar*, 6:19-CV-00317-MC, 2019 WL 1897475, at *16 (D. Or. Apr. 29, 2019) (granting injunction where government did not rebut plaintiffs' extensive evidence regarding the equities). As a result, the Court has no basis on which to find that the harm to the defendant outweighs the harm to Plaintiffs and the public interest. *See, e.g. Herrick v. Potandon Produce, LLC*, No. 4:15-CV-00533-TS, 2016 WL 778355, at *4 (D. Idaho Feb. 26, 2016) (noting that defendant produced no evidence of any harm that would tip the balance in their favor).

If the Court maintains the status quo by keeping the Chemult Pasture closed, it is unclear what harm would flow. The Forest Service—an agency accountable to the public—will benefit from no grazing this summer by preserving its limited resources. And the sole permittee will not be deprived of all of their grazing rights because Plaintiffs have sought a narrowly tailored injunction that would allow grazing on the east side pastures. *See Or. Natural Desert Ass'n v. Tidwell,* No. 03-381-HA, 2010 WL 5464269, at *5 (D. Or. Dec. 30, 2010) (granting injunction where it would "not totally deprive permittees of their grazing rights"). Additionally, the permittee has been unable to graze the Chemult Pasture for the past two seasons, so keeping

cattle off of the allotment represents the status quo. Moreover, the long-term permittee is now dissolving, and the new permittee cannot claim the same expectations or long-term reliance on use of these grazing pastures. McKay Decl. ¶ 6. Further, given that the new grazing scheme is economically untenable and exceeds the resources of the agency and the permittee, it is highly speculative how not grazing the Chemult Pasture will actually harm the permittee. *See* Plf. Ex. 4 at 3-115, 3-119 to 2-120; Plf. Ex. 31 (ECF No. 9-31 at 4).

Even if the permittee had submitted declarations attesting to some demonstrable economic harm, that is often not enough to outweigh such harm to the environment and the public interest in cases like these. *See W. Watersheds Project*, No. 2:19-cv-0750-SI, ECF No. 20 at 34-35 (finding the balance of the equities tipped in Plaintiffs' favor to prevent cattle from grazing even with "monetary harm to [the permittee] of between $16,000 and possibly more than $100,000"). Any speculative and unsubstantiated economic harms fall far short of providing "a significant counterweight" to the harm that will flow to the public and the environment if the status quo is not maintained. *See Or. Natural Desert Ass'n v. Tidwell*, No. 03-381-HA, 2010 WL 5464269, at *5 (D. Or. Dec. 30, 2010) (citation omitted).

In sum, the likely irreparable environmental harm and the public interest in preserving the Jack Creek frog population, the fens, and sensitive plants, outweighs any speculative and unsupported harm that may occur if an injunction is issued. Thus, the equities and public interest tip strongly in favor of granting a preliminary injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court grant their motion for preliminary injunction and order their requested relief.

Dated: June 7, 2019

Respectfully submitted,

s/Elizabeth H. Potter
Lauren M. Rule (OSB #015174)
Elizabeth H. Potter (OSB #105482)
ADVOCATES FOR THE WEST
3701 SE Milwaukie Ave. Suite B
Portland, OR 97202
(503) 914-6388
lrule@advocateswest.org
epotter@advocateswest.org

Attorneys for Plaintiffs