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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ARIZONA
12 TUCSON DIVISION
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15 WILDEARTH GUARDIANS,

16 Plaintiff,

17 vs.

18 UNITED STATES FISH AND WILDLIFE
19 SERVICE and UNITED STATES FOREST
20 SERVICE,

21 Defendants.
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No. 13-151-RCC

**PLAINTIFF'S SURREPLY
IN OPPOSITION TO
FEDERAL DEFENDANTS'
RULE 59 MOTION**

1 **I. The Rule 59 motion impermissibly rehashes old arguments**

2 The Federal Defendants' pending Rule 59 motion has two objectives: (1) to obtain
3 a reversal of the Court's September 12, 2019 decision on the merits and (2) to evade the
4 imposition of injunctive relief for their violations of the mandatory requirements of the
5 Endangered Species Act ("ESA"). Insofar as the merits aspect of the motion is
6 concerned, the motion should be denied.

7 A motion for reconsideration should not be used to ask a court to rethink
8 what the Court has already thought through – rightly or wrongly.
9 *Arguments that a court was in error on the issues it considered should be*
10 *directed to the court of appeals.*

11 *Defenders of Wildlife v. Ballard*, 73 F.Supp.2d 1094, 1115 (D.Ariz. 1999) (emphasis
12 added). The Local Rules of this District Court are absolutely clear on this issue, and
13 affirmatively and expressly prohibit a party from rehashing arguments that were
14 previously made to the Court, considered by the Court, and rejected by the Court:

15 The Court will ordinarily deny a motion for reconsideration of an Order
16 absent a showing of manifest error or a showing of new facts or legal
17 authority that could not have been brought to its attention earlier with
18 reasonable diligence. Any such motion shall point out with specificity the
19 matters that the movant believes were overlooked or misapprehended by the
20 Court, any new matters being brought to the Court's attention for the first
21 time and the reasons they were not presented earlier, and any specific
22 modifications being sought in the Court's Order. *No motion for*
23 *reconsideration of an Order may repeat any oral or written argument made*
24 *by the movant in support of or in opposition to the motion that resulted in*
25 *the Order. Failure to comply with this subsection may be grounds for*
26 *denial of the motion.*

27 Local Rule of Civil Procedure 7.2(g)(1) (emphasis added).

28 The merits arguments in the Federal Defendants' Rule 59 motion run afoul of this
clear prohibition as they are nothing more than a "second stab effort" to get this Court to
"rethink" issues that it considered and rejected in its resolution of the parties' cross-
motions for summary judgment. The fact that Federal Defendants' summary judgment
and Rule 59 arguments are identical cannot be disputed. In their summary judgment
motion, the Federal Defendants argued as follows:

[C]ontrary to Plaintiff's implication, the agencies are able to meet their
Section 7 obligations to protect and conserve the owl without the population
data generated by range-wide population monitoring. This type of

1 monitoring, as explained in the 1995 recovery plan, has to be implemented
2 for a period of *at least* 15 years to be able to generate any meaningful data
3 on population trends. Therefore, taking Plaintiff's argument to its logical
4 extreme would mean that, even if the 1995 population monitoring protocol
5 were practical and implemented, USFS still could not meeting its Section 7
6 obligations with respect to the owl for 15 years. That is simply not the case.
7 Rather, this information's main purpose is for delisting, not USFS' Section
8 7 obligations on site-specific projects. USFS meets its Section 7 obligations
9 by not implementing an even-age silviculture regime and by designing
management projects, in consultation with FWS, to minimize risk of
high-severity, landscape-altering wildfire. USFS further meets its Section 7
obligations to protect the owl by conducting pre- and post-treatment
monitoring for these types of projects to ensure the desired results. If, after
this type of monitoring, it is determined that a particular treatment did not
achieve its goal or is found to have some adverse effect on the owl, USFS,
in consultation with FWS, can and does change its approach to abate or
minimize its owl impacts. Plaintiff's argument is without merit.

10 ECF Doc. No. 52-1 at pp. 17-18 (citations omitted). These are the precise arguments
11 raised in the Rule 59 motion, *see for example* Federal Defendants' Rule 59 Reply
12 Memorandum at pp. 6-8, and it is beyond dispute that the Court apprehended and
13 considered the arguments before it ruled in Plaintiff's favor on this narrow issue.¹

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15 ¹ In its summary of Federal Defendants' arguments as to why the absence of
16 a population monitoring requirement is not a fatal flaw to the BiOp, the Court states:

17 Defendants retort that Plaintiff's argument mischaracterizes the 1996
18 S&Gs, is not supported by the administrative record, and baselessly
19 concludes that the FWS' "no jeopardy" conclusions were predicated on an
20 assurance that USFS had or would engage in range-wide population trend
21 monitoring. First, according to Defendants, the 1995 RP is merely
22 advisory. Next, Defendants contend that range-wide monitoring of the
23 MSO population was not required for compliance with the adaptive
24 management plan. This is purportedly because range-wide population data
25 is not a helpful way to evaluate the local effect of USFS' actions on MSOs.
26 Moreover, Defendants say, USFS cannot be held accountable for the failure
27 to monitor, because it was only required to collaborate about possible
28 monitoring measures. Furthermore, FWS states that range-wide monitoring
is used to determine whether a species should be delisted, not to determine
jeopardy. To evaluate jeopardy, FWS only needed to analyze the extent to
which management actions were in line with the Forest Plans' protective
measures. These protective measures were aimed at resolving the problems
which led to the MSOs' listing: the threat of severe wildfire and harmful
timber management. USFS asserts that its actions comply with Section 7

1 As set out above, the Local Rules of this District Court expressly prohibit a party
2 from bringing a Rule 59 motion in order to “repeat any . . . argument made by the movant
3 in support of or in opposition to the motion that resulted in the Order.” The Federal
4 Defendants’ Rule 59 motion does exactly what the Local Rule prohibits. The Federal
5 Defendants believe that this Court erred in its legal analysis on the long-term range-wide
6 population monitoring issue, but a Rule 59 motion is decidedly *not* the place to recycle
7 rejected arguments; they should proceed to the Court of Appeals to seek redress for the
8 legal error they perceive.

9 **II. The Federal Defendants have not shown “manifest injustice”**

10 The Federal Defendants argue that this Court’s decision is “manifestly unjust”
11 because it provides “no way . . . to correct the alleged error . . . until at least 2023.”
12 Response Memorandum at p. 4. This is absurd, and displays nothing more than a studied
13 ignorance of this Court’s decision and its ramifications. There are *two* ways for the
14 Federal Defendants to correct the error correctly identified by this Court. First, and most
15 easily, the FWS could simply issue BiOps that restore the long-term range-wide
16 population monitoring requirement that existed in the 1996 and 2005 iterations of the
17 BiOps. Such BiOps would presumably pass muster under this Court’s analysis and could
18 be developed and issued with no substantive re-analysis whatsoever. Second, and in the
19 event that the USFS remains defiant about its refusal to commit to the funding and
20 implementation of a long-term range-wide population monitoring program for the MSO,
21 the FWS could issue BiOps that assess the effects of national forest management *without*
22 the long-term range wide population monitoring contemplated by the Revised Recovery
23 Plan. To “correct” the error in the BiOps correctly discerned by this Court, the BiOps

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25 requirements because they (1) implement monitoring before and after
26 agency management projects; (2) conduct uneven-age timber management;
27 (3) form management projects that reduce landscape-altering wildfire; and
28 (4) determine incidental take at site-specific projects. *WildEarth Guardians*
v. U.S. Fish and Wildlife Service (“*WEG 2019*”), 2019 WL 4345333 at *8
(D.Ariz. 2019) (citations omitted).

1 need only address the long-term range-wide population monitoring issue expressly and
2 specifically – by either requiring it, or by excusing it based upon some explanation which
3 does not currently exist in the record for this matter. Either way, the superceding BiOps
4 issued upon remand could be produced expeditiously, and any injunctive relief granted by
5 this Court during the remand period would dissolve upon issuance.

6 **III. Repudiation of adaptive management as a post hoc rationalization**

7 At page 7 of their Reply Memorandum, the Federal Defendants make an argument
8 which is tantamount to a full-throated repudiation of the adaptive management program
9 for the MSO. They irrationally state that “it is unclear” how the implementation of the
10 long-term range-wide population monitoring contemplated by the Recovery Plan is
11 helpful to jeopardy avoidance, and that Plaintiff “offers no suggestions.” No suggestions
12 are needed from the Plaintiff; the Federal Defendants themselves have already made this
13 clear. A 2012 article that was authored by the USFS’s lead MSO biologist and the leader
14 of the MSO Recovery Team explains as follows:

15 Monitoring is critically important to the adaptive management process. The
16 Forest Service has long espoused adaptive management as a cornerstone of
17 its management efforts. *As management actions are applied, information*
18 *that details the efficacy of those actions is critical to future efforts. If the*
actions meet stated objectives, they should continue. If not, perhaps they
should be revised and different approaches are warranted.

19 The recovery plan was a combination of prescriptive site-specific guidance
20 and descriptive desired conditions to strive for on the landscape. *The*
underlying philosophy of the recovery team was that the plan should
emphasize adaptive management, whereby recommendations would be
adjusted as information was acquired to evaluate their effectiveness.

21 AR-FS 9370-72 (emphasis added) *see also* AR-FS 9372 (stating that “[d]epending on the
22 outcome of [monitoring], treatments could continue, discontinue, or be adjusted”), AR-FS
23 9542 (the Revised Recovery Plan states that “[m]onitoring population trends provides a
24 real-time assessment of the owl’s status”).

25 The linkage between the results of a rigorous long-term range-wide population
26 monitoring scheme and *actual* on-the-ground forest treatments was also made pellucidly
27 clear in the 1995 Recovery Plan which set up the adaptive management scheme:
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1 The recommendations contained herein allow most land-management
2 activities to occur provided that the effects of those activities are evaluated
3 during the recovery period. In addition, the Recovery Plan recommends that
4 scientific monitoring of the Mexican spotted owl population and its habitat
5 should accompany those activities to assess their impact on spotted owl
6 populations. *If warranted, these activities can be altered or eliminated if
7 monitoring or research indicated a significant risk to the spotted owl
8 population.*

9 AR-FS 65 (emphasis added). The Federal Defendants' disavowal of the crucial role that
10 population monitoring plays in the development of appropriate forest treatments is
11 irrational and does nothing so much as reinforce and corroborate what this Court has
12 previously found: that there is a wholesale lack of accountability in the Federal
13 Defendants' approach to MSO survival and recovery, and that Federal Defendants are
14 impermissibly shirking their ESA-imposed obligations to the MSO. *WEG 2019* at *11.

15 **IV. The Federal Defendants' post hoc rationalization for no monitoring**

16 Presumably emboldened by this Court's ruling on the BiOps' conclusions with
17 respect to the MSO's population trend, *WEG 2019* at *10, the Federal Defendants now
18 take their population argument up an irrational notch. In their Rule 59 reply
19 memorandum at pp. 3 and 7, the Federal Defendants suggest that the increase in the
20 number of known MSO sites that is attributed to an expanded survey effort somehow
21 justifies the BiOps' no jeopardy conclusions. At the time that the 2012 BiOps were
22 issued, even the USFS admitted that it was "not possible to infer any trends related to the
23 population of owls on" national forest lands in Arizona and New Mexico. AR-FS 4910,
24 5107, 5168, 5219, 5241. The notion that the FWS is in any way complacent about the
25 current population trend of the MSO finds no support whatsoever in the administrative
26 record in this case. The concluding paragraph of the BiOps' no jeopardy findings state
27 that "some level of range-wide MSO population monitoring is needed in order for us to
28 assess the status of the MSO," AR-FWS 7597, and – as this Court is fully aware – the
FWS has determined that long-term range-wide population monitoring is the *sine qua non*
of the adaptive management approach to insure the MSO's survival and recovery.

V. The Federal Defendants mischaracterize Plaintiff's argument

1 Federal Defendants are jousting at windmills in their Rule 59 reply memorandum
2 when they argue that “Plaintiff argues that FWS is required to force USFS into
3 implementing the owl’s recovery plan . . . through binding terms and conditions.” Reply
4 Memorandum at pp. 9-10. Of course, Plaintiff made no such argument in its Rule 59
5 response. What Plaintiff *did* argue is that the *recommendations* of a Recovery Plan and
6 the *requirements* incorporated into a BiOp’s Incidental Take Statement have
7 extraordinarily different legal weight: the inclusion of a long-term range-wide population
8 monitoring requirement in the BiOp would have enforceable and coercive effect on the
9 USFS. Response Memorandum at pp. 4-5. Indeed, it is for precisely this reasons that the
10 USFS balked at the FWS’s proposal to include a population monitoring requirement in
11 the 2012 BiOps. This Court’s September 12, 2019 decision amply demonstrates its
12 understanding that the adaptive management program developed by the FWS for the
13 MSO relies on crucial population trend data for the species, and that the excision of a
14 population monitoring requirement from the 2012 BiOps was a significant step in the
15 evolution of the FWS’s BiOps for the MSOs. *WEG 2019* at *5, *12.

16 **VI. Irreparable injury in this matter supports the issuance of an injunction**

17 Plaintiff can demonstrate the likelihood of three types of irreparable harm in this
18 case, each of which in and of itself justifies an injunction against forest treatments in
19 MSO Recovery Habitat (subject to the exceptions previously made by the Court).

20 First, the omission of a long-term range-wide monitoring requirement from the
21 2012 BiOps constitutes a fatal blow to the MSO adaptive management program which,
22 thereby, results in irreparable injury to the MSO.

23 Second, the excision of the population monitoring requirement from the current
24 generation of the BiOps results in a situation where the Federal Defendants will not
25 validate and test their assumptions that on-going and future treatments are beneficial –
26 and not adverse – for the MSO. This irreparably injures the Plaintiff’s – and the Plaintiff’s
27 members’ – scientific, recreational, and aesthetic interests. *Alliance for the Wild Rockies*
28 *v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (holding that such injuries “satisf[y] the

1 ‘likelihood of irreparable injury’ requirement articulated in *Winter*”).

2 Third, and relatedly, there will be irreparable injury to the MSO and its habitat in
3 the absence of an injunction. Even the Federal Defendants admitted in their summary
4 judgment motion that the implementation of forest treatments contemplated by the 2012
5 BiOps will have numerous adverse impacts on MSOs and their habitat. ECF Doc. No.
6 52-1 at 8-11. The Biological Assessment prepared by the USFS to initiate the Section 7
7 consultation that culminated with the issuance of the 2012 BiOps makes the same
8 concession. *See for example* AR-FS 4831-32.

9 **VII. Conclusion**

10 At bottom, the Federal Defendants’ Rule 59 motion – insofar as the merits are
11 concerned – is based on (1) recycled arguments that have been made, considered, and
12 rejected by this Court and (2) post hoc rationalizations that attempt to obscure the fact that
13 the 2012 BiOps entirely fail to address how the adaptive management approach that the
14 Federal Defendants ostensibly implement for MSO conservation can conceivably function
15 in the absence of long-term range-wide population monitoring. As to the rehashing of old
16 arguments, such arguments are impermissible in the context of a Rule 59 motion and
17 cannot provide a basis for relief. As to the post hoc rationalizations concocted by the
18 Federal Defendants and their counsel for purposes of this litigation, “[i]t is
19 well-established that an agency’s action must be upheld, if at all, on the basis articulated
20 by the agency itself, not post-hoc rationalizations.” *Greater Yellowstone Coalition v.*
21 *Servheen*, 665 F.3d 1015, 1027 n. 4 (9th Cir. 2011) (citations omitted).

22 Insofar as the injunction is concerned, it is clear that Plaintiff has demonstrated the
23 requisite degree of irreparable injury – especially in light of the Ninth Circuit’s
24 admonition in *Cottonwood Environmental Law Center v. USFS*, 789 F.3d 1075, 1091-92
25 (9th Cir. 2015), that the required showing “should not be onerous” in light of the purposes
26 of the ESA. This Court should enjoin forest treatments in MSO Recovery Habitat, and
27 Plaintiff stands ready to meet and confer with the Federal Defendants to the extent that
28 they believe that further narrowing of the injunction is necessary and appropriate.

