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15 **UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**

17 WILDEARTH GUARDIANS,

18 Plaintiff,

19 v.

20 UNITED STATES FISH AND
21 WILDLIFE SERVICE and UNITED
22 STATES FOREST SERVICE,

23 Defendants.

24 CASE NO. 4:13-cv-151-RCC

25 **STIPULATION OF VOLUNTARY**
26 **DISMISSAL**

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1 WHEREAS, in this case, Plaintiff brought various claims under the Endangered
2 Species Act (“ESA”), 16 U.S.C. § 1533 *et seq.*, challenging Defendants’ conservation
3 strategy concerning the Mexican spotted owl (“owl”) in the 11 National Forests
4 comprising Forest Service Southwestern Region (Region 3). More specifically, Plaintiff
5 alleged that the decisions made in FWS’s programmatic 2012 Biological Opinions
6 (“BiOps”) for the 11 National Forests were arbitrary and capricious and that the Forest
7 Service was not complying with either its substantive or its procedural duties under the
8 ESA. ECF No. 10.

9 WHEREAS, Defendants disputed those claims and the Parties briefed summary
10 judgment. ECF Nos. 50-62.

11 WHEREAS, on September 12, 2019, the Court granted in part and denied in part
12 Plaintiff’s motion for summary judgment. ECF No. 89. The Court held that FWS failed to
13 adequately assess the owl’s recovery in its programmatic jeopardy analyses and that the
14 2012 programmatic “BiOps simply do not provide a route to recovery or way to
15 accurately assess it. The no-jeopardy determination is unsupported, arbitrary, and
16 capricious because the finding failed to account for recovery” of the owl. ECF No. 89 at
17 24. The Court also found that the USFS violated its substantive obligations under the
18 Section 7 (a)(2) ESA by relying on those BiOps. *Id.* at 36-37. The Court then granted an
19 injunction on all Forest Service timber management actions on the six National Forests
20 that operated under the 2012 programmatic BiOps – i.e., the Lincoln, Santa Fe, Cibola,
21 Carson, Tonto, and Gila National Forests – and ordered Defendants to reinstitute Section 7
22 formal consultation under the ESA. ECF No. 89 at 38; ECF No. 98.

23 WHEREAS, pursuant to the Court’s order, Defendants reinstituted formal
24 consultation on the Forest Plans for the Lincoln, Santa Fe, Cibola, Carson, Tonto, and
25 Gila National Forests.

26 WHEREAS, in December of 2019 Plaintiff sent 60-day notices of intent to sue
27 under the Endangered Species Act to Defendants regarding the Forest Plan BiOps for the
28 Apache-Sitgreaves, Cibola, Coconino, Coronado, Kaibab, and Prescott National Forests.

1 WHEREAS, the Parties subsequently agreed to narrow the scope of the Court’s
2 injunction. ECF Nos. 99-102.

3 WHEREAS, Defendants filed a motion under Federal Rule of Civil Procedure
4 59(e) asking the Court to alter its summary judgment order. ECF No. 104. That motion is
5 pending.

6 WHEREAS, Defendants have completed reinitiated Section 7 formal consultation
7 on the Forest Plans for the Lincoln, Santa Fe, Cibola, Carson, Tonto, and Gila National
8 Forests and issued new BiOps for each of those Forest Plans, which supersede the BiOps
9 at issue in this lawsuit.

10 WHEREAS, Defendants filed motions to dissolve the Court’s injunction, ECF
11 Nos. 112, 126, and Plaintiff opposed those motions. Those motions are pending.

12 WHEREAS, in order to resolve this lawsuit, the parties, through their authorized
13 representatives, and without any admission of fact or law with respect to Plaintiff’s
14 claims, have reached an alternative arrangement to resolve the claims raised in Plaintiff’s
15 lawsuit. *See* Attachment A hereto (October 26, 2020 response to WildEarth Guardians’
16 December 2019 60 day notices of intent to sue).

17 NOW, THEREFORE, THE PARTIES STIPULATE AS FOLLOWS:

- 18 1. All counts in the above-captioned lawsuit shall be, and upon entry of the order
19 below, dismissed with prejudice;
- 20 2. The current injunction is dissolved in its entirety;
- 21 3. Defendants withdraw all their pending motions; and
- 22 4. Defendants agree that Plaintiff is entitled to reasonable attorneys’ fees and
23 costs pursuant to the fee shifting provisions of the Equal Access to Justice Act,
24 28 U.S.C. § 2412(d) and/or the ESA, 16 U.S.C. § 1540(g)(4). The Parties will
25 attempt to resolve the appropriate amount of fees and costs within 120 days of
26 entry of this stipulation. The Parties further agree that this Court will retain
27 jurisdiction to decide any dispute regarding attorneys' fees and costs. *See*
28 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994).

1 It is so stipulated.

2

3 Dated: October 27, 2020

Respectfully Submitted,

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/s/ Steven Sugarman

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STEVEN SUGARMAN

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Steven Sugarman

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/s/ Rickey D. Turner, Jr.

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

WILDEARTH GUARDIANS,

Plaintiff,

v.

UNITED STATES FISH AND
WILDLIFE SERVICE and UNITED
STATES FOREST SERVICE,

Defendants.

CASE NO. 4:13-cv-151-RCC

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Rickey D. Turner, Jr.
RICKEY D. TURNER, JR.



United States
Department of
Agriculture

Forest
Service

Southwestern Region
Regional Office

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Albuquerque, NM 87102
505-842-3292
Fax: 505-842-3800

File Code: 1570; 2670
Date: October 26, 2020

John Horning
Executive Director
WildEarth Guardians
301 North Guadalupe Street
Santa Fe, NM 87508

Dear Mr. Horning,

On December 24, 2019, WildEarth Guardians sent six separate Notices of Intent (“NOI”) to sue for alleged violations of the Endangered Species Act to the U.S. Forest Service (“Forest Service”), the U.S. Department of Interior, and the U.S. Fish & Wildlife Service (“FWS”). These NOIs generally raise concerns regarding the effects from the ongoing implementation of the forest plans for six national forests on the conservation and recovery of the Mexican spotted owl (“owl”). For five of these forests (the Kaibab, Coconino, Coronado, Prescott, and the Apache-Sitgreaves National Forests), the NOIs address revised forest plans that were adopted in the last six years, along with the associated Biological Opinions (“BiOps”) prepared by the FWS at the time each forest plan was revised. For the Cibola National Forest, which has not yet adopted a revised forest plan, the NOI raises concerns regarding the 1985 Cibola Forest Plan and the 2019 BiOp prepared after the agencies reinitiated consultation. This letter collectively responds to all six NOIs, as well as any similar concerns you might have on other forest plans and BiOps in the region.

The Forest Service and FWS are committed to ensuring the conservation and recovery of the owl. The agencies would also like to avoid litigation on this matter. To that end, both the Forest Service and FWS have already begun taking the following actions, with the intent to continue these efforts into the foreseeable future:

1. **Owl Population Trend Monitoring**: The Forest Service intends to continue monitoring the owl population trend on National Forest System (“NFS”) lands in the Southwestern Region and has secured funding, using current appropriations, to monitor through the year 2025. *See* Recovery Action 7, Mexican Spotted Owl Recovery Plan, First Revision, 2012 (“Recovery Plan”) at p. 77; Recovery Plan at pp. 323-333. The Forest Service has entered into a new agreement with the Bird Conservancy of the Rockies to continue region-wide population trend monitoring through the 2025 field season. The new agreement is consistent with the ongoing population trend monitoring that the Bird Conservancy of the Rockies is currently conducting.
2. **Identify and Protect Owls**: The Forest Service plans to conduct protocol occupancy surveys prior to commencement of ground-disturbing activities within Recovery Habitat using the most current version of the FWS Mexican spotted owl survey protocol in accordance with the current Recovery Plan. *See* Recovery Action 2, Recovery Plan at p. 74; Appendix D, Recovery Plan at pp. 299-322. If surveys detect the owl and the data meets the definition of an owl site (as set forth in the 2012 Recovery Plan, Box C.1, p. 259), managers will designate a Protected Activity Center (“PAC”). The Forest Service will proceed as follows:
 - a. The Forest Service intends to complete protocol surveys for Mexican spotted owls (Recovery Plan, Appendix D) prior to implementation of actions in Recovery Habitat as contemplated by the



Recovery Plan. The goal of surveys is to detect the presence of resident individuals in the project area in order to designate PACs, where applicable, and to minimize harm and harassment to Mexican spotted owl individuals in project areas that reside outside of currently known PACs. The Forest Service will make reasonable efforts to conduct these surveys, but may elect not to conduct such surveys if, for example, it determines that logistical considerations and/or physical circumstances associated with such surveys would pose a risk of harm to the Forest Service's employees and/or contractors. However, if surveys cannot be completed, the Forest Service will assume owl presence within the project area not surveyed, plus a buffer of 0.50 miles, and intends to implement those management constraints and mitigation measures – including but not limited to seasonal restrictions and buffers – that the Recovery Plan recommends be implemented for those areas that are occupied by nesting and roosting owls. See Recovery Plan at pp. 261-63.

3. **Assess the Effects of Mechanical and Prescribed Fire Treatments on the Owl and Its Habitat in PACs Outside of Core Areas:** The Forest Service plans to work in collaboration with FWS to develop and implement rigorous and quality controlled management experiments (as defined on p. 385 and as described in Box C.5, pp. 282-283, Recovery Plan) to determine the effects of (a) mechanical treatments within Recovery Habitat but outside of PAC core areas on owls and owl habitat and (b) prescribed fire treatments within Recovery Habitat on owls and owl habitat. In these management experiment PACs, FWS and Forest Service intend to monitor owls to determine occupancy and monitor key habitat components (i.e., large tree density, snags, logs, etc.) to determine changes pre- and post-treatment. The purpose of these experiments is to establish consistent and up-to-date monitoring and monitoring protocols across multiple owl Ecological Management Units (EMUs) and provide a scientific basis for the modification of forest management treatments based on lessons learned and the best available science. The Forest Service and FWS plan to use information obtained in these management experiments in conjunction with information from the subparagraphs below to ensure that the agencies are assessing the effects of mechanical treatments outside of core areas and prescribed burn treatments to owls and PAC habitat within management experiment areas, and use this information to inform management in Recovery Habitat and PACs outside of the management experiment areas. The Recovery Plan recommends that forest management decisions be made within an adaptive management framework. Recovery Plan at p. 297. Pursuant to the adaptive management framework, the Forest Service and FWS intend to use the monitoring data and the assessment of effects, as well as the best available scientific information, to shape effective forest management recommendations and guidelines that guide and constrain management prescriptions and site-specific decisions in owl habitat. *Id.* The Forest Service and FWS intend to proceed as follows:
- a. **Ongoing projects.** (*see* Phase 1 subsection below for timeframe): These include pre-, during, and post-treatment monitoring of Mexican spotted owls in treatment and reference PACs as described in the 2012 Recovery Plan. The Forest Service and FWS are currently implementing and plan to continue to implement management experiments using this approach on the Flagstaff Watershed Protection Project (FWPP on the Coconino NF, Upper Gila Mountains [UGM] EMU) and Four Forest Restoration Project (4FRI), Phase 1 (Coconino and Kaibab NFs, UGM EMU). *See* 2014 FWS Biological Opinion - Four Forest Restoration Initiative, Phase 1; 2015 FWS Biological Opinion - Flagstaff Watershed Protection Project; *see also* Recovery Action 9, pp. 78-80, 2012 Recovery Plan. The FWPP and 4FRI Phase 1 projects have monitoring plans in place, and the Forest Service and FWS are currently collecting data and will continue to implement these monitoring plans as set out in the decision documents and BiOps for these projects.
 - b. **Future projects.** (*see* Phases 2 and 3 subsections below for more details and timeframe): Examples of potential future project authorizations that may include management experiments include but are not limited to: the Rim Country Forest Restoration Project; and the South Sacramento Restoration Project. The Forest Service and FWS plan to develop and implement future project-specific, comprehensive, and sound monitoring plans and incorporate these plans into the proposed actions and resulting BiOps for suitable projects. Environmental analyses

would incorporate monitoring protocols into the proposed actions to reflect the requirements needed for the management experiments to inform how actions affect the owl occupancy and owl habitat. The BiOps for the future projects that include management experiments will provide the final monitoring plan for each project and require implementation of the final monitoring plan as an essential component of each project.

- c. **Phase 1:** The Forest Service will continue collection of data and associated management experiment implementation in 4FRI Phase 1 and FWPP (both in UGM EMU). The Forest Service and FWS are currently overseeing implementation of treatments and continuing monitoring.
 - d. **Phase 2:** The agencies intend to complete development of monitoring plans for the Puerco Collaborative Forest Landscape Restoration Project (Cibola NF, Colorado Plateau EMU) and Luna Restoration (Gila NF, UGM EMU) projects. FWS has already finalized BiOps for these projects, and monitoring is a requirement included in these BiOps. FWS and the Forest Service are developing the monitoring plans to determine what treatments may or may not occur in PACs prior to any potential treatment, and other monitoring factors related to treatments and the effects on owls. These monitoring plans will take into account the lessons learned from the 4FRI Phase 1 and FWPP management experiments, use best available science, and shall be consistent with the measures discussed in this letter. When completed, FWS intends to append the monitoring plans to the BiOps.
 - e. **Phase 3:** The agencies intend to develop the monitoring plans for the proposed South Sacramento Restoration Project (Lincoln NF, Basin and Range East EMU) and proposed Rim Country (Apache-Sitgreaves NF, Coconino NF, Tonto NF, UGM EMU). FWS and the Forest Service plan to document the commitment and pertinent details for this monitoring in the project specific BiOps and Final NEPA documents. Projects are currently under development with anticipation of decisions in 2021. These monitoring plans will also take into account the lessons learned from the 4FRI Phase 1 and FWPP management experiments, any other applicable projects, and the best available science.
4. **Track Long-term Trends in Mexican spotted owl PAC and Recovery Habitat on NFS Lands of the Southwestern Region and Assure Retention of Adequate Habitat for Recovery:** To better understand broad-scale trends in Mexican spotted owl PAC and Recovery Habitat and to assure retention of adequate Recovery Habitat for recovery of the species, the agencies intend to develop a multi-scale model of Mexican spotted owl Recovery Habitat across Forest Service lands and map Mexican spotted owl Recovery Habitat on Forest Service lands. The agencies intend to take the following steps:
- a. FWS and the Forest Service will assess available information to complete habitat trend monitoring on NFS lands in the Southwestern Region. The Forest Service plans to convene a group of experts to develop models for each EMU in the region and plan to use those models to identify and track Mexican spotted owl habitat availability and trends on National Forest System lands.
 - b. FWS and the Forest Service convened a collaborative workshop to develop EMU-specific models. The Forest Service Pacific Northwest Region, Forest Service Southwestern Region, Rocky Mountain Research Station, FWS, and Recovery Team members participated in this workshop to develop a model for tracking habitat changes through time.
 - c. The experts plan to create models within 6-9 months after the workshop that show trends from 1985 to 2020, which the Forest Service intends to make available online. The Forest Service shall maintain the habitat trend information on an ongoing basis based upon the results of the most recent model inputs and analysis.
 - d. The agencies will update the habitat models as new information or advancement of science indicates that the model would be better calibrated.
 - e. For future site-specific projects involving mechanical and prescribed fire treatments in owl habitat on NFS lands of the Southwest Region, the Forest Service intends to include and assess

the best available scientific information regarding the habitat needs of the Mexican spotted owl – including, but not limited to, information developed in above models showing trends (1985 to 2020, and annual updates thereafter as appropriate based on the listing status of the owl). This information will inform the Forest Service’s objectives and activities, such as the design of mechanical and prescribed fire treatments within the larger recovery habitat landscape as described within Appendix C of the Recovery Plan (Recovery Plan, pp. 275-277), subject to the caution in the Recovery Plan that much of the work needed to reduce the fire risk to Mexican spotted owl habitat can be achieved by treating areas outside of PACs. Recovery Plan at pp. 74, 287.

- f. The Forest Service intends to map Mexican spotted owl recovery habitat for all forests in the Region within 60 days of signing this letter, and provide the layers, with their associated metadata, to Guardians. Subject to available funding, the Forest Service plans to update the layers/maps with more current information every two to three years, if new information is available. The applicability of the recovery habitat maps is at a very broad scale (e.g., the Ranger District) and the maps are used to identify areas to survey for spotted owls prior to implementation of actions and areas to manage for owl nesting and roosting recovery and foraging/dispersal recovery habitat.
 - g. Recovery nesting and roosting habitat should be more specifically identified within the broader area of Recovery Habitat using finer scale information/data (e.g., stand exam data, LiDAR, nearest neighbor, FIA modeling, on the ground validation and verification, etc. or a combination of sources). This action may be deferred until after the mapping of Recovery Habitat on a forest-wide scale as set out above in paragraph (vi), but the Forest Service plans to complete this task for areas inside of Mexican Spotted owl critical habitat and recovery habitat where the Forest Service proposes to undertake a timber management action prior to the NEPA decision for that timber management action. “Timber management actions” do not include: cutting individually identified hazard trees to abate an imminent risk of bodily harm or property damage; cutting individually identified hazard trees when required for maintenance of infrastructure or public safety, in those cases where such cutting does not trigger the requirement for an Environmental Assessment or Environmental Impact Statement pursuant to the National Environmental Policy Act; routine maintenance where individually identified hazard trees would be cut for roadsides, trails and trailheads, buildings and outbuildings, recreation areas, existing dams, existing oil and gas pads, existing communication sites, existing utility lines, and lookout towers. Furthermore, through the period ending December 31, 2022, this provision also does not pertain to the issuance of permits for personal use forest products, such as but not limited to fuelwood, vigas, stays, posts, poles, tribal ceremonial products, and Christmas trees.
5. **Establish Mexican Spotted Owl Leadership Forum:** The Forest Service and FWS intend to identify agency leadership from the Region to host regular open public meetings to discuss Mexican spotted owl recovery efforts in Arizona and New Mexico. Agency leadership plans to use information provided in these open public meetings, as well as the project-specific monitoring and trend data, as key components of the adaptive management framework to develop and, as necessary, modify long-term, innovative solutions for the conservation and recovery of the owl through national forest management. The agencies have begun and intend to continue to implement the Leadership Forum as follows:
- a. Specific invitations to attend the meetings are extended to interested stakeholders, the State Foresters, and State Game & Fish Directors of New Mexico and Arizona. The general public will also be invited, along with interested federal and state agencies, non-governmental organizations, and scientists.
 - b. The Leadership Forum has already convened several times and is set to meet again in October 2020.

- c. The Forest Service has secured a third-party facilitator through December 31, 2020. Future years will be subject to available funding from the agencies and/or partners.

6. **FWS Intends to Establish Working Teams for Mexican spotted owl Ecological Management**

Units: FWS plans to provide a forum for stakeholders to discuss issues relevant to implementation of the Recovery Plan (Recovery Action 10, p. 80; FWS 2012). The Recovery Plan recommends the development of Working Teams for each EMU to allow effective coordination and communication on owl recovery efforts, share information about owls and owl habitat across administrative boundaries, and ultimately to refine the management objectives and strategies given lessons learned and the best available scientific information. These Working Teams (Part V.C, pp. 96-97; FWS 2012) will provide an opportunity for interested parties to participate in discussions affecting owl management at a more local level as follows:

- a. These Working Teams would be comprised of relevant individuals as outlined in the Recovery Plan (Part V.C, pp. 96-97; FWS 2012).
- b. FWS, in coordination with the Mexican Spotted Owl Leadership Forum, intends to convene the first meeting to determine how to initiate the EMU Working Teams by December 31, 2020.

If WildEarth Guardians has concerns about the implementation of the above measures by the Forest Service or FWS, WildEarth Guardians may always provide written notice of the concern and request a meeting to discuss such concerns. The agencies will meet and confer with Guardians (either telephonically or in-person) to attempt to resolve the concerns within 45 days of the written notice, or such time as is mutually agreed by the parties. If the parties are unable to resolve the concerns through this meet and confer, the agencies, subject to available funding, may initiate a formal mediation process with Guardians and such other parties as may be appropriate.

The Forest Service and FWS intend to share with WildEarth Guardians the information and data collected as a result of the above efforts. As always, we appreciate your involvement and interest in working with us to provide for the conservation and recovery of the owl.

Sincerely,

SANDY WATTS
Acting Regional Forester

AMY LUEDERS
Regional Director, Interior Regions 6, 7 & 8
U.S. Fish and Wildlife Service

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

WILDEARTH GUARDIANS,

Plaintiff,

v.

UNITED STATES FISH AND
WILDLIFE SERVICE; UNITED
STATES FOREST SERVICE,

Defendants.

)
) CASE NO. 4:13-cv-151-RCC
)
) **[PROPOSED] ORDER APPROVING**
) **THE PARTIES STIPULATION OF**
) **VOLUNTARY DISMISSAL**
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)
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Having considered the Parties' stipulation, the Court hereby approves the stipulation:

1. All counts in the above-captioned lawsuit shall be dismissed with prejudice;
2. The current injunction is dissolved in its entirety;
3. Defendants' pending motions are withdrawn; and
4. The Parties shall attempt to resolve the appropriate amount of fees and costs within 120 days of approval of this stipulation. And the Court will retain jurisdiction to decide any dispute regarding attorneys' fees and costs.

Dated: _____
Hon. Raner C. Collins