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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TUCSON DIVISION

WILDEARTH GUARDIANS, Plaintiff, vs. UNITED STATES FISH AND WILDLIFE SERVICE and UNITED STATES FOREST SERVICE, Defendants.	))))))))))))	No. 13-151-RCC **PLAINTIFF'S MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO FEDERAL DEFENDANTS' RULE 59 MOTION**

Plaintiff WildEarth Guardians respectfully moves the Court for leave to file a surreply memorandum in opposition to the Federal Defendants' Rule 59 motion.

In support of this motion, WildEarth Guardians respectfully submits as follows:

(1) This Court ordered WildEarth Guardians to respond to the Federal Defendants' Rule 59 motion on an exceptionally compressed schedule. This Court did not Order a response to the Rule 59 motion, pursuant to Local Rule of Civil Procedure

7.2(g)(2), until just before the close of business on Monday, October 21, 2019. ECF Doc. No. 106. Even after a brief extension of the response deadline originally imposed by the Court, the undersigned had only four (4) full business days in which to confer with his clients and his clients' experts, and to prepare a memorandum in opposition to the Rule 59 motion.

(2) On the other hand, the Federal Defendants had twenty-eight (28) days in which to prepare their Rule 59 motion[1] and six (6) full business days in which to prepare their Rule 59 reply memorandum.

(3) The assymetrical amount of time allotted to the parties for briefing on these Rule 59 proceedings is prejudicial to WildEarth Guardians' ability to explain to the Court why its September 12, 2019 decision was correct on the merits.

(4) The Federal Defendants' reply memorandum in support of its Rule 59 motion raises various mischaracterizations – of both the record in this case and WildEarth Guardians' arguments – that require a response. Additionally, the Federal Defendants' reply memorandum makes various impermissible post hoc rationalizations that require a response.

(5) WildEarth Guardians has endeavored to supply the Court with a surreply

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[1] Pursuant to Local Rule of Civil Procedure 7.2(g)(2), the Federal Defendants' Rule 59 motion was untimely since they did not show any "good cause" for failing to file the motion within fourteen (14) days of this Court's September 12, 2019 Order. WildEarth Guardians has not urged the Court to strike the Rule 59 motion on this basis because it is apparent that the Court desires briefing on the Rule 59 motion, and respectfully defers to the Court in this regard.

memorandum in the most expeditious manner possible, so as to facilitate the Court's most informed resolution of the matters raised in the Federal Defendants' Rule 59 motion – and in reviewing the arguments made in the Federal Defendants' reply memorandum in particular.

So as to avoid unfair prejudice to WildEarth Guardians, and so as to assist the Court in the fullest possible review of the issues raised by the Federal Defendants in their Rule 59 motion, WildEarth Guardians respectfully submits that it should be granted leave to file the attached surreply in opposition to the Federal Defendants' Rule 59 motion.

Dated: November 6, 2019.

Respectfully submitted,

/s/ Steven Sugarman

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion for Leave to File Surrerply in Opposition to Federal Defendants' Rule 59 motion was served on counsel of record on November 6, 2019 through the Court's electronic CM-ECF system.

/s/ Steven Sugarman
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FOR THE DISTRICT OF ARIZONA

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WILDEARTH GUARDIANS,

Plaintiff,

vs.

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

Defendants.

No. 13-151-RCC

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

I. The Rule 59 motion impermissibly rehashes old arguments

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

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

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

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

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

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

> monitoring, as explained in the 1995 recovery plan, has to be implemented for a period of *at least* 15 years to be able to generate any meaningful data on population trends. Therefore, taking Plaintiff's argument to its logical extreme would mean that, even if the 1995 population monitoring protocol were practical and implemented, USFS still could not meeting its Section 7 obligations with respect to the owl for 15 years. That is simply not the case. Rather, this information's main purpose is for delisting, not USFS' Section 7 obligations on site-specific projects. USFS meets its Section 7 obligations 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.

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

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

> Defendants retort that Plaintiff's argument mischaracterizes the 1996 S&Gs, is not supported by the administrative record, and baselessly concludes that the FWS' "no jeopardy" conclusions were predicated on an assurance that USFS had or would engage in range-wide population trend monitoring. First, according to Defendants, the 1995 RP is merely advisory. Next, Defendants contend that range-wide monitoring of the MSO population was not required for compliance with the adaptive management plan. This is purportedly because range-wide population data is not a helpful way to evaluate the local effect of USFS' actions on MSOs. Moreover, Defendants say, USFS cannot be held accountable for the failure to monitor, because it was only required to collaborate about possible 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

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

II. The Federal Defendants have not shown "manifest injustice"

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

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requirements because they (1) implement monitoring before and after agency management projects; (2) conduct uneven-age timber management; (3) form management projects that reduce landscape-altering wildfire; and (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).

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

III. Repudiation of adaptive management as a post hoc rationalization

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

> Monitoring is critically important to the adaptive management process. The Forest Service has long espoused adaptive management as a cornerstone of its management efforts. *As management actions are applied, information 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*.
>
> The recovery plan was a combination of prescriptive site-specific guidance 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*.

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

The linkage between the results of a rigorous long-term range-wide population monitoring scheme and *actual* on-the-ground forest treatments was also made pellucidly clear in the 1995 Recovery Plan which set up the adaptive management scheme:

> The recommendations contained herein allow most land-management activities to occur provided that the effects of those activities are evaluated during the recovery period. In addition, the Recovery Plan recommends that scientific monitoring of the Mexican spotted owl population and its habitat should accompany those activities to assess their impact on spotted owl populations. *If warranted, these activities can be altered or eliminated if monitoring or research indicated a significant risk to the spotted owl population*.

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

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

Presumably emboldened by this Court's ruling on the BiOps' conclusions with respect to the MSO's population trend, *WEG 2019* at *10, the Federal Defendants now take their population argument up an irrational notch. In their Rule 59 reply memorandum at pp. 3 and 7, the Federal Defendants suggest that the increase in the number of known MSO sites that is attributed to an expanded survey effort somehow justifies the BiOps' no jeopardy conclusions. At the time that the 2012 BiOps were issued, even the USFS admitted that it was "not possible to infer any trends related to the population of owls on" national forest lands in Arizona and New Mexico. AR-FS 4910, 5107, 5168, 5219, 5241. The notion that the FWS is in any way complacent about the current population trend of the MSO finds no support whatsoever in the administrative record in this case. The concluding paragraph of the BiOps' no jeopardy findings state that "some level of range-wide MSO population monitoring is needed in order for us to 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

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

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

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

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

Second, the excision of the population monitoring requirement from the current generation of the BiOps results in a situation where the Federal Defendants will not validate and test their assumptions that on-going and future treatments are beneficial – and not adverse – for the MSO. This irreparably injures the Plantiff's – and the Plaintiff's members' – scientific, recreational, and aesthetic interests. *Alliance for the Wild Rockies 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.

Dated: November 6, 2019.

Respectfully submitted,

/s/ Steven Sugarman

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Plaintiff's Surreply in Opposition to Federal Defendants' Rule 59 Motion was served on counsel of record on November 6, 2019 through the Court's electronic CM-ECF system.

/s/ Steven Sugarman
Steven Sugarman