

1 JOHN C. CRUDEN,
2 Assistant Attorney General
3 SETH M. BARSKY, Chief
4 S. JAY GOVINDAN, Assistant Chief
5 RICKEY D. TURNER, Trial Attorney
6 U.S. Department of Justice
7 Environment and Natural Resources Division
8 Wildlife and Marine Resources Section
9 999 18th Street
10 South Terrace, Suite 370
11 Denver, Colorado 80202
12 (303) 844-1373
13 rickey.turner@usdoj.gov

14 Attorneys for Federal Defendants

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

14 WILDEARTH GUARDIANS,

15 Plaintiff,

16 v.

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

20 Defendants.

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

**FEDERAL DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT [ECF No. 50]**

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INTRODUCTION

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2 Plaintiff WildEarth Guardians challenges 11 programmatic biological opinions
3 (BiOps) issued by the U.S. Fish & Wildlife Service (FWS) in 2012. *See* Plaintiff’s
4 Memorandum in Support of Summary Judgment, ECF No. 50 (Pl’s Mem.). In these
5 BiOps, FWS analyzed the U.S. Forest Service’s (USFS) programmatic management
6 direction contained in the Land and Resource Management Plans (Forest Plans) for the
7 11 National Forests located throughout USFS’ Region 3. FWS determined that USFS’
8 programmatic management direction in each of the 11 Forest Plans was not likely to
9 jeopardize the continued existence of the Mexican spotted owl, a species listed as
10 “threatened” under the Endangered Species Act (ESA), and that it was not likely to
11 destroy or adversely modify the owl’s designated critical habitat. FWS’ determinations,
12 at their core, were premised on USFS’ long-standing and proven commitment to protect
13 and recruit old-growth, multilayered canopy habitat for the owl by implementing an
14 uneven-aged timber management regime and by designing forest-management projects to
15 minimize the risk of high-severity, landscape-altering wildfire.

16 In its challenge, Plaintiff completely ignores FWS’ core reasoning. Instead,
17 Plaintiff’s primary argument – an argument already rejected by this Court – asserts that
18 the 2012 programmatic BiOps are based on USFS’ adaptive management approach, as
19 outlined in the 1996 standards and guidelines, which require USFS to both carry out a
20 range-wide population trend monitoring program for the owl and to conduct projects
21 within the bounds of the standards and guidelines. Because USFS is allegedly not
22 properly monitoring population trends or conducting projects within the standards and
23 guidelines, Plaintiff argues that it is not possible for USFS to manage adaptively and
24 therefore, the BiOps’ “no jeopardy” conclusions are invalid. Plaintiff’s argument,
25 however, misinterprets the basis for the BiOps (and the preceding 1996 and 2005
26 programmatic BiOps), reveals a fundamental misunderstanding of the interplay between
27 adaptive management and range-wide population trend monitoring, and completely
28 ignores USFS’ commitment – over nearly two decades – to conduct projects within the

1 bounds of the standards and guidelines. To be clear, FWS' BiOps (like the preceding
2 1996 and 2005 BiOps) are premised on USFS' commitment and proven ability to protect
3 and recruit the owl's preferred habitat – *i.e.*, old-growth, multilayered canopy forests. For
4 these reasons, Plaintiff's motion to summary judgment should be denied.

5 **ARGUMENT¹**

6 **I. PLAINTIFF'S ESA CLAIMS LACK MERIT.**

7 **A. FWS' BiOps Comply With the ESA and Should Be Upheld.**

8 As demonstrated in Federal Defendants' opening brief, the agencies (which
9 included members of the owl recovery team) thoroughly and appropriately analyzed the
10 programmatic direction in the Forest Plans, including the protective 1996 owl standards
11 and guidelines, and their potential effects on the owl and its critical habitat. *See*
12 Defendants' Memorandum in Support of Cross-Motion for Summary Judgment (Defs'
13 Mem.), ECF No. 52-1, at 8-13. In short, the agencies' Section 7 analyses centered on the
14 following key points:

15 (1) In 1993, due to a lack of population data, FWS listed the owl based entirely on the
16 loss of vast amounts of old-growth, multilayered canopy habitat (and the
17 continuing threat of habitat loss) due to USFS' pre-1996 even-aged (shelterwood)
18 timber management and catastrophic wildfire, USFS 20;

19 (2) In 1995, FWS issued a recovery plan with specific protective management
20 recommendations (*i.e.*, to manage for protected, restricted, and other woodland
21 habitats) to protect and recruit old-growth, multilayered canopy habitat by
22 eliminating the threat of even-aged timber management and designing projects to
23 minimize risk of catastrophic wildfire, FWS 7918, FWS R 1;

24 (3) In 1996, USFS amended its Forest Plans to incorporate, among other things, *see*
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26 ¹ A detailed outline of the relevant legal and factual background is provided in Federal
27 Defendants' cross-motion for summary judgment, ECF No. 52-1 at 1-6, and Federal
28 Defendants' statement of fact, ECF No. 53.

1 Defs' Mem. at 8-10, the 1995 recovery plan's protective forest management
2 recommendations (*i.e.*, to manage for protected, restricted, and other woodland
3 habitats) to protect and recruit old-growth, multilayered canopy habitat by
4 eliminating the threat of even-aged timber management and designing projects to
5 minimize risk of catastrophic wildfire, FWS 7918, USFS 466-70;

6 (4) USFS had implemented these protective management recommendations for 16
7 years (from 1996 to 2012) and would continue to do so, FWS 7918; and

8 (5) Additional owl surveys have resulted in the discovery of more known owl nesting
9 sites across a wider area throughout the owl's range, FWS 7905.

10 After considering these key points, FWS concluded that USFS' continued
11 implementation of the Forest Plans' protective management measures (1) effectively
12 addressed the primary threats that led to the owl's "threatened" listing in the first instance
13 and (2) improved (and would continue to improve over time) the owl's pre-1996 habitat
14 by protecting and recruiting old-growth, multilayered canopy forests. In other words,
15 while expected to have minimal short-term adverse effects, USFS' continued
16 commitment to implement an uneven-aged timber management regime and to design
17 projects to minimize the risk of high-severity, landscape-altering wildfire would not only
18 avoid jeopardizing the owl and adversely modifying its habitat but would also likely
19 result in long-term conservation benefits for the owl and move the owl closer to recovery.
20 *See, e.g.*, FWS 7596-97; FWS 7917-19. FWS' conclusions are reasonable, supported by
21 the record, and should be upheld.

22 **B. Plaintiff Cannot Meet Its Burden in Demonstrating That the Challenged**
23 **BiOps are Arbitrary and Capricious.**

24 Dissatisfied with FWS' conclusions, Plaintiff levies numerous misguided attacks
25 against the BiOps. As explained below, none of Plaintiff's arguments have any merit.

26 **1. FWS' assumption that USFS would implement the 1996 owl standards**
27 **and guidelines was reasonable and appropriate.**

28 Plaintiff's primary assertion is that the 2012 programmatic BiOps are arbitrary and

1 capricious because FWS relied on “invalid” assumptions that USFS was implementing
2 the 1996 standards and guidelines. Pl’s Mem. at 9-15. More specifically, Plaintiff asserts
3 that, because USFS is not properly monitoring population trends or conducting projects
4 within the standards and guidelines, it is not possible for USFS to manage adaptively and
5 therefore, the BiOps are invalid. To support this assertion, Plaintiff appears to make four
6 sub-arguments. All four sub-arguments mischaracterize USFS’ obligations under the
7 standards and guidelines, the different types of monitoring built into the standards and
8 guidelines, and the purposes for each type of monitoring. Each sub-argument will be
9 addressed in turn.

10 **a. Range-wide population trend monitoring is not used for adaptive**
11 **management.**

12 Plaintiff’s argument that adaptive management is not possible without range-wide
13 owl population trend monitoring is wrong. *See* Pl’s Mem. at 10. Effective adaptive
14 management, as it pertains to the owl, happens at a local, site-specific level and involves
15 a systematic approach for improving USFS management of owl habitat by analyzing the
16 effects of site-specific management projects (or management practices) on individual
17 owls and local habitat within the site-specific project area. Population trend monitoring
18 does not provide the type of data needed for effective localized adaptive management
19 because it provides data at a very broad scale across the entire range of the owl. At this
20 broad scale, many different factors affect the owl’s population trend like weather (wet
21 years vs. drought years), disease, availability of prey, landscape-altering wildfire, climate
22 change, etc. Because these other factors impact the owl across its entire range, they have
23 a significant impact on owl numbers and trends and, due to the relatively small acreage
24 total of USFS site-specific projects in comparison, these range-wide factors almost
25 completely mask any effect of USFS management practices, positive or negative. *See*
26 Defendants Controverting Statement of Facts (Defs’ CSOF) ¶ 10, ECF No. 56. For
27 example, USFS is not able to effectively determine the effects of its localized
28 management practices when analyzing population trend data that, perhaps due to a wet

1 season with high prey abundance and low landscape-altering wildfire impact, may
2 indicate a rising owl population trend.

3 Contrary to Plaintiff's assertion, it is simply unworkable to effectively use range-
4 wide trend data to identify, for adaptive-management purposes, a localized, site-specific
5 project or a USFS management practice in general that is having either a positive or
6 negative effect on the owl or its habitat. Rather, this data's main purpose is for FWS to
7 conduct a future delisting analysis, not to assess USFS' adaptive management or Section
8 7 obligations. USFS meets its Section 7 obligations by implementing uneven-age timber
9 management, by designing management projects, in consultation with FWS, to minimize
10 risk of high-severity, landscape-altering wildfire, and by monitoring for incidental take
11 with the implementation of each site-specific project. USFS 385-470. USFS further meets
12 its Section 7 obligations to protect the owl and to employ adaptive management by
13 conducting pre- and post-treatment monitoring for these types of projects to ensure the
14 desired results. USFS 466-69 (monitoring owls and their habitat for at least a year prior to
15 project implementation and two-three years post-project implementation). If, after this
16 type of monitoring, it is determined that a particular treatment did not achieve its goal or
17 is found to have some adverse effect on the owl, USFS, in consultation with FWS, can
18 and does change its approach to abate or minimize its owl impacts. Plaintiff's argument
19 that population trend monitoring is required for adaptive management (or required for
20 ESA Section 7 compliance) fails.

21 **b. Plaintiff overstates USFS' commitment with respect to range-wide**
22 **population trend monitoring.**

23 Plaintiff next argues that, in the 1996 standards and guidelines, USFS committed
24 to fully fund and implement the population trend monitoring program. Pl's Mem. at 10.
25 Plaintiff's argument is without merit. *See* Defs' Mem. at 15-18; *see also* Defs' CSOF ¶¶
26 18-20. Consistent with the fact that population trend monitoring was not required for
27 adaptive management or Section 7 purposes, USFS' commitment was to
28 "collaboratively" participate in the monitoring effort only and did not require USFS to

1 bear the sole responsibility and burden of range-wide population trend monitoring. USFS
2 158; USFS 469; USFS 8467-68 SUP; USFS 8470 SUP. As already demonstrated, *see*
3 Defs' Mem. at 15-18, from 1996 to the present, with the help of FWS and the recovery
4 team, USFS has continually met its commitment to collaboratively participate in the
5 range-wide population trend monitoring. USFS 479-96; USFS 1169-71; USFS 2026-50.
6 USFS first funded a pilot study on the feasibility of the proposed population trend
7 monitoring program. USFS 479-96; USFS 1169-71; USFS 2047-48. This research and
8 study allowed the recovery team to conclude that the range-wide population monitoring
9 design as proposed in the 1995 recovery plan would not be feasible. USFS next funded a
10 pilot study on the feasibility of the proposed redesigned population trend monitoring
11 program in the 2012 revised recovery plan. USFS 10127-28 SUP. USFS continues to
12 collaboratively participate in the recovery team's redesigned range-wide population
13 monitoring. USFS 7173-86; USFS 10075 SUP; USFS 10138-41 SUP; USFS 10150-60
14 SUP. Plaintiff's argument that USFS has failed to meet its commitment with respect to
15 range-wide population trend monitoring is without merit and was already rejected by this
16 Court. *See WildEarth Guardians v. USFS/FWS (WildEarth I)*, Civ. No. 10-385-DCB (D.
17 Ariz. 2010), ECF No. 81 at 20.

18 **c. USFS adheres to the 1996 standards and guidelines for site-specific**
19 **projects.**

20 Plaintiff next argues mistakenly that USFS is not implementing site-specific
21 projects within the constraints of the 1996 standards and guidelines. Pl's Mem. at 12.
22 Plaintiff provides no evidence to support this claim because none exists. USFS
23 consistently implements projects within the constraints of the standards and guidelines.
24 For example, as explained in Federal Defendants' opening brief, Defs' Mem. at 18-21,
25 from approximately June 2005 to when this lawsuit was filed in early 2013, a total of
26 1,967 project decisions were signed in the region. USFS 10081-124 SUP. Only two out
27 of the 1,967 project decisions obtained a Forest Plan amendment specific to the owl
28 standards and guidelines, and both received their own ESA Section 7 consultation and

1 FWS issued “no jeopardy” BiOps for both proposed projects. USFS 3314 (BiOp for the
2 Elk Park Fuels Reduction/Forest Health Project); USFS 3338 (BiOp for the Perk-
3 Grindstone Hazardous Fuels Reduction Project). The rare need for deviation from the
4 standards and guidelines was expressly considered and allowed for in all the 2012 BiOps
5 through project-specific plan amendment and individual project-level consultation. *See*
6 *e.g.*, USFS 5928. USFS further complies with the standards and guidelines and ESA
7 Section 7 by monitoring each site-specific project for incidental take of owls and for pre-
8 and post-project effects. Plaintiff’s argument that USFS operates outside the bounds of
9 the standards and guidelines was already rejected by this Court once, *see WildEarth I*,
10 ECF No. 81 at 20, and should be again.

11 **d. FWS did not premise its 1996, 2005, and 2012 “no jeopardy” BiOps**
12 **on USFS’ assurance of range-wide population trend monitoring.**

13 Plaintiff’s final argument in this section – that FWS specifically premised its
14 programmatic BiOps over the years on USFS’ assurance of population trend monitoring –
15 fares no better. Pl’s Mem. at 11. As discussed above, population trend monitoring is
16 designed to aid FWS in a future delisting analysis. In conducting its Section 7 analysis on
17 the Forest Plans at issue, FWS is not reviewing whether the owl should be delisted.
18 Rather, it is analyzing how USFS’ various forest management programs are addressing
19 and alleviating long-term threats to the owl and how these programs protect the owl and
20 contribute to its ultimate recovery. To that end, like the 2012 BiOps, the 1996 and 2005
21 BiOps focused on the same key points regarding management of habitat based on the
22 needs of the owl. *See* Section I.A., *supra*.

23 After considering these key points, FWS concluded in 1996 and 2005 that USFS’
24 continued implementation of the Forest Plans’ protective management measures
25 effectively addressed the primary threats that led to the owl’s “threatened” listing and
26 improved (and would continue to improve over time) the owl’s pre-1996 habitat by
27 protecting and recruiting old-growth, multilayered canopy forests. The 2012 BiOps were
28 no different in that respect. FWS never based any of the programmatic BiOps on a range-

1 wide population trend monitoring program. *See* USFS 724-25 (1996 “no jeopardy”
2 conclusion not based on population trend monitoring); USFS 2338-39 (2005 “no
3 jeopardy” conclusion not based on population trend monitoring); FWS 7596-97 (2012
4 “no jeopardy” conclusion for the Apache-Stigreaves National Forest not based on
5 population trend monitoring); FWS 7917-19 (2012 “no jeopardy” conclusion for the
6 Coconino National Forest not based on population trend monitoring).

7 The inclusion of the range-wide population trend monitoring in the 1996 and 2005
8 programmatic incidental take statements, *see* USFS 730; USFS 2341-42, does not change
9 this fact. FWS’ analysis in the BiOps and the incidental take statements are different. In
10 the BiOps, FWS analyzes whether the proposed action is likely to cause jeopardy and
11 adverse modification, whereas in the incidental take statements, FWS evaluates the
12 amount or extent of anticipated incidental take. Failure to comply with a term or
13 condition or reasonable and prudent measure in the incidental take statements does not
14 affect or undermine FWS’ jeopardy or adverse modification determination, it simply
15 means that the action agency or applicant is not complying with the incidental take
16 statements and is no longer covered by the take exemption.²

17 _____
18 ² Furthermore, the inclusion of this monitoring program in the programmatic incidental
19 take statements merely reflects the agencies’ attempt to memorialize both FWS’ strategic,
20 programmatic goal of eventually implementing a collaborative, multi-agency population-
21 trend monitoring program and USFS’ established commitment in the 1996 standards and
22 guidelines to participate to the extent possible in that collaborative program. This was
23 not, as Plaintiff argues, FWS basing its “no jeopardy” determinations on the fact that
24 USFS would fully fund and carry out a population trend monitoring program. Indeed,
25 Plaintiff’s argument is undermined by the fact that the 1996 incidental take statement also
26 includes the requirement that USFS fund and conduct an initial pilot study to assess the
27 feasibility of the range-wide population trend monitoring (as contemplated in the 1995
28 recovery plan), USFS 730, even though FWS knew of the uncertain nature of this
monitoring program. FWS did not premise its 1996 “no jeopardy” BiOp on an uncertain
monitoring program that it knew, based on the results of USFS’ pilot study, might not be
possible or feasible. This desire to memorialize the agencies’ strategic, programmatic
goal of generating population trend data through a collaborative, multi-agency
monitoring program is further reflected in the 2005 programmatic BiOp. At the time of

1 In sum, Plaintiff's primary argument completely misinterprets the interplay
2 between adaptive management and range-wide population trend monitoring and the basis
3 for FWS' 2012 "no jeopardy" BiOps. As explained, range-wide population trend
4 monitoring has almost nothing to do with adaptive management or analyzing USFS'
5 compliance with its Section 7 obligations. Likewise, the basis for FWS' 2012 "no
6 jeopardy" determinations (like the preceding 1996 and 2005 determinations) have
7 nothing to do with range-wide population trend monitoring. Rather, the FWS staff who
8 worked on this consultation (which included members of the owl recovery team) based
9 its determinations on USFS' established implementation of the Forest Plans' protective
10 management measures that effectively addressed the primary threats that led to the owl's
11 "threatened" listing and improved the owl's pre-1996 habitat by protecting and recruiting
12 old-growth, multilayered canopy forests. In other words, USFS' continued commitment
13 to implement an uneven-aged timber management regime and to design projects to
14 minimize the risk of high-severity, landscape-altering wildfire, while expected to have
15 minimal short-term adverse effects, would not only avoid jeopardizing the owl and
16 adversely modifying its habitat but would also likely result in long-term conservation
17 benefits for the owl and move the owl closer to recovery.³ *See, e.g.*, FWS 7596-97; FWS

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19
20 the 2005 BiOp, the agencies and the recovery team already knew that the population
21 trend monitoring program, as outlined in the 1995 recovery plan, was not feasible. USFS
22 2048-49. While the agencies wanted to continue trying to find a way to generate
23 population trend data, FWS did not base its "no jeopardy" conclusion on the assumption
24 of a fully funded and implemented population trend monitoring program.

25 ³ Plaintiff cites a number of cases for the basic proposition that "an agency cannot engage
26 the FWS in an ESA Section 7(a)(2) consultation with respect to one proposed action, but
27 then proceed to implement a different action with potentially different effects." Pl's
28 Mem. at 13. These cases are distinguished on their facts. As explained above, FWS did
not premise its 2012 BiOps on USFS' promise to fully fund and implement the range-
wide population trend monitoring, as Plaintiff argues. Rather, FWS premised the 2012
BiOps on USFS' continued commitment to address the primary threats that led to the
owl's "threatened" listing and to improve the owl's pre-1996 habitat by protecting and

1 7917-19. FWS' conclusions are reasonable and supported by the record.

2 **2. FWS' consideration of USFS' proposed action in light of the data on**
3 **owl population trends was reasonable.**

4 Plaintiff claims mistakenly that the 2012 BiOps are invalid because FWS ignored
5 evidence of a downward population trend since the owl's 1993 listing and instead relied
6 on an increase of known owl protected activity center (PAC) numbers to justify its "no
7 jeopardy" conclusions. Pl's Mem. at 16-17. Contrary to Plaintiff's claim, FWS
8 thoroughly considered the very limited data on the owl's range-wide population trends.
9 *See* Defs' Mem. at 13-15; Def's CSOF ¶¶ 84-92; *see also* FWS Doc. Nos. 2-12
10 (discussing population trend issues in "Status of the Species" and "Environmental
11 Baseline" sections of each BiOp); FWS R 42-47, 54; FWS R 503-05; FWS R 673; USFS
12 479-96; USFS 2026-50; USFS 2300; USFS 4736-38; USFS 8954 SUP. FWS
13 acknowledged that, while the available data indicated both positive and negative trends,
14 none of the data, for numerous reasons, was reliable. Credible range-wide population
15 trend data simply did not (and still does not) exist. In the absence of credible range-wide
16 population trend data, FWS noted the increase in known owl PACS as a positive
17 indicator but fully acknowledged that this information could not replace range-wide
18 population trend data.

19 To be clear, FWS' 2012 "no jeopardy" BiOps were based on many reasons and
20 not just an increase of known owl PACs. As explained above, USFS continually
21 implements forest management projects for the long-term benefit of the owl. These
22 protective forest management measures improve and continue to improve upon the pre-
23 1996 circumstances for the owl by conserving and recruiting old-growth, multilayered
24 canopy forests. For all these reasons, of which the surveys are a very small part, FWS
25 concluded that USFS' continued implementation of uneven-aged timber management and
26 recruiting old-growth, multilayered canopy forests. USFS continues to meet its
27 commitment and does not run afoul of the proposition Plaintiff's cite.
28

1 projects to minimize risk of high-severity, landscape-altering wildfire would not likely
2 jeopardize the owl or result in adverse modification of its critical habitat. Contrary to
3 Plaintiff's assertions, FWS' conclusions are reasonable and supported by the record.

4 **3. FWS' issuance of 11 separate BiOps was reasonable and appropriate.**

5 When USFS and FWS reinitiated formal Section 7 consultation beginning in 2010,
6 the agencies mutually agreed, for several reasons, to address each national forest
7 separately when preparing the programmatic biological assessments and the resulting
8 BiOps. USFS 4449-55. First, this approach would make it easier on agency staff in
9 completing their respective tasks during consultation as opposed to the previous approach
10 used in 2005. *See, e.g.*, USFS 4316 (notes from August 18, 2010 meeting between the
11 agencies stating, "[w]e also discussed that the BA would be organized by Forest, instead
12 of by species. . . . This approach will make it easier at both the Regional and field office
13 levels for both agencies."). Second, this forest-specific approach allowed for a more
14 accurate accounting of incidental take by site-specific projects occurring within a
15 particular forest as opposed to trying to account for incidental take within an owl
16 recovery unit that comprises portions of multiple forests, each conducting numerous site-
17 specific projects (as seen in the superseded regional BiOp). And, third, this approach
18 ensured the proper ESA coverage through a staged Forest Plan revision process where
19 each Forest Plan revision is scheduled to occur at different times and has slightly
20 different Forest Plan components and concerns.

21 In response, Plaintiff does not dispute the fact that the ESA does not require one
22 region-wide programmatic BiOp for the numerous species across the country that have
23 similar circumstances and needs – *i.e.*, species distributed in a metapopulational structure
24 with the need for adequate habitat connectivity across a range that spans multiple states,
25 forests, and other public lands. Pl's Mem. at 17-18. Nor does Plaintiff mention the fact
26 that USFS regularly issues programmatic BiOps on individual Forest Plans with other
27 similarly situated species like the Northern spotted owl and the Canada lynx. *See* Defs'
28 Mem. 21-22. Rather, Plaintiff simply asserts that FWS, in issuing 12 programmatic

1 BiOps instead of one, provided no explanation for the “significant change in analytical
2 approach.” Pl’s Mem. at 17-18. In support, Plaintiff cites two cases in which courts
3 considered whether an agency’s decision to change its previous policy was arbitrary and
4 capricious. Neither case, however, considers a factual or legal situation even remotely
5 similar to the case at hand.

6 In *Northwest Environmental Defense Center v. Bonneville Power Administration*
7 (*NEDC*), 477 F.3d 668, 690 (9th Cir. 2007), the Bonneville Power Administration
8 changed how the agency as a whole interpreted and implemented an explicit statutory
9 mandate. Likewise, in *Organized Village of Kake v U.S. Department of Agriculture*, 795
10 F.3d 956 (9th Cir. 2015), *cert. denied sub nom., Alaska v. Organized Vill. of Kake*, 136 S.
11 Ct. 1509 (2016), the Department of Agriculture promulgated (through formal rulemaking
12 procedures) a new rule exempting the Tongass National Forest indefinitely from the
13 department-wide “2001 Roadless Rule.” In both cases, the agency was changing a
14 substantive position that had future and far-reaching implications beyond a single project
15 or proposal.⁴ That is simply not the case here.

16 An analogous case to the situation at hand is found in *Cloud Foundation v.*
17 *Kemphorne*, No. CV-06-111-BLG-RFC, 2008 WL 2794741, at *2 (D. Mont. July 16,

18
19 ⁴ Other cases considering whether a policy change is arbitrary and capricious have looked
20 at similar situations where an agency has adopted a new rule, issued enforcement orders,
21 broadly applied a new statutory interpretation, or otherwise taken a substantive position
22 that was clearly contrary to previous positions, none of which are similar or analogous to
23 the situation here where USFS and FWS simply chose to divide up a single consultation
24 effort by forest. *See, e.g., FCC v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009)
25 (agency issued enforcement order introducing new interpretation of statutory
26 prohibition); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967,
27 1001-1002 (2005) (agency issued formal declaratory ruling interpreting a term under the
28 Telecommunication Act of 1996); *Modesto Irr. Dist. v. Gutierrez*, 619 F.3d 1024, 1036-
1037 (9th Cir. 2010) (National Marine Fisheries Service treated the steelhead as a distinct
species under the ESA when listing it as threatened); *Def’s. of Wildlife v. Hall*, 565 F.
Supp. 2d 1160, 1170-1171 (D. Mont. 2010) (FWS changed its recovery criteria for gray
wolves as part of an effort to delist a distinct population segment).

1 2008). Plaintiffs in *Cloud Foundation* also attempted to rely on *NEDC* and claimed the
2 Bureau of Land Management changed its policy by deciding to prepare a single multi-
3 year environmental assessment under the National Environmental Policy Act to address
4 population control measures in a wild horse herd where it had previously prepared annual
5 environmental assessments from 2001 to 2005. *Id.* The court rejected that claim and
6 distinguished *NEDC* because in that case “the BPA changed a process it had followed for
7 18 years on the basis of a committee comment to a provision of legislation which was not
8 even part of the final bill. Here, the BLM performed a detailed Environmental
9 Assessment addressing the environmental impacts of administering PZP over several
10 years. As such, [NEDC] is distinguishable.” *Id.* Similarly, the agencies in this case chose
11 to divide their environmental documents in a different manner than they had during the
12 previous consultations on the owl, but that does not constitute an arbitrary and capricious
13 change in policy.

14 There is no change in agency policy at issue here. For the reasons discussed above,
15 the agencies simply chose to use a different procedural approach for this particular
16 consultation than was used two times previously; neither agency invoked a new policy. In
17 order to maintain adequate habitat connectivity, all 11 National Forests manage for the
18 three essential habitat levels outlined in the applicable owl recovery plan: owl PAC
19 habitat; restricted/recovery habitat; and other forest and woodland habitat. Defs’ CSOF
20 ¶¶ 76-83. That remains unchanged regardless of whether FWS does one consultation or
21 11. The analysis of each Forest Plan has not and will not occur in a vacuum; the impacts
22 of the implementation of all the Forest Plans in the region will continue to be considered
23 in the environmental baseline of the jeopardy analysis for the owl as well as the
24 destruction or adverse modification analysis for its designated critical habitat. This is not
25 only consistent with the ESA but is also consistent with the agencies’ approach
26 nationwide with other listed species – *e.g.*, the Northern spotted owl and the Canada lynx
27 – with large metapopulations and ranges that span multiple states/National Forests and
28 have the same need for adequate habitat connectivity. Plaintiff’s argument lacks any

1 support and must be rejected. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1239
2 (10th Cir. 2011) (“absent constitutional constraints or extremely compelling
3 circumstances the administrative agencies should be free to fashion their own rules of
4 procedure and methods of inquiry permitting them to discharge their multitudinous
5 duties”) (citation omitted).

6 **4. FWS’ consideration of climate change in its programmatic BiOps was**
7 **reasonable.**

8 FWS’ 2012 BiOps adequately analyzed the threat of climate change in the region.
9 *See, e.g.*, USFS 4716-19, 4740; FWS 7578-79; *see also* Defs’ CSOF ¶¶ 93-100. FWS
10 explained that, while analyzing climate change at the programmatic level is inherently
11 general and speculative, climate change may affect the owl through long-term drought
12 and hotter-than-average temperatures which will inevitably result in negative effects to
13 owl habitat from catastrophic wildfire, insects, and disease. USFS 4717, 4740; FWS
14 7578-79; USFS 9221 SUP. For these reasons, among others, FWS concluded that
15 implementation of the Forest Plans – managing for the three levels of habitat which
16 protects and recruits old-growth, multilayered canopy habitat – would address the threat
17 of climate change by increasing the sustainability and resiliency of owl habitat
18 (particularly through fuels management and forest restoration activities), would not
19 jeopardize the continued existence of the owl, and would not adversely modify the owl’s
20 critical habitat. *See e.g.*, FWS 7572-73, 7578-79, 7596-97. Plaintiff’s argument that FWS
21 failed to adequately analyze climate change, *see* Pl’s Mem. at 18-19, is baseless.

22 **5. FWS adequately considered Tribal cumulative effects.**

23 FWS’ 2012 BiOps also adequately considered cumulative effects on tribal lands.
24 Tribal lands are sovereign nations and management of information for wildlife
25 populations is considered proprietary and controlled by Tribal governments. USFS 9921
26 SUP; FWS 7595; Defs’ CSOF ¶¶ 57-62. For this reason, the agencies can only consider
27 the information disclosed by the tribes. In the 2012 programmatic BiOps, FWS
28 appropriately discussed cumulative effects (with the information available) in the

1 applicable forests or BiOps. *Compare* FWS 7917 (noting the absence of cumulative
2 effects in the Coconino programmatic BiOp) *with* FWS 7594-96 (analyzing the
3 applicable cumulative effects in the Apache-Sitgreaves programmatic BiOp). In the
4 Apache-Sitgreaves BiOp, FWS noted that the cumulative effects regarding the owl were
5 “very similar to the section provided in the 2005 LRMP BO/CO except that is specific to
6 areas surrounding the Apache-Sitgreaves NFs.” FWS 7594. Furthermore, FWS analyzed
7 the effects of Tribal forest management actions on owl PACs in the cumulative effects
8 section of the Apache-Sitgreaves programmatic BiOp and other programmatic BiOps
9 where Tribal forest management actions were deemed to be cumulative effects. FWS
10 7595; *see also*, FWS 7815 (Carson National Forest); FWS 8736 (Lincoln National
11 Forest); FWS 8938 (Santa Fe National Forest); FWS 8987 (Tonto National Forest). FWS
12 found the Tribal management plans to be protective and beneficial to the owl. FWS 7595.
13 In other words, because the Tribal forest management plans are similar to the 11 Region
14 3 Forest Plans – *i.e.*, an emphasis on uneven-aged timber management and on designing
15 projects to minimize risk of high-severity, landscape-altering wildfire – the Tribal
16 cumulative effects were expected to be minimal. FWS 7594-96. Plaintiff’s argument is
17 without merit.

18 **6. FWS’ BiOps used the best available science regarding wildfire.**

19 In their opening brief, Federal Defendants explained FWS’ analysis of the threat
20 of high-severity, landscape-altering wildfire. Defs’ Mem. at 22-23. FWS noted that most
21 wildfires “burn in a patchy nature and leave pockets of useable habitat for [owls], and
22 [owls] appear able to locate and use these patches. Thus, [owls] appear to be somewhat
23 resilient to wildfire, at least in the short term.” FWS 7583. However, while data regarding
24 the long-term effects of catastrophic wildfire are generally lacking, FWS noted that the
25 owl’s dependency on mature old-growth forests containing uneven, multilayered canopy
26 habitat for long-term survival and recovery is well-documented and established. *See e.g.*,
27 FWS R 47-48; FWS R 448, R 496-99. For this reason, FWS reasonably explained that the
28 likely long-term effects of a high-severity, landscape-altering wildfire (which leaves no

1 habitat in its wake) would be adverse. FWS 7583.

2 Plaintiff takes issue with the agencies' (and recovery team's) focus on high-
3 severity, landscape-altering wildfire and their emphasis on designing projects to abate
4 and minimize this threat. Pl's Mem. at 20-21. In essence, Plaintiff claims, mistakenly,
5 that catastrophic wildfire is not a threat to the owl's survival and recovery as evidenced
6 by USFS survey reports on the Coronado National Forest demonstrating the owl's long-
7 term survival in a post-fire environment as "observed in areas that burned at high severity
8 more than seven years previously." *Id.*; Defs' CSOF ¶¶ 106-112. First, seven years of
9 data in a small area within the owl's expansive range does not constitute credible data
10 demonstrating any trend in the owl's long-term response to wildfire. Second, this data
11 does not contradict in any way the recovery team's conclusions in the 2012 revised
12 recovery plan or FWS' conclusions in the 2012 programmatic BiOps. In short, owl
13 distribution is limited primarily by the availability of habitat used for nesting and/or
14 roosting. USFS 9804 SUP. As relevant here, that habitat is old-growth, multilayered
15 canopy forests. Some wildfires burn in a mosaic and patchy nature, and this type of
16 habitat may provide short-term benefits post-fire; but large, high-severity fires that do not
17 contain habitat post-fire, will result in forest-stand degradation leaving no
18 nesting/roosting habitat – *i.e.*, adverse long-term impacts. USFS 9590 SUP. Plaintiff's
19 data supports the fact that owls are able to continue to occupy these areas because
20 nest/roost habitat is still present due to the mosaic-burn pattern or patchy nature of the
21 fires. USFS 9758 SUP. If there were no nest or roost habitat left, these areas would no
22 longer support owls. USFS 9759 SUP.

23 In sum, it is indisputable that high-severity, landscape-altering wildfire has
24 resulted in the greatest loss of owl PACs and owl critical habitat relative to any other
25 threat throughout the owl's U.S. range. This type of fire completely destroys old-growth,
26 multilayered canopy habitat. For this reason, the recovery team makes clear that, based
27 on the best available scientific data, the current primary threat to the owl is "habitat
28 degradation and loss of old growth nesting habitats through stand-replacing wildfire."

1 FWS R 449; *see also* FWS R 509-10. FWS' consideration of and determination on the
2 effects of high-severity, landscape-altering wildfire is entirely consistent with the
3 recovery team's analysis in the 2012 recovery plan revision. *See* FWS R 448. Plaintiff's
4 apparent alternative approach of "just let the forests burn" is inconsistent with the best
5 available data. *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc)
6 (holding that courts are to be "most deferential" when, as here, "the agency is 'making
7 predictions, within its [area of] special expertise, at the frontiers of science'" (citation
8 omitted).

9 **7. FWS adequately discussed owl recovery.**

10 As demonstrated, *see* Section I.A, *supra* and Defs' Mem. at 8-13, virtually
11 everything USFS does in its forest management program pursuant to the 1996 standards
12 and guidelines is designed primarily for the benefit and recovery of the owl. FWS
13 concluded that USFS' continued implementation of the Forest Plans' protective
14 management measures effectively addressed the primary threats that led to the owl's
15 "threatened" listing and improved (and would continue to improve over time) the owl's
16 pre-1996 habitat by protecting and recruiting old-growth, multilayered canopy forests. In
17 other words, while expected to have minimal short-term adverse effects, USFS'
18 continued commitment to implement an uneven-aged timber management regime and to
19 design projects to minimize the risk of high-severity, landscape-altering wildfire would
20 not only avoid jeopardizing the owl and adversely modifying its habitat but would also
21 likely result in long-term conservation benefits for the owl and move the owl closer to
22 recovery. *See, e.g.*, FWS 7596-97; FWS 7917-19. Plaintiff's assertion that the 2012
23 BiOps fail to account for owl recovery is simply not true.

24 **8. FWS' incidental take statements were reasonable.**

25 Plaintiff argues that the BiOps' incidental take statements are invalid because they
26 (1) do not set a "hard cap" on the amount of incidental take and (2) do not account for
27 owl take outside of designated owl PACs. Pl's Mem. at 23-24. Both arguments are
28 misplaced. First, in each of the 2012 programmatic BiOps, FWS set a measurable level of

1 incidental take. FWS explained that the anticipated incidental take for site-specific
2 projects implemented under the Forest Plan would be mostly in the form of short-term
3 harassment (defined as owls that may fail to successfully rear young in one or more
4 breeding seasons, but not likely desert the area because of a short-term disturbance).
5 FWS 7920. As a result, the 2012 BiOps focused primarily on harassment and, as seen in
6 the Coconino incidental take statement, allows incidental take in the form of harassment
7 for up to nine owl PACs per year and harm and/or harassment of owls associated with
8 two owl PACs due to long-term or chronic disturbance, or habitat degradation or loss
9 over the life of the project. FWS 7921; *see also* FWS 7599 (Apache-Sitgreaves incidental
10 take statement). FWS deemed it more appropriate to have a limit on actions that could
11 result in short-term harassment, per year, than over the life of the Forest Plan
12 (approximately 15 years) because otherwise the agencies would be reinitiating Section 7
13 consultation after the first significant landscape-level project due to an exceedance of the
14 incidental take limit. This set-up is not limitless and does not result in owls leaving the
15 site or being harmed indefinitely.

16 Second, contrary to Plaintiff's assertion, the agencies were fully aware that owls
17 use habitat outside of owl PACs. *See, e.g.*, FWS R 47-48; FWS R 104-113; FWS R 715-
18 27; FWS 7104; FWS 7596-97; FWS 7919-22; USFS 466. FWS considered habitat
19 outside owl PACs within each National Forest. *See* FWS 7919-22. Incidental take issued
20 at the programmatic forest-plan level covers all habitat within a particular National Forest
21 – *i.e.*, both inside and outside designated owl PACs. This is why USFS is required to
22 conduct owl surveys outside of known owl PACs prior to implementing site-specific
23 projects. USFS 466 (Forest Plan standard requiring pre-project owl surveys). If the
24 surveys discover owl presence, the agencies may designate new PACs or implement
25 other measures to avoid impacts. *Id.*; FWS 7919-22. The use of owl PACs as a measure
26 for incidental take does account for the owls that shift outside designated PACs.
27 Plaintiff's argument fails. *See also*, Defs' CSOF ¶¶ 55-56.

28 In sum, it is impossible to provide the amount of detail that plaintiff is seeking at

1 the programmatic-planning level. More importantly, it is not necessary. Future site-
2 specific actions will require their own project-level Section 7 consultation, at which time
3 the agencies will be able to look at site-specific information and have better information
4 as to numbers of owls or the presence of owl habitat (both inside and outside of a PAC).
5 The programmatic incidental take statements at issue in this case are reasonable for a
6 programmatic action like a Forest Plan. They both set a limit on incidental take and
7 adequately track and account for owl take inside and outside of owl PACs.⁵ Plaintiff's
8 argument is without merit.

9 **C. USFS Reasonably Relied on the 2012 BiOps.**

10 As explained above, FWS considered all the relevant factors with respect to the
11 owl, its habitat, and the potential effects of the site-specific projects implemented under
12 USFS' Forest Plans on the owl and its habitat. FWS provided reasonable and rational
13 explanations as to why USFS' Forest Plans protected the owl and improved upon the
14 owl's pre-1996 circumstances. USFS' reliance on the 2012 BiOps was reasonable.

15 **CONCLUSION**

16 After a thorough consultation, FWS (including members of the owl recovery team)
17 concluded that USFS' continued implementation of the Forest Plans' protective
18 management measures effectively addressed the primary threats that led to the owl's
19

20 ⁵ FWS, due to the difficult and often speculative nature of predicting future incidental
21 take from a programmatic Forest Plan which does not actually approve any specific
22 project, recently adopted a different approach with respect to incidental take statements
23 for these types of programmatic consultations. Current and future Forest Plan
24 consultations are no longer required to include incidental take statements where the
25 amount or extent of incidental take cannot be established with reasonable certainty. *See*
26 80 Fed. Reg. 26,832 (May 11, 2015). Incidental take in such instances would still be
27 specified and regulated as appropriate at the future project-level consultations. Therefore,
28 even if Plaintiff was to prevail in its request for FWS to reconsider the 2012 incidental
take statement, FWS would most likely remove the programmatic incidental take
statement under the current policy rather than issuing a new incidental take statement if it
could provide only speculative details.

1 “threatened” listing and improved (and would continue to improve over time) the owl’s
2 pre-1996 habitat by protecting and recruiting old-growth, multilayered canopy forests.
3 FWS determined that, while expected to result in minimal short-term adverse impacts,
4 USFS’ continued commitment to implement an uneven-aged timber management regime
5 and to design projects to minimize the risk of high-severity, landscape-altering wildfire
6 would not only avoid jeopardizing the owl and adversely modifying its habitat but would
7 also likely result in long-term conservation benefits for the owl and move the owl closer
8 to recovery. While Plaintiff obviously would have preferred a different result, it has not
9 shown the determinations in FWS’ 2012 programmatic BiOps to be arbitrary, capricious,
10 or contrary to law. Rather, Plaintiff’s arguments simply amount to a disagreement with
11 the expert agency’s scientific conclusions. Mere disagreement, however, is insufficient to
12 overturn otherwise lawful and reasonable determinations. *River Runners for Wilderness*
13 *v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (“The [agency’s] action . . . need only be [
14] reasonable, not the best or most reasonable, decision.”) (citation omitted). FWS’
15 programmatic BiOps comport with the ESA, are reasonable, are supported by the record,
16 and are entitled to deference. Accordingly, this Court should grant Federal Defendants’
17 cross-motion for summary judgment.

18
19 Dated: June 3, 2016

Respectfully Submitted,

20 JOHN C. CRUDEN,
21 Assistant Attorney General
22 SETH M. BARSKY, Section Chief
23 S. JAY GOVINDAN,
Assistant Section Chief

24 /s/ Rickey D. Turner, Jr.
25 RICKEY D. TURNER, JR.
26 Trial Attorney
27 U.S. Department of Justice
28 Envnt. & Natural Resources Division
Wildlife & Marine Resources Section
999 18th Street

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South Terrace, Suite 370
Denver, CO 80202
Telephone: (303) 844-1373

Attorneys for Federal Defendants