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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA
 TUCSON DIVISION

16 WILDEARTH GUARDIANS,

17 Plaintiff,

18 vs.

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

22 Defendants.

Civil No. 13-151-RCC

**PLAINTIFF'S RESPONSE
 IN OPPOSITION TO
 DEFENDANTS' CROSS-
 MOTION FOR SUMMARY
 JUDGMENT [DOC. NO. 52-1]**

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I. INTRODUCTION

For twenty years now, the Federal Defendants have pretended that Defendant U.S. Forest Service (“USFS”) implements the adaptive management approach to Mexican spotted owl (“MSO”) conservation and recovery required by the “1996 Standards and Guidelines.” This is simply untrue. Instead, the Federal Defendants have adopted a haphazard and budget-driven approach to MSO conservation which entirely precludes the implementation of any rational adaptive management program. In the meanwhile, the best available scientific evidence shows that the species’ range-wide population has declined by >30% since 1993 when it was listed for the protections afforded by the Endangered Species Act (“ESA”). AR-USFS 9770.

“The ESA requires a . . . realistic, common sense examination” of the impacts of agency actions on listed species. *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 933 (9th Cir. 2008). The 2012 Biological Opinions at issue in this lawsuit do not accomplish this task. Instead, the 2012 Biological Opinions are premised on the irrational assumption that the USFS “continues to implement” the 1996 Standards and Guidelines, and are otherwise flawed by their failure to incorporate the best available scientific information and to objectively consider all relevant factors. For these reasons, the 2012 Biological Opinions issued by Defendant U.S. Fish and Wildlife Service (“FWS”) are arbitrary and capricious, as is the USFS’s reliance on those Biological Opinions. Put colloquially, “the Emperor has no clothes” and WildEarth Guardians respectfully submits that this Court should order Federal Defendants to confront reality in their management of the MSO, and to comply with the important substantive and procedural requirements of the ESA.

II. THE FEDERAL DEFENDANTS’ DEFENSE OF THE 2012 BIOLOGICAL OPINIONS IGNORES THE BEST AVAILABLE SCIENTIFIC INFORMATION AND RELIES ON POST HOC RATIONALIZATIONS UNSUPPORTED BY THE RECORD

As WildEarth Guardians noted in its opening brief in support of its motion for summary judgment, federal agencies must utilize “the best scientific and commercial data

1 available” in their efforts to comply with the substantive and procedural requirements of
2 the ESA. 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.14(g)(8). “The best available data
3 requirement . . . prohibits [an agency] from disregarding available scientific evidence that
4 is in some way better than the evidence [it] relies on.” *Kern County Farm Bureau v.*
5 *Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006) (internal quotations omitted). “Essentially,
6 FWS cannot ignore available biological information.” *Id.* at 1081-82 (internal quotations
7 omitted). In *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir.
8 2014), the Ninth Circuit explained that the best available science rule applies even in
9 those instances where the available biological information is inconclusive or incomplete:

10 [I]nsufficient [or] incomplete information does not excuse [an agency’s]
11 failure to comply with the statutory requirement of a comprehensive
12 biological opinion using the best information available where there was
13 some additional superior information available.

14 *Id.* at 601-02 (internal quotations and ellipses omitted).

15 In this case, the Federal Defendants’ defense of the 2012 Biological Opinions
16 sweeps important biological information under the rug. Most notably, and as described in
17 further detail below, the FWS entirely disregards and ignores – amongst other important
18 information – (1) the considerable body of scientific evidence which shows a downward
19 trend in MSO populations in Arizona and New Mexico and (2) the mounting scientific
20 evidence demonstrating that MSOs can and do co-exist even with severe wildfire
21 regimes. The Federal Defendants neither acknowledge or account for this important
22 biological evidence in this case.

23 Furthermore, “[i]t is well-established that an agency’s action must be upheld, if at
24 all, on the basis articulated by the agency itself.” *Motor Vehicles Manufacturers*
25 *Association v. State Farm Mutual Automobile Ins. Co.*, 103 S.Ct. 2856, 2870 (1983).
26 “[C]ourts may not accept . . . counsel’s post hoc rationalizations for agency action.” *Id.*
27 When challenged as arbitrary and capricious, “[t]he basis for the decision . . . must come
28 from the agency” and a “reviewing court may not substitute reasons for agency action that
are not in the record.” *Arizona Cattle Growers’ Association v. U.S. Fish and Wildlife*

1 *Service*, 273 F.3d 1229, 1236 (9th Cir. 2001). Judicial review of agency action “cannot
 2 gloss over the absence of a cogent explanation by the agency by relying on the post hoc
 3 rationalizations offered by defendants in their briefs” and such “post hoc explanations
 4 serve only to underscore the absence of an adequate explanation in the administrative
 5 record itself.” *Center for Biological Diversity v. U.S. Bureau of Land Management*, 698
 6 F.3d 1101, 1124 (9th Cir. 2012) (internal quotations and citation omitted). In their
 7 quixotic efforts to defend the 2012 Biological Opinions, the Federal Defendants trample
 8 this most elementary rule of administrative law as they repeatedly offer up justifications
 9 for the Biological Opinions’ analytical approach and conclusions that are found nowhere
 10 in the administrative records.

11 **III. THE FEDERAL DEFENDANTS VIOLATE THE ESA WHEN THEY**
 12 **ENGAGE IN A SECTION 7(A)(2) CONSULTATION AS TO AN ACTION**
 13 **THAT THE USFS DOES NOT IMPLEMENT¹**

14 “The heart of the ESA is section 7(a)(2).” *Western Watersheds Project v.*
 15 *Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010). Given the core importance of the
 16 Section 7(a)(2) consultation process to the conservation scheme contemplated by the
 17 ESA, courts have held – time and time again – that a Section 7(a)(2) consultation which
 18 fails to assess the management actions that a federal agency *actually* implements violates
 19 the ESA. In their cross-motion for summary judgment, the Federal Defendants evade the
 20 core and dispositive fact in this dispute: the adaptive management approach to MSO
 21 conservation and recovery embodied in – and required by – the “1996 Standards and
 22 Guidelines” is an acknowledged failure.² Both the FWS and the USFS admit that the

23 1. A considerable portion of the Federal Defendants’ cross-motion is devoted to the
 24 anticipatory refutation of an argument that WildEarth Guardians *does not* rely on in its
 25 motion for summary judgment in this litigation. *See* Fed.Memo. at 18-21.

26 2. In their memorandum brief in support of their cross-motion for summary judgment,
 27 the Federal Defendants assert that federal agencies have no obligation to “implement or
 28 adhere” to a recovery plan. Federal Defendants’ Memorandum Brief (“Fed.Memo.”)
 [ECF Doc No. 52-1] at 2. While this is true as a general principle, it is immaterial and
 irrelevant in this case as USFS specifically and expressly incorporated the provisions of

1 USFS has *not* implemented the 1996 Standards and Guidelines in the past, and will *not*
2 implement the 1996 Standards and Guidelines in the future. WildEarth Guardians’
3 Statement of Facts (“SOF”) ¶¶ 28-32, 37-42, 65-75. In this light, it is clear that the notion
4 that the USFS “continues to implement” the 1996 Standards and Guidelines – the
5 underlying premise of the ten 2012 Biological Opinions at issue in this lawsuit – is pure
6 fiction. For this reason alone, the subject Biological Opinions are arbitrary and
7 capricious, and must be vacated by this Court.³ Simply put, federal agencies satisfy their
8 obligations under Section 7(a)(2) of the ESA only when their Section 7(a)(2)
9 consultations address *actual* – and not *fictional* – management actions.

10 This Court addressed this precise issue in *Forest Guardians v. U.S. Forest Service*,
11 Civil No. 00-612-TUC-RCC (D.Ariz.), where Forest Guardians argued that the USFS’s
12 failure to implement the grazing standards of the 1996 Standards and Guidelines vitiated
13 and invalidated the 1996 Biological Opinion on the 1996 Standards and Guidelines which
14 was premised on the FWS’s assumption that the USFS *would* implement the grazing
15 standards incorporated therein. This Court agreed, holding that “failure to implement
16 new grazing standards [of the 1996 Standards and Guidelines] . . . are actions by the
17 Forest Service which may effect the owl and its habitat,” and further holding that the

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19
20 the 1995 Recovery Plan – including, most importantly, all aspects of the MSO adaptive
21 management program – into the Forest Plans governing management activities on
22 national forest lands in Arizona and New Mexico. SOF at ¶¶ 18-22, 25. The Federal
23 Defendants do not dispute the fact that the Forest Plans *are* binding and, therefore, that
24 the provisions of the 1995 Recovery Plan are binding on the U.S. Forest Service as they
25 have been incorporated into those Forest Plans. *See also* Fed.Memo. at 4 (“after FWS
26 finalized the owl recovery plan, USFS amended its 11 Forest Plans to incorporate the
27 recovery plan’s forest management protections”).

28 3. As the Federal Defendants indicate in their motion, the Kaibab National Forest
adopted a new Forest Plan after the 2012 Biological Opinion for that forest was issued,
and the amended Forest Plan has been the subject of a superceding Biological Opinion.
Fed.Memo. at 7. Accordingly, WildEarth Guardians’ challenge to the 2012 Biological
Opinion for the Kaibab National Forest is moot.

1 USFS’s failure to consult with the FWS as to the action that it *actually* implemented –
2 that is, grazing management *without* implementation of the standards required by the
3 1996 Standards and Guidelines – was “contrary to the provisions of the ESA and not in
4 accordance with law as required by the APA.” *Id.*, Order of October 17, 2002 [ECF
5 Doc.No. 111] at 11.

6 This Court’s 2002 holding is entirely consistent with a now unfortunately long line
7 of cases rebuking the Federal Defendants for failing to engage in a Section 7(a)(2)
8 consultation as to the management approach that the USFS *actually* implements to
9 conserve and recovery the MSO. *See for example Silver v. Babbitt*, 924 F.Supp. 976,
10 984-86 (D.Ariz. 1995) (the USFS’s and FWS’s consultation as to a future management
11 approach that the parties intended to implement did not satisfy the requirements of the
12 ESA, as a Section 7(a)(2) consultation must assess the forest management activities
13 actually implemented by the USFS), *Forest Guardians v. Johanns*, 450 F.3d 455, 463-67
14 (9th Cir. 2006) (the USFS violated the ESA when it failed to implement a forage
15 monitoring program that it had committed to implement during the course of a Section
16 7(a)(2) consultation with the FWS concerning the effects of grazing on the MSO), *Center*
17 *for Biological Diversity v. U.S. Forest Service*, 820 F.Supp.2d 1029, 1034 (D.Ariz. 2011)
18 (the USFS’s failure to monitor for MSO occupancy as specifically contemplated in the
19 2005 Biological Opinion on the MSO “constitutes a failure to conserve [the] species” and
20 required preparation of a new Biological Opinion). In sum, this line of cases – all
21 emanating from the Federal Defendants’ management failures with respect to MSO
22 conservation and recovery – are all based on a fundamental canon of ESA law: it is
23 simply impermissible for the Federal Defendants to conduct a Section 7(a)(2) consultation
24 as to the effects a management approach that the USFS *does not* implement.

25 As WildEarth Guardians has previously explained, adaptive management is an
26 iterative process requiring a constant flow of information feedback from robust
27 monitoring in order to verify the adequacy of an evolving management strategy:

28

1 The Service has defined adaptive management as a structured process for
2 learning by doing and a method for examining alternative strategies for
3 meeting measurable biological goals and objectives, and then, if necessary,
adjusting future conservation management actions according to what is
learned.

4 *Greater Yellowstone Coalition v. Servheen*, 665 F.3d 1015, 1029 n.5 (9th Cir. 2011)
5 (internal quotations and citation omitted). The Federal Defendants admit that robust
6 population trend monitoring was the *sine qua non* of the adaptive management scheme
7 adopted for the MSO, in light of the significant uncertainties regarding MSO population
8 levels and the effect of management activities on the population. In a 1999 letter, the
9 FWS's Regional Director made this abundantly clear when he wrote that "implementation
10 of the population monitoring program recommended in the Recovery Plan [which, as
11 previously noted, was incorporated into all Arizona and New Mexico Forest Plans by the
12 1996 Standards and Guidelines] is essential . . . [to] it's [sic] implementation." AR-USFS
13 8467. An article written by members of the MSO Recovery Team – detailing the failure
14 of the MSO adaptive management program – also highlights the critical importance of
15 population trend monitoring to the ultimate success of the program:

16 Without monitoring, there would be no empirical and objective basis for
17 determining whether management guidelines led to desired outcomes,
whether plan recommendations need reevaluation in an adaptive
management context, or whether the owl should ultimately be delisted.

18 AR-USFS 1008 *see also* AR-USFS 1011 ("[i]nformation about a declining population . . .
19 may provide a trigger for the initiation of more conservative management actions and
20 research specifically designed to understand causes of population declines").

21 Notably, a draft iteration of the 2012 Biological Opinions candidly acknowledged
22 the Federal Defendants' failure to acquire the critical MSO population trend data required
23 for implementation of an adaptive management approach. In this respect, the draft
24 Biological Opinion contained the following sentence:

25 However, since we do not have any overall population trend data for the
26 owl, we do not know the extent of the effects of these wildland fires or
management actions on actual owl numbers.

27 AR-FWS 1632. A USFS reviewer objected to the inclusion of this honest and declarative
28

1 statement with respect to the failure of the adaptive management program, writing that
2 “[t]his sentence is simply not necessary and adds no value.” *Id.* The “offending”
3 sentence was therefore stricken from the Biological Opinions at the USFS’s behest.

4 Notwithstanding the USFS’s desire to obfuscate the core fact that it has failed to
5 implement the adaptive management approach required by the 1996 Standards and
6 Guidelines, the administrative records in this case are replete with the Federal
7 Defendants’ admissions as to this failure. For example, USFS MSO biologists
8 summarized the adaptive management of the 1996 Standards and Guidelines in a 2011
9 research paper as follows: “[t]he proposed strategy . . . was intended to both protect
10 occupied habitat and protect or enhance replacement roost/nest habitat while the
11 knowledge necessary to support a more comprehensive long-term was gained.” AR-
12 USFS 9259 *see also* AR-USFS 1006 (the MSO Recovery Team explains that the 1996
13 Standards and Guidelines were “firmly rooted in the concepts of adaptive management . .
14 . whereby efficacy of the management recommendations needed to be actively tracked
15 and adjusted depending on the results of monitoring”). However, the USFS admits that
16 many aspects of the adaptive management approach “were never implemented”:

17 As a result, we still have no rigorous estimates of population trends in owl
18 populations or habitat, nor have we evaluated the effects of common land-
19 management activities on owls or their prey and habitat Thus, the
20 uncertainties that limited our ability to devise a long-term, landscape-
dynamics-based management strategy for Mexican spotted owls remain and
will continue to remain until we proactively address some of the major
information gaps identified.

21 AR-USFS 9259-60.

22 Likewise, a 2012 research paper authored by Dr. William Block – the USFS’s
23 principal MSO biologist and the Leader of the MSO Recovery Team – admits that the
24 Federal Defendants failed to implement the adaptive management approach that is the
25 subject of the 2012 Biological Opinions. In that paper, Dr. Block explains that the
26 Federal Defendants’ plan was to act in a “staged” or iterative fashion, where the effects of
27 the specific management recommendations prescribed by the 1996 Standards and
28

1 Guidelines “would be assessed to identify the next course of action.” AR-USFS 9372.
2 “Depending on the outcome of these assessments, treatments could continue, discontinue,
3 or be adjusted.” *Id.* However, Dr. Block concedes that the contemplated “assessment
4 never took place.” *Id.* Specifically, Dr. Block acknowledges that the Federal Defendants
5 (1) never implemented a population monitoring program to establish the range-wide
6 population trends of the MSO and (2) never conducted cause and effect experiments to
7 assess the impacts of various USFS forest management treatments:

8 The recommendations for management and monitoring were based on the
9 best available science, much resulting from studies conducted by FSR [the
10 USFS’s research branch]. Regardless, progress on implementing them has
11 been delayed for various reasons. Although NFS [the USFS’s management
12 branch] requires high-quality information, its budgets and expertise are not
13 keeping up with progress in wildlife science, namely the use of modern
14 methods to monitor populations, and the need for experimental studies to
15 realize cause and effect relationships.

16 AR-USFS 9372-73.

17 The FWS is also well aware of the fact that the USFS has failed to implement the
18 1996 Standards and Guidelines. In a 2001 Biological Opinion on national forest
19 management activities in the wild-urban interface, the FWS acknowledged that the
20 population trend monitoring program required by the 1996 Standards and Guidelines was
21 abandoned after a pilot study, and that “no meaningful monitoring of the spotted owl
22 population can occur” until details as to a redefined survey protocol are developed. AR-
23 USFS 1029. Moreover, in the Revised Recovery Plan the FWS acknowledges the
24 USFS’s lamentable failure to acquire basic information as to the impacts of its on-going
25 forest management activities on MSOs:

26 Unfortunately, empirical data on the effects of thinning and other
27 mechanical forest treatments on Mexican spotted owls are nonexistent, and
28 empirical data on effects of forest treatments on other subspecies of spotted
29 owls . . . are sparse and difficult to interpret. Understanding how these
30 treatments affect Mexican spotted owls is one of the major questions faced
31 in integrating recovering this owl with plans for restoring southwestern
32 forests. Although this has been clearly noted for years (e.g., USDI FWS
33 1995, Beier and Maschinski 2003, Ganey et al. 2011), no studies on this
34 topic have been funded to date. Consequently, we can only extrapolate from
35 the sparse data available on this topic resulting from studies of other
36 subspecies of spotted owls. Collectively, these studies suggest that at least

1 some kinds of mechanical forest treatments may negatively affect spotted
2 owls.

3 AR-USFS 9628 .

4 Clearly, there is a fundamental “disconnect” between the fictional management
5 approach which is the subject of the challenged 2012 Biological Opinions – the
6 “continued implementation” of the 1996 Standards and Guidelines – and the management
7 approach which the USFS *actually* implements. During the course of the Section 7(a)(2)
8 consultation that culminated in issuance of the 2012 Biological Opinions, a USFS
9 reviewer candidly pointed to the core infirmity of the FWS’s analysis and questioned
10 whether that analysis could withstand scrutiny in light of the failed adaptive management
11 program. In commenting on a draft version of the Biological Opinions, she wrote:

12 So, the jeopardy analysis is based on an unknown status of the species. Is
13 this defensible?

14 AR-FWS 1639. The clear answer to this question is “no,” and WildEarth Guardians
15 respectfully submits that this Court should provide that unequivocal answer to the Federal
16 Defendants in this case.

17 In their cross-motion for summary judgment, the Federal Defendants make various
18 arguments in their effort to convince the Court that they have complied with the adaptive
19 management plan of the 1996 Standards and Guidelines. First, they argue that they are
20 able to implement the adaptive management program “without the population data
21 generated by range-wide population monitoring,” and that such data is useful only for
22 delisting purposes after 15 years of monitoring. Fed.Memo. at 17. This notion is absurd,
23 and is a post hoc rationalization that finds no support whatsoever in the administrative
24 records. Indeed, as discussed above, all the evidence in the administrative record is to the
25 contrary: range-wide population trend data is “essential” to implementation of the 1996
26 Standards and Guidelines because without such information it is impossible for the
27 Federal Defendants to verify that the management actions permitted by the 1996
28 Standards and Guidelines are consistent with the MSO’s conservation and recovery. *See*

1 also SOF ¶¶ 14-22. Plain and simple, adaptive management *without* range-wide
2 population trend monitoring to verify the impacts of permitted management actions is *not*
3 adaptive management in any way, shape, or form. It is nothing more than a sham.

4 Second, the Federal Defendants argue that project-specific “implementation
5 monitoring” – “for at least a year prior to project implementation and two-three years
6 post-project implementation” – provides adequate “feedback” for the Federal Defendants
7 to ascertain whether permitted management actions should be modified or curtailed.
8 Fed.Memo. at 17-18. Again, this is nothing more than a post hoc rationalization which
9 finds no support in the administrative records. The FWS has *never* taken the position that
10 the limited and anecdotal information obtained through “implementation monitoring” of
11 site-specific projects is adequate to inform the development and evolution of an effective
12 management approach towards the MSO. In fact, the administrative records make it clear
13 that the USFS knows the limitations of “implementation monitoring,” and that the FWS
14 has taken the position that it *does not* serve the same purpose as range-wide population
15 trend monitoring. *See* AR-FWS 1643 (in its comments on a draft version of the
16 Biological Opinions, the USFS states that “the FWS has determined that the data
17 collected [through implementation monitoring] could not be used to make conclusions
18 related to the impacts of treatments”).

19 Third, the Federal Defendants argue that the USFS “did not . . . commit to sole
20 responsibility for the implementation and execution of range-wide population
21 monitoring” when it adopted the 1996 Standards and Guidelines, and that it cannot
22 therefore be faulted for the fact that the required monitoring never occurred. Fed.Memo.
23 at 15-16. Even if this is true, and the USFS only committed to “collaborate” with other
24 stakeholders to conduct the MSO population monitoring required by the 1996 Standards
25 and Guidelines, this would not constitute a defense to WildEarth Guardians’ claims. In
26 *Natural Resources Defense Council v. Kempthorne*, 506 F.Supp.2d 322, 354 (E.D.
27 Cal.2007), the federal defendant argued that it could continue to rely on the validity of a
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1 no-jeopardy Biological Opinion that was premised on the FWS’s assumption that the
2 defendant would develop and implement a regional water management plan, even though
3 development of the plan depended on the collaboration of other stakeholders. The court
4 held that such an arrangement absolved the defendant of its “direct responsibility” for
5 ESA compliance:

6 Leaving it to the Army [the defendant] and other interested parties to
7 develop a regional water management plan enables the Army to sidestep
8 any direct responsibility for addressing deficit groundwater pumping, and
9 was an admission that what is currently on the table as far as mitigation
10 measures is inadequate to support the no jeopardy decision.

11 *Id.* Likewise, in this case, the USFS cannot shirk its *own* responsibility to acquire
12 population trend data by shifting the blame for the monitoring failures to third parties. As
13 the Court stated in *Oregon Natural Desert Association v. Tidwell*, 716 F.Supp. 982, 1004
14 (D.Ore. 2010), “the buck must stop somewhere,” and since the USFS received the
15 benefits of the 1996 Standards and Guidelines – in the form of liberal management
16 recommendations pending verification of their adequacy through monitoring – it cannot
17 repudiate the corresponding obligations to monitor as required by the 1996 Standards and
18 Guidelines. AR-USFS 1006 (the Recovery Team states that “[r]ather than recommend
19 cessation of all management activities that constituted possible but uncertain effects, [it]
20 developed a more flexible plan that was contingent upon an adaptive philosophy . . .
21 whereby efficacy of the management recommendations needed to be actively tracked and
22 adjusted depending on the results of monitoring”) *see also* SOF ¶ 17 (USFS given
23 “considerable latitude” because of its commitment to conduct population monitoring).

24 Fourth, the Federal Defendants argue that budgetary constraints and personnel
25 issues prevented the USFS from complying with the range-wide population trend
26 monitoring requirement of the 1996 Standards and Guidelines. Fed.Memo. at 16. This
27 argument likewise fails. It became apparent to the Federal Defendants as early as 2000
28 that the range-wide population monitoring required by the 1996 Standards and Guidelines
would run afoul of the USFS’s limited financial commitment to MSO conservation and

1 recovery. Surely, in the last 15 or so years the Federal Defendants could have developed
2 the wherewithal to acquire the necessary funding to conduct the critical MSO population
3 trend monitoring required by the 1996 Standards and Guidelines. And, in any event,
4 budgetary constraints are simply not an excuse for violating the ESA:

5 Budgetary constraints, far from being exceptional, are an everyday reality . .
6 . . Defendant may not avoid its mandatory duties under the ESA on the
7 grounds that its budget and staff are inadequate.

8 *Center for Biological Diversity v. Norton*, 304 F.Supp.2d 1174, 1179-80 (D.Ariz. 2003).

9 Fifth, the Federal Defendants make much of the USFS's collaborative participation
10 in the development and implementation of a redesigned MSO population monitoring
11 program, and argue that the "USFS continues to participate in the collaborative effort to
12 establish a range-wide population monitoring program" in lieu of implementing the
13 range-wide population trend monitoring required by the 1996 Standards and Guidelines.
14 Fed.Memo. at 16-17, 20. This argument fails for three separate and independent reasons.
15 First, the argument impermissibly relies on post-decisional documents (AR-USFS 10075,
16 10150) that were not part of the administrative records for the Biological Opinions.
17 *Arizona Cattle Growers' Association*, 273 F.3d at 1244-45 (FWS may not rely on post-
18 decisional documents to defend Biological Opinions in litigation). Second, the argument
19 is a mere post hoc rationalization as the FWS has never taken the position that the
20 redesigned population monitoring protocol is equivalent to the monitoring program
21 required by the 1996 Standards and Guidelines. Indeed, the FWS admits in the Revised
22 Recovery Plan that the redesigned population monitoring program "will not provide the
23 detailed demographic data that mark-recapture sampling [as was contemplated by the
24 1996 Standards and Guidelines] would provide for the MSO." AR-USFS 9648.

25 Finally, and most importantly, the Federal Defendants fail to disclose to the Court
26 that the USFS has categorically refused to make any commitment whatsoever with respect
27 to its future participation in the redesigned population trend monitoring program. A draft
28 iteration of the Biological Opinions contained a paragraph in which the FWS represents

1 that the USFS committed to participate in the population trend monitoring program:

2 As part of the proposed action, the USFS Region 3 has agreed to participate
3 in the population occupancy monitoring pursuant to the procedures provided
4 by the Mexican Spotted Owl Recovery Team and outlined in the Draft
5 Revised Recovery Plan. In cooperation with the FWS, Mexican Spotted
6 Owl Recovery Team, USDA Rocky Mountain Research Station, and other
land management agencies, the USFS has agreed to assist with monitoring
owl occupancy within a . . . framework pursuant to procedures provided by
the Mexican Spotted Owl Recovery Team in order to evaluate trends in the
overall population.

7 AR-FWS 1639. This proposed language was reviewed by the USFS, where it triggered
8 the firmest possible rebuke. One USFS reviewer wrote: “At this time, Region 3 has not
9 agreed to participate in population occupancy monitoring.” *Id.* A second USFS reviewer
10 wrote: “The FS did not agree to this. The FS offered to initiate discussions regarding this
11 new approach in the revised Recovery Plan.” *Id.* A third USFS reviewer was less
12 restrained than her colleagues in her categorical rejection of any notion that the USFS had
13 committed itself to participate in the implementation of a redesigned population
14 monitoring program:

15 ABSOLUTELY NOT. FS HAS NOT SUGGESTED THAT WE WANT
16 TO INCLUDE THE MSO RECOVERY PLAN OCCUPANCY
17 MONITORING AS PART OF THE [FOREST PLAN] PROPOSED
18 ACTION. FS WANTS THIS MONITORING SEPARATED FROM THE
19 ESA § 7 PROCESS OR PLACE [sic] IN THE CONSERVATION
20 RECOMMENDATIONS AT MOST.

21 *Id.* (capital letters in original). In light of the USFS’s unequivocal refusal to commit to
22 participation in the redesigned population trend monitoring program, the FWS may not
23 rely on such hypothetical future participation in reaching a no jeopardy conclusion in the
24 2012 Biological Opinions. Accordingly, the Federal Defendants fail in their efforts to
25 bootstrap a newly hatched monitoring program – which the USFS refuses to embrace and
26 commit to – into a permissible substitute for the monitoring required by the 1996
27 Standards and Guidelines.

28 In the past, courts and academic commentators have acknowledged “the extent to
which overly flexible adaptive management schemes do not fit neatly within the ESA’s
existing regulatory structure.” *Kemphorne*, 506 F.Supp.2d at 352-53 *see also Greater*

1 *Yellowstone Coalition*, 665 F.3d at 1028 n. 5 (“[c]ommentators have noted that, while
2 adaptive management has become the dominant agency response to scientific uncertainty,
3 it can be difficult to evaluate against the substantive requirements of environmental laws
4 such as the ESA”). In this case, the pitfalls of over-reliance on an adaptive management
5 approach towards ESA compliance are manifest. The lynchpin of the 1996 Standards and
6 Guidelines was range-wide population monitoring which was necessary to verify the
7 FWS’s assumptions as to (1) the adequacy of the existing MSO population to ensure the
8 species’ survival and (2) the impacts associated with permitted management actions. In
9 the absence of such verifying data on MSO population trends, the entire adaptive
10 management program unravels. For this reason, the 2012 no-jeopardy Biological
11 Opinions – which all irrationally assume “continued implementation” of the 1996
12 Standards and Guidelines – are arbitrary and capricious.

13 **IV. THE FEDERAL DEFENDANTS IGNORE THE BEST AVAILABLE**
14 **SCIENTIFIC INFORMATION CONCERNING THE MSO’S DECLINING**
15 **POPULATIONS**

16 In justifying their “no jeopardy conclusions,” the 2012 Biological Opinions
17 irrationally assert that “our records indicate no decline in the MSO population.” SOF ¶
18 92. This misrepresentation is head spinning in its audacious departure from reality.
19 Indeed, even the 2012 Biological Opinions themselves concede that the studies of MSO
20 population trends that have been conducted “have all noted that the study populations
21 have declined in the recent past.” SOF ¶ 86. The fact of the matter is that virtually all the
22 population trend evidence available to the Federal Defendants shows that the MSO
23 population is declining range-wide, and that some local populations have gone extinct
24 since the time of listing. SOF ¶¶ 84-90. This decline was addressed at length in “Raptors
25 of New Mexico,” J.E. Cartron ed. (University of New Mexico Press 2010), wherein the
26 author of the chapter on the MSO concludes that there is a “widespread and continued
27 decline of the species” that has “occurred over the past two decades.” AR-USFS 9158
28 *see also id.* at 9140 (noting that the only two detailed demographic studies of the MSO

1 observed declining population trends), *id.* at 9143 (“good data” shows that “the number of
2 owls declined in at least some parts of the Southwest”), *id.* at 9155-56 (discussing the
3 various MSO population trend studies that have been conducted, all of which show
4 declines in the MSO population and local extirpations).

5 The overwhelming – and consistent – evidence in the administrative records as to
6 the MSO’s recent population declines is too voluminous to recount here in its entirety, so
7 WildEarth Guardians cites to the following record excerpts as examples: AR-USFS 9262
8 (a 2011 USFS study states “all [MSO] populations studies within the [Upper Gila
9 Mountains Recovery Unit] were declining during the 1990s”), AR-USFS 3176-79 (a 2006
10 USFS study acknowledges declining populations and local extirpations), AR-USFS 9772
11 (the MSO Revised Recovery Plan states that available population trend monitoring
12 “results suggest that most populations of Mexican spotted owls studied either have
13 declined in the recent past or are still declining”), AR-USFS 9585 (the MSO Revised
14 Recovery Plan states that studies thus far conducted on population trends “have all noted
15 that the study populations have declined in the recent past”), *see also* SOF ¶¶ 84-90.

16 The only evidence relied upon by the Federal Defendants in support of their
17 patently fallacious assertion that there are “no records” indicating a decline in MSO
18 populations is the increase in known MSO sites which has occurred as a result of MSO
19 surveys in new areas. But the MSO Revised Recovery Plan expressly cautions that “an
20 increase in abundance cannot be inferred from these data.” SOF ¶ 91. In fact, during the
21 consultation process that culminated in the 2012 Biological Opinions, the FWS cautioned
22 that inferring population increases as a result of the newly discovered MSO sites is
23 “misguided” and “misleading.” AR-FWS 357, 368 *see also* AR-USFS 10039 (a USFS
24 MSO surveyor notes that a 50% increase in known MSO sites “does not mean the MSO
25 population has increased by 50%, just that we are finding more previously unknown
26
27
28

1 territories as we expand our surveys”).⁴

2 In *Tucson Herpetological Society v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009), the
 3 Ninth Circuit held that “[i]f the science on population size and trends is underdeveloped
 4 and unclear, the Secretary cannot reasonably infer that the absence of evidence of
 5 population decline equates to evidence of persistence.” That prohibition has particular
 6 resonance in this case, where the Federal Defendants infer increases in MSO population
 7 trends despite the overwhelming evidence showing population declines. If ever an issue
 8 called out for application of the “best available scientific information” rule, this is it.
 9 Overwhelming scientific evidence shows that MSO population trends are declining, and
 10 the FWS simply ignored this evidence to reach the no jeopardy conclusions of the 2012
 11 Biological Opinions.

12 **V. THE FEDERAL DEFENDANTS HAVE FAILED TO PROVIDE ANY**
 13 **RATIONAL ADMINISTRATIVE-RECORD BASED JUSTIFICATION FOR**
 14 **THE FWS’S DEPARTURE FROM ITS PAST PRACTICE OF ISSUING A**
 15 **SINGLE REGIONAL LANDSCAPE-LEVEL BIOLOGICAL OPINION**
 16 **ASSESSING USFS MANAGEMENT ACTIONS AFFECTING THE MSO**

17 In their cross-motion for summary judgment, the Federal Defendants acknowledge
 18 that “due to the owl’s metapopulation structure, maintaining habitat connectivity is an
 19 important element for owl conservation and recovery.” Fed.Memo. at 21. Indeed, the
 20 FWS’s Revised Recovery Plan for the MSO states that “[l]andscape modeling and
 21 analysis are critical in evaluating the distribution of owls and habitats, identifying areas
 22 where threats are greatest, and then applying Recovery Plan recommendations in such a
 23 way as to sustain and improve owl habitat.” AR-USFS 9541, *see also* SOF ¶¶ 76-83.

24 The crucial importance of maintaining habitat connectivity across the MSO’s

25 4. In their cross-motion for summary judgment, the Federal Defendants cite to one
 26 isolated study positing a “possibly expanding” population in the Smokey Bear Ranger
 27 District of the Lincoln National Forest. Fed.Memo. at 14. However, this conclusion –
 28 like the 2012 Biological Opinions’ irrational no jeopardy conclusions – was based on an
 increase in known MSO sites associated with more intensive survey efforts. AR-USFS
 8954 (“[t]he number of sites surveyed this year was greater than any year to date, which
 could have something to do with more pairs and fledglings being found”).

1 entire range cannot be gainsaid, especially in light of the species' obligate dispersal
2 patterns:

3 A consequence of this behavior for the Mexican Spotted Owl is that the
4 young birds that are produced in other populations are critical to the
5 continued persistence of any local population. This means that Spotted Owl
6 populations in the Southwest are tied together to a greater or lesser extent
7 by the dispersal of juveniles, depending upon geographic distances between
8 the populations.

9 * * * *

10 Thus the number of new birds that become breeders in a range and that
11 serve as the replacement for the older birds as they die is heavily dependent
12 on what happens elsewhere. In order for a local population in one mountain
13 range to persist through time, there must be other populations in other
14 mountain ranges that are successfully producing enough young that will
15 disperse and then move into the target population.

16 AR-USFS 9148, 9156. It is for this reason that the Ecological Management Units
17 developed for purposes of the FWS's MSO Revised Recovery Plan do not respect
18 national forest boundaries, and are instead comprised of multiple adjacent and/or nearby
19 national forests with habitat connectivity. SOF ¶ 79.

20 While the FWS acknowledges that its decision to limit the analysis in each of the
21 2012 Biological Opinions to a single national forest is a "distinct change" from previous
22 Biological Opinions, it provides no justification whatsoever for this change. In their
23 cross-motion for summary judgment, the Federal Defendants attempt to fill this obvious
24 gap with post hoc rationalizations and they endeavor to provide rationales for the new
25 analytical approach that find no support anywhere in the administrative records compiled
26 by the Federal Defendants. Fed.Memo. at 21. As discussed at this outset of this
27 memorandum, the Federal Defendants may not rely on such post hoc rationalizations to
28 justify their actions during the course of litigation.

Furthermore, the Federal Defendants' argument that the FWS always pursues a
similar forest-by-forest approach to the preparation of Biological Opinions in connection
with other ESA-listed species is simply untrue and misleading. Fed.Memo. at 22. In fact,
and despite the Federal Defendants' erroneous representations to the contrary, the FWS

1 has issued *one* Biological Opinion assessing the combined impacts of management
2 actions implemented by the USFS and the Bureau of Land Management on the Northern
3 spotted owl, and has issued *one* Biological Opinion assessing the impacts of USFS
4 management actions in “seven National Forests within Colorado and southeastern
5 Wyoming” on the Canada lynx. *See* Exhibit 1 (excerpt of the FWS’s Biological Opinion
6 on the range-wide impacts of all federal actions in the range of the Northern spotted owl)
7 and Exhibit 2 (excerpt of the FWS’s Biological Opinion on the effects of the Southern
8 Rocky Mountains Lynx Amendments).⁵

9 **VI. THE BIOLOGICAL OPINIONS’ INCIDENTAL TAKE STATEMENTS**
10 **ARE ARBITRARY AND CAPRICIOUS BECAUSE THEY**
11 **IRRATIONALLY FAIL TO ACCOUNT FOR THE INCIDENTAL TAKE**
12 **OF MSOs OUTSIDE OF PROTECTED ACTIVITY CENTERS**

13 The Federal Defendants state in their cross-motion that the Biological Opinions’
14 Incidental Take Statements account for all incidental take “both inside and outside
15 designated owl PACs.” Fed.Memo at 22. This assertion is incorrect, is a post hoc
16 rationalization of counsel, ignores the best available scientific information concerning
17 MSO dispersal, and is at odds with the language of the Incidental Take Statements
18 themselves.

19 Even a cursory glance at the Incidental Take Statement language shows that the
20 only incidental take which is anticipated by the Biological Opinions is take occurring
21 *inside* of Protected Activity Centers. *See for example* AR-FWS 7921 (Incidental Take
22 Statement in the Cocooning National Forest is limited in scope to the permitted amount of
23 incidental take occurring in Protected Activity Centers). Further, the Biological Opinions
24 go so far as to explain – in an attempt to justify – the impermissibly narrow focus of the
25 Incidental Take Statements on Protected Activity Centers alone:

26 _____
27 5. In light of the Federal Defendants patently and demonstrably untrue and misleading
28 statements with respect to the analytical approach of those Biological Opinions, Wild
Earth Guardians is constrained to correct the record on this important point with extra-
record evidence so that the Federal Defendants’ misrepresentations are not left
unchallenged and uncorrected.

1 Actions outside PACs will generally not result in incidental take because we
2 are not reasonably certain the MSOs are nesting and roosting in areas
3 outside of PACs.

4 AR-FWS 7920. Of course, this purported explanation for “writing off” all of the
5 incidental take which occurs outside of Protected Activity Centers is irrational and
6 inconsistent with the best available scientific information on this issue which shows that
7 MSOs are obligate dispersers which spend a significant amount of their life cycles in
8 habitats *outside of* Protected Activity Centers that have no regulatory protections
9 whatsoever. *See* SOF ¶¶ 101-05 (discussing the fact that MSOs are obligate dispersers
10 that “occupy cover types that have no protected status” during their long migrations).
11 Accordingly, the FWS’s facile effort to wash its hands of the obligation to account for the
12 incidental take of MSOs that is likely to occur *outside of* Protected Activity Centers by
13 stating that it is “not reasonably certain” that MSOs occupy such habitats must fail: the
14 FWS’s claim in this regard is simply inconsistent with the best available scientific
15 information that shows that MSOs *do* occupy non-Protected Activity Center habitats
16 during their life cycles.

17 Finally, the Federal Defendants’ claim that there is no need to worry about the
18 extent of incidental take occurring outside of Protected Activity Centers because “the
19 agencies may designate new PACs or implement other measures to avoid impacts” is
20 nothing more than a post hoc rationalization of counsel for purposes of this litigation.
21 Fed.Memo. at 22. Admittedly, surveys for newly discovered dispersing MSOs and the
22 subsequent creation of Protected Activity Centers around dispersing MSOs would bring
23 those dispersers into the coverage of the 2012 Biological Opinions’ Incidental Take
24 Statements. However, there is no evidence anywhere in the administrative records that
25 supports the argument that such surveys and Protected Activity Center designations will
26 occur in connection with those dispersing MSOs that inhabit “cover types that have no
27 protected status.”

28 For the foregoing reasons, the Federal Defendants’ efforts to salvage the arbitrary

1 and capricious Incidental Take Statements in the 2012 Biological Opinions must fail. To
2 make their arguments in this regard, the Federal Defendants are forced to posit a “fantasy
3 world” where all MSOs spend their entire lives inside Protected Activity Centers. As
4 WildEarth Guardians has demonstrated, the reality of the MSO life cycle is far different
5 and even the Federal Defendants acknowledge that MSOs occupy habitats outside of
6 Protected Activity Centers for important parts of their life cycle.

7 **VII. THE 2012 BIOLOGICAL OPINIONS ARE ARBITRARY AND**
8 **CAPRICIOUS BECAUSE THEY DO NOT INCORPORATE THE BEST**
9 **AVAILABLE SCIENTIFIC INFORMATION CONCERNING THE**
10 **EFFECTS OF CLIMATE CHANGE ON MSOs**

11 All MSO biologists who have considered the issue opine that climate change will
12 have a significant adverse impact on the MSO in the future, and the FWS’s Revised
13 Recovery Plan for the MSO details the specific impacts that are expected to be associated
14 with climate change:

15 1) shifts in the distribution of the owl itself, along with major prey species
16 and potential competitors and predators, possibly along elevational or
17 latitudinal gradients; 2) effects on demographic rates, such as survival and
18 reproduction; 3) changes in coevolved interactions, such as prey-predator
19 relationships; 4) direct loss of habitat due to increased fire severity, bark
20 beetle outbreaks, and direct warming of habitats; 5) increased population or
21 range expansion of species that are direct competitors; and, 6) reductions in
22 population size.

23 AR-USFS 9614, 9790-93. Indeed, the FWS admits that scientific projections regarding
24 the possible extinction of the MSO as a species in light of climate change impacts are
25 “robust and sobering.” AR-USFS 9791-92 *see also* SOF ¶¶ 93-100. To confront the
26 challenge of climate change and the risk of MSO extinction, the FWS recommends both
27 “mitigation strategies” and “adaptation strategies.” AR-USFS 9851-52.

28 Notwithstanding this well known risk, the FWS barely discusses the climate
change issue in the 2012 Biological Opinions. SOF ¶ 100. The rationale for the
shockingly superficial treatment of one of the most important issues facing the MSO is
found in the administrative record:

[T]he climate change portion [of the Biological Opinions] will consist of a
section in the front of the document, and a pp [paragraph] or more for each

1 species depending upon how much specific information might be available
2 related to climate change and the species. This portion of the document will
3 be very general for the most part. It is unlikely that we will see significant
climate change effects during the life of the consultation (less than 10
years).

4 AR-FWS 194. This analytical approach fails to satisfy the stringent requirements of the
5 ESA. First, by their very nature the impacts of climate change will unfold over time
6 incrementally and slowly – they will not be experienced in *any* 10 year increment of time.
7 Accordingly, the FWS may not evade its obligation to consider climate change effects in
8 Biological Opinions because of their temporal scale relative to the temporal scale of
9 federal actions. If this were the rule, then the FWS would *never* have to discuss the
10 impacts of climate change in any Biological Opinion.

11 Second, WildEarth Guardians has demonstrated that there is a significant body of
12 credible scientific information concerning the impacts of climate change and the MSO,
13 and the real possibility of extinction associated with almost all climate change scenarios.
14 SOF ¶¶ 93-100. The FWS is well aware of this scientific information and incorporated
15 much of it into the Revised Recovery Plan for the MSO, as discussed in the paragraph
16 immediately preceding. Nonetheless, there is absolutely no MSO-specific discussion of
17 climate change impacts in the 2012 Biological Opinions. This is a clear case of the FWS
18 both (1) ignoring the best available scientific information on a crucial issue affecting the
19 MSO and (2) failing to meaningfully consider a relevant factor. Accordingly, the 2012
20 Biological Opinions are arbitrary and capricious.

21 **VIII. THE FWS ENTIRELY FAILED TO CONSIDER CUMULATIVE EFFECTS**
22 **OF NON-USFS FOREST MANAGEMENT ACTIONS IN THE 2012**
BIOLOGICAL OPINIONS

23 The Federal Defendants' cross-motion for summary judgment does not discuss the
24 obvious inadequacy of the Biological Opinions' discussion of cumulative effects
25 associated with non-USFS forest management actions. Nonetheless, WildEarth
26 Guardians briefly re-visits this issue in this response memoranda to emphasize the fact
27 that the Biological Opinions are arbitrary and capricious insofar as their assessment of
28

1 cumulative effects is concerned.

2 An agency's failure to consider "a relevant factor" of an issue renders the agency's
3 action with respect to that issue arbitrary and capricious. *Arizona Cattle Growers*, 273
4 F.3d at 1236. In the preparation of Biological Opinions, an analysis of cumulative effects
5 is not only "relevant" – it is also specifically and expressly required by the FWS's
6 implementing regulations for Section 7(a)(2) consultations. 50 C.F.R. § 402.14(g)(3)-(4).
7 As WildEarth Guardians explained in its opening brief in support of its motion for
8 summary judgment, one of the lead drafters of the Biological Opinions admits that she
9 "spaced putting the cumulative effects in all of the MSO [Biological Opinions]." SOF ¶
10 61. In an effort to gloss over this fatal oversight, an e-mail containing excerpts from the
11 2005 Biological Opinions' discussion of cumulative effects was circulated with
12 instructions to "cut and paste" the 2005 paragraphs into the relevant 2012 Biological
13 Opinions. AR-FWS 6724-26.

14 In fact, the cumulative effects sections of the 2012 Biological Opinions are 100%
15 cut-and-paste from the 2005 Biological Opinions SOF ¶ 62. That is, there is absolutely
16 no new material concerning cumulative effects in the 2012 Biological Opinions, despite
17 the fact that seven years had elapsed since the language on cumulative effects was drafted
18 for inclusion in the 2005 Biological Opinion. Obviously, the Federal Defendants did not
19 actually consider cumulative effects at all in preparing the 2012 Biological Opinions.
20 This particular issue – required by regulation to be included in the Biological Opinions –
21 was "spaced" by the drafter of the Biological Opinions, so seven year old language was
22 recycled for purposes of the 2012 Biological Opinions. This course of action does not
23 constitute the reasoned consideration of a relevant factor and, accordingly, the 2012
24 Biological Opinions are arbitrary and capricious.

25 **IX. THE FEDERAL DEFENDANTS IGNORE THE BEST AVAILABLE**
26 **SCIENTIFIC INFORMATION CONCERNING THE MSO'S RESPONSE**
27 **TO WILDFIRE**

28 Finally, the Federal Defendants' cross-motion for summary judgment asserts that

1 the FWS's 2012 Biological Opinions "reasonably explain that the likely long-term effects
2 of a high-severity, landscape-scale wildfire . . . would be negative." Fed.Memo. at 23.
3 This argument fails for two reasons. First, the 2012 Biological Opinion page cited by the
4 Federal Defendants in support of this proposition poses no such hypothesis as to the long-
5 term effects of wildfire. The statement is yet another post hoc rationalization which finds
6 no support in the administrative records. Second, the evidence that *is* available in the
7 administrative records as to this issue shows that while the science is unclear with respect
8 to the long-term effect of severe wildfires on MSOs, available evidence shows that such
9 effects are likely beneficial:

10 [T]he second major presumed threat to the [MSO], that from large or
11 catastrophic wildfires, has now been found in numerous studies to be not as
12 serious a problem for the owls as originally believed, and in some cases it
13 may perhaps even be beneficial Not only do owls continue to occupy
14 and successfully breed in areas that have been burned during large fires, but
15 there is anecdotal evidence that they may actually be attracted to some
16 burned areas where a ground cover of grass develops and rodent densities
17 consequently increase.

18 AR-USFS 9158 *see also* SOF ¶¶ 106-09, 111-12. Indeed, in recent USFS studies
19 addressing the impacts of fire and in the FWS's Revised Recovery Plan, both the USFS
20 and the FWS acknowledge that there is no available evidence supporting the proposition
21 that severe fire has a negative impact on MSO populations, and ample evidence
22 supporting the proposition that MSOs are well adapted to even severe wildfires. AR-
23 USFS 9217-19, 9755-59. The Federal Defendants' assertions to the contrary in this
24 litigation are yet another striking example of their failure to utilize the best available
25 scientific information and post hoc rationalization.

26 **X. CONCLUSION**

27 In an article entitled "Adaptive Management to Protect Biodiversity: Best
28 Available Science and the Endangered Species Act," O. Odom Green at al. (U.S.
Environmental Protection Agency Papers 2012), the authors state that "[t]he legal
criticisms of adaptive management have centered on agencies using the term adaptive
management as a means to allow for informal management or to shirk management

1 responsibility altogether.” Another commentator notes that “[a]daptive management can
2 be used as a smokescreen to conceal political accommodations that sacrifice the
3 protection of species or natural systems.” H. Doremus, “Adaptive Management, the
4 Endangered Species Act, and the Institutional Challenges of New Age Environmental
5 Protection,” 41 Washburn L.J. (2001). Unfortunately, in the case of the MSO the Federal
6 Defendants’ claims as to the USFS’s “continuing implementation” of the 1996 Standards
7 and Guidelines’ adaptive management approach to MSO conservation and recovery
8 serves just these nefarious purposes. The USFS *does not* implement the adaptive
9 management strategy prescribed by the 1996 Standards and Guidelines, and the 2012
10 Biological Opinions’ conclusions to the contrary are arbitrary and capricious for this
11 reason and the other reasons discussed by WildEarth Guardians.

12 For the foregoing reasons, USFS management activities adversely affecting the
13 MSO should be enjoined pending the Federal Defendants’ compliance with the ESA.

14
15 Dated: June 24, 2016

Respectfully submitted,

16
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