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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CENTER FOR BIOLOGICAL DIVERSITY, and MARICOPA AUDUBON SOCIETY, Plaintiffs, v. DIRK KEMPTHORNE, Secretary of the Interior, U.S. Department of Justice; and DALE HALL, Director, U.S. Fish and Wildlife Service, Defendants.	No. CV 07-0038-PHX-MHM **ORDER** 3/5/08

Currently before the Court are Plaintiffs Center for Biological Diversity and Maricopa Audubon Society's ("Plaintiffs") motion for summary judgment (Dkt. #28); and Defendants Dirk Kempthorne and Dale Hall's ("Defendants") cross-motion for summary judgment (Dkt. #36). Also before the Court are the San Carlos Apache Tribe, Yavapai-Apache Nation, Tonto Apache Tribe, Fort McDowell Yavapai Nation, and Salt River Pima-Maricopa Indian Community's (collectively, the "Amici Curiae") motions for leave to file amicus curiae briefs. (Dkt. #s 47, 49, 51). Plaintiffs challenge the United States Fish & Wildlife Service's ("FWS") August 30, 2006 finding denying Plaintiffs' petition to define the bald eagle population of the Sonoran Desert region of the American southwest ("Desert bald eagle") as a distinct population segment ("DPS") and to list the Desert bald eagle as "endangered" pursuant to the Endangered Species Act ("ESA").

Defendants counter that the FWS's July 9, 2007 final delisting rule moots Plaintiffs' challenge to the FWS's August 30, 2006 finding, and in the alternative, the FWS's August 30, 2006 finding was reasonable. After careful consideration of the pleadings and the administrative record, and after holding oral argument on February 5, 2008, the Court issues the following Order.

I. FACTUAL BACKGROUND

Desert bald eagles are a discrete population of bald eagles that nest in the Sonoran Desert in central Arizona and northwestern Mexico. Administrative Record ("AR") 3538, 3731. They represent the entire bald eagle population known to breed in the Southwestern United States, and they demonstrate unique behavioral characteristics in contrast to the greater population of bald eagles in the contiguous 48 states. AR 5898-99; AR 6408. Desert bald eagles inhabit a desert ecological setting, a desert riparian habitat that is drier, warmer, and less vegetated than is typical for the bald eagle species. AR 3539, 3594; AR 4142. They breed in upper and lower Sonoran life zones; and they are smaller and lighter than most other bald eagles. AR 3542, 3594. Desert bald eagles also possess behavioral distinctions, such as frequent cliff nesting and early season breeding. AR 3541, 3595-96; AR 6165, 6408. In addition, Desert bald eagles are reproductively isolated, and perhaps genetically distinct, from other bald eagle populations. AR 3542, 3596-98; AR 3542. Indeed, "[b]ecause of the limited distribution and small size of the Southwest bald eagle population, its geographic location and relative isolation, and the unique ecological conditions to which it has adapted, this population is both unique and important." AR 5899.

In 2005, estimates by the Arizona Game and Fish Department ("AGFD") indicated that there were 36 active breeding pairs in the Desert bald eagle population. AR 3972. Desert bald eagles suffer from high mortality rates and low productivity, and their small population size and reproductive isolation make them vulnerable to loss of genetic variability, which in turn can precipitate population decline. AR 3583, 3607-11, 3792, 3809-11, 4069; AR 3549-51, 3605-07. Desert bald eagles also face a number of external

threats such as habitat loss due to human development, loss of riparian trees and snags, recreational disturbance, declining prey base, grazing, water diversions, dams, and mining. AR 3545-46, 3550-53. Moreover, a recent population viability study conducted by the Center for Biological Diversity concludes that without continued and concerted protection, the Desert bald eagle population may become extinct in approximately 75 years. (Dkt. #33, Ex. B).

II. REGULATORY & PROCEDURAL HISTORY

The Bald Eagle was first listed as an endangered species pursuant to the Endangered Species Act ("ESA") on February 14, 1978[1]. AR 6560; 72 Fed. Reg. 6230 (Feb. 14, 1978). The primary goal of the ESA is to restore endangered and threatened animals and plants to the point where they are again viable, self-sustaining members of their ecosystems. AR 5992. The U.S. Fish and Wildlife Service ("FWS") administers the ESA with respect to freshwater fish and all other species, including the Bald Eagle.

Section 4(f) of the ESA provides for the development and implementation of recovery plans for listed species to identify, describe, and schedule the actions necessary to restore endangered and threatened species to a more secure condition. AR 5992. The FWS established five recovery regions for the Bald Eagle, including one for the southwestern corner of the United States (consisting of Arizona, the area of California bordering the Lower Colorado River, New Mexico, Oklahoma, and Texas west of the 100th Meridian). AR 5992, 5813.

On July 12, 1995, the FWS reclassified the Bald Eagle from "endangered" to "threatened." 60 Fed. Reg. 36,000 (July 12, 1995); AR 5990-91. At that time, the FWS declared that it recognized "only one population of bald eagles in the lower 48 States," because Desert bald eagles "are not reproductively isolated." AR 5994, 5995. However, the FWS has since changed its mind, stating that data indicating that no bald eagles have

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[1]The Bald Eagle was listed as endangered in 43 states, and as threatened in the States of Michigan, Minnesota, Wisconsin, Oregon, and Washington.

immigrated to, and only one eagle has emigrated from, the Desert bald eagle population establishes that "the Sonoran Desert bald eagle population [is] discrete from other bald eagle populations." AR 3543; 72 Fed. Reg. 37346, 37355 (July 9, 2007).

On October 6, 2004, Plaintiffs petitioned the FWS to define the Desert bald eagle as a distinct population segment ("DPS") and to then list that DPS as "endangered" pursuant to the ESA. AR 3578-93. Subsequently, on March 27, 2006, Plaintiffs filed a lawsuit against the U.S. Department of the Interior and the FWS for failing to make a timely finding on Plaintiffs' petition. AR 3538. The parties reached a settlement and the FWS agreed to complete its finding by August 2006. AR 3200, 3268, 3751-56.

On August 30, 2006, the FWS issued a negative 90-day finding that Plaintiffs' petition "[did] not present substantial scientific or commercial information indicating that the petitioned action may be warranted." 71 Fed. Reg. 51,549; 51,551 (Aug. 30, 2006); AR 3538. As such, the FWS did not initiate a status review of the Desert bald eagle to determine whether listing the Desert eagle population as a DPS is in fact warranted. AR 3554. And on January 5, 2007, Plaintiffs brought the instant action challenging the FWS's August 30, 2006 negative 90-day finding. (Complaint, Dkt. #1).

III. DISCUSSION

Plaintiffs contend that the FWS's August 30, 2006 finding violates the Endangered Species Act ("ESA") and is arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. §706. Defendants, on the other hand, contend that Plaintiffs' challenge to the FWS's August 30, 2006 finding is moot due to the FWS's July 9, 2007 final delisting rule, and in the alternative, the FWS's August 30, 2006 finding did not violate the ESA and was reasonable under the APA.

A. Standard of Review

"The [APA] governs judicial review of administrative decisions involving the Endangered Species Act." Aluminum Co. of America v. Bonneville Power Admin., 175 F.3d 1156, 1160 (9th Cir. 1999). Where a court conducts judicial review pursuant to the APA, "summary judgment is an appropriate mechanism for deciding the legal question of

whether the agency could reasonably have found the facts as it did." Occidental Engineering Co. v. Immigration and Naturalization Service, 753 F.2d 766, 770 (9th Cir. 1985). Under the APA, 5 U.S.C. §702, an aggrieved party may sue to set aside a final non-discretionary agency action that is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. Mt Graham Red Squirrel v. Espy, 986 F.2d 1568, 1571 (9th Cir. 1993).

An agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). "The arbitrary and capricious standard is 'highly deferential, presuming the agency action to be valid and [requires] affirming the agency action if a reasonable basis exists for its decision.'" Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1076 (9th Cir. 2006) (quoting Indep. Acceptance Co. v. California, 204 F.3d 1247, 1251 (9th Cir. 2000)). Review under this standard is "exacting, yet limited"; a court "may not substitute [its] judgment for that of the agency." Id. Deference is especially appropriate where the challenged decision implicates substantial expertise. Ninilchik Traditional Council v. United States, 227 F.3d 1186, 1194 (9th Cir. 2000).

Nevertheless, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n of U.S., 463 U.S. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). A reviewing court "must not rubber-stamp . . . administrative decisions that [the court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 859 (9th Cir. 2005).

B. Statutory Framework

The ESA's substantive protections for a species and its habitat are triggered only if the FWS formally lists a species as either "endangered" or "threatened" pursuant to the ESA. 16 U.S.C. §1533; 50 C.F.R. §402.12(d). An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. §1532(6). A "threatened species" is "any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. §1532(20). In addition, the ESA defines "species" to include any "distinct population segment of any species." 16 U.S.C. §1532(16). ESA listing determinations must rely on the best scientific and commercial data available; at no point may the FWS consider political and economic factors. 16 U.S.C. §1533(b)(1)(A).

Any interested person may file a petition with the Secretary of the Interior to list a species as threatened or endangered under the ESA. 16 U.S.C. §1533(b)(3)(A); 50 C.F.R. 424.14(a). On receipt of a petition, the FWS must review the petition and, "to the maximum extent practicable," within 90 days make a finding as to whether the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted" (commonly referred to as a "90-day finding"). 16 U.S.C. §1533(b)(3)(A); 50 C.F.R. §424.14(b). ESA regulations define "substantial information" as "the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. §424.14(b).

In making its 90-day finding, the FWS must consider whether the petition: (1) clearly indicates the administrative measure recommended and gives scientific and common name of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information on the status of the species overall or a significant portion of its range; and (4) is accompanied by appropriate supporting documentation in the form of

bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps. 40 C.F.R. §414.14(b)(2).

If the FWS concludes in its 90-day finding that the petition does not present substantial information indicating that a petitioned listing may be warranted (commonly referred to as a "negative 90-day finding"), then the FWS must publish the finding in the Federal Register; and at that time the administrative listing process is complete. 16 U.S.C. §1533(b)(3)(A). A negative 90-day finding may be challenged in federal court. 16 U.S.C. §1533(b)(3)(C)(ii).

Alternatively, if the FWS concludes in its 90-day finding that the petition does present "substantial information" indicating that the listing may be warranted (commonly referred to as a "positive 90-day finding"), then the FWS must publish the finding in the Federal Register and conduct a "review of the status of the species concerned" in order to determine whether listing the species as a DPS is "warranted" (commonly referred to as a "status review"). 16 U.S.C. §1533(b)(3)(B). In conducting a status review, the FWS "shall consult as appropriate with affected States, interested persons and organizations, other affected Federal agencies." 50 C.F.R. §424.13. In addition, FWS guidelines reiterate this requirement by stating that the FWS "must conduct the [status] review after soliciting comments from the public by publishing a notice in the Federal Register and notifying State, Tribal, and Federal officials and other interested parties of the need for information." FWS Petition Management Guidance, p.9 (http://www.nmfs.noaa.gov/pr/pdfs/laws/petition_management.pdf).

After the status review and within 12 months of the receipt of the petition, the FWS must determine whether listing of the species is "warranted," "not warranted," or "warranted, but" precluded by other listing priorities (commonly referred to as a "12-month finding"). 16 U.S.C. §1533(b)(3)(B). If the FWS determines on completion of its status review that listing of the species as a DPS is "warranted," then it must publish a proposed listing rule in the Federal Register and solicit public comment. 16 U.S.C. §1533(b)(5). Then, within 12 months of publishing the proposed rule, and after

considering public comment and all relevant evidence, the FWS must make a final decision whether to formally adopt the proposed listing rule. 16 U.S.C. §1533(b)(6).

C. Mootness

On July 6, 1999, the FWS published a proposed rule to delist the entire bald eagle population throughout the contiguous 48 states and sought public comment on the proposed rule. AR 6163-64. On February 16, 2006, the FWS reopened the public comment period on the FWS's 1999 proposed delisting rule. AR 6558. At that time, the FWS stated that it "need not at this time analyze whether any particular geographic area would constitute a DPS pursuant to [the FWS's] DPS policy." AR 6564.

On May 16, 2006, the comment period for the delisting proposal was again extended, and the FWS made no mention of whether it was reviewing the status of bald eagles in any particular geographic area to determine whether they constituted a distinct population segment ("DPS"). 71 Fed. Reg. 28293. Nonetheless, on June 19, 2006, the Center for Biological Diversity, the Sierra Club, Portland Audubon Society, Raptor Research Foundation, and Robert McGill submitted comments to the FWS on the issue of whether the Desert bald eagle should be designated as a DPS and not be delisted under the FWS's proposed delisting rule. (Defendants' Statement of Facts ("DSOF") ¶A(9)).

Ultimately, the FWS issued a final delisting rule on July 9, 2007, effective August 8, 2007, that removed all bald eagles throughout the contiguous 48 states from the threatened species list under the ESA. 72 Fed. Reg. 37,346, 37355 (July 9, 2007). As such, Desert bald eagles and their habitat currently lack protections under the ESA. Plaintiffs' Statement of Facts ("PSOF") ¶43). The FWS noted that "the limited habitat available in Arizona makes the bald eagles there particularly vulnerable to habitat threats," and the likelihood of significant emigration into the Sonoran area from eagles elsewhere in the United States was "minimal in the foreseeable future." 72 Fed. Reg. at 37,355. Nonetheless, the FWS stated that "although the Sonoran Desert bald eagle is discrete, it is not significant in relation to the remainder of the taxon. Sonoran Desert bald eagles lack any biologically or ecologically distinguishing factors. Although they do

persist in an arid region, Sonoran Desert bald eagles do not have any adaptations that are not found in bald eagles elsewhere. The adaptability of the species allows its distribution to be widespread throughout the North American continent. Therefore, we conclude that the Sonoran Desert population of the bald eagle in the lower 48 states is not a listable entity under section 3(16) of the [EPA]." 72 Fed. Reg. at 37,558. In addition, the FWS stated that the Desert eagle population does not make significant contributions to the "representation," "resiliency," or "redundancy" of the broader eagle population because the Desert eagle population is too small and the "loss [of the Desert eagle] would not result in a decrease in the ability to conserve the bald eagle [throughout the rest of the contiguous United States]." 72 Fed. Reg. at 37,372.

In addition, the FWS stated the following:

> This final delisting rule supersedes the [FWS's] 90-day petition finding because it constitutes a final decision on whether the Southwestern bald eagles, including those in the Sonoran Desert, qualify for listing as a DPS. This decision was made after notice and comment . . . and was based on all of the relevant information that the Service has obtained. Even if the court in the 90-day finding suit were to find that the plaintiffs' petition warranted further review, this finding addresses the same issues that the [FWS] would have considered as part of a 12-month finding had the [FWS] made a positive 90-day finding on the petition. This document constitutes the [FWS's] final determination on these issues, and is judicially reviewable with respect to them; therefore, any controversy regarding the August 30, 2006, 90-day finding is now moot.

72 Fed. Reg. at 37,347. Accordingly, Defendants' contend that the instant action challenging the FWS's August 30, 2006 negative 90-day finding is moot because the FWS made a "final decision on whether the Southwestern bald eagles, including those in the Sonoran Desert, qualify for listing as a DPS[, and] [t]he decision was made after notice and comment . . . and was based on all of the relevant information that the Service has obtained." 72 Fed. Reg. at 37,347.

A federal court's jurisdiction is limited to "cases or controversies." U.S. Const. art. III, §2. Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'") (quoting Preiser v.

Newkirk, 422 U.S. 395, 401 (1975)). A case may become moot if the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. Northwest Environmental Defense Center v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988) (citing Murphy v. Hunt, 455 U.S. 478, 481 (1982)). However, "[t]he burden of demonstrating mootness is a heavy one," and "[t]he basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." Id. A case may be mooted only if "events have completely and irrevocably eradicated the effects of the alleged violation." Lindquist v. Idaho State Board of Corrections, 776 F.2d 851, 854 (9th Cir. 1985); Gordon, 849 F.2d at 1244-45 ("The question is whether there can be *any* effective relief.") (emphasis in original).

In order to establish that the instant action is moot, Defendants must show that the FWS's July 9, 2007 final delisting rule "completely and irrevocably" rendered inconsequential the declaratory and injunctive relief that Plaintiffs' request in this case. In other words, Defendants must establish that even if the Court were to find that the FWS's August 30, 2006 negative 90-day finding was arbitrary and capricious and thus remand the matter back to the FWS and order them to conduct either a new 90-day finding or a status review, that ruling would be meaningless because the FWS has already examined all of the relevant information on the DPS issue in its July 9, 2007 final delisting rule. And thus, under no circumstances, would the FWS come to the opposite conclusion and find that the Desert bald eagle should be listed as a DPS.

Defendants contend that the FWS's delisting process for the entire bald eagle population in the contiguous 48 states encompassed a status review of the Desert bald eagle population. Defendants support this contention by referencing the comments that the FWS received from a handful of organizations and individuals regarding whether the Desert bald eagle should be considered a DPS. (DSOF ¶A(9)). Based on those comments, Defendants contend that the FWS reexamined its August 30, 2006 negative 90-day finding and reaffirmed its conclusion that listing the Desert bald eagle as a DPS was not warranted. (DSOF ¶A(11)). Defendants argue that the FWS's subsequent

reexamination and conclusion regarding the DPS status of the Desert bald eagle was the equivalent of a status review and thus supercedes and moots the FWS's August 30, 2006 negative 90-day finding; therefore, any order by the Court on the instant action would merely require the FWS "to do what it already did in conducting a status review for the delisting determination." (Dkt. #36, p.11). As such, Defendants contend that if Plaintiffs want to challenge the legality of the FWS's findings regarding the DPS status of the Desert bald eagle, then they must challenge the FWS's July 9, 2007 final delisting rule instead of the FWS's August 30, 2006 negative 90-day finding.

Defendants cite the Court to American Rivers v. National Marine Fisheries Service to support their mootness argument. 109 F.3d 1484 (9th Cir. 1997) (amended on other grounds). In American Rivers, the Ninth Circuit held that a subsequent biological opinion published by the National Marine Fisheries Service ("NMFS") regarding the operation of the Federal Columbia River Power System and its effects on Snake River salmon superceded the NMFS's previous biological opinion on that same matter, and thus mooted the plaintiffs' challenge to the NMFS's previous biological opinion. Id. at 1491. Defendants contend that their reexamination and decision regarding the Desert bald eagle's DPS status in the July 9, 2007 final delisting rule likewise supercedes their August 30, 2006 negative 90-day finding. However, Defendants' analogy between the biological opinions at issue in American Rivers and the DPS findings at issue here is inadequate. Biological opinions, unlike DPS findings, are not subject to notice and comment rulemaking procedures pursuant to the ESA. As such, Defendants must convinced the Court that the FWS's DPS finding in its July 9, 2007 final delisting rule is one and the same with a status review and all that it entails.

In order for a subsequent DPS finding to supercede a status review and 12-month finding, it would have to follow the requisite procedural requirements pursuant to the ESA, such as publishing a positive 90-day finding in the Federal Register that listing as a DPS may be warranted and consulting with interested parties in conducting a status review to determine whether listing as a DPS is truly warranted. But at no time prior to

its July 9, 2007 final delisting rule did the FWS indicate that it was reexamining its August 30, 2006 negative 90-day finding. Indeed, the FWS explicitly stated in its February 16, 2006 reopening of the period for public comment on its delisting proposal that the FWS "need not at this time analyze whether any particular geographic area would constitute a DPS pursuant to [the FWS's] DPS policy." AR 6564. However, Defendants contend that "[t]his statement is far from an indication that it would not accept comments on the issue" (Dkt. #35, pp.15-16, n.10); and that since the FWS did in fact receive comments on the DPS issue from a handful of interested parties, the FWS in effect received the same comments and conducted the same analysis that it would have conducted had it instead performed a status review of the Desert bald eagle population. This contention is far-fetched at best.

This Court cannot accept the proposition that after explicitly stating that it need not re-examine the DPS status of any particular population segment of the bald eagle, the FWS actually "addresse[d] the same issues that the [FWS] would have considered as part of a 12-month finding had the [FWS] made a positive 90-day finding on the petition." 72 Fed. Reg. at 37,347. The mere fact that a handful of interested parties submitted information concerning the Desert bald eagles' DPS status during the comment period for the FWS's delisting proposal is not the equivalent of publishing a positive 90-day finding in the Federal Register on the specific issue of the Desert eagle's DPS status and then soliciting comment from various federal and state agencies, Tribes, and other interested parties on the particular issue of whether listing the Desert bald eagle as a DPS is warranted. Case in point, the Amici Curiae[2] ardently contend that if the FWS had conducted a status review of the Desert bald eagle population, then they would have provided the FWS with additional information regarding the Desert eagle and its importance to the Arizona Indian community that the FWS did not consider in its July 9,

[2]The Amici Curiae in this case are the San Carlos Apache Tribe, the Yavapai-Apache Nation, the Tonto Apache Tribe, the Fort McDowell Yavapai Nation, and the Salt River Pima-Maricopa Indian Community.

2007 final delisting rule. The amici briefs, as well as a declaration submitted by Richard Glinski, a biologist who served as Team Leader of the Southwest Bald Eagle Recovery Team from 1983 to 1985 (Dkt. #32), supports the notion that additional interested parties with knowledge relating to the Desert bald eagle population would have submitted additional information to the FWS if the FWS had conducted a status review of the Desert eagle population, instead of just slipping a statement into its July 9, 2007 delisting rule that it considered the DPS issue and reaffirmed its previous conclusion that the Desert bald eagle population is not a DPS.

In addition, the Court cannot accept the FWS's unsupported assertion that its finding regarding the DPS status of the Desert bald eagle in its July 9, 2007 final delisting rule moots any challenge to the FWS's August 30, 2006 negative 90-day finding. Defendants have not carried their heavy burden of establishing mootness; they have not convinced the Court that the FWS would not have received or considered additional information on the alleged DPS status of the Desert bald eagle population if the FWS had conducted a status review of the Desert eagle population. The Court cannot find that the FWS's July 9, 2007 delisting rule completely and irrevocably eradicated the effects of the FWS's alleged ESA violations in conducting its August 30, 2006 negative 90-day finding. Thus, Defendants' request to consider Plaintiffs' challenge moot is denied.

D. The FWS's Negative 90-Day Finding Was Arbitrary and Capricious

An agency's decision is arbitrary and capricious if the agency does not "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n of U.S., 463 U.S. at 43 (quotation omitted). When the FWS receives a listing petition from the public, it must review the petition within 90 days to determine whether the "petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. §1533(b)(3)(A); 50 C.F.R. §424.14(b). ESA regulations define "substantial information" as "the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be

warranted." 50 C.F.R. 424.14(b) (emphasis added). In other words, the 90-day review of a listing petition is a cursory review to determine whether a petition contains information that warrants a more in-depth review.

The only question before the FWS when it conducts a 90-day review is whether the petitioned action may be warranted, not whether it is warranted. As such, the application of an evidentiary standard requiring conclusive data in the context of a 90-day review is arbitrary and capricious. Ctr. for Biological Diversity v. Morgenweck, 351 F.Supp.2d 1137, 1141 (D. Colo. 2004) ("[I]t is clear that the ESA does not contemplate that a petition contain conclusive evidence of a high probability of species extinction to warrant further consideration of listing that species. Instead, it sets forth a lesser standard by which a petitioner must simply show that the substantial information in the Petition demonstrates that listing of the species may be warranted. FWS's failure to apply this appropriate standard renders its findings and ultimate conclusion flawed."); Moden v. United States Fish & Wildlife Serv., 281 F.Supp.2d 1193, 1203 (D. Or. 2003) ("[T]he standard in reviewing a petition . . . does not require conclusive evidence.").

To determine whether a population segment qualifies as a DPS, the FWS must consider two key elements, discreteness and significance. 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996). The FWS and Plaintiffs agree that Desert bald eagles constitute a "discrete" population, because there is virtually no eagle emigration out of, or immigration into, the Sonoran population of bald eagles. (PSOF ¶7); AR 3543. However, the FWS concluded in its August 30, 2006 negative 90-day finding that Plaintiffs' petition did not present substantial information to indicate that Desert eagles may be "significant," rejecting the information in the petition that supported the conclusions that Desert bald eagles persist in a unique ecological setting, that the loss of Desert eagles would create a gap in the greater species' range, and that the Desert eagle has markedly different genetic characteristics than the greater bald eagle population. PSOF ¶37; AR 3543-45. Thus, whether the FWS's 90-day finding was arbitrary and capricious centers on the second

criterion, that is, whether a population segment is "significant" to the taxon to which it belongs, i.e. the greater population of bald eagles.

In examining whether a population may be significant, the FWS considers, among others, the following factors:

> (1) Persistence of the population segment in an ecological setting unusual or unique for its taxon, (2) evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon, (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside of its historic range, [and] (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

61 Fed. Reg. at 4725. If the FWS concludes that a population segment may be both discrete and significant, then it must consider whether the petition presents substantial information that the alleged DPS should be listed as threatened or endangered pursuant to the ESA. 61 Fed. Reg. 4725; 50 C.F.R. §424.14(b).

The FWS published a negative 90-day finding on August 30, 2006, and stated that the FWS would "not initiate a further status review" of the Desert bald eagle. AR 3538, 3543-45, 3554. Despite the various information in Plaintiffs' petition regarding the "significance" of the Desert eagles to the greater bald eagle population, the petition's "detailed information on numerous threats affecting the Sonoran Desert population of bald eagles," and the fact that the FWS was "[l]argely . . . in agreement that these threats are present, and in some cases are having some level of effect on Sonoran Desert bald eagles," the FWS concluded that Plaintiffs' petition failed to present "substantial information indicating that the petitioned action may be warranted." AR 3538, 3543-45, 3554. Specifically, the FWS's negative 90-day finding found that Plaintiffs' petition did not present substantial information that Desert bald eagles satisfy the first criterion for significance – persistence in an ecological setting "unique or unusual" for the species – because Desert eagles, like all other eagles, favor riparian zones, i.e. the interface between land and a flowing surface water body. AR 3543. Also, the FWS found that Desert eagles merely occupy "the edge of [the Bald Eagle's] range of suitable habitats" rather

than a unique or unusual setting for the species, and that the genetic data is "inconclusive with regard to significance." AR 3543-45, 3554. Moreover, the FWS's August 30, 2006 negative 90-day finding stated that the FWS "[does not] have data to tell [it] conclusively that [the Desert bald eagle] population will tank." AR 678. Thus, "[b]ecause of . . . the failure of the petition to conclusively demonstrate increasing threats . . . the Service has determined the population is not in danger of extinction." AR 977.

The question here is whether the FWS examined the relevant data and articulated a satisfactory explanation for its 90-day finding; the issue is whether there is a rational connection between the facts found and the choice made at the 90-day stage. The Arizona Ecological Services' Phoenix Field Office, Region 2 ("FWS Arizona Field Office"), analyzed Plaintiffs' petition to evaluate its reliability and to determine whether the FWS had data in its files to refute the information in the petition. (DSOF ¶C(2)); AR 308-316. The administrative record demonstrates that FWS scientists found on multiple occasions that "the [Desert eagle] persists in ecological setting unusual/unique for the taxon," and the "loss [of Desert eagles] would . . . result in a significant gap in the range of the species." PSOF ¶¶ 26, 27; AR 311-13, 1976-78. Indeed, the record indicates that each time FWS biologists from the FWS's Arizona Field Office assessed whether listing the Desert bald eagle population as a DPS may be warranted, they found that "no information in [the FWS's] files refutes" Plaintiffs' petition and that the information in the petition "appears to be substantial." PSOF ¶28; AR 162-67, 215-22, 271-77, 308-16, 1976-79, 1990-91. In addition, the FWS's May 2006 threats analysis found that the threats information presented by the petition "appears to be reliable," and "the petition presents substantial information to indicate that the southwestern population is small; productivity is lower than other bald eagle populations; and adult and nestling mortality [is] high." AR 488, 692.

The record also indicates that FWS Regional Director Benjamin Tugel and Steve Chambers, Senior Scientist, FWS-Region 2, did not believe that the Desert bald eagle population should ultimately be listed as a DPS. AR 348. But even if there was

disagreement between FWS officials regarding whether listing the Desert bald eagle as a DPS is warranted, the record clearly indicates that a number of FWS scientists believed that there was substantial information that listing the Desert bald eagle as a DPS may be warranted. The ultimate conclusion regarding whether to list the Desert bald eagle as a DPS is of little consequence when the FWS undertakes a 90-day finding, because at the 90-day stage the FWS may only evaluate whether there is sufficient information in a listing petition to indicate that the petitioned action may be warranted, such that the FWS should proceed with a status review of the alleged DPS.

On July 18, 2006, FWS scientists and officials from the FWS Arizona Field Office, the Southwest Regional Office in New Mexico, and the Listing Branch Office of the Division of Conservation & Classification in Washington, D.C., participated in a telephone conference call. AR 1980-1988. During that call, although Sarah Quamme, of the FWS's Regional Office, stated that there was "no info[rmation] to refute [Plaintiffs' petition] at [the] 90 day stage," FWS biologist Chris Nolan asserted that whether or not a population qualifies as a DPS is "largely a policy call." AR 1983, 1985. He informed the participants that "Ben [Tuggle, FWS Southwest Regional Director] and Ren [Loenhoffer, FWS Associate Director in the Washington, D.C. Office] have reached [a] policy call & we need to support [it]." AR 1985. Sarah Quamme then stated that the "[a]nswer has to be that its [sic] not a DPS . . . [w]e have marching orders." AR 1985, 1987. Doug Krofta, of the Washington, D.C. Office, also stated that "[w]e've been given an answer now we need to find an analysis that works. . . . Need to fit argument in as defensible a fashion as we can." AR 1986-87. These statements suggest that the FWS drew an irrational connection between the facts found and the choice made in the 90-day finding; they appear to exemplify an arbitrary and capricious agency action.

However, Defendants contend that Plaintiffs "fail to present the back and forth of the discussion and the differing points of view" at the conference call. (Dkt. #43, p.9) ("In short, even at the conference call, there was not unanimity among the scientists regarding the 'significance' criteria at issue here."). Defendants agree that there was a

disagreement among reasonable FWS scientists as to whether the Desert bald eagle population should be listed as a DPS pursuant to the ESA. However, Defendants state that the conference call was appropriate because DPS findings involve "policy calls" and depend on whether "the Director of FWS 'considered the relevant factors and articulated a rational connection between the facts found and the choices made,' not whether there may have been dissenting views with respect to that decision." (Dkt. #37, p.17; Dkt. #43 , p.7) (citing Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service, 475 F.3d 1136, 1145 (9th Cir. 2007)). To support this line of reasoning, Defendants rely on Northwest Ecosystem Alliance, in which the Ninth Circuit stated that the FWS has the right to change its mind after internal deliberation and found that a final determination by the FWS was not arbitrary and capricious even though it reached the opposite result from its preliminary determination and provided no new information to support its conclusion. 475 F.3d at 1145. However, Northwest Ecosystem Alliance is inapposite here because it involved a 12-month finding, which employs the more stringent "is warranted" evidentiary burden as opposed to the 90-day finding's "may be warranted" standard.

The 90-day finding's "may be warranted" standard merely requires the consideration of whether a "reasonable person" could conclude that the petitioned action may be warranted. 16 U.S.C. §1533(b)(3)(A); 50 C.F.R. §424.14(b). Thus, it appears that where there is reasonable disagreement among FWS scientists, the "may be warranted" standard is satisfied, and the FWS should publish a positive 90-day finding and proceed with a status review, at which time the FWS may employ the more-searching "is warranted" standard. The specific question at the 90-day stage is not whether there is conclusive evidence to establish that the petitioned action is warranted, but merely whether there is enough information to lead a reasonable scientist to believe that the petitioned action may be warranted. In this case, that question is answered affirmatively by the information contained in the administrative record; the fact that the FWS's scientists found that no information in the FWS's files refuted the evidence in Plaintiffs' petition, as well as the fact that FWS scientists disagreed as to whether the petitioned

action was ultimately warranted, clearly supports a 90-day finding that the petitioned action may be warranted.

In Ctr. for Biological Diversity v. Kempthorne, the district court noted that "drafts [by FWS officials finding the petitioned action may be warranted] serve as evidence that reasonable people could find that the petitioned action was warranted, not that the [FWS] should never change its mind." 2007 WL 163244 at *7, n.1 (N.D.Cal. 2007). The district court stated that "the [reasonable person] standard . . . contemplates that where there is disagreement among reasonable scientists, then the FWS should make the 'may be warranted' finding and then proceed to the more-searching next step in the ESA process." Id. at *7. This Court agrees; such disagreement among reasonable FWS scientists satisfies the reasonable person standard and necessitates a positive 90-day finding that the petitioned action may be warranted, requiring the FWS to proceed with a status review to determine whether the petitioned action is ultimately warranted.

"If courts are to defer to agency expertise . . . then they must have confidence in the objectivity of the agency's decision making process." Native Ecosystems Council v. United States Forest Serv., 1999 U.S. Dist. LEXIS 22243 at *9-10 (D. Mont. 1999). In this case, not only does the administrative reflect that Plaintiffs' petition appears to present substantial information that the petitioned action may be warranted, FWS scientists found that there was no information in the FWS's files to refute the information in the petition, and the FWS published a negative 90-day finding after the July 18, 2006 conference call established that there was disagreement among FWS scientists as to whether listing the Desert bald eagle as a DPS was ultimately warranted. Moreover, it appears that FWS participants in the July 18, 2006 conference call received "marching orders" and were directed to find an analysis that fit with a negative 90-day finding on the DPS status of the Desert bald eagle. These facts cause the Court to have no confidence in the objectivity of the agency's decision making process in its August 30, 2006 90-day finding. Accordingly, the Court finds that the FWS's decision to ignore the reasonable disagreements among its scientists at the initial 90-day stage and not issue a positive 90-

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day finding and proceed with a status review to determine whether the petitioned action was in fact warranted, violates the ESA and is arbitrary and capricious under the APA.

E. Remedy

The APA provides that a court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §706. Upon finding a violation of the ESA, courts have broad discretion to fashion injunctive relief. National Wildlife Federation v. National Marine Fisheries Service, 481 F.3d 1224, 1242 (9th Cir. 2007). The "traditional bases for injunctive relief are irreparable injury and inadequacy of legal remedies." Idaho Watersheds Project v. Hahn, 307 F.3d 815, 832-33 (9th Cir. 2002). The Court must balance the equities between the parties and give due regard to the public interest. Id. And if environmental injury is sufficiently likely, then "the balance of harms will usually favor the issuance of an injunction to protect the environment." Id. "Although the ordinary remedy when a court finds an agency's action to be arbitrary and capricious is to remand for further administrative proceedings, a court can order equitable relief or remand with specific instructions in rare circumstances." Earth Island Inst. v. Hogarth, 494 F.3d 757, 770 (9th Cir. 2007) (quotation omitted).

First, declaratory relief is appropriate in this case to the extent, as previously discussed in this order (Section III(D)), that the Court found the FWS's negative 90-day finding to be arbitrary and capricious. Second, due to the FWS's arbitrary and capricious action, injunctive relief is also appropriate. Plaintiffs seek an injunction ordering the FWS "to immediately commence a status review of Desert eagles rather than merely remand to the agency for a new 90 day finding." (Dkt. #39, p.12). In addition, Plaintiffs request that the Court "enjoin FWS from removing ESA protections from Desert eagles prior to conducting a status review of [the Desert eagle] population." (Dkt. #28, p.13).

Plaintiffs cite the Court to Colo. River Cutthroat Trout v. Kempthorne, 448 F.Supp.2d 170, 176 (D.DC 2006), and Ctr. for Biological Diversity v. Morgenweck, 351 F.Supp.2d 1137, 1144 (D.Colo. 2004). In those cases, rather than remand the matter to

the FWS for a new 90-day finding, the district courts ordered the FWS to proceed with a status review because the FWS's 90-day review unlawfully considered information from outside agencies and thus was overinclusive; the courts reasoned that the FWS had in effect already begun a status review. Likewise, here, the FWS unlawfully considered information from an outside agency, the Arizona Game & Fish Department ("AGFD"), at the 90-day stage.

When deciding whether a petitioned listing action may be warranted, the FWS may analyze only the petition itself and information in the agency's files. Colo. River Cutthroat Trout, 448 F.Supp.2d at 176 ("The FWS has explicitly acknowledged in other findings that the 90-day finding is limited to the petition and information available in the files of the FWS."). The FWS may not solicit information from outside parties until the FWS makes a positive 90-day finding and initiates a formal status review. Id. ("Even a cursory reading of [the ESA and its implementing regulations] shows that [the regulations] refer to the FWS's right to consult with affected states in the course of a status review or subsequent listing determinations, not at the 90-day review stage.").

Here, the FWS solicited opinions from the AGFD on its proposed 90-day finding and made changes in response to the AGFD's comments. AR 662, 873. Defendants contend that the FWS's "limited" communications with the AGFD about Plaintiffs' petition and the subsequent "minor edits" that the FWS made to its 90-day finding were lawfully conducted pursuant to a 2002 Memorandum of Agreement ("MOA") between the FWS and the AGFD to "facilitate joint participation, communication, coordination, and collaboration" in implementing the ESA within the State of Arizona." (Dkt. #36, p.23). However, an MOA does not trump the ESA and its implementing regulations' direction that "petitions that are meritorious on their face should not be subject to refutation by information and views provided by selected third-parties solicited by FWS." Morgenweck, 351 F.Supp.2d at 1143.

Moreover, the FWS examined the information in Plaintiff's petition regarding the threats to the Desert bald eagle. (Dkt. #36, p.22). However, the FWS is not required to

consider whether a petition presents substantial information that an alleged DPS should be listed as threatened or endangered pursuant to the ESA unless the FWS makes a positive 90-day finding. 61 Fed. Reg. 4725; 50 C.F.R. §424.14(b). As such, by both seeking and obtaining comments from an outside agency and conducting a threats analysis with respect to the Desert eagle population, the FWS in effect made an initial positive 90-day finding that listing the Desert eagle as a DPS may be warranted and thus began a status review to determine whether listing the Desert eagle was actually warranted. Further, in its July 9, 2007 final delisting rule, the FWS purported to have already conducted the equivalent of a status review; but, as discussed above, the Court found such review inadequate under the ESA. Thus, since the FWS in effect already began a status review, and since, as previously discussed, the reasonable disagreement among the FWS's scientists necessitates a positive 90-day finding, simply remanding this matter back to the FWS for a new 90-day finding would constitute inequitable and vacuous relief.

Defendants state that requiring the FWS to proceed with a status review is akin to prejudging the outcome of the FWS's review and thus constitutes an unlawful intrusion into the executive function. However, by exercising its discretion in fashioning the appropriate relief in this case and requiring the FWS to proceed with a status review, the Court is in no way commenting on or directing any particular outcome of the FWS's decision on whether listing the Desert bald eagle as a DPS is warranted.

In light of the many threats facing the Desert bald eagle and the harm that the Desert eagle might suffer in the interim should the FWS find that the Desert eagle is a DPS worthy of continued ESA protection, the Court will also exercise its broad discretion in fashioning injunctive relief to enjoin the application of the FWS's July 9, 2007 final delisting rule to the discrete population of Desert bald eagles pending the outcome of the FWS's status review. By enjoining the delisting of the discrete population of Desert bald eagles and maintaining the previous ESA protections that the Desert eagles received as a "threatened" species pursuant to the ESA, the Court is not challenging the FWS's July 9,

2007 final delisting rule, but merely maintaining the status quo with respect to the Desert bald eagle population as of the time that the FWS made its arbitrary and capricious negative 90-day finding on August 30, 2006. The FWS's July 7, 2007 final delisting rule, as applied to the discrete population of Desert bald eagles, is inextricably intertwined with the FWS's arbitrary and capricious August 30, 2006 negative 90-day finding. If the FWS had applied the appropriate evidentiary standard at the 90-day stage and published the requisite positive 90-day finding, and then proceeded with a status review of the Desert bald eagle population, the FWS would have been required to determine whether to list the Desert bald eagle as a DPS. And if the FWS had concluded that the Desert eagle population was a DPS, then the FWS would have been required to separately assess the status of the Desert bald eagle DPS, as opposed to merely assessing the status of the entire bald eagle population, to determine whether the Desert bald eagle DPS continued to warrant ESA protections.

The Court is aware that the ordinary remedy in finding that an agency's action is arbitrary and capricious is to remand for further administrative proceedings, and that it can order equitable relief or remand with specific instructions only in rare circumstances. See Hogarth, 494 F.3d at 770 (quotation omitted). However, based on the administrative record and the arguments presented to the Court, this is one of those rare circumstances. The discrete population of Desert bald eagles, which the FWS acknowledges can easily be cordoned off and is still particularly vulnerable to habitat threats, should not face increased risks to its existence prior to a lawful decision on Plaintiffs' petition to list the Desert bald eagle as a DPS. The Court is not willing to risk the continued vitality of the Desert bald eagle pending the FWS's lawful determination of whether listing the Desert eagle as a DPS is warranted, and if so, whether the Desert eagle DPS should continue to receive ESA protections. Accordingly, the Court enjoins the application of the FWS's July 9, 2007 delisting rule to the discrete population of Desert bald eagles to ensure that Desert eagles continue to receive ESA protections until the FWS makes a lawful determination of their status as a DPS.

IV. CONCLUSION

In sum, the FWS's July 9, 2007 final delisting rule does not moot Plaintiffs' challenge to the FWS' August 30, 2006 negative 90-day finding. In addition, the FWS's August 30, 2006 finding that Plaintiffs' petition did not present substantial information that the petitioned action may be warranted violated the ESA and was arbitrary and capricious under the APA. The FWS applied an inappropriately strict evidentiary burden on Plaintiffs' petition at the 90-day review stage and thus arbitrarily and capriciously concluded that the petition did not present substantial information that listing the Desert bald eagle may be warranted. Moreover, the FWS arbitrarily and capriciously conducted the 90-day review of Plaintiffs' petition by soliciting information and opinions from a limited outside source.

Accordingly,

IT IS HEREBY ORDERED that the San Carlos Apache Tribe, Yavapai-Apache Nation, Tonto Apache Tribe, Fort McDowell Yavapai Nation, and Salt River Pima-Maricopa Indian Community's motions for leave to file amicus curiae briefs (Dkt. #s 47, 49, 51) are GRANTED.

IT IS FURTHER ORDERED that Defendants' cross-motion for summary judgment (Dkt. # 36) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' motion for summary judgment (Dkt. #28) is GRANTED.

IT IS FURTHER ORDERED that the Court DECLARES that the United States Fish and Wildlife Service ("FWS") violated the Endangered Species Act ("ESA") by failing to make the requisite positive 90-day finding that Plaintiffs' October 6, 2004 petition to list the bald eagle population of the Sonoran Desert region of the American southwest ("the Desert bald eagle") as a distinct population segment ("DPS") pursuant to the ESA may be warranted;

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IT IS FURTHER ORDERED that the Court DECLARES that the FWS's August 30, 2006 negative 90-day finding on Plaintiffs' petition was arbitrary and capricious, and contrary to law, under the Administrative Procedure Act;

IT IS FURTHER ORDERED that the FWS must conduct a status review of the Desert bald eagle population pursuant to the ESA to determine whether listing the Desert eagle population as a DPS is warranted, and if so, whether listing the Desert bald eagle DPS as threatened or endangered pursuant to the ESA is warranted;

IT IS FURTHER ORDERED that the FWS must issue a 12-month finding on whether listing the Desert bald eagle population as a DPS is warranted, and if so, whether listing the Desert eagle DPS as threatened or endangered is warranted, the FWS must issue the 12-month finding within nine months pursuant to 16 U.S.C. §1533(b)(3)(B);

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IT IS FURTHER ORDERED that the FWS is ENJOINED from removing the discrete population of Desert bald eagles from the threatened species list under the ESA pursuant to the FWS's July 9, 2007 final delisting rule pending the outcome of the FWS's status review and12-month finding.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

DATED this 5th day of March, 2008.

Mary H. Murguia
United States District Judge

11/30/2011

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Center for Biological Diversity and Maricopa Audubon Society,

Plaintiffs,

and

San Carlos Apache Tribe, a federally recognized Indian tribe, and Salt River Pima-Maricopa Indian Community, a federally recognized Indian tribe,

Plaintiff-Intervenors,

vs.

Kenneth Salazar, in his official capacity as Secretary of the United States Department of the Interior, and Daniel Ashe, in his official capacity as Director of the United States Fish and Wildlife Service,

Defendants.

No. 10-2130-PHX-DGC

ORDER

Plaintiffs Center for Biological Diversity ("the Center") and the Maricopa Audubon Society filed this action against Kenneth Salazar in his official capacity as Secretary of the United States Department of Interior ("Interior") and Rowan Gould in his official capacity as acting Director of the United States Fish and Wildlife Service ("FWS"). Plaintiffs ask the Court to set aside FWS's finding that the desert bald eagle ("desert eagle") does not qualify as a distinct population segment ("DPS") of bald eagles

entitled to statutory protection under the Endangered Species Act ("ESA"). The San Carlos Apache Tribe and the Salt River Pima-Maricopa Indian Community intervened as Plaintiffs.[1]

Plaintiffs have filed motions for summary judgment (Docs. 57, 61, 63) and Defendants have filed a cross motion for summary judgment (Doc.73). The motions are fully briefed. Docs. 75-77, 81-83, 85. The Pacific Legal Foundation ("PLF") has filed a motion for leave to submit an amicus curiae brief in support of Defendants. Docs. 71. The Court will grant PLF's motion and consider its amicus curiae brief. Doc. 72. Oral argument was held on November 22, 2011. For reasons that follow, the Court will grant Plaintiffs' motion for summary judgment in part, deny Defendants' motion, and remand the DPS determination to FWS for further consideration.

I. Statutory Framework.

Congress enacted the ESA primarily "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b); *see National Audubon Society, Inc. v. Davis*, 307 F.3d 835,852 (9th Cir. 2002). Congress declared that all Federal departments and agencies "shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of this chapter." 16 U.S.C. § 1531(c)(1). The Secretaries of Commerce and Interior have delegated their responsibilities under the ESA to the National Marine Fisheries Service ("NFMS") for marine life, and to FWS for all other species. 50 C.F.R. § 402.01; *see Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F. 3d 969, 973-74 (9th Cir. 2003).

The ESA provides for the development and implementation of recovery plans to identify, describe, and schedule the actions necessary to restore endangered and

[1] Throughout this order, the Court will use the term Plaintiffs to refer to both Plaintiffs and the Tribes.

threatened species to a more secure condition. 16 U.S.C. § 1533(f). These substantive protections for a species and its habitat are triggered for a terrestrial species only if the Secretary of Interior, acting through FWS, formally lists that species as either endangered or threatened. *Id.* at § 15339(a)(1) & (d). An endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A threatened species is "any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). In addition, the ESA defines "species" to include any "distinct population segment of any species." 16 U.S.C. § 1532(16). ESA listing determinations must rely solely on the best scientific and commercial data available; at no point may FWS consider political and economic factors. 16 U.S.C. § 1533(b)(1)(A), 50 C.F.R. § 424.11(b).

A. 90-Day Finding.

Any interested person may file a petition with the Secretary of the Interior to list a species as threatened or endangered under the ESA. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. 424.14(a). On receipt of such a petition, FWS must review the petition and, "to the maximum extent practicable," make a finding within 90 days as to whether the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b). This determination commonly is referred to as a "90-day finding." ESA regulations define "substantial information" as "the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b).

If FWS concludes in its 90-day finding that the petition does not present substantial information indicating that a petitioned listing may be warranted (a "negative 90-day finding"), then FWS must publish the finding in the Federal Register. 16 U.S.C.

§ 1533(b)(3)(A). At that point the administrative listing process is complete and may be challenged in federal court. *Id.* at § 1533(b)(3)(C)(ii).

B. Status Review and 12-Month Finding.

If FWS concludes in its 90-day finding that the petition does present substantial information indicating that the listing may be warranted (a "positive 90-day finding"), then FWS must publish the finding in the Federal Register and proceed with a more detailed "review of the status of the species concerned" in order to determine whether listing the species is "warranted." *Id.* at. § 1533(b)(3)(B). This more detailed inquiry commonly is referred to as a "status review," and requires FWS to "consult as appropriate with affected States, interested persons and organizations, [and] other affected Federal agencies." 50 C.F.R. § 424.13. FWS guidelines provide that FWS "must conduct the [status] review after soliciting comments from the public by publishing a notice in the Federal Register and notifying State, Tribal, and Federal officials and other interested parties of the need for information." *See* FWS Petition Management Guidance, p. 9 (http:// www.nmfs.noaa.gov/pr/pdfs/laws/petition_management.pdf).

After the status review, and within 12 months of the receipt of the petition, FWS must determine whether listing of the species is warranted, not warranted, or warranted but precluded by other listing priorities. 16 U.S.C. § 1533(b)(3)(B). This determination commonly is referred to as a "12-month finding." If FWS determines that listing of the species is warranted, then it must publish a proposed listing rule in the Federal Register and solicit public comment. 16 U.S.C. § 1533(b)(5). Within 12 months of publishing the proposed rule and after considering public comment and all relevant evidence, FWS must make a final decision whether to formally adopt the proposed listing rule. 16 U.S.C. § 1533(b)(6).

FWS and the NMFS ("the Services") have developed a "Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act" (the "DPS Policy"). 61 Fed. Reg. 4722-01 (Feb. 7, 1996). Under the DPS Policy,

FWS must consider three elements in deciding whether a population segment qualifies as a DPS: (1) the discreteness of the population segment in relation to the rest of the species, (2) the significance of the population segment to the species, and (3) the population segment's conservation status in relation to the ESA's standards for listing species as endangered or threatened. *Id.* at 4725. A population is discrete if it either "is markedly separated from other populations as a consequence of physical, physiological, ecological, or behavioral factors," or "is delimited by international governmental boundaries" subject to significantly different management and conservation policies. *Id.* A population is significant if available scientific evidence shows that it is "importan[t] to the taxon to which it belongs." *Id.* If FWS concludes that a population segment is both discrete and significant, then it must consider whether the petition presents substantial information that the population segment should be listed as threatened or endangered under the ESA. 61 Fed. Reg. 4725; 50 C.F.R. § 424.14(b).

II. Factual Background of this Case.

The bald eagle was first listed as an endangered species on March 11, 1967. The listing occurred under the Endangered Species Preservation Act of 1966, a predecessor to the ESA. 75 Fed. Reg. at 8,601. Following enactment of the ESA in 1973, the bald eagle was listed as endangered in 43 states and as threatened in Michigan, Minnesota, Wisconsin, Oregon, and Washington. 72 Fed. Reg. 6230 (Feb. 14, 1978). On July 12, 1995, the bald eagle was reclassified as threatened in all states. 75 Fed. Reg. at 8,602.

The bald eagle is an ESA success story. Its numbers have increased significantly throughout the United States over the last several decades, from an estimated 487 breeding pairs in 1963 to an estimated 9,789 breeding pairs in 2007. 72 Fed. Reg. 37346.

In 2004, as FWS was considering removing the bald eagle from the threatened species list, the Center filed a petition asking that FWS list desert eagles as a DPS. When FWS failed to respond within 90 days as required by the ESA, the Center filed suit. The parties subsequently reached a settlement agreement under which FWS agreed to issue a

90-day finding by August 30, 2006. The resulting 90-day finding concluded that the Center had not presented sufficient scientific or commercial information to support its petition. *See* 71 Fed. Reg. 51,549, 51,551 (Aug. 30, 2006). As a result, FWS did not initiate a status review or solicit comments to determine whether the desert eagle qualified as a DPS.

In response to FWS's negative 90-day finding, the Center filed suit in this Court. *See Ctr. for Biological Diversity v. Kempthorne*, No. CV 07-0038-PHX-MHM, 2008 WL 659822 (D. Ariz. March 6, 2008). The Center alleged that FWS had violated the ESA by not basing its 90-day finding on the best available evidence, and asked the Court to set aside the finding as arbitrary and capricious under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701-706. Judge Mary H. Murguia agreed with the Center and found that the record before FWS was sufficient for a reasonable person to conclude that the Center's petition "may be warranted." *Id.* at *8-12. Judge Murguia stated that she had "no confidence in the objectivity of the agency's decision making process" due, in part, to evidence in the record that FWS officials in Washington, D.C. had given "marching orders" to local FWS personnel that the petition was to be denied, stating that the local FWS personnel should make their analysis support this policy decision. *Id.* at *11-12.

After issuing its negative 90-day finding, but before Judge Murguia ruled, FWS issued a rule removing all bald eagles in the United States from the threatened species list ("the 2007 delisting rule"). The 2007 delisting rule included a finding that the desert eagle is not a DPS. FWS argued before Judge Murguia that the 2007 delisting rule rendered its 90-day finding on the Center's petition moot. FWS argued, in effect, that the 2007 delisting rule had the same effect as a status review and 12-month finding, and that reversing the negative 90-day finding and ordering such a status review would therefore be an unnecessary exercise. Judge Murguia disagreed, noting that FWS had not complied with the procedural requirements for a status review when it made the DPS finding in the 2007 delisting rule. Judge Murguia noted that a DPS status review requires notice and

public comment, and yet the notice for the 2007 delisting rule had specifically stated that FWS did *not* intend to analyze whether any particular bald eagle population was a DPS. *Id.* at *8. As a result, those potentially interested in commenting on whether the desert eagle qualified for DPS status had no notice that FWS would be addressing that issue. Although FWS did receive and consider some comments, Judge Murguia found that this was not the equivalent of a full status review. *Id.* at *5-8. Judge Murguia ordered FWS to conduct a full status review and issue a 12-month finding on whether the desert eagle constituted a DPS. *Id.* at *16. She enjoined FWS from applying its 2007 delisting rule to the desert eagle until the status review and 12-month finding were complete. *Id.*

As a result of this order, FWS undertook a status review of the desert eagle with full notice and public comment. FWS published its 12-month finding in the Federal Register on February 19, 2010, finding that the desert eagle was "discrete" but not "significant" to the species as a whole, and therefore not entitled to DPS treatment. *See* 75 Fed. Reg. 8,601-01 (Feb. 25, 2010). FWS filed a motion to have Judge Murguia's injunction against delisting the desert eagle lifted. *See Ctr. for Biological Diversity v. Salazar*, No. CV 07-0038-PHX-MHM, 2010 WL 3924069 (D. Ariz. Sept. 30, 2010). Judge Murguia lifted the injunction, stating that its purpose had been to forestall delisting of the desert eagle until FWS had completed a full status review. *Id.* at *4. Because FWS had complied with the review, Judge Murguia found that conditions for lifting the injunction had been met. *Id.*

The Center asked Judge Murguia to grant leave to file a supplemental complaint, arguing that FWS had made an arbitrary and capricious 12-month finding. *Id.* at *3. Judge Murguia found that the question of whether the 12-month finding violated the ESA and APA was factually and legally distinct from the question of whether FWS acted unlawfully when it issued the negative 90-day finding, and therefore denied the Center's request to file a supplemental complaint. As a result, Plaintiffs filed this case, alleging that FWS and Interior violated the ESA and APA in issuing the 12-month finding.

Docs. 1, 25, 41. In addition to raising ESA and APA claims, the Tribes argue that FWS failed to incorporate traditional ecological knowledge into its findings and violated its obligation to consult meaningfully with the Tribes on a government-to-government basis.

III. Standard of Review.

The APA governs judicial review of administrative decisions involving the ESA. *Aluminum Co. of America v. Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9th Cir.1999). "[S]ummary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." *Occidental Engineering Co. v. Immigration and Naturalization Service*, 753 F.2d 766, 770 (9th Cir.1985). The Court must set aside a final, non-discretionary agency action that is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. *Mt Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir.1993).

An agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In conducting an APA review, the Court must determine whether the agency's decision is "founded on a rational connection between the facts found and the choices made . . . and whether [the agency] has committed a clear error of judgment." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1243 (9th Cir.2001). The standard for review "is 'highly deferential, presuming the agency action to be valid and [requires] affirming the agency action if a reasonable basis exists for its decision.'" *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir.2006) (quoting *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir.2000)). At the same time, a reviewing court "must not rubber-stamp . . . administrative decisions that [the court deems] inconsistent with a statutory

mandate or that frustrate the congressional policy underlying a statute." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859 (9th Cir.2005).

IV. Is The 12-Month Finding Procedurally Flawed?

Plaintiffs argue that FWS's 12-month finding is procedurally flawed because FWS disregarded the uniform view of biologists and its own Arizona and Region 2 staff that the desert eagle qualified for DPS status, and instead arbitrarily stood by its 2007 delisting rule. The Court will address this argument before considering other issues raised by the motions.

As noted above, the DPS Policy requires FWS to consider three elements in deciding whether a population segment qualifies as a DPS – discreteness, significance, and conservation status. 61 Fed. Reg. 4725. FWS concluded in the 12-month finding that the desert eagle population is discrete. FWS found a lack of bald eagle immigration into and emigration from the desert eagle population. FWS also found that the geographic areas immediately surrounding the desert eagle's habitat lack appropriate eagle habitat and contain no known breeding bald eagles. 75 Fed. Reg. 8616.

FWS then turned to the significance inquiry and found that although the desert eagle population is discrete, it is not significant to the bald eagle population as a whole. *Id.* at 8616-20. Plaintiffs challenge this significance determination.

Under the DPS Policy, significance depends on "available scientific evidence of the discrete population segment's importance to the taxon to which it belongs." 61 Fed. Reg. 4725. The policy directs FWS to consider the following non-exclusive list of factors:

1. Persistence of the population segment in an ecological setting unusual or unique for its taxon;

2. Evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon;

3. Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside of its historic range; or

4. Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

Id.

The 12-month finding focused primarily on the first two factors. Although FWS found that the desert eagle persists in an ecological setting that is unique, FWS concluded that this "persistence is not significant to the taxon as a whole because these particular eagles exhibit similar behavior and nesting adaptations to their setting as do bald eagles in other settings." 75 Fed. Reg. 8619. In addressing the second factor, FWS concluded that "loss of eagles in the Sonoran Desert Area would not represent a significant gap in the range of the species due to a loss of biologically distinctive traits or adaptations, or genetic variability of the taxon." *Id.*

Although Plaintiffs dispute the soundness of these conclusions in light of evidence in the administrative record, they first argue that FWS employed a flawed procedure to arrive at these conclusions. Plaintiffs base this argument on the following facts – facts not disputed by Defendants.

After remand from Judge Murguia, FWS initiated a status review by publishing notice in the Federal Register and initiating consultations with interested Indian tribes. Doc. 65, ¶ 15. FWS received 36 written comments in response to the notice, including submissions from the State of Arizona Game and Fish Department ("AGFD"), a variety of organizations, Indian tribes, and individuals, and comments from three former members of FWS's Southwest Bald Eagle Recovery Team. *Id.*, ¶16. Every biologist and the AGFD concluded that desert eagles meet the criteria for DPS treatment. *Id.*; *see also id.* at 7-10 (summarizing comments from 10 commentators).

FWS scientists in Arizona also found that desert eagles meet the criteria of the DPS Policy and are therefore eligible for listing as a DPS. Between November of 2008 and September of 2009, the FWS Arizona office produced ten versions of a draft 12-

month finding which concluded that desert eagles are discrete and significant under the DPS Policy. *See* AR3342, 3540, 4043, 4180, 4228, 4262, 5400, 5925, 6884, 7309. Each draft found that desert eagles meet the DPS Policy's significance criterion because desert eagles inhabit an ecological setting unique for the species, and loss of the population would result in a significant gap in the range of bald eagles. *Id.*

The Regional Director of FWS Region 2 (which includes Arizona) agreed. The Regional Director submitted a decision memorandum to the FWS Director in Washington, D.C. which summarized the Arizona office's conclusion that desert eagles meet the significance criterion of the DPS Policy. *See* AR6680-6684. Several conference calls and other communications then occurred between the Arizona, Region 2, and Washington, D.C. offices of FWS.

On October 12, 2009, the FWS Assistant Director for Endangered Species, Gary Frazer, issued an email which concluded that the desert eagle does not qualify for DPS status. He provided this explanation:

> My conclusion was based on my evaluation of the facts at hand, the previous DPS analysis, and [the] proposed finding [from the Arizona office and Region 2]. I found no significant new information since the previous DPS analysis, nor did I see any obvious error in the previous analysis. Our DPS policy has not changed. I believe it is important for the Service to stand by its previous decisions unless a change in fact or policy, or a finding of error, compels a different conclusion. None of those were indicated here, so I did not concur with their proposal to reverse direction on the issue of Sonoran Desert bald eagles as a valid DPS. The issue of evolutionary adaptation did not factor into my decision.

Doc. 65, ¶33; AR7497, 8006. Mr. Frazer's reference to "the previous DPS analysis" was to the 2007 delisting rule.

On December 4, 2009, Mr. Frazer sent a memorandum to the Region 2 Director explaining his decision:

> As you know, a DPS analysis of the Sonoran Desert bald eagle population was conducted in the July 2007 delisting rule for the bald eagle. I

> appreciate the concerns you raised in the Region's memo that this analysis overlooked features of the unique desert environment, and that it did not focus on the birds' response or adaptation to the uniqueness of the Sonoran Desert setting. I kept these concerns in mind while reviewing and evaluating the previous analysis and the Region's draft analysis, but was unable to find any error or omission in the previous DPS analysis. It is my judgment that the [2007 delisting rule] reached the correct conclusion based on the best data available at the time. Moreover, there does not appear any significant relevant new information, nor has our DPS policy changed since the previous analysis was published. Thus, I conclude that the best data currently available also supports a conclusion that this population is not a valid DPS. This conclusion is based on my evaluation of the past DPS analysis, portions of the administrative record made available to me, and the Region's draft analysis.
>
> My staff will work with you on development of the revised version of the [12-month] finding. Obviously, the finding should not simply cite to my conclusion, but rather reflect the thorough analysis of the best available information upon which the July 2007 DPS analysis and my conclusion was based.

Doc. 65, ¶39; AR8557.

As a result of the Assistant Director's decision, the 12-month finding was revised to conclude that the desert eagle population was discrete but not significant to the taxon as a whole, and therefore not entitled to DPS status. 75 Fed. Reg. 8601-20. A comparison between the 12-month finding and the 2007 delisting rule shows that the 12-month finding incorporated much of the delisting rule verbatim.

This history from the administrative record establishes the following facts: (1) FWS undertook a status review and 12-month finding as directed by Judge Murguia and in conformity with FWS procedures; (2) the review elicited virtually unanimous comments from biologists that the desert eagle should be accorded DPS status; (3) the Arizona-based scientists in FWS and the Region 2 Director in New Mexico concluded that the desert eagle warrants DPS status; (4) this view was not accepted by the Assistant Director for Endangered Species in Washington, D.C.; (5) the Assistant Director based

his decision primarily on the 2007 delisting rule; and (6) the Assistant Director stood by the 2007 delisting rule because he found "no significant new information" from the status review, did not "see any obvious error in the [2007 delisting rule]," and felt FWS should stand by its previous decision "unless a change in fact or policy, or a finding of error, *compels* a different conclusion." AR8006 (emphasis added).

Stated differently, the 2007 delisting rule became FWS's decision on the DPS status of the desert eagle, to be departed from only if information generated in the status review or a change in FWS policy compelled a different result. FWS thus accorded great weight to the 2007 delisting rule, making it the de facto final decision unless compelling evidence to the contrary was found. Although courts must defer to procedurally sound agency decisions, deference is not warranted when procedures are flawed.

As already noted, FWS argued before Judge Murguia that the 2007 delisting rule should be treated as the agency equivalent of a status review and 12-month finding. Judge Murguia did not agree. She noted that the public notice for the 2007 delisting rule specifically stated that FWS "'need not at this time analyze whether any particular geographic area would constitute a DPS.'" *Kempthorne*, 2008 WL 659822 at *5 (quoting AR6564). Thus, far from calling for public comment on the potential DPS status of desert eagles, the notice specifically stated that such an inquiry would not occur. When the comment period for the delisting proposal was later extended, FWS again "made no mention of whether it was reviewing the status of bald eagles in any particular area to determine whether they constituted a [DPS]." *Id.* As a result, Judge Murguia found that the 2007 delisting rule failed to comply with the notice, comment, and consultation requirements for a DPS status review – "publishing a positive 90-day finding in the Federal Register that listing as a DPS may be warranted and consulting with interested parties in conducting a status review to determine whether listing as a DPS is truly warranted." *Id.* at *7. She found that FWS could not satisfy status review requirements simply by "slipping a statement into its July 9, 2007 delisting rule that it considered the

DPS issue [and found] that the Desert eagle population is not a DPS." *Id.* at *8. Judge Murguia characterized FWS's contention that the 2007 delisting rule was the equivalent of a status review and 12-month finding as "far-fetched at best." *Id.* at *7.

This Court agrees that the 2007 delisting rule was not a valid status review for the desert eagle. FWS did not comply with the notice, comment, and consultation requirements established by statute and regulations for a status review and 12-month finding. *See* 16 U.S.C. § 1533(b)(3)(A), (B); 50 C.F.R. § 424.14(b)(3), 15(a) & (c). As a result, the 2007 delisting rule should not have become FWS's de facto decision on the DPS issue, to be departed from only for compelling reasons. An invalid status review should not trump a valid status review. Findings reached without appropriate notice, comment, and consultation should not become an agency's presumptive decision. Such a procedure flies in the face of the notice, comment, and consultations requirements of the law. *Id.*

What is more, it appears that the 2007 delisting decision was made at a time when FWS simply was not open to new information about the desert eagle. Judge Murguia's invalidation of the negative 90-day finding reflects this fact. She found that Arizona-based scientists within FWS found the DPS petition for the desert eagles to have merit, but that a "policy call" was made in Washington, D.C. and the local FWS office was given "marching orders" to reach a different conclusion. *Kempthorne*, 2008 WL 659822 at *11 (quoting AR1985). As one FWS manager stated, "'[w]e've been given an answer [and] now we need to find an analysis that works . . . . Need to fit argument in as defensible a fashion as we can.'" *Id.* (quoting AR1986-87). Judge Murguia found that these and other communications on FWS's 90-day finding "appear to exemplify an arbitrary and capricious action." *Id.*

The 2007 delisting decision was made less than a year after the negative 90-day finding, and appeared designed in part to forestall Judge Murguia's ruling on the 90-day finding. Indeed, FWS took the unusual step of asserting in the 2007 delisting rule itself

that the question before Judge Murguia "is now moot." *Id.* at *6. Thus, it appears that the 2007 delisting decision was made in the same environment as the negative 90-day finding, an environment in which Washington's "policy call" resulted in "marching orders" for FWS scientists in Arizona. Needless to say, a result-driven decision should not become the presumptive baseline for a subsequent and properly-noticed status review, to be departed from only for compelling reasons.

The Court finds that FWS's 12-month finding was based on the 2007 delisting rule, and that the 2007 delisting rule failed to comport with the notice, comment, and consultation requirements of the law. As a result, the Court concludes that the 12-month finding is not in accordance with law and not "founded on a rational connection between the facts found and the choices made." *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1243.

The Court will set aside the 12-month finding as an abuse of discretion and require FWS to complete a new 12-month finding. Because it does not appear that the status review process was procedurally flawed, the Court will not require FWS to start the process over again with notice and public comment. The Court instead will require FWS to complete a new 12-month finding based on information gathered and consultations completed during the status review conducted in response to Judge Murguia's order. The Court expresses no view on the proper outcome of the new 12-month finding.

V. Plaintiffs' Other Arguments.

Plaintiffs argue that FWS ignored a 2008 study by Allison that identified breeding differences in the desert eagle, a study by ecologist Dr. Gary Meffe on the importance of distinctive traits in peripheral populations to an overall species, a study by Dr. Irene Tieleman on the adaptations of larks in arid climates, and traditional ecological knowledge submitted by the tribes. Because FWS will be required to complete a new 12-month finding, the Court will leave it to FWS to deal with these sources of information in the new finding.

Plaintiffs claim that FWS arbitrarily changed the DPS Policy without notice and comment by requiring additional proof of significance beyond a showing that a population segment persists in a unique ecological setting. Doc. 64 at 23. In particular, Plaintiffs allege that FWS required "an evolutionary standard" or a showing of adaptations to demonstrate significance. *Id.* at 25. Defendants argue that persistence in a unique ecological setting is not itself sufficient to support a finding of significance unless that finding also shows that the population segment is "significant to the taxon to which it belongs." Doc. 75 at 21 (quoting 75 Fed. Reg. 8619 (citing to *National Ass'n of Home Builders v. Norton*, 340 F. 3d 835, 849 (9th Cir. 2003)). In its new finding, FWS should address whether it has adopted a new interpretation of the DPS Policy and, if so, the reasons for and validity of the change.

Plaintiffs argue that even if an additional showing of significance is required, the record contained sufficient evidence of adaptations to support a finding that the desert eagle is significant to the taxon as a whole. Plaintiffs similarly argue that in its analysis of the second consideration – whether loss of the population segment would result in a significant gap in the range of the taxon – FWS failed to offer a reasoned explanation for its determination that loss of the desert eagle would not result in a significant gap. The Court will leave it to FWS to address these issues in the new 12-month finding.

VI. The Tribes' Consultation Arguments.

The Tribes argue that the long-standing principle requiring the United States to engage in meaningful government-to-government consultation with Indian tribes, codified through numerous executive branch orders and memoranda, is a legally enforceable obligation. Docs. 61 at 28, 58 at 17-18.[2] Defendants do not dispute this

[2] *See, e.g.*, President Clinton's May 14, 1998, and November 6, 2000, Executive Orders, "Consultation and Coordination With Indian Tribal Governments," Exec. Order No. 13084, Fed. Reg. 27655 (May 14, 1998), Exec. Order No. 1317563, 65 Fed. Reg. 67349 (Nov. 6, 2000); President Obama's November 5, 2009, "Memorandum on Tribal Consultation," 74 Fed. Reg. 57881; Interior's "Policy on Consultation with Indian Tribes" (proposed) 76 Fed. Reg. 76 28446-01 (May 17, 2011).

obligation generally. Interior's Secretarial Order on this topic states in broad terms that its agencies "shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable," and provide "affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes." Sec. Order No. 3206, at 4 (June 5, 1997) (quoted in Doc. 75 at 55) (internal citations omitted). The questions for the Court are whether this obligation carries with it specific, measurable consultation requirements that have the force of law in the ESA context, and whether FWS failed to meet those requirements in this case.

A. Consultation Obligations.

The Tribes cite several cases to show that courts have set aside agency actions taken without proper government-to-government consultation. As Defendants note, however, the two main cases relied on by the Tribes are not directly on point because they derive the agencies' consultation requirements from federal statutes other than the ESA. In *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010), the Bureau of Land Management ("BLM") was required to consult with affected tribes under the National Historic Preservation Act ("NHPA") before approving a solar energy project on lands containing 459 identified cultural resources, including archeological sites where the tribe had buried human remains. *Id.* at 1107-08. NHPA regulations specified seven issues about which BLM was to consult with the tribe and included a process for the tribe to challenge a BLM decision regarding a cultural or archeological site's National Register eligibility. *Id.* at 1109. It was in the context of this detailed regulatory scheme that the court stated that "[t]he consultation requirement is not an empty formality" and set aside the BLM's final decision for side-stepping consultation requirements "imposed by Congressionally-approved statues and duly adopted regulations." *Id.* at 1108, 1119.

In *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072 (9th Cir. 2011) ("*CWC*"), the Department of Energy ("DOE") failed to comply with statutory

requirements to consult with the States in developing electrical transmission congestion studies prior to designating "national interest electrical transmission corridors" under the Energy Policy Act of 2005 ("EPAct"). *Id.* at 1081. *CWC* was based on consultation obligations found in the EPAct. The ESA does not contain similar consultation requirements.

The remaining cases cited by the Tribes derive their consultation requirements either from the federal government's role as trustee over treaty-protected tribal lands or resources, or from federal law. For example, *Klamath Tribes v. United States*, 1996 WL 924509 (D. Or. Oct. 2, 1996), dealt with the United States Forest Service's ("USFS") failure to consult with the Klamath Tribes before engaging in eight timber sales from tribal lands in violation of the federal government's trust duty "to avoid adverse effects on treaty resources." 1996 WL 924509 at *8. *Confederated Tribes and Bands of the Yakama Nation v. U.S. Department of Agriculture*, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010), dealt with the Department of Agriculture's ("USDA") failure to consult with the Yakama Nation before placing a landfill adjacent to tribal lands where it would interfere with the tribe's treaty-protected hunting, gathering, and fishing rights. The court found that the duty to consult in that case derived from "the Yakama Treaty of 1855 and federal Indian trust common law." *Id.* at *4. The remaining cases all deal with decisions made by the Bureau of Indian Affairs' ("BIA") directly related to administrative issues or services on tribal reservations, including appointments to BIA supervisory positions, changes in education funding, and employment reductions. *See Ogala Sioux Tribe v. Andrus*, 603 F. 2d 707 (8th Cir.1979); *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774 (D. S.D. 2006); *Lower Brule Sioux Tribe v. Deer*, 911 F.Supp. 395 (D. S.D. 1995). In each case, the courts found that the BIA had violated consultation requirements clearly established by federal law or by specific BIA policy.

This case impacts tribal interests because the desert eagle population lives, in part, on tribal lands and the desert eagle is an integral part of tribal culture. DPS listing

decisions made pursuant to the ESA, however, do not implicate the federal government's fiduciary duty over the management of specific treaty-protected resources as did the actions of the USFS and the USDA in *Klamath Tribes* and *Yakama Nation*, nor does FWS have the same statutory and regulatory obligations to consult with the Tribes under the ESA that the BIA has when making decisions directly related to the management of tribal services and employment on Indian Reservations.

For these reasons, the Court cannot conclude that the cases cited by the Tribes establish the consultation standards for an ESA case. Congress and Interior have not imposed such consultation obligations in the ESA context, and it is not the proper role of the Court to impose such obligations on its own.

B. The "Ultimate Decision-Maker" Argument.

The San Carlos Apache Tribe ("San Carlos") concedes that throughout the status review the FWS "Field Office and Region 2 office made a genuine effort to involve Indian tribes, nations and communities in Arizona . . . and to listen, understand, and synthesize the traditional ecological knowledge provided by the Apache Tribe and others relevant to the DPS policy." Doc. 61 at 28. San Carlos argues, however, that the status review process was unlawful because San Carlos did not have direct access to FWS Assistant Director Gary Frazer, who made the ultimate DPS decision. *Id.* at 29. The Salt River Pima-Maricopa Indian Community ("Salt River") makes the same argument. Doc. 58 at 22-23.

The Tribes' argument is based on dictum in *Lower Brule* that "[m]eaningful consultation means tribal consultation in advance with the decision maker or with intermediaries with clear authority to present tribal views to the . . . decision-maker." 911 F. Supp. at 401. *Lower Brule* itself concerned BIA's "total failure to consult" and therefore did not explain or apply this principle. *Id.* at 400. The Tribes cite no other authority for their claim that consultation requires access to the ultimate decision maker,

and the Court declines their invitation to fashion a new common law consultation obligation on the basis of dictum in another district court decision.

Moreover, even if the Court were to conclude that consultation requires access to the ultimate decision-maker or his or her intermediaries, the Tribes do not dispute that their elected officials met with FWS's Arizona and Regional Staff, including Region 2 Director Tuggle, and that Director Tuggle had authority to present tribal views to his superiors. The record shows that Region 2 staff transmitted draft DPS findings, including tribal information, to the reviewing staff in Washington, D.C., and that staff from both offices worked on preparing a final draft of the 12-month finding. AR 8345-8423 (see, especially, AR8364-67), AR8859-8941 (see, especially, AR8869-70, 8881-82, 8908, 8919-21). It thus appears the Tribes had access to "intermediaries with clear authority to present tribal views to the . . . decision-maker." *Lower Brule*, 911 F. Supp. at 401.

C. Salt River's Other Arguments.

Salt River argues that its sole consultation with the FWS Regional Director on July 20, 2009, was not "timely, meaningful, or [in] good faith." Doc. 81 at 17. Salt River asserts that meaningful consultation should begin early and continue throughout the process. Doc. 58 at 24. Defendants respond that they initiated contact with the tribes well before the status review started, and shortly thereafter began making plans for consultation with individual tribes. While the record cited by Salt River reflects this fact, it also reflects that Salt River repeatedly asked for individual consultation and that it objected that a single, multi-tribe meeting did not constitute government-to-government consultation. The record also shows that despite initiating contact with the tribes in March of 2008, and then meeting with Salt River to discuss the consultation process in May of 2008, FWS did not meet individually with Salt River to discuss the status review until July 20, 2009. Given Salt River's repeated requests to consult individually and its clear position that a one-day joint-meeting was not sufficient, Defendants' argument that

the meeting in July of 2009 was timely because it was still several months before the end of the by-then extended status review rings hollow.

While meeting with Salt River months earlier would undoubtedly have been more meaningful to and respectful of the tribe, the Court cannot conclude that the consultation undertaken by FWS was unlawful. Salt River cites *CWC* for the principle that "consultation with tribal government should begin early and continue throughout the administrative process." Doc. 58 at 24 (citing *CWC*, 631 F. 3d at 1087-92). But this requirement actually comes from the NHPA regulations in *Quechan* which state that "[c]onsultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties." 755 F. Supp. 2d at 1109 (citing 36 C.F.R. § 800.2(c)(2)(ii)(A)). No similar regulations apply here.

Salt River's cases are also distinguishable. In *Quechan*, the BLM never sent letters inviting the tribe to consult, and it did not meet with the tribe to discuss sensitive sites in the relevant project area until after the solar project had been approved. *Id.* at 1118. *Lower Brule* involved the BIA's "total failure to consult." 911 F. Supp. at 401. *Lower Brule* also found that the BIA had met its consultation duties in the past with one or two hour meetings with tribal councils. *Id.*

Salt River argues that FWS denied it the chance to review and comment on FWS draft documents "despite the lack of any law or regulation that prohibits such collaboration." Doc. 58 at 24. But the relevant question is not whether the law prohibits such collaboration, but whether the law requires it. In *CWC*, which Salt River cites for this proposition, the DOE was required to collaborate by Congress. 631 F. 3d. 1072 at 1080. Congress specifically intended that states participate in the EPAct process because DOE's determinations could infringe the state's traditional powers. *Id.* at 1087. The relevant standards for federal state cooperation in the EPAct context simply do not apply

to the ESA, and the Court will not import them into some kind of common law requirement when neither Congress nor Interior has seen fit to impose them on FWS.

It is also in the context of *CWC* that Salt River makes the argument that FWS did not provide Salt River with the data upon which the final decision was based. Doc. 81 at 10. In *CWC*, the DOE failed to give the states modeling data that was essential to their ability to evaluate the agency's energy congestion study, an act that kept the states from being able to provide "informed criticism and comments." 631 F. 3d at 1072. Salt River acknowledges that in 2008 FWS gave it CDs containing most of the information FWS ultimately relied on. Doc. 81 at 10. Salt River argues that because FWS ultimately revised its draft DPS finding in 2009, it must have withheld information actually relied upon, but Salt River does not support this assertion by reference to any information in the administrative record.

Salt River argues that it never had the chance to comment on FWS's revised negative DPS finding before FWS published it in early 2010. *Id.* at 10-11. Salt River cites no basis for the claim that FWS had a legal obligation to give the tribes a chance to comment before releasing a final agency determination.

In sum, Salt River has failed to identify specific legal standards that apply to FWS and that have been violated in this case. The Court therefore cannot accept its consultation argument.

VII. Remedy.

The Court will enter summary judgment in favor of Plaintiffs on their claim that the 12-month finding was procedurally flawed. As a remedy, Plaintiffs ask the Court to remand the 12-month finding to DPS. Doc. 64 at 41. The Court will do so.

Plaintiffs also ask the Court to enjoin DPS from applying the 2007 delisting rule to the desert eagle until the 12-month finding has been revised on remand. *Id.* Defendants seek an opportunity to brief the propriety of injunctive relief before the Court imposes

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such a remedy. Doc. 75 at 57 n. 29. The Court will establish a short briefing schedule and resolve the issue of injunctive relief in the next several weeks.

IT IS ORDERED:

1. Plaintiff's motions for summary judgment (Docs. 57, 61, 63) are **granted** to the extent they assert that FWS's desert eagle 12-month finding is procedurally flawed. The motions are denied in all other respects.

2. Defendants' cross-motion for summary judgment (Doc. 73) is **denied**.

3. The 12-month finding is remanded to FWS for reconsideration consistent with this order. FWS shall produce a new 12-month finding by **April 20, 2012**. The 12-month finding may be based on information gathered during the status review already conducted, and should address the issues identified in this order.

4. Plaintiffs and Plaintiff-Intervenors shall, by **May 4, 2012**, file brief memoranda (no longer than 7 pages each) stating their positions with respect to the new 12-month finding and their views on whether additional action is necessary in this litigation. The Court will then convene a conference call with the parties to discuss the future course, if any, of this litigation.

5. The parties shall, by **December 16, 2011**, submit simultaneous memoranda, not to exceed 10 pages each, on Plaintiffs' request that the Court enjoin DPS from applying the 2007 delisting rule to the desert eagle until the 12-month finding has been revised on remand.

6. The motion for leave to file a brief amicus curiae by the Pacific Legal Foundation (Doc. 72) is **granted.**

Dated this 30th day of November, 2011.

David G. Campbell
United States District Judge