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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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CENTER FOR BIOLOGICAL DIVERSITY,
and MARICOPA AUDUBON SOCIETY,

No. CV 07-0038-PHX-MHM

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Plaintiffs,

ORDER

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v.

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DIRK KEMPTHORNE, Secretary of the
Interior, U.S. Department of Justice; and
DALE HALL, Director, U.S. Fish and
Wildlife Service,

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Defendants.

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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”).

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

6 **I. FACTUAL BACKGROUND**

7 Desert bald eagles are a discrete population of bald eagles that nest in the Sonoran
8 Desert in central Arizona and northwestern Mexico. Administrative Record ("AR")
9 3538, 3731. They represent the entire bald eagle population known to breed in the
10 Southwestern United States, and they demonstrate unique behavioral characteristics in
11 contrast to the greater population of bald eagles in the contiguous 48 states. AR 5898-99;
12 AR 6408. Desert bald eagles inhabit a desert ecological setting, a desert riparian habitat
13 that is drier, warmer, and less vegetated than is typical for the bald eagle species. AR
14 3539, 3594; AR 4142. They breed in upper and lower Sonoran life zones; and they are
15 smaller and lighter than most other bald eagles. AR 3542, 3594. Desert bald eagles also
16 possess behavioral distinctions, such as frequent cliff nesting and early season breeding.
17 AR 3541, 3595-96; AR 6165, 6408. In addition, Desert bald eagles are reproductively
18 isolated, and perhaps genetically distinct, from other bald eagle populations. AR 3542,
19 3596-98; AR 3542. Indeed, "[b]ecause of the limited distribution and small size of the
20 Southwest bald eagle population, its geographic location and relative isolation, and the
21 unique ecological conditions to which it has adapted, this population is both unique and
22 important." AR 5899.

23 In 2005, estimates by the Arizona Game and Fish Department ("AGFD") indicated
24 that there were 36 active breeding pairs in the Desert bald eagle population. AR 3972.
25 Desert bald eagles suffer from high mortality rates and low productivity, and their small
26 population size and reproductive isolation make them vulnerable to loss of genetic
27 variability, which in turn can precipitate population decline. AR 3583, 3607-11, 3792,
28 3809-11, 4069; AR 3549-51, 3605-07. Desert bald eagles also face a number of external

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

7 **II. REGULATORY & PROCEDURAL HISTORY**

8 The Bald Eagle was first listed as an endangered species pursuant to the
9 Endangered Species Act (“ESA”) on February 14, 1978¹. AR 6560; 72 Fed. Reg. 6230
10 (Feb. 14, 1978). The primary goal of the ESA is to restore endangered and threatened
11 animals and plants to the point where they are again viable, self-sustaining members of
12 their ecosystems. AR 5992. The U.S. Fish and Wildlife Service (“FWS”) administers the
13 ESA with respect to freshwater fish and all other species, including the Bald Eagle.

14 Section 4(f) of the ESA provides for the development and implementation of
15 recovery plans for listed species to identify, describe, and schedule the actions necessary
16 to restore endangered and threatened species to a more secure condition. AR 5992. The
17 FWS established five recovery regions for the Bald Eagle, including one for the
18 southwestern corner of the United States (consisting of Arizona, the area of California
19 bordering the Lower Colorado River, New Mexico, Oklahoma, and Texas west of the
20 100th Meridian). AR 5992, 5813.

21 On July 12, 1995, the FWS reclassified the Bald Eagle from “endangered” to
22 “threatened.” 60 Fed. Reg. 36,000 (July 12, 1995); AR 5990-91. At that time, the FWS
23 declared that it recognized “only one population of bald eagles in the lower 48 States,”
24 because Desert bald eagles “are not reproductively isolated.” AR 5994, 5995. However,
25 the FWS has since changed its mind, stating that data indicating that no bald eagles have
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27 ¹The Bald Eagle was listed as endangered in 43 states, and as threatened in the States
28 of Michigan, Minnesota, Wisconsin, Oregon, and Washington.

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

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

10 On August 30, 2006, the FWS issued a negative 90-day finding that Plaintiffs’
11 petition “[did] not present substantial scientific or commercial information indicating that
12 the petitioned action may be warranted.” 71 Fed. Reg. 51,549; 51,551 (Aug. 30, 2006);
13 AR 3538. As such, the FWS did not initiate a status review of the Desert bald eagle to
14 determine whether listing the Desert eagle population as a DPS is in fact warranted. AR
15 3554. And on January 5, 2007, Plaintiffs brought the instant action challenging the
16 FWS’s August 30, 2006 negative 90-day finding. (Complaint, Dkt. #1).

17 **III. DISCUSSION**

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

24 **A. Standard of Review**

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

1 whether the agency could reasonably have found the facts as it did." Occidental
2 Engineering Co. v. Immigration and Naturalization Service, 753 F.2d 766, 770 (9th Cir.
3 1985). Under the APA, 5 U.S.C. §702, an aggrieved party may sue to set aside a final
4 non-discretionary agency action that is arbitrary or capricious, an abuse of discretion, or
5 otherwise not in accordance with the law. Mt Graham Red Squirrel v. Espy, 986 F.2d
6 1568, 1571 (9th Cir. 1993).

7 An agency action is arbitrary and capricious "if the agency has relied on factors
8 which Congress has not intended it to consider, entirely failed to consider an important
9 aspect of the problem, offered an explanation for its decision that runs counter to the
10 evidence before the agency, or is so implausible that it could not be ascribed to a
11 difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n of
12 U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). "The arbitrary and
13 capricious standard is 'highly deferential, presuming the agency action to be valid and
14 [requires] affirming the agency action if a reasonable basis exists for its decision.'" Kern
15 County Farm Bureau v. Allen, 450 F.3d 1072, 1076 (9th Cir. 2006) (quoting Indep.
16 Acceptance Co. v. California, 204 F.3d 1247, 1251 (9th Cir. 2000)). Review under this
17 standard is "exacting, yet limited"; a court "may not substitute [its] judgment for that of
18 the agency." Id. Deference is especially appropriate where the challenged decision
19 implicates substantial expertise. Ninilchik Traditional Council v. United States, 227 F.3d
20 1186, 1194 (9th Cir. 2000).

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

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1 **B. Statutory Framework**

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

12 Any interested person may file a petition with the Secretary of the Interior to list a
13 species as threatened or endangered under the ESA. 16 U.S.C. §1533(b)(3)(A); 50 C.F.R.
14 424.14(a). On receipt of a petition, the FWS must review the petition and, “to the
15 maximum extent practicable,” within 90 days make a finding as to whether the petition
16 presents “substantial scientific or commercial information indicating that the petitioned
17 action may be warranted” (commonly referred to as a “90-day finding”). 16 U.S.C.
18 §1533(b)(3)(A); 50 C.F.R. §424.14(b). ESA regulations define “substantial information”
19 as “the amount of information that would lead a reasonable person to believe that the
20 measure proposed in the petition may be warranted.” 50 C.F.R. §424.14(b).

21 In making its 90-day finding, the FWS must consider whether the petition: (1)
22 clearly indicates the administrative measure recommended and gives scientific and
23 common name of the species involved; (2) contains detailed narrative justification for the
24 recommended measure, describing, based on available information, past and present
25 numbers and distribution of the species involved and any threats faced by the species; (3)
26 provides information on the status of the species overall or a significant portion of its
27 range; and (4) is accompanied by appropriate supporting documentation in the form of
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1 bibliographic references, reprints of pertinent publications, copies of reports or letters
2 from authorities, and maps. 40 C.F.R. §414.14(b)(2).

3 If the FWS concludes in its 90-day finding that the petition does not present
4 substantial information indicating that a petitioned listing may be warranted (commonly
5 referred to as a “negative 90-day finding”), then the FWS must publish the finding in the
6 Federal Register; and at that time the administrative listing process is complete. 16
7 U.S.C. §1533(b)(3)(A). A negative 90-day finding may be challenged in federal court.
8 16 U.S.C. §1533(b)(3)(C)(ii).

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

22 After the status review and within 12 months of the receipt of the petition, the
23 FWS must determine whether listing of the species is “warranted,” “not warranted,” or
24 “warranted, but” precluded by other listing priorities (commonly referred to as a “12-
25 month finding”). 16 U.S.C. §1533(b)(3)(B). If the FWS determines on completion of its
26 status review that listing of the species as a DPS is “warranted,” then it must publish a
27 proposed listing rule in the Federal Register and solicit public comment. 16 U.S.C.
28 §1533(b)(5). Then, within 12 months of publishing the proposed rule, and after

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

3 **C. Mootness**

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

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

18 Ultimately, the FWS issued a final delisting rule on July 9, 2007, effective August
19 8, 2007, that removed all bald eagles throughout the contiguous 48 states from the
20 threatened species list under the ESA. 72 Fed. Reg. 37,346, 37355 (July 9, 2007). As
21 such, Desert bald eagles and their habitat currently lack protections under the ESA.
22 Plaintiffs' Statement of Facts ("PSOF") ¶43). The FWS noted that "the limited habitat
23 available in Arizona makes the bald eagles there particularly vulnerable to habitat
24 threats," and the likelihood of significant emigration into the Sonoran area from eagles
25 elsewhere in the United States was "minimal in the foreseeable future." 72 Fed. Reg. at
26 37,355. Nonetheless, the FWS stated that "although the Sonoran Desert bald eagle is
27 discrete, it is not significant in relation to the remainder of the taxon. Sonoran Desert
28 bald eagles lack any biologically or ecologically distinguishing factors. Although they do

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

11 In addition, the FWS stated the following:

12 This final delisting rule supersedes the [FWS’s] 90-day petition finding
13 because it constitutes a final decision on whether the Southwestern bald
14 eagles, including those in the Sonoran Desert, qualify for listing as a DPS.
15 This decision was made after notice and comment . . . and was based on all
16 of the relevant information that the Service has obtained. Even if the court
17 in the 90-day finding suit were to find that the plaintiffs’ petition warranted
18 further review, this finding addresses the same issues that the [FWS] would
19 have considered as part of a 12-month finding had the [FWS] made a
20 positive 90-day finding on the petition. This document constitutes the
21 [FWS’s] final determination on these issues, and is judicially reviewable
22 with respect to them; therefore, any controversy regarding the August 30,
23 2006, 90-day finding is now moot.

24 72 Fed. Reg. at 37,347. Accordingly, Defendants’ contend that the instant action
25 challenging the FWS’s August 30, 2006 negative 90-day finding is moot because the
26 FWS made a “final decision on whether the Southwestern bald eagles, including those in
27 the Sonoran Desert, qualify for listing as a DPS[, and] [t]he decision was made after
28 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.

1 Newkirk, 422 U.S. 395, 401 (1975)). A case may become moot if the issues presented are
2 no longer “live” or the parties lack a legally cognizable interest in the outcome.
3 Northwest Environmental Defense Center v. Gordon, 849 F.2d 1241, 1244 (9th Cir.
4 1988) (citing Murphy v. Hunt, 455 U.S. 478, 481 (1982)). However, “[t]he burden of
5 demonstrating mootness is a heavy one,” and “[t]he basic question in determining
6 mootness is whether there is a present controversy as to which effective relief can be
7 granted.” Id. A case may be mooted only if “events have completely and irrevocably
8 eradicated the effects of the alleged violation.” Lindquist v. Idaho State Board of
9 Corrections, 776 F.2d 851, 854 (9th Cir. 1985); Gordon, 849 F.2d at 1244-45 (“The
10 question is whether there can be *any* effective relief.”) (emphasis in original).

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

21 Defendants contend that the FWS’s delisting process for the entire bald eagle
22 population in the contiguous 48 states encompassed a status review of the Desert bald
23 eagle population. Defendants support this contention by referencing the comments that
24 the FWS received from a handful of organizations and individuals regarding whether the
25 Desert bald eagle should be considered a DPS. (DSOF ¶A(9)). Based on those
26 comments, Defendants contend that the FWS reexamined its August 30, 2006 negative
27 90-day finding and reaffirmed its conclusion that listing the Desert bald eagle as a DPS
28 was not warranted. (DSOF ¶A(11)). Defendants argue that the FWS’s subsequent

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

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

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

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

12 This Court cannot accept the proposition that after explicitly stating that it need not
13 re-examine the DPS status of any particular population segment of the bald eagle, the
14 FWS actually “addresse[d] the same issues that the [FWS] would have considered as part
15 of a 12-month finding had the [FWS] made a positive 90-day finding on the petition.” 72
16 Fed. Reg. at 37,347. The mere fact that a handful of interested parties submitted
17 information concerning the Desert bald eagles’ DPS status during the comment period for
18 the FWS’s delisting proposal is not the equivalent of publishing a positive 90-day finding
19 in the Federal Register on the specific issue of the Desert eagle’s DPS status and then
20 soliciting comment from various federal and state agencies, Tribes, and other interested
21 parties on the particular issue of whether listing the Desert bald eagle as a DPS is
22 warranted. Case in point, the Amici Curiae² ardently contend that if the FWS had
23 conducted a status review of the Desert bald eagle population, then they would have
24 provided the FWS with additional information regarding the Desert eagle and its
25 importance to the Arizona Indian community that the FWS did not consider in its July 9,

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27 ²The Amici Curiae in this case are the San Carlos Apache Tribe, the Yavapai-Apache
28 Pima-Maricopa Indian Community.

1 2007 final delisting rule. The amici briefs, as well as a declaration submitted by Richard
2 Glinski, a biologist who served as Team Leader of the Southwest Bald Eagle Recovery
3 Team from 1983 to 1985 (Dkt. #32), supports the notion that additional interested parties
4 with knowledge relating to the Desert bald eagle population would have submitted
5 additional information to the FWS if the FWS had conducted a status review of the Desert
6 eagle population, instead of just slipping a statement into its July 9, 2007 delisting rule
7 that it considered the DPS issue and reaffirmed its previous conclusion that the Desert
8 bald eagle population is not a DPS.

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

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

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

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

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

16 To determine whether a population segment qualifies as a DPS, the FWS must
17 consider two key elements, discreteness and significance. 61 Fed. Reg. 4722, 4725 (Feb.
18 7, 1996). The FWS and Plaintiffs agree that Desert bald eagles constitute a “discrete”
19 population, because there is virtually no eagle emigration out of, or immigration into, the
20 Sonoran population of bald eagles. (PSOF ¶7); AR 3543. However, the FWS concluded
21 in its August 30, 2006 negative 90-day finding that Plaintiffs’ petition did not present
22 substantial information to indicate that Desert eagles may be “significant,” rejecting the
23 information in the petition that supported the conclusions that Desert bald eagles persist
24 in a unique ecological setting, that the loss of Desert eagles would create a gap in the
25 greater species’ range, and that the Desert eagle has markedly different genetic
26 characteristics than the greater bald eagle population. PSOF ¶37; AR 3543-45. Thus,
27 whether the FWS’s 90-day finding was arbitrary and capricious centers on the second
28

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

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

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

13 61 Fed. Reg. at 4725. If the FWS concludes that a population segment may be both
14 discrete and significant, then it must consider whether the petition presents substantial
15 information that the alleged DPS should be listed as threatened or endangered pursuant to
16 the ESA. 61 Fed. Reg. 4725; 50 C.F.R. §424.14(b).

17 The FWS published a negative 90-day finding on August 30, 2006, and stated that
18 the FWS would “not initiate a further status review” of the Desert bald eagle. AR 3538,
19 3543-45, 3554. Despite the various information in Plaintiffs’ petition regarding the
20 “significance” of the Desert eagles to the greater bald eagle population, the petition’s
21 “detailed information on numerous threats affecting the Sonoran Desert population of
22 bald eagles,” and the fact that the FWS was “[l]argely . . . in agreement that these threats
23 are present, and in some cases are having some level of effect on Sonoran Desert bald
24 eagles,” the FWS concluded that Plaintiffs’ petition failed to present “substantial
25 information indicating that the petitioned action may be warranted.” AR 3538, 3543-45,
26 3554. Specifically, the FWS’s negative 90-day finding found that Plaintiffs’ petition did
27 not present substantial information that Desert bald eagles satisfy the first criterion for
28 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

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

7 The question here is whether the FWS examined the relevant data and articulated a
8 satisfactory explanation for its 90-day finding; the issue is whether there is a rational
9 connection between the facts found and the choice made at the 90-day stage. The
10 Arizona Ecological Services’ Phoenix Field Office, Region 2 (“FWS Arizona Field
11 Office”), analyzed Plaintiffs’ petition to evaluate its reliability and to determine whether
12 the FWS had data in its files to refute the information in the petition. (DSOF ¶C(2)); AR
13 308-316. The administrative record demonstrates that FWS scientists found on multiple
14 occasions that “the [Desert eagle] persists in ecological setting unusual/unique for the
15 taxon,” and the “loss [of Desert eagles] would . . . result in a significant gap in the range
16 of the species.” PSOF ¶¶ 26, 27; AR 311-13, 1976-78. Indeed, the record indicates that
17 each time FWS biologists from the FWS’s Arizona Field Office assessed whether listing
18 the Desert bald eagle population as a DPS may be warranted, they found that “no
19 information in [the FWS’s] files refutes” Plaintiffs’ petition and that the information in
20 the petition “appears to be substantial.” PSOF ¶28; AR 162-67, 215-22, 271-77, 308-16,
21 1976-79, 1990-91. In addition, the FWS’s May 2006 threats analysis found that the
22 threats information presented by the petition “appears to be reliable,” and “the petition
23 presents substantial information to indicate that the southwestern population is small;
24 productivity is lower than other bald eagle populations; and adult and nestling mortality
25 [is] high.” AR 488, 692.

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

1 disagreement between FWS officials regarding whether listing the Desert bald eagle as a
2 DPS is warranted, the record clearly indicates that a number of FWS scientists believed
3 that there was substantial information that listing the Desert bald eagle as a DPS may be
4 warranted. The ultimate conclusion regarding whether to list the Desert bald eagle as a
5 DPS is of little consequence when the FWS undertakes a 90-day finding, because at the
6 90-day stage the FWS may only evaluate whether there is sufficient information in a
7 listing petition to indicate that the petitioned action may be warranted, such that the FWS
8 should proceed with a status review of the alleged DPS.

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

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

1 disagreement among reasonable FWS scientists as to whether the Desert bald eagle
2 population should be listed as a DPS pursuant to the ESA. However, Defendants state
3 that the conference call was appropriate because DPS findings involve “policy calls” and
4 depend on whether “the Director of FWS ‘considered the relevant factors and articulated
5 a rational connection between the facts found and the choices made,’ not whether there
6 may have been dissenting views with respect to that decision.” (Dkt. #37, p.17; Dkt. #43
7 , p.7) (citing Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service, 475 F.3d
8 1136, 1145 (9th Cir. 2007)). To support this line of reasoning, Defendants rely on
9 Northwest Ecosystem Alliance, in which the Ninth Circuit stated that the FWS has the
10 right to change its mind after internal deliberation and found that a final determination by
11 the FWS was not arbitrary and capricious even though it reached the opposite result from
12 its preliminary determination and provided no new information to support its conclusion.
13 475 F.3d at 1145. However, Northwest Ecosystem Alliance is inapposite here because it
14 involved a 12-month finding, which employs the more stringent “is warranted”
15 evidentiary burden as opposed to the 90-day finding’s “may be warranted” standard.

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

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

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

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

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

3 **E. Remedy**

4 The APA provides that a court shall hold unlawful and set aside agency action,
5 findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or
6 otherwise not in accordance with law. 5 U.S.C. §706. Upon finding a violation of the
7 ESA, courts have broad discretion to fashion injunctive relief. National Wildlife

8 Federation v. National Marine Fisheries Service, 481 F.3d 1224, 1242 (9th Cir. 2007).

9 The "traditional bases for injunctive relief are irreparable injury and inadequacy of legal
10 remedies." Idaho Watersheds Project v. Hahn, 307 F.3d 815, 832-33 (9th Cir. 2002).

11 The Court must balance the equities between the parties and give due regard to the public
12 interest. Id. And if environmental injury is sufficiently likely, then "the balance of harms
13 will usually favor the issuance of an injunction to protect the environment." Id.

14 "Although the ordinary remedy when a court finds an agency's action to be arbitrary and
15 capricious is to remand for further administrative proceedings, a court can order equitable
16 relief or remand with specific instructions in rare circumstances." Earth Island Inst. v.
17 Hogarth, 494 F.3d 757, 770 (9th Cir. 2007) (quotation omitted).

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

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

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

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

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

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

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

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

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

1 2007 final delisting rule, but merely maintaining the status quo with respect to the Desert
2 bald eagle population as of the time that the FWS made its arbitrary and capricious
3 negative 90-day finding on August 30, 2006. The FWS's July 7, 2007 final delisting rule,
4 as applied to the discrete population of Desert bald eagles, is inextricably intertwined with
5 the FWS's arbitrary and capricious August 30, 2006 negative 90-day finding. If the
6 FWS had applied the appropriate evidentiary standard at the 90-day stage and published
7 the requisite positive 90-day finding, and then proceeded with a status review of the
8 Desert bald eagle population, the FWS would have been required to determine whether to
9 list the Desert bald eagle as a DPS. And if the FWS had concluded that the Desert eagle
10 population was a DPS, then the FWS would have been required to separately assess the
11 status of the Desert bald eagle DPS, as opposed to merely assessing the status of the
12 entire bald eagle population, to determine whether the Desert bald eagle DPS continued to
13 warrant ESA protections.

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

1 **IV. CONCLUSION**

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

12 **Accordingly,**

13 **IT IS HEREBY ORDERED** that the San Carlos Apache Tribe, Yavapai-Apache
14 Nation, Tonto Apache Tribe, Fort McDowell Yavapai Nation, and Salt River Pima-
15 Maricopa Indian Community's motions for leave to file amicus curiae briefs (Dkt. #s 47,
16 49, 51) are GRANTED.

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

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

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

