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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Center for Biological Diversity and
9 Maricopa Audubon Society,

No. 10-2130-PHX-DGC

10 Plaintiffs,

ORDER

11 and

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

15 Plaintiff-Intervenors,

16 vs.

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

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

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

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

12 **I. Statutory Framework.**

13 Congress enacted the ESA primarily “to provide a means whereby the ecosystems
14 upon which endangered species and threatened species depend may be conserved [and] to
15 provide a program for the conservation of such endangered species and threatened
16 species.” 16 U.S.C. § 1531(b); see *National Audubon Society, Inc. v. Davis*, 307 F.3d
17 835,852 (9th Cir. 2002). Congress declared that all Federal departments and agencies
18 “shall seek to conserve endangered species and threatened species and shall utilize their
19 authorities in furtherance of this chapter.” 16 U.S.C. § 1531(c)(1). The Secretaries of
20 Commerce and Interior have delegated their responsibilities under the ESA to the
21 National Marine Fisheries Service (“NMFS”) for marine life, and to FWS for all other
22 species. 50 C.F.R. § 402.01; see *Turtle Island Restoration Network v. Nat’l Marine*
23 *Fisheries Serv.*, 340 F. 3d 969, 973-74 (9th Cir. 2003).

24 The ESA provides for the development and implementation of recovery plans to
25 identify, describe, and schedule the actions necessary to restore endangered and
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27 ¹ Throughout this order, the Court will use the term Plaintiffs to refer to both
28 Plaintiffs and the Tribes.

1 threatened species to a more secure condition. 16 U.S.C. § 1533(f). These substantive
2 protections for a species and its habitat are triggered for a terrestrial species only if the
3 Secretary of Interior, acting through FWS, formally lists that species as either endangered
4 or threatened. *Id.* at § 1533(a)(1) & (d). An endangered species is “any species which
5 is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C.
6 § 1532(6). A threatened species is “any species that is likely to become an endangered
7 species within the foreseeable future throughout all or a significant portion of its range.”
8 16 U.S.C. § 1532(20). In addition, the ESA defines “species” to include any “distinct
9 population segment of any species.” 16 U.S.C. § 1532(16). ESA listing determinations
10 must rely solely on the best scientific and commercial data available; at no point may
11 FWS consider political and economic factors. 16 U.S.C. § 1533(b)(1)(A), 50 C.F.R.
12 § 424.11(b).

13 **A. 90-Day Finding.**

14 Any interested person may file a petition with the Secretary of the Interior to list a
15 species as threatened or endangered under the ESA. 16 U.S.C. § 1533(b)(3)(A); 50
16 C.F.R. 424.14(a). On receipt of such a petition, FWS must review the petition and, “to
17 the maximum extent practicable,” make a finding within 90 days as to whether the
18 petition presents “substantial scientific or commercial information indicating that the
19 petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b).
20 This determination commonly is referred to as a “90-day finding.” ESA regulations
21 define “substantial information” as “the amount of information that would lead a
22 reasonable person to believe that the measure proposed in the petition may be warranted.”
23 50 C.F.R. § 424.14(b).

24 If FWS concludes in its 90-day finding that the petition does not present
25 substantial information indicating that a petitioned listing may be warranted (a “negative
26 90-day finding”), then FWS must publish the finding in the Federal Register. 16 U.S.C.
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1 § 1533(b)(3)(A). At that point the administrative listing process is complete and may be
2 challenged in federal court. *Id.* at § 1533(b)(3)(C)(ii).

3 **B. Status Review and 12-Month Finding.**

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

16 After the status review, and within 12 months of the receipt of the petition, FWS
17 must determine whether listing of the species is warranted, not warranted, or warranted
18 but precluded by other listing priorities. 16 U.S.C. § 1533(b)(3)(B). This determination
19 commonly is referred to as a “12-month finding.” If FWS determines that listing of the
20 species is warranted, then it must publish a proposed listing rule in the Federal Register
21 and solicit public comment. 16 U.S.C. § 1533(b)(5). Within 12 months of publishing the
22 proposed rule and after considering public comment and all relevant evidence, FWS must
23 make a final decision whether to formally adopt the proposed listing rule. 16 U.S.C.
24 § 1533(b)(6).

25 FWS and the NMFS (“the Services”) have developed a “Policy Regarding the
26 Recognition of Distinct Vertebrate Population Segments Under the Endangered Species
27 Act” (the “DPS Policy”). 61 Fed. Reg. 4722-01 (Feb. 7, 1996). Under the DPS Policy,
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1 FWS must consider three elements in deciding whether a population segment qualifies as
2 a DPS: (1) the discreteness of the population segment in relation to the rest of the
3 species, (2) the significance of the population segment to the species, and (3) the
4 population segment's conservation status in relation to the ESA's standards for listing
5 species as endangered or threatened. *Id.* at 4725. A population is discrete if it either "is
6 markedly separated from other populations as a consequence of physical, physiological,
7 ecological, or behavioral factors," or "is delimited by international governmental
8 boundaries" subject to significantly different management and conservation policies. *Id.*
9 A population is significant if available scientific evidence shows that it is "importan[t] to
10 the taxon to which it belongs." *Id.* If FWS concludes that a population segment is both
11 discrete and significant, then it must consider whether the petition presents substantial
12 information that the population segment should be listed as threatened or endangered
13 under the ESA. 61 Fed. Reg. 4725; 50 C.F.R. § 424.14(b).

14 **II. Factual Background of this Case.**

15 The bald eagle was first listed as an endangered species on March 11, 1967. The
16 listing occurred under the Endangered Species Preservation Act of 1966, a predecessor to
17 the ESA. 75 Fed. Reg. at 8,601. Following enactment of the ESA in 1973, the bald eagle
18 was listed as endangered in 43 states and as threatened in Michigan, Minnesota,
19 Wisconsin, Oregon, and Washington. 72 Fed. Reg. 6230 (Feb. 14, 1978). On July 12,
20 1995, the bald eagle was reclassified as threatened in all states. 75 Fed. Reg. at 8,602.

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

24 In 2004, as FWS was considering removing the bald eagle from the threatened
25 species list, the Center filed a petition asking that FWS list desert eagles as a DPS. When
26 FWS failed to respond within 90 days as required by the ESA, the Center filed suit. The
27 parties subsequently reached a settlement agreement under which FWS agreed to issue a
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1 90-day finding by August 30, 2006. The resulting 90-day finding concluded that the
2 Center had not presented sufficient scientific or commercial information to support its
3 petition. See 71 Fed. Reg. 51,549, 51,551 (Aug. 30, 2006). As a result, FWS did not
4 initiate a status review or solicit comments to determine whether the desert eagle
5 qualified as a DPS.

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

18 After issuing its negative 90-day finding, but before Judge Murguia ruled, FWS
19 issued a rule removing all bald eagles in the United States from the threatened species list
20 ("the 2007 delisting rule"). The 2007 delisting rule included a finding that the desert
21 eagle is not a DPS. FWS argued before Judge Murguia that the 2007 delisting rule
22 rendered its 90-day finding on the Center's petition moot. FWS argued, in effect, that the
23 2007 delisting rule had the same effect as a status review and 12-month finding, and that
24 reversing the negative 90-day finding and ordering such a status review would therefore
25 be an unnecessary exercise. Judge Murguia disagreed, noting that FWS had not complied
26 with the procedural requirements for a status review when it made the DPS finding in the
27 2007 delisting rule. Judge Murguia noted that a DPS status review requires notice and
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1 public comment, and yet the notice for the 2007 delisting rule had specifically stated that
2 FWS did *not* intend to analyze whether any particular bald eagle population was a DPS.
3 *Id.* at *8. As a result, those potentially interested in commenting on whether the desert
4 eagle qualified for DPS status had no notice that FWS would be addressing that issue.
5 Although FWS did receive and consider some comments, Judge Murguia found that this
6 was not the equivalent of a full status review. *Id.* at *5-8. Judge Murguia ordered FWS
7 to conduct a full status review and issue a 12-month finding on whether the desert eagle
8 constituted a DPS. *Id.* at *16. She enjoined FWS from applying its 2007 delisting rule to
9 the desert eagle until the status review and 12-month finding were complete. *Id.*

10 As a result of this order, FWS undertook a status review of the desert eagle with
11 full notice and public comment. FWS published its 12-month finding in the Federal
12 Register on February 19, 2010, finding that the desert eagle was “discrete” but not
13 “significant” to the species as a whole, and therefore not entitled to DPS treatment. *See*
14 75 Fed. Reg. 8,601-01 (Feb. 25, 2010). FWS filed a motion to have Judge Murguia’s
15 injunction against delisting the desert eagle lifted. *See Ctr. for Biological Diversity v.*
16 *Salazar*, No. CV 07-0038-PHX-MHM, 2010 WL 3924069 (D. Ariz. Sept. 30, 2010).
17 Judge Murguia lifted the injunction, stating that its purpose had been to forestall delisting
18 of the desert eagle until FWS had completed a full status review. *Id.* at *4. Because
19 FWS had complied with the review, Judge Murguia found that conditions for lifting the
20 injunction had been met. *Id.*

21 The Center asked Judge Murguia to grant leave to file a supplemental complaint,
22 arguing that FWS had made an arbitrary and capricious 12-month finding. *Id.* at *3.
23 Judge Murguia found that the question of whether the 12-month finding violated the ESA
24 and APA was factually and legally distinct from the question of whether FWS acted
25 unlawfully when it issued the negative 90-day finding, and therefore denied the Center’s
26 request to file a supplemental complaint. As a result, Plaintiffs filed this case, alleging
27 that FWS and Interior violated the ESA and APA in issuing the 12-month finding.
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1 Docs. 1, 25, 41. In addition to raising ESA and APA claims, the Tribes argue that FWS
 2 failed to incorporate traditional ecological knowledge into its findings and violated its
 3 obligation to consult meaningfully with the Tribes on a government-to-government basis.

4 **III. Standard of Review.**

5 The APA governs judicial review of administrative decisions involving the ESA.
 6 *Aluminum Co. of America v. Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9th
 7 Cir.1999). “[S]ummary judgment is an appropriate mechanism for deciding the legal
 8 question of whether the agency could reasonably have found the facts as it did.”
 9 *Occidental Engineering Co. v. Immigration and Naturalization Service*, 753 F.2d 766,
 10 770 (9th Cir.1985). The Court must set aside a final, non-discretionary agency action
 11 that is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with
 12 the law. *Mt Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir.1993).

13 An agency action is arbitrary and capricious “if the agency has relied on factors
 14 which Congress has not intended it to consider, entirely failed to consider an important
 15 aspect of the problem, offered an explanation for its decision that runs counter to the
 16 evidence before the agency, or is so implausible that it could not be ascribed to a
 17 difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S.*
 18 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In conducting an APA review,
 19 the Court must determine whether the agency’s decision is “founded on a rational
 20 connection between the facts found and the choices made . . . and whether [the agency]
 21 has committed a clear error of judgment.” *Ariz. Cattle Growers’ Ass’n v. U.S. Fish &*
 22 *Wildlife*, 273 F.3d 1229, 1243 (9th Cir.2001). The standard for review “is ‘highly
 23 deferential, presuming the agency action to be valid and [requires] affirming the agency
 24 action if a reasonable basis exists for its decision.’” *Kern County Farm Bureau v. Allen*,
 25 450 F.3d 1072, 1076 (9th Cir.2006) (quoting *Indep. Acceptance Co. v. California*, 204
 26 F.3d 1247, 1251 (9th Cir.2000)). At the same time, a reviewing court “must not rubber-
 27 stamp . . . administrative decisions that [the court deems] inconsistent with a statutory
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1 mandate or that frustrate the congressional policy underlying a statute.” *Ocean*
2 *Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 859 (9th Cir.2005).

3 **IV. Is The 12-Month Finding Procedurally Flawed?**

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

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

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

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

- 23
- 24 1. Persistence of the population segment in an ecological setting unusual or
25 unique for its taxon;
 - 26 2. Evidence that loss of the discrete population segment would result in a
27 significant gap in the range of the taxon;
 - 28

- 1 3. Evidence that the discrete population segment represents the only surviving
2 natural occurrence of a taxon that may be more abundant elsewhere as an
3 introduced population outside of its historic range; or
- 4 4. Evidence that the discrete population segment differs markedly from other
5 populations of the species in its genetic characteristics.

6 *Id.*

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

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

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

27 FWS scientists in Arizona also found that desert eagles meet the criteria of the
28 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-

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

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

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

15
16 My conclusion was based on my evaluation of the facts at hand, the
17 previous DPS analysis, and [the] proposed finding [from the Arizona office
18 and Region 2]. I found no significant new information since the previous
19 DPS analysis, nor did I see any obvious error in the previous analysis. Our
20 DPS policy has not changed. I believe it is important for the Service to
21 stand by its previous decisions unless a change in fact or policy, or a
22 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.

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

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

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

1 appreciate the concerns you raised in the Region's memo that this analysis
2 overlooked features of the unique desert environment, and that it did not
3 focus on the birds' response or adaptation to the uniqueness of the Sonoran
4 Desert setting. I kept these concerns in mind while reviewing and
5 evaluating the previous analysis and the Region's draft analysis, but was
6 unable to find any error or omission in the previous DPS analysis. It is my
7 judgment that the [2007 delisting rule] reached the correct conclusion based
8 on the best data available at the time. Moreover, there does not appear any
9 significant relevant new information, nor has our DPS policy changed since
10 the previous analysis was published. Thus, I conclude that the best data
11 currently available also supports a conclusion that this population is not a
12 valid DPS. This conclusion is based on my evaluation of the past DPS
13 analysis, portions of the administrative record made available to me, and
14 the Region's draft analysis.

15 My staff will work with you on development of the revised version of the
16 [12-month] finding. Obviously, the finding should not simply cite to my
17 conclusion, but rather reflect the thorough analysis of the best available
18 information upon which the July 2007 DPS analysis and my conclusion
19 was based.

20 Doc. 65, ¶39; AR8557.

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

26 This history from the administrative record establishes the following facts:
27 (1) FWS undertook a status review and 12-month finding as directed by Judge Murguia
28 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

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

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

12 As already noted, FWS argued before Judge Murguia that the 2007 delisting rule
13 should be treated as the agency equivalent of a status review and 12-month finding.
14 Judge Murguia did not agree. She noted that the public notice for the 2007 delisting rule
15 specifically stated that FWS “‘need not at this time analyze whether any particular
16 geographic area would constitute a DPS.’” *Kemphorne*, 2008 WL 659822 at *5 (quoting
17 AR6564). Thus, far from calling for public comment on the potential DPS status of
18 desert eagles, the notice specifically stated that such an inquiry would not occur. When
19 the comment period for the delisting proposal was later extended, FWS again “made no
20 mention of whether it was reviewing the status of bald eagles in any particular area to
21 determine whether they constituted a [DPS].” *Id.* As a result, Judge Murguia found that
22 the 2007 delisting rule failed to comply with the notice, comment, and consultation
23 requirements for a DPS status review – “publishing a positive 90-day finding in the
24 Federal Register that listing as a DPS may be warranted and consulting with interested
25 parties in conducting a status review to determine whether listing as a DPS is truly
26 warranted.” *Id.* at *7. She found that FWS could not satisfy status review requirements
27 simply by “slipping a statement into its July 9, 2007 delisting rule that it considered the
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1 DPS issue [and found] that the Desert eagle population is not a DPS.” *Id.* at *8. Judge
2 Murguia characterized FWS’s contention that the 2007 delisting rule was the equivalent
3 of a status review and 12-month finding as “far-fetched at best.” *Id.* at *7.

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

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

25 The 2007 delisting decision was made less than a year after the negative 90-day
26 finding, and appeared designed in part to forestall Judge Murguia’s ruling on the 90-day
27 finding. Indeed, FWS took the unusual step of asserting in the 2007 delisting rule itself
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1 that the question before Judge Murguia “is now moot.” *Id.* at *6. Thus, it appears that
2 the 2007 delisting decision was made in the same environment as the negative 90-day
3 finding, an environment in which Washington’s “policy call” resulted in “marching
4 orders” for FWS scientists in Arizona. Needless to say, a result-driven decision should
5 not become the presumptive baseline for a subsequent and properly-noticed status review,
6 to be departed from only for compelling reasons.

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

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

19 **V. Plaintiffs’ Other Arguments.**

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

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

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

19 **VI. The Tribes’ Consultation Arguments.**

20 The Tribes argue that the long-standing principle requiring the United States to
 21 engage in meaningful government-to-government consultation with Indian tribes,
 22 codified through numerous executive branch orders and memoranda, is a legally
 23 enforceable obligation. Docs. 61 at 28, 58 at 17-18.² Defendants do not dispute this

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 26 ² See, e.g., President Clinton’s May 14, 1998, and November 6, 2000, Executive
 27 Orders, “Consultation and Coordination With Indian Tribal Governments,” Exec. Order
 28 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).

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

9 **A. Consultation Obligations.**

10 The Tribes cite several cases to show that courts have set aside agency actions
11 taken without proper government-to-government consultation. As Defendants note,
12 however, the two main cases relied on by the Tribes are not directly on point because
13 they derive the agencies' consultation requirements from federal statutes other than the
14 ESA. In *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755
15 F. Supp. 2d 1104 (S.D. Cal. 2010), the Bureau of Land Management ("BLM") was
16 required to consult with affected tribes under the National Historic Preservation Act
17 ("NHPA") before approving a solar energy project on lands containing 459 identified
18 cultural resources, including archeological sites where the tribe had buried human
19 remains. *Id.* at 1107-08. NHPA regulations specified seven issues about which BLM
20 was to consult with the tribe and included a process for the tribe to challenge a BLM
21 decision regarding a cultural or archeological site's National Register eligibility. *Id.* at
22 1109. It was in the context of this detailed regulatory scheme that the court stated that
23 "[t]he consultation requirement is not an empty formality" and set aside the BLM's final
24 decision for side-stepping consultation requirements "imposed by Congressionally-
25 approved statutes and duly adopted regulations." *Id.* at 1108, 1119.

26 In *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072 (9th
27 Cir. 2011) ("CWC"), the Department of Energy ("DOE") failed to comply with statutory
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1 requirements to consult with the States in developing electrical transmission congestion
2 studies prior to designating “national interest electrical transmission corridors” under the
3 Energy Policy Act of 2005 (“EPAAct”). *Id.* at 1081. CWC was based on consultation
4 obligations found in the EPAAct. The ESA does not contain similar consultation
5 requirements.

6 The remaining cases cited by the Tribes derive their consultation requirements
7 either from the federal government’s role as trustee over treaty-protected tribal lands or
8 resources, or from federal law. For example, *Klamath Tribes v. United States*, 1996 WL
9 924509 (D. Or. Oct. 2, 1996), dealt with the United States Forest Service’s (“USFS”)
10 failure to consult with the Klamath Tribes before engaging in eight timber sales from
11 tribal lands in violation of the federal government’s trust duty “to avoid adverse effects
12 on treaty resources.” 1996 WL 924509 at *8. *Confederated Tribes and Bands of the*
13 *Yakama Nation v. U.S. Department of Agriculture*, 2010 WL 3434091 (E.D. Wash. Aug.
14 30, 2010), dealt with the Department of Agriculture’s (“USDA”) failure to consult with
15 the Yakama Nation before placing a landfill adjacent to tribal lands where it would
16 interfere with the tribe’s treaty-protected hunting, gathering, and fishing rights. The court
17 found that the duty to consult in that case derived from “the Yakama Treaty of 1855 and
18 federal Indian trust common law.” *Id.* at *4. The remaining cases all deal with decisions
19 made by the Bureau of Indian Affairs’ (“BIA”) directly related to administrative issues or
20 services on tribal reservations, including appointments to BIA supervisory positions,
21 changes in education funding, and employment reductions. *See Ogala Sioux Tribe v.*
22 *Andrus*, 603 F. 2d 707 (8th Cir.1979); *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp.
23 2d 774 (D. S.D. 2006); *Lower Brule Sioux Tribe v. Deer*, 911 F.Supp. 395 (D. S.D.
24 1995). In each case, the courts found that the BIA had violated consultation requirements
25 clearly established by federal law or by specific BIA policy.

26 This case impacts tribal interests because the desert eagle population lives, in part,
27 on tribal lands and the desert eagle is an integral part of tribal culture. DPS listing
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1 decisions made pursuant to the ESA, however, do not implicate the federal government's
2 fiduciary duty over the management of specific treaty-protected resources as did the
3 actions of the USFS and the USDA in *Klamath Tribes* and *Yakama Nation*, nor does
4 FWS have the same statutory and regulatory obligations to consult with the Tribes under
5 the ESA that the BIA has when making decisions directly related to the management of
6 tribal services and employment on Indian Reservations.

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

11 **B. The “Ultimate Decision-Maker” Argument.**

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

21 The Tribes’ argument is based on dictum in *Lower Brule* that “[m]eaningful
22 consultation means tribal consultation in advance with the decision maker or with
23 intermediaries with clear authority to present tribal views to the . . . decision-maker.”
24 911 F. Supp. at 401. *Lower Brule* itself concerned BIA’s “total failure to consult” and
25 therefore did not explain or apply this principle. *Id.* at 400. The Tribes cite no other
26 authority for their claim that consultation requires access to the ultimate decision maker,
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1 and the Court declines their invitation to fashion a new common law consultation
2 obligation on the basis of dictum in another district court decision.

3 Moreover, even if the Court were to conclude that consultation requires access to
4 the ultimate decision-maker or his or her intermediaries, the Tribes do not dispute that
5 their elected officials met with FWS's Arizona and Regional Staff, including Region 2
6 Director Tuggle, and that Director Tuggle had authority to present tribal views to his
7 superiors. The record shows that Region 2 staff transmitted draft DPS findings, including
8 tribal information, to the reviewing staff in Washington, D.C., and that staff from both
9 offices worked on preparing a final draft of the 12-month finding. AR 8345-8423 (see,
10 especially, AR8364-67), AR8859-8941 (see, especially, AR8869-70, 8881-82, 8908,
11 8919-21). It thus appears the Tribes had access to "intermediaries with clear authority to
12 present tribal views to the . . . decision-maker." *Lower Brule*, 911 F. Supp. at 401.

13 **C. Salt River's Other Arguments.**

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

3 While meeting with Salt River months earlier would undoubtedly have been more
4 meaningful to and respectful of the tribe, the Court cannot conclude that the consultation
5 undertaken by FWS was unlawful. Salt River cites *CWC* for the principle that
6 “consultation with tribal government should begin early and continue throughout the
7 administrative process.” Doc. 58 at 24 (citing *CWC*, 631 F. 3d at 1087-92). But this
8 requirement actually comes from the NHPA regulations in *Quechan* which state that
9 “[c]onsultation should commence early in the planning process, in order to identify and
10 discuss relevant preservation issues and resolve concerns about the confidentiality of
11 information on historic properties.” 755 F. Supp. 2d at 1109 (citing 36 C.F.R.
12 § 800.2(c)(2)(ii)(A)). No similar regulations apply here.

13 Salt River’s cases are also distinguishable. In *Quechan*, the BLM never sent
14 letters inviting the tribe to consult, and it did not meet with the tribe to discuss sensitive
15 sites in the relevant project area until after the solar project had been approved. *Id.* at
16 1118. *Lower Brule* involved the BIA’s “total failure to consult.” 911 F. Supp. at 401.
17 *Lower Brule* also found that the BIA had met its consultation duties in the past with one
18 or two hour meetings with tribal councils. *Id.*

19 Salt River argues that FWS denied it the chance to review and comment on FWS
20 draft documents “despite the lack of any law or regulation that prohibits such
21 collaboration.” Doc. 58 at 24. But the relevant question is not whether the law prohibits
22 such collaboration, but whether the law requires it. In *CWC*, which Salt River cites for
23 this proposition, the DOE was required to collaborate by Congress. 631 F. 3d. 1072 at
24 1080. Congress specifically intended that states participate in the EPAct process because
25 DOE’s determinations could infringe the state’s traditional powers. *Id.* at 1087. The
26 relevant standards for federal state cooperation in the EPAct context simply do not apply
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1 to the ESA, and the Court will not import them into some kind of common law
2 requirement when neither Congress nor Interior has seen fit to impose them on FWS.

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

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

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

20 **VII. Remedy.**

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

24 Plaintiffs also ask the Court to enjoin DPS from applying the 2007 delisting rule to
25 the desert eagle until the 12-month finding has been revised on remand. *Id.* Defendants
26 seek an opportunity to brief the propriety of injunctive relief before the Court imposes
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1 such a remedy. Doc. 75 at 57 n. 29. The Court will establish a short briefing schedule
2 and resolve the issue of injunctive relief in the next several weeks.

3 **IT IS ORDERED:**

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

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

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

12 4. Plaintiffs and Plaintiff-Intervenors shall, by **May 4, 2012**, file brief
13 memoranda (no longer than 7 pages each) stating their positions with respect to the new
14 12-month finding and their views on whether additional action is necessary in this
15 litigation. The Court will then convene a conference call with the parties to discuss the
16 future course, if any, of this litigation.

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

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

23 Dated this 30th day of November, 2011.

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26 _____
27 David G. Campbell
28 United States District Judge