RONALD J. TENPAS
Acting Assistant Attorney General
Environment & Natural Resources Division

LISA L. RUSSELL
Assistant Chief

ROBERT L. GULLEY
Senior Trial Attorney (D.C. Bar No. 394061)
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
Telephone: (202) 305-0500
Facsimile: (202) 305-0275

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, Plaintiffs, v. DIRK KEMPTHORNE, Secretary of the Interior, *et al.*, Defendants.	CIV 07-0038-PHX-MHM **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

The Sonoran Desert population of bald eagles is not a distinct population segment ("DPS") and, thus, is not listable under the Endangered Species Act ("ESA"). In considering its recent decision to delist the bald eagle, the United States Fish and Wildlife Service ("FWS") fully and completely examined the question of whether the Sonoran Desert population qualified for listing as a DPS. 72 Fed. Reg. 37,346, 37,354-58 (July 9, 2007). That examination included reviewing extensive comments on the issue from the Center for Biological Diversity, a plaintiff in this case, and at least five other organizations and persons. At the conclusion of that process, FWS determined that while the Sonoran Desert population is discrete, it is not significant in relation to the remainder of the taxon. *Id.* at 37,358. Accordingly, FWS concluded that this population "is not a listable entity" under the ESA. *Id.*

Undeterred by this reality, Plaintiffs continue to focus on an earlier piece of history -- FWS's finding in August 2006 that Plaintiffs' 90-day petition did "not provide substantial scientific or commercial information indicating that the petitioned action may be warranted." *See* 71 Fed. Reg. 51,549 (Aug. 30, 2006). Plaintiffs have not challenged FWS's decision not to treat the Sonoran Desert population as a DPS in the delisting rule. Nonetheless, Plaintiffs ask the Court, solely on the basis of their view of the merits of their 90-day finding, to enjoin the delisting rule as it pertains to the Sonoran Desert population of bald eagles.

Plaintiffs cannot use a challenge to the 90-day finding to unring the bell that tolled on July 9, 2007. Because the delisting decision surplants the 90-day finding regarding the merits of Plaintiffs' petition, their case is moot. Accordingly, Plaintiffs' Complaint must be dismissed. Even if Plaintiffs' case were not moot, FWS reasonably determined that Plaintiffs' petition did not present substantial information that the petitioned action may be warranted. Finally, even if the 90-day finding were infirm, Plaintiffs are not entitled to an injunction with respect to the delisting rule that they have not challenged.

BACKGROUND

A. Statutory and Regulatory Background

Section 4 of the ESA directs the Secretary[1/] to determine by regulation whether a given species should be listed as endangered or threatened. 16 U.S.C. § 1533. An endangered species is "in danger of extinction throughout all or a significant portion of its range," while a threatened species is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(6), (20). "Species" is defined to include subspecies and any "distinct population segment of any species . . . which interbreeds when mature." 16 U.S.C. §1532(16). *See also* 50 C.F.R. § 424.02(k).

Congress did not define the term "distinct population segment." It did, however, direct FWS to use the DPS designation "sparingly." S.Rep. No. 96-151, 96th Cong., 1st sess. 1397 (1979). In 1996, FWS and NMFS developed a policy (the "DPS Policy") to ensure consistency in their respective DPS determinations. 61 Fed. Reg. 4722 (Feb. 7, 1996). The policy identifies three elements that are to be considered in making a DPS determination: (1) the discreteness of the population in relation to the remainder of the species to which it belongs; (2) the significance of the population segment to the species to which it belongs; and (3) the population segment's conservation status in relation to the ESA's standards for listing. *Id.* at 4725. If a population segment is considered discrete, its biological and ecological significance is then considered in light of Congressional guidance that the authority to list DPS's be used "sparingly." *Id.* If a population segment is discrete and significant (*i.e.*, it is a DPS) it is then evaluated to determine whether it is threatened or endangered based on the

---

[1/] Depending on the species in question, the "Secretary" may be the Secretary of the Interior or the Secretary of Commerce. 16 U.S.C. § 1532(15). The Secretary of the Interior has jurisdiction over the bald eagle. In turn, this authority has been delegated to the FWS Director.

factors enumerated in § 4(a) of the ESA.[2/] *Id.*

Listing may be carried out at the initiative of the Secretary or in response to a petition. Any "interested person" may petition the Secretary to add a species to the list of endangered and threatened species, or to remove such species from the list (*i.e.*, "delist" a species), by following the procedures set out in the Administrative Procedure Act ("APA") at 5 U.S.C. § 553(e). 16 U.S.C. § 1533(b)(3)(A). After receiving a petition to list or delist a species, the Secretary must, "[t]o the maximum extent practicable," make a finding within 90 days of receiving the petition "as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A) (known as a "90-day finding"). *See also* 50 C.F.R. § 424.14(b)(1). A "negative" 90-day finding ends the listing or delisting process, and the ESA authorizes judicial review of such a finding. 16 U.S.C. § 1533(b)(3)(C)(ii). In this case, Plaintiffs challenge such a negative finding with respect to the Sonoran Desert population of bald eagles.[3/]

FWS regulations define "substantial information" as "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)(1). The statute expressly places the burden on the petitioner to gather and present sufficient information to pass the threshold of "substantial

---

[2/] The factors are: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1).

[3/] If a positive initial finding is made, the Secretary has one year from the receipt of the petition to undertake a status review and to issue a "12-month finding." 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3). The finding must be that the petitioned action is "warranted," "not warranted," or "warranted but precluded" by other priorities. *Id.*

scientific or commercial information indicating that the petitioned action may be warranted" in order to justify further activity by the FWS toward the requested listing or delisting. *See* 16 U.S.C. § 1533(b)(3)(A).

B. Factual Background

1. Status Of The Bald Eagle Under The ESA

FWS listed bald eagles south of 40 north latitude as endangered under the ESA in 1967. 32 Fed. Reg. 4001 (Mar. 11, 1967). On February 14, 1978, FWS listed the bald eagle as endangered in 43 of the contiguous States and as threatened in the States of Michigan, Minnesota, Wisconsin, Oregon, and Washington. 43 Fed. Reg. 6230 (Feb. 14, 1978). To facilitate management of the recovery process for the bald eagle, FWS divided the lower 48 states into five regions. 72 Fed. Reg. at 37,356. The Southwestern Recovery Region at issue here consists of Arizona, the area of California bordering the Lower Colorado River, New Mexico, Oklahoma, and Texas west of the 100th Meridian. 71 Fed. Reg. 8238, 8241 (Feb. 16, 2006).

On July 12, 1995, FWS reclassified the bald eagle from endangered to threatened in the 43 States where it had been listed as endangered and retained the threatened status for the other five States. 60 Fed. Reg. 36,000 (July 12, 1995). In the reclassification rule, FWS determined that eagles in the Southwest Recovery Region were part of the same bald eagle population as that of the remaining lower 48 States. *Id.* at 36,004. On July 6, 1999, FWS published a proposed rule to delist the bald eagle throughout the 48 contiguous States. 64 Fed. Reg. 36,454 (July 6, 1999).

On February 16, 2006, FWS reopened the comment period on the proposed delisting of the bald eagle. 71 Fed. Reg. at 8238. On June 19, 2006, the Center for Biological Diversity submitted over 170 pages of comments specifically addressing the need to treat the Sonoran Desert population as a DPS and to reclassify its status from threatened to

endangered. Attached hereto as Exhibit 1. At least five other organizations and one individual including the Sierra Club, Portland Audubon Society, Raptor Research Foundation, and Robert McGill also submitted comments specifically on the issue of whether the Sonoran Desert population of bald eagles should be designated as a DPS and not delisted.

On July 9, 2007, FWS delisted the bald eagle. 72 Fed. Reg. 37,346 (July 9, 2007). In making that determination, FWS fully and completely examined the question of whether the Sonoran Desert population qualified for listing as a DPS. 72 Fed. Reg. at 37,354-58. FWS summarized its extensive analysis as follows:

> We have reviewed the best scientific and commercial data available and have evaluated the data in accordance with 50 CFR 424.14(b). On the basis of our review, we find that although the Sonoran Desert bald eagle is discrete, it is not significant in relation to the remainder of the taxon. Sonoran Desert bald eagles lack any biologically or ecologically distinguishing factors. Although they do persist in an arid region, Sonoran Desert bald eagles do not have any adaptations that are not found in bald eagles elsewhere. The adaptability of the species allows its distribution to be widespread throughout the North American continent. Therefore, we conclude that the Sonoran Desert population of the bald eagle in the lower 48 States is not a listable entity under section 3(16) of the Act.

72 Fed. Reg. at 37,358.

2. Plaintiffs' Petition Regarding The Sonoran Desert Population Of Bald Eagles

On October 6, 2004, FWS received a petition from the Center for Biological Diversity, the Maricopa Audubon Society, and the Arizona Audubon Council requesting that the bald eagle population found in the Sonoran Desert or, alternatively, in the upper and lower Sonoran Desert be classified as a DPS, that this DPS be reclassified from threatened to endangered, and that FWS concurrently designate critical habitat for the DPS. AR 3578-3722, 3731-34. On February 11, 2005, FWS asked the petitioners for clarification regarding the geographical scope of their petition. AR 89-90. FWS received that clarification on March 11, 2005. AR 91-94. FWS, however, did not have funds in FY 2004-05 to complete the 90-day finding. AR 51,549.

Plaintiffs sent FWS a Notice of Intent to Sue on January 19, 2006, for FWS's failure to make the 90-day finding. AR 3736-38. Plaintiffs filed the suit on March 27, 2006. AR 3739-48. To settle the suit, FWS agreed to submit the 90-day finding to the Federal Register by August 9, 2006. AR 3751-56. On August 9, the Court entered a stipulation allowing FWS an additional two weeks to submit the 90-day finding to the Federal Register. AR 3200, 3268.

On August 30, 2006, FWS made a 90-day finding that the petition did not present substantial scientific or commercial information indicating that the petitioned action may be warranted. 71 Fed. Reg. at 51,556. After reviewing the evidence presented in the petition, FWS concluded that although the petition presented evidence that the population is discrete, it did not present substantial information that the Sonoran Desert population may be significant to the remainder of the taxon. 71 Fed. Reg. at 51,556. Although FWS was not required to consider whether a change in status from threatened to endangered because the petition had not provided substantial evidence that the Sonoran Desert population may be a DPS, FWS analyzed the information in the petition regarding threats to the Sonoran Desert population. *Id.* FWS concluded that the petition presented no new evidence on threats to the population and no evidence indicating an increased level of threat. *Id.* at 51,565. Specifically, FWS found that:

> The lack of information on new or escalating threats, combined with the increased number of occupied breeding areas and increased productivity levels, causes us to conclude that the Sonoran Desert bald eagle population, while facing threats, continues to increase in numbers of adult birds and in productivity. We therefore find that the petition did not provide substantial information led us to conclude that the petitioned action to reclassify the Sonoran desert bald eagle as endangered may be warranted.

Id.

After providing the required 60-day notice, on January 5, 2007, Plaintiffs brought this action challenging FWS's 90-day finding.

C. Standard of Review

The Court's review of FWS's 90-day finding is governed by the "arbitrary and capricious" standard of review of the APA. *See Aluminum Co. of America v. Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9th Cir. 1999) ("The [APA] governs judicial review of administrative decisions involving the Endangered Species Act."); *City of Las Vegas v. Lujan*, 891 F.2d 927, 932 (D.C. Cir. 1989). The Court's review under this standard is narrow, and the Court cannot substitute its judgment for that of the agency, particularly when "'the challenged decision implicates substantial agency expertise.'" *See Aluminum Co.*, 175 F.3d at 1160-1161 (citing *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir.1993)).

The agency's conclusions regarding the status and threats to the bald eagle must be upheld if the agency has considered the relevant factors and has articulated a rational connection between its factual judgments and its policy choice. *City of Las Vegas*, 891 F.2d at 932; *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 982 (9th Cir. 1985) (*quoting Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983)). In essence, the Court must decide only whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971). The Court must uphold FWS's decision unless FWS "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). A "reviewing court must generally be at its most deferential" when the agency is "making predictions,

within its area of special expertise, at the frontiers of science." *Baltimore Gas*, 462 U.S. at 103 (cited in *Cent. Ariz. Water v. Conservation Dist. V. EPA*, 990 F.2d at 1540-41 (9th Cir. 1993).

ARGUMENT

I. Plaintiffs' Challenge To FWS's 90-Day Finding Is Moot.

A. The Mootness Doctrine

Under Article III of the Constitution, federal courts may decide only an actual "case or controversy," and a case must be dismissed – at any stage in the litigation – if it appears to be moot. *See, e.g., Defunis v. Odegaard*, 416 U.S. 312, 319 (1974); *Envtl. Prot. Info. Ctr. v. Pacific Lumber Co.*, 257 F.3d 1071, 1076 (9th Cir. 2001). Federal courts have "no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before [them].'" *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

A claim is moot if it has lost its character as a present, live controversy. *American Tunaboat Ass'n v. Brown*, 67 F.3d 1404, 1407 (9th Cir. 1995). A claim is rendered moot if intervening events prevent the court from granting effective relief. *See, e.g., Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982); *Northwest Res. Info. Ctr. v. NMFS*, 56 F.3d 1060, 1069 (9th Cir. 1995); *GTE Calif., Inc. v. FCC*, 39 F.3d 940, 945 (9th Cir. 1994). Whenever a case has lost its character as an actual controversy it must be dismissed because "Article III of the Constitution prohibits federal courts from taking further action on the merits in moot cases." *Envronmental Prot. Info. Ctr. v. Pacific Lumber Co.*, 257 F.3d at 1076 (citation omitted).

1. This Court Can No Longer Provide Any Effective Relief.

The issue raised by Plaintiffs' Complaint is whether FWS was arbitrary and capricious in determining that Plaintiffs' petition did not present "substantial scientific or commercial

information indicating that the petitioned action may be warranted." *See* 16 U.S.C. § 1533(b)(3)(A). The sufficiency of Plaintiffs' petition, however, is no longer an issue. That determination has been superceded by a final determination that the Sonoran Desert population of bald eagles is not a DPS. In making that determination, FWS considered all of the evidence, including Plaintiffs' petition and comments submitted by other organizations and individuals.

Even if the Court were to determine that FWS's 90-day finding were arbitrary and capricious, the Court could not grant any effective relief. If the Court were to make such a determination, the proper course would be to set that finding aside and remand it to the agency. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (Where the administrative record does not support an agency action, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *see also INS v. Ventura*, 537 U.S. 12, 16 (2002) ("Generally speaking, a court . . . should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."). An order to re-examine whether an earlier petition presented substantial evidence that consideration of the Sonoran Desert population as a DPS **may be** warranted would be meaningless because FWS has already examined all of the available information on the DPS issue in the delisting context, including Plaintiffs' petition and other comments, and concluded that the consideration of the population **is not** warranted.[4/]

[4/] Plaintiffs feign an inability to understand why FWS made a "second finding" that the Sonoran Desert population does not constitute a DPS. Pls' Mem. at 8, fn. 2. Of course, FWS has not made two such findings. The 90-day finding related only to whether the petition presented substantial evidence that the Sonoran Desert population may warrant treatment as a DPS and warranted uplisting as an endangered population. In the delisting determination, FWS decided whether to actually delist all bald eagles in the 48 contiguous States. Because it had received comments arguing against doing so with respect to the Sonoran Desert population, FWS conducted a further analysis and concluded that the consideration of the Sonoran Desert population as a DPS is not

Plaintiffs argue that they are entitled to more than just a remand. They argue that, because FWS issued an improper 90-day finding, the Court should order FWS to undertake "a full status review and issue a 12-month finding." Pls' Mem. at 22. It is well settled, however, that, in remanding an agency action, the court may not dictate how the agency is to exercise its discretion on remand. *See Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.") (citations omitted); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("judicial judgment cannot be made to do service for an administrative judgment."); *Gonzales v. Thomas*, 547 U.S. 183, 187 (2006) (finding the Ninth Circuit should have applied the "ordinary remand rule" in reviewing a decision of the Board of Immigration Appeals rather than make a determination of the matter in the first instance) (citing *Ventura*, 537 U.S. at 16, 18); *Nat'l Tank Truck Carriers v. EPA*, 907 F.2d 177, 185 (D.C. Cir. 1990) (citations omitted) ("We will not, indeed we cannot, dictate to the agency what course it must ultimately take . . . . It may even be that the EPA will choose some other solution altogether. In any event, that choice is the agency's and not ours."). The requested relief would require the Court to prejudge the outcome of that review and, thus, would be an unlawful intrusion into the executive function.[5/] Regardless, even if this Court were to order FWS to proceed with a 12-month

---

warranted.

[5/] Plaintiffs rely on *Colorado River Cutthroat Trout v. Kempthorne*, 448 F. Supp. 2d 170, 178 (D.D.C. 2006), and *CBD v. Morganweck*, 351 F. Supp. 2d 1137, 1144 (D. Colo. 2004), to support their argument. Because these district courts improperly interjected themselves into the executive function, these cases were wrongly decided. The extent that they can be justified at all relates only to the equities of the cases. In *Colorado River Cutthroat Trout*, the Court ordered the extraordinary relief because FWS had waited for four years from the receipt of the petition before even making the 90-day finding. *Id.* at 178. Here FWS made the finding within 18 months of receipt of an adequate petition. *Compare Morganweck*, 351 F. Supp. 2d at 1138, 1143 (FWS took two and one-half years

finding, it still would not be providing effective relief because it just would be ordering FWS to do what it already did in conducting a status review for the delisting determination.

Plaintiffs argue that this Court should go further. Plaintiffs ask the Court to enjoin "application of the recent delisting rule to the Sonoran eagle population until FWS makes a final, lawful determination of their eligibility for listing as a DPS." Pls' Mem. at 23. This Court lacks the authority to grant such relief. Plaintiffs have not challenged the delisting rule. Until they provide the required 60-days notice,[6] bring such a challenge, and a court finds, based on the record of the delisting rule, that it is unlawful, FWS is entitled to a presumption of regularity as to its delisting determination. *Citizens to Preserve Overton Park*, 401 U.S. at 415. Indeed, because the requisite 60-days notice has not been given, this Court lacks jurisdiction to adjudicate any aspect of the July 9, 2007 delisting decision. Moreover, the simple fact that Plaintiffs argue that the delisting rule is unlawful does not change the fact that its challenge to the 90-day finding is moot. *See American Rivers v. Nat'l Marine Fisheries Serv.*, 109 F.3d 1484 (9th Cir. 1997) (holding that a subsequent biological opinion mooted a challenge to an earlier biological opinion notwithstanding plaintiffs claim that the subsequent biological opinion was legally infirm).[7]

---

to respond to the petition and used that time to create new files to review the petition).

[6] Because such a challenge must be brought under the citizen-suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g)(1)(C), a plaintiff must provide notice of its intent to sue 60 days prior to bringing such a challenge. 16 U.S.C. § 1540(g)(2)(A). The 60-day notice requirement is jurisdictional. *Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998) ("sixty-day notice requirement is jurisdictional" a failure "to strictly comply with the notice requirement acts as an absolute bar to bringing suit under the ESA.").

[7] The Ninth Circuit subsequently amended this decision as it applied to the consulting agency, NMFS, but left in place the dismissal of the action against the action agencies on mootness grounds. *American Rivers v. Nat'l Marine Fisheries Service*, 126 F.3d 1118, 1125 (9th Cir. 2002). The decision had to be amended as it applied to the

Plaintiffs rely on *Northwest Envtl. Def. Ctr. v. Bonneville Power Administration*, 477 F.3d 668 (9th Cir. 2007) to argue that the Court has broad equitable powers. Pls' Mem. at 22. However, in *Northwest Environmental Defense Ctr.*, the Ninth Circuit did not hold, or even suggest, that a Court had the power to issue affirmative relief with respect to an action that was not before it. It simply found that § 706(2) of the APA gave it the equitable power to provide affirmative relief by setting aside the action that the Court found to be unlawful. *Id.* at 680.

Plaintiffs make no credible showing that the extraordinary relief they seek is necessary to remedy the allegedly unlawful 90-day finding. They claim that the 90-day finding was the "linchpin" for the agency's decision to delist the eagles because, had it made a positive 90-day decision, it could not delist bald eagles until it had done a "full status review" of the Sonoran Desert population. Pls' Mem. at 20. This argument, however, is specious. The result of the 90-day finding is not relevant to the delisting decision because, in making the delisting decision, FWS conducted the full review it would have done had it made a positive 90-day finding. Moreover, a positive 90-day finding would be only a determination that the DPS status "may be" warranted; it would not be binding on the decision of whether DPS status was, indeed, warranted. Thus, whether positive or negative, the 90-day finding did not dictate or affect the DPS determination in the delisting decision.

In summary, even if the Court were to find the 90-day finding to be arbitrary and capricious, it could not provide Plaintiffs any effective relief, and this case is moot.

---

consulting agency because the Supreme Court in *Bennett v. Spear*, 520 U.S. 154 (1977) found that suits against the consulting agency regarding a biological opinion must be brought under the APA, not the citizen-suit provisions of the ESA. *Id.* at 1125. Under Ninth Circuit law, Plaintiffs' suit against the delisting decision must be brought under the citizen-suit provision of the ESA after 60-days notice is provided. *Ass'n of California Water Agencies v. Evans*, 386 F.3d 879, 884 (9th Cir. 2004) (suits alleging substantive or procedural violations of ESA § 4 obligations must be brought pursuant to citizen-suit provision in 16 U.S.C. § 1540(g)(1)(c)).

Plaintiffs, however, are free to challenge the delisiting determination based on the record of that decision. Plaintiffs instead insist on using the 90-day finding to argue that the delisting determination should be enjoined as it applies to the Sonoran Desert population.

2. Even If The Court Were To Have Jurisdiction To Consider The Validity Of The Delisting Determination In This Case, That Determination Is Not Unlawful.

Plaintiffs argue that their challenge to the 90-day determination is not mooted by the subsequent delisting decision because that decision unlawfully failed to provide an opportunity for notice and comment on whether the Sonoran Desert population was a DPS. Pls' Mem. at 6. Plaintiffs argue that the ESA and its implementing regulations expressly require FWS to provide an opportunity for public comment prior to the issuance of a 12-month finding. *Id.* at 3, 6 (citing 16 U.S.C. § 1533(b)(3)(A) and 50 C.F.R. § 424.15(c)). They maintain that the delisiting rule is not a lawful status review because FWS did not solicit comments on whether the Sonoran Desert population should be considered a DPS and not delisted. Pls' Mem. at 8.

As discussed above, the Court lacks the authority to consider the validity of the delisting determination in this case. Even if the Court were to have such authority, neither the ESA nor its implementing regulations requires FWS to provide notice and an opportunity to comment prior to issuing a 12-month finding as Plaintiffs argue. Section 1533(b)(3)(A), upon which Plaintiffs rely to support their argument, does not require notice and comment *prior* to the issuance of a 12-month finding. It simply requires FWS to publish its determination for the 90-day finding *after* the finding is made. 16 U.S.C. § 1533(b)(3)(A).

Section 424.15(c) of the regulations implementing the listing process is equally unavailing. It states that "[s]uch notices of review will invite comment from all interested parties regarding the status of the species named." 50 C.F.R. § 424.15(c). By using the phrase "[s]uch notices of review," FWS clearly limited the application of § 424.15(c) only

to the two status reviews enumerated in § 424.15. Those reviews are limited to: (1) a listing determination in which FWS finds that a listing "maybe warranted, but that the available evidence is not sufficiently definitive to justify proposing the action at that time", 50 C.F.R. § 424.15(a); and (2) notices of review of candidate species, 50 C.F.R. § 424.15(b). Neither of those reviews implicate the status review conducted prior to making a 12-month finding.

Plaintiffs rely on *Morgenweck*, 351 F. Supp. 2d at 1144, for their argument that notice and comment is required prior to conducting a 12-month status review. Pls' Mem. at 12. The District Court in *Morgenweck*, found in *dicta*[8/] that 50 C.F.R. § 424.15(c) requires notice and comment prior to making a 12-month finding. 351 F. Supp. 2d at 1143. This *dicta* is not precedential nor is it persuasive in light of the express language of the regulation.[9/] Thus, while FWS may and often does request comments from interested parties prior to conducting the status review for the 12-month finding, it is not required to do so as Plaintiffs allege.

Plaintiffs are equally mistaken in their contention that the proposed delisting rule did not provide adequate notice to allow comments on FWS's decision not to treat the Sonoran Desert population as a DPS. Pls' Mem. at 8. A proposed rule does not have to expressly request comments on an issue to adequately put the public on notice. Instead, it simply must provide notice that is sufficient to "fairly apprise interested persons of the 'subjects and issues' before the Agency." *Natural Res. Def. Council, Inc. v. EPA*, 863 F.2d 1420, 1429 (9th Cir.1988) (quoting *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 121

[8/] *Morgenweck* involved a challenge to a negative 90-day finding. The issue of whether such comment was required for making a 12-month finding was not before the court.

[9/] The Court "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Nigro v. Sullivan*, 40 F.3d 990, 996 (9th Cir. 1994) (an agency's interpretation of its regulations is entitled to a "high degree of deference" unless it is plainly erroneous or inconsistent with the regulation).

(D.C.Cir.1987)); *Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 975 (9th Cir. 2005) ("[A]n interested member of the public should be able to read the published notice of an application and understand the 'essential attributes' of that application .... [and] should not have to guess the [agency's] 'true intent.') (quoting *California ex rel. Lockyer v. FERC,* 329 F.3d 700, 706-07 (9th Cir. 2003)).

In the case of the proposed delisting rule, FWS provided notice that it proposed to delist all bald eagles in the 48 contiguous States, including the Sonoran Desert population. FWS made very clear that it believed that the bald eagles in the Southwest Recovery Region had exceeded the downlisting goals established in the recovery plan for the southwestern bald eagle population. 71 Fed. Reg. 8238, 8242-43 (Feb. 16, 2006) (explaining that the State of Arizona had 41 occupied breeding areas, a productivity estimated to be 0.75 young per occupied breeding area, and that the number of occupied breeding areas has more than doubled in the past 15 years). Further, FWS discussed the issue of whether bald eagles in the Southwest Recovery Region should be considered a DPS under its DPS policy. 71 Fed. Reg. at 8244. FWS explained that:

> We are not aware of threats specific to any part of the eagle's range, including the Southwest and Chesapeake Bay Recovery Regions, that suggest that the bald eagle is likely to become endangered in any particular geographic area. As discussed above, the bald eagle's recovery is widespread. Even in the Southwest region, where there has historically and is currently limited available habitat, the bald eagle has significantly exceeded the reclassification goals outlined in the recovery plan. Therefore, we need not at this time analyze whether any particular geographic area would constitute a DPS pursuant to our DPS policy.

Id. at 8244.[10/] This discussion was more than sufficient to apprise the public that the

---

[10/] Plaintiffs state that, in reopening the comment period, FWS "explicitly stated" that it "would *not"* analyze the DPS status of the bald eagles. Pls' Mem. at 7 ("FWS explicitly stated that it would *not* analyze whether any particular geographic area would constitute a DPS pursuant to the purport our DPS policy.") (emphasis in brief). FWS suggested no such thing. Instead, FWS explained that in light of the widespread recovery of the bald eagle "we *need not at this time* analyze whether any particular geographic area

proposed action included delisting the Sonoran Desert population of bald eagles and to invite comments from those who disagreed. The best evidence that the notice was sufficient is that Plaintiff, Center for Biological Diversity, in response to FWS's decision to reopen the comment period for the delisting rule in February 2006 submitted well over 170 pages of comments on the DPS status of the Sonoran bald eagle population, including a copy of its petition. Moreover, extensive comments also were submitted on the issue of the DPS status of the Sonoran Desert population by the Sierra Club, Portland Audubon Society, Raptor Research Foundation, and Robert McGill.

II. Even If Plaintiffs' Challenge Were Not Moot, FWS's 90-Day Finding Was Reasonable And Must Be Upheld.

A. FWS's 90-Day Finding Is Not Arbitrary Or Capricious Because The Record Contains Contrary Positions Prepared By Staff.

Plaintiffs argue that the court should find the 90-day finding to be arbitrary and capricious because it is "precisely the opposite of the result indicated by both the facts and the agency's own analysis of the petition." Pls' Mem. at 16. They argue that because the decision was based on "'marching orders' from managers[11/] rather than on biological analysis of the petition by FWS biologists," the decision finds no support in the record. *Id.* at 12. Finally, Plaintiffs argue that the 90-day finding is arbitrary and capricious because FWS ignored the opinions of its own experts. Pls' Mem. at 16 (citing *Center for Biological Diversity v. BLM*, 422 F. Supp. 2d 1115, 1127-28 (N.D. Cal. 2006)).

In *Northwest Ecosystem Alliance v. FWS*, 475 F.3d 1136 (9th Cir. 2007), the Ninth

---

would constitute a DPS pursuant to our DPS policy." 71 Fed. Reg. at 8244 (emphasis added). This statement is far from an indication that it would not accept comments on the issue.

11/ By commission and omission, Plaintiffs mischaracterize the process leading up to the decisionmaking process. *See* Pls' Mem. at 10-12. An overview of the review process, correcting Plaintiffs' errors, is set out in Defendants' Statement of Facts at § C.

Circuit rejected the same argument Plaintiffs make here in the context of a 12-month finding. In *Northwest Ecosystem Alliance*, the staff scientists recommended listing the Washington population of the western gray squirrel as an endangered DPS. *Id.* at 1139. However, FWS ultimately denied the petition because the Washington population was not significant to the taxon. *Id.* at 1139-40. The Ninth Circuit rejected Northwest Ecosystem Alliance's argument that FWS's final determination was arbitrary and capricious because FWS reached an opposite result from that recommended by the staff without providing any new information. *Id.* at 1145 The Ninth Circuit found no problem with this fact because FWS had the right to change its mind after internal deliberation. *Id.* 1145 (citing *Southwest Center For Biological Diversity*, 143 F.3d at 523).[12/]

Thus, binding precedent requires this Court to reject Plaintiffs' argument here that the 90-day finding is arbitrary and capricious because it did not adopt the recommendation of the Arizona Field Office's biologists. Further, the issue here is whether the Director of FWS "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Northwest Ecosystem Alliance*, 475 F.3d at 1145. As discussed below, the basis for that decision is fully laid out and explained in the 90-day finding.

Plaintiffs' argument that FWS ignored its experts is also without merit. This is not a case where the agency ignored its scientists. The FWS managers involved here were Dr.

[12/] In *Southwest Center for Biological Diversity*, the Ninth Circuit made it clear that a biological opinion is not arbitrary and capricious simply because the record contains contrary positions prepared by staff prior to the agency's decision. *Southwest Center for Biological Diversity*, 143 F.3d at 523-24 n.4 (rejecting an argument that the agency was arbitrary and capricious in rejecting a draft reasonable and prudent alternative because "neither the Secretary nor the FWS . . . ever adopted the draft RPA, so it never became the official policy of the Secretary."). In fact, more recently, the Supreme Court held that the fact that a preliminary determination by FWS staff is later overruled by the decisionmaker does not render the decisionmaking process arbitrary and capricious. *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2527 (2007).

Renne Lohoefener, who was at the time the Assistant Director for FWS's Endangered Species Program, Dr. Benjamin Tuggle, Regional Director for Region 2 of the FWS and Dr. Steve Chambers, a Senior Scientist in the Division of Ecological Services at FWS Region 2. *See* Defs' SOF at § C.3, 6, and 7. Drs. Tuggle, Lohoefener and Chambers are more than FWS managers. They are well-respected scientists with substantial scientific credentials.[13/] In preparing a recommendation for the Director, they had to address issues such as whether the information provided is legally sufficient to constitute "substantial" information, whether a population is "significant" to the taxon as a whole, and how to implement the Congressional directive that FWS use the DPS designation "sparingly."[14/] These issues go beyond a simple determination that a petition is "reliable" and whether the scientists have information in their files that might refute something in the petition. Thus, this is a case where scientists within the FWS had different views and the Director adopted the views of the more senior scientists experienced in the application of the DPS Policy and informed about the factual background information. *Aluminum Co. of America v. Bonneville Power*

[13/] Dr. Lohoefener joined the FWS as a field biologist in 1989 after working for six years as an ecologist for NMFS. Before that, he was a Research Associate and Adjunct Professor at Mississippi State University. He also was FWS's Texas State Administrator and Assistant Regional Director of the Southwest Region that includes Arizona. He has a Bachelor of Science and Master of Science degrees and a Ph.D. from Mississippi State University. *See* http://www.fws.gov/news/newsreleases/showNews.cfm?newsId=D9C76235-9F7B-9D71-71 (last visited 9/13/07). Dr. Tuggle is currently the Regional Administrator for FWS's Southwest Region. He has been with the FWS since 1979. Dr. Tuggle has a B.S. in Biology from Fort Valley State College and an M.S. and Ph.D. in Zoology from Ohio State University. *See* http://www.fws.gov/southwest/About%20Us/RDindex.html. (last visited 9/13/07). Dr. Steve Chambers is a Senior Scientist in the Division of Endangered Species and Conservation Habitat at FWS Region 2. He holds a Ph.D. in Zoology from the University of Florida and has published papers on taxonomy and genetics.

[14/] *Northwest Ecosystem Alliance*, 475 F.3d at 1144 (upholding consideration of this factor as part of the DPS Policy).

Admin., 175 F.3d 1156, 1162 (9th Cir. 1999) (a biological opinion was not arbitrary or capricious where differing scientific views were resolved through expert choices); *Brower v. Daley*, 93 F. Supp. 2d 1071, 1082-1083 (N.D. Cal. 2000) (Where there are competing expert opinions, or where the scientific data are equivocal, it is the agency's prerogative "to weigh those opinions and make a policy judgment based on the scientific data"), *aff'd* 257 F.3d 1058 (9th Cir. 2001); *National Fisheries Inst. v. Mosbacher*, 732 F. Supp. 210, 227 (D.D.C. 1990) (That the administrative record "reflects a certain amount of disagreement among the countless individuals involved in developing or commenting on the [Fisheries Management Plan] is inevitable and indicates that the debate was as open and vigorous as Congress intended.").

B. FWS Reasonably Determined That Plaintiffs Did Not Provide Substantial Evidence That The Sonoran Desert Population Of Bald Eagles May Be Significant To The Taxon.

Plaintiffs argue that FWS's conclusion regarding the significance of the Sonoran Desert eagle population to the taxon finds no support in the record. Pls' Mem. at 12. As discussed previously, the issue is whether the Director of FWS "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Northwest Ecosystem Alliance*, 475 F.3d at 1145. The 90-day finding satisfies these requirements.

With respect to the significance of the population to the species as a whole, the DPS Policy directs FWS to consider whether the petition presented substantial information regarding whether: (1) the population persists in an ecological setting that is unique to the taxon; (2) the loss of the population would result in a significant gap in the range of the taxon; (3) the population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range; and (4) the population differs markedly from other populations in its genetic characteristics.

61 Fed. Reg. at 4275. The petition implicated only the first, second, and fourth considerations. 71 Fed. Reg. at 51,555.

With respect to the first consideration - - whether the population persists in a unique ecological setting - - the petition contended that the Sonoran Desert bald eagle persists in the unique ecological setting of the Sonoran Desert. *See* 71 Fed. Reg. at 51,554. FWS, however, concluded that the petition did not present substantial evidence that the population is persisting in a unique ecological setting. *Id.* FWS explained:

> [D]espite the desert setting, bald eagles of the Sonoran Desert are consistently associated with preferred bald eagle habitat, the riparian ecosystem. ... As with all populations of bald eagles throughout the lower 48 States, suitable riparian habitat, or other comparable aquatic habitat, is an essential prerequisite to successful eagle reproduction in the desert Southwest (USFWS 1982). Riparian ecosystems occupied by nesting bald eagles in the Sonoran life zones of the desert Southwest, therefore, do not constitute a unique setting for the species. The persistence of the bald eagle in this setting likely represents an example of a species occupying the edge of its range of suitable habitats.

Id.

The DPS determination is not about whether the population resides in a different habitat. AR 1980, 1982. It is about the evolutionary significance of the habitat to the species, *i.e.*, whether residing in the habitat results in a significant adaption by the population. AR 1984 (the question is whether "it is about [changing] the behavior of the birds"); AR 1985 (DPS is about the "evolutionary advantage they get from behavior"); *see* 61 Fed. Reg. at 4722 (a DPS must represent an important component of the evolutionary legacy of the species). Thus, FWS found quite reasonably that the relevant fact for the first consideration was that the Sonoran Desert population was consistently associated with riparian habitat as it was elsewhere in the species range, not whether the riparian habitat was situated in a desert setting.

With respect to the second consideration - - whether the loss of the population would result in a significant gap in the range of the taxon - - the petition contended that FWS has

long recognized that the Southwest represents a "significant portion of the bald eagle range." 71 Fed. Reg. at 51,554. FWS found that the evidence presented by petitioner related to whether the loss of the Southwest Recovery Region would constitute such a gap, not whether the loss of Sonoran Desert population would create such a gap. *Id.* at 51,554-55. FWS further pointed out that this region was not a population as such but simply a recovery region established as a management tool to facilitate recovery efforts. *Id.* at 51,555. FWS explained that the "existence of a recovery region does not, in itself, imply significance under the DPS policy." *Id.*

FWS also explained that, subsequent to the issuance of the DPS policy, FWS had recognized only a single listed population of bald eagles. *Id.* Further, FWS pointed out that biological opinions issued after the DPS Policy considered the effect of the action on the species as a whole rather than on the geographical area in which the impacts may occur. *Id.* In short, FWS questioned whether petitioners' evidence regarding the pre-DPS Policy references was directly relevant to whether the loss of the Sonoran Desert population would result in a significant gap in the range of the taxon.

In addition, the petition contended that two authors have speculated about the consequences of the loss of the Southwestern population of bald eagles with respect to whether the population could be restored to the area. 71 Fed. Reg. at 51,554. FWS acknowledged the Field Office's conclusion that the petition was reliable because petitioner had accurately quoted two authors cited by the petitioners. *Id.* at 51,555. FWS, however, found that neither of the quoted authors addressed the significance of any gap to the taxon if the population were lost, and that neither the authors nor the petitioners had provided evidence to support the authors' speculation. *Id.*

For these reasons, FWS reasonably found that the evidence presented by the petition regarding the significance of any gap that might occur if the population were lost was not

substantial.

With respect to the fourth consideration - - whether the Sonoran Desert population differs markedly from other populations in its genetic characteristics - - the petition argued that the genetic analysis of the Southwestern Desert bald eagle reveals consistent uncertainty and does not refute the discrete and isolated nature of the desert nesting bald eagle. AR 51,556. FWS responded:

> We have addressed the genetic evidence provided by the petitioner in the analysis of discreteness above.[15/] Consistent with that analysis we have determined that the best available genetic information is inconclusive with regard to significance. We conclude that the petition does not present substantial information that the population differs markedly from other populations of the species in its genetic characteristics. Further, the petition does not present nor are we aware of any other factors that would lead us to believe that the Sonoran Desert population of the bald eagle differs markedly from the taxon as a whole.

71 Fed. Reg. at 51,556. Thus, FWS found that the petition did not show any actual or appreciable genetic differences between the Sonoran Desert population and the species as a whole. *See National Ass'n of Home Builders v. Norton*, 340 F.3d 835, 851 (9th Cir. 2003) ("The fourth significance factor ... requires not only **actual** genetic differences but that those actual genetic differences must be **appreciable**.") (emphasis added).

C. FWS Was Not Required To Examine Whether The Petition Presented Substantial Evidence That The Sonoran Desert Population Should Retain Its Threatened Status.

Although FWS was not required to consider a change in status from threatened to endangered because the petition had not provided substantial evidence that the Sonoran Desert population may be a DPS, FWS went on to analyze the information in the petition regarding threats to the Sonoran Desert population. 71 Fed. Reg. at 51,556. Even though they concede that their petition asked only for the Sonoran Desert population to be

---

15/ FWS found that the studies relied upon in the petition regarding genetic evidence had acknowledged that the data are "preliminary", "incomplete", possibly an "artifact", and perhaps "not reliable." 71 Fed. Reg. at 51,553, 51,560.

reclassified as "endangered", Plaintiffs argue that the 90-day finding is infirm because it did not look at whether the population should be considered to be "threatened." Pls' Mem. at 17. Plaintiffs' argument makes no sense. At the time the 90-day finding was made, the Sonoran Desert population along with all other populations of bald eagles in the 48 contiguous States were already listed as "threatened." The petition asked that the status be changed from its current status, threatened, to endangered. There is no requirement in the DPS policy, or elsewhere, that, under such circumstances, FWS must re-examine whether the current threatened status determination should remain in place.

D. FWS Was Reasonable In Sharing The 90-day Finding With The Arizona Game And Fish Department.

Plaintiffs argue that the 90-day finding is unlawful because FWS solicited information from other parties. Pls' Mem. at 15 (citing *Colorado River Cutthroat Trout v. Kempthorne*, 448 F. Supp. 2d 170 (D.D.C. 2006)). Contrary to what Plaintiffs allege, nothing in FWS's regulations precludes FWS from seeking input from third parties with respect to the 90-day finding. While FWS has, as a matter of policy, generally limited its review to information available to the agency because of the short time available for making the finding, this case presents a unique circumstance. In 2002, FWS entered into a Memorandum of Agreement ("MOA") with the Arizona Game and Fish Department ("AGFD") to "facilitate joint participation, communication, coordination, and collaboration" regarding implementation of the ESA within the State of Arizona. Memorandum Of Agreement, State Wildlife Participation in Implementing the Endangered Species Act: State of Arizona, dated June 26, 2002 (attached hereto as Ex. 2). FWS sent drafts of the proposed 90-day finding to the AGFD, pursuant to this MOA.

Moreover, this case is distinguishable from *Colorado River Cutthroat Trout*, 448 F. Supp. 2d 170 (D.D.C. 2006) upon which Plaintiffs rely because in that case FWS solicited information from various state wildlife agencies and other federal agencies and **based its**

decision on that information. *Id*. at 174. Here, **after** it had reached a tentative decision, FWS provided the AGFD a draft of its decision and received very limited comments on the DPS issue. AR at 2443 (transmitting AGFD's "minor edits" on the draft 90-day finding); *see also* AR 762-67 (AGFD's comments on the threats issue). Thus, even if FWS were required to limit its consideration to the information in its files, at worst, soliciting comments from AGFD with respect to the petition in this case would constitute harmless error. 5 U.S.C. § 706 (in reviewing agency action, the court must take "due account ... of the rule of prejudicial error").[16/] *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764 (9th Cir. 1986) ("In evaluating whether to set aside the Secretary's action, we take due account of the rule of prejudicial error"); *County of Del Norte v. United States,* 732 F.2d 1462, 1467 (9th Cir.1984) ("insubstantial errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside.").

CONCLUSION

For the reasons stated herein, Defendants Dirk Kempthorne, in his capacity as Secretary of the Department of Interior, and Dale Hall, in his capacity as Director of the United States Fish and Wildlife Service, request the Court to deny Plaintiffs' motion for Summary Judgment and dismiss Plaintiffs' claims as moot or, alternatively, to grant Defendants' Motion for Summary Judgment.

Dated: September 13, 2007

Respectfully submitted,

RONALD J. TENPAS
Acting Assistant Attorney
LISA L. RUSSELL, Assistant Section Chief

/s/ Robert L. Gulley
ROBERT L. GULLEY

[16/] This case is also distinguishable from *Morgenweck*, where the court made that determination because FWS had undertaken a "targeted information gathering campaign," and "creat[ed] new research files post-Petition." 351 F. Supp. 2d at 1143.

Senior Trial Attorney (D.C. Bar No. 394061)
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7369
Washington, DC 20044-7369
Phone: (202) 305-0500
Fax: (202) 305-0275

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 13, 2007, I electronically filed the foregoing Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-motion for Summary Judgment in this case and using the CM/ECF system which will send notification of such filing to:

Justin Augustine, jaugustine@biologicaldiversity.org.

/s Robert L. Gulley
ROBERT L. GULLEY