IGNACIA S. MORENO, Assistant Attorney General
SETH M. BARSKY, Section Chief
KRISTEN L. GUSTAFSON, Assistant Section Chief
H. HUBERT YANG, Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7369
Washington, DC 20044-7369
Tel: (202) 305-0209
E-mail: hubert.yang@usdoj.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CENTER FOR BIOLOGICAL DIVERSITY and MARICOPA AUDUBON SOCIETY, Plaintiffs, and SAN CARLOS APACHE TRIBE, a federally recognized Indian Tribe, and SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, a federally recognized Indian Tribe, Plaintiff-Intervenors, v. KENNETH SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, and DANIEL ASHE, in his official capacity as Director of the United States Fish and Wildlife Service, Defendants.	Case No. CV 10-2130-PHX-DGC DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

FEDERAL REGULATIONS

INTRODUCTION

Pursuant to the Court's Order, dated November 30, 2011, Docket ("Dkt.") 88, Defendants Kenneth Salazar, in his official capacity as Secretary of the United States Department of the Interior ("DOI"), and Daniel Ashe, in his official capacity as Director of the United States Fish and Wildlife Service ("FWS" or the "Service") (collectively, "Defendants"), respectfully submit this Memorandum in opposition to the request for injunctive relief sought by Plaintiffs Center for Biological Diversity and Maricopa Audubon Society (collectively, "Plaintiffs").[1] The Court has instructed the parties to simultaneously submit memoranda on "Plaintiffs' request that the Court enjoin [FWS] from applying the 2007 delisting rule to the desert eagle until the 12-month finding has been revised on remand." *Id*. at 23. For all the reasons set forth below, the Court should decline to grant such interim injunctive relief pending FWS's completion of a revised 12-month finding because Plaintiffs have not met their burden of showing any likely irreparable harm to the Desert eagle population during the four-month remand period.

STANDARD OF REVIEW

As the Supreme Court has explained, an injunction is "an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 376 (2008). Indeed, the Supreme Court has recently reiterated that "[i]t is not enough for a court considering a request for injunctive relief to ask whether there is a good reason

[1] Based on their prior briefing, it does not appear that Plaintiff-Intervenors San Carlos Apache Tribe ("SCA") and Salt River Pima-Maricopa Indian Community ("SRPMIC") (collectively, "Plaintiff-Intervenors") have joined in Plaintiffs' request to enjoin the application of the 2007 final delisting rule to bald eagles in the Sonoran Desert (the "Desert eagle population"). *See* SRPMIC Summ. J. Mem., Dkt. 58, at 24 (requesting only vacatur of the prior 12-month finding); SCA Summ. J. Mem., Dkt. 61, at 25 (same). However, to the extent they now seek to join in this request, Defendants' use of the term "Plaintiffs" hereafter also refers to Plaintiff-Intervenors, unless otherwise stated.

why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010) (emphasis in original). The burden that a plaintiff must carry to show its entitlement to a permanent injunction is essentially the same as that required to obtain a preliminary injunction, except that a plaintiff must win success on the merits.[2] *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987). To be granted a permanent injunction, in general, "[a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto*, 130 S. Ct. at 2756 (citation omitted). In the specific context of the Endangered Species Act ("ESA"), the third and fourth factors – the balance of equities and the public interest – are generally considered to tip in favor of the species. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) ("*TVA*"). However, regardless of the statute at issue, a plaintiff must satisfy all four factors to obtain injunctive relief, including a specific showing that irreparable harm is "likely" in the absence of the requested injunctive

[2] To the extent that Plaintiffs again rely on *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1035 (9th Cir. 2005), in support of the proposition that FWS bears the burden of proving that its action is "non-jeopardizing" in order to avoid an injunction, *see* Pls.' Prelim. Inj. Mem., Dkt. 15-1, at 16, their reliance is misplaced. *Washington Toxics* predates both *Winter* and *Monsanto*, in which the Supreme Court held that the burden rests with the moving party to show irreparable harm. *Monsanto*, 130 S. Ct. at 2760. Further, *Washington Toxics* addressed the presumptive remedy for a procedural violation of the consultation provisions in ESA Section 7. 413 F.3d at 1035. These requirements apply to already-listed species – not potentially-listed species – and thus these non-jeopardy provisions are not applicable here. For this reason, Plaintiffs' prior reliance on *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, (9th Cir. 1994), which also involved consultation for a previously-listed species, is equally unavailing.

relief. *Winter*, 129 S. Ct. at 374; *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (following *Winter*) ("*AWR*"). Significantly, the likelihood of irreparable harm can never be presumed. *Monsanto*, 130 S. Ct. at 2756-57.

ARGUMENT

I. Plaintiffs Have Not Met Their Burden Of Showing Likely Irreparable Harm

An injunction will not follow automatically upon a finding of success on the merits. *Winter*, 129 S. Ct. at 381 ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (holding that "a federal judge . . . is not mechanically obligated to grant an injunction for every violation of law"). Indeed, the Supreme Court has articulated this very principle in the specific context of the ESA. *TVA*, 437 U.S. at 193.

Instead, as the Supreme Court held in *Winter*, injunctive relief is warranted only when irreparable harm is "likely" – not merely possible – in the absence of an injunction. 129 S. Ct. at 375; *see also AWR*, 632 F.3d at 1131. Since *Winter*, the Supreme Court has further clarified the standard for injunctive relief, reiterating in *Monsanto* that an injunction represents a "drastic and extraordinary remedy, which should not be granted as a matter of course," and that any plaintiff seeking a permanent injunction "must satisfy [the traditional] four-factor test before a court may grant such relief." 130 S. Ct. at 2756, 2761. As particularly relevant in this case, the Supreme Court also held in *Monsanto* that there is no presumption that "an injunction is the proper remedy" for a violation of an environmental law. *Id.* at 2757. To the contrary, the Supreme Court held that "[n]o such thumb on the scales is warranted," and that, in fact, any such presumption "invert[s] the proper mode of analysis." *Id.*; *see also AWR*, 632 F.3d at 1135 (holding that it is not the case that "'any potential environmental

injury' warrants an injunction.") (citation omitted); *cf. AFL Telecomms. LLC v. SurplusEZ.com, Inc.*, No. CV 11-1086-PHX-DGC, 2011 WL 5547855, at *3 (D.Ariz. Nov. 15, 2011) (noting that the Ninth Circuit's apparent "rejection of presumptions of irreparable harm applies broadly to all actions for injunctive relief") (citation omitted).

Rather, the Supreme Court has made it plain that there must be a predicate showing of "likely irreparable harm" before injunctive relief is granted. *Monsanto*, 130 S. Ct. at 2760 (noting that an injunction should only be granted if "needed to guard against any present or imminent risk of likely irreparable harm"). Any such irreparable harm must be "actual or imminent, not conjectural or hypothetical." *Center for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011) (citation omitted). Further, in the context of the ESA, this showing of "irreparable injury requires harm 'significant' to the 'overall population.'" *Defenders of Wildlife v. Salazar*, No. 09-CV-77-M-DWM, 2009 WL 8162144, at *4 (D. Mont. Sept. 8, 2009) ("*Defenders*") (citing *Pacific Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1210 (E.D.Cal. 2008)). In other words, "the measure of irreparable harm is taken in relation to the health of the overall species rather than individual members," which may be taken on an individual basis without triggering a showing of irreparable harm to the larger population. *Defenders*, 2009 WL 8162144, at *4-5 (holding that the hunting of individual wolves in the former northern Rocky Mountain gray wolf distinct population segment did not constitute irreparable harm sufficient to warrant injunctive relief); *see also Wild Equity Inst. v. City and County of San Francisco*, No. C 11-00958 SI, 2011 WL 5975029, at *7 (N.D.Cal. Nov. 29, 2011) (denying preliminary injunction, noting that "[n]o court has held that as a matter of law, the taking of a single animal or egg, no matter the circumstance, constitutes irreparable harm").

In their summary judgment briefing, Plaintiffs have not identified any specific harm that might occur to the Desert eagle population during the four-month remand period.[3] Instead, Plaintiffs simply refer to Judge Mary Murguia's reasoning in her decision on the FWS's 90-day finding, *see* Pls.' Summ. J. Mem., Dkt. 67 at 35; Pls.' Summ. J. Reply/Opp. Mem., Dkt. 83 at 25, in which Judge Murguia enjoined FWS from "removing the discrete population of Desert bald eagles from the threatened species list under the ESA pursuant to the FWS's July 9, 2007 final delisting rule pending the outcome of the FWS's status review and 12-month finding." *Center for Biological Diversity v. Kempthorne*, No. CV 07-0038-PHX-MHM, 2008 WL 659822, at *16 (D.Ariz. Mar. 6, 2008) ("*CBD I*"). Significantly, however, the decision did not identify any specific harm that was likely to occur pending FWS's completion of its status review and 12-month finding, or explain how any potential threats to Desert eagles would be likely to result in any irreparable harm during that period. *Id*. at *1 (describing possible "threats such as habitat loss due to human development, loss of riparian trees and snags, recreational disturbance, declining prey base, grazing, water diversions, dams, and mining"). Rather, Judge Murguia only concluded that injunctive relief was warranted based on the "rare circumstances" at that time, noting that the Desert eagle population "can easily be cordoned off and is still particularly vulnerable to habitat

[3] In their preliminary injunction briefing, Plaintiffs alleged certain harms that might befall the Desert eagles pending the resolution of this litigation. *See* Pls.' Prelim. Inj. Mem. at 21-22. However, none of the alleged harms warranted injunctive relief because the allegations were either non-specific or wholly speculative. *See* Defs.' Prelim. Inj. Opp. Mem., Dkt. 18, at 16-19. To the extent that Plaintiffs or Plaintiff-Intervenors press the same allegations now, Defendants refer this Court to its prior briefing. *Id*. at 15-19. If Plaintiffs or Plaintiff-Intervenors allege an entirely different set of harms not previously raised in either their preliminary injunction briefing or their summary judgment briefing, Defendants respectfully request the opportunity to submit additional briefing, if necessary, to respond to any such new allegations.

threats" and citing the "many threats facing the Desert bald eagle and the harm that the Desert eagle might suffer in the interim" as grounds for injunctive relief. *Id*. at *14-15.[4]

This is significant because both the factual and legal circumstances have changed considerably since Judge Murguia issued her decision almost four years ago. As a factual matter, the Desert eagle population has continued to demonstrate remarkable resilience – growing in both numbers and distribution. *See* Spangle Decl. at ¶6 (attached as Exh. 1). For example, from 2007 to 2011, the number of known bald eagle breeding areas in the U.S. portion of the Sonoran Desert jumped from 49 to 56 – a 14% increase. *Id*. The number of breeding Desert eagles has also climbed from 90 in 2007 to at least 100 in 2011, which is in addition to the population of unmated adult eagles and non-breeding subadult eagles. *Id*. Reproductive success among Desert eagles has also continued its upward trend, with 60% of occupied nests fledging a total of 48 eaglets in 2011. *Id*. These facts show that the Desert eagle population is more robust and thus in a stronger position now as compared to four years ago, which weakens the rationale for injunctive relief. *See, e.g., Wild Equity Inst.*, 2011 WL 5975029, at *8 (citing the "expansion of the [species'] population" as evidence showing "a situation that does not warrant the temporary, immediate, and drastic relief afforded by a preliminary injunction").

The legal landscape has also changed substantially since Judge Murguia's decision. As discussed *supra*, the Supreme Court's subsequent decisions in *Winter* and *Monsanto* reaffirmed the importance of making a showing of likely irreparable harm as

[4] Judge Murguia also ordered FWS to complete its status review and 12-month finding within nine months – more than twice the length of the remand period contemplated by this Court's Order. To the extent that there was any likelihood of a specific irreparable harm occurring during that time frame, it was greater than any such likelihood here.

part of the four-factor test for injunctive relief.[5] *Winter*, 129 S.Ct. at 375-76; *Monsanto*, 130 S. Ct. at 2757. Other district courts in the Ninth Circuit that have considered post-*Winter* and post-*Monsanto* requests for injunctive relief in ESA cases have denied such relief where the plaintiffs failed to show irreparable harm to the larger population. *See*, *e.g.*, *Wild Equity Inst.*, 2011 WL 5975029, at *9 (denying preliminary injunction because "[p]laintiffs have failed to meet their burden of showing irreparable harm"); *Northwest Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs.*, No. CV-10-1129-AC, 2011 WL 4369129, at *20-21 (D.Or. Sept. 19, 2011) (denying preliminary injunction where plaintiff failed to show "imminent, likely irreparable harm to the [specific] population, or the species as a whole"); *Native Ecosystems Council v. U.S. Forest Serv.*, No. 4:11-CV-00212-CWD, 2011 WL 4015662, at *11 (D.Idaho Sept 9, 2011) (denying preliminary injunction where plaintiffs presented no evidence that the challenged project would harm the species or its habitat); *Defenders*, 2009 WL 8162144, at *1 (denying preliminary injunction for "insufficient proof of irreparable harm to the wolf population, as opposed to individual wolves");[6] *cf. Animal Welfare Inst. v. Martin*, 623 F.3d 19, 27

---

[5] Cases from this Circuit predating *Winter* and *Monsanto* that "have suggested a lesser standard . . . are no longer controlling, or even viable." *American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). Likewise, to the extent that Plaintiffs repeat the argument raised in their preliminary injunction briefing that a policy of "institutionalized caution," as noted in *TVA*, 437 U.S. at 194, displaces the traditional four-factor test in ESA cases, Defendants refer this Court to its prior briefing. *See* Defs.' Prelim. Inj. Opp. Mem. at 7-10. Briefly, however, "[n]owhere does the Supreme Court suggest that the holding of *Winter* is inapplicable to ESA cases." *Defenders*, 2009 WL 8162144, at *2 (noting that *TVA* "does not command a separate ESA standard").

[6] *Center for Biological Diversity v. U.S. Forest Serv.*, No. CV-10-431-TUC-DCB, 2011 WL 5008514 (D.Ariz. Oct. 11, 2011), in which Judge David Bury granted a preliminary injunction pending the completion of ESA consultation, does not dictate a different result. That case is factually distinguishable because there was evidence of prior and ongoing takings of the two species at issue, which the court noted was "'instructive,

(1st Cir. 2010) (affirming denial of permanent injunction where plaintiffs failed to demonstrate irreparable harm because "[t]his circuit has consistently applied the traditional tests for preliminary injunctions in ESA cases, without modifying the irreparable harm requirement") (citations omitted).

The same result should apply here. *Winter* and *Monsanto* impose a heavy burden on Plaintiffs to show that an injunction is warranted, and therefore this Court should determine at the threshold whether Plaintiffs have carried their burden of demonstrating likely irreparable harm to the Desert eagle population. *See Native Ecosystems Council*, 2011 WL 4015662, at *11 (noting that "[p]laintiffs bear the burden of demonstrating a likelihood of irreparable harm"); *Defenders*, 2009 WL 8162144, at *5 (noting that, "[w]ithout showing irreparable harm, the [p]laintiffs have failed to meet their burden"). Judge Murguia's prior decision – based on a different set of factual and legal circumstances – does not lift this burden. Hence, because Plaintiffs offer no other basis for granting the extraordinary remedy of injunctive relief now, they have failed to make this predicate showing of irreparable harm, and their request for injunctive relief should be denied on these grounds alone. *See, e.g., DeRoche v. Adu-Tutu*, No. CV 11-0302-PHX-DGC (JRI), 2011 WL 4947494, at *3 (D.Ariz. Oct. 18, 2011) (denying motion for preliminary injunction because "there is no evidence that [plaintiff] faces immediate irreparable injury absent injunctive relief" and noting that, "[t]o meet the 'irreparable

---

especially if there is evidence that future similar takings are likely.'" *Id*. at *3 (citation omitted). In this case, by contrast, there is no evidence of any past, ongoing, or likely future takings of Desert eagles. Further, in a concurrent decision issued in a companion action based on the same operative facts, Judge Bury denied a motion for preliminary injunction because there was "no evidentiary basis to enter injunctive relief," noting that the court could not "enter an injunction directed to prevent abstract harm." *WildEarth Guardians v. U.S. Forest Serv.*, No. CV-10-385-TUC-DCB, slip op. at 20-21, Dkt. 81 (D.Ariz. Oct. 11, 2011) (citing *Winter* and *Monsanto*) (attached as Exh. 2).

harm' requirement, [p]laintiff must do more than simply allege imminent harm; he must demonstrate it") (citation omitted).[7]

II. The Balance Of Equities And The Public Interest Do Not Outweigh The Failure To Show Likely Irreparable Harm

Because Plaintiffs have made no specific showing of likely irreparable harm, the Court need not consider the balance of equities and public interest factors. *See, e.g.*, *Center for Food Safety*, 636 F.3d at 1174; *Native Ecosystems Council*, 2011 WL 4015662, at *7 (denying injunctive relief because, "in the absence of a showing of irreparable harm, [p]laintiffs cannot obtain the relief they seek"). Although these factors generally tip in favor of a species in ESA cases, *see TVA*, 437 U.S. at 194, they cannot overcome the failure to demonstrate irreparable harm in the first instance.

Further, while the Court must give any endangerment of a species "the utmost consideration," the potential for harm does not "blindly compel" a particular outcome if there are countervailing public interest considerations. *See, e.g.*, *Water Keeper Alliance v. U.S. Dep't of Defense*, 271 F.3d 21, 34 (1st Cir. 2001) (affirming that *TVA's*

---

[7] Plaintiffs also overstate the risk of potential harm to the Desert eagle population, which remains separately protected under both the Bald and Golden Eagle Protection Act ("BGEPA"), 16 U.S.C. §§668-668d, and the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§703-712, irrespective of its status under the ESA. Both statutes provide sweeping protections against the taking, possession, sale, or transport of bald eagles as well as civil and/or criminal penalties for violations thereof. *See* Defs.' Prelim. Inj. Opp. Mem. at 10-14. Bald eagle habitat is also indirectly protected by both statutes. *See* Millsap Decl. at ¶¶9-12 (attached as Exh. 3); *see also Contoski v. Scarlett*, Civ. No. 05-2528 (JRT/RLE), 2006 WL 2331180, at *2-3 (D.Minn. Aug. 10, 2006) (finding "no merit to plaintiff's argument that the [BGEPA] cannot prohibit adverse modification of bald eagle habitat"). Further, the Arizona Game and Fish Department's comprehensive management plan for bald eagles in Arizona, including its Nestwatch monitoring program, also provides separate and ongoing protections for Desert eagles. *See* Driscoll Decl. at ¶¶5-12 (attached as Exh. 4). Likewise, FWS has implemented a post-delisting monitoring plan to monitor the status of the bald eagle, including Desert eagles, over a 20-year period. 75 Fed. Reg. 31,811 (June 4, 2010).

prioritization for listed species did not foreclose the consideration of military preparedness). Stated differently, "'[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Winter*, 129 S.Ct. at 376-77 (reversing a preliminary injunction that imposed restrictions on military training exercises, citing the "adverse impact on the public interest in national defense") (citation omitted).

In this case, Plaintiffs' request for interim injunctive relief would likely result in considerable confusion regarding the appropriate application of the ESA to the Desert eagle population among both the regulators, *i.e.*, the various agencies charged with implementing and enforcing the ESA, as well as the regulated, *i.e.*, the public and private entities that would be required to account for the changing – and potentially temporary – ESA status of the Desert eagle population prior to proceeding with ongoing or planned projects and other actions during the four-month remand period. *See* Spangle Decl. at ¶¶42-44. For example, FWS is aware of at least six specific projects with completed or ongoing environmental regulatory evaluations for which the initiation or reinitiation of ESA consultation may be required if the injunction is granted.[8] *Id*. at ¶43. FWS expects that additional projects may also be delayed if an additional analysis of ESA compliance is now required as part of their evaluations. *Id*. Accordingly, the potential for regulatory confusion shows that an injunction would not be in the public interest.

CONCLUSION

For all the reasons set forth above, Plaintiffs' request for interim injunctive relief pending FWS's completion of a revised 12-month finding on remand should be denied.

[8] If FWS issues a positive 12-month finding on remand and the Desert eagle population is listed under the ESA, its listing would likely trigger ESA consultation for any such projects that are ongoing at that time.

Dated: December 16, 2011

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
SETH M. BARSKY
Section Chief
KRISTEN L. GUSTAFSON
Assistant Section Chief

/s/ H. Hubert Yang
H. HUBERT YANG
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7369
Washington, DC 20044-7369
Tel: (202) 305-0209
Fax: (202) 305-0275
E-mail: hubert.yang@usdoj.gov

Of Counsel:

JANET SPAULDING
Attorney-Adviser
United States Department of the Interior
Office of the Solicitor
Southwest Regional Office

BENJAMIN JESUP
Attorney-Adviser
United States Department of the Interior
Office of the Solicitor
Branch of Fish & Wildlife
Washington, DC Headquarters

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2011, I electronically filed the foregoing Defendants' Memorandum in opposition to Plaintiffs' Request for Injunctive Relief with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ H. Hubert Yang

H. HUBERT YANG
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
601 D Street, N.W., Room 3710
Washington, DC 20004
Tel: (202) 305-0209
Fax: (202) 305-0275
E-mail: hubert.yang@usdoj.gov

Attorney for Defendants