IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE HOPI TRIBE, Plaintiff, v. THE UNITED STATES FOREST SERVICE, *et al*., Federal Defendants.	Civil No.: 1:12-cv-01846-RJL

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff, the Hopi Tribe, seeks to enjoin snowmaking with Class A+ reclaimed water at the Arizona Snowbowl ski resort ("Snowbowl"), which is set to begin on December 14, 2012. On November 20, 2012, Plaintiff filed a motion for preliminary injunction. As set forth below, this motion should be rejected for several reasons. As a threshold matter, Plaintiff has failed to comply with the Endangered Species Act's ("ESA") strict jurisdictional 60-day notice requirement. Moreover, even assuming Plaintiff had satisfied the ESA's jurisdictional prerequisites, Plaintiff has failed to make the necessary showing for preliminary injunctive relief. Specifically, Plaintiff alleges that the United States Forest Service's ("Forest Service") failure to prohibit snowmaking with Class A+ reclaimed water constitutes an irreversible or irretrievable commitment of resources and is therefore, a violation of Sections 7(d) and 7(a)(2) of the ESA. *See* Complaint, ECF No. 1 at 9-10; Pl's Br. at 16. As set forth below, however, the Forest Service is in full compliance with its procedural and substantive obligations under the ESA. The Forest Service has analyzed Plaintiff's new information and has determined based, on the information before it, that the artificial snowmaking is not likely to adversely affect the ragwort or its critical habitat or result in irretrievable commitment of resources. This determination is based on several factors including, among others, that the Plaintiff's model does not reliably predict snow transport in the context at issue here and thus does not support Plaintiff's claims; snowmaking this season will be limited to the lower portion of the mountain – far from any ragwort habitat; and even if artificial snow were to reach portions of ragwort habitat, it would be of limited consequence and would not have the impacts predicted by Plaintiff. Finally, Plaintiff has failed to demonstrate that any "immediate irreparable harm" will result absent an injunction. As such, Plaintiff's motion for preliminary injunction must be denied.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Endangered Species Act

The ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). In relevant part, Section 7(a)(2) of the ESA requires each Federal agency, in consultation with the Secretary,[1] to "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species" or destroy or adversely modify its critical habitat.[2] 16 U.S.C. § 1536(a)(2).[3] To help action agencies comply with this provision, ESA Section 7 and its implementing regulations set out a detailed consultation process for determining the biological impacts of a proposed activity. 16 U.S.C. § 1536; 50 C.F.R. Part 402. Under the regulations, the action agency (here the Forest Service) is to consult with FWS whenever a federal action "may affect" an endangered or threatened species. 50 C.F.R. § 402.14(a). To help determine the potential effects of a proposed action, an action agency may prepare a Biological Assessment ("BA"). 16 U.S.C. § 1536(c)(1);

[1] The ESA is administered by the Secretaries of the Interior and the Secretary of Commerce, 16 U.S.C. § 1532(15), with the Secretary of the Interior generally responsible for terrestrial species, such as the plant species at issue here. *Nw. Res. Info. Ctr. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1065 n.5 (9th Cir. 1995). The Secretary of the Interior has delegated his responsibilities to the Fish and Wildlife Service ("FWS"). *Id*.

[2] Critical habitat is a specific geographic area(s) that is essential for the conservation of a threatened or endangered species and that may require special management and protection. 16 U.S.C. § 1532(5)(A). Critical habitat may include an area that is not currently occupied by the species but that will be needed for its recovery. *Id.*

[3] The consultation regulations define "jeopardize the continued existence" to mean:

> engag[ing] in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

50 C.F.R. § 402.02.

50 C.F.R. §§ 402.12(a), (b), 402.01(a), 402.02. If a proposed action "may affect" a listed species, the action agency must conduct "informal consultation" or "formal consultation," as appropriate. The implementing regulations provide for "informal consultation" (the process followed in this case) to assist an action agency in determining whether and when further consultation is necessary. Informal consultation is "an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency . . . designed to assist the [action agency] in determining whether formal consultation . . . is required." 50 C.F.R. § 402.13(a). "If during informal consultation it is determined by the [action agency], with the written concurrence of [FWS], that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary." *Id*.; *see also Am. Bird Conservancy v. FCC.* 516 F.3d 1027, 1034 (D.C. Cir. 2008) (determining that informal consultation satisfies the requirements of ESA Section 7 when, among other instances, an agency's preparation of a BA indicates that its proposed action is not likely to adversely affect a listed species.).

If the proposed action is "likely to adversely affect" listed species or designated critical habitat, the action agency must engage in formal consultation. 50 C.F.R. 402.13(a), 402.14(a)–(b). Formal consultation ordinarily culminates with FWS's issuance of a biological opinion that makes a "jeopardy" or "no jeopardy" conclusion. *Id*. § 402.14(g)(4), (h)(3); *see* 16 U.S.C. § 1536(b)(4). If FWS determines that the action "is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat," the opinion suggests "reasonable and prudent alternatives, if any," the agency can take to avoid violating Section 7. 50 C.F.R. § 402.14(h)(3); *see* 16 U.S.C. § 1536(b)(3)(A).

The ESA's implementing regulations also set forth circumstances where, after the Section 7 process is completed, the action agency must "reinitiate" consultation, 50 C.F.R. § 402.16, including situations where "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. 402.16(b). The commencement of consultation (or reinitiated consultation), however, does not necessarily preclude an agency from proceeding with its action. Section 7(d) of the ESA allows action agencies to proceed with the action while consultation is ongoing, as long as the action does not result in "any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures" that would avoid violating Section 7(a)(2). 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09; *see also* ESA § 7 Consultation Handbook at 2-7 (March 1998), available at http://www.fws.gov (noting that, during consultation, "[n]ot all irreversible and irretrievable commitments of resources are prohibited" and explaining that "resource commitments may occur as long as the action agency retains sufficient discretion and flexibility to modify its action to allow formulation and implementation of an appropriate reasonable and prudent alternative").

II. FACTUAL BACKGROUND

A. The Arizona Snowbowl Ski Resort

The Coconino National Forest covers nearly two million acres of northern Arizona, including a range of extinct volcanoes known as the San Francisco Peaks. Within this range, Snowbowl operates under a 777-acre special use permit issued by the United States Forest Service and includes 40 ski trails. *See* Declaration of John Buehler ("Buehler Dec."), ¶ 4 and Exh 1, Special Use Permit. The special use permit area is on the western flank of the San

Francisco Peaks and is primarily located on Agassiz Peak, and is surrounded on three sides by the Kachina Peaks Wilderness. Pl's Exh 3, ECF No. 8-2 at 30-31 (Final Environmental Impact Statement).

In 1979, a master plan for improving Snowbowl was produced, which proposed the installation of new lifts, trails, and facilities. Because Snowbowl operates under a special use permit[4], it was required to obtain Forest Service approval before implementing any upgrades. As part of the approval process, the Forest Service conducted an extensive environmental review of the proposed upgrades under the National Environmental Policy Act ("NEPA") and the ESA. The review culminated in the 1979 Arizona Snowbowl Ski Area Proposal Final Environmental Statement and the Forest Service approved the proposed upgrades through its associated Record of Decision ("ROD"). *See* ECF No. 8-2 at 31.

Shortly after the Forest Service approved the proposed upgrades in 1979, several Indian Tribes, including the Hopi Tribe, challenged the decision and claimed that the proposed upgrades violated numerous laws and statutes, including the ESA. The District Court for the District of Columbia upheld the Forest Service's decision to approve the upgrades. In particular, the District Court denied Plaintiff's ESA claim, which expressly named the San Francisco Peaks ragwort[5] (the plant at issue in the instant case) as a species of concern, because the ragwort was at that time unlisted under the ESA, and was thus ineligible for the Act's protections. *Wilson v. Block*, 708 F.2d 735, 747-51 (D.C. Cir. 1983). That decision was affirmed by the U.S. Court of

[4] The special use permit is held by Arizona Snowbowl Resort Limited Partnership EGB Enterprises, Inc.

[5] The common name of the species has changed from the San Francisco Peaks groundsel to the San Francisco Peaks ragwort. See Buehler Dec., Exh 2, Supplemental Biological Opinion at 2, fn 1. Though documents before the Court utilize both names, the Forest Service refers to the plant throughout this brief as "the ragwort."

Appeals for the District of Columbia Circuit, *id*., and the United States Supreme Court subsequently denied certiorari, 464 U.S. 956 (1983).

Over the past 30 years, many, but not all, of the improvements authorized by the Forest Service in 1979 -- and subsequently approved by the *Wilson* court -- have been implemented. *See* ECF No. 8-2 at 31.

B. The Arizona Snowbowl Facilities Improvements Project

In 2002, Snowbowl sought to further improve and modernize its facilities. Because of the length of time that had passed since the approval of the 1979 master plan, on September 10, 2002, Snowbowl submitted a formal facilities improvement proposal to the Forest Supervisor for the Coconino National Forest. The primary feature of the proposed improvement project included a plan for the installation of a snowmaking system which would use Class A+ reclaimed water from the City of Flagstaff. *See* ECF No. 8-2 at 37, 316. Class A+ reclaimed water is "the highest quality of recycled wastewater recognized by Arizona law and may be safely and beneficially used for many purposes, including irrigating school ground landscapes and food crops." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1065 (9th Cir. 2008) ("*Navajo Nation III*") (en banc) (citing Ariz. Admin. Code R18-11-309 tbl. A).

As it did for the 1979 review, the Forest Service again undertook a painstaking, multi-year, public examination of the proposed improvement project to ensure it conformed to multiple federal regulatory requirements, including the ESA. *See* ECF No. 8-2. One of the species considered in the course of the Forest Service's ESA analysis was the species at issue in this case, the San Francisco Peaks ragwort, a short, flowering plant found only in Arizona. Pl's Exh 2, ECF No. 8-1 at 53 (2004 Biological Assessment). In 1983, FWS listed the ragwort as a "threatened species" under the ESA due to the threat of "trampling from off-trail hiking." *See*

Final Listing Rule, 48 Fed. Reg. 52743 (Nov. 22, 1983). FWS also designated critical habitat for the ragwort, which consists of approximately 720 acres on the summits of Agassiz and Humphrey's peaks and the surrounding slopes and alpine areas. 48 Fed. Reg. 52743. This critical habitat designation sought to protect the habitat type essential to the ragwort's conservation – *i.e.*, the loose cinder talus slopes of the alpine tundra system of the San Francisco Peaks. 48 Fed. Reg. 52743. The eastern-most extent of the special use permit area falls within the ragwort's designated critical habitat. Pl's Exh 1, ECF No. 8-1 at 17.

In the course of its ESA analysis, the Forest Service determined that the project "may affect" the ragwort, and therefore engaged in Section 7 consultation with FWS. *See* Pl's Exh 1, ECF No. 8-1 (2004 Biological Assessment); Pl's Exh 2, ECF No. 8-1 (2004 Letter of Concurrence). To facilitate the consultation, the Forest Service prepared a Biological Assessment for the ragwort, in which the Forest Service extensively considered the potential effects of the project on the ragwort and its habitat. *See* Pl's Exh 1, ECF No. 8-1 at 15. The Forest Service determined that the project, including the proposed snowmaking with Class A+ reclaimed water, was not likely to adversely affect the ragwort or its designated critical habitat, and sought FWS's concurrence with this conclusion. *See* Pl's Exh 1, ECF No. 8-1 at 33-35. On July 8, 2004, after thorough review of the Forest Service's findings in its BA and accompanying materials, FWS concurred with the Forest Service's "not likely to adversely affect" determination. Pl's Exh 2, ECF No. 8-1 at 53-55. As relevant to this case, FWS explained that its concurrence was based on the fact that "[n]o snowmaking using reclaimed water will occur where known plant populations exist." Pl's Exh 2, ECF No. 8-1 at 54. With this information in hand, the Forest Service concluded its environmental review and approved Snowbowl's

snowmaking plan on Feburary 18, 2005. Buehler Dec., ¶ 10 and Exh 2, Supplemental Biological Assessment ("SuppBA") at 3.

C. Legal Challenges to the Project

The Forest Service's 2005 project approval prompted a series of legal challenges. That same year, the Hopi Tribe filed suit in the United States District Court for the District of Arizona, alleging that the Snowbowl improvement project violated multiple statutes, including the ESA. *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 871 (D. Ariz. 2006) ("*Navajo Nation I")*. The District Court ruled for Federal Defendants on all claims. Specifically, Plaintiff's ESA claim, which alleged general concerns regarding native species, failed because Plaintiff neglected to provide the Secretary of the Interior with notice of its intent to file suit as required by 16 U.S.C. § 1540(g)(2)(A)(i). *See Navajo Nation I*, 408 F. Supp. 2d at 881-82. A three-judge panel of the Ninth Circuit Court of Appeals affirmed in part and reversed in part (the ESA dismissal was not appealed and thus not at issue). *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024 (9th Cir. 2007) ("*Navajo Nation II*"). In 2008, an en banc panel of the Ninth Circuit Court of Appeals affirmed the district court's judgment in all respects. *Navajo Nation III*, 535 F.3d 1058 (en banc).

Almost immediately after the Supreme Court denied certiorari in *Navajo Nation III*, a new group of plaintiffs filed suit in the United States District Court for the District of Arizona challenging Snowbowl's improvement project. *Save the Peaks Coal. v. U.S. Forest Serv*., 669 F.3d 1025 (9th Cir. 2012) ("*Save the Peaks*"). In this second case, Plaintiffs closely tied to those in the *Navajo Nation* litigation brought "environmental claims that were virtually identical to some that the attorney [for plaintiffs in both suits] had improperly attempted to raise in the earlier lawsuit, for no apparent reason other than to ensure further delay and forestall development."

Save the Peaks, 669 F.3d at 1028. After describing the suite as "a gross abuse of the judicial process," the Ninth Circuit affirmed the Arizona District Court's grant of summary judgment to Federal Defendants and Defendant-Intervenors in all respects. The Ninth Circuit issued its mandate on April 27, 2012. Slip op., No. 10-17896 (Apr. 27, 2012).

D. The Hopi Tribe's Development of New Information

The same month the Ninth Circuit issued its mandate in the *Save the Peaks* action, the Hopi Tribe – a plaintiff in the 2005 action – approached the Forest Service with "new information" that it contended called into question an aspect of the Forest Service's 2004 "not likely to adversely affect" decision . *See* Udo Dec., Exh 5 (ECF No. 8-4). In its April 2012 letter, Plaintiff explained that it had procured the opinion of an environmental consulting company which indicated that both the Forest Service and FWS had failed to adequately assess the risk of wind-borne transport of artificial snow from the ski trails near the ragwort's habitat. According to Plaintiff, artificial snow, which has a higher nitrogen content, could potentially adversely affect the ragwort and its habitat. Plaintiff also commissioned a second, more robust report dated August 24, 2012, asserting that the Forest Service's 2004 "assumption that there will be no snowmaking in any areas where there are known [ragwort] populations or suitable habitat for the species" was "invalid." *See* Carothers Dec., Exh 7 (ECF No. 6 at 41). The report further challenged the alleged failure of FWS "to analyze [the] potential effects of snow transport." *Id*. Based on this new information, Plaintiff requested that the Forest Service reinitiate Section 7 consultation to analyze the effects of wind-borne nitrogen-enriched snow potentially being transported to the ragwort and its critical habitat. Udo Dec., Exh. 6 (ECF No. 8-5); *see also* 50 C.F.R. § 402.16.

//

E. Reinitiation of Section 7 Consultation

As explained above, the Forest Service addressed, in detail, the potential impacts to the ragwort in its 2004 BA and FWS concurred in that analysis. *See, e.g.,* Udo Dec., Exh. 1 (ECF No. 8-1). Nonetheless, the Forest Service met with the Hopi Tribe's environmental consultant to review their analysis. *See* Carothers Dec., ¶ 6; *id.*, Exh 4 (ECF No. 6 at 81) (May 2, 2012 letter referencing April 2012 discussion); *id.* ¶ 7. The Forest Service formally reinitiated consultation on June 11, 2012. Udo Dec., Exh 8 (ECF No. 8-7 at 117-18). Throughout the reinitiated consultation, the Forest Service remained in close contact with the Hopi Tribe's environmental consultant, requesting and receiving additional analysis. *See* Carothers Dec., ¶¶ 8-10. In addition, the Forest Service received analysis on this issue from the SE Group, on behalf of Snowbowl. *See* Declaration of Bret Anderson ("Anderson Dec."), ¶ 2 and Exh 3, SE Group Letter ("SE Group"). On December 3, 2012, the Forest Service issued a supplemental BA analyzing the potential effect of artificial snow deposition on the ragwort, again concluding that the project is not likely to adversely affect the ragwort and designated critical habitat. *See* SuppBA at 41-44.

In the supplemental BA, after defining the action area and evaluating the proposed snowmaking operations, the Forest Service evaluated the current population status of the ragwort. Surveys performed in 2010 found that the species is locally abundant, persisting, and reproducing. *Id*. at 22. Although those surveys resulted in a population estimate of 180,000, conservative estimates project the ragwort population to be in the range of 90,000 to 135,000 individual plants. *Id*. Overall, the most recent FWS five-year status review concluded that the status of the plant is stable. *Id*. Many of the actions called for in a FWS 1987 recovery plan for

the ragwort either are completed or are currently being implemented, such as monitoring, invasive species treatment, and limitation of hiking in ragwort habitat. *Id*. at 23-24.

The Forest Service considered, based on the information to date, whether machine overspray or snow drift of artificial snow would likely reach the ragwort or its habitat. SuppBA at 29-31, 35-38. As part of this analysis, the Forest Service first considered Snowbowl's "Operational Elements of Planned Snowmaking" and Plaintiff's snow transport model. *Id*. at 29. The Forest Service noted that the proposed snowmaking logistics made it unlikely that snow would be transported into the ragwort's habitat. Snowbowl proposed to use an "airless" snowmaking machine which allows for greater precision and control of where the snow is deposited. *Id*. This technology, combined with the frequency of low winds, allowed the Forest Service to conclude that snowmaking would most likely be completed during non-windy periods. *Id*.

The Forest Service also considered Plaintiff's snow transport model. SuppBA at 29-31. Both the Forest Service experts and private experts commented that Plaintiff's model lacked scientific integrity and credibility for many different reasons. *Id*.; *see* Anderson Dec. ¶¶ 3-7; Declaration of John Elder ("Elder Dec.") ¶¶ 3-12. For example, the model type (*i.e.*, AERMOD) used by Plaintiff was not appropriate for Snowbowl's complex mountainous terrain and unique wind patterns thereby rendering it completely incapable of providing reliable results. SuppBA at 30; Anderson Dec. at ¶¶ 3, 7. In fact, AERMOD has never been applied, either in a regulatory or non-regulatory setting, to snow dispersion and deposition. Anderson Dec. at ¶ 3. Additionally, even if AERMOD was appropriate in this setting, Plaintiff based its model on grossly incomplete datasets of wind measurements and made numerous assumptions, without justification, which support their over-prediction of effects. SuppBA at 30; Elder Dec. ¶¶ 3-12; Anderson Dec. ¶¶ 3-

7. Finally, Plaintiff did not provide the Forest Service with all the data used to drive its model. This is important because without the complete dataset used, Plaintiff's model is of little value as there is no way to independently verify the accuracy of the model results. *See* Elder Dec. at ¶10 ("I have no doubt that someone could run AERMOD and obtain results that showed no transport of nutrients to the critical habitat area and someone else could run the model and obtain results that broadcast the nutrients statewide. The point is without documentation, nobody can evaluate or replicate the STI model results."). Because of the competing opinions surrounding Plaintiff's snow transport model, the Forest Service relied on its own experts – including Bret Anderson, a former air modeler from the Environmental Protection Agency with extensive AERMOD experience – and reasonably concluded that it was "very unlikely and speculative that any significant amount of snow from Class A+ reclaimed water will be transported to the critical habitat or location of any plant populations." SuppBA at 42.

Even assuming *arguendo* that artificial snow would reach ragwort habitat, the Forest Service nonetheless went on to consider the potential effect, if any, of increased nitrogen levels from artificial snow on the ragwort and its habitat. To inform this analysis, the Forest Service first defined the amount of habitat and plant numbers within the area that could possibly be impacted by artificial snow. Of the 50 acres in this area, there are 44.8 acres of designated critical habitat, of about 6% of the entire designated critical habitat. SuppBA at 28-29. However, only about 4 acres consisted of habitat actually occupied by ragwort plants. *Id.* These 4 acres revealed approximately 1100 plants, or about 0.8 to 1.2 % of total population. *Id.* Fewer than 300 plants in three locations are within 500 feet of the uppermost potential snowmaking site for 2013/2014 operations and beyond. *Id.*

The Forest Service next evaluated whether any artificial snow in this area would directly impact ragwort plants. SuppBA at 32. The topography of ragwort habitat means that snow has a short retention time before it sublimates, evaporates, or melts.[6] *Id.* The water that does melt moves quickly through the rocky fellfields, which is a desert-like habitat. *Id*. The majority of soluables in natural snow leach out during the initial snowmelt period of April to May. *Id.* The Forest Service determined that snowmelt from manmade snow would likewise percolate quickly through the rocks, leaving little snow water to be retained after the April-May meltoff. *Id.* The ragwort is dormant during this period and will have little to no exposure to any manmade snow that may reach its habitat. *Id.*

In preparation of the supplemental BA, the Forest Service then evaluated whether any nitrogen depositions would impact ragwort habitat. SuppBA at 32-35. This analysis took into account several factors, including the level of background nitrogen in the ecosystem, the amount of nitrogen in the artificial snow, and the ecosystem's reaction to the nitrogen. Contrary to Plaintiff's assertion, the Forest Service noted that existing atmospheric nitrogen deposition is below critical loads for alpine ecosystems. *Id.* at 34. Additionally, emissions data shows a systemic decline and that regulatory control programs will further reduce pollution, suggesting that the nitrogen deposition levels over the San Francisco Peaks area will continue to decline from current levels. *Id.* With respect to the amount of nitrogen in the Class A+ wastewater, the most recent documented nitrogen levels in the Class A+ reclaimed water averaged 5.4 mg/l,

[6] Sublimation is the conversion of a solid to a gas without passing through a liquid state. SuppBA at 18. In other words, the snow particles do not melt before evaporation. Conditions in the San Francisco Peaks favor evapo-sublimation, especially during the early snow season. *Id.* This has two practical effects for the artificial snow at issue. Snow could either evaporate or sublimate prior to even reaching ragwort habitat or evapo-sublimation of snow in ragwort habitat means a much shorter retention time and less opportunity for nitrogen to deposit in ragwort habitat.

instead of the 10 mg/l assumed in Plaintiff's report. *Id.* This assumption overestimated the modeled nitrogen by 85%. *Id.* When this overestimate was evaluated together with the inaccurate assumptions about atmospheric nitrogen trends, the Forest Service concluded that Plaintiff's report significantly overestimated the potential for increased nitrogen inputs to ragwort habitat. *Id.* In addition, the Forest Service noted that the nitrogen would be substantially diluted through mixing of manmade snow with natural snow and snow water. *Id.*

Finally, even assuming the nitrogen inputs reached the levels predicted by Plaintiff's report, the Forest Service determined that such results would not negatively impact the ragwort or its habitat. SuppBA at 32-35. The Forest Service observed that Plaintiff's report focused on the incorrect critical threshold by focusing on nitrogen levels that lead to increase of species instead of the decline of target species, like the ragwort.[7] *Id.* at 34. Readjusting the focus to nitrogen levels that could cause a decrease in species, the Forest Service evaluated the same studies cited by Plaintiff showing no significant decrease of species in experiments with higher levels of nitrogen input and ranging over 15 years. *Id.* Based on these studies, it estimated that the critical threshold for loss of species would be approximately 25-30 kilograms per hectare per year ("kg/ha/yr") in dry alpine meadows with acidic soils. *Id.* The Forest Service determined that the varying soil on Agassiz Peak would lead the site to tolerate a higher critical threshold of nitrogen deposits. *Id.*

[7] Such studies do not necessarily lead to the conclusion that the ragwort will be impacted or outcompeted by any increase in species that could occur over the long term. The role of competition in the loss of species richness due to nitrogen deposition has been questioned. See Anderson Dec., Exh 2, Climate & Atmospheric Research Associates ("CARA Report") at 6-4 (citing Stevens *et al.* 2010)). In any event, this is unlikely to occur in ragwort habitat because of the low likelihood for competitive exclusion. *Id.* The ragwort typically grows in isolation and its nearest neighbor is noted for its low competitive ability in the face of additional nitrogen inputs. *Id.* The Forest Service concurs that species competition is not an important factor in the alpine tundra ecosystem and that Plaintiff's claim of competitive exclusion by other species is speculative. SuppBA at 34-35.

For these reasons, the Forest Service reasonably determined the snowmaking using Class A+ reclaimed water was not likely to adversely affect the ragwort or its habitat.[8] *Id.* at 41-44. The Forest Service has requested FWS's concurrence in these findings and consultation is ongoing.

F. Section 7(d) Determination

While neither the ESA nor its regulations require an agency to make an explicit 7(d) finding, the Forest Service examined the snowmaking activities expected to proceed during the pendency of the ongoing consultation to ensure that it would not "make any irreversible or irretrievable commitment of resources" that would "foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures" to ensure compliance with Section 7(a)(2). 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. The Forest Service noted that for the 2012/13 winter season, Snowbowl will limit its snowmaking to the lower portion of the mountain – far from any ragwort habitat (approximately 1600 feet). *See* Buehler Dec., Exh 3 Section 7(d) Determination ("7d Det.") at 4. The Forest Service reasoned that none of the snow made this season would be expected to be transported from the lower portion of the mountain up to, or even close to, the nearest ragwort aggregations. *Id.* at 6-8. And, even in the extremely unlikely event that snow would reach those heights, as explained in the supplemental BA, none of the snow is expected to adversely affect the ragwort or its habitat. *Id*. This reasoning was based on multiple considerations: (1) snowmaking will generally be completed during non-windy periods; (2) the deployment of airless snowmaking technology allows for heightened precision and increased control in snowmaking process; (3) a 42-acre area of dense forest exists between snowmaking on the lower portion of Snowbowl and the nearest ragwort population; (4)

[8] The Forest Service separately analyzed the impact on ragwort critical habitat. SuppBA at 35-41. Since the factors are largely the same, they are not duplicated in this discussion.

nitrogen concentrations in the artificial snow are insufficient to negatively impact ragwort populations. *Id.* Additionally, the Forest Service reasoned that, even if Plaintiff's claims were true, one season of snowmaking at the levels of nitrogen estimated by Plaintiff would not result in a competitive disadvantage or the availability of competition plant species in this environment. *Id.* Based on this information, the Forest Service reasonably determined that snowmaking with Class A+ reclaimed water for the limited 2012/2013 ski seasons would be consistent with the agency's obligations under Section 7(d). *Id*.

As part of its Section 7(d) determination, the Forest Service also ensured that it complied with Section 7(a)(2) during the pendency of consultation. 7d Det. at 4-5. The Forest Service first noted that snow deposition in ragwort habitat was unlikely due to the fact that snowmaking would be limited to the lower portion of the mountain about 1,600 feet from any ragwort populations. *Id.* The Forest Service next noted that even if snow were to travel 1600 feet up the mountain, the increase in nitrogen content would not be expected to have a significant impact. *Id*. This was due to several reasons: (1) the nitrogen levels in artificial snow is about half the level of ambient natural precipitation and not considered toxic to plants, including the ragwort; (2) the nitrogen in artificial snow would be expected to be diluted when mixed with natural snow; and (3) given the topography and chemical makeup of the habitat, there exists a low capacity for retention of nitrogen. *Id*. Finally, the Forest Service determined that even assuming the nitrogen levels estimated by Plaintiff, one season of snowmaking (*i.e.*, approximately three months), would not increase competition for the ragwort. *Id*. In any event, even if it did create the opportunity for increased competition, any adverse effects would take decades to occur. *Id*. For these combined reasons, the Forest Service determined that snowmaking for the limited time

period until consultation is complete, would not adversely affect the ragwort or its critical habitat.

As such, the Forest Service has not required Snowbowl to halt its snowmaking preparations while it completes the reinitiated consultation process. Snowbowl intends to commence snowmaking no sooner than December 14, 2012.

G. 2012 Snowbowl Litigation

Plaintiff sent an initial 60-day notice of intent to sue on June 4, 2012, threatening suit unless the Forest Service reinitiated consultation. *See* Udo Dec., Exh 7, ECF No. 8-7 at 3. Plaintiff sent a second 60-day notice of intent to sue letter to the Forest Service on October 23, 2012 alleging violations of ESA Sections 7(d) and 7(a)(2). Udo Dec., Exh.11, ECF No. 8-8 at 74-81. Accordingly, as to violations raised in its second letter, Plaintiff would be able to file suit alleging an ESA violation against the Forest Service no earlier than December 22, 2012. However, Plaintiff did not wait for the 60 days to elapse. Instead, Plaintiff filed its newest lawsuit on November 14, 2012 – this time in the District of Columbia, rather than in the District of Arizona. The instant lawsuit attempts to revive a claim dismissed for lack of jurisdiction during Plaintiff's previous litigation, *see Wilson v. Block*, 708 F.2d 735, 747-51 (D.C. Cir. 1983), and *Navajo Nation I*, 408 F. Supp. 2d at 881-82, namely that the Forest Service has violated the ESA by failing to protect the ragwort, as the Snowbowl implements its improvement project. Plaintiff now argues that the Forest Service must prohibit Snowbowl from commencing snowmaking for the 2012/2013 season pursuant to the ESA, 16 U.S.C. §§ 1536(a)(3) and 1536(d), pending completion of yet another round of ESA consultation.

//

//

STANDARD OF REVIEW

I. STANDARDS FOR GRANTING EMERGENCY INJUNCTIVE RELIEF

An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2761 (2010). Because it is an extraordinary remedy, a plaintiff seeking a preliminary injunction "must establish" that: (1) it is likely to succeed on the merits of its claims; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 21 (2008).[9] While a particular plaintiff must satisfy all four factors, *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995), its failure to show either irreparable harm or a likelihood of success on the merits obviates the need for the Court to address the remaining factors, *Apotex, Inc. v. FDA*, 449 F.3d 1249, 1253-54 (D.C. Cir. 2006); *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989). Additionally, under the stringent standard for a preliminary injunction, "[i]t is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue." *Monsanto*, 130 S. Ct. at 2757; 2760 (An injunction should issue only if it is "needed to guard against any present or imminent risk of likely

[9] Although courts in the past have applied a "sliding scale" approach, whereby a strong showing on one prong may make up for a weaker showing on another, the Supreme Court's decision in *Winter* has called that approach into question. *See Winter*, 555 U.S. at 22 ("Issuing a preliminary injunction based only on a possibility of irreparable harm [even where the plaintiff has shown a strong likelihood of success on the merits] is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.") (citation omitted). The D. C. Circuit has twice suggested, without deciding, that *Winter* should be read to abandon the sliding-scale analysis in favor of a "more demanding burden" requiring Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm. *See Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). Given Plaintiffs' weak showing on all of the preliminary injunction factors, this Court similarly need not reach the question of whether the sliding-scale approach remains valid after *Winter*.

irreparable harm."). Rather, an injunction should issue only where a plaintiff makes a "clear showing" and presents "substantial proof" that an injunction is warranted. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). A plaintiff has the burden of proving the need for injunctive relief; defendant bears no burden to defeat the motion. *Granny Goose Foods v. Bhd. of Teamsters*, 415 U.S. 423, 442-43 (1974).

II. THE ADMINISTRATIVE PROCEDURE ACT

The deferential review provisions of the Administrative Procedure Act ("APA") govern this Court's review of the challenged action. *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 685 (D.C. Cir. 1982) (ESA citizen suit governed by APA standard of review). Even at the emergency motion stage in the proceedings, "[w]hether plaintiff is likely to prevail on the merits is, under the circumstances of this case, informed by the deferential standards of review under the APA." *Apotex v. FDA*, Civ. No. 06-0627 JDB, 2006 WL 1030151, at *7 (D.D.C. Apr. 19, 2006), *aff'd*, 449 F.3d 1249 (2006); *accord Am. Bioscience v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001).

Under the APA, "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Instead, the court must apply a "presumption of regularity" and "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 415-16. A decision is arbitrary and capricious only "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of

agency expertise." *Motor Veh. Mfgrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *S. Co. Servs. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002). The high degree of deference due an agency determination is particularly important where, as here, the Court is called upon to review determinations involving agencies' technical expertise and scientific judgments. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983) (in circumstances involving predictions of future events based on special scientific expertise, "a reviewing court must generally be at its most deferential.").

ARGUMENT

I. PLAINTIFF HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.

A plaintiff seeking emergency relief "must establish that he is likely to succeed on the merits" of its claims. *Winter*, 555 U.S. at 20; *see also Astellas Pharma U.S. v. FDA*, 642 F. Supp. 2d 10, 16 (D.D.C. 2009) ("It is particularly important for the movant to demonstrate a likelihood of success on the merits;" absent "substantial indication" of likely success, "there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review") (citations omitted). Plaintiff cannot meet this standard.

A. Because Plaintiff Has Failed to Comply with the ESA's Jurisdictional Prerequisites, The Court Lacks Jurisdiction Over the Complaint.

As a threshold matter, this Court lacks jurisdiction over the instant action. Section 11 of the ESA mandates that suits may not be commenced "prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation." 16 U.S.C. § 1540(g)(2)(A)(i). Where the alleged violator is a federal agency, the notice provision operates as waiver of sovereign immunity. *Conservation Force v. Salazar*, 811 F. Supp. 2d 18, 32 (D.D.C. 2011) ("*Conservation Force II*"). As such, the notice requirement

"must be complied with strictly, and it cannot be avoided by equitable, 'flexible,' or 'pragmatic' considerations." *Id*. (quoting *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 26-28 (1989)); *Water Keeper Alliance v. U.S. Dep't of Def.*, 271 F.3d 21, 29-30 (1st Cir. 2001). The notice requirement is mandatory and jurisdictional in nature, and a claim brought without proper notice must be dismissed. *Conservation Force II*, 811 F. Supp. 2d at 32.

If an ESA 60-day notice is to serve its intended purpose – *i.e.*, to facilitate the resolution of controversies without resort to litigation – the contents of the notice must not force its recipients to play a "guessing game" concerning the specific duties and violations at issue. *Ctr. for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 801 (9th Cir. 2009). Rather, the notice must describe the alleged violations in a fashion allowing both the Secretary and the alleged violator to evaluate and, if necessary, to alter their current course of action. Thus, although the "requirement of adequate notice does not mandate that citizen plaintiffs 'list every specific aspect or detail of every alleged violation,'" *Friends of the Earth v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 399-400 (4th Cir. 2011) (citations omitted), the notice must nonetheless "inform the [action] agency of the *exact* grievances against it." *Water Keeper*, 271 F.3d at 29-30 (emphasis added). *See also Conservation Force v. Salazar*, 851 F. Supp. 2d 39, 56 (D.D.C. 2012) ("*Conservation Force III*") (claim "not mentioned" in notice was jurisdictionally barred).

In this case, Plaintiff has submitted two 60-day notices in the last year. In its first 60-day notice letter, dated June 4, 2012, Plaintiff threatened suit unless the Forest Service reinitiated consultation. *See* Udo Dec., Exh 7 (ECF No. 8-7) at 3. The Forest Service did precisely that on June 11, 2012. In the second 60-day notice letter, dated October 23, 2012, Plaintiff threatened suit if the Forest Service allowed Snowbowl to make snow during the consultation period,

because snowmaking during that time would allegedly constitute a violation of ESA Section 7(d). *See* Udo Dec., Exh 11 (ECF No. 8-8 at 74). It is this latter 7(d) issue that is the subject of Plaintiff's lawsuit. However, under the 60-day notice requirement, the Plaintiff could not file this suit until December 22, 2012. *See* 16 U.S.C. § 1540(g). Thus, Plaintiff has failed to provide the statutorily required notice, and the attendant litigation-free window, for the only claim appearing in its Complaint. Because neither the Secretary nor the Forest Service was ever provided notice of an alleged violation of ESA Section 7(d) prior to September 14, 2012, Plaintiff's claim is jurisdictionally barred and must be dismissed.

Plaintiff will argue, as suggested in its Complaint, that the first June letter gave notice of this suit. *See* ECF No. 1, Complaint ¶ 4. That is wrong. The June letter did not raise any allegations of violations of Section 7(d), but instead was concerned with the consultation requirements of Section 7(a). At the time of the June letter – and as the letter's contents make abundantly clear – the Forest Service had not yet reinitiated consultation with FWS under Section 7(a). *See* Udo Dec., Exh 7 (ECF No. 8-7) at 3. Indeed, Section 7(d) is mentioned only once – in the "legal background" section. *Id.* at 4. However, the mere mention of a legal requirement in the legal background section of a letter that threatens suit on other grounds does not give, as required, sufficient information for the Secretary to identify or abate the violation. *See Research Air v. Norton*, No. 05-cv-623 (RMS), 2006 WL 508341 at *10 (D.D.C. Mar. 1, 2006).

Section 7(d), by its own terms, applies only "*[a]fter* initiation of consultation required under [Section 7(a)]." 16 U.S.C. § 1536(d) (emphasis added). Because the requirements of Section 7(d) are contingent on Section 7(a) consultation, the Forest Service could not have been in violation of Section 7(d) as of June 4, 2012, when Section 7 consultation had not yet begun.

As this Court has held, a plaintiff does not provide adequate notice under ESA Section 11 when articulating the breach of a duty that did not – and could not – exist at the time of notice.

In *Conservation Force v. Salazar*, 715 F. Supp. 2d 99, 103-04 (D.D.C. 2010) ("*Conservation Force I")*, the Canadian National Wood Bison Recovery Team petitioned to remove the Canadian wood bison from the Secretary's list of endangered species, obligating the Secretary to issue a "finding" on the petition within 90 days "to the maximum extent practicable." *See* 16 U.S.C § 1533(b)(3)(A). A second obligation – the publication of a "12-month finding" – was contingent on the substance of the initial finding. Plaintiffs sued the Secretary for the violation of both obligations, claiming to have provided adequate notice for each. This Court dismissed plaintiffs' claim regarding the 12-month finding for lack of notice, reasoning that "the need for [that finding] remained speculative when the intent to sue letter was submitted." *Conservation Force I*, 715 F. Supp. 2d at 104. *See also Friends of Animals v. Salazar*, 670 F. Supp. 2d 7 (D.D.C. 2009). Similarly, the June letter at issue in this case could not have provided the Forest Service with notice of failure to comply with Section 7(d), because, as the letter itself repeatedly noted, the statutory predicate to those requirements had not yet begun. *See Natural Res. Def. Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1179 (E. D. Cal. 2008) ("Plaintiffs cannot rely on [a] March 20, 2006, sixty-day notice to assert a § 7(d) claim . . . for violations that occurred after consultation was reinitiated on July 6, 2006; this would be a 'pre-violation' notice.").

Even assuming Section 7(d) duties were somehow imposed upon the Forest Service prior to the onset of consultation, the June letter provided – at most – notice that the Forest Service had allegedly violated Section 7(a) only. Insofar as the letter sought to identify alleged ESA violations that the Forest Service or FWS could remedy prior to Plaintiff's complaint, the alleged

violations pertain entirely to consultation. *See* Udo Dec., Exh 7 (ECF No. 8-7) at 3 ("If the Forest Service does not reinitiate consultation within sixty days, the Hopi Tribe will deem this a failure to take action required by the ESA"); *id*. at 6 ("the Hopi Tribe is notifying the Forest Service that it will file suit to enforce the provisions of Section 7 of the ESA, specifically including 50 C.F.R. § 402.16 . . . unless the Forest Service reinitiates consultation within sixty days."). Nor could the Forest Service have been expected to "guess" that Plaintiff's reference to Section 7(a) violations implied Section 7(d) violations: Section 7(d)'s "narrow" prohibition on the commitment of resources, although contingent on Section 7(a), is a distinct requirement manifesting a distinct congressional purpose. *Defenders of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 113 (D.D.C. 2011); *see also Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1034-35 (9th Cir. 2005).

Thus, even had the Forest Service and FWS reinitiated consultation prior to the June letter, the letter would have failed to provide any notice of any alleged Section 7(d) violations. In this hypothetical world, the Forest Service would have lacked any opportunity to evaluate claims of the kind in Plaintiff's complaint, and, therefore, any opportunity to avoid litigation of those claims. The June letter, in short, contained no notice of the Section 7(d) claim set forth in the Complaint, as required by ESA Section 11(g). *See Conservation Force III*, 851 F. Supp 2d at 56 ("[Plaintiff's claim under ESA Section 6(b)(1)(A)] was not mentioned in [its] notice of intent to sue, so it is now jurisdictionally barred."); *Conservation Force I*, 715 F. Supp. 2d at 103; *see also ONRC Action v. Columbia Plywood*, 286 F.3d 1137, 1144 (9th Cir. 2002) ("Had [plaintiff] specified its other theories" in its notice of intent to sue for alleged Clean Water Act violations, "[defendants] might well have decided that those theories had sufficient merit to call for agency action."). Therefore, the only sufficient notice of an ESA Section 7(d) violation was sent to the

Forest Service on October 23, 2012. *See* Udo Dec., Exh 11 (ECF No. 8-8) at 74, and the 60-day timetable has yet to elapse. As such, this Court lacks jurisdiction to entertain a case filed on November 14, 2012. The Complaint should be dismissed.

B. Assuming *Arguendo* The Court Has Jurisdiction, Plaintiff Cannot Show A Likelihoood Of Success On the Merits BecauseThe Forest Service Has Complied with the ESA

Plaintiff asks this Court to enjoin snowmaking until the completion of reinitiated Section 7 consultation. As such, the timeframe within which to analyze the Forest Service's ESA compliance consists of only a relatively short period – *i.e.*, approximately three to five months for the completion of consultation. 16 U.S.C. §§ 1536(b)(1), (2) (unless extended by agreement, consultation should be completed in 90-150 days). Plaintiff argues that, regardless of the time period involved, any snowmaking whatsoever will both jeopardize the ragwort and destroy or adversely modify its critical habitat in violation of Section 7(a)(2). Plaintiff also argues that allowing Snowbowl to proceed with limited snowmaking will violate Section 7(d) in that it would constitute an irreversible or irretrievable commitment of resources that effectively forecloses the formulation or implementation of any reasonable and prudent alternatives needed to comply with Section 7(a)(2). As discussed further below, Plaintiff is not likely to succeed on the merits.

1. Continued authorization of snowmaking during consultation does not violate Section 7(a)(2).

Contrary to Plaintiff's assertion, *see* Pl's Br. at 15-16, the Forest Service has not violated its substantive duty to avoid jeopardy of the ragwort and adverse modification of its critical habitat under Section 7(a)(2). As an initial matter, as explained above, the Forest Service analyzed the potential snowmaking impacts in 2004 and found that Snowbowl's snowmaking activities were not likely to adversely affect the ragwort and its critical habitat. *See* Udo Dec.,

Exh 2, ECF No. 8-1. FWS concurred with that determination. *See* Udo Dec., Exh 3, ECF No. 8-1. The fact that reintiation of consultation has occurred does not automatically render the agencies' 2004 "not likely to adversely affect" determination inaccurate or invalid, nor does it mean that the Forest Service can no longer rely on the results of this lawful consultation. *Defenders of Wildlife v. Bureau of Ocean Energy Management*, 684 F.3d 1242, 1252 (11th Cir. 2012) (mere re-initiation of consultation does not automatically render prior and currently in effect ESA consultation invalid). Rather, the agency can continue to rely on that consultation provided it also has reasonably considered the new information giving rise to the request for re-initiation. *Id*. (agency was not required to await completion of consultation and to delay issuance of exploratory drilling permit in the Gulf of Mexico in light of the Deepwater Horizon disaster, where agency re-initiated consultation, and reasonably relied on existing biological opinion along with analysis of the new information).

Here, the Forest Service has analyzed Plaintiff's new information and has subsequently determined that the full range of snowmaking – as proposed in the 2004 BA – is not likely to adversely affect the ragwort or its critical habitat. SuppBA at 40-43. Moreover, as mentioned above, Plaintiff's motion concerns only the potential impacts from the limited snowmaking (*i.e.*, lower portion of Snowbowl) in the time until consultation is completed. During this specific time period, Snowbowl will limit its snowmaking to the lower portion of the mountain – far from any ragwort habitat (approximately 1,600 feet). *See* 7d Det. at 4. In this situation, the Forest Service noted that not only would the snow need to be transported 1600 feet up the mountain, but in doing so, the snow would have to make it through a dense 42-acre block of forest between the Midway Catwalk and the closest ragwort populations above the Agassiz chair lift. The Forest Service reasonably determined that the limited snowmaking for the 2012/2013 season would not

be expected to be transported from the lower portion of the mountain up to, or even close to, the nearest ragwort aggregations. *Id.* at 6-8.

The Forest Service next considered the effect of increased nitrogen level on the ragwort and its habitat within the limited time until consultation is complete. The Forest Service noted that:

> The level of nitrogen in artificial snow is about half the level of ambient natural precipitation and not considered to be toxic to plants (BA, p. 33). The artificial snow would mix with natural snow, substantially diluting the nitrogen prior to exposure to the San Francisco Peaks ragwort (BA, p. 34) uptake during the summer season. Finally, given the soil types and steeps slopes in San Francisco Peaks ragwort habitat and the mobile nature of nitrogen in soils, the habitat for San Francisco Peaks ragwort has a very low capacity for retention of nitrogen (BA, 34).

7d Det. at 5. Therefore, even in the extremely unlikely event that snow would reach the plant, it is not expected to have any impacts. *Id*.

Finally, the Forest Service noted that, even if Plaintiff's nitrogen claims were true, one season of snowmaking at increased nitrogen levels does not support a competitive disadvantage for the ragwort or the availability of competition plant species. 7d Det. at 7. Furthermore, the Forest Service determined that adverse effects from competition (if any) would take decades to occur. *Id*. For these combined reasons, the Forest Service reasonably determined – consistent with FWS's 2004 conclusion – that snowmaking for the limited time period until consultation is complete, would not adversely affect the ragwort or its critical habitat, and it certainly would not approach the jeopardy threshold contemplated in Section 7(a)(2). The Forest Service's determination is reasonable and its expert judgment is entitled to deference by the Court. *City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003) ("[W]e will give an extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise") (quotations omitted).

2. Continued Authorization Of Snowmaking During Consultation Does Not Violate Section 7(d).

Plaintiff next claims that the Forest Service's failure to stop snowmaking violates Section 7(d). Pl's Br. at 15-16. As such, Plaintiff argues that a preliminary injunction is appropriate to maintain the *status quo* until consultation is complete. *Id*. This argument is legally and factually incorrect. In fact, the ESA does not *per se* require the immediate cessation of all activity pending the completion of consultation. *North Slope Borough v. Andrus*, 642 F.2d 589, 610-11 (D.C. Cir. 1980). ESA Section 7(d) provides that, after consultation has been initiated, the action agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures" that would avoid violating Section 7(a)(2). 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

"Congress enacted § 7(d) to prevent Federal agencies from 'steamrolling' activity in order to secure completion of the projects regardless of their impact on endangered species." *North Slope Borough v. Andrus*, 486 F. Supp. 332, 356 (D.D.C.), aff'd in part and rev'd in part on other grounds, 642 F.2d 589 (D.C. Cir. 1980). Section 7(d) is intended "to preclude the investments of large sums of money in any endeavor if (1) at the time of the investment there was a reasonable likelihood that the project, at any stage of development, would violate § 7(a)(2), and (2) that investment was not salvageable (*i.e.* it could not be applied to either an alternative approach to the original endeavor or to another project)." *Id*. (footnotes omitted). "The relevant inquiry is whether the [agency]'s actions permanently commit resources in a way that ties its hands for future actions." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d. 1122, 1192 (E.D. Cal. 2008).

For example, in *National Wilderness Inst. v. U.S. Army Corps of Eng'rs*, No. 01-cv-0273, 2005 WL 691775 (D.D.C. March 23, 2005), the court held that EPA's issuance of a Clean Water Act discharge permit during consultation did not violate Section 7(d) "because the EPA retain[ed] authority to reopen and modify the permit or rescind it altogether" if necessary to avoid jeopardy. *Id*. at *16. The court also held that the discharges themselves did not violate Section 7(d) because they were not analogous to "significant investments into a project that cannot be recovered, or would be wasted, if it were determined that the project jeopardized the continued existence of an endangered species," and they did not "preclude the formulation or implementation of alternative measures that could be taken with regard to operation of the [project]." *Id*.; *see also Nat'l Wildlife Fed'n v. Nat'l Park Serv*., 669 F. Supp. 384, 390 (D. Wyo. 1987) (operation of campground under interim management plan pending completion of Environmental Impact Statement ("EIS") did not violate Section 7(d) because plan "may be terminated, modified, or made permanent depending upon the EIS findings").

Here, the Forest Service reasonably determined that continued authorization of snowmaking at Snowbowl for the limited time period required to complete consultation would not result in an irreversible or irretrievable commitment of resources in violation of ESA Section 7(d). *See* 7(d) Det. at 6-8. The Forest Service retains authority under the special use permit to modify Snowbowl's snowmaking activities as necessary. 7d Det. at 7-8; s*ee also* Buehler Dec., Exh 1, Special Use Permit at 19 (providing that "[i]f protection measures prove inadequate . . . [as deemed] by the Regional Forester, the authorized officer may specify additional protection regardless of when such facts become known."). In other words, the Forest Service reasonably concluded that any "commitment of resources" with respect to snowmaking was not "irreversible

or irretrievable" under the ESA because the special use permit gives the Forest Service the authority to "reverse" and "retrieve" them.

Furthermore, the challenge to the Forest Service's compliance with Section 7(d) fails for the additional reason that continued authorization of snowmaking pending completion of consultation represents a continuation of the *status quo* since the decision was finalized in 2005. The Forest Service is not taking any new management action or irrevocably committing any additional agency resources. Nor does continued authorization of snowmaking have the effect of "foreclosing the formulation or implementation of any reasonable and prudent alternative measures" that would avoid violating Section 7(a)(2). 16 U.S.C. § 1536(d). The Forest Service retains its authority to amend or modify Snowbowl's special use permit, including snowmaking activities if needed. *Id*.; *see also* Buehler Dec., Exh 1 at 18. Any action the Forest Service could take now to preserve the ragwort and its habitat, the Forest Service will also be able to take at the end of consultation. When an agency maintains "sufficient discretion and flexibility to modify its action to allow formulation and implementation of an appropriate reasonable and prudent alternative," the activity is not an irretrievable or irreversible commitment of resources. *See* FWS ESA Section 7 Consultation Handbook at 2-7 (Mar. 1998), available at http://www.fws.gov; *see also Andrus*, 642 F.2d at 593.

The limited snowmaking planned for 2012/2013 plainly entails no irreversible or irretrievable commitment of resources. Furthermore, the snowmaking activities on the lower half of Snowbowl will not reach, affect, or jeopardize the ragwort or its habitat. *See* 7d Det. at 4-7. Even if it did, which is unlikely as demonstrated above, limited snowmaking will not have an impact on the ragwort or its habitat. *Id*.; *see* SuppBA 41-44. Accordingly, continued authorization of *limited* snowmaking pending completion of consultation complies with ESA

Sections 7(a)(2) and 7(d) and injunctive relief is unwarranted. *See Nat'l Wilderness Inst*., 2005 WL 691775, at *16-*17.

II. PLAINTIFF CANNOT DEMONSTRATE THAT IRREPARABLE HARM IS LIKELY IN THE ABSENCE OF EMERGENCY RELIEF

Equitable relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief," *Winter,* 555 U.S. at 22 (citation omitted), and "the basis for injunctive relief in the federal courts has always been irreparable harm," *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) (citation omitted). The D.C. Circuit has "set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). As demonstrated below, Plaintiff fails to carry the burden to demonstrate irreparable harm because its allegations of harm from 2012/2013 snowmaking are speculative, based on flawed science, and fail to show a significant impact to the species or its critical habitat designation as a whole.

A. 2012/2013 Manmade Snowmaking Is Unlikely to Even Reach the Ragwort.

Plaintiff must demonstrate that irreparable injury is *likely* in the absence of an injunction (i.e., until the merits of Plaintiff's claims can be decided). *Winter*, 555 U.S. at 21-22. If Plaintiff's alleged harms stem from some longer-scale consequences of the challenged action, such harms cannot provide the basis for a finding of irreparable harm. A preliminary injunction is not warranted to prevent "the possibility of some remote future injury". *Id.* at 22 (quotation and citation omitted).

Plaintiff generally alleges that there will be long-term impacts from increased nutrient accumulation in ragwort habitat. *E.g.* Pl's Br. at 12. However, Plaintiff's allegations of harm relate to snowmaking that will not occur this ski season. The only snowmaking that will occur in the 2012/2013 season covers approximately 100 acres on the lower and midway portions of the

mountain. 7d Det. at 2. These operations are so distant from the ragwort that there is no chance that this snow could reach the plant. 7d Det. at 6-8. All snowmaking is more than 1,600 feet below the nearest aggregations of ragwort. 7d Det. at 2*; Id.* at 3 Fig. 1. The maximum projection of snow from guns is 80 feet in front of the gun with a width of 20 feet. SuppBA at 5. The type of equipment used allows heightened precision and control. *Id.* at 5-6. Snowmaking will generally occur under calmer wind conditions. *Id.* Furthermore, snowmaking will be monitored to ensure that it is being deposited on the trails and not dispersed into the air, trees, lifts, or other structures. *Id.* The manmade snow will be groomed and compacted, not subject to snow drift. *Id.* at 10. Additionally, there is a dense timber stand of 42 acres between this lower and mid-mountain snowmaking area and the nearest ragwort plants, which will block wind and snow drift. *Id.* at 8.

By contrast, Plaintiff fails to present any specific data concerning whether the 2012/2013 snowmaking is likely to even reach ragwort populations or habitat. *E.g.* Pl's Br. at 3 (mentioning "reports" of only lower mountain snowmaking, but failing to provide any specific analysis related to impacts of limited 2012/2013 snowmaking); *compare* CARA Report at 5-29 (the reported nitrogen deposition impacts would be greatly reduced and the range of deposition would be minimized if just the lower level operations were simulated); *id* at 4-9 (in addition to 25 surface-level snow guns on lower mountain, STI modeling incorrectly assumed 25 additional tower-mounted snowmakers with a height of 7.5 m on the upper mountain; in any event these additional 25 snowmakers will not be used in 2012/2013). Plaintiff's analysis concerning the impacts of the full range of snowmaking simply cannot support a claim about the more limited impacts of 2012/2013 snowmaking. Accordingly, Plaintiff has failed to support its burden to

show that any harm from the more limited 2012/2013 snowmaking is likely to occur. *Winter*, 555 U.S. at 21-22.

Even if Plaintiff's analysis of the full range of snowmaking were somehow relevant to the limited 2012/2013 operations, those conclusions are speculative and not supported by the best available science. Mere threatened, speculative harm, without more, does not amount to irreparable injury for the purposes of justifying preliminary injunctive relief. As the Supreme Court made clear in the *Winter* decision, Plaintiff must show that harm is not merely possible, it must be likely. *Winter*, 555 U.S. at 21-22; s*ee also Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (movants must show that irreparable injury is "both certain and great; it must be actual and not theoretical"). Plaintiff relies on the use of inaccurate modeling to argue that manmade snow will be transported into ragwort habitat. However, as discussed above, both agency and private experts have examined these contentions and find them without merit. SuppBA at 29-31; Elder Dec. ¶¶ 3-12; Anderson Dec. ¶¶ 3-7. Viewed in light of the data gaps, incorrect assumptions, and overestimated impacts, Plaintiff's modeling cannot support issuance of an injunction, even it were applicable to the more limited 2012/2013 snowmaking.

B. Irreparable Harm to the Ragwort is Not Likely to Occur

Even if some of the 2012/2013 manmade snow did reach ragwort habitat, Plaintiff's allegations of the harm from this snow are based on overestimates about the amount of nitrogen in water used for 2012/2013 operations and the impact that increased nitrogen would have on the ragwort.

Plaintiff's allegations rest on an incorrect assumption about the amount of nitrogen in the water to be used for 2012/2013 snowmaking. The 2005 EIS, upheld by the Ninth Circuit, documented that reclaimed water to be used for snowmaking would have a mean nitrogen

concentration of 6.0 mg/l. SuppBA at 33. The most recent data from the Rio de Flag wastewater reclamation plant shows that nitrogen concentration in the plant's output has been even lower, averaging 5.4 mg/l over the past five months. *Id.* Yet, the Plaintiff's analysis assumes that snowmaking operations will use reclaimed water containing 10 mg/l of total nitrogen. *Id.* This assumption alone leads to an 85% overprediction of total inorganic nitrogen deposition at all points, including critical habitat and occupied ragwort areas. *Id.* In order to demonstrate irreparable harm, a plaintiff needs to demonstrate that such harm is likely to occur, not just that there is a potential for the reclaimed water to include that level of nitrogen. *Winter*, 555 U.S. at 21-22. The evidence before the Court shows that the current nitrogen levels are almost half of the assumptions used by Plaintiff and that Plaintiff's model grossly overestimates the potential for nitrogen load during the 2012/2013 season.

Even if the Court were to accept Plaintiff's estimations of nitrogen in the water, Plaintiff further overstates the amount of nitrogen that could be deposited in ragwort habitat, if at all. Plaintiff stresses that the deposition of manmade snow "will result" in increases of nitrogen of "up to six times" the current background amount. Pl's Br. at 11 (citing Chinkin Dec ¶¶ 4, 12). However, Plaintiff's own data shows that these amounts occur on the ski trails themselves, not in the ragwort distribution area. CARA Report at 5-28, 5-29. For occupied ragwort locations, Plaintiff's data shows a maximum nitrogen deposition of 1.6 kg/ha in an average year or 2.5 kg/ha in a maximum snowmaking year.[10] *Id.* (citing Carothers Dec., Exh 7 at A-10). Even if

[10] While Plaintiff's data shows a maximum deposition of 3.2 kg/ha/yr under the "rotated winds" scenario, this data set has been discredited by Forest Service experts. Anderson Dec. ¶ 9; Elder Dec. ¶ 81 (second data set is an arbitrary attempt to manipulate the data that violates fundamental scientific methodology). In any event, Plaintiff utterly fails to demonstrate that the more limited 2012/2013 operations will use an amount of water even close to the volumes analyzed in the SWCA materials. Presumably, the amount of water utilized will be even less than the volume analyzed in the wet year scenario, which resulted in only 1.1 kg/ha in occupied ragwort areas. *See* Carothers Dec., Ex. 7 at A-10 (ECF No. 6 at 237).

this snow does reach ragwort plants this year, Plaintiff's own projections show that the average amounts are much less significant than the dire predictions stressed to the Court.

Even if such levels of nitrogen deposition occur in ragwort habitat, this will not have the impacts predicted by Plaintiff. As an initial matter, Plaintiff's predicted impacts rest on the addition of such deposits to an overestimated amount of background levels of nitrogen in the ecosystem and the incorrect assumption that these levels will increase. SuppBA at 33. Furthermore, the addition of nitrogen itself will not have the results predicted by Plaintiff. Experiments in alpine ecosystems have not shown a decrease in abundance or changes in the health of species, even at experimental levels over double the amount predicted by Plaintiff. [11] *Id.* at 30-31; CARA Report at 6-3. Based on these studies, it estimated that the critical threshold for loss of species would be approximately 25-30 kg/ha/yr in dry alpine meadows with acidic soils. *Id.* at 34. The Forest Service determined that the varying soil in ragwort habitat would lead the area to tolerate an even higher critical threshold of nitrogen deposits. Plaintiff does not demonstrate that 2012/2013 snowmaking operations would result in nitrogen depositions at or near these levels.

Finally, and most importantly for the Court's irreparable harm analysis, even assuming the worst case scenario of nitrogen levels, Plaintiff fails to provide any data to demonstrate that one season of snowmaking could cause the type of long-term ecological impacts predicted. *See* Carothers Dec. ¶ 12 (focusing on long-term impacts to species). In fact, the only projection about the time it may take for such impacts to accumulate is over a period of five decades. *Id.*, Exh. 8 at 5. Forest Service experts agree that it would require this longer timescale for such

[11] As discussed above, this is the relevant inquiry for significant adverse impacts to the ragwort or its critical habitat because competitive exclusion from any increase of plants is not an important factor in the ragwort's alpine environment. SuppBA at 21. In addition, the Forest Service monitors ragwort habitat and has a program of prevention, early detection, and rapid treatment of any invasive species. *Id.*

impacts to accumulate. SuppBA at 43. There is simply no evidence before the Court that one season of snowmaking could result in the alleged harms. Accordingly, Plaintiff fails to carry its burden of demonstrating imminent and irreparable harm.

C. Plaintiff Fails to Show Irreparable Harm at the Species or Habitat Level

Not only are Plaintiff's claims of harm to the ragwort from 2012/2013 snowmaking unsupported, they are insufficient to obtain the requested preliminary injunction. Of the 720 acres of ragwort designated critical habitat, only about 6% of that critical habitat is within the action area. SuppBA at 35. Furthermore, during intensive 2012 surveys, 4 acres of the action area were found to be occupied, or about 1.9% of the total occupied habitat for the species. *Id.* at 28-29. The 2012 surveys documented approximately 1,100 plants, or about 0.8% to 2.2% of the estimated population range, within the action area. *Id.*[12]

Plaintiff offers no evidence to demonstrate that any alleged impacts to the ragwort will affect the species as a whole, as courts have held is required to obtain an injunction under the ESA. *Defenders of Wildlife v. Salazar*, 812 F. Supp. 2d 1205, 1210 (D. Mont. 2009) (the purpose of the ESA is to prevent species "endangerment and extinction. With this purpose in mind, the measure of irreparable harm is taken in relation to the health of the overall species rather than individual members."); *Humane Soc'y v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008) (finding death of over 2,000 listed salmon would not constitute irreparable harm to the species); *Butte Envt'l Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936 (9th Cir. 2010) (destruction of over 230 acres does not rise to level of adverse modification of critical habitat); *Water Keeper Alliance v. U.S. Dep't of Def.*, 271 F.3d 21, 34 (1st Cir. 2001) (affirming denial of emergency

[12] Plaintiff alleges that snowmaking, long-term, will result in total nitrogen deposition values that exceed the critical load threshold on 48-99% of critical habitat and 53-91% of the population. Carothers Dec. ¶ 24. However, this is based on the discredited modeling results and does not undercut the Forest Service's determination of the action area.

relief, where no showing was made on "how these deaths may impact the *species*" (emphasis added).

Ignoring this relevant caselaw, Plaintiff argues that any threat of imminent harm to a protected species or critical habitat is *per se* irreparable. Pl's Br. at 17 (citing *Loggerhead Turtle v. Cnty. Council of Volosia County, Fla.*, 896 F. Supp. 1170, 1178 (M.D. Fla. 1995), and *Fund for Animals v. Turner*, No. 91-cv-2201 (MB), 1991 WL 206232 (D.D.C. Sept. 27 1991)). Addressing the very question of whether irreparable harm requires species-level harm, the District of Maine evaluated, among other authorities, the *Loggerhead* and *Turner* cases. *See Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70 (D. Me. 2008), *aff'd*, 623 F.3d 19 (1st Cir. 2010). However, the court found that *Water Keeper Alliance* is the better-reasoned position because it "places the concept of irreparable harm within the greater context of the purpose of the ESA," which protects species and habitat designations, but permits individual take and some level of habitat modification. *Martin*, 588 F. Supp. 2d at 105.

It is true that in some cases, "[c]ourts have found that the death of a small number of individuals may constitute irreparable harm, but this situation exists only when the 'loss of those individuals would be significant for the species as a whole." *Defenders of Wildlife*, 812 F. Supp. 2d at 1210 (citing *Pac. Coast Fed'n of Fishermen's Ass'ns*, 606 F. Supp. 2d 1195, 1210 n.12 (E.D. Cal. 2008)). Here, Plaintiff offers no evidence that, even assuming that 2012/2013 snowmaking could eliminate the less than 1% of plants within the action area or adversely modify the 6% of designated critical habitat in the area, such a loss is significant to the species as a whole. Any such argument would be directly contrary to the finding of Forest Service experts that 2012/2013 snowmaking is not likely to jeopardize the continued existence of the ragwort or

result in the destruction or adverse modification of its critical habitat. *See* 7d Det. at 4-8. Accordingly, Plaintiff does not, and cannot, meet the showing for irreparable harm to the species.

III. THE BALANCING OF HARMS AND THE PUBLIC INTEREST DO NOT SUPPORT ISSUANCE OF EMERGENCY RELIEF.

Here, because Plaintiff has made no showing of irreparable harm or likelihood of success on its Section 7(d) claim, the Court need not consider the balance of equities and the public interest factors. *See St. Croix Chippewa Indians v. Kempthorne*, 535 F. Supp. 2d 33, 36 (D.D.C. 2008). Nevertheless, if the Court does find that Plaintiff meets the first two preliminary injunction factors, it still must weigh the third and fourth factors – the balancing of the equities and the public interest. *Gordon v. Holder*, 632 F.3d 722, 725 (D.C. Cir. 2011) (after *Winter*, admonishing lower court for addressing these factors in a conclusory fashion). These factors apply equally to cases concerning the protection of ESA-listed species. *See Safari Club Intern. v. Salazar*, 852 F.Supp.2d 102, 124-25 (D.D.C. 2012).

Plaintiff argues that the purpose of the ESA requires a finding that these two factors favor an injunction. Pl's Br. at 18-20. While the Court must give endangerment of species "the utmost consideration," the potential for harm to listed species does not "blindly compel [the Court's] decision," where there are substantial counterbalancing considerations as in this case and any potential harm to listed species is not dire. *See Water Keeper*, 271 F.3d at 34; *Animal Welfare Inst. v. Martin*, 623 F.3d 19, 27 (1st Cir. 2010) ("The circumstances here are none so dire . . . . The district court found the statutory violation here has not caused the death of any Canada lynx, let alone that it poses the ultimate danger of extinction."); *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 496-97 (2001) (noting that the injunction in *TVA v. Hill*, 437 U.S. 153 (1978), was necessary to prevent the complete eradication of the species). Furthermore, it does not promote the purposes of the ESA to further delay projects based on speculative claims

of harm. As the Supreme Court has noted, the ESA is "not be implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176-177 (1997).

Contrary to Plaintiff's arguments, the third and fourth factors do not compel the issuance of a preliminary injunction in this case.

CONCLUSION

For the reasons set forth above, Plaintiff's Motion for Preliminary Injunction should be denied.

DATED: 3rd day of December, 2012

Respectfully Submitted:

IGNACIA S. MORENO
Assistant Attorney General
SETH M. BARSKY, Section Chief
S. JAY GOVINDAN, Assistant Section Chief

/s/ Rickey D. Turner, Jr.
RICKEY D. TURNER, JR., Trial Attorney
(CO Bar No. 38353)
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
999 18th Street, South Terrace, Suite 370
Denver, Colorado 80202
Tel: (303) 844-1373
Email: rickey.turner@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was today served via the Court's CM/ECF system on all counsel of record.

/s/ Rickey D. Turner, Jr.
RICKEY D. TURNER, JR.