IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BUFFALO FIELD CAMPAIGN, *et al*.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:16-cv-1909 CRC
RYAN ZINKE, *et al*.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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APA	Administrative Procedure Act
APHIS	Animal and Plant Health Inspection Service
DEIS	Draft Environmental Impact Statement
DPS	Distinct Population Segment
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FWS	Fish and Wildlife Service
IBMP	Interagency Bison Management Plan
NPS	National Park Service
SPR	Significant Portion of its Range
YNP	Yellowstone National Park

INTRODUCTION

The U.S. Fish and Wildlife Service (FWS) received two petitions in early 2014 and late 2015 requesting that FWS list the Yellowstone bison as "endangered" or "threatened" under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq*. After a thorough review of each of the petitions, as well as the agency's own records, FWS reasonably determined that the petitions failed to present substantial scientific or commercial information to indicate that listing the Yellowstone bison as a distinct population segment (DPS) may be warranted and issued a finding denying the petitions. 81 Fed. Reg. 1368 (Jan. 12, 2016) (90-Day Finding).[1] FWS applied the correct standard when reviewing the petitions' assertions that the Yellowstone bison should be listed because of the ESA's five listing factors, and the administrative record demonstrates that FWS articulated a rational connection between its findings on those factors and the agency's final decision.[2] In particular, the administrative record shows that the population of Yellowstone bison is stable to increasing and that the Interagency Bison Management Plan (IBMP) has been an effective regulatory mechanism for achieving a balance between conserving Yellowstone bison and preventing the transmission of brucellosis from Yellowstone bison to livestock.

Plaintiffs challenge FWS's denial of the consolidated petitions. But Plaintiffs have not met their burden to show that FWS's action is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. At bottom, Plaintiffs are disappointed with the outcome of FWS's decisionmaking process and ask this Court to substitute their judgment and views for those of the agency. But the Court should reject this invitation because there is no

[1] The information supporting the 90-Day Finding is contained in a separate document that is part of Federal Docket No. FWS-R6-ES-2015-0123.

[2] Citations to the administrative record are noted by the letters AR and a page cite corresponding to the Bates number at the bottom of the page.

legal basis for substituting the judgment of Plaintiffs or the Court where FWS has articulated a rational listing decision. Thus, FWS's 90-Day Finding should be upheld.

For these reasons, the Court should deny Plaintiffs' motion for summary judgment and grant Federal Defendants' cross-motion for summary judgment.

STATUTORY AND REGULATORY BACKGROUND

Congress enacted the ESA in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] and to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). Only those species that meet the statutory definition of either a threatened species or an endangered species qualify for the protections of the ESA. Congress delegated the authority to make this determination to the Secretary of the Interior or the Secretary of Commerce. *Id.* § 1533(a)(1). An endangered species is one that "is in danger of extinction throughout all or a significant portion of its range," and a threatened species is one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* §§ 1532(6), 1532(20). "Species" includes "any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife that interbreeds when mature."[3] *Id.* § 1532(16). The Secretary of the Interior has jurisdiction over listing decisions for terrestrial species, such as the Yellowstone bison in this case, and the

[3] A population segment must be both "discrete" and "significant" to qualify as a DPS. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996) (DPS Policy). In 2007, FWS reviewed a petition to list the Yellowstone bison and determined that it may have qualified as a DPS. AR 0479. In 2011, FWS reviewed a petition to list the wild plains bison, which includes the Yellowstone bison herd, and suggested that its previous determination on the Yellowstone bison was erroneous. AR 0475-76. Upon consideration of information in the new petitions at issue in this case, FWS again determined that the Yellowstone bison may qualify as a DPS. AR 0004.

Secretary in turn has delegated his authority to the Fish and Wildlife Service (FWS). *See id.* § 1532(15); 50 C.F.R. § 402.01(b).

The determination of whether a species should be listed under the ESA may be made either on the initiative of the Secretary or in response to a citizen's petition. 16 U.S.C. § 1533(a)(1), (b)(3)(A); 50 C.F.R. § 424.14(a). For the citizen petition process, the statute requires the agency to "make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A). To the maximum extent practicable, FWS must make this finding within 90 days after receiving a petition; thus this action is known as a "90-day finding." *Id.* FWS regulations regarding the agency's review of petitions have changed in the time between the challenged 90-Day Finding and the briefing of this case, 81 Fed. Reg. 66462 (Sept. 27, 2016), but for purposes of the petitions at issue here, Federal Defendants rely on the regulations in place at the time of the 90-Day Finding. These previous regulations defined "substantial scientific or commercial information" as "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)(1) (2015).[4]

FWS determines the status of a species by evaluating whether it meets the definition of "endangered species" or "threatened species" because of any of the following five factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;

[4] In the regulations promulgated after this 90-Day Finding, this section was replaced by 50 C.F.R. § 424.14(h)(1)(i), which states: "For the purposes of this section, 'substantial scientific or commercial information' refers to credible scientific or commercial information in support of the petition's claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted. Conclusions drawn in the petition without the support of credible scientific or commercial information will not be considered 'substantial information.'"

(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence.

Id. § 1533(a)(1); 50 C.F.R. § 424.11(c). If FWS determines that a petition presents substantial scientific or commercial information indicating that listing may be warranted – a "positive" 90-day finding – then the agency begins a status review of the species, and within 12 months of receiving a petition that is found to present substantial information, must determine whether the petitioned action is warranted. 16 U.S.C. § 1533(b)(3)(B). If, on the other hand, FWS determines that the petition does not present substantial scientific or commercial information indicating that action may be warranted – a "negative" 90-day finding – then the agency has performed a final agency action that is subject to judicial review. *Id.* § 1533(b)(3)(C)(ii).

At the 90-day finding stage, FWS's evaluation is based on the information presented in the petition and in the agency's own records. This approach accords with the statutory and regulatory language and has been discussed in the FWS's Guidance on Making 90-Day Petition Findings Under Section 4(b)(3)(A) of the ESA (90-day Petition Finding Guidance). AR 5529-36. Moreover, as outlined in the 90-day Petition Finding Guidance, FWS can consider information that is readily available at the time the determination is made "that provides context in which to evaluate whether the information that a petition presents is substantial." AR 5529.

FACTUAL AND PROCEDURAL BACKGROUND

I. Yellowstone Bison

The American bison (*Bison bison*) is the largest land mammal in North America. AR 0467; 1703. Within the species there are two sub-species, the more common plains bison (*B. bison bison*), which occurs in Yellowstone National Park (YNP) and throughout the United States, and the wood bison (*B. bison athabascae*), which currently exists in northern Canada and Alaska. *See* AR 0466; 1160; 2821-23. Prior to European colonization, bison ranged from central

Mexico to Northern Canada and east to west across almost the entire width of the continent. AR 1704. At its height, the species is estimated to have contained 24-40 million individuals, but by the late 1880s fewer than 1,000 American bison remained. *Id.*

Today bison have rebounded from near extinction at the end of the nineteenth century, making it one of the earliest conservation success stories. AR 1709. Recent estimates put the total number of plains bison in North America at over 500,000. AR 0920. In 2011, an estimated 20,000 of those bison were in herds that were being primarily managed for conservation purposes. AR 0920; 1161. As of 2010, the Department of the Interior manages 12 herds of plains bison in 10 separate locations. AR 0999-1003. None of the Department of the Interior herds has a high level of cattle-gene introgression, with all herds falling well below the advised 2% cattle-genes threshold for conservation herds. AR 1004. Of these herds, the Yellowstone bison population is the largest, and one of the few populations to have continuously occupied portions of its current range and shown no evidence of cattle genes in its members' DNA. AR 0674. Biologically, then, they are also important as a member of a complete ecosystem that includes a full complement of natural selection factors – such as predators, diseases, and a heterogeneous landscape – that encourage "unique adaptive capabilities." AR 0674-75.

In the Greater Yellowstone Ecosystem, bison historically occupied approximately 20,000 km^2 near the headwaters of the Madison and Yellowstone rivers. AR 0912. With the decline of the rest of the species throughout the nineteenth century, the Yellowstone bison population was reduced to approximately 23 individuals in central YNP. AR 0673. At that time, the Yellowstone bison were some of the only remaining wild and free-ranging bison in the United States. AR 0912. In 1902, 21 unrelated bison from Texas and Montana were introduced to the northern portion of YNP to form a second herd. AR 0673; 0999. After this reintroduction, individuals

from both the northern and central herds were artificially relocated to the opposite herd as part of the intensive husbandry and restoration of the species. AR 0673; *see also* AR 0912. Park managers in 1969 limited active management in an effort to allow bison numbers to fluctuate naturally in response to predation, resource limitations, and hunting outside the park. AR 1261-62. With the end of active management in 1969, the Yellowstone bison population grew rapidly and bison were moving outside the park in increasing numbers by the 1980s, as they searched for forage during winter months. AR 1262.

This migration created concerns among the local cattle industry because scientists had confirmed that Yellowstone bison were infected with brucellosis as early as 1917. AR 0912. Bovine brucellosis is a disease caused by the bacteria *Brucella abortus* that can infect many different species including cattle, elk, bison, and humans. AR 0912; 0697. Depending on the species it infects, the bacteria may cause abortions or other complications like arthritis and high fever. AR 0697. In response to concerns that brucellosis-infected bison would pass the disease on to cattle outside of YNP, federal and state agencies attempted to balance the conservation of bison with the limitation of their movement beyond the park boundary through a collection of management plans, including the current Interagency Bison Management Plan (IBMP), which are described in greater detail below. AR 0912; 4064-65.

Today, the Yellowstone bison have fully rebounded, with the total population reaching 4,865 in 2014 – 3,421 of those in the northern herd and 1,444 in the central herd. AR 0536. This rebound has occurred even though approximately 40-60% of Yellowstone bison tested positive for brucellosis in 2011. AR 0912. As the bison population within YNP has grown in recent years, the northern and central herds have begun to naturally intermix, causing scientists to begin to

view them as one larger, intermixing population. AR 0538. The rebound of the Yellowstone bison has occurred during the implementation of the IBMP. AR 0480; 0536; 0540-45.

II. Interagency Bison Management Plan

The long-term management of Yellowstone bison has been complicated by the fact that the Yellowstone bison move across multiple jurisdictions and by the different goals of federal and state agencies as they relate to the bison. Yellowstone bison primarily reside in YNP, over which the Secretary of the Interior has exclusive jurisdiction. AR 4067. But when the bison move outside the park they can go onto national forest service system lands managed by the U.S. Forest Service or onto land managed by the State of Montana. *Id.* The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) also has authority over Yellowstone bison given its mission to prevent the transmission of diseases to livestock. *Id.* The relevant federal and state agencies have different goals as they relate to the Yellowstone bison, including, *inter alia*, maintaining a viable population of wild bison in YNP from a biological, genetic, and ecological perspective; preventing the spread of brucellosis from bison to livestock and eliminating brucellosis from bison; and providing for public safety and the protection of private property. AR 4069; *see W. Watersheds Project v. Salazar*, 766 F. Supp. 2d 1095, 1103 (D. Mont. 2011), *aff'd* 494 F. App'x 740 (9th Cir. 2012) (noting disagreements among "rural inhabitants living in the communities and areas adjacent to the Park, private landowners, environmentalists, farmers and ranchers, livestock associations, state and local governments, and state and federal wildlife specialists, scientists, and administrators.").

In light of these complicating factors and increased migration of Yellowstone bison, federal and state agencies began to recognize the need for a cooperative, long-term management plan for Yellowstone bison. Between 1990 and 1995, federal agencies and Montana state

agencies executed a Memorandum of Understanding (MOU) in which they agreed to work together to develop a long-term plan and entered into three interim bison management plans, which allowed for the culling of bison that migrated outside of YNP. AR 4065. The first of these interim plans was upheld after being challenged. *Fund for Animals v. Lujan*, 962 F.2d 1391 (9th Cir. 1992). The Ninth Circuit affirmed the district court's finding that the National Park Service's (NPS) actions had not decreased the number of free roaming bison and that the interim plan, which would help prevent the spread of brucellosis from bison to cattle and humans, was in the interests of the health of Montana's citizens and its livestock. *Id*. at 1400-02.

Disagreement between the State of Montana and the federal agencies followed. In 1995, Montana sued NPS and APHIS, claiming that their actions were delaying the completion of the long-term bison management plan. AR 4065. The parties settled the case and entered into a fourth interim management plan, which also survived a legal challenge seeking a preliminary injunction. *Greater Yellowstone Coal. v. Babbitt*, 952 F. Supp. 1435 (D. Mont. 1996), *aff'd* 108 F.3d 1385 (9th Cir. 1997). The fourth interim plan was modified in 1997, and both the 1996 and 1997 interim plans were upheld following another challenge. *Intertribal Bison Coop. v. Babbitt*, 25 F. Supp. 2d 1135 (D. Mont. 1998), *aff'd sub nom. Greater Yellowstone Coal. v. Babbitt*, 175 F.3d 1149 (9th Cir. 1999).

In 1998, the federal agencies developed a Draft Environmental Impact Statement (DEIS) for the IBMP. AR 4066. The DEIS was followed by a modified preferred alternative allowing for a larger bison population than the DEIS's preferred alternative and for greater tolerance of bison outside of YNP. *Id.* The federal agencies subsequently withdrew from the 1992 MOU, but after negotiations with Montana, in 2000, the federal agencies developed a Final Environmental Impact Statement (FEIS), which Montana adopted. AR 4064-66. The FEIS implemented a

slightly different version of the modified preferred alternative, which became the IBMP. The Record of Decision produced by NPS and APHIS contains the original IBMP. AR 4082-96.

The principal objective of the IBMP is clear: "to maintain a wild, free-ranging population of bison and address the risk of brucellosis transmission to protect the economic interest and viability of the livestock industry in Montana." AR 4083. To accomplish this goal, the IBMP established a three-step plan that would provide spatial and temporal separation of bison from cattle as a means of controlling the risk of brucellosis transmission and would allow bison to move to winter ranges on public and private lands outside of YNP. *Id.* The primary conservation area for Yellowstone bison includes YNP, two management zones outside of the north and west boundaries of YNP, and areas of the Gallatin National Forest. AR 4083-93. The IBMP expressly contemplates an adaptive management process, AR 4083, and since its initial adoption in 2000, the IBMP has been modified to focus on increased hazing, vaccination, and hunting by Montana-licensed hunters and American Indians with treaty rights. AR 0912-15. These adaptive management changes have withstood judicial challenge. *W. Watersheds Project*, 766 F. Supp. 2d at 1116 ("These have been beneficial changes for the Yellowstone bison, because the bison are now being permitted to range outside the Park to the north and to the West as an experiment to allow the IBMP partners to learn more about winter migration behavior.").

III. Previous Petitions to List Bison

The challenged 90-Day Finding in this case is not the first time that FWS has received and rejected petitions to list the Yellowstone bison or the wild plains bison. In 2007, the agency issued a negative 90-day finding in response to a petition from James Horsley seeking to list the Yellowstone bison. AR 0477-82. FWS agreed that the Yellowstone bison may be a DPS, but concluded that the petition had not presented substantial information indicating that listing may

be warranted because of the abundance and management status of the Yellowstone bison. AR 0478. The agency's analysis under Factor A stated that despite the winterkill of 1996-1997, the bison herd "has continued to grow despite culling for population and brucellosis control, and currently numbers approximately 4,500 head." AR 0479. The available information also showed that control actions were not affecting the migratory behavior of the bison because they continued to engage in their migrations toward YNP's boundaries during the winter. *Id.* FWS also addressed culling as part of its Factor B analysis, highlighting that under the IBMP, measures to protect bison would be increased when the Yellowstone bison population dropped below 2,300 and that culling would be halted when the population dropped below 2,100. AR 0480. FWS also considered whether the IBMP was an adequate regulatory mechanism under Factor D. The agency noted that "[o]ne of the primary goals of the [IBMP] is to provide a 'free-ranging bison herd'" and that the IBMP established "conservation measures that eliminate the control program as a threat to the continued existence of the herd." AR 0480, 0482.

Four years later, FWS issued a negative 90-day finding in response to a petition from James A. Bailey and Natalie A. Bailey to list the wild plains bison, which includes the Yellowstone bison. AR 0465-76. In FWS's analysis of Factor A, the agency considered the current status of the species and therefore its current range, but added that historical range may be relevant to the analysis of the current and future viability. FWS acknowledged the significant reduction in the historical range, but concluded: "We do not believe that the market hunting that led to the precipitous decline of wild plains bison in the 1800s is likely to be repeated. Habitat is currently available to accommodate additional herds. Furthermore, recent stable-to-slightly increasing population trends in conservation herds do not indicate that habitat is a limiting factor for wild plains bison." AR 0470. FWS also considered the management of the Yellowstone bison

under the IBMP with respect to disease. FWS described the IBMP as a "comprehensive approach" to protecting Yellowstone bison and minimizing the risk of brucellosis. AR 0471.

IV. FWS's 2016 90-Day Finding

The 90-Day Finding challenged in this case was FWS's consolidated response to two petitions to list the Yellowstone bison as threatened or endangered. FWS received the first petition on November 14, 2014, from Plaintiffs Western Watersheds Project and Buffalo Field Campaign (first petition). AR 0003; 0366-426. FWS received a second petition from Mr. Horsley on March 2, 2015 (second petition). AR 0003, 0037-365; *see* AR 5531 ("For a petition that is equivalent to a petition for which a 90-day finding has not yet been made, the later petition will be combined with the earlier petition . . ."). According to both petitions, the Yellowstone bison qualified as a DPS. AR 0004. Both petitions asserted that the Yellowstone bison met the first four of the five listing factors, and the first petition also asserted that the Yellowstone bison satisfied the fifth listing factor. AR 0004-15.

On January 12, 2016, FWS issued its 90-Day Finding on the petitions. 81 Fed. Reg. 1368 (AR 0003-20, 0021-28). FWS determined that "the petitions do not provide substantial scientific or commercial information indicating that the petitioned action may be warranted." AR 0016. In making the finding, FWS first considered whether the Yellowstone bison was a DPS, as the petitioners claimed. FWS acknowledged its 2011 decision regarding the wild plains bison, which concluded that the Yellowstone bison was not a DPS, but added that based on the new information provided by the consolidated petitions, the Yellowstone bison "may meet the discreteness and significance criteria needed to qualify as a DPS."[5] AR 0004.

[5] Plaintiffs' misconstrue this conclusion by suggesting that "FWS agreed with Plaintiffs that the Petitions provide substantial scientific or commercial information indicating the Yellowstone bison qualifies as a DPS." Pls. Br. (ECF 17) at 11. Plaintiffs ignore the qualifying language used

FWS then evaluated whether there was substantial information under each of the listing factors in ESA Section 4 to indicate that the Yellowstone bison is threatened or endangered. In terms of the first factor – the destruction, modification, or curtailment of its habitat or range – the agency analyzed the concerns raised by the petitions, which included range curtailment, livestock grazing, development and infrastructure, and invasive species. AR 0004-6. FWS turned next to the second factor – overutilization for commercial, recreational, scientific, or educational purposes – and focused in particular on hunting (a recreational purpose) and culling (a scientific purpose), which are described in greater detail as part of the description of the IBMP. AR 0007-10. With respect to the third factor – disease or predation – FWS focused its analysis on disease, and in particular brucellosis. AR 0010-12. For the fourth factor – the inadequacy of existing regulatory mechanisms – the key question was whether the IBMP provided an adequate mechanism for conserving Yellowstone bison. AR 0012-13. Finally, FWS analyzed genomic extinction and climate change when considering the fifth factor – other natural or manmade factors affecting continued existence of the species. AR 0013-15.

Plaintiffs sent FWS a Notice of Intent to sue dated July 11, 2016, and Plaintiffs filed a Complaint challenging the 90-Day Finding under the ESA on September 26, 2016.[6] *See* ECF 1.

STANDARD OF REVIEW

Challenges to listing determinations under the ESA are subject to judicial review under Section 706(2)(A) of the Administrative Procedure Act (APA). 5 U.S.C. § 706(2)(A); *Am.*

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by FWS in accordance with the statute: that the substantial information contained in the petitions indicated that the Yellowstone bison "may" qualify as a DPS.

[6] The 90-Day Finding responded to the consolidated petitions. However, Plaintiffs' opening brief focuses on the first petition, which was submitted by two of the Plaintiffs. Federal Defendants therefore respond primarily to the concerns raised with respect to the first petition, but Federal Defendants assert defenses to the 90-Day Finding as it relates to both petitions.

Wildlands v. Kempthorne, 530 F.3d 991, 997 (D.C. Cir. 2008). Courts will set aside FWS's decisions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "arbitrary and capricious" standard is a narrow one, and "a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A regulation is arbitrary and capricious "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 difference in view or the product of agency expertise." *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1144-45 (D.C. Cir. 2005). (citation omitted).

In applying this narrow standard, a court must only "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." *State Farm*, 463 U.S. at 43 (citations omitted). A reviewing court "will give an extreme degree of deference to the agency when it 'is evaluating scientific data within its technical expertise,'" *Huls Am. Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir 1996) (quoting *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992)), especially when the "agency actions involve[d] policy decisions based on uncertain technical information." *New York v. Reilly*, 969 F.2d 1147, 1150-51 (D.C. Cir. 1992) (citation omitted). Indeed, "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989); *see In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 709 F.3d 1, 9 (D.C. Cir. 2013) (citation

omitted) (finding that a court must defer to the agency in the face of "competing views about policy and science"). When reviewing a negative 90-day finding, "the issue before the Court is not whether a reasonable person could accept [the petitioner's] interpretation of the data, but whether the [agency] had a rational basis for concluding that a reasonable person would not do so." *Palouse Prairie Found. v. Salazar*, No. CV-08-032, 2009 WL 415596, at *2 (E.D. Wash. Feb. 12, 2009), *aff'd*, 383 F. App'x 669 (9th Cir. 2010).

The court's review is limited to the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Although summary judgment usually means that "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a), in APA cases, the agency decides factual issues, *N.C. Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 79 (D.D.C. 2007), and the "district judge sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). Courts implement summary judgment as a means of ascertaining whether the record supports the agency's action. *Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 60 (D.D.C. 2014).

ARGUMENT

I. FWS Applied the Appropriate Standard for Reviewing the Petitions to List Yellowstone Bison as Threatened or Endangered.

The administrative record demonstrates that FWS utilized the correct standard to evaluate the consolidated petitions. *Contra* Pls. Br. at 17-23. That standard is expressly stated on the first page of FWS's 90-Day Finding, which notes that the ESA "requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted." AR 0003 (citing 16 U.S.C. § 1533(b)(3)(A)). "Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day finding is 'that amount of

information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.'"[7] AR 0003 (citing 50 C.F.R. § 424.14(b)). FWS applied this standard throughout its analysis of the ESA's five listing factors. *E.g.*, AR 0005 ("we do not find substantial information that restriction of range is likely . . ."); AR 0006 ("we do not find the petitioners present substantial information that non-native species may be a threat to the YNP bison such that listing may be warranted"); *see Palouse Prairie Found. v. Salazar*, 383 F. App'x at 670 ("The Service's analysis in its 90-day finding does not suggest that it applied a different standard than the one it stated.").

Contrary to Plaintiffs' assertions, FWS's approach in the 90-Day Finding comports not only with the statutory and regulatory language, but also judicial decisions applying the standard. *See* Pls. Br. at 18. Plaintiffs cite to a number of cases in which courts determined that an agency had applied a higher standard than that required by the ESA for 90-day findings,[8] and suggest that FWS applied that higher standard to the consolidated petitions. Pls. Br. at 18-19. But Plaintiffs' argument is flawed because: (1) they have ignored that the burden is on petitioners to provide the agency with substantial information; and (2) they rely on examples that do not bear the weight placed on them.

A. Congress Placed the Burden on Petitioners to Provide the Agency with Substantial Scientific or Commercial Information.

Plaintiffs' opening brief disregards the fact that "[i]t is the petitioner's burden to provide the Service with the necessary 'substantial scientific or commercial information.'" *W.*

[7] This standard was revised by 50 C.F.R. § 424.14(h)(1)(i). *See supra* at 3 n.4.
[8] Federal Defendants do not dispute that some courts have found that an agency applied an incorrect standard in specific circumstances. Indeed, FWS has noted in another 90-day finding that judicial decisions have held that "a petition need not establish a 'strong likelihood' or a 'high probability' that a species is threatened or endangered to support a positive 90-day finding." 79 Fed. Reg. 4877, 4878 (Jan. 30, 2014).

Watersheds Project v. Norton, No. CV 06-127-S-EJL, 2007 WL 2827375, at *2 (D. Idaho Sept. 26, 2007) (citing 16 U.S.C. § 1533(b)(3)(A) and 50 C.F.R. § 424.14(b)); *see also WildEarth Guardians v. U.S. Sec'y of the Interior*, No. 4:08-cv-508-EJL-LMB, 2011 WL 1225558, at *8 (D. Idaho Feb. 11, 2011). Although there is no dispute that FWS cannot require conclusive evidence from a petitioner, this does not change a petitioner's burden. In fact, Congress "*raise[d]* the burden upon a petitioner requesting a species listing or delisting" by adding the word "substantial" to Section 4 when it amended the ESA in 1982. H.R. Rep. No. 97-567, at 21, reprinted at 1982 U.S.S.C.A.N. 2807, 2821 (1982) (emphasis added); *see* AR 5532 (FWS Guidance noting that "substantial" refers to "the quality of the information (scientific methods and results) and not the quantity or aggregate size of publications or reports"; *see also* Black's Law Dictionary (10 ed. 2014) (defining substantial as "[c]onsiderable in amount or value"). Therefore, "it is not sufficient for a petitioner to provide only supporting materials and request that the Service draw a conclusion that the petitioned action may be warranted, without articulating in the petition itself *how* the purported threats negatively impact the status of the species such that it warrants listing." AR 5532 (emphasis added). None of the cases that Plaintiffs cite hold otherwise.

Plaintiffs also ignore the well-established principle that FWS need not "blindly accept statements in petitions that constitute unscientific data or conclusions, information FWS knows to be obsolete, or unsupported conclusions of petitioners." *Ctr. for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1140-42 (D. Colo. 2004); *see Ctr. for Biological Diversity v. Kempthorne*, No. C 06-4186 WHA, 2007 WL 163244, at *4, *7 (N.D. Cal. Jan. 19, 2007) (stating that information cannot be dismissed out of hand "unless the Service has demonstrated the unreliability of information that supports the petition"). As a corollary to this principle, courts

have emphasized that "FWS can rely on what is within its own expertise and records to reject petitions consistent with ESA standards." *Morgenweck*, 351 F. Supp. 2d at 1142; *see also Colo. River Cutthroat Trout v. Kempthorne*, 448 F. Supp. 2d 170, 177 (D.D.C. 2006) ("Both the statute setting forth the 90-day review requirements . . . and its implementing regulations . . . make plain that the 90-day review is to be based on the petition alone or in combination with the FWS's own records"). This ability on the part of the agency to reject unsupported claims makes sense because it prevents the agency from finding information to be substantial when in fact the agency has information to the contrary. AR 5530; *see id.* at 5529 (noting that FWS can consider contextual information if it is aware that the information presented is "out of date, unreliable, or unrepresentative of the great bulk of available data."). Thus, FWS can find a lack of substantial scientific information that the action may be warranted where, as here, it finds a petitioner's claims unsupported based on FWS's expertise and own files.

B. There Is No Record Evidence that FWS Applied the Wrong Standard in Evaluating the Petitions.

Plaintiffs devote five pages of their brief to allegedly showing where and how FWS applied an incorrect standard in its review of the petitions. Pls. Br. at 19-23. But a closer look at these examples shows that Plaintiffs have erred in their assessment of the 90-Day Finding and the administrative record.

Plaintiffs' lead example is a sentence in an internal agency email in which a scientist said "it might be appropriate to do a 12-month finding to resolve discrepancies." Pls. Br. at 19. This is a slender reed on which to hang their argument because a court's review of an agency action is "based on the agency's *final* action, and not the views expressed by individual staff at earlier stages of the administrative process." *Ctr. for Biological Diversity v. Nat'l Marine Fisheries Serv.*, 977 F. Supp. 2d 55, 75 (D.P.R. 2013) (citing *Nat'l Ass'n of Home Builders v. Defs. of*

Wildlife, 551 U.S. 644, 658-59 (2007)). Further, Plaintiffs fail to show how the text of this email translates into FWS requiring conclusory evidence. According to Plaintiffs, the scientist "appears to conclude" that further information would be required because the 12-month status review would allow for input from NPS. Pls. Br. at 19. But this is pure speculation. Moreover, the email states that a 12-month status review "might" be appropriate, and so the scientist was flagging a potential issue, not conclusively saying that a status review was required. Finally, Plaintiffs take the sentence out of context by failing to mention that elsewhere in the email, the scientist said "I think the petitioners overstate threats" and "I believe there are many overstatements in the petition." AR 5920-21. Plaintiffs also fail to mention the chart created by the scientist describing the weaknesses in many of the petitioners' claims. AR 5922-25. Plaintiffs cannot cherry pick information to support their position without the full context of that information.

Plaintiffs turn next to the language of the 90-Day Finding itself, but their two examples of a supposedly "stringent analysis" do not support their argument. Pls. Br. at 20-21. First, Plaintiffs refer to FWS's assessment that "deleterious genetic effects would . . . not necessarily be exacerbated by present culling management regimes." Pls. Br. at 20 (quoting AR 0008). Although the sentence contains the words "would not necessarily be," Plaintiffs not only failed to place the quote in context, but also excised language that provides further explanation. This statement comes at the end of FWS's list of reasons for why the evidence presented in the Pringle study cited in the petitions does not support the claim that culling undermines genetic viability. These reasons include: the impairments have not been connected to specific defects in the bison genome; Pringle's assertions are based on assumptions that such defects are caused by not the same, but similar mutations observed in humans and dogs; only one bison from YNP had the potentially harmful mutations; and the defects are thought to have arisen from the initial

population bottleneck from the early 1900s. AR 0008. FWS's analysis concludes with the sentence from which Plaintiffs draw their quote. In full, that sentence reads: "Therefore, any deleterious genetic effects *of the bottleneck* would have occurred at the time and would not necessarily be exacerbated by present culling management regimes." *Id.* (emphasis added). Considering this context and the excised portion of the quote, it is evident that the sentence specifically referred to the potential impact of present culling practices on any genetic defects that occurred in the past.

The second and only other example provided by Plaintiffs mischaracterizes FWS's assessment of the claim about the central herd being culled at a disproportionately high rate compared to the northern herd. According to Plaintiffs, FWS concluded "there is no definitive evidence that culling has impacted the Yellowstone bison's genetic viability and that preservation of overall genetic diversity may not be crucial for preserving genes from the original 25 surviving wild bison." Pls. Br. at 20 (quoting AR 0009). Plaintiffs' argument hangs on the word "definitive," but notably, FWS did not use that word or any similar word. Instead, FWS stated that "[t]o date, there is no evidence that culling has impacted the long-term genetic viability or persistence of the YNP bison population." AR 0009. Moreover, the second half of Plaintiffs' statement about preserving genes from the original 25 surviving bison relates to FWS's reasoned response to the petition's assertions about subpopulations within the Yellowstone bison. *See infra* at 26-31. Here, FWS cited another study (White and Wallen, 2012) showing evidence that the subpopulations were "artificially created" and that a better course of action would be to allow ecological processes, rather than artificial ones, to "influence how population and genetic substructure is maintained in the future. . . ." AR 0009-10 (quoting White and Wallen, 2012).

Plaintiffs' final tack is to compare the draft and final versions of the 90-Day Finding and point out the change in the language describing the standard. *See* Pls. Br. at 21-23. This approach relies on the flawed premise that the "underlying analysis" was unsound. As shown in greater detail below, the record demonstrates that FWS's underlying analysis met the standard, and Plaintiffs fail to show otherwise. The more likely explanation for the edits is that the scientist who reviewed the Draft 90-Day Finding was the more senior reviewing biologist and recognized that the junior biologist had utilized the words one would see in a 12-month status review and changed the language to align with the analysis for a 90-day finding. Thus, the correction did not also require changes to the analyses underlying them. *See supra* at 14-15.

In short, the examples that Plaintiffs cite do not bear the weight they place on them. And they certainly cannot be read to suggest "discord" between FWS's analyses and its conclusions. Pls. Br. at 21. The record shows that FWS analyzed the petitions under the correct standard.

II. FWS Correctly Determined that the Petitions Failed to Present Substantial Information Indicating that Listing of Yellowstone Bison May be Warranted.

In FWS's expert opinion, neither the petitions nor the agency's own records contained substantial information indicating that listing the Yellowstone bison may be warranted. The administrative record provides ample support for FWS's decision on all five of the ESA's listing factors. For Plaintiffs to prevail on their ESA claim, it is not enough that they disagree with the weighing of evidence by FWS. Rather, Plaintiffs must convince the Court that FWS committed "a clear error in judgment," *State Farm*, 463 U.S. at 43, and that the decision falls below "minimal standards of rationality." *Troy Corp. v. Browner*, 120 F.3d 277, 283 (D.C. Cir. 1997) (citation omitted). Plaintiffs fail to make such a showing, and therefore the Court should uphold the 90-Day Finding.

A. FWS Reasonably Considered the Habitat and Range of the Yellowstone Bison Under Factor A.

FWS began its analysis of Factor A by considering whether present or threatened range curtailment posed a threat that may warrant listing the Yellowstone bison. FWS recognized the diminishment in the size of the Yellowstone bison's range since the turn of the twentieth century, but, consistent with the Significant Portion of the Range (SPR) Policy issued jointly by FWS and the National Marine Fisheries Services (NMFS) (the Services), FWS focused on the bison's current range. 79 Fed. Reg. 37578 (July 1, 2014) (AR 0429-64). FWS determined that "given the current stable-to-increasing population status of the YNP bison herd, we do not find substantial information that restriction of range is likely a limiting factor for the continued existence of YNP bison." AR 0005. In support, FWS referenced the maintenance of the bison population within the conservation goal of 2,500-4,500 animals. *Id.* FWS considered the petitions' claims about range curtailment and made a rational determination based on the petitions and the information in the agency's own records.[9]

Plaintiffs' challenge to FWS's finding on range curtailment rests entirely on case law that pre-dates the SPR Policy.[10] *See* Pls. Br. at 29-31. This approach fails because the Supreme Court has made clear that an agency is not bound by a court's prior interpretation of an ambiguous statutory term for which the agency later provides a legally binding, reasonable interpretation.

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[9] FWS's 2011 90-day finding concluded that the factors that caused the near-extirpation of the Yellowstone bison more than a hundred years ago were not currently a threat. AR 0470; *see supra* at 10.

[10] Plaintiffs do not challenge the other findings under Factor A, but there too the agency reasonably determined that the petitions had failed to provide substantial information. *See* AR 0006 (finding that the first petition and its sources did not describe "the extent of habitat degradation caused by livestock"); *id.* (finding that the first petition lacked information on "how these land use changes may cause direct or indirect adverse impacts on the YNP bison"); *id.* (finding that the first petition did not provide information on "the extent to which this plant or others mentioned may be a threat to foraging bison in YNP").

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005). Plaintiffs rely primarily on two Ninth Circuit cases and contend that FWS acted improperly when it did not consider whether the loss of the Yellowstone bison's historical range constitutes a significant portion of its range. Pls. Br. at 29-30 (citing *Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001), and *Tuscon Herpetological Soc'y v. Salazar*, 566 F.3d 870, 877 (9th Cir. 2009)). But the argument is simply wrong. The Services' SPR Policy, which was issued in 2014, reasonably interpreted the ambiguous term "range" and determined that the ESA does not require FWS to determine whether lost historical range is an SPR.

The Services' interpretation that an agency need not consider whether lost historical range is an SPR is entitled to *Chevron* deference. *See Defs. of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 1009 (D. Mont. 2016); *WildEarth Guardians v. Jewell*, 134 F. Supp. 3d 1182, 1192 (D. Ariz. 2015).[11] *Chevron* deference applies "only where Congress has 'delegated authority to the

[11] Although the District Court for the District of Arizona recently issued a decision vacating and remanding the SPR Policy and FWS's decision to not list the pygmy owl, *Ctr. for Biological Diversity v. Jewell*, No. CV-14-2506-TUC-RM, 2017 WL 2438327 at *9 (D. Ariz. Mar. 29, 2017), that decision is not controlling here for a number of reasons. First, FWS has moved for alteration or amendment of the decision pursuant to Federal Rule of Civil Procedure 59(e) and that motion is still pending. *Id.*, ECF 76. The filing of the 59(e) motion suspends the finality of the judgment. *See Derrington-Bey v. D.C. Dep't of Corr.*, 39 F.3d 1224, 1225 (D.C. Cir. 1994). Second, as noted in FWS's 59(e) motion, the Arizona court's decision regarding the Policy was premised on an erroneous interpretation of NMFS's listing decision on the African coelacanth. Third, even if the Arizona court re-affirms its decision, the court may agree with FWS that it should limit the scope of its judgment to the District of Arizona and to the substantive aspect of the Policy found unlawful. Notably, the substantive aspect of the Policy at issue in that case is not the Policy's interpretation of lost historical range at issue in this case. Finally, here Plaintiffs have brought only an as-applied challenge to the application of the SPR Policy to FWS's 90-Day Finding on the Yellowstone bison, not both facial and as-applied challenges to the SPR Policy as the plaintiffs in the pygmy owl case. Consequently, even if the Arizona court denies FWS's 59(e) motion entirely and determines that vacatur of the Policy has a nationwide effect, FWS's interpretation on historical range is still entitled to *Skidmore* deference because the Services' views "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." S*kidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 579 (D.C. Cir. 2016) (quoting *Pub. Citizen v. U.S. Dep't of Health & Human Servs.*, 332 F.3d 654, 659 (D.C. Cir. 2003)). When it enacted the ESA, Congress "delegated broad administrative and interpretive power to the Secretary." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 707, 708 (1995) (citing 16 U.S.C. §§ 1533, 1540(f)). Because FWS is responsible for the protection and recovery of endangered species, it "has the authority to interpret the ESA in rules carrying the force of law." *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 776 (9th Cir. 2011); *see In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 748 F. Supp. 2d at 27 ("[T]he Court finds that the overall structure of the ESA suggests that the definition of an endangered species was intentionally left ambiguous. . . . Indeed, under the ESA, Congress broadly delegated responsibility to the Secretary to determine whether a species is 'in danger of extinction' in light of the five statutory listing factors and the best available science for that species."). Thus, FWS had the delegated authority to issue the SPR Policy. And because the guidelines contained in the policy were subject to notice and comment and represent the official position of FWS, they constitute rules that are owed deference. *WildEarth Guardians v. Jewell*, 134 F. Supp. 3d at 1192.

Under *Chevron*'s two-step framework, the court "asks 'if the statute unambiguously forecloses the agency's interpretation', . . . and, 'if it does not, then at Step Two [the court] defer[s] to the administering agency's interpretation as long as it reflects a permissible construction of the statute.'" *Union Neighbors United*, 831 F.3d at 579 (citation omitted). Congress has not unambiguously spoken on the specific issue of how to interpret the phrase "significant portion of its range" or the term "range" within that phrase. Nor is it clear from other

provisions of the ESA or the ESA's legislative history how exactly the Services should define that specific phrase. That is why every court that has considered the issue (including courts in this jurisdiction), has held that Congress has not directly spoken on the definition of "significant portion of its range," the phrase is ambiguous under *Chevron* step one, and the Services' interpretation of the phrase is properly analyzed under *Chevron* step two. *See Humane Soc'y of the United States v. Jewell*, 76 F. Supp. 3d 69, 128 (D.D.C. 2014) ("The parties do not dispute that the phrase 'significant portion of its range' is, for *Chevron* purposes, ambiguous . . . and the Court concurs.") (citations omitted); *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 99 (D.D.C. 2010) (holding that the phrase "significant portion of its range" is ambiguous); *see also Defs. of Wildlife v. Norton*, 258 F.3d at 1141 (the phrase is "inherently ambiguous" and "puzzling"); *In re Polar Bear*, 748 F. Supp. 2d at 27 (holding that the definition of "endangered species," which includes the phrase "significant portion of its range," is inherently ambiguous). Therefore, the Court must "accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980.

The Services' interpretation – that range is limited to current range and that the statute therefore does not require an analysis of whether historical range is an SPR – is a permissible construction of the ESA, and thus the Court should defer to it. FWS interpreted the term "range" to mean "current range" at the time of the listing decision under Section 4 and not "historical range." AR 0435. This reading is consistent with the plain language of the ESA, which directed FWS to ascertain whether a species "*is in danger* of extinction" or "*likely to become* an endangered species within the foreseeable future." 16 U.S.C. § 1532(6), (20) (emphasis added). This language denotes a "present-sense condition of being at risk of a current or future undesired

event," and it is not possible for a species or DPS to be "in danger of" extinction in a location where it no longer exists (*i.e.*, lost historical range). AR 0435. The language in Factor A reinforces this conclusion by directing FWS to consider "*present* or *threatened* destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1)(A) (emphasis added). Although historical range remains relevant to whether a species should be listed,[12] the SPR Policy reasonably interprets the test of the ESA as not requiring the Services to determine whether lost historical range is an SPR. AR 0435.

The SPR Policy's interpretation of how to consider historical range informed FWS's decision to consider the "current range" of the Yellowstone bison and to not examine whether lost historical range was an SPR. Contrary to Plaintiffs' assertions, FWS was not bound by the Ninth Circuit's prior construction of an ambiguous statutory term that the agency has since reasonably interpreted. *See Brand X*, 545 U.S. at 980. Further, Plaintiffs provide no support for their assertion that even if "the loss of historical habitat would not be significant under relevant agency policies," the agency must explain as much. *See* Pls. Br. at 31.

B. FWS Reasonably Considered Overutilization of Yellowstone Bison Under Factor B.

FWS acted reasonably in its evaluation of whether the petitions presented substantial information that the listing of Yellowstone bison may be warranted based on their overutilization for commercial, recreational, scientific, or educational purposes. AR 0007-10. FWS considered the petitioners' claims that culling under the IBMP could degrade genetic viability because it "favor[s] less migratory bison." AR 0008. However, FWS determined that the petitioners had not

[12] For example, "[t]he effect of loss of historical range on the viability of the species could prompt [FWS] to list a species. . . . Conversely, a species suffering a similar loss of historical range would not be listed if viability of the *remaining individuals* was not compromised to the point of endangering or threatening the species." AR 0436 (emphasis added).

met their burden of providing substantial information. Specifically, FWS noted that only one of the bison analyzed in the study cited by the petitioners had potentially "deleterious mutations," and that the genetic defects "would not necessarily be exacerbated by present culling management regimes" because they are "thought to have arisen from the initial population bottleneck." *Id.* FWS offered two additional reasons for its decision on migratory bison: first, continual migration each year suggests that the behavior persists despite the culling, and second, "winter culling may actually be serving as a surrogate for a dispersal sink (permanent movement out of the population) that would occur as a natural part of the ecosystem process." AR 0008-9.

FWS's 90-Day Finding also considered the petitioners' concerns about the ratio of bulls to cows killed each winter and the differential impact of culling on one herd over the other. AR 0009. Here, too, the record shows that the agency acted rationally in deciding that the petitioners had not met their burden. Specifically, FWS placed weight on the fact that the IBMP includes guidelines for taking equal numbers of each gender and sets separate population size goals for the central and northern herds. *Id.* FWS further concluded that "[t]o date, there is no evidence that culling has impacted the long-term genetic viability or persistence of the YNP bison population," and that in fact, some experts suggest the best path forward would be to let the ecological process play out rather than to focus on "artificially created" subpopulations. *Id.* FWS's expert opinion on overutilization is entitled to deference.

Plaintiffs assert that FWS's decisionmaking on Factor B was arbitrary and capricious, but these arguments are misplaced. *See* Pls. Br. at 24-25, 26-27, 31-36.[13] Plaintiffs' argument, which reiterates the one made in their petition, rests primarily on the assumption that a minimum

[13] Plaintiffs assail FWS's analysis of Factor B in four separate sections of their opening brief. For the sake of clarity, Federal Defendants respond to these arguments jointly here, except for those assertions connected to Plaintiffs' argument about the IBMP, which are discussed below.

effective population size of 1000 (from the Hedrick study) and the possible existence of two genetic subpopulations (from the Halbert study), "would translate into a census of at least 2,000-3,000 for each Yellowstone breeding herd." Pls. Br. at 26 (quoting AR 0410). FWS's 90-Day Finding acknowledged the Halbert study, but did not accept the proposal for calculating the subpopulations separately because the same Hedrick study indicated that the population of the Yellowstone bison herd as a whole met the minimum effective population size. AR 0009. FWS acted reasonably in considering the population of the Yellowstone bison as a whole, especially given that the petitions submitted to FWS sought to "list the Yellowstone bison." AR 0370; 0043. Moreover, Plaintiffs' arguments that the disproportionate culling poses a threat to the genetic viability of Yellowstone bison fall short because: (1) their attacks on a study from 2011 misunderstand the applicable standards; (2) they misread the 90-Day Finding; and (3) they recycle assertions made previously in their brief.

1. FWS Acted Reasonably in Relying on the White Study.

Plaintiffs cite 16 U.S.C. § 1533(b)(1)(A) and 50 C.F.R. § 424.11(b) for the proposition that FWS's reliance on a study by White *et al.* (2011) "violates the ESA's requirement that agency decisions be based on the best available science." Pls. Br. at 24. Yet Plaintiffs' reading of the ESA as requiring FWS "to premise a 90 day finding on the best available scientific information is wrong." *Sw. Ctr. for Biological Diversity v. Babbitt*, 131 F. Supp. 2d 1, 5 n.1 (D.D.C. 2001). As shown by the ESA's plain language, that standard is to be applied when the agency is considering whether to list a species as endangered or threatened based on a 12-month status review. In that context, the Secretary must make a determination about whether to list "solely on the basis of the best scientific and commercial data available to him *after conducting a review of the status of the species*. . . ." 16 U.S.C. § 1533(b)(1)(A) (emphasis added). For 90-day

findings made pursuant to 16 U.S.C. § 1533(b)(3)(A), on the other hand, the "substantial scientific or commercial information" standard is to be used when making a determination as to whether the action to list may be warranted. *See Sw. Ctr. for Biological Diversity*, 131 F. Supp. 2d at 5 n.1. It is only after making a positive 90-day finding that the status review begins and the best scientific and commercial data standard applies. *See* 16 U.S.C. § 1533(b)(3)(A). This interpretation of the statute fits with the scope of the review conducted at the 90-day finding stage, when the agency considers only the petition and what is in the agency's own records and is not permitted to engage in an in-depth engagement with the best *available* data.

Ignoring the statutory framework, Plaintiffs erroneously suggest that FWS acted improperly by relying on White *et al*. Pls. Br. at 24-25. But as described above, the agency is obligated to consider whether the conclusions drawn by the petitions are supported, AR 5533, and here FWS, applying its scientific expertise, determined that the information in the petitions did not support the conclusion that culling has an adverse impact on long-term viability of the Yellowstone bison. AR 0009. Plaintiffs' suggestion that the White *et al.* study should be ignored because it predated the Halbert *et al.* study misses the mark because the former was published just one year before the latter, and Plaintiffs provide no reason to suggest that the information in White *et al.* is inadequate or incorrect. Finally, Plaintiffs fail to explain why FWS cannot consider its 90-day finding from 2007, especially in light of the fact that an agency can consider what is in its own records. *Colo. River Cutthroat Trout*, 448 F. Supp. 2d at 177. For these reasons, the Court should reject the first of Plaintiffs' three attacks on FWS's Factor B analysis.[14]

[14] Plaintiffs also ignore the other parts of the White study that relate to its conclusion that there is no evidence that culling has had detrimental impacts. *See* AR 0920 ("To date, the bison population has shown remarkable resiliency to recover from large-scale culling for population and brucellosis control"); *see also id.* at 0921.

2. FWS Considered All Information Presented by the Petitions.

It is difficult to square Plaintiffs' assertion that FWS ignored information regarding the subpopulations, *see* Pls. Br. at 26, with the text of the 90-Day Finding, which reads:

> Finally, the first petition suggests animals from the Central/Western herd are being hunted at a disproportionately high rate compared to their Northern counterparts, which "threatens the genetic viability of the Yellowstone bison and could result in the loss of unique genetic qualities, maternal lineages, and the loss of overall genetic diversity." Halbert *et al.* (2012, p. 8, both petitions) indicate that the YNP bison consists of two subpopulations that are genetically distinct, but not isolated. . . . [T]he first petition claims that the two herds (subpopulations) should be managed in light of their unique qualities.

AR 0009. FWS responded in part to the petitioners' claims by noting that the first petition cited the Hedrick study "on the importance of maintaining an effective population size of 1000 animals (or less with substantial genetic exchange between smaller subpopulations) and that the YNP herd meets this standard." *Id.* Federal Defendants acknowledge that this language could have been clearer, but FWS's response was an attempt to summarize two aspects of the Hedrick study – the minimum effective size of 1000 and the fact that "this [number] is larger than any of the plains bison herds except for Yellowstone NP" (AR 1288) – and not, as Plaintiffs suggest, to misrepresent their petition. *See Defs. of Wildlife v. Zinke*, 849 F.3d 1077, 1085 D.C. Cir. 2017) ("Even assuming the sentence is not a model of clarity, its meaning is apparent upon examination."). Federal Defendants' reading aligns with the next sentence of the 90-Day Finding, which states that "there is no evidence that culling has impacted the long-term genetic viability or persistence of the *YNP bison* population." AR 0009 (emphasis added).

FWS's analysis also shows that FWS did not dismiss the petitioners' information as inconsequential. *Contra* Pls. Br. at 26. FWS responded not only by engaging with the Hedrick study, but also by pointing out that the IBMP sets annual population size goals for the two herds

separately.[15] AR 0009. Further, FWS considered the evidence presented in the White and Wallen (2012) study suggesting that the subpopulations were "artificially created." *Id.* That study "question[ed] whether the National Park Service should actively manage to preserve the genetic distinctiveness of each herd because history indicates humans likely facilitated the creation and maintenance of this population substructure." AR 0674. White and Wallen then argued that "it is the conservation of ecological processes that is important, not the preservation of a population or genetic substructure that may or may not have been created and/or facilitated by humans." AR 0010 (quoting AR 0674). Taken together, the information in the petition and in FWS's own records indicated that petitioners had failed to meet their burden of providing *substantial* scientific information indicating that listing may be warranted based on the potential for genetic vulnerability.[16]

3. The Petitions Did Not Provide Substantial Information on the Impacts of Hunting and Culling.

Plaintiffs' repeated assertions in support of their Factor B argument does not make them more persuasive. *See* Pls. Br. at 31-33. Plaintiffs return to their previous mistaken assertion about the standard that FWS applied, but again ignore the fact that the burden is on the petitioners.

[15] The fact that the IBMP sets goals for each herd should not be read to indicate there is substantial information showing that there are distinct genetic subpopulations or that the agencies are required to meet the subpopulation numbers proposed by Plaintiffs. *See* AR 0674 ("Biologists have also acknowledged that it is not clear how large-scale culling might influence the genotype diversity and allelic distributions of the subpopulations over time (White et al. 2011b). These analyses and uncertainties led to the implementation of several adaptive management adjustments to the Interagency Bison Management Plan designed to minimize future large-scale culls of bison, evaluate how the genetic integrity of bison may be affected by management removals (all sources combined), and assess the genetic diversity necessary to maintain a robust, wild, free-ranging population that is able to adapt to future conditions (USDI et al. 2008).").

[16] Plaintiffs quote from the legislative history of the ESA, but the reference to "genetic variation" was made in the context of the larger, more fundamental issue of protecting species rather than maintaining genetic diversity within species or even within DPSs. *See* Pls. Br. at 26-27.

Plaintiffs' presentation also elides the context for the quoted statements. For example, Plaintiffs refer to the 90-Day Finding's statement that "maintenance of subpopulation genetic differentiation and overall genetic diversity may not be crucial for preserving genes from the survivors of the historic bottleneck." Pls. Br. at 32 (quoting AR 0009). FWS's response suggested that because only 30-40% of the genetic makeup of Yellowstone bison stem from the original 25 survivors, the petitioners had not shown "*how* the purported threats negatively impact the status of the species such that it warrants listing," AR 5532 (emphasis added), and thus had not shown substantial information in support of their request. This explanation, together with the other responses, led FWS to deny the petition. It is also important to note that the first petition itself acknowledged the lack of substantial information on the issue of genetic viability: "The effective population sizes for the two or three Yellowstone bison subpopulations are *unknown*, and a thorough viability analysis to determine the appropriate effective population size for the long-term sustainability of the subpopulations *has not been conducted*." AR 0388-89 (emphasis added).

The record provides ample support for FWS's decision on listing Factor B.

C. FWS Reasonably Considered Disease or Predation Under Factor C.

Although Plaintiffs do not directly challenge FWS's 90-Day Finding as it pertains to Factor C, Plaintiffs allude to FWS's Factor C analysis as part of their contention that the petitions presented substantial information that Yellowstone bison are threatened by hunting and culling and both petitions raised concerns about disease and predation. Pls. Br. at 31 n.10; *see* AR 0403-6. Here, too, the administrative record demonstrates that FWS considered the petitions and reached a reasonable determination about whether the petitions provided substantial information about the risks of disease and predation. In the 90-Day Finding, FWS placed weight

on the fact that there had been no recent reported cases or outbreaks of hemorrhagic septicemia or malignant catarrhal fever. AR 0011. In terms of brucellosis, FWS found that the Yellowstone bison population "does not appear to suffer from a portion being infected as their numbers are stable or increase each year." *Id.* FWS reached a similar conclusion for the indirect effects, *i.e.*, the effects of culling that is aimed to prevent the transmission of brucellosis from bison to livestock: "the petitions do not provide evidence suggesting IBMP activities may be a threat to the species such that the species may warrant listing." *Id.* After considering predation, FWS determined that there was no information presented suggesting it may be a threat. AR 0012. These determinations represent reasonable conclusions based on the information before the agency and its expertise.

D. FWS Reasonably Considered the Inadequacy of Existing Regulatory Mechanisms Under Factor D.

FWS's 90-Day Finding properly concluded that the petitions did not present substantial information regarding the inadequacy of existing regulatory mechanisms indicating that listing may be warranted. AR 0013. The focal point for FWS's analysis of existing regulatory mechanisms was the IBMP, which has been the primary mechanism for cooperative federal and state management of Yellowstone bison since 2000; *see supra* at 7-9. FWS considered the IBMP throughout the 90-Day Finding and reasonably determined that the IBMP adequately protected the Yellowstone bison. *Contra* Pls. Br. at 33-36.

FWS's determination about the IBMP was based on the combination of the IBMP's adaptive management guidelines and evidence that there has been no decline in the Yellowstone bison population during the years that the IBMP has been in effect. In particular, FWS acknowledged the culling that occurs pursuant to the IBMP, but found that the IBMP was "maintaining the conservation goal of 2,500-4,500 animals." AR 0005. FWS also responded to

petitioners' concerns about hunting and culling by highlighting the fact that the IBMP annual culling guidelines involve taking approximately equal numbers of males and females and that the IBMP sets annual population size goals for the two herds so as to prevent the significant reduction of one or the other. AR 0009. Further, FWS emphasized the lack of evidence that the IBMP had harmful effects on disease in Yellowstone bison. AR 0011. With respect to the indirect effects of protecting livestock from brucellosis, the agency added that "[d]isease management is often an important aspect of wildlife management and stable-to-increasing population trends do not indicate IBMP disease management is limiting the YNP population." AR 0012.

Plaintiffs base their Factor D argument on the flawed premise that the IBMP's primary function is to protect livestock and that it is "designed to keep bison out of their habitat inside and beyond the park." Pls. Br. at 7. But in fact, the IBMP's principal objective is to conserve Yellowstone bison while also preventing the transmission of brucellosis from Yellowstone bison to livestock. AR 4083; *see supra* at 9. The two aspects of this objective may lead to different results for Yellowstone bison depending on where they move, but the control of bison migration and the conservation of the herd are not mutually exclusive, as Plaintiffs suggest.

Moreover, courts have held that regulatory mechanisms that include lethal measures can be adequate. *See Defs. of Wildlife v. Zinke*, 849 F.3d at 1084 (noting that the state plan would "use a licensing system to regulate the frequency with which wolves can be killed in the trophy area"); *id.* at 1085-86 (noting that the state law provides for promulgation of rules under which lethal-take permits will be issued only as long as the removals authorized by such permits could not reduce the numbers of gray wolves below a certain minimum); *see also Greater Yellowstone Coal. v. Servheen*, 665 F.3d 1015, 1032 n.7 (9th Cir. 2011) ("We simply point out that these laws

'allow the killing of bears' only under state regulation – such as with hunting licenses that are subject to annual limits – and thus enable the state to exercise some control over grizzly mortality."). Also relevant here are the court decisions upholding the initial interim management plans for Yellowstone bison and the IBMP's adaptive management plan. *See supra* at 7-9; *see e.g.*, *W. Watersheds Project v. Salazar*, 766 F. Supp. 2d at 1122 ("Distasteful as lethal removal may be to some, it is clearly one of the foremost management tools – time honored – necessarily utilized to protect the species, the habitat, and the public.").

Plaintiffs also rest their argument on the notion that FWS placed "blind reliance" on the IBMP, Pls. Br. at 36, but this misconstrues FWS's analysis in the 90-Day Finding and ignores the long history of the IBMP. FWS's 90-Day Finding did reference the IBMP's guidelines and goals, but it also examined the current stable-to-increasing size of the Yellowstone bison herd, which it rationally interpreted as a sign that the IBMP has been adequate.[17] AR 0005; 0009; 0011. Plaintiffs' refrain also rings hollow because, as Plaintiffs acknowledge, any in-depth finding about the IBMP's validity would be "improper at the 90-day stage." Pls. Br. at 34. Under Plaintiffs reasoning, FWS failed by not doing more but was prohibited from doing more – yet this approach would read the 90-day finding out of the statute. As shown by the record, FWS performed a reasonable evaluation of the IBMP.

[17] Plaintiffs assert that the regulatory mechanism must be "sufficiently certain to be implemented," Pls. Br. at 33 (quoting *Defs. of Wildlife v. Zinke*, 849 F.3d at 1084), but this standard comes from a FWS policy aimed at assisting in evaluations of "formalized conservation efforts that have not yet been implemented or have been implemented, but have not yet demonstrated whether they are effective at the time of the listing decision." Policy for Evaluation of Conservation Efforts when Making Listing Decisions, 68 Fed. Reg. 15100, 15113 (Mar. 28, 2003). This standard does not apply where, as here, a mechanism has been implemented since 2000 and shown to be effective.

Plaintiffs return, for the fourth time, to their argument about FWS's alleged failure to consider the impact of genetic subpopulations, but this iteration of their argument also falls short for many of the same reasons. Pls. Br. at 34-36. Contrary to Plaintiffs' assertions, FWS did acknowledge the Halbert study from 2012. AR 0009. FWS nevertheless acted appropriately when it analyzed the overall population of the Yellowstone bison herd. *Id.* In fact, looking at the overall population was consistent with the other studies, including the Hedrick study, *see supra* at 29, as well as the Geremia study from 2014. AR 0536-55. Moreover, the agency reasonably determined that the petitions failed to present substantial scientific information regarding the speculative risks associated with interbreeding between the herds. AR 0009-10. The ESA does not mandate that regulatory mechanisms exist to protect a species from every conceivable impact. Instead, the ESA requires protection against threats that would cause the species to be "an endangered species or a threatened species." 16 U.S.C. § 1533(a)(1); *see Defs. of Wildlife v. Zinke*, 849 F.3d at 1088 ("the ESA does not require a regulation to address every far-fetched, what if scenario. . . .") (citation omitted).

Importantly, Plaintiffs concede that under the IBMP there have been "attempts to equalize the population distribution." Pls. Br. at 35. Those attempts include an effort to remove more bison from the northern management area than the western management area.[18] *See* AR 0545 (showing more removals from the northern management area in 2013 and 2014); *id.* 0548. Plaintiffs attempt to overcome this concession by pointing to the numbers of bison from each of the two herds "over the past few years" as evidence that "the IBMP has had and continues to have a differential impact between the two herds." Pls. Br. at 35-36. Yet a closer look at the table

[18] The removal of bison from the northern management area is not necessarily correlated to the total number of northern herd bison that are removed because bison from both the northern and central herds migrate out of the park through the northern management area.

referenced by Plaintiffs shows that from 2001 to 2007, which were the first seven years *after* the IBMP was implemented, the numbers were flipped and the northern herd was smaller. AR 0544-45. These numbers undercut Plaintiffs' argument about the detrimental effects of the IBMP.

Plaintiffs' final attack on FWS's Factor D analysis is based on FWS's referral back to other listing factors for which the agency had also discussed the IBMP. Pls. Br. at 36. Plaintiffs' attempt to elevate form over substance should be dismissed. FWS's analysis of Factor D contains a discussion that presented the petitioners' claims on this issue and described the multiple interests and multiple jurisdictions governed by the IBMP. AR 0013. Moreover, because the issues raised under Factors B and C relate directly to the IBMP, a reference back to those sections rather than a repetition of the analysis was entirely reasonable.[19]

FWS considered petitioners' claims and the agency's own records, and rationally concluded that the petitions failed to present substantial information on how the actions taken pursuant to the IBMP posed a threat to the Yellowstone bison such that listing may be warranted. *See* AR 0008; 0011. The record shows that the Yellowstone bison population is stable-to-increasing under the existing regulatory mechanism of the IBMP and thus supports FWS's decision that the petitions did not present substantial information under this factor.

E. FWS Reasonably Considered Other Natural or Manmade Factors Under Factor E.

FWS analyzed the concerns raised in the petitions about genomic extinction and climate change and offered a rational explanation for its determination that the petitions had not presented substantial information suggesting listing may be warranted based on these natural or manmade factors. AR 0013-15. Genomic extinction can stem from hybridization and the related issue of introgression, which involves genes flowing between species as a result of hybridization

[19] FWS also discussed the IBMP as part of its analysis of Factor A. AR 0005.

"followed by backbreeding of the hybrid offspring to their respective parental populations." AR 2824. For bison in general, hybridization has often occurred with cattle. The issue of hybridization was raised by both petitions, however, FWS found no evidence that Yellowstone bison in particular are at risk because of the lack of evidence of cattle-gene introgression. AR 0014. In fact, both petitions acknowledged that the Yellowstone bison herd is one of the few bison herds that exhibits no evidence of cattle-gene introgression. *Id.* FWS also placed weight on the geographic isolation of the Yellowstone bison as well as the disease management practices under the IBMP that preclude any hybridization with cattle. *Id.*

Geographic isolation also factored into FWS's reasonable analysis of the first petition's assertions about the threats posed by climate change. AR 0015. The first petition raised concerns about the impacts of drought conditions on the migration of bison out of YNP, but FWS found no evidence in either the petitions or their sources that, given the unique topography of the Park, dispersal out of the Park is likely to occur as a result of drought conditions. AR 0015. FWS also considered the first petition's suggestion that a reduction in snow pack could lead to the migration of bison from YNP southward to Grand Teton National Park, which in turn could lead to interbreeding with the Jackson herd in Grand Teton – a herd with evidence of hybridization with cattle – which in turn could lead to a decline in the genetic viability of Yellowstone bison, which in turn could put the Yellowstone bison at risk of extinction. AR 0413. FWS determined that the petitions had not presented substantial information that this series of hypotheticals was likely enough to indicate listing may be warranted under Factor E. In particular, FWS said it lacked information on what extent of snow pack reduction would spur such migration, or whether snow would reach such levels. AR 0015. FWS also determined that there is no evidence that migration occurs between the Yellowstone and Grant Teton herds, which is likely due to the

herds being separated by the Continental Divide and an expansive coniferous forest. *Id.* Separate and apart from that hypothetical scenario, FWS concluded that Yellowstone bison are likely to be flexible with any climate changes that may occur in the future. *Id.* The record demonstrates that FWS reasonably assessed the information before the agency, and Plaintiffs' arguments to the contrary should be rejected. *See* Pls. Br. at 27-28, 37-39.

Plaintiffs focus their Factor E argument on what they call the "foreseeable risk" of increased interactions between bison from the Yellowstone and Jackson herds as a result of climate change. Pls. Br. at 37. But Plaintiffs themselves have indicated that this is highly unlikely because in their petition, which endeavored to show that the Yellowstone bison was a discrete population (and therefore met the criteria for a DPS), Plaintiffs argued that "there is substantial evidence that Yellowstone bison are geographically isolated from *all* other populations." AR 0392 (emphasis added). This concession severely undermines their argument on Factor E, especially when combined with the variables of when and how climate change may affect the movement of Yellowstone bison.

Similarly, Plaintiffs' assertions about migration between the YNP and Jackson herds is undermined by their own petition. Plaintiffs' brief assails FWS for concluding that "there is no evidence that migration occurs between the Jackson and YNP herds," Pls. Br. at 27 (quoting AR 0015), yet their petition stated that "there is no evidence of *any* migration of bison from the Jackson bison herd that congregates in two areas (Antelope Flats and Wolf Ridge Road) within Grand Teton National Park during the rut to Yellowstone" and describes the handful of bison that have moved southward to Jackson as "*rare* occasions."[20] AR 0392 (emphasis added). FWS

[20] Plaintiffs criticize FWS's reference to page 77 (AR 3001) in the Gates *et al.* study in support of its conclusion. Pls. Br. at 27-28. Although page 77 focuses on archaeological information, just two pages later, on page 79 (AR 3003), the study's authors wrote: "The closest contemporary

reasonably concluded that the petition did not provide substantial information indicating that listing may be warranted based on such migration for the same reasons Plaintiffs contended the Yellowstone bison herd is discrete. Even those "rare occasions" of bison moving southward do not provide grounds for finding FWS's action to be arbitrary or capricious because the only examples of bison that moved southward from YNP and came back to rut in YNP were bulls, *see* AR 3017, 0392, which could not themselves bring back any hybridized genes to the Yellowstone herd. Some cows followed those bulls to Jackson, but there is no evidence that any of those cows bred with Jackson bulls and returned to YNP with the calves. Therefore, the scintilla of evidence that Plaintiffs provide about a handful of bulls does not provide substantial information indicating that listing may be warranted under Factor E.

Plaintiffs' other attempts to bolster their argument also fail. First, Plaintiffs try to draw a distinction between the "relative probability of the risk" and the "magnitude of the risk," but such a distinction is not supported by any statutory or regulatory language. *See* Pls. Br. at 37-38. The agency was well within its discretion to describe the issue of genomic preservation as "important" but at the same time determine there was no evidence of risk on this front. AR 0014-15. Second, Plaintiffs suggest that FWS misconstrued the information in Plaintiffs' petition and required Plaintiffs to provide conclusive evidence. Pls. Br. at 27-28, 38. To the contrary, FWS acted reasonably in noting the lack of information regarding snow pack, and not accepting petitioners' unsupported statements. Indeed, it would be a waste of agency resources to require

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population is in the Jackson Valley, separate from YNP bison ranges by the Continental Divide and an expansive tract of coniferous forest." AR 3003. Thus, despite an incorrect page cite, the study supports FWS's conclusion. The conclusion is also supported by page 93 (AR 3017) of the study because, as described above, a few rare examples of bison movement do not translate into substantial information regarding the possibility of interbreeding with the Jackson herd and genomic extinction.

FWS to issue a positive 90-day finding on such speculation, and then spend more resources on a 12-month status review. Further, the 90-Day Finding simply did not require "conclusive evidence"; instead, it highlighted the lack of substantial information indicating that listing may be warranted. Third, Plaintiffs' contention that FWS committed a "type II logical error" misses the mark because the agency did not conclude that the "null hypothesis is true." Pls. Br. at 28. Unlike the case cited by Plaintiffs, *Natural Resources Defense Council v. Rauch*, -- F. Supp. 3d --, No. 15-CV-198 (RDM), 2017 WL 1155688 (D.D.C. Mar. 25, 2017), which involved a 12-month status review, Plaintiffs have challenged FWS's 90-Day Finding, and thus Plaintiffs have the burden of providing substantial information to support moving to a more thorough 12-month status review where FWS is required to conduct a comprehensive review of the best available scientific information.

FWS correctly determined that plaintiffs did not present substantial evidence pertaining to Factor E.

III. Plaintiffs' Request for an Order Requiring FWS to Complete a 12-Month Status Review Should be Rejected.[21]

Although Federal Defendants do not believe that any remedy is warranted in this case, they submit that if Plaintiffs were to succeed on the merits, the only appropriate remedy would be to "hold unlawful and set aside" agency action found to be arbitrary, capricious, or an abuse of discretion or contrary to law. 5 U.S.C. § 706(2). A remand to the agency for a reconsideration of its decision would be fully consistent with the normal course of judicial review of agency decisions under the standards set by the APA. *See Fla. Power & Light Co. v. Lorion*, 470 U.S.

[21] Plaintiffs request oral argument in this case. Pls. Motion for Summary Judgment at 2. Federal Defendants do not oppose Plaintiffs' request that the Court hold oral argument in this case. Federal Defendants leave it to the Court to determine whether it believes oral argument would assist the Court in resolving the parties' cross-motions for summary judgment.

729, 744 (1985) (stating that if the record does not support the agency action, the agency has not considered all relevant factors, or the reviewing court cannot evaluate the challenged action, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999) ("when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards.") (citations omitted).

Plaintiffs ask this Court to order FWS to proceed with a 12-month status review. Pls. Br. at 39. This approach would impermissibly direct the agency to make a positive 90-day finding. *See Nat'l Tank Truck Carriers v. EPA*, 907 F.2d 177, 185 (D.C. Cir. 1990) ("We will not, indeed we cannot, dictate to the agency what course it must ultimately take . . . that choice is the agency's and not ours."). Plaintiffs rely on *Colorado River Cutthroat Trout* as an example of a court directing such an outcome, but that case is inapposite. *See* Pls. Br. at 38-39. There, the court determined that such relief was appropriate because the agency had looked beyond the material in the petition, which in effect began the 12-month status review, and because the agency's 90-day finding had been delayed for more than four years. *Colo. River Cutthroat Trout*, 448 F. Supp. 2d at 178. Neither of those circumstances is present here, and numerous other examples show that remand of the 90-Day Finding would be the only appropriate remedy in this case. *E.g.*, *Humane Society of the U.S. v. Pritzker*, 75 F. Supp. 3d 1, 15 (D.D.C. 2014); *Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1205 (D. Or. 2003).

CONCLUSION

For all the reasons stated herein, Plaintiffs' motion for summary judgment should be denied, and Federal Defendants' cross-motion for summary judgment should be granted.

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Respectfully submitted,

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