IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

GENERAL LAND OFFICE OF THE STATE OF TEXAS, Plaintiff, v. UNITED STATES FISH AND WILDLIFE SERVICE, *et al* Defendants.	No. A-17-CA-00538-SS

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

ORAL HEARING REQUESTED

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To the Honorable Sam Sparks, United States District Judge:

Plaintiff General Land Office of the State of Texas files this Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Plaintiff respectfully moves this Court for an order granting summary judgment on its sole remaining claim. (*See* Dkt. No. 56, Corrected Second Amended Complaint at p.18 (Second Claim for Relief)). There is no triable issue of material fact regarding the issue of whether the Defendants United States Fish & Wildlife Service, *et al*. have impermissibly denied the Petition to Delist the Golden-Cheeked Warbler as an endangered species by using an incorrect legal standard to consider whether the Petition to Delist contained "substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A). On this basis, because the Petition to Delist was impermissibly denied by the Defendants, Plaintiff is entitled to judgment as a matter of law, and the denial should be reversed. Plaintiff's Motion for Summary Judgment is based on the pleadings and administrative record filed in this action, as well as the accompanying memorandum and declaration, the entire record of proceedings before this Court, and any additional response, evidence, or argument that counsel will make at or before any hearing. Pursuant to Rule CV-7(h), Plaintiff hereby requests an oral hearing on this motion.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff General Land Office of Texas ("GLO") moves the Court to set aside the 90-day finding of the United States Fish and Wildlife Service (the "Service") denying a Petition (the "Petition") to remove the golden-cheeked warbler (the "Warbler") from the list of endangered species. In denying the Petition, the Service violated the Endangered Species Act ("ESA") (16 U.S.C. §1531, et seq.) and its implementing regulations (50 C.F.R. §424.01, et seq.), as well as the Administrative Procedure Act ("APA") (5 U.S.C. §551 et seq.).

Despite overwhelming evidence in the administrative record that substantial scientific information exists that would lead a "reasonable person to believe" that the Petition should be granted, *see* 50 C.F.R. § 424.14(b)(1), the Service impermissibly discounted or ignored numerous scientific studies showing that the Warbler is thriving and no longer needs the protections afforded by the ESA. At the same time, the Service cherry-picked snippets of other studies in an effort to justify its denial of the Petition. In so doing, the Service conducted an impermissibly one-sided review of the Petition that is not sanctioned by the ESA, its implementing regulations, or applicable case law. Accordingly, the denial of the Petition should be reversed by this court.

II. LEGAL BACKGROUND OF THE ENDANGERED SPECIES ACT

A. Listing of Species

The ESA was adopted in 1973 in an effort to protect species threatened with extinction. See H.R. Rep. No. 93-412, at 4-5 (1973). Before a species receives protection under the ESA, it must be listed by the Secretary of the Interior (the "Secretary") as either "endangered" or "threatened." 16 U.S.C. § 1533(a). The Secretary has delegated this authority to the Fish and Wildlife Service (the "Service"). 50 C.F.R. § 402.01(b). An "endangered" species is one "which

is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. §1532(6). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. §1532(20). The listing determination must be based on certain factors using the "best scientific and commercial data available." 16 U.S.C. §1533(b)(1)(A). Economic or other factors may not be considered in making a listing determination.

A species will be listed if it is endangered or threatened due to any one or a combination of the following 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;
>
> (D) the inadequacy of existing regulatory mechanisms; [or]
>
> (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1).

B. <u>Designation of Critical Habitat</u>

The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved." 16 U.S.C. §1531(b). To achieve that purpose, under Section 4 of the ESA, when listing a species as threatened or endangered, the government has a concurrent duty to designate critical habitat for that species "to the maximum extent prudent and determinable." 16 U.S.C. §1533(a)(3)(A)(i); *see also id.* § 1533(b)(6)(C) (permitting the Secretary to extend the deadline for designating critical habitat up to two years

after the publication of the proposed rule to list the species if critical habitat is not "determinable" at the time of listing).

The ESA defines "critical habitat" as either "the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which there are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and "specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A).

Designating critical habitat is the most effective way of protecting species and was at the forefront of legislators' minds during the initial debates on the ESA: "Often, protection of habitat is the only means of protecting endangered animals which occur on nonpublic lands." S. Rep. No. 307, 93 Cong., 1st Sess. 4 (1973). In 1978, Congress amended the ESA to expressly link the timing of the critical habitat designation to the decision to list a species. 16 U.S.C. §1533(a)(3). The duty to designate critical habitat is a "non-discretionary duty" and a "congressional mandate." *Schoeffler v. Kempthorne*, 493 F.Supp.2d 805, 809 (W.D. La. 2007).

In the years since the enactment of the 1978 Amendments, courts have regularly emphasized the central importance of designating and protecting critical habitat in the ESA. *See, e.g., Catron County Board of Commissioners v. FWS*, 75 F.3d 1429, 1437 (10th Cir. 1996) ("[T]he core purpose of the ESA is to prevent extinction of species by preserving and protecting the habitat on which species depends from the intrusive activities of humans."); *Palila v. Hawaii Department of Land & Natural Resources*, 649 F.Supp. 1070, 1076 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th

Cir. 1988) ("one of the main purposes of [the ESA] was conservation and preservation of the ecosystems upon which endangered species depend.").

In proposed and final listing rules, the Service must state its reasons for failing to designate critical habitat based upon whether designation is "not prudent" or "not determinable." 50 C.F.R. §424.12(a). The Service defines "not prudent" as when any of the following situations exist:

> (i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or (ii) Such designation of critical habitat would not be beneficial to the species, including for reasons that the present or threatened change to the species habitat or range does not pose a threat to the species, or whether any areas meet the definition of "critical habitat."

Designation of critical habitat is "not determinable" when one or both of the following situations exist: "(i) There is insufficient data to perform required analyses; or (ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of 'critical habitat.'" 50 CFR § 424.12(a)(1) & (2).

C. <u>Effects of Listing and Designation</u>

Only listed "endangered" species are specifically protected by Section 9 of the ESA, which, among other things, makes it unlawful for any person to "take" such species. 16 U.S.C. §1538(a)(1)(b). The term "take" under the ESA means to "harass, harm, hunt, pursue, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. §1532(19). ESA Section 4(d), however, authorizes Section 9 take protections for merely "threatened" species if such protections are promulgated by rule. 16 U.S.C. § 1533(d). Pursuant to this section, the Secretary of the Interior has issued a general regulation that extends the Section 9 take prohibitions to all threatened species. *See* 50 C.F.R. § 17.31(a).

The designation of a species as endangered or threatened forces property owners to seek permits or approval of activities that could potentially disturb the species. *See* 16 U.S.C. § 1539(a)

(discussing permitting provisions). The ESA prohibits takes of certain endangered and threatened species. *See* 16 U.S.C. § 1538(a)(1)(B); see also 50 C.F.R. § 17.21(c) (2016) (discussing endangered species takes). A "take" is broadly defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to engage in any such conduct. *See* 16 U.S.C. § 1532(19). Consequences of an unauthorized take include civil and criminal penalties, including fines of up to $50,000 and imprisonment for up to one year. 16 U.S.C. § 1540.

Prohibited actions under the ESA include import or export, take, possession and specified other acts, including but not limited to engaging in interstate or foreign commerce, and sale or offering for sale a threatened or endangered species, as the case may be. 50 C.F.R. §17.21(a)-(f).

Under Section 7 of the ESA, federal agencies must engage in a consultation process with the Secretary of the Interior if they believe their project on any property may affect endangered or threatened species. 16 U.S.C. § 1536(a)(2). Under Section 7, the Secretary must provide the consulting federal agency and applicant with a Biological Opinion summarizing the basis for the opinion and detailing how the project will impact a species or its critical habitat. See 16 U.S.C. §1536(b)(3)(A). If jeopardy or adverse modification is found, the opinion must suggest "reasonable and prudent alternatives" that may be taken by the consulting agency or applicant to avoid jeopardy to the species or adverse modification of critical habitat. *Id*.

If it is determined that the "taking of an endangered species or a threatened species incidental to the agency action" will not jeopardize the species' continued existence or result in the destruction or adverse modification of critical habitat of such species, a written (incidental take) statement must be issued that (1) specifies the impact of such incidental taking on the species;

(2) specifies those reasonable and prudent measures that are necessary or appropriate to minimize such impact; and (3) sets forth the terms and conditions with which the agency or applicant must comply to implement the specified measures. 16 U.S.C. §1536(b)(4)(B)(i), (ii) and (iv).

D. Five-Year Status Reviews of Species

Every five years, the Service must conduct a status review of each listed species to determine whether a change in the species' listing status is warranted. 16 U.S.C. §1533(c)(2)(A). During such status reviews, the Service must determine whether any species should: (i) be removed from such list; (ii) be changed in status from an endangered species to a threatened species (i.e., "downlisted"); or (iii) be changed in status from a threatened species to an endangered species (i.e., "uplisted"). 16 U.S.C. §1533(c)(2)(B).

E. Petitions to List, Delist, or Reclassify a Species

An interested person may petition the Service to list, delist, or reclassify the status of a species. 16 U.S.C. § 1533(b)(3)(A). In contrast to the "best scientific and commercial data" standard applied to actually listing a species, the Service reviews listing and delisting petitions for "substantial scientific or commercial information indicating that the petitioned action *may* be warranted." 16 U.S.C. § 1533(b)(3)(A) (emphasis added). "Substantial information is that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted."[1] 50 C.F.R. § 424.14(b)(1). Further, in evaluating substantiality, the Service shall consider whether the petition:

[1] Effective October 27, 2016, this definition was changed 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." 50 C.F.R. § 424.14(h)(1)(i). Because the 90-day finding was issued on May 25, 2016, the standard applied to that decision is the earlier one in effect at that time. *See Buffalo Field Campaign v. Zinke*, 289 F.Supp.3d 103, 106 & n.1 (D.D.C. 2018) (applying the former version of this very rule, rather than the new version, when evaluating a 90-day finding on a petition that was finalized when the older version was in place).

> (i) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved;
>
> (ii) Contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species;
>
> (iii) Provides information regarding the status of the species over all or a significant portion of its range; and
>
> (iv) Is accompanied by appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps.

50 C.F.R. § 424.14(b)(2).

To the maximum extent practicable, within 90 days after receiving a petition, the Service must determine whether the petition presents information meeting the indicated criteria. 16 U.S.C. § 1533(b)(3)(A). This finding is known as the "90-day" finding and is published in the Federal Register. *Id.* If the Service determines that the petition presents substantial information indicating that the petitioned action may be warranted, it commences a "review of the status of the species concerned," which culminates in a "12-month finding" determining whether the petitioned action is warranted. *Id.* § 1533(b)(3)(A), (B).

Upon a positive 90-day finding, the Service is to commence a "12 month review," where the Service reviews the status of the species within 12 months of the receipt of the petition to delist, then makes one of three findings: that the petitioned action is not warranted; that the petitioned action is warranted; or that the petitioned action is warranted but precluded. 16 U.S.C. §1533(b)(3)(A)-(B).

Any negative 90-day finding, denying any further evaluation of a petition, is "subject to judicial review." 16 U.S.C. § 1533(b)(3)(C)(ii).

III. STATEMENT OF FACTS

A. Listing History of the Warbler

The Warbler is a small, migratory songbird that breeds exclusively in parts of Texas. *See* Endangered and Threatened Wildlife and Plants; Proposed Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 18846-01, 18846 (May 4, 1990).

The Warbler was first mentioned by the Service in a Notice of Review published on December 30, 1982, as a species under consideration for addition to the List of Endangered and Threatened Wildlife. 47 Fed. Reg. 251, 58459. At that time, the Warbler was categorized as a species for which the Service had information indicating that a proposal to list the species was "possibly appropriate, but for which substantial data are not currently available to biologically support a proposed rule. Further biological research and field study will usually be necessary to ascertain the status of the taxa in this category, and it is likely that some of the taxa will not warrant listing." *Id*. at 58454. The Warbler remained in that category for both the September 18, 1985 Review of Vertebrate Wildlife [50 Fed. Reg. 37958] and the January 6, 1989, Animal Notice of Review [54 Fed. Reg. 554].

On February 2, 1990, a petition was filed seeking an emergency listing for the Warbler, asserting that the normal listing procedure could be "inadequate to protect the bird and its habitat from imminent destruction from clearing and development." 55 Fed. Reg. 18846, 18847.

On May 4, 1990, an emergency rule listing the Warbler as endangered was published concurrently with a proposed rule to provide for public comment. In the proposed rule, the Service stated that it had determined that an "emergency posing a significant risk to the well-being of the golden-cheeked Warbler" existed. *Id*. at 18847. The emergency rule cited past habitat loss and planned development in Travis County and the City of Austin as immediate threats to Warbler

habitat, and also cited the risk of habitat destruction that might occur before the Warbler could go through the regular listing process. 55 Fed. Reg. 18844-45.

In December of 1990, the final rule listing the Warbler as endangered was published. 55 Fed. Reg. 53153 (Dec. 27, 1990). In the final rule, the Service listed multiple areas and development projects posing threats to Warblers. *Id*. at 53157-58.

Pursuant to the listing factors identified in the ESA, the Service provided the following justifications for the listing of these species as endangered:

Listing Factor A (the present or threatened destruction, modification, or curtailment of its habitat or range): The Service stated "[w]idespread clearing of juniper as a range management practice and urban encroachment continue to threaten the golden-cheeked warbler and its habitat." At that time, the Service found the greatest rate of Warbler habitat loss had occurred in the southern and eastern portions of the Edwards Plateau. The Service also cited habitat fragmentation due to highway construction, proposed residential and commercial developments, and proposed reservoirs and water delivery systems, as well as habitat loss in the Warbler's winter territory in Mexico and Central America. *Id*. at 53156-58.

Listing Factor B (overutilization for commercial, recreational, scientific, or educational purposes): The Service determined that this listing factor did not support listing. *Id*. at 53158.

Listing Factor C (disease or predation): The Service determined that it was difficult to assess the extent of next predation due to the difficulty in observing Warbler nests, but listed scrub jays, blue jays, crows, grackles, feral cats and dogs, rat snakes, raccoons, opossums, and squirrels as nest predators. The Service noted that fire ants "could become a threat." *Id*.

Listing Factor D (the inadequacy of existing regulatory mechanisms): The Service determined that although the Warbler is protected under the Migratory Bird Treaty Act (16 U.S.C.

703 *et seq.*) and was listed as a threatened species by the Texas Parks and Wildlife Department, making it illegal to "shoot or physically harm, possess, sell or transport" Warblers without a permit, there was no provision for the protection of habitat in the regulations. The Service also noted that the City of Austin had limited power to protect Warbler habitat. 55 Fed. Reg. at 53158.

Listing Factor E (other natural or manmade factors affecting its continued existence): The Service determined that "[h]abitat destruction that causes habitat fragmentation is an immediate threat to the golden-cheeked warbler." The Service also listed brown-headed cowbird parasitism and lack of reproduction of deciduous trees as factors affecting the continued existence of the Warbler. *Id*. at 53158-59.

Essentially, the listing decision was based on the following key assumptions: (1) habitat loss and fragmentation due to urbanization and range clearance would continue unchecked; (2) current protections under the Migratory Bird Treaty Act and the Texas' endangered species law were insufficient to protect Warbler habitat; and (3) predation might occur, although the difficulty in observing Warblers made this uncertain. 55 Fed. Reg. 53153, 53153-60.

In the final rule listing the Warbler, the Service did not designate critical habitat. The Service stated that "[c]ritical habitat for this species remains undeterminable at this time." *Id*. at 53156. The Service noted that although satellite mapping was used to identify Warbler habitat, "all the specific elements of the habitat that are critical to the survival of the golden-cheeked Warbler are not known." *Id*. The Service stated that biological studies were being conducted to address the issue, and gave a deadline of May 4, 1992, to determine and designate critical habitat. *Id*. More than 25 years from the date the final listing rule was published, critical habitat for the Warbler remains undesignated by the Service.

B. The Eventual 5-Year Status Review

The Service completed its first five-year status review of the Warbler only in 2014 – 24 years after the initial listing. (R006774).[2] The Service was required but failed to conduct five-year status reviews for 1995, 2000, 2005, and 2010; the record is silent regarding why such five-year status reviews were not conducted prior to 2014. The 2014 five-year status review concluded that the Warbler was still "in danger of extinction throughout its range" and should remain listed as an endangered species. (R006789).

C. The Filed Petition to Delist the Warbler

On June 29, 2015, a group of petitioners submitted to the Service a petition to delist the Warbler (the "Petition to Delist"). The Petition to Delist provided substantial new scientific information indicating that delisting may be warranted.

One of the primary sources relied upon by the Petition to Delist was a 2015 study on the Warbler conducted by the Texas A&M University Institute of Renewable Natural Resources (the "2015 Texas A&M Study"). (M000086). Among other things, the 2015 Texas A&M Study presents new information gathered after the publication of the 2014 five-year status review, in particular that there are approximately five times more Warbler breeding habitat than estimated at the time of the emergency listing in 1990, and approximately 19 times more Warblers than assumed at the time of the emergency listing in 1990. (M000089; M000093). The 2015 Texas A&M Study also summarized the extensive research and analysis that has been performed since 1990 and concluded that the warbler's listing status should be re-examined. The Texas A&M Study

[2] Where Plaintiff cites to the Administrative Record lodged by Defendants, citations beginning with an "R" refer to References and Literature Cited, whereas citations beginning with an "M" refer to the Main Index and PDFs.

concluded that the listing of the Warbler was "based upon a fundamental misunderstanding of the existing abundance and population structure" of the Warbler. (M000087).

The Petition to Delist also provided scientific support showing that the Warbler does not currently meet the ESA's definition of "endangered" or "threatened," and is not today "in danger of extinction throughout all or a significant portion of its range," and is unlikely to become so in the foreseeable future. (M000048). The Petition to Delist pointed to research indicating that there is a consensus among the scientific community that breeding Warblers inhabit a much wider range of habitat types than were identified in the early studies on which the Service relied in making its listing determination. (M000049).

The Petition to Delist pointed out that "[t]he [2014] Five-Year Review did not . . . take advantage of the work already completed by Groce, *et al*. (2010) reviewing the state of scientific knowledge concerning the warbler." (M000054). The Petition to Delist also noted that the 2014 5-year status review, which the Service called the "best available body of science known to the Service pertaining to the status of the warbler," failed to consider a 2012 study by Michael L. Morrison, *et al*., which estimated a much larger Warbler habitat than originally believed when it was listed in 1990, and ignored at least eight other studies which estimated a much larger Warbler habitat and instead relied upon the outdated 1990 Wahl study and the 2007 SWCA study. (M000058-59).

The Petition to Delist also pointed out that, although the original listing asserted that fire ants could be a threat to the Warbler, no evidence was provided to support that assertion; it also cited studies contradicting the predation of the Warbler by fire ants or other birds or mammals, and showing the limited effect of brood parasitism. (M000065).

On December 11, 2015, the petitioners submitted supplemental information (the "Supplement") in support of the Petition to Delist. (M000114). The Supplement "identifie[d] actions and events that have addressed the five factors for listing the warbler and identifie[d] the requirements of the 1992 Recovery Plan and draft 1995 Golden-Cheeked Warbler Population and Habitat Viability Assessment Report that have been achieved." (Supplement at p. 2, M000115).

D. The Service's Denial of the Petition to Delist the Warbler

On May 25, 2016, the Service issued a negative 90-day finding, denying the Petition to Delist. (M000440 (Petition Review Form); M000458 (Federal Register notice)). The Service acknowledged that the Warbler's population size and potential range were larger than originally estimated in the original 1990 listing, but noted that "threats of habitat loss and habitat fragmentation are ongoing and expected to impact the continued existence of the warbler in the foreseeable future." (M000449). Determining that the Petition to Delist did "not present substantial information not previously addressed in the 2014 5-year review," the Service concluded the Warbler "has not been recovered, and due to ongoing wide-spread destruction of its habitat, the species continues to be in danger of extinction . . . ." (M000449).

E. The 60-Day Notice Preceding the Present Litigation

Before filing suit, a potential plaintiff must comply with the ESA's "notice and delay" provision, which states that "[n]o action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary" of the alleged violation. 16 U.S.C. § 1540(g)(2)(C). On March 1, 2017, more than 60 days prior to the filing of the initial complaint in this action, GLO provided Defendants written notice of violation in accordance with this provision. (*See* Declaration of Mark McAnally ("McAnally Decl."), ¶ 3 & Ex. 1 thereof, attached hereto.).

On June 5, 2017, Plaintiff GLO filed a lawsuit in this Court challenging the 90-day finding. (Dkt. No. 1).

IV. STANDARD OF REVIEW

"[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). "Summary judgment is the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review." *Buffalo Field Campaign v. Zinke*, 289 F.Supp.3d 103, 108 (D.D.C. 2018) (evaluating negative 90-day finding under the ESA) (quoting *Blue Ocean Institute v. Gutierrez*, 585 F.Supp.2d 36, 41 (D.D.C. 2008)). The court's review of an agency's decision is limited to the administrative record already in existence. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "If the moving party meets the initial burden of showing there is no genuine issue of material fact, the burden shifts to the nonmoving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Allen v. Rapides Parish Sch. Bd.*, 204 F.3d 619, 621 (5th Cir. 2000) (quoting *Engstrom v. First Nat'l Bank*, 47 F. 3d 1459, 1462 (5th Cir. 1995)).

Section 704 of the APA states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The APA mandates that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

5 U.S.C. § 704. ESA section 4(b)(3)(C)(ii) explicitly makes "not substantial" 90-day findings reviewable by federal courts. 16 U.S.C. § 1533(b)(3)(C)(ii) ("Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review."). Therefore, this case is properly brought pursuant to the APA and ESA section 4; a negative 90-day finding is final agency action subject to judicial review. *Western Watersheds Project v. Norton*, No. CV 06-00127-S-EJL, 2007 WL 2827375, at *3 (D. Idaho Sept. 26, 2007).

In order to prevail on its claim, GLO must establish that the 90-day finding denying the Petition to Delist violated the APA, which provides that a court must hold unlawful and set aside agency action, findings, and conclusions that are: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. §706(2)(A)-(D).

An agency order is lawful only if it "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983) (citation omitted). The court must consider whether the agency acted within the scope of its authority, whether the agency adequately explained its decision, whether the agency based its decision on the facts in the record, and whether the agency considered the relevant factors. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

Agency action is arbitrary and capricious when "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 Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A reviewing court must undertake a "thorough, probing, in-depth review" of the agency's decision and then decide whether it was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971).

V. ARGUMENT

A. GLO Has Standing to Bring this Action

1. Constitutional Standing under Article III

Article III of the Constitution limits federal judicial power to cases or controversies. U.S. Const., art. III, § 2, cl.1. In order to state an Article III case or controversy, a plaintiff must satisfy three elements to establish standing: (1) injury-in-fact; (2) a causal connection such that the injury is "fairly traceable" to the challenged action of the defendant; and (3) a "likelihood" that the injury will be redressed by a favorable decision, as opposed to a mere speculation of redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

a) Injury in Fact

GLO has suffered an injury in fact, which is an invasion of a legally protected interest that is: (1) concrete and particularized; and (2) actual or imminent, not conjectural or hypothetical. *See Lujan*, 504 U.S. at 560-61. GLO has suffered an injury in fact due to the continued, unlawful maintenance of the Warbler on the list of endangered species and, most recently, the failure of the Service to properly consider the Petition to Delist the Warbler, as required under the ESA and the Service's own petition review regulations because GLO owns property occupied by the Warbler. (McAnally Decl., ¶ 4).

The GLO is the oldest state agency in Texas, established by the Constitution of the Republic of Texas. Upon annexation by the United States, Texas retained control of its public

lands. Texas constitutionally dedicated half of these public lands to the Permanent School Fund, which is maintained for the benefit of the public schoolchildren of the State of Texas. Tx. Const. art. VII § 2. The GLO is responsible for maximizing revenues from Texas public school lands. Tex. Nat. Res. Code Ann. § 31.051. Under the Texas Constitution, proceeds from the sale and mineral leasing of public school lands flow to the Permanent School Fund via the GLO. Tx. Const. art. VII § 5(g).

Additionally, the GLO owns and maintains State Veterans Cemeteries to honor those who have served, as well as State Veterans Homes that provide care and dignity for veterans, their spouses, and Gold Star parents. (McAnally Decl., ¶ 4). The ability of the GLO to maximize revenues from Texas public school lands, and to maintain State Veterans Cemeteries and State Veterans Homes to a high standard, is undermined by the restrictions imposed due to the presence of Warblers or Warbler habitat on GLO properties. (McAnally Decl., ¶¶ 7-10 & Ex. 2 thereof).

The presence of Warblers on GLO property subjects certain GLO's actions on its property to the time consuming and costly requirements of Sections 7 and 9 of the ESA. For example, in Bexar and Kendall counties, GLO owns a 2,316.45-acre parcel of land – approximately 84.5% of which contains Warbler habitat. (McAnally Decl., ¶¶ 9-10). In order to clear or develop the property under the Service's mitigation program, GLO must replace every one acre of cleared land with three acres of Warbler habitat. (McAnally Decl., ¶11 & Ex. 2 thereof). This encumbrance on the property makes development of the property vastly more expensive and significantly decreases its market value if sold, resulting in less money for the Permanent School Fund, State Veterans Cemeteries, and State Veterans Homes. (McAnally Decl., ¶¶ 7-8, 12-15 & Ex. 3 thereof).

In fact, after conducting three studies on the presence of Warbler habitat on this property, experts concluded that the presence of Warbler habitat decreased the property's value by

approximately 35%. (McAnally Decl., ¶ 13 & Ex. 3 thereof). GLO also owns and leases 429 acres in Williamson County, approximately 5 miles east of Jonah. Warblers inhabit areas located throughout Williamson and surrounding counties. (McAnally Decl., ¶ 14).

The reduction in property value caused by the presence of Warbler habitat translates to less money available for fulfilling GLO's mission to maximize revenues from Texas public school lands for the benefit of Texas schoolchildren. (McAnally Decl., ¶ 15). Those portions of GLO's lands that have been surveyed and confirmed as occupied or potential Warbler habitat are now diminished in value and cannot be used without either risking an enforcement action by the Service or a citizen suit alleging incidental take of Warblers, incurring the expense of seeking an incidental take permit from the Service, or incurring the expense of complying with state and local measures the Service has deemed sufficient to avoid "take" of Warblers. The Fifth Circuit has recognized that the "stigma" associated with ESA-listed species and their habitats can result in decreased property values sufficient to establish injury-in-fact. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 463 (5th Cir. 2016), *cert. granted*, *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 138 S.Ct. 924 (Mem) (2018).

GLO is injured on a current and ongoing basis by the maintenance of the Warbler on the list of endangered species—which drives the continued application of the ESA regulatory regime (including potential for civil and criminal enforcement for violations of the ESA take prohibitions) and the associated valuation stigma based on constrained future land uses—where the Warbler does not warrant listing under the ESA. By virtue of the ongoing listing of the Warbler (and, specifically in this action, the Service's failure to review the Petition to Delist in accordance with the standards required by its own regulations and the ESA itself), GLO continues to be subject to regulatory burdens and thus actually and imminently injured. *See Markle Interests, LLC v. U.S.*

Fish & Wildlife Serv., 40 F.Supp.3d 744, 757 (E.D. La. 2014) (rejecting as "utterly frivolous" federal defendants' assertion that plaintiffs owning land designated as critical habitat for an endangered species lacked standing because they failed to establish actual or imminent injury sufficient to challenge the critical habitat designation), *aff'd*, 827 F.3d 452 (5th Cir. 2016), *cert. granted*, *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 138 S.Ct. 924 (Mem) (2018). Here, because GLO is continually burdened by unwarranted regulation and devaluation of its lands under the ESA, and because that regulation hinges upon the listing status of the Warbler, GLO has standing to contest the 90-day finding that maintains that listing status.

b) Causation

There exists a direct causal connection between GLO's injuries and the Service's conduct complained of, namely, failure of the Service to properly apply the relevant petition review criteria at the 90-day finding stage. GLO's injuries are fairly traceable to the challenged action of the Service and are not the result of the independent action of some third party not before this Court. *See Lujan*, 504 U.S. at 560-61. The Service is the federal agency charged with implementing the ESA, and GLO's injuries are directly attributable to the Service's original listing of the Warbler and the Service's erroneous 90-day finding. (McAnally Decl., ¶ 16). A direct consequence of the flawed 90-day finding is the continued listing of the Warbler that injures GLO. Therefore, there can be no question that GLO's injuries are fairly traceable to the Service's arbitrary and capricious 90-day finding. If the Service had reached a positive 90-day finding, concluding that the petition presented substantial information that delisting was warranted, the Service would have proceeded toward determining under a 12-month review whether the Warbler should be delisted. By making the 90-day finding, the Service has blocked the delisting process, thereby continuing the listing of the Warbler.

c) Redressability

It is "likely," as opposed to merely "speculative," that GLO's injuries will be redressed by a favorable decision of this Court. *See Lujan*, 504 U.S. at 561. It is likely, as opposed to speculative, that the requested injunctive and declaratory relief reversing the 90-day finding would redress GLO's injuries. The Petition to Delist demonstrates that there is substantial scientific and commercial information indicating that delisting may be warranted. A judgment in favor of GLO would at the very least require the Service to reconsider the Petition to Delist under the proper standards and to publish a new 90-day finding indicating whether delisting may be warranted, thereby removing the first roadblock to delisting the Warbler. *See, e.g.*, *Mass. v. Envtl. Prot. Agency*, 549 U.S. 497, 517-18 (2007) (redressability is met if relief will require federal agency to reconsider a procedural step connected to the substantive result); *see also Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002) (same).

2. Prudential Standing

GLO's grievances fall within the zone of interests protected by the ESA, and therefore GLO is able to demonstrate prudential standing. Prudential standing is a judicially self-imposed limit on the exercise of federal jurisdiction that supplements Article III standing and requires that plaintiffs' grievances arguably fall within the zone of interests protected or regulated by the statutory provision invoked in the suit. *Bennett v. Spear*, 520 U.S. 154, 162-63 (1997). The breadth of the zone-of-interests test varies according to the provisions of law at issue and is considered "generous" under the APA. *Id.* at 163.

GLO's grievances fall within the zone of interests protected by ESA Section 4, which specifically provides that negative 90-day findings on petitions to list, delist, and reclassify species are judicially reviewable. 16 U.S.C. § 1533(b)(3)(C)(ii). Similar to the circumstances described in *Bennett v. Spear*, where the Supreme Court opined that the ESA establishes an expansive zone

of interest for parties that file an action under the citizen suit provision, here the ESA establishes an expansive zone of interest for parties that file an action challenging a negative 90-day finding. *Bennett*, 520 U.S. at 165. Accordingly, GLO meets the "generous" zone of interest test to satisfy prudential standing.

B. The Service Applied an Unlawfully Stringent Standard

"The 'substantial evidence' standard applied at the 90-day finding period is not a rigorous one. A petitioner need not present 'conclusive evidence regarding' threats to a species." *Buffalo Field Campaign v. Zinke*, 289 F.Supp.3d 103, 106 (D.D.C. 2018) (citing *Humane Soc'y of the U.S. v. Pritzker*, 75 F.Supp.3d 1, 14 (D.D.C. 2014)); *see also Ctr. for Biological Diversity v. Morgenweck*, 351 F.Supp.2d 1137, 1140 (D. Colo. 2004) ("[T]he ESA does not require . . . conclusive evidence . . . to go to the next step."); *Moden v. U.S. Fish & Wildlife Serv.*, 281 F.Supp.2d 1193, 1203 (D. Or. 2003) ("[T]he standard in reviewing a petition to delist does not require conclusive evidence that delisting is warranted."). "And in making its 90-day determination, the Service is confined to the information contained in the petition or the Service's files." *Buffalo Field Campaign*, 289 F.Supp.3d at 106 (citations omitted).

In its 90-day finding, the Service failed to take into account the substantial scientific or commercial information presented, in violation of 16 U.S.C. § 1533(b)(3)(A). By failing to consider under the proper standard the substantial scientific data presented in the Petition to Delist and the accompanying 2015 Texas A&M Study, the Service has violated not only the statutory requirement but also the implementing regulations set forth in 50 C.F.R. § 424.14(h)(1).

As described in detail above, Section 4 of the ESA sets forth the Service's obligations with respect to petitions to list or delist a species. At the 90-day finding stage, the Service must 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)-(B). At the 12-

month stage, which commences upon a positive 90-day finding, the Service must make a finding that the petitioned action *is or is not* warranted. *Id*.

Here, Congress has established a two-part process by which petitions to list and delist species should be subjected. First, the Service is to review a petition to determine whether it presents "substantial scientific and commercial information indicating" that the requested action "may be warranted." 16 U.S.C. § 1533(b)(3)(A). A second, more searching "review of the status of the species" commences upon a positive 90-day finding, the purpose of which is for the agency to determine whether the petitioned action actually is or is not warranted, as opposed to determining merely whether the action may be warranted. *Id*. at § 1533(b)(3)(B).

The Service's former Petition Review Regulations – the ones applicable to the 90-day finding at issue in this action[3] – defined "substantial information" as "that amount of information that would lead a *reasonable person* to believe that the measure proposed in the petition *may be* warranted." 50 C.F.R. § 424.14(b)(1) (2014) (emphasis added). The same regulations further explain that in making a determination on petitions to list or delist species, the Service must consider, among other things, whether the petition "[c]ontains detailed narrative justification for the recommended measure, describing, *based on available information*, past and present numbers and distribution of the species involved and any threats faced by the species" and "[p]rovides information regarding the status of the species over all or a significant portion of its range." *Id*. at § 424.14(b)(2) (2014) (emphasis added).

As set forth in detail *infra,* the information in the Petition to Delist unquestionably would lead a *reasonable person* to *believe* that delisting *may be* warranted. Case law reinforces the plain language and structure of the ESA, establishing that a lower standard of evidence is required to

[3] *See* supra at n.1.

reach a positive 90-day finding than is required for the Service to reach a positive 12-month finding. *See, e.g.*, *Humane Soc'y of the U.S. v. Pritzker*, 75 F.Supp.3d 1, 14–15 (D.D.C. 2014) (holding as arbitrary and capricious the agency's application of an "inappropriately high standard of evidence" at the 90-day finding stage and that evidence provided in the petition "more than meets that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.").

Where the Service has required conclusive evidence at the 90-day finding stage, courts have routinely held the agency applied too high a burden on petitioners, in violation of the APA. *Pritzker*, 75 F.Supp.3d 1, 14-15; *see also Moden v. U.S. Fish & Wildlife Serv.*, 281 F.Supp.2d 1193, 1204 (D. Or. 2003) ("the standard for evaluating whether substantial information has been presented by an 'interested person' is not overly-burdensome, does not require conclusive information, and uses the 'reasonable person' to determine whether . . . action [to delist] may be warranted"); *Ctr. for Biological Diversity v. Kempthorne*, Case No. CV 07-0038-PHX-MHM, 2008 WL 659822, at *12 (D. Ariz. Mar. 6, 2008) (concluding that, where there is reasonable disagreement among scientists of the Service, the "may be warranted" standard is met, and the Service should proceed with a status review in which it may "employ the more-searching 'is warranted' standard" and reiterating that conclusive evidence is not required at the preliminary stage); *Ctr. for Biological Diversity v. Morgenweck*, 351 F.Supp.2d 1137, 1141–44 (D. Colo. 2004) (setting aside negative 90-day finding where the agency applied an incorrect standard to require conclusive evidence that the petitioned-for action was warranted); *Colo. River Cutthroat Trout v. Kempthorne*, 448 F.Supp.2d 170, 176–77 (D.D.C. 2006) (holding that the 90-day finding stage is intended to be a "threshold determination" and a "less searching review").

The Service has violated the APA by agency action that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law by failing to apply the proper standards in response to the Petition to Delist. 5 U.S.C. §706(2)(A).

A significant flaw throughout the Service's reasoning is that it has never articulated a rational connection between its primary reason for listing the Warbler (habitat destruction) and its decision not to designate critical habitat. Claiming that the Warbler is endangered while at the same time refusing to designate critical habitat for decades is both logically and legally inconsistent. The Service cannot have it both ways. Either critical habitat must be designated or the Warbler must be delisted.

"A major goal of the ESA is the recovery of species to the point at which the protection of the ESA is no longer necessary." *Safari Club Intern. v. Jewell*, 960 F.Supp.2d 17, 27-28 (D.D.C. 2013) (quoting M. Lynne Corn *et al*., Cong. Research Serv., RL31654, *The Endangered Species Act: A Primer*, at 5 (2012)). The fact that the Warbler has been listed for nearly three decades without a critical habitat designation strongly supports delisting, especially in light of the new evidence on species recovery brought to the Service's attention in the Petition to Delist. Failure to designate critical habitat for over two decades after listing the Warbler is not only a violation of the mandatory duty set forth in 16 U.S.C. § 1533(a)(3)(A), but refusing to consider delisting under the circumstances of this case is arbitrary and capricious.

The Petition to Delist pointed out substantial information that would lead a reasonable person to believe that delisting of the Warbler may be warranted. The Service, at the 90-day finding stage, is not permitted to evaluate the studies against others so long as they meet the minimum criteria:

> the 90-day standard does not allow the Service to simply discount scientific studies that support the petition or to resolve reasonable

> extant scientific disputes against the petition. Unless the Service explains why the scientific studies that the petition cites are unreliable, irrelevant, or otherwise unreasonable to credit, the Service must credit the evidence presented. In other words, if two pieces of scientific evidence conflict, the Service must credit the supporting evidence unless that evidence is unreliable, irrelevant, or otherwise unreasonable.

Buffalo Field Campaign, 289 F.Supp.3d at 110 (internal citations omitted).

The Service here did not question the basic scientific bona fides of the studies cited in the Petition to Delist, but either ignored them in favor of other studies or resolved any disputes among the literature against the granting of the petition. This was an impermissible standard applied to the Petition to Delist.

1. Warbler Population and Habitat

The Service concluded in its 90-day finding that the 2015 Texas A&M Study "does not present substantial information not previously addressed in the 2014 5-year review for this species and does not offer any substantial information indicating that the petitioned action to delist the species may be warranted." (M000449). The Service provided no credible analysis to support its summary dismissal of the 2015 Texas A&M Study.

The weaknesses in the 90-day finding are numerous. First, in its analysis of Factor A, the Service dismissed the 2015 Texas A&M Study as summarizing "information already known to the Service and discussed in the 5-year review," and praises its 2014 five-year status review as representing "the best available body of science known to the Service pertaining to the status of the warbler." (M000442). But the Service then adds that it "recognizes that the modeling studies described in the 2015 Texas A&M Study do represent the most recent and comprehensive efforts to estimate range-wide warbler habitat and population size to date." (M000442) (emphasis added). Logically, the 2014 five-year status review cannot be the "best available body of science" on the status of the Warbler when the more recent 2015 Texas A&M Study is the most "recent and

comprehensive" research on Warbler habitat and population size, which are key factors in determining the viability of the Warbler's continued listing as endangered.

The Service mentions habitat destruction multiple times throughout the 90-day finding, most prominently in its analysis of Factor A, but also in Factor C, Factor D, and Factor E.[4] This stands in contrast to the Service's refusal to designate critical habitat. How can destruction of the Warbler's habitat be a primary reason for denying the delisting petition when the Service has explicitly stated that it cannot determine which areas of Texas are critical habitat for the Warbler?

Moreover, the record shows that the Warbler population is neither endangered nor threatened. Beardmore, C., *et al*. (1995), created a Population and Habitat Viability Assessment of the Warbler for the Service (the "PVA"), which concluded that around 3,000 breeding pairs would sustain the population for around 100 years, *i.e.*, enough to preclude extinction. (R000981-R000982); *see also* Alldredge, M. (2004) (supporting this conclusion) (R000535). There is more than adequate support that this criteria has not only been met but has been substantially exceeded.

First of all, the recovery plan by the Service in 1992 anticipated that the date of recovery for the Warbler, leading ultimately to delisting, would be 2008. (R007034; R007076). The recovery plan also recognized that the Warbler had "a high potential for recovery." (R007037). Campomizzi, A., *et al*., (2010) shows that older studies, most of which focused on the central portion of the Warbler range, cannot necessarily be extrapolated across the rage, and that the species occupies a much wider range of conditions that previously thought. (R001164).

Recent studies show a wider population of Warblers, even in urban areas. Reidy, J. (2015) indicates uncertainty but shows habitat well occupied by Warblers: "This result suggests that

[4] With regard to Listing Factor B (overutilization for commercial, recreational, scientific, or educational purposes), in the 90-day finding the Service reiterated that it "does not consider overutilization to be a threat to the warbler." (M000444).

habitat within the BCP [Balcones Canyonland Preserve] is not saturated, and either could support more golden-cheeked warblers or that the population is being limited by something other than the local and landscape features we evaluated," (R004458), and indicates a stable warbler population and the ability of the birds to move around between sites over time: "This suggests that there was movement of birds within the BCP from year to year, but that annual variation in population size during our study was relatively low." (R004460); Reidy, J. (2009) (R004466) (shows that urbanization is not harming Warbler survival: ". . . survival in Austin's urban landscape . . . was similar to survival in Fort Hood's rural landscape . . . . Both landscapes likely support self-sustaining populations based on reasonable assumptions for adult survival and number of nesting attempts."). Coldren, C. (1998) found that ". . . warblers did not select for or against residential development. Once a warbler settled on a patch, placement of a territory was not based on the location of residential development next to the patch." (R001529). The study also concludes roads did not necessarily have a pronounced negative impact on Warblers: "Warbler reproductive success did not differ with transportation types. However, distance to the edge increased with increasing transportation density. … This may have been due to differences in vegetation, although I have no data to support or refute that possibility." (R001531).

Newer techniques of estimating Warbler habitat are much improved and provide a substantially greater estimate. Loomis-Austin (2008) (R003047). Recent research, including multiple independent studies—leading up to Mathewson (2012)—showed that the species was actually widely distributed and not isolated across the breeding range, with the actual population size exceeding 200,000 adult males. (R003579). Thus, the total population is well beyond the criteria established for recovery. *See also* Lindsay, D. (2008) (R003015, R003023) ("[t]he sampled sites do not appear to represent isolated lineages requiring protection as separate

management units . . .," and "effective population sizes have not yet become small enough to result in serious erosion of genetic diversity.").

In addition, Groce, J., (2010) summarized breeding habitats for the Warbler, with more recent estimates ranging from around 550,000 to 1.1 million hectares ("ha") (R002504).[5] Biologists participating in a Population and Habitat Viability Assessment Workshop in 1996 recommended maintaining a carrying capacity of 3,000 breeding pairs "to assure a probability of extinction less than 5% over 100 years" in each of the 8 Recovery Regions; they estimated that a "target habitat area" per warbler population (i.e., per Recovery Region) would consist of approximately 13,150 ha (32,500 ac) . . . ." (R002556). The study ". . . estimated warbler winter habitat . . . of 1,115,653 ha," (R002508), which far exceeds the amount of area needed to support the recommended breeding habitat area for the Warbler in Texas.

Recent studies have shown even larger estimates of Warbler habitat. Diamond, D., (2007) lists 1,771,883 ha of total breeding habitat area available for the Warbler. (R001705). Collier, B., *et al*., (2012) shows high occupancy except in the smallest patches, and that very large (11,000 ha) patches occur, and they classified ~1.6 million total ha of habitat, (R001595), concluding that decrease in patch size in the northern portion of range is due primarily but not entirely to natural environmental conditions. (R001596). Russell, F., *et al*. (2002) indicates that juniper, which is required for Warbler breeding, is not declining. (R005649; *see also* Russell, F., *et al*., (2004), R005667 (same); Andruk, *et al*., (2014) (concluding that juniper, required by Warblers for breeding, is increasing in abundance) (R000661). Peak, R. (2007) found that, based on the suggested requirement of a nest survival rate of 0.25 to 0.30 to balance juvenile and adult mortality

[5] A hectare is approximately 2.47 acres. *See* https://www.convertunits.com/from/hectare/to/acre (last visited May 10, 2018).

that "[o]n Fort Hood, nest survival estimates for the Golden-cheeked Warbler (0.32–0.37) have been above this range during the past four breeding seasons, suggesting that, at least in some years, Fort Hood functions as high-quality breeding habitat for this endangered species . . . ." (R003904).

Further, fragmentation is not of concern because the Warbler is widespread, and evolved in a heterogeneous environment. Multiple studies have shown they successfully breed in patches of 15 ha or greater. Robinson, D. (2013) found, in an urban environment (Austin, Texas), that ". . . a minimum patch-size threshold of 13.4 ha and 19.7 ha [i.e., ~30-50 acres] where territory establishment and pairing success occurred, respectively . . . ." (R005505). Thus, small patches are occupied successfully by Warblers even in an urban setting. Anders, A. (2000) shows that the Warbler exhibits very high breeding success, setting forth the following evidence: (1) "Golden-cheeked warbler pairing success (95.0%) and productivity per pair (92.6%) on Fort Hood in 2000 were high relative even to source populations of other neotropical migrant species" (R000646); (2) the Warbler breeds successfully despite differences in habitat fragmentation (patch size): "Despite differences in habitat fragmentation, patch size, and land use patterns on and around the 3 study sites used in 2000, no differences were seen in pairing success, productivity, or age structure between these sites" (R000648); and (3) the Warbler has been increasing in abundance in a well-studied part of its breeding range on Fort Hood (R000649). US Fish and Wildlife Service (2014) acknowledges that successful breeding occurs in small habitat patches: "In their breeding range, GCWA pairs have been found in habitat patches smaller than 10 hectares (ha) (24.7 acres [ac]); however, successful reproduction is more likely if patches of habitat exceed 15 ha (37 ac)." (R006778); *see also* Pruett, L. (2014) (R004150) (experienced (older) males can successfully breed in even small habitat patches).

Moreover, Baccus, J., *et al*., (2007) showed that Warblers would occupy and breed in small (~38 acre) patches even following disturbance (fire): "Fragments >15 ha in size and oval in shape with an intact, interior forest consistently provided suitable habitat for territorial males . . . ." (R000936); *see also* Butcher, J., *et al*., (2010) (R001143) ("We found evidence of a minimum patch size threshold (between 15.0 ha and 20.1 ha) of reproductive success for golden-cheeked warblers . . . . We found no minimum patch size thresholds for presence, territory establishment by males, or pair formation for [warblers] . . . ."). DeBoer, T., *et al*., (2006) shows that habitat patches between 20-100 ha have high (67%) occupancy by Warblers, R001662, that juniper and not total or oak canopy cover is central to Warbler occupying a location; juniper is increasing throughout the warbler range, (R001668), and that isolated patches are occupied by the species across the breeding range. (R001669).

Warblers have also been shown to be able to disperse large distances among small patches. City of Austin (2011) indicates that "[d]ispersal distances observed in 2011 ranged from 0.9 to 11 kilometers and occurred within macrosites (4 of 6 dispersal events, ranging from 0.9 to 3.2 km) and between macrosites (2 of 6, ranging from 3.4 to 11 km). Dispersal between macrosites included Canyon Vista to Vireo Preserve (11 km), and from Vireo Preserve to Emma Long (3.4 km)." (R001240); *see also* City of Austin (2012) ("Dispersal distances ranged from 1.2 to 16 kilometers and occurred within macrosites (2 of 7 dispersal events, ranging from 1.2 to 1.9 km) and between macrosites (5 of 7, ranging from 4.6 to 16 km).") (R001377); City of Austin (2013) ("Dispersal distances ranged from 1.6 to 14.7 kilometers and occurred within macrosites (1 event of 1.6 km) and between macrosites (4 events, ranging from 6.8 to 14.7 km)," (R001290).

If that were not enough, Magness, D. (2006) shows that because of the natural fragmentation of the landscape, Warblers would be expected to be adapted to fragmentation

overall: "Our results suggest that golden-cheeked warblers may be less sensitive to fragmentation than they are to overall habitat loss, which may be due to natural habitat heterogeneity related to the variable terrain," (R003545), and that on the broad, landscape scale, it is not fragmentation per se that matters but rather the amount of woodland available overall: "While this species has some very specific and narrow requirements for nesting habitat, it appears that an overriding influence on habitat occupancy is the amount of juniper–oak woodland in an area of up to 200 ha surrounding a point (or patch) of interest." (R003550). Further, McFarland, T. (2012) shows that fragmentation per se is not necessarily a negative factor but depends on what is being fragmented: "Although fragmentation of habitat is seldom desirable for the warbler, fragmentation of large patches may not always decrease the occupancy probability of resulting patches. For instance, if habitat fragmentation occurs in a large area of habitat and results in large patch fragments (>160 ha), the predicted occupancies of the new patches may not decrease significantly from the original occupancy value, supporting the idea of a patch-size threshold . . . ." (R003603).

And recent research has shown Warblers breed successfully in patches of much less tree cover than originally seen because of the limited scope of early studies. Farrell, S. (2012) conducted a field experiment for Warblers and found that "[p]airing and reproductive success of males was not correlated with canopy cover, as commonly thought. . . . These results suggest the range of habitat within which birds can perform successfully may be greater than is typically observed." (R002147). Klassen, J., *et al*. (2012) found "that warblers will occupy and successfully reproduce in areas with canopy closure as low as 15% and only 3% oak composition," showing that Warblers occupy a much wider range of habitat conditions than previously acknowledged. (R002827). Lopez, R. (2012) shows that Warblers are able to breed successfully despite thinning of woodland understory. (R003121). Morrison, M.L., *et al*., *The Prevailing Paradigm as a*

Hindrance to Conservation (2012),[6] found that the literature shows that Warbler habitat is not more fragmented now that it was historically: "…the distribution of woodlands and grasslands in the Hill Country (an area of approx. 2,000,000 ha and covering about two-thirds of the warbler's breeding range) and estimated that about 55% of the area was historically woodland or forest, compared with a current estimate of 57%." *See* Appendix 1 at 3. It also summarized recent literature showing that the Warbler occupies areas with much less canopy cover that previously acknowledged, and work ". . . has demonstrated that successful breeding regularly occurs in sites with <35% canopy cover," *id*., and also noted that the original federal listing relied heavily on a report by Wahl, *et al*. (1990), which made the (now known to be inaccurate) conclusion that that two-thirds of Warbler habitat occurred in "rapidly changing urban counties in the eastern Edwards Plateau," *id*.

Thus, because the Petition presents substantial scientific or commercial information indicating that delisting *may* be warranted, the Petition to Delist should not have been denied. *See* 16 U.S.C. § 1533(b)(3)(A)-(B). The number, breadth, and depth of the studies, as summarized above, surely would lead a "reasonable person to believe" that the Petition should have been granted. *See* 50 C.F.R. § 424.14(b)(1). The Service discounted the studies cited in the Petition to Delist by referring to competing studies whose interpretation the Service preferred. (M000442-M000443). This is unacceptable at the 90-day finding stage, where "if two pieces of scientific evidence conflict, the Service must credit the supporting evidence unless that evidence is

[6] Although this study is reproduced in the AR, for reasons unknown to the Plaintiff GLO it is not consecutively Bates-numbered as are the other studies in the record. The study may be found as a separate PDF listed alphabetically in the certified record under the primary author's name, "Morrison." However, because Bates numbers for the study were not included by the government, Plaintiff GLO has reproduced the study as an Appendix hereto, for the convenience of the Court. Accordingly, the citations to the Morrison M. L. *et al*, (2012) study reference the specific page numbers as set forth in the Appendix.

unreliable, irrelevant, or otherwise unreasonable to credit." *Buffalo Field Campaign*, 289 F.Supp.3d at 110; *see also id.* at 110-111 (noting that "the Service appears to have taken it upon itself to resolve a disagreement among reasonable scientists . . . The Service thereby applied an inappropriately heightened standard to the evaluation of Buffalo Field's petition," and discussing how the Service in that case "simply picked a side in an ongoing debate in the scientific community, which is improper at the 90-day finding stage. The Court need not defer to an agency's application of the improper legal standard."). Here, the Service simply picked a side without providing justification that the numerous studies cited in the Petition were in any way "unreliable, irrelevant, or otherwise unreasonable to credit." *Id.* Accordingly, because the 90-day finding applied the wrong standard in evaluating the scientific evidence regarding the current success and clear recovery of the Warbler population, it must be vacated. The Service's denial of the Petition on other grounds fares no better.

2. Predation

In its analysis of Listing Factor C (disease or predation), the Service states that the claim of the Petition to Delist that predation does not constitute a significant threat to the continued existence of the Warbler is refuted by the 2014 five-year status review, which concluded that urbanization and habitat fragmentation "have likely resulted in increased rates of predation of warbler nests by a wide variety of animal predators, especially rat snakes." But the 2014 five-year status review merely lists animals which have been known to prey on warbler nests, which the Service acknowledges is a "natural occurrence in [Warbler] habitat," but goes on to extrapolate from these perfectly natural instances of predation the unsupported contention that increased urbanization leads to higher than normal levels of predation. (R006785). There is no concrete support given for this analytical leap, which the Service then relied upon in its denial of the delisting petition.

In fact, Reidy, J. (2009) found Warbler breeding success high despite natural snake predation: "Daily nest survival was 0.971 (95% CI: 0.959–0.980). We observed six predations of females by snakes over 781 observation days during nest days 3–21, resulting in a daily female predation rate of 0.008 (95% CI: 0.003–0.017)." (R004485). Stake, M. (2003) shows that Warblers are subject to the usual range and variation in nest predation as expected for a small songbird: "Snakes were the most frequent predators of golden-cheeked warbler eggs and nestlings, but we suggest that the relative importance of predator types for a bird species may vary regionally, depending on habitat type, landscape composition, or geography…," (R005773), and notes that other predators of Warbler nests were infrequent. (R005774-5776); *see also* Arnold, K., *et al*., (1996) (finding no effect on Warbler habitat range by avian predators) (R00787). A subsequent study, Stake, M., *et al*. (2004), indicated that Warblers are not showing any unusual signs of nest failure, (R005831), and Butcher, J., *et al*., (2010) "failed to find evidence that cowbird parasitism or arthropod biomass were limiting factors." (R001143). Thus, the evidence regarding predation does not support the Service's denial of the Petition.

3. Adequacy of Existing Regulatory Mechanisms

In its analysis of Listing Factor D (adequacy of existing regulatory mechanisms), the Service contended that "an estimated 29 percent of existing breeding season habitat was lost between 1999-2001 and 2010-2011." (M000446). The Service found that existing regulatory mechanisms like the Migratory Bird Treaty Act of 1918 and the Texas Endangered Species Act were not sufficient to protect the Warbler, maintaining that the 2014 5-year status review discussed that "while these regulations do provide some protections for the birds neither 'prohibits habitat destruction, which is an immediate threat to the warbler." (M000445). However, as already pointed out above, the Service has refused to designate critical habitat for the Warbler, making the Service's disparagement of those provisions inexplicable. Additionally, the Service admits in the

90-day finding that it did not consider existing long-term land protections like wildlife preserves and habitat conservation plans in its consideration of Factor D in the 5-year review, though it refers to its consideration of those efforts under Factor A in that review. (M000446). But the 2014 5-year status review in fact did not provide a meaningful analysis of the efficacy of the other regulatory programs, and the 90-day Finding did not provide any meaningful support for the conclusion reached on this Factor. (R006784).

4. Other Natural or Manmade Factors Affecting the Warbler

Finally, in its analysis of the catchall Listing Factor E (other natural or manmade factors affecting the species' continued existence), the 90-day finding failed to address a number of studies adverse to its conclusion, notwithstanding the fact the studies were pointed out in the Petition to Delist. Specifically, the petition cited to the Groce study on the effects of land conversion and Warbler population expansion, as well as the work by Robinson (2013) (R005467), Butcher, *et al*. (2010) (R001143), Magness, *et al*. (2006) (R003545), Coldren (1998) (R001438), Arnold, *et al*. (1996) (R00786), Campomizzi, *et al*. (2012) (R00156), and a 2013 study by Peak and Thompson (2013) (R003908). *See* M000070-M000071. All of those studies supported the relief sought by the Petition to Delist. Nevertheless, the Service conveniently did not address the substantial evidence presented in such studies regarding Factor E.

The Service stated that "habitat fragmentation, habitat degradation, inappropriate habitat management practices, and excessive noise all contribute to reductions in overall warbler habitat quality and present a real and significant threat to the long term viability of the species," along with oak wilt and recreation. (M000447-000448). In discussing each of these threats, the Service stated that they each have the potential to significantly affect Warbler habitat, but did not cite to any examples of instances where this actually has been the case. For instance, the Service states that "catastrophic wildfires have the potential to significantly diminish occupancy by Warblers in

previously occupied habitat." (M000447-M000448). While this may be true as an abstract proposition, nowhere does the Service state that wildfires, or any of the other natural or man-made threats, have actually impacted Warbler habitat in any way. In fact, without being able to determine where the Warbler's critical habitat exists, the Service's conclusions are speculative at best.

The issue of habitat, including fragmentation and patch size, has already has been addressed in the discussion above; as with that issue, there is substantial evidence in the record undermining the Service's contentions that fire, noise, oak wilt, or recreation are threats to the Warbler. For example, Reemts, C. (2008), was cited by the Service in its 90-day finding for the proposition that fire was a threat to the Warbler, (M000447), but that study shows that while Warbler numbers decrease after a fire, they appear to move elsewhere until the trees re-grow: ". . . overall golden-cheeked warbler populations on Fort Hood were not greatly affected by the fires . . . perhaps because the birds relocated to available habitat elsewhere on post . . . ." (R004443). Further weakening the Service's contention is Yao, J., *et al*., (2012), which shows the value of fire in actually *promoting* oak development for the Warbler: ". . . we also observed that high-intensity fire was related to higher oak recruitment which has the potential to sustain GCW habitat for the future." (R007503).

Ortega, C. (2012) was the sole authority cited by the Service in its 90-day Finding for its claim that noise could be a threat to the Warbler. (M000448). "This review provides general background information, updates on the most current literature, and suggestions for future research that will enhance our comprehensive knowledge and ability to mitigate negative effects of noise." (R003871). But the Ortega study presented no information on the Warbler specifically, and evidence against the proposition that noise is a threat to the Warbler includes Lopez, R. (2012)

(concluding, in an experiment on the impacts on Warblers of military training, that "[i]n general, there were no patterns in the noise, movement, or song data to suggest that GCWAs were adjusting their vocalizations to increases in ambient noise."), (R003121), and Lackey, M. (2012) (finding ". . . the majority of Golden-cheeked Warblers have habituated to road and construction noise," (R002945), and that "[t]he broadcast-unit experiment showed that territories located near broadcast units had similar year-to-year shifts in territory locations as a random sample of territories not located near broadcast units.") (R002952).

The Service's contention that oak wilt was a threat to the Warbler is also refuted by substantial evidence in the record. Appel, D., *et al*., (2010) found that oak wilt did not appear to be a serious threat to Warblers: "Only a small proportion of the oak wilt centers (12 percent) were located in designated GCW habitat," (R00737), and ". . . oak wilt appears to fall in areas where oak densities are greater than those found in preferred GCW habitats." (R00746). Stewart, L., *et al*., (2014) found that paired male Warblers that do nest in oak wilt affected stands "fledged young as successfully as paired males who only used unaffected forest." (R005840).

The 90-day finding fares no better in its contention that there was no substantial evidence that refuted findings that recreation was a threat to the Warbler. Peak, R. (2003) studied the potential impacts of mountain bike recreation on Warblers, and "did not find a difference in abundance or demography of the golden-cheeked warbler . . . ," (R003893), and the City of Austin (2012) commented on a pilot study of the influence of mountain bikes on Warbler breeding that "[m]ajor limitations of the pilot study include small sample sizes (low numbers of warblers) and lack of quantitative data on recreational activities (including number of recreational users per day, type(s) of activities, pathways taken through the BCP tracts, etc.)." (R001371).

In short, there is more than enough evidence in the record to demonstrate that a "reasonable person [would] believe" that the Petition should be granted. *See* 50 C.F.R. § 424.14(b)(1). The Service failed to examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made, especially in light of the Service's failure for almost three decades to designate critical habitat. *See Motor Vehicle Mfrs.*, 463 U.S. at 43. "[W]hen 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." *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999).

VI. CONCLUSION

For the foregoing reasons, the 90-day finding should be vacated, and this matter should be remanded to the Service for reconsideration of the Petition to Delist under the correct standard.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Texas by using the CM/ECF system, which will serve a copy of same on the counsel of record.

/s/Theodore Hadzi-Antich
THEODORE HADZI-ANTICH