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

GENERAL LAND OFFICE OF THE STATE OF TEXAS,
Plaintiff,

-vs-

CAUSE NO.:
AU-17-CV-00538-SS

UNITED STATES FISH AND WILDLIFE SERVICE, UNITED STATES DEPARTMENT OF THE INTERIOR, RYAN ZINKE in his official capacity as Secretary for the United States Department of the Interior, GREG SHEEHAN in his official capacity as Acting Director of the United States Fish and Wildlife Service, and AMY LUEDERS in her official capacity as Southwest Regional Director of the United States Fish and Wildlife Service,
Defendants.

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Plaintiff General Land Office of the State of Texas (Texas)'s and Defendants United States Fish and Wildlife Service, United States Department of the Interior, Ryan Zinke in his official capacity as Secretary for the United States Department of the Interior, Greg Sheehan in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Amy Leuders in her official capacity as the Southwest Regional Director of the United States Fish and Wildlife Service (collectively, Defendants)' respective Motions for Summary Judgment ([#64] and [#67]), along with their respective Responses ([#67] and [#76]) and Replies ([#76] and [#77]). Having reviewed the documents, the relevant law, and the file as a whole, the Court now enters the following opinion and orders.

Background

I. Introduction

The golden-cheeked warbler (*Setophaga chrysoparia*) (hereinafter Warbler) is a small, migratory songbird that breeds exclusively in parts of central Texas. Pl.'s Mot. Summ. J. [#64] at 9; Defs.' Mot. Summ. J. [#67] at 6. Its breeding range is limited because it depends on the bark from Ashe juniper trees to construct its nests. *See* Defs.' Mot. Summ. J. [#67] at 6. During the late 1980s, planned developments in the City of Austin and Travis County led to the widespread removal of Ashe juniper trees, resulting in a significant reduction of the Warbler's available breeding habitat. *See id.* at 6; *see also* Pl.'s Mot. Summ. J. [#64] at 9.

II. Initial Listing Decision

In February 1990, an emergency petition was submitted to the United States Fish and Wildlife Service (the Service) seeking to add the Warbler to the endangered species list. Defs.' Mot. Summ. J. [#67] at 6. Based on this petition, the Service issued an emergency rule temporarily listing the Warbler as endangered under Section 4(b)(7) of the Endangered Species Act (ESA), codified as 16 U.S.C. § 1533(b)(7). *Id.*

In December 1990, the Service issued a final rule placing the Warbler on the endangered species list. *Id.* The Service determined the Warbler was endangered due to the present and threatened destruction of its range, the threat of nest predation, the inadequacy of existing regulatory mechanisms, and the threat of habitat fragmentation. *Id.* at 6–7. The Service declined to designate a critical habitat for the Warbler because it determined the specific elements of the Warbler's habitat critical to its survival were not known. Pl.'s Mot. Summ. J. [#64] at 11.

As part of the listing process, the Service was obligated to develop and implement a "Recovery Plan" for the Warbler. *See* 16 U.S.C. § 1533(f). The Warbler's Recovery Plan, which

was issued in 1992, set out five conditions to be met before the Service would consider the Warbler sufficiently recovered to justify removal from the endangered species list. Defs.' Mot. Summ. J. [#67] at 7. These five conditions were:

1. Sufficient breeding habitat has been protected to ensure the continued existence of at least one viable, self-sustaining population in each of eight regions outlined in the Recovery Plan;
2. The potential for gene flow exists across regions between demographically self-sustaining populations where needed for long-term viability;
3. Sufficient and sustainable non-breeding habitat exists to support the breeding populations;
4. All existing warbler populations on public lands are protected and managed to ensure their continued existence; and
5. All of the above criteria have been met for ten consecutive years.

Id. The Service also established a plan to achieve Warbler recovery by encouraging research on the species, increasing protections for Warblers on public lands, encouraging conservation by private landowners, protecting the Warbler's winter habitat and migratory route, and increasing public awareness about the Warbler. *See id.*

III. 2014 Five-Year Status Review

Although the Service was required to conduct a review of the Warbler's endangered status every five years, the first such status review did not occur until August 26, 2014 (2014 Review). Pl.'s Mot. Summ. J. [#64] at 12. The 2014 Review found that although progress had been made toward achieving the recovery criteria set out in the 1992 Recovery Plan, none of the criteria had yet been achieved,[1] AR 0067778, and the Warbler was still threatened by "the ongoing, wide-spread destruction of its habitat." AR 006789. The Service therefore concluded the Warbler remained in danger of extinction throughout its range and recommended no change to the Warbler's endangered status. *Id.*

[1] Somewhat contradictorily, the Service also found the recovery criteria outlined in the 1992 Recovery Plan did not adequately address all of the Warbler's threats or needs. This led the Service's to conclude that "revision to the recovery plan [was] warranted." AR 006667.

The 2014 Review concluded the destruction of the Warbler's habitat was largely due to "rapid suburban development" in Travis, Williamson, and Bexar Counties. AR 006782, 006789. In fact, the evidence cited by the 2014 Review suggested increases in residential and commercial development, highways, transmission corridors, reservoirs, and overall human population had reduced available Warbler habitat by 29% between 2001 and 2011 alone. AR 006782. Because the human population was projected to continue to increase throughout the Warbler's range, the 2014 Review concluded these threats would persist, thereby further reducing and fragmenting the Warbler's breeding habitat. AR 006783.

The 2014 Review also found these habitat threats exacerbated other threats to the Warbler's continued survival. For instance, increased habitat fragmentation was thought to increase Warbler nest predation to a "significant" degree. *See* AR 006785. The continued loss of habitat also led the Environmental Protection Agency to classify the Warbler as "critically vulnerable" to climate change, and the Warbler's breeding habitat was found to be particularly susceptible to catastrophic wildfires. AR 006787. Finally, a larger human population in the Warbler's breeding range created the possibility that recreational activities could threaten the Warbler. AR 006788.

Though the 2014 Review concluded threats to the Warbler's habitat justified its continued inclusion in the endangered species list, it also considered evidence suggesting the Warbler's survival chances were not as dire originally believed. For example, the 2014 Review noted that Warbler pairs could occupy smaller contiguous areas of habitat, or "patches," than initially believed, and it referred to a study that predicted the existing Warbler male population to be larger than 263,000 individuals. AR 006778–79. The 2014 Review concluded, however, that the scientific evidence demonstrated the importance of large patches to the Warbler's continued

survival, as Warbler reproductive success and occupancy rates both increased with increasing patch size. AR 006778. And it noted that the predicted population of 263,000 male Warblers might have been inflated, as that population estimate was 1.4 to 13 times larger than the estimates generated by an intensive survey conducted by the City of Austin in 2013. AR 006779. In light of the wide range of Warbler population estimates and the ample evidence demonstrating significant destruction and fragmentation of the Warbler's breeding habitat, the Service determined the best scientific and commercial data available showed the Warbler should remain on the endangered species list. *See* AR 006789.

IV. Petition to Delist

On June 29, 2015—less than one year after the 2014 Review concluded the Warbler should remain on the endangered species list—a petition was submitted requesting the removal of the Warbler from the list (Petition to Delist). Pl.'s Mot. Summ. J. [#64] at 12. Relying primarily on an "exhaustive survey" of the existing scientific literature prepared by the Texas A&M Institute of Renewable Natural Resources (2015 Texas A&M survey), the Petition to Delist contended the initial listing decision relied on evidence that underestimated the Warbler's population size and the extensiveness of its breeding habitat. AR 000015–18. According to the Petition to Delist, the best available research in 1990 suggested "there were only about 328,928 hectares[2] of potential warbler habitat in Texas" and that such habitat could potentially support 13,800 Warbler pairs.[3] AR 000007. But the evidence described in the 2015 Texas A&M

[2] A hectare is equivalent to 2.471 acres. *E.g.*, Alastair Hazell, *Hectares-Acres Converter*, THE CALCULATOR SITE, https://www.thecalculatorsite.com/conversions/area/hectares-to-acres.php (last visited Dec. 20. 2018).

[3] The precise language used in the Petition to Delist referred to "13,800 warbler territories." AR 000007. A scientific evaluation of the 2014 Review, relying on the same studies as the Petition to Delist, noted that the research in 1990 concluded there was a "potential population of 27,600 individuals." AR 002509. As this figure is exactly double the number of "warbler territories" noted in the Petition to Delist, the Court assumes the reference to "warbler territories" is to Warbler pairs.

survey—evidence that was also considered by the Service during the 2014 Review, AR 000442—demonstrated that the Warbler's breeding habitat was more widely distributed and variable than was initially assumed and that the predicted Warbler population was much larger. AR 000019.

Regarding available Warbler habitat, the Petition to Delist contended there was between 1,578,281 and 1,678,053 hectares of available breeding habitat, a figure five times greater than the amount of available Warbler habitat the Service believed existed in 1990. AR 000015. The Petition to Delist offered two reasons to explain the dramatic increase in the estimate of available Warbler habitat. The first was technological advances. The studies relied on by the Petition to Delist benefitted from "improved classification techniques, better satellite image quality, and on-the-ground sampling," which allowed scientists to better identify environments that could potentially contain Warblers. *Id.* The second was a shift in the understanding of what type of habitat Warblers require to breed successfully. For example, although the Service believed in 1990 that Warblers could not successful breed in patches of less than fifty hectares, studies compiled in the 2015 Texas A&M survey revealed Warblers were capable of breeding in patches as small as sixteen to eighteen hectares in rural areas and twenty-one hectares in urban areas. *See* AR 000011, 000030.[4] And despite initial assumptions that any removal of Ashe juniper in Warbler habitat would have a negative impact on the bird's survival, one recent study found Warblers experienced greater reproductive success in areas where Ashe juniper had been thinned. AR 000031.

Regarding Warbler population, the Petition to Delist cited the population study considered during the 2014 Review that indicated the predicted population of male Warblers was

[4] The Petition to Delist also noted, however, that predicted occupancy, pairing success, and fledgling success all increased with increasing patch sizes. AR 000029–30.

between 223,927 and 302,260, roughly nineteen times larger than the Service initially believed it to be. AR 000021. The Petition to Delist contended the increased predicted population was a result of "improved imagery" technology and better statistical modeling practices. *Id.* In response to the 2014 Review's conclusion that these predictions may have been inflated, the Petition to Delist stated the 2014 Review had misapplied the population study and it insisted the study "represent[ed] the best available warbler breeding population estimate." AR 000021–22.

Based on these increased estimates of Warbler habitat and population, the Petition to Delist argued destruction of the Warbler's habitat did not threaten the Warbler's continued survival. *See* AR 000029 And because the primary reason for initially listing the Warbler was the potential for habitat destruction, the Petition to Delist contended the evidence strongly indicated the Warbler was not "endangered" under the ESA. AR 000031. The Petition to Delist concluded by explaining there were no other threats to justify keeping the Warbler on the endangered list. *See* AR 000024 (noting there was no evidence indicating disease, fire ant predation, or brood parasitism posed a significant threat to the Warbler); AR 000024–29 (arguing overlapping regulatory regimes ensured adequate protection for the Warbler even if it were removed from the endangered species list); AR 000030 (positing declines in the availability of oak foliage in Warbler's breeding habitat are unrelated to reproductive success or habitat use).

V. 90-day Finding

On May 25, 2016, the Service issued a 90-day finding that concluded the Petition to Delist failed to present substantial information indicating that removing the Warbler from the endangered species list may be warranted. Defs.' Mot. Summ. J. [#67] at 14; *see* 16 U.S.C. §1533(b)(3)(A). Although the Service acknowledged the Warbler's population size and known potential range were both larger than was believed at the time of the initial listing decision, it

determined ongoing threats to the Warbler's habitat were expected to impact the Warbler's continued existence into the foreseeable future. *See* AR 000449. The 90-day finding also remarked that the Petition to Delist did not include any information the Service had not considered during the 2014 Review. *See id.*; *see also* Defs.' Mot. Summ. J. [#67] at 8.

Although the Service acknowledged that the Warbler's population was potentially much larger than assumed and conceded that the Warbler's known potential range was "geographically more extensive" that was believed at the time of the initial listing decision, AR 000442, the Service concluded this evidence alone did not constitute substantial information that the Warbler was no longer endangered. The 90-day finding first questioned the reliability of the population study, noting that "population estimates are very difficult to determine" and that the study relied on in the Petition to Delist tended to overestimate Warbler populations in areas of low Warbler density. *Id.* Furthermore, the Service concluded the Warbler was still confronted by the threats described in the original listing rule and noted that none of the recovery criteria enumerated in the 1992 Recovery Plan had been achieved. *Id.* The 90-day finding thus determined that although the Petition to Delist presented evidence that the Warbler's population and habitat were larger than initially assumed, such evidence did not demonstrate the Warbler was no longer endangered. *See id.*

The Service paid particular attention to the Petition to Delist's failure to include any new information on the nature and severity of various threats facing the Warbler. For instance, the 90-day finding observed that the Petition to Delist "fail[ed] to articulate whether or not habitat fragmentation is a significant threat to the warbler" despite scientific evidence showing that conservation of large, unfragmented habitat patches was "especially important" for ensuring the Warbler's long-term viability. AR 000443. The 90-day finding reiterated the 2014 Review's

conclusion that Warbler habitat fragmentation was "mostly driven by rapid suburban development and human population growth in Travis, Williamson, and Bexar Counties" and observed that such fragmentation was likely to persist because the human population of the thirty-five counties within the Warbler's breeding range was predicted to increase by 64% by 2050.[5] *Id.* Because the Petition to Delist failed to present any information regarding the threats of habitat destruction or fragmentation, the Service concluded the Petition to Delist failed to present substantial evidence suggesting delisting the Warbler may be warranted. *Id.*

Further, the Service found the Petition to Delist's failure to consider habitat destruction and fragmentation affected its analysis of other potential threats to the Warbler. For instance, the Service concluded urbanization and habitat fragmentation had likely contributed to increased rates in Warbler nest predation by rat snakes and had exacerbated the threat of nest parasitism. AR 000444–45. The Service countered the Petition to Delist's claim that the Warbler was adequately protected under other state and federal regulations by noting that an estimated 29% of existing Warbler breeding habitat was lost from 2001 to 2011 despite these regulations. AR 000446. And although the Service agreed with the Petition to Delist that the magnitude of threats such as oak wilt, vegetation management, noise, and decreased patch size was uncertain, the Service also found the Petition to Delist failed to present any information on other potential threats to the Warbler's survival, including climate change, the likelihood of more destructive wildfires, and human recreational activities. AR 000447–48.

VI. Procedural Posture

On June 5, 2017, Texas filed this suit seeking declaratory judgment and injunctive relief. Compl. [#1]. Texas asserted three claims against Defendants: (1) Defendants violated the ESA

[5] The figures were especially bleak in Williamson and Hays Counties, where the human population was expected to increase by 179% and 135%, respectively, by 2050. AR 004102.

and its implementing regulations by listing the Warbler as an endangered species without concurrently designating its critical habitat; (2) Defendants improperly denied the Petition to Delist when they failed to consider new and substantial scientific data and refused to designate critical habitat; and (3) Defendants violated the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, by failing to prepare an Environmental Assessment or an Environmental Impact Statement in conjunction with the initial listing decision, as part of the subsequent five-year review, or in connection with the 90-day finding. *See* Second Am. Compl. [#40]. Defendants moved to dismiss Texas's first and third claims. Mot. Partially Dismiss [#41] at 2–3. The Court granted the motion, leaving only Texas's claim that Defendants failed to remove the Warbler from the endangered species list despite substantial evidence in the Petition to Delist and the Service's continued refusal to designate critical habitat. Order of Nov. 30, 2017 [#47] at 15.

Texas now moves for summary judgment on its remaining claim, arguing the 90-day finding was arbitrary and capricious because it improperly reviewed the information presented in the Petition to Delist and failed to articulate a rational connection between the listing decision and the continued refusal to designate critical habitat. Pl.'s Mot. Summ. J. [#64] at 25. Defendants, in a cross-motion for summary judgment, argue that the 90-day finding properly reviewed the information presented in the Petition to Delist and that designating critical habitat is irrelevant to a listing determination. Defs.' Mot. Summ. J. [#67] at 10, 14. Both motions have been thoroughly briefed and are ripe for review.

Analysis

I. Standard of Review

A district court reviews whether the Service properly administered the ESA under the Administrative Procedure Act (APA). *See Bennett v. Spear*, 520 U.S. 154, 171–74 (1997). Under

the APA, a court must "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although a court must review the entire administrative record in determining whether an agency's action was arbitrary and capricious, *id.*, "there is a presumption that the agency's decision is valid," and it is the plaintiff's burden to overcome this presumption. *La. Pub. Serv. Comm'n v. Fed. Energy Regulatory Comm'n*, 761 F.3d 540, 558 (5th Cir. 2014).

When considering whether the agency's action was arbitrary and capricious, the court's sole task is to determine whether the agency "has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983). "This inquiry must 'be searching and careful,' but 'the ultimate standard of review is a narrow one.'" *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). The court may not substitute its judgment for the agency's, *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009), and the 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 the contrary views more persuasive." *Marsh*, 490 U.S. at 378.

II. Procedures for Listing and Delisting Species Under the Endangered Species Act.

The ESA was intended "to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). To achieve this objective, the ESA requires the Secretary of the Interior to identify and list "endangered" and "threatened" species. 16 U.S.C. § 1533(a)(1). A species is "endangered" if it is determined to be in danger of becoming extinct throughout all or a significant portion of its range because of any of the

following factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) the overutilization of the species for commercial, recreational, scientific, or educational purposes; (3) disease or predation of the species; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting the continued existence of the species. *Id.* § 1532(6) (defining endangered species); *id.* § 1533(a)(1)(A)–(E) (outlining the five factors to be considered in determining whether a species is endangered).

In determining whether a species is endangered, the Service must consider "the best scientific and commercial data available." *Id.* § 1533(b)(1)(A). This requirement merely prohibits the Service from "disregarding available scientific evidence that is in some way better than the evidence [it] relies on." *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000). "The obvious purpose of the requirement that each agency 'use the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Bennett*, 520 U.S. at 176.

When a species is placed on the endangered list, the Service must concurrently designate the critical habitat of the species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A)(i). A "critical habitat" consists of specific areas within the existing habitat containing physical and biological features essential to conservation that may require special protections, as well as specific areas beyond the existing habitat determined to be essential for conservation. *Id.* § 1532(5)(A). A critical habitat designation must account for the economic impact, the impact on national security, and "any other relevant impact" the designation might have. *Id.* § 1533(b)(2).

Once a species is placed on the endangered list, its status must be reviewed every five years. 16 U.S.C. § 1533(c)(2)(A). A species may be delisted if the best available scientific and

commercial data available demonstrates the species is no longer endangered based on any of § 1533's five factors. *Id.* § 1533(c)(2)(B); 50 C.F.R. § 424.11(d). There are three reasons why the best scientific and commercial data available may no longer support listing a species: (1) the species may have become extinct; (2) the species may have recovered to such a point that "protection under the Act is no longer required"; or (3) the original listing determination may have been based on erroneous data or an erroneous interpretation of the data. 50 C.F.R. § 424.11(d)(1)–(3).

The ESA also includes a provision under which any "interested person" may petition the Secretary of the Interior to delist a species. 16 U.S.C. § 1533(b)(3)(A). The Secretary must issue a finding within ninety days of receiving such a petition stating whether the petition presents "substantial scientific or commercial information indicating [delisting] may be warranted." *Id.* "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." 50 C.F.R. § 424.14(b)(1).[6] If the Secretary determines the petition presents substantial information that delisting may be warranted, the Secretary must then commence a twelve-month status review to determine whether the species should be delisted. 16 U.S.C. § 1533(b)(3)(A), (B). The Secretary's determination that a petition does not present substantial information is considered final agency action that may be reviewed by the district court. *Id.* § 1533(b)(3)(C)(ii).

[6] The definition for "substantial scientific or commercial information" was changed on October 27, 2016 to mean "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 earlier definition of "substantial scientific or commercial information" was in place when the Service issued its 90-day finding in this case, the Court applies that definition. *See* Pl.'s Mot Summ. J. [#64] at 7 n.1; Defs.' Mot. Summ. J. [#67] at 11 n.1.

III. Application

Texas argues the Service's refusal to commence a twelve-month status review was arbitrary and capricious for two reasons. First, Texas contends the Service improperly reviewed the Petition to Delist by requiring conclusive evidence that delisting was warranted, ignoring evidence supporting delisting, and resolving reasonable scientific disputes in favor of keeping the Warbler on the endangered list. Pl.'s Mot. Summ. J. [#64] at 22, 25. Second, Texas contends the Service has failed to articulate a rational connection between its refusal to designate critical habitat for the Warbler and its determination that the Warbler is endangered because of significant threats to its habitat. *Id.* at 25. The Court considers each of Texas's arguments in turn.

A. Review of the Petition to Delist

Texas contends the Service's review of the Petition to Delist was overly stringent. *Id.* at 22. According to Texas, even though the Service did not explicitly require the Petition to Delist to present conclusive evidence indicating delisting may be warranted, it must have implicitly done so because "the information in the Petition to Delist unquestionably would lead a *reasonable person* to *believe* that delisting *may* be warranted." *Id.* at 23 (emphasis in original). Texas further argues the 90-day finding shows the Service either "ignored" the studies presented in the Petition to Delist "or resolved any disputes among the literature against the granting of the petition." *Id.* at 26. Each of these contentions, if true, would render the Service's refusal to proceed to the twelve-month status review arbitrary and capricious. *See, e.g.*, *Humane Soc'y of U.S. v. Pritzker*, 75 F. Supp. 3d 1, 13–15 (D.D.C. 2014).

As to Texas's first argument, the parties agree that, at the 90-day stage, the Service may not require a petition to present substantial information that delisting may be warranted. *See* Defs.' Mot. Summ. J. [#67] at 11. Rather, the proper standard of review is whether a reasonable

person could have determined that delisting may be warranted. The Court therefore applies this standard in determining whether the Service acted arbitrarily and capriciously in concluding the Petition to Delist failed to present substantial evidence.

The Court concludes the Service's review of the Petition to Delist was not arbitrary and capricious. Texas's argument to the contrary is unpersuasive for three reasons.

First, Texas overstates the significance of the evidence presented in the Petition to Delist. The Petition to Delist argued delisting was warranted based on the increased predictions of the Warbler's known range and potential population. *See* AR 000056–57. But multiple studies demonstrate the Petition to Delist may have overstated the Warbler population.[7] And the Petition to Delist failed to include any new information on a number of threats to the Warbler's survival, which the Service is required to consider when determining whether delisting may be warranted. *See* AR 000443 ("The petition does not provide any information on [habitat fragmentation or habitat loss]."); AR 000445 ("The petition does not provide any new information indicating that predation is no longer a threat to the warbler."); AR 000448 ("The petition did not present any information to address [threats of climate change or human recreation]."). Because the Petition to Delist failed to include any evidence on threats, and because the scientific evidence demonstrated these threats jeopardized the Warbler's continued survival, *see* AR 000449, a reasonable person could have concluded the Warbler remained endangered despite promising population predictions and a greater known potential range. Indeed, this is precisely the conclusion the Service reached in the 2014 Review after considering *the same evidence* presented in the Petition

[7] As previously noted, a 2013 survey conducted by the City of Austin concluded the population study presented in the Petition to Delist may have overestimated the Warbler population by 1.4 to 13 times. AR 006779. And a study published in 2016 found the population study overestimated Warbler density in fourteen of the twenty plots surveyed; in some of these plots, actual Warbler density was nearly *thirty times* smaller than the population study's predictions. AR 003865. The population study was also found to have consistently overestimated Warbler population in patches with low Warbler density, which represent the vast majority of patches in which the Warbler may be found. *See* AR 000442; AR 003865; AR 001595.

to Delist. *See* AR 000442 (noting the evidence presented in the Petition to Delist "was evaluated in the 2014 5-year review where [the Service] recommended that the species remain listed as in danger of extinction throughout its range"). Even assuming a larger population and range alone demonstrates a species is no longer endangered,[8] and even ignoring the ESA's requirements that the listing decision be made based on evidence of threats to a species, the 2014 Review belies Texas's determination that the evidence presented in the Petition to Delist would have "unquestionably" led a reasonable person to conclude delisting may be warranted.

Texas seeks to avoid this conclusion by claiming the 2015 Texas A&M survey constitutes new information that would unquestionably lead a reasonable person to conclude delisting may be warranted. According to Texas, because the 90-day finding conceded the 2015 Texas A&M survey represents the most recent and comprehensive research on Warbler habitat and population size and because the 2015 Texas A&M survey was issued after the 2014 Review, the Service effectively admitted the 2014 Review did not consider the best available scientific data when it determined the Warbler should remain on the endangered list. *See* Pl.'s Mot. Summ. J. [#64] at 26–27.

There are two flaws with this argument. First, it misreads the 90-day finding, which "recognize[d] that *the modeling studies described* in the 2015 Texas A&M survey" represented the most recent and comprehensive estimates of Warbler habitat and population size. AR 000442 (emphasis added). Because these studies were considered by the Service during the 2014 Review, the 2014 Review considered the best available scientific data. Second, because the 2015

[8] As history has shown, a species may be threatened with extinction even where its population is immense and its range expansive. For instance, there were an estimated 30–60 million American bison in the mid-1800s; fifty years later, the population was 300. *See, e.g.*, Gilbert King, *Where the Buffalo No Longer Roamed*, SMITHSONIAN.COM (July 17, 2012), https://www.smithsonianmag.com/history/where-the-buffalo-no-longer-roamed-3067904/. And over the past thirty years, the catch of Atlantic Cod in the Gulf of Maine has dropped by nearly 94%. Alana Semuels, *Cape Cod's namesake fish population rapidly disappearing*, L.A. TIMES (Aug. 30, 2014, 9:06 P.M.), https://www.latimes.com/nationa/la-na-cid-fishing-29140831-story.html.

Texas A&M survey merely compiled the existing scientific literature on Warbler population and habitat, it did not present any new information to the Service. At most, the 2015 Texas A&M survey merely offered a differing interpretation of the information. For these reasons, the 2015 Texas A&M survey does not show the Service required conclusive evidence demonstrating delisting may be warranted.

The Court also concludes the Service's review was not arbitrary and capricious because there is no evidence the Service required the Petition to Delist to present conclusive evidence. As an initial matter, Texas does not dispute that the 90-day finding properly described the standard of review as "'that amount of information that would lead a reasonable person to believe that [delisting] may be warranted.'" AR 000440 (quoting 50 C.F.R. § 424.14(b)). Further, the 90-day finding did not deny the Petition to Delist for failing to "conclusively demonstrate" delisting the Warbler may be warranted, and there is no evidence in the administrative record that Service scientists believed the Petition to Delist presented substantial evidence. *Cf. Ctr. for Biological Diversity v. Kempthorne*, No. CV 07-0038-PHX-MHM, 2008 WL 659822, at *10 (D. Ariz. Mar. 6, 2008) (finding the Service required conclusive evidence where the 90-day finding noted the petitioner failed to "conclusively demonstrate" the petitioned action was warranted and where Service scientists admitted the petition contained substantial evidence). The Service did not "ignore simple probability" when it determined the Petition to Delist failed to present substantial evidence, *cf. Pritzker*, 75 F. Supp. 3d at 12, nor did it "weigh the information presented in the petition against information selectively solicited from third parties." *Cf. Colorado River Cutthroat Trout v. Kempthorne*, 448 F. Supp. 2d 170, 176 (D.D.C. 2006); *see also Ctr. for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1143 (D. Colo. 2004). In short,

Texas has failed to offer any evidence the Service applied the incorrect standard when it considered the Petition to Delist.

Finally, the Court concludes reversing the 90-day finding in this case would disregard the deference it is required to apply when reviewing agency action. Texas effectively contends that if the Court determines the information presented in the Petition to Delist would lead a reasonable person to conclude delisting may be warranted, the Service's finding to the contrary must be arbitrary and capricious. *See* Pl.'s Mot. Summ. J. [#64] at 23–25. But this argument elides the distinction between arbitrary-and-capricious analysis and de novo review. *Cf. Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1204 (D. Or. 2003) (engaging in arbitrary-and-capricious analysis after concluding that information contained in a petition to delist could have led a reasonable person to conclude delisting may be warranted). The APA permits a court to overturn an agency's decision only where the plaintiff shows the decision was invalid because the agency failed to consider relevant factors or failed to articulate a rational connection between the facts found and the decision made. *See La. Pub. Serv. Comm'n*, 761 F.3d at 558; *Balt. Gas & Elec. Co*, 462 U.S. at 105. By contrast, Texas asks this Court to overturn the 90-day finding not because the Service failed to consider the relevant factors or to provide a rational basis for its decision, but simply because the 90-day finding was wrong. But a court may not overturn an agency's decision simply because it believes it to be wrong. *See, e.g.*, *Fox Television Studios*, 556 U.S. at 513 ("We have made clear . . . that a court is not to substitute its judgment for that of the agency . . . .") (quotation omitted); *see also Marsh*, 490 U.S. at 378 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its experts even if, as an original matter, a court might find contrary views more persuasive."). Because Texas has not produced evidence that the Service failed to consider relevant factors or

failed to articulate a rational connection between the facts found and the decision made, the Court is not permitted to reverse the Service's 90-day finding.

Texas further contends the Service's review of the Petition to Delist was arbitrary and capricious because the Service either "ignored" the studies presented in the Petition to Delist in favor of other studies demonstrating the Warbler remained endangered "or resolved any disputes among the literature against the granting of the petition." Pl.'s Mot. Summ. J. [#64] at 26. These contentions are unsupported by the administrative record.

The Court first notes that nearly all the studies Texas claims the 90-day finding ignored are not cited in the Petition to Delist; indeed, many do not even appear in the Petition to Delist's enclosed bibliography. *Compare* Pl.'s Mot. Summ. J. [#64] at 27–33, *with* AR 000006–000031 (Petition to Delist), *and* AR 000033–37 (enclosed bibliography). Moreover, the 90-day finding acknowledged, based on the studies presented in the Petition to Delist, that the Warbler's "known potential range is geographically more extensive than when the [Warbler] was originally listed." AR 000442. The 90-day finding further admitted that the studies described in the 2015 Texas A&M survey "represent the most recent and comprehensive efforts to estimate range-wide warbler habitat and population size to date." *Id.* The 90-day finding therefore demonstrates that, rather than ignoring the evidence presented in the Petition to Delist, the Service considered it to be the best evidence available on Warbler population and habitat. The fact the Service nonetheless determined the Warbler remained in danger throughout its range does not prove it ignored the studies presented in the Petition to Delist.

There is also no evidence that the Service "resolved any disputes among the literature" against the Petition to Delist. To begin with, Texas points to no scientific dispute the 90-day finding resolved. *Compare Zinke*, 289 F. Supp. 3d at 110 (finding the Service acted arbitrarily

and capriciously when it determined there was no need to maintain two subpopulations of bison despite conflicting scientific studies on the existence of the subpopulations). Even assuming *arguendo* the 90-day finding resolved disputes about the size of the Warbler's population or range, the Service consistently favored those studies indicating the Warbler's population and range were larger than originally supposed. In other words, to the extent the Service resolved any scientific disputes in the 90-day finding, it resolved those disputes in favor of the Petition to Delist. And if the "dispute" Texas refers to is whether the Warbler should be delisted, the Service was entitled to rely on the opinions of its own experts in reaching this decision. *See Marsh*, 490 U.S. at 378. Given the Petition to Delist's failure to include information on threats to the Warbler's continued survival, it is unsurprising the Service concluded these threats were severe enough to justify keeping the Warbler on the list.

Thus, Texas has not shown that the Service required the Petition to Delist to present conclusive evidence indicating delisting may be warranted, that the Service ignored evidence in the Petition to Delist, or that the Service resolved scientific disputes against granting the Petition to Delist. The Court therefore concludes the Service's review of the Petition to Delist was not arbitrary or capricious.

B. Failure to Designate Critical Habitat

Texas also contends the Service acted arbitrarily and capriciously when it determined the Warbler was endangered while concurrently refusing to designate critical habitat for the Warbler. Texas claims this stance is "logically and legally inconsistent" because the Service considers habitat destruction as the primary threat facing the Warbler but is unable to identify the Warbler's critical habitat. Pl.'s Mot. Summ. J. [#64] at 25, 27. Texas concludes that for the Service's determination to be reasonable, "[e]ither critical habitat must be designated or the

warbler must be delisted." *Id.* at 25. Defendants argue in response that designating critical habitat requires the Service to consider factors that are not part of the delisting analysis, and therefore the designation of critical habitat is entirely separate from, and irrelevant to, the listing determination. Defs.' Mot. Summ. J. [#67] at 15.

The Court concludes that, under the plain text of the ESA, the Service's refusal to designate critical habitat at the 90-day stage was neither arbitrary nor capricious. The ESA directs the Service to consider five factors—and only five factors—in determining whether delisting a species may be warranted: (1) the present or threatened destruction, modification, or curtailment of the habitat or range of the species; (2) overutilization of the species for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting the continued existence of the species. 16 U.S.C. § 1533(a)(1). The ESA therefore "makes clear that the question of whether a species is endangered or threatened is a scientific decision in which economic factors must not play a part." M. Lynne Corn et al., Cong. Research Serv., RL 31654, *The Endangered Species Act: A Primer*, at 5 (2012); *see* H.R. Rep. No. 97-567, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2812 (explaining that economic considerations were eliminated from the listing process because "[w]hether a species has declined sufficiently to justify listing is a biological, not an economic, question"). By contrast, the Service may designate a critical habitat where prudent or determinable only after considering, *inter alia*, "the economic impact" of making such a designation. 16 U.S.C. § 1533(b)(2). The ESA therefore *requires* the Service to consider different factors in a listing determination than those considered in designating critical habitat. Consequently, the claim that the Service must either designate critical habitat or delist the Warbler finds no support in the statute. *See Alabama-*

Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1270–71 (11th Cir. 2007) (refusing to delist a species despite the Service's failure to designate critical habitat by reasoning that "[r]emoving one protection is not a fit remedy for the lack of another").

The legislative history further supports this distinction between the listing determination and designating critical habitat. One of the primary reasons Congress amended the ESA in 1982 was "to divorce from the listing decisions the economic analysis that comes with critical habitat designation." *Id.* at 1266. As Judge Carnes explained in *Kempthorne*, when prior iterations of the ESA required the Service to consider the economic impact of critical habitat in its listing determinations, the pace of listing species slowed "to a crawl." *Id.* at 1265. Concerned by the significant delay in listing species that resulted from this requirement, Congress chose to remove it. *See id.* at 1265–66. The legislative history thus makes clear Congress amended the ESA precisely to avoid forcing the Service to consider critical habitat designation as part of its listing determination. *See id.* at 1266 ("Congress wanted to *prevent* [habitat] designation from influencing the decision on the listing of a species.") (internal quotations omitted) (emphasis added).

Although the Court, like the Eleventh Circuit, is troubled by the Service's consistent dilatoriness in designating critical habitat, *see id.* at 1268, it nonetheless determines nothing in the ESA compelled the Service to make a critical habitat designation concurrent with its 90-day finding that the Warbler remained endangered. It thus concludes the Service's failure to designate critical habitat did not render its 90-day finding arbitrary and capricious.[9]

Conclusion

[9] Defendants also contend Texas is precluded from claiming the Service acted arbitrarily and capriciously by failing to designate critical habitat concurrent with the 90-day finding because this claim was not presented in the Petition to Delist. Defs.' Mot. Summ. J. [#67] at 14. Because the Court concludes the Service's failure to designate critical habitat did not render the 90-day finding arbitrary and capricious, it does not consider whether the failure to present this argument in the Petition to Delist precludes Texas from making it here.

Because the Court concludes the Service's 90-day finding was not arbitrary and capricious, the Court denies Plaintiff's motion for summary judgment. Correspondingly, because the Court concludes the Service's 90-day finding accorded with the requirements of the Administrative Procedure Act, the Court grants Defendants' motion for summary judgment.

Accordingly,

IT IS ORDERED that Texas's Motion for Summary Judgment [#64] is DENIED, and

IT IS ORDERED that Defendants' Cross-Motion for Summary Judgment [#67] is GRANTED.

SIGNED this the 6th day of February 2019.

Sam Sparks

SAM SPARKS
SENIOR UNITED STATES DISTRICT JUDGE