IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The 90-Day Finding issued by the U.S. Fish and Wildlife Service (FWS) in response to petitions to list the Yellowstone bison as "endangered" or "threatened" under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, represents a rational determination by FWS based on the information in the petitions and the agency's own records as well as the application of FWS's scientific expertise. FWS applied the standard established by Congress for reviewing petitions and concluded that the petitions did not present substantial scientific or commercial information indicating that listing may be warranted. The administrative record in this case establishes that FWS acted reasonably in analyzing each of the five listing factors and that FWS complied with the ESA and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*

Plaintiffs provide no basis for overturning FWS's well-reasoned decision. They fail to identify any record evidence that would satisfy their burden to demonstrate that FWS acted arbitrarily and capriciously. They also fail to engage with the history of the Interagency Bison Management Plan (IBMP), which has served as an effective regulatory mechanism for balancing the conservation of Yellowstone bison with the protection of livestock. Instead, Plaintiffs offer unsupported assertions that cannot be squared with the record or case law. For the reasons stated below and in Federal Defendants' opening brief, the Court should deny Plaintiffs' motion for summary judgment and grant Federal Defendants' cross-motion for summary judgment.

ARGUMENT

I. FWS Applied the Appropriate Standard in Its 90-Day Finding and That Finding Should be Upheld Under the Well-Established Standard of Review for APA Cases.

The record establishes that FWS applied the correct standard when it analyzed the petitions to list the Yellowstone bison and issued a negative 90-Day Finding. Federal Defendants' Cross-Motion for Summary Judgment (Fed. Defs. Br.) (ECF 18-1) at 14-20.

Specifically, FWS appropriately determined that the petitioners failed to meet their burden of presenting *substantial* scientific information and that the information before it did not support the inferences made in the petitions. The less rigorous standard Plaintiffs advocate is not the appropriate standard for the 90-day finding stage at issue here. *See* Plaintiffs' Opposition to Defendants' Cross-Motion and Reply in Support Their Motion (Pls. Resp.) (ECF 21) at 1, 5. Plaintiffs' error is premised on a fundamental misunderstanding of the standard: at this 90-day finding juncture, Congress placed the burden on the *petitioners* to provide substantial scientific information. Plaintiffs also misconstrue FWS's internal deliberations regarding the 90-Day Finding and misconstrue whether and to what extent FWS can apply its scientific expertise at this stage. Finally, contrary to Plaintiffs' assertions, Federal Defendants applied the correct standard of review for APA cases. Fed. Defs. Br. at 12-14.

A. The Record Evidence Shows That FWS Considered Whether the Petitions Presented Substantial Scientific or Commercial Information.

Under Section 4 of the ESA, a citizen can petition FWS to list a species as endangered or threatened, but Congress placed the burden on the petitioner to provide the agency with "substantial scientific or commercial information." 16 U.S.C. § 1533(b)(3)(A). Congress added the word "substantial" to Section 4 when it amended the statute in 1982 and, in doing so, "raise[d] the burden upon a petitioner." H.R. Rep. 97-567, at 18, reprinted at 1982 U.S.S.C.A.N. 2807, 2821 (1982). At the time of the challenged 90-Day Finding, FWS regulations interpreted "substantial scientific or commercial information" to mean "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). Although FWS is "obligated to generously evaluate the

[1] FWS revised this standard following the 90-Day Finding at issue in this case. The new language can be found at 50 C.F.R. § 424.14(h)(1)(i). *See* Fed Defs. Br. at 3 n.4.

data contained in the plaintiffs' petition," it is "entitled to use sound scientific judgment in deciding whether the data reasonably supported the plaintiffs' inferences." *Palouse Prairie Found. v. Salazar*, No. CV-08-032, 2009 WL 415596 at *2 (E.D. Wash. Feb. 12, 2009), *aff'd*, 383 F. App'x 669 (9th Cir. 2010).

FWS acted in accordance with the statutory and regulatory requirements when it analyzed the petitions to list the Yellowstone bison. Fed. Defs. Br. at 14-15, 20-40. FWS considered the petitioners' arguments under each of the ESA's five listing factors and determined that "the petitions do not provide substantial scientific or commercial information indicating that the petitioned action may be warranted." AR 0016. The 90-Day Finding represents FWS's reasoned analysis of the petitions and the agency's extensive records, which include previous petitions to list the Yellowstone bison and the plains bison. Fed. Defs. Br. at 9-11.

B. FWS's Internal Documents Do Not Show That FWS Applied the Wrong Standard.

Noticeably absent from Plaintiffs' reply is any evidence that the petitioners presented substantial scientific information or any explanation for how the purported threats negatively impact the status of the species such that it warrants listing.[2] Without this evidence, Plaintiffs resort to manufacturing evidence based solely on internal FWS communications and documents that were exchanged in advance of the 90-Day Finding. Plaintiffs point to the edits made by a senior biologist, Ms. Snyder, regarding a draft of the 90-Day Finding written by a junior

[2] Plaintiffs challenge Federal Defendants' reliance on FWS's Guidance on Making 90-Day Petition Findings Under Section 4(b)(3)(A) of the ESA. Pls. Resp. at 12 n.4, 17 n.8. But this guidance is entitled to *Skidmore* deference because it "constitute[s] a body of experience and informed judgment. . . ." *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). This guidance helps explain what FWS reviewers look for as evidence that there is substantial information – that evidence need not be conclusive, but it is "not enough for the petition to just indicate that threats to the species or its habitat exist, without providing some information to reasonably *connect* those threats to the negative impact on the status of the species." AR 5532 (emphasis added).

biologist, Ms. Servis. Pls. Resp. at 6-7. In highlighting the comments and changes, Plaintiffs assert that "there is no evidence in the record that Ms. Servis, Ms. Snyder, or any others actually went back to revisit the underlying analysis and analyze the petitions under the lens of the reasonable person standard." *Id.* Yet this assertion is based on two unfounded assumptions. First, they assume that the underlying analysis itself was flawed; as described in greater detail below, that argument is without merit. Second, they assume that Ms. Snyder's review did not include a review of the underlying analysis. But Plaintiffs provide no evidence that Ms. Snyder skipped over the underlying analysis in her review and ignore the fact that her comments and edits extended beyond notes about the "wrong standard." AR 5778-92. Plaintiffs further assert that the language articulating the standard at the beginning of the 90-Day Finding should not be considered because it was "not written by Ms. Servis herself." Pls. Resp. at 7. But this argument should be rejected because Congress charged FWS with making 90-day findings, not one individual biologist at the agency.

Next, Plaintiffs incorrectly suggest that Federal Defendants "urge the Court to adopt an alternative explanation" regarding Ms. Snyder's review of Ms. Servis's draft 90-Day Finding. *See* Pls. Resp. at 7-8. Because Ms. Servis drafted the underlying analysis and because that analysis applied the appropriate standard, Federal Defendants were simply offering an explanation for why some of Ms. Servis's sentences needed to be edited, *i.e.*, that Ms. Servis was a more junior reviewer of such petitions. Fed. Defs. Br. at 20. However, this explanation is ultimately beside the point; indeed, as Plaintiffs acknowledge, the "agency's action must be upheld, if at all, on the basis articulated by the agency itself." Pls. Resp. at 8 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983)). The basis

articulated by FWS in the 90-Day Finding was rational and because Plaintiffs have failed to show otherwise, the Court should reject Plaintiffs' detour into deliberations at FWS.

Plaintiffs' reference to a single sentence written by a FWS scientist in an email attachment does not salvage their argument that FWS applied the incorrect standard. *See* Pls. Resp. at 8-9. Plaintiffs quote Ms. Gober's statement that "based on the information in the petitions, it might be appropriate to do a 12-month finding to resolve discrepancies."[3] *Id.* at 8 (quoting AR 5921). But this statement does not bear the weight placed on it. Fed. Defs. Br. at 17-18. This Court must review FWS's action "based on the agency's *final* action, and not the views expressed by individual staff at earlier stages of the administrative process." *Ctr. for Biological Diversity v. Nat'l Marine Fisheries Serv.*, 977 F. Supp. 2d 55, 75 (D.P.R. 2013) (citing *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658-59 (2007)). In any event, the statement on its face says little about the standard that FWS applied.

Plaintiffs' effort to compare Ms. Gober's statement with the facts in *Center for Biological Diversity v. Kempthorne*, No. C 06-4186 WHA, 2007 WL 163244 (N.D. Cal. Jan. 19, 2007) (*CBD I*), is misplaced. *See* Pls. Resp. at 9. In *CBD I*, the court remanded FWS's negative 90-day finding in part because both an early outline and draft of the finding prepared within the agency had concluded that listing may be warranted. *Id.* at *7. Unlike *CBD I*, there was no indication that FWS changed course during the review of the petitions to list the Yellowstone bison.[4] A

[3] Plaintiffs argue that Federal Defendants' omission of the phrase "'based on information in the petition' . . . deprives this statement of its significance." Pls. Resp. at 8 n.2. Plaintiffs' reasoning is unclear because, in their opening brief, they attached significance to the mention of a possible 12-month status review, not the fact that it was based on information in the petitions.

[4] The circumstances here are also distinguishable from those in *Center for Biological Diversity v. Kempthorne*, CV 07-38, 2008 WL 659822 (D. Ariz. Mar. 6, 2008) (*CBD II*). *See* Pls. Resp. at 5. In *CBD II*, the court based its decision in part on the fact that "a number of FWS scientists believed that there was substantial information that listing the Desert bald eagle as a DPS *may be*

more analogous case is *Palouse Prairie Foundation v. Salazar*, which also addressed a similar, single statement from an email. 2009 WL 415596, at *5. In that case, a FWS employee suggested that the negative 90-day finding was "potentially inconsistent" with the standard. *Id.* But according to the court, plaintiffs "place[d] far too much weight on this single, cautious statement. There is no indication that the author of the email actually disagreed with the FWS's negative finding." *Id.* Like the statement in *Palouse*, Ms. Gober's email message expressed a "single, cautious" statement while the rest of her comments described weaknesses in the petitions' claims. AR 5920-25.

C. FWS Properly Applied Its Scientific Expertise.

Plaintiffs also assert that FWS applied a heightened standard in its review of the petitions because it improperly "weigh[ed] the weight of the evidence and/or resolve[d] legitimate conflicting views." Pls. Resp. at 9. This argument takes two forms, but both are flawed. First, Plaintiffs suggest that FWS cannot apply its scientific expertise and weigh or analyze the facts and data presented. *Id.* at 9, 11. This approach finds no support in the case law, which makes clear that an agency may apply its scientific expertise when evaluating citizen petitions at the 90-day finding stage. *Ctr. for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1142 (D. Colo. 2004) ("Of course FWS can rely on what is within its own expertise and records to reject petitions consistent with ESA standards."); *Palouse Prairie Found.*, 2009 WL 415596, at *2; Fed. Defs. Br. at 16-17. Even "plaintiffs do not dispute that FWS, using its scientific expertise, could rightfully determine that statements in a petition are insufficient to satisfy the reasonable person standard. . . ." Pls. Resp. at 9. Plaintiffs' argument also runs counter to common sense: if

warranted." *CBD II*, 2008 WL 659822, at *11. As with *CBD I*, *CBD II* involved a kind of disagreement within the agency that is simply not evident here.

the agency, which Congress tasked with evaluating the petitions, has knowledge that the petitions lack substantial information, it is better to apply that knowledge at the 90-day finding stage and avoid the unnecessary expenditure of resources that are required for a 12-month status review.

Plaintiffs' second variation on this theme is that "the appropriate process for [FWS to apply its scientific expertise] where there is an apparent dispute among outside experts is during the 12-month review." Pls. Resp. at 1. As discussed below, there is no "apparent dispute among outside experts" in this case, especially as it relates to the Halbert *et al.* (2012) study. *See infra* at 14-15. Moreover, any attempt to limit the application of FWS's scientific expertise whenever there is debate among scientists is not supported by the case law, including the *CBD I* case cited by Plaintiffs. *See* Pls. Resp. at 9-10. The opinion in *CBD I* stated that the substantial information standard "contemplates that where there is disagreement among reasonable scientists, then the Service should make the 'may be warranted' finding and then proceed to the more-searching next step in the ESA process." *Id.* (quoting *CBD I*, 2007 WL 163244, at *7). But even this case, which is central to Plaintiffs' position, contemplates that the agency would be able to apply its scientific expertise because, in the same paragraph, the court stated: "On remand, if the Service again finds that the threats to the salamanders would not justify further action, the Service must clearly explain why the evidence that supports the petition is unreliable, incorrect, or otherwise irrelevant." *CBD I*, 2007 WL 163244, at *7. FWS would not be able to make such a finding, even in the face of a scientific dispute, if it could not apply its expertise.

Plaintiffs compound the error in their crabbed interpretation by ignoring other 90-day finding cases that underscore the deference that is owed to FWS's expertise when it is reviewing petitions. *E.g., Colo. River Cutthroat Trout v. Kempthorne*, 448 F. Supp. 2d 170, 174 (D.D.C.

2006) ("There is a strong presumption in favor of upholding decisions of the FWS in view of its expertise in the area of wildlife conservation and management and the deferential standard of review.") (citations omitted); *Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1201 (D. Or. 2003) ("the court should defer to the agency's scientific and technical expertise so long as the agency 'considered the relevant factors and articulated a rational connection between the facts found and the choice made.'") (citation omitted). And Plaintiffs' objections to Federal Defendants' reliance on *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), and *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litigation*, 709 F.3d 1 (D.C. Cir 2013), misses the mark. *See* Pls. Resp. at 2, 10. Plaintiffs fail to explain why the principle – that an agency can apply its scientific expertise – should not apply simply because the evaluation is performed under a different standard or statute. With respect to *Marsh*, Plaintiffs also overlook other cases, including one from the District Court for the District of Columbia that have cited *Marsh* in this 90-day finding context. *E.g.*, *Colo. River Cutthroat Trout*, 448 F. Supp. 2d at 174 (citing *Carlton v. Babbitt*, 900 F. Supp. 526, 530 (D.D.C. 1995), and *Marsh*, 490 U.S. at 375-78).

Plaintiffs' attempt to circumscribe FWS's application of its scientific expertise in 90-day findings is directly connected to Plaintiffs' effort to lower the substantial scientific information requirement. *See* Pls. Resp. at 23 ("it was FWS's duty here to *accept the information* weighing in favor of the petition, and to defer in-depth analysis. . . .") (emphasis added); *see also id.* at 9-10 ("the 90-day finding should be positive if a reasonable person believes the information in the petition is *credible* and indicates that the petitioned action may be warranted. . . .") (emphasis added). Yet under Plaintiffs' preferred approach, the agency's role would be meaningless. If Congress intended for FWS to merely "accept the information" and not perform an initial evaluation of the petition, Congress would not have included Section 4(b)(3)(A); instead,

Congress would have had the agency commence a 12-month status review for every petition. The ESA's plain language shows that Congress intended FWS to use its expertise in the initial evaluation of each petition and to proceed further only if a petition presents substantial information indicating that the petitioned action may be warranted. 16 U.S.C. § 1533(b)(3)(A).

D. Federal Defendants Articulated the Correct Standard of Judicial Review.

Plaintiffs' suggestion that Federal Defendants misstated the APA standard of review for this type of case should be dismissed for at least two reasons. *See* Pls. Resp. at 2-3. First, Plaintiffs' assertion that Federal Defendants applied a standard that is "too limited," *id.* at 3, misrepresents Federal Defendants' opening brief, which contained a section entitled "Standard of Review" that expressly referred to the same factors that Plaintiffs identified in their opening brief: "A regulation is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to difference in view or the product of agency expertise.'" Fed. Defs. Br. at 13 (quoting *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1144-45 (D.C. Cir. 2005)). Second, to the extent that Plaintiffs are now arguing that FWS acted outside the scope of its authority when it issued the 90-Day Finding, Plaintiffs have failed to offer any record evidence in support of the assertion.[5] *See* Pls. Resp. at 2.

[5] Federal Defendants agree that it is appropriate for this Court to consider whether FWS applied the correct 90-day finding standard. *See* Fed. Defs. Br. at 14-20. But Plaintiffs' statements about the scope of FWS's authority, which rely on a Tenth Circuit case, appear to conflate a claim that FWS acted arbitrarily and capriciously under 5 U.S.C. § 706(2)(A) with a claim that FWS acted in excess of its statutory authority under 5 U.S.C. § 706(2)(C). *See* Pls. Resp. at 2.

II. FWS Properly Considered All of the Listing Factors and Determined That the Petitions Failed to Present Substantial Information.

The record establishes that FWS considered the petitions and rationally concluded that they did not present substantial information indicating that listing the Yellowstone bison may be warranted. Fed. Defs. Br. at 20-40. Plaintiffs have not met their burden of showing that FWS both failed to consider the "relevant factors" and committed "a clear error of judgment." *State Farm*, 463 U.S. at 43. Moreover, reviewing courts are "most deferential" when the agency is "making predictions, within its area of special expertise, at the frontiers of science." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983). Therefore, this Court should defer to FWS's decision and uphold the 90-Day Finding.

A. FWS Acted Reasonably in Its Analysis of Factor A.

The record shows that FWS not only considered the habitat and range of the Yellowstone bison in the 90-Day Finding, but also reasonably concluded that the petitions had not presented substantial information indicating that the petitioned action may be warranted under Factor A. Fed. Defs. Br. at 21-25. In accord with the Significant Portion of the Range (SPR) Policy issued jointly by FWS and the National Marine Fisheries Service (collectively the Services) in 2014, AR 0429-64, FWS's analysis of the Yellowstone bison's range not only focused on the current range, but also considered the loss of historical range on the status of the species. AR 0005. FWS acknowledged the decrease in the range of the bison now inhabiting Yellowstone National Park (YNP) and the limitation of the Yellowstone bison's movements, which must stay within YNP, two management zones outside the park, and areas of the Gallatin National Forest pursuant to the IBMP. *Id.*; *see* AR 4083-93. FWS determined, though, that "given the current stable-to-increasing population status of the YNP bison herd, we do not find substantial information that restriction of range is likely a limiting a factor for the continued existence of the YNP bison."

AR 0005. The agency based this conclusion on the fact that since 2000, when the IBMP was established, the size of the Yellowstone bison herd has remained within the conservation goal of 2,500-4,500 despite the annual winter culls of bison. *Id.* FWS's analysis comports with the SPR Policy's guidance for considering loss of historical range, which stated that "a species suffering a similar loss of historical range would not be listed if viability of the remaining individuals was not compromised to the point of endangering or threatening the species." AR 0436. Thus, consistent with the SPR Policy, FWS rationally concluded that the petitions had not presented substantial information on range curtailment.

The SPR Policy is entitled to *Chevron* deference because Congress has not spoken unambiguously on the meaning of the phrase "significant portion of its range" and the Services' interpretation is a permissible construction of the ESA. *Chevron, USA v. Nat. Res. Def. Council*, 467 U.S. 837, 845 (1984); Fed. Defs. Br. at 22-25. In the portion of the SPR Policy relevant here, the Services interpreted the term "range" to mean "current range" at the time of the Section 4 listing decision and not "historical range" because the language of Section 4 "denotes a present-sense condition of being at risk of a current or future undesired event," and it is not possible to say a species "is in danger" of extinction in a location where it no longer exists. AR 0435.

Plaintiffs assert that the SPR policy is not entitled to deference, but their argument founders on the shoals of case law. *See* Pls. Resp. at 13-15. Plaintiffs initially assail the status of the SPR Policy based on an adverse decision in the District Court for the District of Arizona.[6] Pls. Resp. at 14 (citing *Ctr. for Biological Diversity v. Jewell*, -- F. Supp. 3d --, No. CV-14-2506-TUC-RUM, 2017 WL 2438327 (D. Ariz. Mar. 29, 2017)). However, as Plaintiffs acknowledge,

[6] To the extent that Plaintiffs are now offering a facial challenge to the SPR Policy, that claim has been waived because Plaintiffs did not raise it in their opening brief. *See Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 353 (D.C. Cir. 2011).

the judgment in that case is not yet final and the decision itself does not discuss the Policy's interpretation of loss of historical range.[7] *Id.* Plaintiffs fail to mention another opinion, this one final and published, by the same district court that *did* specifically consider the SPR Policy's treatment of loss of historical range and upheld it as a reasonable interpretation of the ESA. *WildEarth Guardians v. Jewell*, 134 F. Supp. 3d 1182, 1191-93 (D. Ariz. 2015). That court "conclude[d] that it should accord *Chevron* deference to the Service's authoritative interpretation of the ESA, even though it post dates the 2013 Finding" challenged in the case. *Id.* at 1193; *see also Humane Soc'y v. Zinke*, -- F. 3d --, No. 15-5041, 2017 WL 3254932 at *14 (D.C. Cir. Aug. 1, 2017); *Defs. of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 1009-10 (D. Mont. 2016).

Despite these cases upholding the reasonableness of the SPR Policy, Plaintiffs maintain their reliance on cases that pre-date the Policy. Pls. Resp. at 14-15. Yet these cases are now irrelevant because "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *see Defs. of Wildlife*, 176 F. Supp. 3d at 1009 (noting that the cases "predate the SPR Policy" and thus "do little to support the argument that the Service's current SPR Policy fails to account for historical range"). Because Plaintiffs rely on cases pre-dating the SPR Policy rather than show how it is an impermissible construction, the Court should reject their argument.

When Plaintiffs' argument shifts toward the statutory language, their position appears to align with that of Federal Defendants. *See* Pls. Resp. at 15-16. Plaintiffs cite Section 4(a)(1)(A)

[7] According to Plaintiffs, the decision is nonetheless persuasive. Pls. Resp. at 14 n.5. This assertion is unavailing given that the decision did not examine loss of historical range.

and argue that "FWS must determine whether a species' range is presently curtailed or destroyed." Pls. Resp. at 16. As described above, FWS's 90-Day Finding focused on the *current* range of the Yellowstone bison. This approach was consistent with the SPR Policy, which was based on a permissible reading of Section 4(a)(1)(A). Fed. Defs. Br. at 25. Nevertheless, Plaintiffs suggest that analysis of present curtailment means "whether a significant portion of its range no longer exists." Pls. Resp. at 16. The statute does not support this interpretation, and although FWS must consider the loss of historical range on the species' status, "a specific consideration of whether lost historical range constitutes a significant portion of the range is not necessary." AR 0435. As described above, FWS considered the loss of historical habitat by discussing the loss of range and the restriction of movement under the IBMP. AR 0005.

B. FWS Acted Reasonably in Its Analysis of Factor B.

The record shows that FWS considered the petitions' claims about overutilization for recreational (hunting) and scientific (culling) purposes and reasonably determined that the petitions failed to present substantial information indicating that the petitioned action may be warranted under Factor B. Fed. Defs. Br. at 25-31. As relevant to Plaintiffs' reply, FWS's Factor B analysis responded to the claim that culling under the IBMP allegedly degraded the Yellowstone bison's genes by culling migratory bison. Fed. Defs. Br. at 25-26. Specifically, FWS considered the studies cited by the petitions, identified the limitations of the Pringle study (2011), and discussed the evidence showing that Yellowstone bison continue to migrate. AR 0008-9. FWS also responded to the claim that differential culling between the herds threatens the genetic viability of the Yellowstone bison herd as a whole. AR 0009. After considering the studies and the inferences that the petitioners' drew from them, FWS determined that there was not substantial information in the petitions. AR 0010.

Contrary to Plaintiffs' assertions, FWS neither ignored nor improperly rebutted the information in the petitions. *See* Pls. Resp. at 1-2, 11-12, 17-22.[8] Plaintiffs' reply brief focuses on the claim about differential culling between the herds and the claims regarding the loss of resilience through the culling of migratory bison. Yet Plaintiffs continue to misread FWS's 90-Day Finding analysis of these issues and to confuse the applicable standards.

1. The Record Supports FWS's Decision to Reject Petitioner's Inferences About Subpopulations and Genetic Viability.

Plaintiffs' reply brief begins with an attempt to recast their argument for why FWS allegedly acted arbitrarily and capriciously in its analysis of the claims about hunting and culling under the IBMP. Plaintiffs' petition and opening brief inferred that because the effective minimum size of a population is 1,000 and because there may be two subpopulations (herds) within the Yellowstone bison herd, the population size should be 2,000-3,000 for each herd. AR 410; Pls. Br. (ECF 17) at 26. To reach this inference, Plaintiffs combined parts of the Hedrick study (2009) with parts of the Halbert *et al.* study. *Id.* After FWS analyzed those studies and the White *et al.* (2011) and White and Wallen (2012) studies, FWS determined that the petition's inference was unsupported. AR 0009-10; Fed. Defs. Br. at 26-31.

Plaintiffs now portray the issue as an "apparent dispute" between the White *et al.* and Halbert *et al.* studies. Pls. Resp. at 1. This recasting glosses over key nuances and misrepresents FWS's analysis. First, Plaintiffs suggest that Federal Defendants' opening brief "tries to defend its decision to rely on the White *et al.* (2011) study over the Halbert *et al.* (2012) study." Pls. Resp. at 1. But Federal Defendants were not defending White *et al. over* Halbert *et al.*; they were defending FWS's reliance on White *et al.* in its analysis. Fed. Defs. Br. at 27-28. The attempt to

[8] Plaintiffs' reply brief criticizes FWS's Factor B analysis in three separate sections. For the sake of clarity, Federal Defendants respond to these argument jointly here.

recast the underlying analysis on this aspect of Factor B appears to be aimed at furthering Plaintiffs' argument that where there is a dispute among scientists, FWS must withhold the application of its scientific expertise until a 12-month status review. As explained above, this argument is inconsistent with Section 4(b)(3)(A). Further, Plaintiffs mischaracterize the Halbert *et al.* study as a standalone study that definitively supports petitioners' inference that each herd should have a population size of 2,000-3,000. *See* Pls. Resp. at 1 ("nowhere in the 90-Day Finding does FWS ever suggest that the Halbert study, taken at face value, is not the sort of evidence that might lead a reasonable person to want to proceed with a 12-month status review."). This approach ignores FWS's analysis of the inference in Plaintiffs' petition about subpopulations and the agency's conclusion, based on the Hedrick, White *et al.*, and White and Wallen studies, that the inference was unsupported. AR 0009-10; *see infra*.

As a part of FWS's scientific engagement with the claim that the population of each of the herds should be 2,000-3,000, FWS determined that "[t]o date, there is no evidence that culling has impacted the long-term genetic viability or persistence of the YNP bison population." AR 0009. Plaintiffs criticize FWS's statement as "unsupported and impermissible" but overlook the rest of the statements made by FWS as well as the Halbert *et al.* study's own indications of uncertainty. *See* Pls. Resp. at 19. As shown by the 90-Day Finding, FWS considered but rejected the proposal for calculating subpopulations separately because the Hedrick study indicated that the Yellowstone bison herd as a whole met the minimum effective population size, FWS reasonably relied on the White *et al.* study, and FWS incorporated analysis from the White and Wallen study on the role of humans on the Yellowstone bison populations. AR 0009-10; Fed. Defs. Br. at 26-31. Moreover, a closer look at the Halbert *et al.* study reveals uncertainty about its conclusions. AR 0721 ("It is not clear at this point how the subpopulations may be changing

over time or how the current bison management plan might influence the genetic integrity of the subpopulations.") (citation omitted); *id.* ("Population subdivision theoretically leads to decreased genetic variation within individual subpopulations due to genetic drift. . . ."); *see id.* at 0720-21 (Hedrick's estimated effective population size "is *not* related to what effective population sizes should be recommended for the subpopulations in the future.") (emphasis added).

Plaintiffs' direct attack on the White *et al.* study and indirect attack on the Perez-Figueroa *et al.* study and FWS's 2007 negative 90-day finding on Yellowstone bison are misplaced. *See* Pls. Resp. at 19-20. As an initial matter, contrary to Plaintiffs' assertion, the discussion of the impact of culling on genetic viability in the White *et al.* study is not limited to one line in a table. *See* AR 0920-21. Plaintiffs' collateral attack on the Perez-Figueroa *et al.* study, which was updated in 2012, is also flawed. The modelling in the Perez-Figueroa *et al.* study lends credence to FWS's conclusion that there is no evidence that culling under the IBMP has harmed the genetic variation of Yellowstone bison. Specifically, the models showed that "fluctuations in population size are unlikely to greatly accelerate the loss of genetic variation, at least for the relatively large [population census size] and positive population growth rates considered here," *i.e.*, of the Yellowstone bison herd.[9] AR 0688. For these reasons, this Court should reject Plaintiffs' attempt to undermine the White *et al.* and Perez-Figueroa *et al.* studies.

This Court should also reject Plaintiffs' misguided assertions about FWS's 2007 negative 90-day finding. *See* Pls. Resp. at 20. First, as indicated above, the challenged 90-Day Finding relied on more than the 2007 finding. Second, it was entirely appropriate for FWS to consider its own records. *See Colo. River Cutthroat Trout*, 448 F. Supp. 2d at 177. Third, the ESA does not

[9] That same modelling suggested that even for high genetic diversity, the average population size would need to be around 3,250. *Id.* Notably, between the establishment of the IBMP and 2014, the Yellowstone bison herd has averaged a population size of 3,864. *See* AR 0544-45.

require the agency to consider the "best scientific and commercial data available" at the 90-day finding stage. *Sw. Ctr. for Biological Diversity v. Babbitt*, 131 F. Supp. 2d 1, 5 n.1 (D.D.C. 2001); *contra* Pls. Resp. at 20. The "best scientific and commercial data available" does not apply at the 90-day finding stage because that would require the agency to conduct a review of research and data beyond the scope of the petition. Fed. Defs. Br. at 27-28. At the 90-day finding stage, the standard is whether the petition presented "substantial scientific or commercial information." 16 U.S.C. § 1533(b)(3)(A). Fourth, Plaintiffs conflate *evidence* of adverse impacts on genetic variation with *data* on genetic relationships, inheritance, and history of the Yellowstone bison – the increase of the latter does not necessarily mean that it provides the former. *See* Pls. Resp. at 20.

Next, Plaintiffs challenge FWS's reliance on the White and Wallen study, but FWS appropriately used that study as it rebuts the claims made by the petitioners that each of the two herds should be kept at a certain size. *See* Pls. Resp. at 21-22; AR 0009-10. Plaintiffs begin by mischaracterizing the White and Wallen study as an "opinion piece." Pls. Resp. at 21. Though no field work was done for the study, it was a peer-reviewed scientific article published in the same *Journal of Heredity* as the Halbert *et al.* study. AR 0673-75. Plaintiffs ignore key conclusions of the White and Wallen study. For example, White and Wallen concluded that Halbert *et al.*: disregarded the human contributions to the genetic substructure; may have overestimated the isolation of the subpopulations because "extensive monitoring . . . suggests that emigration and gene flow is now much higher"; and failed to note that under the IBMP "management plans and monitoring/research to inform and adjust actions, including culling activities, have considered the two breeding herds." AR 0673-74. Based on these findings, White and Wallen seriously

questioned whether management under the IBMP should "preserve the genetic distinctiveness of each herd." AR 0674. White and Wallen in turn informed FWS's analysis. AR 0009-10.

Plaintiffs then suggest that some of the White and Wallen language that FWS relied upon actually supports Plaintiffs' position: "White and Wallen's emphasis on the maintenance of natural processes over artificial selection is an argument against the IBMP's artificially selective culling practices. . . ." Pls. Resp. at 22. But it is difficult to reconcile Plaintiffs' petition and their underlying argument with the White and Wallen study. Plaintiffs petitioned for an approach that would have the IBMP maintain "a census of at least 2,000-3,000 for each Yellowstone breeding herd."[10] AR 0410. According to White and Wallen, on the other hand, the "preservation of a population or genetic substructure" should not be the IBMP's focus. AR 0674. Thus, this Court should reject Plaintiffs' attempt to embrace the conclusions of White and Wallen.

This Court should also reject Plaintiffs' suggestion that "FWS did not itself articulate the same rationales connecting these counterarguments to its conclusions that Defendants attribute to them *post hoc* in their brief." Pls. Resp. at 17. The one example that Plaintiffs provide – FWS's analysis of the petitioners' subpopulation claim – simply does not support their argument. Specifically, FWS discussed evidence showing that the genetic substructure was "artificially created" and estimates suggesting that only approximately 30-40% of the Yellowstone bison genes derive from the original 25 survivors; based on these points, FWS concluded that "genetic differentiation and overall genetic diversity may not be crucial for preserving the genes from the survivors of the historic bottleneck." AR 0009. FWS's conclusion was aimed directly at

[10] The petition also stated: "The continued practice of culling bison *without regard to subpopulation structure* has the potentially negative long-term consequences of reducing genetic diversity and permanently changing the *genetic constitution within subpopulations* and across the Yellowstone metapopulation." AR 0388 (emphasis added).

rebutting the petitioners' claim that genetic substructure was critical for genetic viability. Federal Defendants' brief placed this FWS conclusion in the context of the agency's other points about subpopulations to defend the overall conclusion made by FWS that the petitions had not presented substantial information. These conclusions are contained in FWS's 90-Day Finding.[11]

2. The Record Supports FWS's Decision to Reject Petitioner's Inferences About Migratory Behavior.

FWS properly analyzed the petitions' claims about the impact of culling migratory bison on the genetic viability of Yellowstone bison, which relied largely on the Pringle study. AR 0008-9; *contra* Pls. Resp. at 11-12, 18-19. Plaintiffs incorrectly assert that "FWS did not argue or provide any evidence to show that Pringle's methods, assumptions, or conclusions were unreliable or obsolete" and that Federal Defendants' opening brief offered two unresponsive statements. Pls. Resp. at 11. A review of the text of the 90-Day Finding, which Federal Defendants largely summarized in their opening brief, shows FWS's thoughtful analysis and rejection of the impairments predicted by Pringle:

> However, these impairments have *not been connected to specific defects* in the bison mitochondrial genome and Pringle's assertions are predicated on *assumptions* that bison mitochondrial defects are caused by not the same, but similar mutations observed in humans and dogs (Pringle 2011, p. 1, both petitions). Only one bison from YNP analyzed in Pringle's study had haplotypes that contain the *possibly deleterious* mutations (Pringle 2011, p. 14, both petitions). Further, these defects are thought to have arisen *from the initial population bottleneck* that reduced the North American bison population to 25 animals in YNP (Boyd and Gates 2006, p. 1, first petition). Therefore, any deleterious genetic effects of the bottleneck would have occurred at that time and would not necessarily be exacerbated by present culling management regimes.

[11] Plaintiffs again return to their incorrect assertion that where there are competing scientific claims, FWS can only apply its scientific expertise at the 12-month status review stage. Pls. Resp. at 17 n.9. As discussed above, that assertion neither finds support in the case law, nor applies here, where even the petitions suggest uncertainty about genetic substructures. *See* AR 0388-89 (acknowledging that the effective population sizes of the two subpopulations are "unknown" and that a "thorough viability analysis to determine the appropriate effective population size for the long-term sustainability of the subpopulations has not been conducted").

AR 0008 (emphases added); Fed. Defs. Br. at 18-19. The 90-Day Finding also included a response to a claim about artificial selection of non-migratory bison in the second petition:

> However, the second petition *does not cite sources to support these claims* and there is no evidence at this time that indicates culling animals migrating from YNP will eliminate a genetic basis for the migratory behavior. In addition, *continual migration each year* suggests this behavior persists.

AR 0008 (emphases added); Fed. Defs. Br. at 25-26. Thus, the record shows that FWS responded directly to the claims made in the petitions and in the Pringle study they cited. Plaintiffs' arguments on reply do not overcome these rational explanations.

Plaintiffs posit that FWS's reference to only one Yellowstone bison containing the possibly deleterious mutation is wrong and rely on excerpts from a different table in the Pringle study purportedly showing a larger number of Yellowstone bison with the suspected mutation. Pls. Resp. at 12. Even if the numbers in that table (Table 9) were taken at face value, however, there is still no evidence connecting the mutation to specific defects in bison because Pringle based his conclusions on assumptions drawn from other animals without providing any evidence that those animals were comparable to bison or that the similar genes he found in bison had actually caused the harms he feared. AR 0957-65. Moreover, the numbers in Table 9 are based on a series of assumptions drawn from two unrelated studies.[12] Thus, this Court should not accept Table 9's estimates as a sign that the petitions presented substantial scientific information.

[12] First, "*under the assumption* that the control region alone serve[s] as a satisfactory proxy" for the disease mutation, Pringle produced a table (Table 8) illustrating whether that mutation was observed or predicted for 133 bison genes in GenBank. AR 0965 (emphasis added); AR 0973. Next, Pringle looked at the Gardipee (2007) study, which used fecal DNA sampling to assess genetic population structure of the Greater Yellowstone Area bison. AR 1770-1832. Gardipee had identified two haplotypes (6 and 8) in the bison from YNP and Grand Teton National Park (GTNP) that were associated with two of the 133 genes from GenBank. AR 1799. Haplotype 6 was associated with AF083362, which on Table 8 was *predicted* to contain the mutation, and Haplotype 8 was associated with AF083364, which was *predicted* to be healthy. *Id.*; AR 0970-71. Pringle then extrapolated from Gardipee's fecal sampling, which showed what percentage of

Plaintiffs also repeat their erroneous assertion that FWS's response on migratory behavior applied too high a bar. Pls. Resp. at 18. In the 90-Day Finding, FWS concluded that "any deleterious effects of the bottleneck would have occurred at that time and would not necessarily be exacerbated by present culling management regimes." AR 0008. Plaintiffs excised part of this conclusion in their opening brief and now contend that the excised part "fails to carry the weight assigned to it." Pls. Resp. at 18, n.10. But, as Federal Defendants explained in their opening brief, the focus on *when* the mutation occurred was central to FWS's conclusion because the bottleneck occurred over 100 years ago, and the petitions claimed that the IBMP's culling was responsible for the supposedly deleterious effects. Fed. Defs. Br. at 18-19. Plaintiffs also assail FWS's reference to the evidence that the IBMP's culling is a surrogate for a dispersal sink, *i.e.*, the out-migration of Yellowstone bison that would occur naturally. Pls. Resp. at 18-19. This part of the 90-Day Finding is pertinent, though, because it suggests that even without the culling, there would be migration of certain bison out of YNP, which could have the same impact on the Yellowstone bison's genes, *i.e.*, the departure of more migratory bison. AR 0008-9. Finally, FWS cited to the Plumb *et al.* (2009) study in support. AR 0008-9; *contra* Pls. Resp. at 19.[13]

C. FWS Acted Reasonably in Its Analysis of Factor C.

The record shows that FWS considered the claims raised by the petitions about disease and predation and reasonably determined that the petitions did not present substantial

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the YNP and GTNP herds he examined contained Haplotype 6. *See* AR 1823. Based on all of these assumptions, Pringle crated "an overall *estimate* of 145 bison with the V98A / I60N haplotype and 34 without in Table 8 and Table 9." AR 0965 (emphasis added); AR 0971.

[13] Plaintiffs cite to *Colorado River Cutthroat Trout*, 448 F. Supp. 2d at 175-76, to support their assertion that FWS improperly weighed arguments, but that case is inapt. In that case, the court stated that "FWS simply cannot bypass the initial 90-day review and proceed to what is effectively a 12-month status review" because FWS had contacted outside agencies at the 90-day finding stage. *Id.* Here, on the other hand, FWS applied its expertise only to its review of the information in the petitions and its own records.

information on either issue indicating that listing may be warranted. Fed. Defs. Br. at 31-32. Plaintiffs contend that FWS made errors here because "the IBMP justifies its culling scheme as being aimed at preventing the transmission of infectious brucellosis from wild migratory bison to captive cattle herds." Pls. Resp. 17 n.7. More than this one-sentence assertion is needed to show that FWS's decision was a "clear error of judgment." *State Farm*, 463 U.S. at 43. Further, Plaintiffs again mischaracterize the objective of the IBMP; the primary goal of the IBMP is to conserve Yellowstone bison while also preventing the transmission of brucellosis from Yellowstone bison to livestock. AR 4083; Fed. Defs. Br. at 33-34.

D. FWS Acted Reasonably in Its Analysis of Factor D.

The record shows that FWS considered the adequacy of the existing regulatory mechanisms, and in particular the IBMP. Fed. Defs. Br. at 32-36. The record further shows that FWS acted reasonably when it concluded that the IBMP provides adequate protection for the Yellowstone bison. *Id.*

All of the complaints that Plaintiffs lodge against FWS's Factor D analysis are without merit. *See* Pls. Resp. at 22-23. Plaintiffs suggest that FWS's statement about the annual population size goals for each of the herds is untrue. *Id.* at 22. Even though there are no specific numbers established each year, the IBMP manages the hunting and culling with the goal of maintaining the sizes of both the central and northern herds. *See* AR 0536-37 ("Managers at Yellowstone National Park also want to maintain breeding herds of bison in the central and northern regions of the park. . . ."); AR 0536 ("However, we recommend limiting harvest in the western management area to adult males because other central herd animals will likely be removed after migrating outside the northern park boundary."); AR 0548 (noting that in 2014 "[m]ore harvests occurred in the northern management area (258 north; 64 west)" in an effort to

equalize the size of the two herds); AR 0554 ("building evidence suggests that end of the winter herd sizes of >2,500 northern and >1,500 central may be more appropriate for maintaining annual migrations. . . ."); *see also* AR 0674. Plaintiffs also contend that the herd sizes from between 2001 and 2007 do not undercut their argument about the IBMP. Pls. Resp. at 23. But to make this point, Plaintiffs must adjust their assertion, from an initial claim that the IBMP "has had and continues to have differential impact between the two herds," Pls. Br. at 35-36, to a modified assertion that under the IBMP, "herd proportions gradually shifted." Pls. Resp. at 23. In addition, Plaintiffs' protestations about the herd sizes overlook FWS's reasonable assessment of the overall Yellowstone bison population. AR 0009; Fed. Defs. Br. at 35.

FWS directly responded to the petitions' claims about the IBMP's impact on the Yellowstone bison as it relates to disease. *Contra* Pls. Resp. at 22. In this portion of the 90-Day Finding, FWS responded to concerns that culling under the IBMP was limiting the population size of the Yellowstone bison. AR 0011. FWS concluded: "Disease management is often an important aspect of wildlife management and stable-to-increasing population trends do not indicate IBMP disease management is limiting the YNP bison population." AR 0012. With respect to the indirect impacts, such as "genetic viability," the next sentence of the 90-Day Finding noted that those impacts were discussed under Factor B, *id.*, and indeed they were. AR 0008-9; Fed. Defs. Br. at 25-31, 35-36.

E. FWS Acted Reasonably in Its Analysis of Factor E.

The record shows that FWS reached a rational decision that the petitions failed to present substantial information under Factor E, particularly with respect to genomic extinction and climate change. Fed. Defs. Br. at 36-40. Plaintiffs have made no attempt to respond to Federal

Defendants' arguments about FWS's Factor E analysis, and thus have conceded these arguments. *Maddux v. Dist. of Columbia*, 144 F. Supp. 3d 131, 140 (D.D.C. 2015).

III. Plaintiffs Ignore the Rebound of the Yellowstone Bison and the Role Played by the IBMP in Adaptive Management of the Species.

Plaintiffs attempt to impugn Federal Defendants' opening brief for its suggestion of "a rosy picture of the status of Yellowstone bison."[14] Pls. Resp. at 3. But Plaintiffs' discussion on this issue is flawed because the focus of Plaintiffs' attack is not the status of the Yellowstone bison, but the status of all plains bison throughout North America. *See id.* at 3-4. Indeed, Plaintiffs go so far as to quote a study concluding that "plains bison warrant consideration for a listing." *Id.* at 4 (quoting AR 3774). Although the overall story of the plains bison represents an important part of the historical context for the Yellowstone bison, this case is about whether listing the *Yellowstone bison* may be warranted. AR 0370; 0043. Plaintiffs' focus on all plains bison only underscores the weakness of their own argument about the status of the Yellowstone bison. This weakness is also evident from Plaintiffs' decision to ignore the long history of effective and adaptive management of the Yellowstone bison under the IBMP as well as the judicial decisions that upheld earlier management plans and the IBMP itself. Fed. Defs. Br. at 7-9.

[14] Plaintiffs seem to allege bad faith on the part of FWS, arguing that "[o]ne would not expect an agency to objectively review a set of petitions that strongly indicate a problem with the government's 'success story' narrative it has advanced for years regarding bison generally and specifically for the Yellowstone bison." Pls. Resp. at 3. This unsupported claim should be rejected because Plaintiffs make no effort to meet their burden to prove bad faith. *See Envtl. Def. Fund v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981) (the "arbitrary and capricious" standard of review "is a highly deferential one . . . which presumes the agency's action to be valid") (citations omitted); *New Life Evangelical Ctr. v. Sebelius*, 753 F. Supp. 2d 103, 125 (D.D.C. 2010) ("To put it generously, New Life's generalized, conclusory, and wholly unsupported allegations of agency bad faith fall short of the circumstances that would justify overcoming this presumption [of regularity] and concluding that New Life has discharged its burden of proof.") (citation omitted).

Additionally, Plaintiffs rely on the Hedrick study, which argues for managing bison as a conservation species because of low initial numbers of founders, past bottlenecks, cattle hybridization, and low genetic variation. Pls. Resp. at 4 (quoting AR 1281). But Hedrick points to another study showing that relative to the other federal herds, the Yellowstone bison herd had many founders and is one of the two herds with the highest genetic variation, and that there is no evidence of cattle ancestry in the Yellowstone bison herd. AR 1286. Thus, Plaintiffs' assertions about the plains bison are not on point.

IV. Any Remedy Should Be Limited to Remand of the 90-Day Finding.

On reply, Plaintiffs address remedy only in their concluding paragraph, which asks this Court to remand or order FWS to conduct a 12-month status review. Pls. Resp. at 24. In the event the Court grants Plaintiffs' motion, the appropriate remedy would be to "hold unlawful and set aside" the 90-Day Finding and remand to FWS to complete a new 90-day finding. 5 U.S.C. § 706(2); Fed. Defs. Br. at 40-41. It would not be appropriate for the Court to order FWS to skip ahead to the 12-month stage, which would be akin to ordering specific relief. *See Nat'l Tank Truck Carriers v. EPA*, 907 F.2d 1777, 185 (D.C. Cir. 1990) ("We will not, indeed we cannot, dictate to the agency what course it must ultimately take . . . that choice is the agency's and not ours.") (citations omitted). Plaintiffs provide no explanation for why this case would warrant an exception to that rule. If, however, the Court finds a flaw with the 90-day finding, Federal Defendants respectfully request the opportunity to submit further briefing on the scope of the remedy in light of the specific violations identified by the Court.

CONCLUSION

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

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Respectfully submitted,

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