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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 Center for Biological Diversity; and  
10 Maricopa Audubon Society,

11 Plaintiffs,

12 v.

13 S.M.R. Jewell, in her official capacity as  
14 Secretary of the United States Department  
15 of the Interior; and Daniel Ashe, in his  
16 official capacity as Director of the United  
17 States Fish and Wildlife Service,

18 Defendants.

No. CV-12-02296-PHX-DGC

**ORDER**

19 Plaintiffs have filed motions to supplement the administrative record. Docs. 32,  
20 33. If the Court denies the motion, Plaintiffs request that the Court take judicial notice  
21 of a report from the United States Inspector General (“IG report”). Doc. 33 at 2. The  
22 motion has been fully briefed. For the following reasons, the motion will be denied.<sup>1</sup>

23 **I. Legal Standard.**

24 Judicial review of agency action is generally limited to review of the  
25 administrative record, and the task of the reviewing court is to apply the appropriate  
26 standard of review under the Administrative Procedures Act based on the record the  
27 agency presents to the reviewing court. *Animal Def. Council v. Hodel*, 840 F.2d 1432,

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28 <sup>1</sup> The requests for oral argument are denied because the issues have been fully  
briefed and oral argument will not aid the Court’s decision. *See* Fed. R. Civ. P. 78(b);  
*Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 1436 (9th Cir. 1988), *amended*, 867 F.2d 1244 (9th Cir. 1989) (citing *Friends of the*  
2 *Earth v. Hintz*, 800 F.2d 822, 828 (9th Cir.1986), and *Florida Power & Light Co. v.*  
3 *Lorion*, 470 U.S. 729, 743-44 (1985)). The administrative record consists of “all  
4 documents and materials directly or indirectly considered by agency decision-makers  
5 and includes evidence contrary to the agency’s position.” *Thompson v. U.S. Dep’t of*  
6 *Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (citing *Hodel*, 840 F.2d at 1436). The focal  
7 point for judicial review “should be the administrative record already in existence, not  
8 some new record made initially in the reviewing court.” *Camp v. Pitts*, 411 U.S. 138,  
9 142 (1973).

10 Certain circumstances justify expanding judicial review beyond the agency’s  
11 record. *Pub. Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982). The  
12 record may be supplemented (1) when necessary to determine whether the agency has  
13 considered all relevant factors and has explained its decision, (2) when the agency has  
14 relied on documents not in the record, (3) when necessary to explain technical terms or  
15 complex subject matter, or (4) when the plaintiffs make a showing of agency bad faith.  
16 *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir.  
17 2006). “It is the plaintiffs’ burden to demonstrate that one or more of these exceptions  
18 apply.” *Parravano v. Babbitt*, 837 F. Supp. 1034, 1039 (N.D. Cal. 1993) *aff’d*, 70  
19 F.3d 539 (9th Cir. 1995).

## 21 **II. Analysis.**

22 Plaintiffs seek to supplement the record with two documents: an article by David  
23 Fraser from the British Columbia Ministry of Environment, Lands, and Parks which  
24 discusses generally peripheral species, and an excerpt from a 2008 United States  
25 Inspector General report detailing an investigation into certain policy decisions by the  
26 U.S. Fish and Wildlife Service (“FWS”) related to endangered species. Doc. 33 at 2.  
27 Plaintiffs argue that both documents will assist the Court in determining “whether the  
28 agency has considered all relevant factors and explained its decision.” *Id.* at 33.

1           While this exception provides an avenue for expanding an administrative record,  
2 the broad language of the exception must be applied cautiously to avoid swallowing the  
3 rule. *Johnson*, 674 F.2d at 794. Supplementation of a record will not be allowed  
4 whenever a plaintiff, in an attempt to convince a court that an agency made an unwise  
5 choice, argues that the agency should have considered other information. *See, e.g.*,  
6 *Asarco Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980 (“[C]onsideration of the  
7 evidence to determine the correctness or wisdom of the agency’s decision is not  
8 permitted[.]”). Nor will supplementation be permitted merely to bolster the record or  
9 supply background information. *Hintz*, 800 F.2d at 829 (“The discovery sought by the  
10 appellants might have supplied a fuller record, but otherwise does not address issues  
11 not already there.”). Rather, the moving party must make a viable argument that  
12 failure to supplement the record will “effectively frustrate judicial review.” *Hodel*,  
13 840 F.2d at 1436.

14           **A. Fraser Publication.**

15           Plaintiffs claim that the Fraser publication (Doc. 32-1) will assist the Court in  
16 determining whether Defendants considered all relevant scientific information on the  
17 significance of peripheral populations before they decided that the desert bald eagle is not  
18 eligible for listing consideration under FWS’s Distinct Population Segment (“DPS”)   
19 Policy. Doc. 33 at 3-5. Plaintiffs argue that because FWS previously relied on this study  
20 to make a DPS determination regarding marbled murrelets, the study should have been  
21 used by FWS in its desert bald eagle determination. *Id.* at 4. Plaintiffs contend that FWS  
22 did not give full consideration to the “significance” determination in its report because it  
23 “summarily dismissed – in only two sentences – the idea that loss of desert eagles might  
24 have a negative effect on bald eagles as whole.” Doc. 48 at 4.

25           The relevant factors exception applies, however, only “when Federal Defendants  
26 fail to consider a general subject matter that is demonstrably relevant to the outcome of  
27 the agency’s decision, not when specific hypotheses and/or conclusions are omitted from  
28 consideration.” *Pinnacle Armor, Inc. v. United States*, 923 F.Supp.2d 1226, 1234 (E.D.

1 Cal. 2013) (internal quotations omitted). Plaintiffs acknowledge that FWS considered the  
2 general subject matter, but argue that the nature of the consideration was perfunctory and  
3 inadequate. Doc 48 at 4. As noted above, however, a party may not supplement the  
4 record merely to bolster the record on the general subject matter addressed by the agency.  
5 *See Hintz*, 800 F.2d at 829.

6 Further, Plaintiffs bear the burden of showing that failure to include this report  
7 “effectively frustrates judicial review.” *Hodel*, 840 F.2d at 1436. Plaintiffs make no  
8 argument that failure to include the Fraser publication frustrates judicial review. Instead,  
9 they seem dissatisfied with the conclusions reached by Defendants and wish to  
10 supplement the record with a report that could be favorable to their position.

11 **B. IG Report.**

12 Plaintiffs claim that a 2008 IG report (Doc. 32-2) should be added to the record  
13 because it is necessary to determine whether the agency considered all relevant factors  
14 and explained its decision. Doc. 33 at 5. Plaintiffs allege that the report is “central to the  
15 issue of whether or not [Defendants] properly and consistently interpreted its DPS  
16 Policy” in determining that desert eagles were not eligible for listing as a DPS. *Id.*

17 The IG report details an investigation conducted after a 2008 ruling in which  
18 Judge Murguia found Defendants’ 90-day finding regarding the desert bald eagle to be  
19 “arbitrary and capricious.” Doc. 32-2 at 8. The report explains a dispute between the  
20 FWS Washington office and the FWS Region 2 office which led to the mishandled 90-  
21 day finding. *Id.* at 2. Plaintiffs contend that the IG report should be included as evidence  
22 that Defendants did not consistently apply DPS Policy for purposes of its 12-month  
23 finding. Doc. 48 at 6. As discussed above, however, admitting non-record evidence is  
24 permissible only when the “agency entirely failed to consider a general subject matter  
25 relevant to its decision making.” *Pinnacle Armor*, 923 F.Supp.2d at 1235. Plaintiffs  
26 have not made this showing,

27 In addition, Plaintiffs bear the burden of showing that failure to include this data  
28 “effectively frustrates judicial review.” *Hodel*, 840 F.2d at 1436. In its 12-month

1 finding, FWS clearly states that it continues consistently to apply DPS policy. 77 Fed.  
2 Reg. 25808. The IG report centers on an inter-agency dispute that occurred in 2006, and  
3 the Court is not persuaded that the report is necessary to determine whether FWS applied  
4 the proper DPS policy in February 2010.

5 Plaintiffs also argue that the IG report is admissible under the bad faith exception.  
6 Doc. 33 at 6. Plaintiffs allege that the IG report provides evidence that improper  
7 behavior occurred in the past with regard to FWS' consideration of the desert eagle  
8 petition. *Id.* They essentially argue that FWS' mishandling of the 90-day finding in  
9 August 2006 is proof of a culture of improper behavior within the agency and that the IG  
10 report is proof of continued bad faith in this case. This argument is without merit. For  
11 the bad faith exception to apply, "[n]ormally there must be a *strong showing* of bad faith  
12 or improper behavior before the court may inquire into the thought processes of  
13 administrative decision makers." *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437  
14 (9th Cir. 1988), amended, 867 F.2d 1244 (9th Cir. 1989) (emphasis added). The IG  
15 report about 2006 events does not constitute a strong showing of bad faith in 2010.

16 **C. Judicial Notice.**

17 Plaintiffs ask the Court to take judicial notice of the IG report. Doc. 33 at 7. This  
18 argument is best decided in the context of the parties' summary judgment arguments.  
19 The parties should address the issue of judicial notice of the IG report in their summary  
20 judgment briefing.

21 **IT IS ORDERED** that Plaintiffs' motions to supplement (Docs. 32, 33) are  
22 **denied.**

23 Dated this 13th day of January, 2014.

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28 David G. Campbell  
United States District Judge