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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, et al.,

No. CV-12-02296-PHX-DGC

10 Plaintiffs,

ORDER

11 v.

12 Sally Jewell, et al.,

13 Defendants.

14
15 This case involves Plaintiffs' attempts to have the Sonoran Desert population of
16 bald eagles listed as threatened or endangered under the Endangered Species Act. This
17 population of the bald eagle, which will be referred to in this order as the "desert eagle,"
18 has been the subject of two previous lawsuits in this Court. *See Ctr. For Biological*
19 *Diversity v. Kempthorne*, 2008 WL 659822 (D. Ariz. Mar. 6, 2008); *Ctr. For Biological*
20 *Diversity v. Salazar*, 2011 WL 6000497 (D. Ariz. Nov. 30, 2011). Plaintiffs challenge
21 the decision of the Fish and Wildlife Service that the desert eagle is not a distinct
22 population segment under the Endangered Species Act.

23 The parties have filed cross motions for summary judgment. Docs. 30, 63. The
24 motions are fully briefed (Docs. 63, 66, 68), and the Court heard oral argument on
25 October 10, 2014. The Court will grant summary judgment for Defendants.

26 **I. Background.**

27 The Endangered Species Act ("ESA") defines "species" to include "any distinct
28 population segment of any species of vertebrate fish or wildlife[.]" 16 U.S.C. § 1532(16).

1 The Fish and Wildlife Service (“FWS”) is an agency charged with determining when a
2 portion of a species constitutes a distinct population segment (“DPS”).

3 The bald eagle was first listed as an endangered species on March 11, 1967. The
4 listing occurred under the Endangered Species Preservation Act of 1966, a predecessor to
5 the ESA. Following enactment of the ESA in 1973, the bald eagle was listed as
6 endangered in 43 states and threatened in 5 others. 43 Fed. Reg. 6230 (Feb. 14, 1978).
7 On July 12, 1995, the bald eagle was reclassified as threatened in all states. 60 Fed. Reg.
8 36000.

9 The bald eagle is an ESA success story. Under the protection of the ESA, bald
10 eagle numbers increased significantly throughout the United States from less than 500
11 breeding pairs in 1963 to almost 10,000 breeding pairs in 2007. 72 Fed. Reg. 37346. As
12 a result this remarkable recovery, FWS removed the bald eagle from the threatened
13 species list in 2007.

14 In 2004, as delisting was being considered, the Center for Biological Diversity
15 (“CBD”) filed a petition asking FWS to designate the desert eagle as a DPS and provide
16 for its continued protection under the ESA. Upon receiving such petitions, FWS must
17 issue a 90-day finding on whether the “petition presents substantial scientific or
18 commercial information indicating that the petitioned action may be warranted.” 16
19 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b). After some delay and litigation, FWS
20 found that CBD’s petition did not “present substantial scientific or commercial
21 information to indicate that the Sonoran Desert bald eagle constitutes a valid DPS.” 71
22 Fed. Reg. 51549 at 51556 (Aug. 30, 2006).

23 CBD challenged the finding in this Court, and in 2008 Judge Mary H. Murguia set
24 aside the finding as arbitrary and capricious under the Administrative Procedures Act
25 (“APA”). *Ctr. For Biological Diversity v. Kempthorne*, 2008 WL 659822 (D. Ariz. Mar.
26 6, 2008). Judge Murguia stated that she had “no confidence in the objectivity of the
27 agency’s decision making process” due, in part, to evidence that FWS officials in
28 Washington, D.C. had given “marching orders” to local FWS personnel that the petition

1 was to be denied. *Id.* at *12. Judge Murguia remanded the petition to FWS with orders
2 to conduct a full status review and issue a finding on whether the desert eagle constituted
3 a DPS. *Id.* at *15-16.

4 After additional public comment and review, FWS issued its finding in February
5 2010. 75 Fed. Reg. 8601-01 (Feb. 25, 2010). FWS found that the desert eagle population
6 was not a DPS eligible for listing under the ESA. *Id.* Plaintiffs challenged this new
7 finding in this Court, and the undersigned judge set it aside. *See Ctr. for Biological*
8 *Diversity v. Salazar*, 2011 WL 6000497, at *14 (D. Ariz. Nov. 30, 2011). The Court held
9 that the finding was based on a 2007 delisting procedure and rule that “failed to comport
10 with the notice, comment, and consultation requirements of the law.” *Id.* at *9. The
11 Court found the finding to be an abuse of discretion and ordered FWS to complete a new
12 finding based on information gathered during the status review ordered by Judge
13 Murguia. *Id.* at *14.

14 FWS issued its new finding on May 1, 2012, again finding that the desert eagle is
15 not a DPS (the “2012 Finding”). 77 Fed. Reg. 25792-01 (May 1, 2012). FWS also found
16 that desert eagles are not threatened or endangered. *Id.* at 25828. In this lawsuit,
17 Plaintiffs claim that the 2012 Finding, like FWS’s previous actions on the desert eagle, is
18 arbitrary and capricious.

19 **II. DPS Policy and the 2012 Finding.**

20 FWS has issued a formal policy on how DPS decisions are to be made (the “DPS
21 Policy”). The DPS Policy reflects Congressional guidance that DPS designations should
22 be used “sparingly” while “encouraging the conservation of genetic diversity.” 61 Fed.
23 Reg. 4725. The policy requires FWS to evaluate three elements in deciding whether a
24 portion of a species constitutes a DPS entitled to protection under the ESA – discreteness,
25 significance, and conservation status. 61 Fed. Reg. at 4725.

26 A population satisfies the first element – discreteness – if it is “markedly separated
27 from other populations of the same taxon” by “physical, physiological, ecological, or
28 behavioral factors,” or if it is “delimited by international boundaries within which

1 differences [in species management] exist that are significant.”¹ *Id.* The 2012 Finding
2 found the desert eagle population to be discrete because it is physically separated from
3 other populations of bald eagles and because there is little or no immigration to and
4 emigration from the surrounding populations. 77 Fed. Reg. at 25801-05. Plaintiffs agree
5 with this finding and do not challenge it in this case.

6 In assessing the second element – significance – the DPS Policy requires FWS to
7 “consider available scientific evidence of the discrete population segment’s importance to
8 the taxon to which it belongs.” 61 Fed. Reg. at 4725. The DPS Policy identifies four
9 factors to be considered in evaluating the significance of a population: (1) persistence of
10 the population in an ecological setting unusual or unique for the taxon; (2) evidence that
11 loss of the population would result in a significant gap in the range of a taxon;
12 (3) evidence that the population represents the only surviving natural occurrence of a
13 taxon; and (4) evidence that the population differs markedly from other populations of
14 the species in its genetic characteristics. *Id.* The DPS Policy makes clear that these
15 factors are not exclusive. *Id.* The policy further instructs that “[b]ecause precise
16 circumstances are likely to vary considerably from case to case, it is not possible to
17 describe prospectively all the classes of information that might bear on the biological and
18 ecological importance of a discrete population segment.” *Id.*

19 In applying the first significance factor – “persistence of the population in an
20 ecological setting that is unusual or unique for the taxon” – the 2012 Finding considered
21 the broad variety of settings in which bald eagles live:

22 Bald eagles are highly adaptable, wide-ranging habitat generalists. Across
23 the range of the species, there is no “usual” ecological setting, in terms of
24 the elevation, temperature, prey species, nest tree species, or type of water
25 source[.] The bald eagle is capable of inhabiting areas throughout North
America, so long as a sufficient food source persists.

26 77 Fed. Reg. at 25806.

27 _____
28 ¹ A “taxon” is a taxonomic category, such as a species. *Coos Cnty. Bd. of Cnty.
Comm’rs v. Kempthorne*, 531 F.3d 792, 798 (9th Cir. 2008).

1 The 2012 Finding provided additional detail to support its conclusion that the bald
2 eagle is a “habitat generalist” that can survive almost anywhere. It noted that the bald
3 eagle is distributed across the North American continent, “from the Aleutian Islands to
4 Baja California, Mexico, and from northeastern Canada to Florida.” *Id.* It found that the
5 bald eagle “breeds at elevations ranging from sea level to mountains as high as 10,000
6 feet,” and occupies a wide range of aridity including “some of the driest areas in the
7 United States and . . . some of the wettest.” *Id.* The 2012 Finding noted that although
8 bald eagles generally nest in trees along rivers, lakes, and seacoasts in proximity to a
9 sufficient source of prey, they have also been documented to nest on cliffs, on the ground,
10 in mangroves, in caves, and in man-made structures such as cell-phone towers. Bald
11 eagles are not limited to eating any particular species of or even class of prey. *Id.*

12 Because the bald eagle lives in such a wide range of settings, FWS concluded that
13 it could not find the desert eagle significant to the species as a whole merely because it
14 lives in the desert. “Though the Sonoran Desert Area may represent a unique set of
15 habitat characteristics, we cannot say it is unusual or unique for the bald eagle such that
16 persistence there is significant to the bald eagle species as a whole.” *Id.*

17 To determine whether the desert eagle is significant to the species as a whole,
18 FWS asked whether it has adapted in ways that could benefit the species in times of stress
19 or catastrophic loss. *Id.* at 25806-07. For example, FWS considered the relatively small
20 size of the desert eagle, but found no evidence that its size resulted from a unique
21 adaptation to the desert. *Id.* FWS instead found that its size was likely due to the latitude
22 at which it lives. *Id.* at 25807. FWS cited studies showing that bald eagle size generally
23 increases with more northerly latitudes, “consistent with Bergmann’s Rule, which holds
24 that animal size increases with increasing latitude due to changes in climate.” *Id.* FWS
25 noted studies finding that bald eagles in Florida, which is farther south than Arizona, are
26 the smallest, and that their size decreases from north to south within the State of Florida.
27 *Id.* FWS thus concluded that “small size is not an adaptation unique to the Sonoran
28 Desert but is rather part of the natural variability of the taxon as a whole.” *Id.*

1 FWS considered the porosity of the desert eagle's egg shells, a factor cited by
2 some in arguing that the desert eagle has adapted uniquely to the hot desert environment.
3 FWS found only one study that addressed egg shell porosity – a 1992 study by Hunt *et al.*
4 The study did not draw any conclusions about the significance of porosity and was based
5 on an extremely small sample size of only four eggs. *Id.* FWS concluded that “it would
6 not be scientifically robust to draw any conclusions” from such a limited study. *Id.*

7 FWS examined differences in life history traits of the desert eagle, including the
8 timing of breeding, feeding habits, nest-site selection, and juvenile migration. *Id.* at
9 25807-08. As with size, however, studies reviewed by FWS suggested that variations
10 were likely due to differences in latitude. *Id.* For example, “the breeding chronology of
11 Florida birds (further south than the Sonoran Desert Area eagles) is even earlier than
12 those in the Sonoran Desert.” *Id.* at 25807.

13 On the basis of this analysis, FWS concluded that persistence of the desert eagle in
14 the Sonoran Desert did not support a finding that the desert eagle is significant to the bald
15 eagle species as a whole. As FWS explained: “the combination of a highly adaptable
16 species persisting in a varied habitat base leads us to conclude that the particular
17 variations displayed in the Sonoran Desert Area population do not make that population
18 more ecologically or biologically important[.]” *Id.* at 25808.

19 Turning to the second significance factor – “evidence that loss of the population
20 segment would result in a significant gap in the range of the taxon” – FWS concluded
21 that a significant gap would not occur. *Id.* at 25809. FWS found that the desert eagle
22 does not represent a significant percentage of the total number of bald eagles, and that
23 “the actual amount of suitable bald eagle habitat in the Sonoran Desert Area is in general
24 limited and represents a minute fraction of the total suitable habitat for bald eagles
25 throughout their range.” *Id.* Further, FWS found that “the Sonoran Desert Area itself
26 does not play any particular role in the life history of the bald eagle[.]” *Id.*
27 Consequently, FWS found that the loss of eagles in the Sonoran Desert Area would not
28 represent a significant gap in the range of the bald eagle as a whole. *Id.*

1 Applying the third significance factor, FWS found no evidence that the desert
2 eagle “represents the only surviving natural occurrence of a taxon that may be more
3 abundant elsewhere as an introduced population outside its historic range.” *Id.* On the
4 fourth factor, FWS found no evidence that desert eagles have genetic characteristics that
5 are markedly different from other bald eagles. *Id.* at 25809-10. Plaintiffs do not
6 challenge these third- or fourth-factor determinations.

7 On the basis of these findings, the 2012 Finding concluded that the desert eagle
8 does not constitute a DPS. FWS nonetheless proceeded to evaluate the conservation
9 status of the desert eagle, finding that it is not threatened or endangered. *Id.* at 25810-27.
10 Plaintiffs challenge the finding’s application of the first and second significance factors
11 and its conclusion that the desert eagle is not endangered or threatened.

12 **III. Legal Standard.**

13 The APA governs judicial review of administrative decisions involving the ESA.
14 *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9th Cir. 1999).
15 “[S]ummary judgment is an appropriate mechanism for deciding the legal question of
16 whether the agency could reasonably have found the facts as it did.” *Occidental Eng’g*
17 *Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 770 (9th Cir. 1985). The Court
18 must set aside a final, non-discretionary agency action that is arbitrary or capricious, an
19 abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A);
20 *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993).

21 An agency action is arbitrary and capricious “if the agency has relied on factors
22 which Congress has not intended it to consider, entirely failed to consider an important
23 aspect of the problem, offered an explanation for its decision that runs counter to the
24 evidence before the agency, or is so implausible that it could not be ascribed to a
25 difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S.*
26 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court must determine
27 whether the agency’s decision is “founded on a rational connection between the facts
28 found and the choices made . . . and whether [the agency] has committed a clear error of

1 judgment.” *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1243
2 (9th Cir. 2001). The Court’s review must be “highly deferential, presuming the agency
3 action to be valid and . . . affirming the agency action if a reasonable basis exists for its
4 decision.” *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006)
5 (citation omitted). At the same time, the Court “must not rubber-stamp . . . administrative
6 decisions that [are] inconsistent with a statutory mandate or that frustrate the
7 congressional policy underlying a statute.” *Ocean Advocates v. U.S. Army Corps of*
8 *Eng’rs*, 402 F.3d 846, 859 (9th Cir. 2005) (internal quotations and citations omitted).

9 **IV. Significance.**

10 Plaintiffs argue that the 2012 Finding’s consideration of the second DPS element –
11 significance – is arbitrary and capricious for four reasons: (1) by considering the
12 adaptation of desert eagles to conditions in the Sonoran Desert in its evaluation of the
13 persistence factor, FWS improperly revised the DPS Policy and ignored the plain
14 language and past applications of the policy; (2) FWS failed to consider all relevant
15 evidence in its evaluation of the persistence factor; (3) FWS ignored science regarding
16 the importance of peripheral populations in its “significant gap” analysis; and (4) FWS
17 did not consider the impact of climate change on bald eagles. The Court will address
18 each of these arguments separately.

19 **A. Adherence to the DPS Policy.**

20 As noted above, the first factor identified in the DPS Policy for evaluating the
21 significance of a population to the species as a whole is the “[p]ersistence of the discrete
22 population segment in an ecological setting unusual or unique for the taxon.” 61 Fed.
23 Reg. at 4725. Plaintiffs argue that the 2012 Finding, by considering the extent to which
24 desert eagles have adapted to the desert environment, ignores the plain meaning of this
25 language and constitutes an unlawful change in its application. Doc. 52 at 19-24.² The
26 Court will address these two arguments separately.

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28 ² Docket citations are to page numbers placed on the top of each page by the
Court’s CMECF system, not to numbers on the bottom of each page.

1 **1. Plain Language of the DPS Policy.**

2 Plaintiffs argue that the plain language of this persistence factor should control – if
3 a population persists in an ecological setting that is unique or unusual for the species, this
4 factor is satisfied and supports a finding that the population is significant to the species as
5 a whole. Plaintiffs argue that the 2012 Finding imposed an additional requirement not
6 found in the language of this factor when it analyzed the desert eagle’s adaptation to the
7 desert environment. Doc. 52 at 13-18. Plaintiffs assert that this departure permitted FWS
8 to conclude that “bald eagle nesting habitats in Arizona are among the most unusual
9 nesting habitats occupied by the species,” and yet still find the desert eagle not significant
10 to the species because it lacks identifiable adaptations. Doc. 52 at 17. Plaintiffs call this
11 “significance squared,” and argue that it conflicts with the wording of the policy. *Id.*

12 The Court does not find that the DPS Policy should be read as rigidly as Plaintiffs
13 suggest. The policy does not state that a population is significant merely because it
14 persists in a unique ecological setting. Persistence is one of four significance factors
15 identified in the policy, and the policy expressly states that the agency’s analysis “may
16 include, but is not limited to” these factors. 61 Fed. Reg. at 4725. Thus, the four factors,
17 including persistence in a unique setting, appear to be both optional (“may include”) and
18 non-exclusive (“not limited to”). The DPS Policy further instructs that “[b]ecause precise
19 circumstances are likely to vary considerably from case to case, it is not possible to
20 describe prospectively all the classes of information that might bear on the biological and
21 ecological importance of a discrete population segment.” *Id.* Rather than establishing
22 wooden criteria designed to control FWS’s determination, the DPS Policy is expressly
23 flexible, permitting the agency to consider a variety of relevant factors, only some of
24 which are identified in the policy.

25 In addition, the stated purpose of the persistence inquiry is not simply to find a
26 population that persists in a unique setting, but to determine whether that population is
27 important to the species as a whole. The policy directs that “[i]n carrying out this
28 examination, the Service will consider available scientific evidence of the discrete

1 population segment’s importance to the taxon to which it belongs.” *Id.*

2 As FWS explained in the 2012 Finding, when a species exists across a wide range
3 of unique ecological settings, as does the bald eagle, the fact that it persists in one
4 particular location such as the Sonoran Desert says little about whether the population in
5 that location is important to the species as a whole. It may simply reflect the species’
6 ability to exist almost anywhere. FWS appropriately conducted a further inquiry in
7 determining whether the desert eagle has developed attributes by its life in the desert that
8 are important to the species as a whole. This inquiry is consistent with the DPS Policy’s
9 expressly flexible approach and with the directive that FWS determine whether a
10 particular population is important to the entire species.

11 Where a species is not widely dispersed in a variety of settings – where it is
12 limited primarily to one setting – its persistence in another, different setting might by
13 itself be significant to the species as a whole. Loss of the species in that unique setting
14 could leave the species with only one setting in which to survive, making it more
15 vulnerable to catastrophic events. Thus, there may well be DPS inquiries where
16 adaptation is not relevant. *See, e.g.,* 77 Fed. Reg. 25806 (contrasting the bald eagles’
17 ability to thrive in a variety of settings “with a situation where a portion of the range of a
18 particular species exhibits one set of similar habitat characteristics but the distinct
19 population segment utilizes a different set of habitat characteristics.”). The DPS Policy’s
20 flexible approach allows the agency to consider these and other relevant factors when
21 deciding if a particular population is important to the species as a whole.

22 In short, the Court does not agree that the 2012 Finding was inconsistent with the
23 language of the DPS Policy.

24 **2. Did FWS Adopt a New Policy Interpretation?**

25 Plaintiffs argue that the 2012 Finding effectively adds an adaptation requirement
26 to the persistence factor of the DPS Policy. They argue that this addition significantly
27 changes the policy without appropriate public notice and comment. Plaintiffs raised this
28 issue in their earlier suit, and the undersigned directed FWS on remand to “address

1 whether it has adopted a new interpretation of the DPS Policy and, if so, the reasons for
2 and validity of the change.” *Ctr. for Biological Diversity*, 2011 WL 6000497, at *10.

3 As a result, FWS conducted a review of its previous DPS findings. FWS noted
4 that some DPS evaluations have found that the subject population persisted in an unusual
5 or unique environmental setting and yet was not important to the species as a whole.
6 2012 AR 984. Other DPS decisions found that a setting could be considered unique, but
7 FWS could find no adaptation to the environment that would make the population which
8 persists there important to the species as a whole. These include a 2010 finding on the
9 mountain whitefish, a 2010 finding on the Upper Missouri River arctic grayling, and a
10 2011 decision on the Mohave fringe-toed lizard. 2012 AR 986. FWS found that it
11 frequently has considered species that persist in a wide variety of environmental
12 conditions and has concluded that the persistence of such species in any particular unique
13 setting is not significant to the species as a whole. These include a 2005 finding on the
14 Southern Rocky Mountain population of the boreal toad, a 2009 finding on the coaster
15 brook trout, a 2011 finding on the Lake Sammamish kokanee, and a 2011 finding on wild
16 plain bison. 2012 AR 987. After reviewing these prior findings, FWS concluded:

17
18 The DPS Policy . . . does not mandate that the mere presence of
19 unusual habitat characteristics means that the population is significant to
20 the taxon[.] As articulated in previous determinations, we use the unusual
21 or unique nature of the ecological setting as one consideration in evaluating
22 whether persistence of that population is significant to the conservation of
23 the taxon as a whole. Therefore, in applying the “unusual or unique
24 ecological setting” significance category in the DPS [P]olicy, we evaluate
25 not only whether the population persists in an area with habitat
26 characteristics that are unusual or unique, but whether in the biological
27 expertise of the agency, persistence of that population is significant to the
28 conservation of the taxon as a whole. . . . [W]e have considered
evolutionary and life-history adaptations to be potential indicators that
persistence of that population is significant to the taxon. This approach to
applying the “unusual or unique ecological setting” significance category
. . . gives meaning to all of the words in that significance category of the
DPS [P]olicy, and it is in keeping with Congress’s directive to use the
authority to list DPSs sparingly.

1 2012 AR 988. This review by FWS demonstrated that consideration of the desert eagle’s
2 adaptation to its new environment was not a new approach.

3 FWS also used the 2012 Finding to clarify that adaptation is not a mandatory
4 consideration in every persistence inquiry: “The DPS Policy *does not require* evidence
5 of adaptation to a unique or unusual ecological setting in order to make a finding of
6 significance; however, direct evidence of adaptation to an ecological setting could be a
7 strong indication that persistence of the population segment in that ecological setting is
8 significant to the taxon as a whole.” 77 Fed. Reg. 25806 (emphasis added). FWS
9 explained that “this action is consistent with the Service’s prior interpretations of the DPS
10 Policy, and, as such, the Service has not adopted a new interpretation of DPS Policy.” 77
11 Fed. Reg. 25808.

12 FWS’s review of prior DPS determinations and its clarifying statements in the
13 2012 Finding persuade the Court both that FWS has considered adaptation in the past and
14 that its consideration of that factor in the 2012 Finding did not constitute a change of the
15 DPS Policy. Considering adaptation when evaluating a habitat generalist like the bald
16 eagle comports with the policy’s flexible approach and with its directive that the agency
17 determine whether the population is important to the species as a whole.

18 Moreover, when an agency interprets its own policies, courts must defer to the
19 interpretation. The Court defers to FWS’s conclusion that the 2012 Finding is consistent
20 with prior DPS determinations and does not constitute a change of policy. *California v.*
21 *F.C.C.*, 39 F. 3d 919, 925 (9th Cir. 1994) (“[A]n agency’s interpretation of its own
22 policies and prior orders is entitled to deference.”) (citing *California v. F.C.C.*, 905 F.2d
23 1217, 1230 (9th Cir. 1990)); *Nat’l Ass’n of Regulatory Utility Com’rs v. F.C.C.*, 746 F.
24 2d 1492, 1502 (D.C. Cir. 1984) (FCC’s interpretation of its own policies and regulations
25 entitled to “great deference”) (quoting *Washington Association for Television & Children*
26 *v. FCC*, 712 F.2d 677, 684–85 (D.C.Cir.1983)); *Adoma v. Univ. of Phoenix, Inc.*, 779 F.
27 Supp. 2d 1126, 1135 (E.D. Cal. 2011) (“[T]he [Department of Labor’s] interpretation of
28 its own regulations through these [opinion] letters is given ‘a high degree of deference’

1 unless plainly erroneous or inconsistent with the regulation”) (*quoting Imada v. Hercules*,
2 138 F. 3d 1294, 1297 (9th Cir. 1998)).

3 In arguing to the contrary, Plaintiffs point to a December 10, 2008 Investigative
4 Report by the Inspector General of the Department of the Interior (“IG Report”).³ The
5 portions of the IG Report in the record suggest that the Inspector General investigated
6 whether the original DPS determination for the desert eagle, and other FWS decisions,
7 were politically influenced. Doc. 32-2. The report recounts a 2006 conference call
8 between FWS personnel in the regional and national offices concerning the desert eagle,
9 during which a participant reported that FWS Assistant Director for Endangered Species,
10 Ben Loenhoffer, wanted to apply an “evolutionary standard” to the significance analysis.
11 The report states that Mary Richardson, Region 2 Supervisory Fish and Wildlife
12 Biologist, objected and asserted that an evolutionary standard “was not a part of the FWS
13 distinct population segment policy.” Doc. 32-2 at 4. She reportedly asked whether such
14 a standard had been used in the past, and was told by the Washington participants that
15 this would be the first time. *Id.* The IG Report states that Loenhoffer was later asked
16 about the statement attributed to him in the conference call – that an “evolutionary
17 standard” should be used – and Loenhoffer said he had no knowledge of it. *Id.* at 7. The
18 IG Report recounts these statements as part of its narrative, but makes no effort to
19 determine which of the statements is correct or what was meant by “evolutionary
20 standard.”

21 Plaintiffs cite several other internal FWS documents. An edited page, apparently
22 from a 2009 internal memo, suggests that FWS adopted a “new” policy in May 2009
23 when it concluded that persistence in a unique ecological setting is not enough, and that
24 FWS must also find that that the population has adapted evolutionarily to the setting.

25
26 ³ The Court takes judicial notice of the IG Report. The Court may take judicial
27 notice of a fact that is not subject to reasonable dispute if it “can be accurately and readily
28 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R.
Evid. 201 (b)(2). Reports prepared by administrative agencies are proper subjects of
judicial notice. *Interstate Natural Gas Co. v. S. Cal. Gas Co.*, 209 F. 2d 380, 385 (9th
Cir. 1953).

1 2010 AR 6045. Plaintiffs cite statements from a different region of FWS regarding a
2 DPS decision on coaster brook trout to the same effect. 2010 AR 6228; *see also* 2010
3 AR 5992. Plaintiffs also rely on an August 2009 memorandum from the Region 2
4 Director recommending that the desert eagle be found to be discrete and significant.
5 2010 AR 6680-82. The memo suggests that the Washington office of FWS has stated
6 that for a population to be found significant “we *must* be able to demonstrate that the
7 population has adapted evolutionarily to the setting.” *Id.* at 6680 (emphasis added). The
8 memo concludes: “[i]f *absolute information* on evolutionary adaptation is required for a
9 finding of significance based on unique or unusual ecological settings, formal guidance to
10 that effect should be provided and we will reevaluate our draft findings as appropriate
11 and consistent with this new guidance.” *Id.* at 6682 (emphasis added).

12 The Court is not persuaded by Plaintiffs’ argument. The IG Report contains
13 somewhat conflicting, second-hand accounts of a statement supposedly made by
14 Assistant Director Loenhoffer, snippets of communications from other internal sources,
15 and comments on an apparent proposal that adaptation be made a mandatory part of the
16 persistence inquiry. The 2012 Finding makes clear that such a mandatory requirement
17 has not been adopted by FWS, making the comments on any previously proposed
18 mandatory requirement irrelevant. Moreover, the Court finds the FWS analysis on
19 remand to be a more thorough history of the application of the DPS Policy than can be
20 constructed from the various pieces of evidence cited by Plaintiffs. The Court therefore
21 does not accept Plaintiffs’ argument that the 2012 Finding constituted a new and
22 improper change of the DPS Policy or reflected the continuation of the “marching orders”
23 that Judge Murguia found improper.⁴

24
25 ⁴ The Court also notes that even if some of the statements cited by Plaintiffs can be
26 viewed as inconsistent with the conclusions in the 2012 Finding, opinions of employees
27 within an agency are not controlling as to agency policy. *U.S. v. Farley*, 11 F.3d 1385,
28 1391 (7th Cir. 1993) (“The views of agency employees contained in intra-agency
documents are not, however, expressions of FTC policy.... Rather they are part of the
exchange of ideas—the give and take—central to the formulation of such policy.”)
(internal citations omitted); *Vons Companies, Inc. v. U.S.*, 51 Fed. Cl. 1, 21 (Fed. Claims
2001) (courts should be “extraordinarily hesitant to attribute to the IRS or the Treasury
Department interpretations of a revenue ruling made by individual IRS employees that

1 **B. Failure to Consider All Evidence.**

2 Even if FWS’s interpretation of the DPS Policy is correct and not a departure from
3 previous interpretations, Plaintiffs argue that FWS failed to consider all appropriate
4 evidence when it addressed the desert eagle’s persistence in a unique environment.
5 Specifically, Plaintiffs point to a 2009 memo in which FWS biologists suggested that “the
6 bald eagle in the harsh environment of the Sonoran Desert Area may represent a resilient
7 population, capable of withstanding catastrophes due to its unique adaptations, which
8 benefits the taxon as a whole.” 2010 AR 6682. This memo also asserted that the desert
9 eagles’ “persistence in the Sonoran Desert Area is valuable in that they may serve as a
10 place of safe refuge following a catastrophic event that causes the decline of eagles
11 elsewhere in their range.” *Id.*

12 The 2009 memo cited by Plaintiffs asserts that the desert eagle may be “capable of
13 withstanding catastrophes *due to its unique adaptations.*” 2010 AR 6682. The memo
14 then discusses several possible adaptations, including the desert eagle’s breeding
15 chronology and nesting locations. *Id.* at 6681-82. As shown above, these very
16 adaptations, along with others, were addressed in detail in the 2012 Finding and were
17 found not to be unique to the Sonoran Desert population of bald eagles. 77 Fed. Reg. at
18 25806-08. Although the 2009 memo also noted the high heat of the Sonoran Desert and
19 the fact that the desert eagle population was one of five “strongholds” where bald eagles
20 survived DDT use in the United States, the memo ultimately reflected an opinion, a
21 judgment call, as to whether the desert eagle population is important to the bald eagle
22 species as a whole. The Court cannot say that FWS acted arbitrarily and capriciously
23 when it came to a different conclusion in the 2012 Finding, particularly in light of its
24 careful inquiry into whether the desert eagle displayed adaptations that would render it
25 uniquely important to bald eagles generally. Nor can the Court conclude that the very
26 general assertions in the 2009 memo that the desert eagle is “resilient” or that the
27 Sonoran Desert could constitute a “safe refuge” for bald eagles in the future render the

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represent their personal views, rather than the official position of the agency.”).

1 2012 Finding arbitrary and capricious.

2 A “diversity of opinion by local or lower-level agency representatives will not
3 preclude the agency from reaching a contrary decision, so long as the decision is not
4 arbitrary and capricious and is otherwise supported by the record.” *WildEarth Guardians*
5 *v. Nat’l Park Serv.*, 703 F.3d 1178, 1186-87 (10th Cir. 2013); *see also Farley*, 11 F.3d at
6 1391; *Vons Companies*, 51 Fed. Cl. at 21. Moreover, even if the 2009 memo could be
7 viewed as a different and earlier view within the agency, agencies are free to change
8 course on the basis of new evidence or reasoned analysis. *Nat’l Assoc. of Home Builders*
9 *v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (observing that “the fact that a
10 preliminary determination by a local agency representative is later overruled at a higher
11 level within the agency does not render the decision making process arbitrary and
12 capricious.”).

13 **C. Significant Gap Evidence.**

14 The second factor listed in the DPS Policy for determining whether a population
15 segment is significant to the species as a whole is whether “loss of the discrete population
16 segment would result in a significant gap in the range of a taxon.” 61 Fed. Reg. at 4725.
17 FWS acknowledged in the 2012 Finding that loss of the desert eagle population would
18 create some gap in the range of the bald eagle, but concluded that the gap would not be
19 significant under the DPS Policy. 77 Fed. Reg. at 25808-10.

20 “For purposes of the gap in the range analysis, the term ‘significant’ has its
21 commonly understood meaning, which is ‘important.’” *Nw. Ecosystem Alliance v. U.S.*
22 *Fish & Wildlife Serv.*, 475 F.3d 1136, 1146 (9th Cir. 2007) (citing *Nat’l Ass’n of Home*
23 *Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003)) (internal quotes omitted). There is
24 no guidance in the DPS Policy as to what makes a gap important, and “FWS has given
25 different reasons for the importance of gaps in various listing rules.” *Nat’l Ass’n of*
26 *Home Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003) (citing *DPS Policy*,
27 61 Fed. Reg. 4722-01 at 4725). In *Home Builders*, for example, FWS said the gap was
28 significant because it would decrease the genetic variability of the taxon, reduce the

1 current range of the taxon, reduce the historic range of the taxon, and extirpate the taxon
2 from the United States. *Id.*

3 In analyzing whether the gap created by loss of the desert eagle would be
4 significant, the 2012 Finding noted that the bald eagle population in the Sonoran Desert
5 Area is “neither numerous nor constitute[s] a significant percentage of the total number
6 of bald eagles throughout the range of the taxon.” 77 Fed. Reg. at 25809. In 2009, there
7 were 48 breeding pairs of desert eagles in Arizona, where most of the desert eagles
8 reside, which constituted less than one-half of one percent of the bald eagle breeding
9 pairs in the lower 48 states and “much less” than one-half of one percent of the breeding
10 pairs throughout the range of the species. *Id.*

11 FWS found that loss of the desert eagle would create a gap in the range of the
12 taxon, particularly since studies have found little evidence of bald eagle immigration into
13 the Sonoran Desert Area, but FWS was unable to find evidence that “any gap created in
14 the range would be significant to the taxon as a whole.” *Id.* This was due to the fact that
15 the number of desert eagles is not a significant percentage of bald eagles generally, there
16 is “no evidence of distinctive traits or genetic variations” that would be important to the
17 species as a whole, and the “actual amount of suitable bald eagle habitat in the Sonoran
18 Desert Area is in general limited and represents a minute fraction of the total suitable
19 habitat available for bald eagles throughout their range.” *Id.*

20 FWS also found that the Sonoran Desert does not play any particular role in the
21 life history of the species. *Id.* FWS noted that the Sonoran Desert “is not the sole
22 breeding or rearing location for bald eagles,” nor is it “only one of two parts of the
23 species range such that loss of eagles in one part would result in a significant gap.” *Id.*

24 FWS reached this conclusion: “Having reviewed the best available scientific
25 information with respect to the biological or ecological significance of the [desert eagle],
26 we have determined that loss of eagles in the Sonoran Desert Area would not represent a
27 significant gap in the range of bald eagles as a whole.” *Id.*

28 Plaintiffs argue that FWS ignored several scientific studies regarding peripheral

1 populations. Doc. 52 at 13. Plaintiffs cite a 2009 draft desert eagle finding in which
2 FWS employees cited peripheral population studies and recommended that the desert
3 eagle be designated a DPS. *Id.* at 14-16. Plaintiffs argue that these studies are ignored in
4 the 2012 Finding, something an agency cannot do when making ESA listing decisions.
5 *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir. 2006). Although it
6 is true that the 2012 Finding does not address all of the studies mentioned in the 2009
7 draft, a careful review of that 2009 draft persuades the Court that this does not render the
8 2012 Finding invalid under the APA.

9 The first peripheral population study mentioned in the 2009 draft is Lessica and
10 Allendorf, 1995, p. 754. 2012 AR 505. The 2009 draft describes this study as indicating
11 “that peripheral populations are likely to occur in ecologically marginal or stressful
12 situations, and that *distinct traits* found in peripheral populations may be crucial to a
13 species, allowing adaptation to environmental change.” *Id.* (emphasis added). Thus, the
14 importance of the Lessica and Allendorf study is its suggestion that peripheral
15 populations may develop “distinct traits” that are important to the species as a whole.
16 This, of course, is precisely what the 2012 Finding considered in detail – whether the
17 desert eagle has developed distinct traits or adaptations that are important to the bald
18 eagle population as a whole. FWS could find reliable evidence of none. In its discussion
19 of the Lessica and Allendorf study, the 2009 draft mentioned egg characteristics
20 addressed in the Hunt study of 1992 (*id.*), but this is the same study FWS addressed in the
21 2012 Finding when it considered egg shell porosity (77 Fed. Reg. at 25807). FWS found
22 that the Hunt study “did not reach any conclusions as to the significance this difference in
23 egg shell porosity may have to Arizona eagles,” that it was based on “an extremely small
24 sample size of four eggs,” and that no other reported studies have analyzed the
25 significance of the Hunt observations. *Id.* As a result, FWS concluded that “it would not
26 be scientifically robust to draw any conclusions from the Hunt *et al.* (1992) study.” *Id.*

27 The second peripheral population study cited in the 2009 draft is Vucetich and
28 Waite, 2003, p. 643-644. 2012 AR 506. In discussing the study, the 2009 draft observed

1 “that peripheral and isolated populations may experience pressure at the genetic level
2 favoring development of a *specific trait* rather than a variety of traits.” *Id.* (emphasis
3 added). The examples of such possible traits mentioned in the 2009 draft are, again,
4 those mentioned in the 1992 Hunt study, including, among others, egg characteristics and
5 the small size of the desert eagle. *Id.* These characteristics were considered carefully in
6 the 2012 Finding, as was the Hunt study. 77 Fed. Reg. at 25807.

7 The third and final peripheral population study mentioned in the 2009 draft is
8 Channell and Lomolino, 2000a, p. 85. 2012 AR 506. The draft cites this study as
9 suggesting that peripheral populations survive more frequently than do populations in the
10 core of their historical range when species undergo dramatic reductions in their range. *Id.*
11 The draft then again mentions the 1992 Hunt study, and also asserts that desert eagles
12 survived DDT better than did other bald eagle populations, an indication that they fit the
13 pattern observed by Channell and Lomolino. This aspect of the Channell and Lomolino
14 study is not addressed in the 2012 Finding. The 2012 Finding does note, however, that
15 bald eagles survive throughout North American, in a variety of settings, and are not
16 limited to any particular core range, findings that would seem to be at least partially
17 responsive to the discussion in the 2009 draft.

18 The Court concludes that the essential points made by the 2009 draft report from
19 the first two peripheral population studies – that peripheral populations may develop
20 specific traits valuable to the species as a whole, as possibly illustrated by the 1992 Hunt
21 study – are addressed directly in the 2012 Finding and in more detail than in the 2009
22 draft. Although the essential point made by the 2009 draft from the third study is not
23 addressed directly, it is addressed indirectly, and the Court cannot conclude from this
24 single omission that the 2012 Finding is arbitrary and capricious.⁵

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26 ⁵ Plaintiffs cite briefly to another early draft of a desert eagle study that mentioned
27 studies by Levin (1970) and Meffe (1997). Doc. 52 at 14. But the discussion of these
28 studies again focuses on adaptations that may result from a population’s isolation. *See*
2010 AR 3987 (“When a peripheral population is isolated from other populations, the
isolated peripheral population may become *highly adapted* to local conditions.”)
(emphasis added). The same is true of other studies mentioned in the draft. They are
described as showing that peripheral populations may “*exhibit adaptations*” to their

1 Nor can the Court conclude that the 2012 Finding’s evaluation of the “significant
2 gap” factor is seriously flawed. A holistic look at a species’ population is appropriate
3 when assessing whether a population gap would be significant to the species as a whole.
4 *See, e.g., Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 849 (9th Cir. 2003) (“In
5 other listing rules, the FWS has found a gap to be significant due to the loss of the United
6 States range of a population *only where some additional significance to the taxon as a*
7 *whole also existed.*”) (emphasis added). Moreover, the previous FWS “significant gap”
8 findings identified by Plaintiffs are distinguishable. *See, e.g., 75 Fed. Reg. 3424-01*
9 (finding that loss of marbled murrelet population would create significant gap where
10 population made up 18 percent of the total distribution of species; the inhabited area
11 contained an ecologically distinct forest system; peripheral population played an
12 important role in maintaining opportunities for future biodiversity and speciation; and
13 recovery of species without peripheral population may be impossible); 62 Fed. Reg.
14 10730-01 (assessing peripheral nature of population of Arizona pygmy owl,
15 acknowledging that peripheral nature of population may increase potential for population
16 to diverge genetically, but concluding there was no evidence that population was, in fact,
17 genetically distinct or that its loss would significantly affect the genetic diversity of the
18 species as a whole); 62 Fed. Reg. 4183-01 (analyzing northern population of the
19 copperbelly water snake, which constituted eight of thirteen clusters of entire population
20 of species, completely cut off from southern population, making immigration between
21 populations impossible).

22 **D. Climate Change.**

23 Plaintiffs argue that FWS failed to consider the impacts of climate change as a
24 relevant DPS factor. Doc. 52 at 18. Plaintiffs argue that climate change was considered
25 in earlier draft findings and should therefore have been considered in the 2012 Finding.
26 Doc. 52 at 18. The earlier draft cited by Plaintiffs, however, addressed climate change

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unique setting. *Id.* at 3988 (emphasis added). Such adaptations are precisely what the
2012 Finding studied in detail.

1 for this reason: “Bald eagles in the Sonoran Desert Area, having persisted in a drier, less
2 humid environment, *may be better adapted* to conditions in different areas as
3 temperatures increase.” 2012 AR 451 (emphasis added). Again, the earlier draft focused
4 on possible adaptations that would make the desert eagle important to the bald eagle
5 species as a whole. As discussed at length above, the 2012 Finding considered carefully
6 whether the desert eagle has adapted to the desert environment in ways that would help
7 bald eagles generally, and could find no evidence that it has. This inquiry essentially
8 answered the question posed by Plaintiff’s climate change argument – whether desert
9 eagles have unique characteristics that could help bald eagles as a whole in an era of
10 global warming. Given the detailed analysis of adaptation evidence in the 2012 Finding,
11 the Court cannot conclude that the finding is fatally flawed simply because FWS did not
12 conduct the analysis under the heading of “climate change.”⁶

13 **E. Significance Conclusion.**

14 In summary, the Court cannot conclude that the 2012 Finding “relied on factors
15 which Congress has not intended it to consider, entirely failed to consider an important
16 aspect of the problem, offered an explanation for its decision that runs counter to the
17 evidence before the agency, or is so implausible that it could not be ascribed to a
18 difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n*, 463
19 U.S. at 43. The Court finds that the 2012 Finding is “founded on a rational connection
20 between the facts found and the choices made,” and that FWS has not made “a clear error
21 of judgment.” *Ariz. Cattle Growers’ Ass’n*, 273 F.3d at 1243. And despite Plaintiffs’
22 best arguments to the contrary, the Court cannot conclude that the 2012 Finding is the
23 result of earlier “marching orders” that Judge Murguia appropriately found to be
24 improper.

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⁶ The Court notes that although FWS did not mention climate change in assessing
the significance element of the DPS finding, it did take an in-depth look at the impacts of
climate change in conducting its threat assessment. 77 Fed. Reg. at 25825-26.

1 **V. Threatened or Endangered.**

2 A population must qualify as a DPS before becoming eligible for a threatened or
3 endangered listing. 61 Fed. Reg. 4722. Because the Court upholds FWS's conclusion
4 that the significance element of the DPS Policy is not satisfied, and that the desert eagle
5 therefore does not qualify as a DPS, the Court need not reach the question of whether
6 FWS acted arbitrarily and capriciously in finding the desert eagle not threatened or
7 endangered.

8 **VI. Motion to Strike.**

9 Plaintiffs ask the Court to strike the September 26, 2014 filing by FWS entitled
10 "Defendants' Notice of Completion of Internal Review" and the accompanying exhibit.
11 Doc. 71 at 2. This filing concerns a finding by an internal Scientific Integrity Officer
12 regarding FWS's desert eagle decision. Plaintiffs argue that this material was produced
13 years after the agency decision in this case, is outside the administrative record, and
14 cannot be considered by the Court in its evaluation of the 2012 Finding. Doc. 71 at 4.
15 The Court agrees. Judicial review is normally limited to the administrative record in
16 existence at the time of the agency's decision. *Friends of the Clearwater v. Dombeck*,
17 222 F. 3d 552, 560 (9th Cir. 2000). The motion to strike will therefore be granted.

18 **IT IS ORDERED** that Defendants' cross-motion for summary judgment
19 (Doc. 63) is **granted**, Plaintiffs' motion for summary judgment (Doc. 30) is **denied**, and
20 Plaintiffs' motion to strike (Doc. 70) is **granted**. The Clerk is directed to enter judgment
21 accordingly.

22 Dated this 4th day of November, 2014.

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26 _____
27 David G. Campbell
28 United States District Judge