UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

GENERAL LAND OFFICE OF THE STATE OF TEXAS, *Plaintiff*, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., *Federal Defendants*, and SAVE OUR SPRINGS ALLIANCE, *Defendant-Intervenor*.	)	No. 1:23-cv-00169-DAE

FEDERAL DEFENDANTS' COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The United States Department of the Interior; Debra Haaland, in her official capacity as Secretary of the Interior; the United States Fish and Wildlife Service (the "Service"); Martha Williams, in her official capacity as Director of the Service; and Amy Lueders, in her official capacity as Southwest Regional Director of the Service (collectively, "Federal Defendants") file this combined cross-motion for summary judgment and opposition to Plaintiff's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. Federal Defendants are entitled to judgment as a matter of law on the claims raised in Plaintiff's Complaint, ECF No. 1.

The golden-cheeked warbler ("Warbler") is a migratory songbird that breeds exclusively in Central Texas. The Warbler has been listed as an endangered species under the Endangered Species Act ("ESA") since 1990 largely due to significant threats to its unique and limited habitat. In 2015, the Service received a petition to remove the Warbler from the list of endangered species ("Petition") alleging that recent population and habitat estimates demonstrated that the Warbler no longer qualified as endangered. AR44-85.[1] After considering the information presented in the Petition and the Service's own files, the Service rationally concluded based on its scientific expertise that a reasonable person would find that the Warbler faces serious threats to its continued existence, the Petition did not meaningfully contest the existence of these threats, and the Petition did not present substantial information indicating that delisting may be warranted. The Service applied the correct standard of review to the Petition, and deference to the Service's thoroughly supported and reasoned determination is warranted. Plaintiff may be dissatisfied with the Service's findings, but the Service did not act arbitrarily or capriciously in determining that the Petition failed to present substantial information indicating that delisting may be warranted.

[1] "AR" refers to the Administrative Record. *See* ECF Nos. 16, 51.

II. LEGAL BACKGROUND

The ESA represents "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Its stated purposes are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species[.]" 16 U.S.C. § 1531(b). "The plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Tenn. Valley Auth.*, 437 U.S. at 184.

Section 4 of the ESA requires the Secretary of the Interior[2] ("Secretary") to determine whether any species should be listed as endangered or threatened. 16 U.S.C. § 1533(a). The Secretary must make such determination based upon five factors: (1) the present or threatened destruction, modification, or curtailment of the species' habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence. *Id.* § 1533(a)(1); 50 C.F.R. § 424.11(c) (2014). Relying only on the "best scientific and commercial data available," the Secretary must evaluate these five factors to determine whether a species is "endangered," meaning in danger of extinction throughout all or a significant portion of its range, or "threatened," meaning likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. §§ 1532(6), (20), 1533(b)(1)(A). Species listed as endangered or threatened receive specific

[2] The Secretaries of the Interior and Commerce share responsibility for listing species under the ESA. 16 U.S.C. § 1532(15). The Secretary of the Interior, acting through the Service, is generally responsible for all terrestrial and freshwater species, including the Warbler.

protections under the ESA. *See id.* §§ 1533, 1536, 1538, 1539.

The ESA also requires the Secretary to conduct a status review of all listed species at least once every five years, known as a "five-year review." *Id.* § 1533(c)(2). The five-year review represents the Secretary's determination whether a species should be removed from the list of threatened and endangered species ("delisted"), be changed in status from an endangered species to a threatened species ("downlisted"), or be changed in status from a threatened species to an endangered species ("uplisted"). *Id.* At the time the Petition was submitted to the Service,[3] the Secretary could delist a species only if examination of the five listing factors indicated that a species was no longer endangered or threatened for one or more of the following reasons: (1) the species had gone extinct; (2) the species had recovered to the point that the best available scientific and commercial data indicate that it is no longer endangered or threatened; or (3) investigation showed "that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error." 50 C.F.R. § 424.11(d) (2014).

Any interested person may petition the Secretary to add or remove a species from the list of threatened and endangered species. 16 U.S.C. § 1533(b)(3)(A). "To the maximum extent practicable, within 90 days after receiving the petition . . . the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." *Id.* This finding is known as a "90-day finding." If the Secretary, through the Service, determines that the petition presents substantial scientific or

[3] Since receiving the Petition, the regulations governing removal of a species from the endangered species list have changed. Current regulations provide that the Secretary may delist a species if (1) the species is extinct, (2) the species does not meet the definition of an endangered species or a threatened species, or (3) the listed entity does not meet the statutory definition of a species. 50 C.F.R. § 424.11(e) (2023). In evaluating the Petition, the Service applied the regulations that were in effect in 2015.

commercial information indicating that the petitioned action may be warranted (a "positive 90-day finding"), the Secretary begins a review of the status of the species. *Id.* This review culminates in a "12-month finding," in which the Secretary determines whether the petitioned action is warranted based upon the best available science. *Id.* § 1533(b)(3)(B). By contrast, if the Secretary determines that the petition does not present substantial scientific or commercial information indicating that the petitioned action may be warranted (a "negative 90-day finding"), no further action on the petition is warranted. *Id.* § 1533(b)(3)(A). "Substantial information" is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b)(1) (2014).

III. FACTUAL AND PROCEDURAL BACKGROUND

The golden-cheeked warbler (*Setophaga chrysoparia*) is a small, migratory songbird known for its unique plumage. *See* Endangered and Threatened Wildlife and Plants; Final Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 53153, 53154 (Dec. 27, 1990). Adult male Warblers display striking coloring, with their bright yellow cheeks, jet black upper body, and distinctive white striping. *Id.* Adult females exhibit a more subdued, yet still eye-catching, color palette of grays and olive greens. *Id.* This beautiful bird has a special connection to Texas: its entire, exclusive nesting range occurs within the State. *Id.* Warblers spend the winter in Mexico, Guatemala, Honduras, El Salvador, and Nicaragua, then migrate to their central-Texas breeding territory in early spring. *Id.* Warblers breed, nest, and fledge their young in areas with a mix of mature Ashe juniper and oak trees, which provide essential nesting and foraging materials. *Id.* Prior to the 1990s, the widespread removal of juniper trees due to human development greatly decreased the available habitat for Warblers. *Id.* at 53157–58.

In the wake of this habitat loss, the Service received an emergency petition to list the

Warbler in February 1990. *Id.* at 53154. The Service found that the petitioned action was warranted and issued a temporary emergency listing rule in May 1990, finding that habitat destruction posed a significant risk to the species. Endangered and Threatened Wildlife and Plants; Emergency Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 18844 (May 4, 1990). At the same time, the Service issued a proposed rule to permanently list the Warbler as an endangered species. Endangered and Threatened Wildlife and Plants; Proposed Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 18846 (May 4, 1990).

In December 1990, the Service issued the final rule adding the Warbler to the endangered species list. 55 Fed. Reg. 53153. The Service described the Warbler's "narrow tolerance in habitat requirements" and summarized the condition of its historical and existing habitat. *Id.* at 53154, 53157–58. The final listing rule addressed each of the five statutory listing factors pursuant to 16 U.S.C. § 1533(a)(1) and concluded that present and threatened destruction and fragmentation of Warbler habitat, nest predation and parasitism, and inadequate existing regulatory mechanisms favored listing the Warbler as endangered. *Id.* at 53157–59.

In 1992, the Service published its Golden-Cheeked Warbler Recovery Plan, as required by 16 U.S.C. § 1533(f)(1). AR7028. The Recovery Plan identified "loss of habitat" as "the most important threat to the existence of the [Warbler]" and stated that the Warbler would be considered for delisting when certain criteria concerning habitat conservation and population management were met.[4] *See* AR7033, AR7076, AR7057. In 2014, pursuant to 16 U.S.C. § 1533(c)(2), the Service completed its Five-Year Review for the Warbler and determined that the species continued

[4] Recovery criteria identified in recovery plans are guideposts by which the agency can assess the recovery status of a listed species. Recovery criteria are not dispositive factors in a decision to delist a species—a decision to delist is based solely upon the five statutory criteria identified in 16 U.S.C. § 1533(a)(1). *See* 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c) (2014).

to be in danger of extinction throughout its range due to the "ongoing, wide-spread destruction of its habitat" and should remain listed as an endangered species. AR6789.

Less than one year later, the Texas Public Policy Foundation[5] and others ("Petitioners") submitted to the Service a Petition to delist the Warbler. AR44-85. The Petition claimed that the Service's 1990 listing of the Warbler was in error due to "inaccurate" scientific information or, alternatively, that the Warbler no longer met the definition of endangered under present population and habitat estimates. AR6. A few months later, the Petitioners submitted supplemental information in support of the Petition ("Petition Supplement"). *See* AR114-38. The Service reviewed the Petition and the Petition Supplement, including the information presented therein, as well as the information the Service had in its files at the time the Petition Supplement was received. AR440; *see* 16 U.S.C. § 1533(b)(3)(A). In its May 25, 2016 90-Day Finding ("2016 90-Day Finding"), the Service concluded that the Petition did not present substantial information indicating that the petitioned action may be warranted. AR449.

In 2017, Plaintiff sued the Service, claiming, *inter alia*, that the 2016 90-Day Finding violated the ESA and the Administrative Procedure Act ("APA") by failing to delist the Warbler in response to the Petition. *See Gen. Land. Off. of the State of Tex. v. U.S. Fish & Wildlife Serv.*, Case No. 1:17-cv-00538-SS, ECF No. 56 (W.D. Tex.). This Court ruled in favor of the Service, finding that Plaintiff overstated the significance of the evidence presented in the Petition and that the Service's 2016 90-Day Finding was not arbitrary and capricious. *Gen. Land Off. of the State of Tex. v. U.S. Fish & Wildlife Serv.*, No. AU-17-CV-00538-SS, 2019 WL 1010688, at *7–9 (W.D. Tex. Feb. 6, 2019). Plaintiff appealed this ruling to the Fifth Circuit, which found that the Service applied the incorrect standard when reviewing the Petition. *Gen. Land Off. of the State of Tex. v.*

[5] The Texas Public Policy Foundation serves as Plaintiff's counsel in this litigation.

U.S. Dep't of the Interior, 947 F.3d 309, 312 (5th Cir. 2020). The Fifth Circuit interpreted the 2016 90-Day Finding as requiring the Petition "to contain information that the Service had not considered in its five-year review that was sufficient to refute that review's conclusions[,]" which it deemed an "inappropriately heightened" standard. *Id.* at 320–21. The 2016 90-Day Finding was vacated and remanded to the Service. *Id.* at 321.

Following the remand, the Service reassessed the Petition in accordance with the Fifth Circuit opinion. Again, the Service considered the Petition, the Petition Supplement, and the information in its files at the time it received the Petition Supplement.[6] AR8107. The remand culminated in the Service's July 20, 2021 90-Day Finding ("2021 90-Day Finding"). In the 2021 90-Day Finding, the Service recognized that the Petition provided information indicating that the Warbler population is presently larger and its known potential range is more extensive than was estimated at the time of listing. AR8106. However, the Service also concluded that "the [W]arbler has very particular habitat needs and important threats, especially those associated with habitat destruction and habitat fragmentation, that are ongoing and expected to impact the continued existence of the [W]arbler in the foreseeable future." AR8106-07. Ultimately, the Service concluded that the Petition did not provide substantial information indicating that delisting the Warbler may be warranted. AR8107.

On January 12, 2022, Plaintiff filed its complaint in the Waco Division, alleging that the Service's 2021 90-Day Finding was arbitrary and capricious and violated the ESA and APA. ECF No. 1 ¶¶ 61–88. Federal Defendants successfully moved for an intra-district transfer of this matter to the Austin Division. ECF Nos. 8, 30. On September 18, 2023, this Court denied Plaintiff's

[6] Neither the original Petitioners nor Plaintiff sought to supplement the Petition with any updated information concerning the Warbler after the Fifth Circuit's remand.

motion to supplement the administrative record. ECF Nos. 43, 50.

IV. STANDARD OF REVIEW

Challenges to listing determinations under the ESA are subject to judicial review under the standard and scope of review provided in the APA. 5 U.S.C. § 706; *see Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933 (5th Cir. 1998). Courts will set aside the Service's decisions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious when "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This "arbitrary and capricious" standard is "highly deferential," *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008) (per curium), and "a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs.*, 463 U.S. at 43; *see also Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985). The court simply determines whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43 (internal quotation marks omitted). Issues within the agency's area of technical expertise especially warrant judicial deference. *See Medina Cnty. Env't Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376–77 (1989)); *see also Marsh*, 490 U.S. at 378 ("[A]n agency must have discretion to rely on the reasonable opinions of its own qualified experts even if . . . a court might find contrary views more persuasive."). Plaintiff carries the burden of proving that the agency's determination is arbitrary

and capricious. *Medina Cnty.*, 602 F.3d at 699. "Given the expertise of the [Service] in the area of wildlife conservation and management and the deferential standard of review, the Court begins with a strong presumption in favor of upholding decisions of the Service on the [90-Day Finding]." *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 746–47 (W.D. Tex. 1997).

Even though the ESA sets forth a "reasonable person" standard for what constitutes "substantial information" in a 90-day finding, *see* 50 C.F.R. § 424.14(b)(1) (2014), the Court must still review the agency's decision under the APA's highly deferential "arbitrary and capricious" standard. When reviewing a negative 90-day finding, "the issue before the Court is not whether a reasonable person could accept [the petitioner's] interpretation of the data, but whether the [Service] had a rational basis for concluding that a reasonable person would not do so." *Palouse Prairie Found. v. Salazar*, No. cv-08-032-FVS, 2009 WL 415596, at *2 (E.D. Wash. Feb. 12, 2009), *aff'd* 383 F. App'x 669 (9th Cir. 2010). In other words, the Court must defer to the agency's determination, grounded in its scientific expertise, of whether the Petition presents information substantial enough that a reasonable person would conclude that the petitioned action may be warranted. Thus, the two standards are compatible, and both must be part of the Court's review.

Finally, where the Court is reviewing an agency decision under the APA, summary judgment is the appropriate means for resolving claims because the Court is reviewing the legality of the agency action, not acting as the initial factfinder. *See Cook*, 750 F.2d at 392; *see also Tex. Oil & Gas*, 161 F.3d at 933–34. Thus, the Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook*, 750 F.2d at 392. The Court's review is limited to the administrative record before the agency at the time of its decision. *Camp v. Pitts*, 411 U.S 138, 142 (1973) (per curiam).

V. ARGUMENT

A. The Service Applied the Correct Legal Standard When Evaluating the Petition.

The administrative record before the Court reflects that the Service recited and applied the correct standard. Indeed, the very first statement in the 2021 90-Day Finding is a recitation of the appropriate standard of review:

> Section 4(b)(3)(A) of the Endangered Species Act [] requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. At the time the petition was received, our standard for substantial scientific or commercial information with regard to a 90-day petition finding was "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted."

AR8094 (quoting 50 C.F.R. § 424.14(b) (2014)). Plaintiff's dissatisfaction with the outcome of the 2021 90-Day Finding does not mean that the Service applied an incorrect standard.

At the 90-day finding stage, "[i]t is the petitioner's burden to provide the Service with the necessary 'substantial scientific or commercial information.'" *W. Watersheds Project v. Norton*, No. CV 06-00127-S-EJL, 2007 WL 2827375, at *2 (D. Idaho Sept. 26, 2007); *see also W. Watersheds Project v. Kempthorne*, No. CV07-409-S-EJL, 2009 WL 10678130, at *3 (D. Idaho Mar. 31, 2009); *Defs. of Wildlife v. Kempthorne*, No. CV 05-99-M-DWM, 2006 WL 8435908, at *4 (D. Mont. Sept. 29, 2006). In fact, when it amended the ESA in 1982, Congress "*raise[d]* the burden upon a petitioner requesting a species listing or delisting" by adding the word "substantial" to qualify the amount of information required. H.R. Rep. No. 97-567, at 18 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2807, 2818 (emphasis added). Additionally, Courts have long accepted that the Service may consider information in its own files when evaluating a petition. *See Ctr. for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1142 (D. Colo. 2004); *Wildearth Guardians v. U.S. Sec'y of the Interior*, No. 4:08-CV-00508-EJL-LMB, 2011 WL 1225547, at *6 (D. Idaho Mar. 28, 2011).

Relying on one line from the 2021 90-Day Finding, which stated that new population

estimates were not "indicators of positive trends . . . and thus do not imply recovery," Plaintiff argues that the Service required the Petition to show conclusive proof of the species' recovery. ECF No. 55 at 25–26. But this line does not show that the Service required conclusive proof. Rather the Service looked for information that provided at least an *implication* that the species might have recovered. *See Imply*, Merriam-Webster's Dictionary, http://merriam-webster.com/dictionary/imply (last visited Feb. 15, 2024) ("to express indirectly" or "to contain potentially"). This is consistent with the requirement that a petition present substantial information indicating that delisting may be warranted. Moreover, the Service never faulted the Petition for failing to include conclusive proof of recovery; the Service denied the Petition because the Petition failed to present substantial information indicating that delisting may be warranted. *Cf. Ctr. for Biological Diversity v. Kempthorne*, No. CV 07-0038-PHX-MHM, 2008 WL 659822, at *10 (D. Ariz. Mar. 6, 2008) (finding the Service improperly required conclusive evidence to demonstrate the petitioned action was warranted where Service acknowledged the petition contained substantial information).

There are several different ways that the Service can provide a "rational basis" for determining that a petition does not present substantial information that the requested action may be warranted. *See Palouse Prairie Found.*, 2009 WL 415596, at *2. First, the Service need not "blindly accept statements in petitions that constitute unscientific data or conclusions, information [the Service] knows to be obsolete or unsupported conclusions of petitioners." *Morgenweck*, 351 F. Supp. 2d at 1142. Second, the Service may determine, as an exercise of its scientific judgment, that certain inferences drawn by the petitioner are not warranted when considering the totality of the information before it. *See Palouse Prairie Found.*, 2009 WL 415596, at *5–*6; *Morgenweck*, 351 F. Supp. 2d at 1142 ("[The Service] can rely on what is within its own expertise and records

to reject petitions consistent with ESA standards."); *WildEarth Guardians v. Salazar*, No. 10-CV-00091-WYD, 2011 WL 4102283, at *6 (D. Colo. Sept. 14, 2011) (upholding Service's negative 90-day finding where "even though there were one or more potential threats cited in connection with the [species], the Service found that there was not substantial documentation to indicate that these threats were currently affecting" the species or reasonably likely to affect it in the future). Additionally, the Service could find that the information the petition presents, while valid, is not substantial enough to indicate that the petitioned action may be warranted. *See Palouse Prairie Found.*, 383 F. App'x at 670.

As explained in more detail below, the Service applied the correct standard here. The Service evaluated the information presented in the Petition, credited the cited studies as accurate, and ultimately found that the Petition had not carried its burden. The Service was not arbitrary or capricious in determining that the Petition did not present substantial information indicating that delisting may be warranted.

B. The Service Considered the Petition's Arguments in Favor of Delisting the Warbler and Reasonably Determined that the Petition Failed to Provide Substantial Information Indicating that the Petitioned Action May Be Warranted.

Plaintiff argues that "[t]he Service did not properly consider substantial data in the Petition showing that the original Warbler listing was in error and that delisting may be otherwise appropriate[.]" ECF No. 55 at 27. The Service evaluated both of these arguments and concluded in the 2021 90-Day Finding that "[t]he [P]etition does not present substantial information indicating that delisting the golden-cheeked warbler may be warranted." AR8094. This reasonable and thoroughly explained determination is well supported by the record.

1. The Service Correctly Concluded that the Petition Provided No Evidence that the Original Classification of the Warbler Was in Error.

Plaintiff's claim that the Service "discount[ed]" information demonstrating that "the

original data used to justify the Warbler's listing, or the Service's interpretation of it, were erroneous[,]" ECF No. 55 at 28, stems from a misapplication of the ESA's implementing regulations. At the time that the Petition was submitted, the ESA implementing regulations permitted the Service to delist a species if the species was "neither endangered nor threatened" because the "[o]riginal data for **classification** [was] in error[,]" such as when "[s]ubsequent investigations . . . show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error." 50 C.F.R. § 424.11(d)(3) (2014) (emphasis added). Classification, in the context of animal species, means the assignment of animals into specific taxonomic categories. *See Classification*, Merriam-Webster's Dictionary, https://merriam-webster.com/dictionary/classification (last visited Feb. 15, 2024) ("a systematic arrangement in groups or categories according to established criteria[;] [S]pecifically: Taxonomy"). The Petition provided *no* evidence that the original data for classification was in error at the time of listing; thus, the Service appropriately concluded that the Petition did not present substantial information that delisting may be warranted on this basis. AR8094.

The Petition contained no argument identifying any error in the Warbler's classification. AR44-85. The plain language of the regulation makes clear that this basis for delisting pertains to "classification" data, and the Service's treatment of this provision has been consistent with that language. The Service has relied on the "in error" provision when it has discovered a taxonomical error in the data supporting the original listing—such as if, upon further review, the listed entity does not meet the definition of a "species" eligible for protection under the ESA. *See* 16 U.S.C. § 1532(16); 50 C.F.R. § 424.02 (defining "species"). For example, in 2022 the Service delisted the Braken Bat Cave Meshweaver, a cave-dwelling spider, citing erroneous data at the time of listing after new genetic research revealed that the Braken Bat Cave Meshweaver was not a distinct

"species," and was instead synonymous with a different species, the Madla Cave Meshweaver. 87 Fed. Reg. 51925 (Aug. 24, 2022).[7]

In addition to ignoring the word "classification" in the regulatory provision, Plaintiff incorrectly interprets the former language in 50 C.F.R. § 424.11(d)(3) (2014) to mean that a species' listing was "in error" if any subsequent data improves upon the data known at the time of listing. ECF No. 55 at 27–31. As science is constantly in a state of building upon and refining past knowledge, Plaintiff's interpretation that any improved understanding of a species' status warrants delisting would have vast ramifications for the more than 1,600 listed species. In fact, Plaintiff's counsel has tried—and failed—to make this argument before. In *American Stewards of Liberty v. Department of the Interior*, Plaintiff argued that the discovery of the Bone Cave Harvestman, a species previously thought to inhabit approximately six locations, in over 100 new locations demonstrated that the species' 1988 listing was in error. 370 F. Supp. 3d 711, 729–30 (W.D. Tex. 2019). This Court disagreed, finding that the "discovery of previously unknown populations of the harvestman does not demonstrate that the data on which the original listing is based was erroneous at the time of the 1988 listing." *Id.* at 730. Likewise, the emergence of new technologies and survey methodologies that yield larger estimates of Warbler abundance and habitat do not demonstrate that the data relied upon during the Warbler's initial listing was erroneous at the time of listing. *Contra* ECF No. 55 at 29–30.

Because the Petition lacks any information that calls into question the Warbler's taxonomy

[7] *See also* 87 Fed. Reg. 51928 (Aug. 24, 2022) (delisting Adiantum vivesii for taxonomical error); 82 Fed. Reg. 28582 (June 23, 2017) (same for Hualapai Mexican Vole); 82 Fed. Reg. 7711 (Jan. 23, 2017) (same for Puget Sound/Georgia Basin distinct population segment of Canary Rockfish); 72 Fed. Reg. 43560 (Aug. 6, 2007) (same for Idaho Springsnail); 68 Fed. Reg. 56564 (Oct. 1, 2003) (same for Berberis sonnei); 65 Fed. Reg. 10420 (Feb. 28, 2000) (same for Dismal Swamp Southeastern Shrew); 58 Fed. Reg. 49242 (Sept. 22, 1993) (same for Spineless Hedgehog Cactus); 54 Fed. Reg. 48749 (Nov. 27, 1989) (same for Purple-Spined Hedgehog Cactus).

as it was understood at the time of the species' listing, the Petitioners have failed to meet their burden to present "substantial information" indicating that delisting may be warranted due to erroneous classification data at the time of listing. *See* 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1) (2014); *see also Morgenweck*, 351 F. Supp. 2d at 1142 (Service need not "blindly accept . . . unsupported conclusions of petitioners"). Thus, the Service's conclusion in its 2021 90-Day Finding that the "[W]arbler is a taxonomically unique species [that] was shown to be in danger of extinction at the time of the listing" is not arbitrary and capricious. AR8094.

2. The 2021 90-Day Finding Reasonably Concluded that the Petition Did Not Present Substantial Information that Delisting the Warbler May Be Warranted.

The 2021 90-Day Finding considered all the information presented in the Petition and rationally concluded that the Petition did not present substantial information indicating that delisting may be warranted. Delisting is warranted only when the five listing factors identified in 16 U.S.C. § 1533(a)(1), viewed both separately and cumulatively, do not cause the species to be in danger of extinction throughout all or a significant part of its range now or in the foreseeable future. 50 C.F.R. § 424.11(c), (d) (2014). Plaintiff wrongly suggests that in denying the Petition the Service required conclusive evidence that delisting was warranted under the factors articulated in 16 U.S.C. § 1533(a). ECF No. 55 at 32. But the burden is on the petitioner to submit substantial information addressing each factor and indicating that delisting the species may be warranted. *See* 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b) (2014); *W. Watersheds Project*, 2007 WL 2827375, at *2. Although the Petition addressed four of the five delisting factors that the Service must consider under the ESA,[8] many of the studies cited in the Petition documented serious and

[8] Factor B (overutilization) is not specifically discussed in the Petition nor in Plaintiff's opening brief. The 2021 90-Day Finding stated that the Service "does not consider overutilization to be a significant threat to the [W]arbler at this time." AR8100. Accordingly, it is not discussed below.

ongoing threats to the Warbler, particularly from habitat loss and fragmentation. After examining the information presented in the Petition, as well as information within the Service's own files,[9] the Service exercised its scientific expertise and rationally concluded that a reasonable person would find that the Petition did not provide substantial information indicating that delisting the Warbler may be warranted.

Factor A: Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat

The Petition acknowledged that the Warbler is a species with very specific habitat needs. *See* AR49. The Warbler breeds exclusively in Central Texas in Ashe-juniper and mixed-oak woodlands. 55 Fed. Reg. at 53154. The presence of mature Ashe juniper trees is an essential requirement of Warbler habitat, as Warblers require dense canopy cover and utilize Ashe juniper bark to craft their nests. *Id.* Warblers have a narrow tolerance in habitat requirements. *Id.* If habitat is destroyed, the birds dependent upon it are eliminated from the breeding population. *Id.* Even though recent estimates suggest greater amounts of habitat exist than were known at the time of listing, the science indicates that Warbler habitat is declining. Notably, the Petition admitted that over an approximately ten-year period, Warbler nesting habitat declined by 29%. AR56, AR1919; *see also* AR8098. Climate change and the growing human population in Warbler habitat are expected to further contribute to habitat loss. AR6786, AR6782-83. Once lost, Warbler habitat is unlikely to be restored. AR326, AR330. For these reasons, the Service considers habitat destruction and fragmentation to be high level threats to the Warbler's continued existence.

[9] In 2014, the Service surveyed the best available science and completed a Five-Year Review on the Warbler, which concluded that the Warbler was still "in danger of extinction throughout its range" and should remain listed as an endangered species. AR6789. Less than a year after this thorough review, the Service received the Petition, which cited and discussed the Five-Year Review. AR49-62. As permitted by the ESA, the Service examined the Five-Year Review when reviewing the Petition.

AR6784. Because the Petition failed to raise any doubt about the existence of the serious habitat threats affecting the Warbler, the Service rationally concluded that the Petition failed to present substantial information indicating that delisting may be warranted.

The scientific consensus, recognized in many of the studies cited in the Petition, is that habitat destruction and fragmentation are serious threats that place the Warbler in danger of extinction. Historically, habitat loss was attributed to widespread clearing of juniper trees, but more recently it has been caused by rapid urban and suburban development. AR6782-83 (citing Groce et al. (2010), AR2406, which Petition repeatedly cites, AR54-70). The human population in Warbler breeding range has increased by nearly 50% from 1990 to 2010. AR8099 (citing Groce et al. (2010), AR2528, which Petition repeatedly cites, AR54-70). Future projections indicate that the human population within the Warbler's breeding range will increase by 64% between 2010 and 2050. AR8099. Likewise, suburban development and human population growth have contributed to fragmentation of Warbler habitat. AR8099. Fragmentation results in smaller patches of suitable Warbler habitat and greater edge-to-area ratios, which can expose Warblers to predators and other disturbances.[10] AR6783.

Yet, Plaintiff argues that "[h]abitat fragmentation is not of concern because the Warbler is widespread" and has been observed to breed in smaller patch sizes. ECF No. 55 at 34. As an initial matter, describing the Warbler's occupied habitat as "widespread" is misleading. The Warbler exclusively nests in the Ashe-juniper mixed-oak woodlands of Central Texas. AR6776. This area is finite and experiencing large-scale land-use changes due to human population growth and development. AR8099. Moreover, the Petition acknowledged that although Warblers may breed

[10] "[A] patch is a relatively homogenous area that is distinct from its surroundings[,]" and for purposes of the studies cited generally means an area of potential Warbler habitat. AR2469.

on smaller patches, larger patch size increases the likelihood that Warblers will occupy a patch and increases the likelihood of pairing and fledging success. AR64, AR70-71; AR116 (Petition Supplement admitting that studies showing successful breeding in smaller patch sizes "does not discount the impact of habitat fragmentation on warbler success"). Similarly, Plaintiff's argument that studies showed "an increasing trend in density of Warblers from 1991-2008[,]" ECF No. 55 at 24 (cleaned up), is misleading. The underlying data is based on one monitoring site in a protected area, which does not indicate that territory density is increasing throughout the Warbler's range. AR2445. Likewise, Plaintiff's claim that "[u]rbanization is not harming Warbler survival because mortality rates, predation rates, and predator composition are similar in urban and rural areas[,]" ECF No. 55 at 34, ignores the fact that the cited study compared predation between rural areas and "large protected urban preserves"—not typical urban habitat.[11] *See* AR8229 (describing urban study sites as managed under the Balcones Canyonlands Preserve), AR8235. The Service was not required to "blindly accept" the Petition's unsupported conclusions that contradicted the studies cited in the Petition. *See Morgenweck*, 351 F. Supp. 2d at 1142.

The Petition failed to provide evidence genuinely disputing the existence or severity of the threats posed by habitat loss and fragmentation. Instead, the Petition relies primarily on studies suggesting that the size of the Warbler population and the amount of potential Warbler habitat are greater than the Service estimated when listing the species in 1990.[12] However, as the Service

[11] Plaintiff also argues that urbanization does not threaten the Warbler because areas with higher probability of Warbler occupancy are less likely to be urbanized. *Id.* This circular argument does not show that urbanization is not a threat to the Warbler. Indeed, the areas with the highest rates of occupancy are thought to be so *because* of lower rates of urbanization and fragmentation in those areas. In the portions of the Warbler's range that are more developed, with greater fragmentation and smaller average patch size, "the probability of [W]arbler occurrence declines significantly, even for large patches of woodland habitats." AR1596-97.

[12] The studies cited in the Petition "represent new estimates rather than indicators of positive trends in [W]arbler habitat and population size[.]" AR8097.

explained, "the ESA does not base listing determinations solely or predominantly on population and range size." AR8097; *see also* 16 U.S.C. §§ 1532(6), (20), 1533(a)(1), (b)(1)(A). Although population levels may contribute to determining whether a species does or does not face threats that warrant delisting, the ESA listing criteria do not include a mathematical formula with a specific threshold population size to determine whether a species should be listed. The mere fact that a population is larger than the agency thought at some previous point in time does not mean that the population is sufficiently large to withstand the threats it faces. Likewise, more robust estimates of potential Warbler habitat do not negate the threats posed by continued habitat loss, fragmentation, and degradation. AR8098.

Plaintiff asserts that the Service "impermissibly discounted" abundance and habitat information presented in the Petition yet concedes, only a few sentences later, that the Service "acknowledge[d] that the known potential range [of the Warbler] is geographically more extensive than when the [Warbler] was originally listed in 1990." ECF No. 55 at 30 (quoting AR8097). Indeed, the Service accepted the potential habitat estimates and studies showing higher Warbler population numbers presented in the Petition as "accurate for purposes of evaluating the information in the [P]etition," despite conflicting evidence that this information may be unreliable. AR8097. For example, the Petition relied heavily upon estimates of population size and potential habitat in Mathewson et al. (2012). The Mathewson study produced the highest population and habitat estimates cited in the Petition. Yet other studies "cautioned that this analysis may have over-predicted density estimates, resulting in inflated population estimates." AR6779; *see* AR4550, AR4553, AR4556, AR4558 (comparing predicted abundance from Mathewson et al. (2012) with on-site monitoring). The Mathewson study also admitted it used a "liberal estimation of habitat[,]" including "habitat often assumed as lower quality[.]" AR3588. Mathewson also noted

that 59% of the habitat patches in the study had less than a 10% probability of Warbler occupancy. *Id.* These admissions indicate that the habitat and population estimates made by Mathewson are not reliable indicators of actual Warbler habitat or abundance and are likely overestimations. *Id.* Despite the Service's knowledge of these weaknesses, the agency did not discount this study and assumed that the Mathewson estimates were correct for the purpose of evaluating the Petition.[13]

The Service reasonably found that the population and habitat estimates presented in the Petition, while valid, were not substantial enough to indicate that delisting may be warranted, given the continued habitat threats facing the Warbler. *See Palouse Prairie Found.*, 383 F. App'x at 670. Even if the Warbler population is greater than originally estimated, the population is still reliant on a particular habitat type found only in Central Texas that faces ongoing threats of destruction, fragmentation, and degradation.

Factor C: Disease or Predation

The Petition also failed to provide substantial information that disease and predation are not threats to the Warbler.[14] Plaintiff's conclusory assertion that "the Petition presented and analyzed extensive scientific data showing the Warbler was never and is not now under threat due to . . . disease, or predation" does not point to any specific studies or data. ECF No. 55 at 32. Indeed, the Petition cites several studies that document predation of Warbler nests and nestlings

[13] Plaintiff also argues that "conflicting scientific information on threats. . . requires a positive 90-day finding." ECF No. 55 at 28. But the Service does not disagree with the cited studies and credited them as accurate for the purposes of the 2021 90-Day Finding. AR8097. Plaintiff's argument fails because the Warbler is listed due to the individual and cumulative threats posed by habitat loss, predation, and climate change, not the size of its population or the expansiveness of its range. AR8097-98; AR6782-88. There is no conflicting scientific evidence that these threats are ongoing.

[14] The Petition cited one outbreak of avian pox among Warblers in 2012 but described it as an isolated event. AR65. The Service does not consider disease to be a significant threat to the species. AR8101

by fire ants, snakes, mammals, and other birds. AR65. While the Petition minimizes and mischaracterizes the threat of predation, the Service did not act arbitrarily or capriciously by looking at the substance of the presented scientific studies to determine if the Petition met the substantial information standard.

The Petition cites Stake et al. (2004) for the proposition that the threat of fire ant predation is reduced due to the height of Warbler nests and that Warblers are not the main target of other predators. *Id.* Yet, the fact that some predators have other targets beside the Warbler does not negate the risk of predation. Further, Stake et al. (2004) observed that predators, including fire ants, snakes, birds, and other mammals, depredated 22% of eggs monitored and 24% of nestlings monitored in their Fort Hood study, indicating that predators pose a significant barrier to Warbler breeding and fledging success. AR5828. The Petition also characterizes brood parasitism as "uncommon" and "a small risk[.]" AR65. Yet, the study cited to support this point, Groce et al. (2010), actually indicates that parasitism of Warbler nests by brown-headed cowbirds ranged from 8.3 to 57.6% depending on the study site and year. AR2465. As stated in another study cited in the Petition, in areas without effective cowbird control programs, "[W]arblers are susceptible to brood parasitism by cowbirds[.]" AR647. The Service fairly considered numerous studies indicating that predation, as exacerbated by habitat threats, is a significant threat to the Warbler. AR8101 (citing studies). The Petition acknowledged that predation occurs and put forth no actual evidence that predation does not have a significant negative effect on Warbler survival and breeding, particularly when considered cumulatively with other threats to the species. Therefore, the Service "had a rational basis for declining to draw the inferences sought" by the Petitioners, *Palouse Prairie Found.*, 2009 WL 415596, at *6, and reasonably concluded that the Petition did not present substantial information indicating that a lack of predation supports a determination that the

Warbler may warrant delisting.

Factor D: Adequacy of Existing Regulatory Mechanisms

The Petition also failed to provide substantial information demonstrating that adequate regulatory mechanisms exist to protect the Warbler if it were delisted. In its brief, Plaintiff again includes the conclusory statement that "the Petition included information demonstrating both Warbler habitat and Warbler population[s] are sufficiently protected by other existing federal, state, and local laws and regulations" without further argument or analysis. ECF No. 55 at 32. The Petition argues that the Migratory Bird Treaty Act and the Texas Endangered Species Act would continue to protect the Warbler if the species were delisted under the ESA. AR66-68. While these laws make it illegal to capture, take, or kill the Warbler, 16 U.S.C. § 703(a); Tex. Parks & Wild. Code Ann. § 68.015, the Service noted in its 2021 90-Day Finding that neither of these regulatory mechanisms "prohibits habitat destruction, which is an immediate threat to the [W]arbler." AR8102.

Likewise, the Petition argues that several existing land protection programs would continue to protect the Warbler's habitat if it were delisted. AR68-70. Yet, despite these land protections, approximately 29% of existing breeding habitat was lost between 1999-2001 and 2010-2011. AR1921. Moreover, the Petition assumes that existing land protection programs and federal and state conservation efforts would remain in effect regardless of the Warbler's listing status. This is certainly not guaranteed. Many of the land protections cited in the Petition derive from habitat conservation plans, which non-federal parties are required to prepare in order to receive an incidental take permit under Section 10 of the ESA, 16 U.S.C. § 1539(a)(2), and thus may discontinue if the species is no longer ESA-protected. Therefore, the Petition did not present evidence of any regulatory mechanisms that would protect the Warbler and its habitat to a sufficient degree to ensure it will not be in danger of extinction if delisted. Again, the Service

determined that the inferences drawn by Petitioners concerning existing regulatory mechanisms were not warranted given the totality of the information before it, *see Palouse Prairie Found.*, 2009 WL 415596, at *6, and reasonably concluded that the Petition did not present substantial information regarding this factor indicating that delisting the Warbler may be warranted.

Factor E: Other Natural or Manmade Factors

The Petition argued under Factor E that habitat fragmentation is not a significant threat to the Warbler. AR70-72. Habitat fragmentation involves the destruction, modification, or curtailment of the species' habitat, which is covered by delisting Factor A, and the Petition's arguments on these points are addressed in the Factor A analysis above. *See supra* 16–20. The Petition also discusses the effects of oak wilt, wildfire, habitat management, and noise on Warblers. AR71-72. The 2021 90-Day Finding agreed that noise was not a significant threat to the Warbler. AR8105. Regarding oak wilt (a fungal infection that can affect all oak species, AR8104), the Petition acknowledged studies showing that pairing success for male Warblers decreased substantially (27%) in areas suffering from oak wilt. AR71 (citing Stewart et al. (2014b), AR5843-51). Stewart et al. (2014b) also found that "oak wilt frequently occurred in golden-cheeked warbler habitat" and predicted that oak wilt would affect twice as much habitat by 2018, "with the greatest increase occurring in the areas with the highest probability of occupancy." AR5849; AR71 (Petition noting that oak wilt predicted to double by 2018). Warblers breed in mixed-oak woodlands with 50 to 100% canopy cover. AR5835. Oak wilt reduces oak canopy cover, negatively affecting Warblers by decreasing their breeding habitat. AR8104, AR5840. The Petition failed to highlight any studies that cast doubt on the conclusion that oak wilt occurs in Warbler habitat and has the potential to negatively affect Warblers and their habitat.

Nor did the Petition cast doubt upon the validity of the other miscellaneous threats facing the Warbler. The Petition suggests uncertainty regarding the effects of browsing by deer, wildfire,

and vegetation management (i.e., prescribed thinning of trees) upon the Warbler and its habitat. AR71-72. By contrast, the 2021 90-Day Finding identified wildfire, a lack of appropriate prescribed fire, and inappropriate conversion of Warbler habitat to other land uses as threats to the Warbler. AR8105 (citing Reemts and Hansen (2008), AR4436; Yao et al. (2012), AR7495; and Duarte et al. (2016), AR326). Moreover, the Five-Year Review found that climate change and recreation pose additional threats to the Warbler, AR6786-88, and neither was addressed in the Petition. Even assuming that these threats have a relatively minor or uncertain effect when viewed in isolation, the ESA requires the Service to consider *all* potential threats when deciding whether to list or delist a species. Because the Petition did not cast doubt upon the existence of these threats, it did not provide substantial information indicating that delisting the Warbler may be warranted under this factor.[15]

C. The Service Did Not Require the Petition to Present "New Information" That Was Not Analyzed in the Five-Year Review.

Contrary to Plaintiff's assertions, the Service did not require the Petition to present "new information not previously considered by the Service[.]" ECF No. 55 at 22. Plaintiff begins its legal argument with a blatant misconstruction of a single line from the 2021 90-Day Finding, arguing that the Service "applied an incorrect standard by finding the Petition 'does not report any new data or study results . . . but summarizes readily available information about the [Warbler] and its habitat.'" ECF No. 55 at 18 (citing AR17, but appearing to reference AR8097) (alterations in original). But the 2021 90-Day Finding never stated that the Petition did not report any new data or study results. Rather, it stated that "*[t]he summary referenced in the [P]etition as Exhibit 1* does not report any new data or study results regarding the [W]arbler. . ." and identified the Texas A&M

[15] The Petition also failed to address the cumulative impacts of threats to the Warbler. *See* AR8106.

Institute of Renewable Natural Resources Report from 2015 ("Texas A&M Report") as Exhibit 1 to the Petition.[16] AR8097 (emphasis added); AR74. When read in context, this statement was obviously a description of the Texas A&M Report intended to explain why the Service's discussion quickly moved on to the studies cited in the Report, not as a judgment of the Report's merits or contents. *See* AR8097. The Service considered the Texas A&M Report, and the studies cited within, and credited them as "reliable for the purposes of evaluating [] the [P]etition[.]" *Id.* In fact, the Service even recognized that "[t]he modeling studies described in the [Texas A&M Report] . . . represent the most recent and comprehensive efforts to estimate range-wide [W]arbler habitat and population size to date[.]" *Id.* Plaintiff's misconstruction of one line in the 2021 90-Day Finding does not accurately depict the Service's treatment of the Texas A&M Report or the Petition as a whole. Plaintiff points to no other sentence or analysis in the 2021 90-Day Finding that inappropriately required new information.

The 2021 90-Day Finding fully complied with the Fifth Circuit's holding in *General Land Office of the State of Texas v. U.S. Department of the Interior*. The Fifth Circuit held that the Service applied "an inappropriately heightened" standard at the 90-day finding stage because it "required the delisting petition to contain information that the Service had not considered in its five-year review that was sufficient to refute that review's conclusions." *Gen. Land Off.*, 947 F.3d at 321. In support of this conclusion, the Fifth Circuit cited several passages from the 2016 90-Day Finding demonstrating that the Service had compared the Petition to the 2014 Five-Year Review

[16] Plaintiff admits that the Texas A&M Report is a "survey-of-surveys" that does not include original data. ECF No. 55 at 23; *see also* AR57 (Petition stating that "[t]he 2015 Texas A&M Survey *summarized* the extensive research and analysis that has been performed since 1990") (emphasis added).

and required the Petition to include new information not part of that review. *Id.*[17]

On remand, the Service applied the correct standard and did not repeat any of the problematic comparisons identified by the Fifth Circuit. The Service considered and credited all the materials cited in the Petition, including the 2014 Five-Year Review cited in the Petition, to determine whether the Petition presented "substantial information" that delisting may be warranted, which the Service is permitted to do, so long as it does not require the Petition to definitively "refute" this other information. *See id.*; *see also* ECF No. 55 at 52; *Morgenweck*, 351 F. Supp. 2d at 1142; *Wildearth Guardians*, 2011 WL 1225547, at *6. A holistic reading of the 2021 90-Day Finding shows that the Service credited all studies presented in the Petition and did not rely on the Five-Year Review to discount that information. AR8094-107. Accordingly, the Service complied with the Fifth Circuit's opinion by not requiring the Petition to contain "new information" or to refute the Five-Year Review. Consistent with the appropriate standard, the Service required the Petition to present substantial information indicating that delisting may be warranted and only denied the Petition when it fell short.

D. The Service Did Not Rely on the Species' Recovery Plan in Its 2021 90-Day Finding.

The Service did not use the 1992 Golden-Cheeked Warbler Recovery Plan as a

[17] The full Fifth Circuit quote is: "*See Negative Ninety-Day Finding*, *supra*, at 2 ("Much of this argument is based on Mathewson et al. (2012, p. 1,123) .... The Mathewson et al. (2012) study was considered by the Service and discussed in our most recent 5-year review for the warbler ...."); *id.* at 3 ("This and other pertinent information was evaluated in the 2014 5-year review where we recommended that the species remain listed as in danger of extinction throughout its range (Service 2014, p. 15)."); *id.* at 5 ("Information provided in the petition is refuted by the 2014 5-year review, in which we conclude ...."); *id.* at 6 ("The petition does not provide any *new* information indicating that predation is no longer a threat to the warbler." (emphasis added)); *id.* at 9 ("There are additional threats that we evaluated and identified in the 2014 5-year review .... The petition did not present any information to address these threats."); *id.* at 10 ("This and other pertinent information was evaluated in the 2014 5-year review."); *id.* ("No *new* information is presented that would suggest that the species was originally listed due to an error in information." (emphasis added))." *Id.*

"determining factor" when denying the Petition. *Contra* ECF No. 55 at 26–27. Review of the 2021 90-Day Finding clearly reveals that the Service based its decision solely upon the Petition's evidence regarding the statutorily required listing criteria. *See* 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c) (2014). Indeed, the portion of the 2021 90-Day Finding Review Form that substantively evaluates the Petition poses only six questions. The first five questions concern the Petition's claims regarding each of the five statutory listing factors, respectively, while the sixth question concerns the Petition's claims regarding the cumulative effects of the five factors upon the species. AR8095-106. By contrast, the 2021 90-Day Finding does not include any section that evaluates the species' recovery criteria or recovery plan. *See* AR8094-107.

The Petition devoted eleven pages to arguing that all action items in the Recovery Plan had been met. AR119-29. Since recovery criteria in a Recovery Plan are not determinative for delisting, the Service responded to this extensive argument with one line in the 2021 90-Day Finding that the "recovery criteria have not been accomplished[.]" AR8098. Plaintiff uses this single statement to argue that the Service impermissibly used the Recovery Plan as a determining factor. The full quote from the 2021 90-Day Finding states: "[t]he most serious threats described in the original listing rule, and which are well documented in the literature that is readily available in the Service's files, remain, and recovery criteria have not been accomplished[.]" *Id.* The Service mentions the recovery criteria as an additional point *after* reaching a determination on the threats it is required to evaluate under the ESA. Nowhere does the Service say that the Petition must prove that the recovery criteria have been accomplished for a positive 90-day finding or analyze the recovery criteria as a basis for granting or denying the Petition. Instead, the rationale for the negative 90-day finding is clearly based upon the five statutory factors, 16 U.S.C. § 1533(a)(1), and the Petition's failure to provide substantial information that the five factors may support delisting the

species. AR8106-07; *see supra* 15–24; *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432–34 (D.C. Cir. 2012) (recovery plans non-binding upon delisting determinations). Thus, Plaintiff's claim that the Service improperly used the Recovery Plan as a determining factor fails.

E. Plaintiff Is Barred from Raising Its Critical Habitat Claim And, Regardless, Critical Habitat Is Irrelevant to the 2021 90-Day Finding.

Oddly, Plaintiff includes within its remedy request the assertion that a lack of critical habitat designation for the Warbler warrants delisting the species. ECF No. 55 at 34–35. Regardless of where in its brief Plaintiff raises this point, such argument is barred for several reasons. First, Plaintiff did not plead this claim in its Complaint. *See* ECF No. 1 at 15–22. A claim raised for the first time in a motion for summary judgment "is not properly before the court." *See Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005). Second, the Petition did not argue that delisting may be warranted based on the lack of designated critical habitat, and Plaintiff cannot raise arguments in this litigation that were not presented "within the four corners of their petition." *See Wildearth Guardians*, 2011 WL 1225547, at *4. Third, even if Plaintiff had pled this claim, it would be barred by the doctrine of res judicata, which counsels that "a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action." *N.Y. Party Shuttle, L.L.C. v. NLRB*, 18 F.4th 753, 765 (5th Cir. 2021) (internal quotation marks omitted). This Court previously ruled against Plaintiff's critical habitat claim, finding that "the Service's failure to designate critical habitat did not render its 90-day finding arbitrary and capricious." *Gen. Land Off.*, 2019 WL 1010688, at *10, *rev'd on other grounds, Gen. Land Off.*, 947 F.3d at 318 (finding claim concerning Warbler critical habitat designation time barred by 28 U.S.C. § 2401(a)). As determined by this Court, and not appealed by Plaintiff, the ESA provides that delisting decisions must be made "*solely* on the basis of the best scientific and commercial data available" as applied to the five statutory factors. 16 U.S.C. §

1533(a)(1), (b)(1)(A) (emphasis added); *see also* 50 C.F.R. § 424.11(b), (c) (2014). The Service may not add or remove a species from the list based on other information. *See, e.g., Save Our Springs*, 27 F. Supp. 2d at 747. In fact, "Congress amended the ESA precisely to avoid forcing the Service to consider critical habitat designation as part of its listing determination." *Gen. Land Off.*, 2019 WL 1010688, at *10. Thus, the fact that critical habitat was never designated for the Warbler is irrelevant to the 2021 90-Day Finding, and Plaintiff cannot use its remedy request to relitigate this issue.

F. Plaintiff's Requested Remedy Is Incompatible with the Basic Principles of Administrative Law.

Although Federal Defendants do not believe that any remedy is warranted in this case, they submit that if Plaintiff were to succeed on the merits, the only appropriate remedy would be to "hold unlawful and set aside" agency action found to be arbitrary, capricious, an abuse of discretion, or contrary to law. 5 U.S.C. § 706(2). A remand to the agency for reconsideration of its decision would be fully consistent with the normal course of judicial review of agency decisions under the standards set by the APA. *See, e.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (stating that if the record does not support the agency action, the agency has not considered all relevant factors, or the reviewing court cannot evaluate the challenged action, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"); *see also Fed. Power Comm'n v. Idaho Power Co.,* 344 U.S. 17, 20 (1952).

Plaintiff's request that this Court order the Service to issue a positive 90-day finding and proceed with a 12-month review of the Warbler's status is not permitted.[18] ECF No. 55 at 33; *see*

[18] Plaintiff cites no case law that supports its remedy request. Plaintiff claims that *North Cypress Medical Center Operating Company v. Aetna Life Insurance Company* stands for the proposition that "courts can decide themselves what needs to be done" "where remand to the agency for further deliberation would 'unnecessarily prolong the dispute and the underlying litigation,'" yet no agencies nor agency action were at issue in *North Cypress* and the quoted language concerns an

NLRB v. Food Store Emps. Union, 417 U.S. 1, 10 (1974) ("[R]emand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course."). This requested relief exceeds the appropriate role of the Court under the APA and would inappropriately constrain the discretion of the Service. For a court to order detailed injunctive relief "clearly runs the risk of propelling the court into the domain which Congress has set aside exclusively for the administrative agency." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 544–45 (1978) (cleaned up); *accord SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (stating "a judicial judgment cannot be made to do service for an administrative judgment" and a reviewing court "cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency"). Remanding the 2021 90-Day Finding to the Service is the only remedy in accordance with administrative law principles. *See e.g., Gen. Land Off.*, 947 F.3d at 321 (remanding to Service for new 90-day finding); *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1022 (5th Cir. 2019) (vacating arbitrary and capricious agency action and remanding to agency); *Am. Stewards of Liberty*, 370 F. Supp. 3d at 729 (collecting cases).

VI. CONCLUSION

For all these reasons, the Court should grant Federal Defendants' cross-motion for summary judgment and deny Plaintiff's motion.

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appellate court's authority to rule on issues decided by a lower court. 898 F.3d 461, 479 (5th Cir. 2018); *contra* ECF No. 55 at 33. Similarly, Plaintiff grossly misrepresents the Court's order in *NLRB v. Wyman-Gordon Company*, where the Court held it would not vacate and remand an order that the NLRB was undisputedly within its adjudicatory powers to issue but acknowledged remand is the proper solution where an agency "applied the wrong standards to the adjudication of a complex factual situation[.]" *See* 394 U.S. 759, 766 n.6 (1969); *contra* ECF No. 55 at 33.

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