IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT,	)
Plaintiff,	) Case No. CV07-409-S-EJL
vs.	) ORDER
DIRK KEMPTHORNE, et al,	)
Defendants.	)

Before the Court in the above entitled matter are the Plaintiff's motion for summary judgment and the Defendants' cross-motion for summary judgment. The parties have submitted their briefing on the motions and the matters are now ripe for the Court's review. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, the motions shall be decided on the record before this Court without oral argument. Local Rule 7.1(d)(2)(ii).

Factual and Procedural Background

On June 14, 2006, Plaintiff Western Watersheds Project ("WWP") submitted a petition ("Petition") to the Defendants United States Fish and Wildlife Service and Dirk Kempthorne, the

then Secretary of the Department of the Interior (collectively referred to as "the Service").[1] (AR 345-363).[2] The Petition seeks protection of the Big Lost River Mountain Whitefish (*Prosopium williamsoni*) ("BLR Whitefish") as an endangered or threatened species under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*. The Petition requests the listing of the BLR Whitefish as threatened or endangered under the ESA and that critical habitat be designated for the BLR Whitefish concurrently with the listing. (AR 345-363). Alternatively, the Petition asks that the BLR Whitefish be listed as a Distinct Population Segment ("DPS"). On July 2, 2007, WWP sent the Service a 60-day Notice of Intent to Sue for failing to timely respond to the Petition. On October 2, 2007, WWP initiated this action by filing a complaint challenging the Service's failure to satisfy the ESA deadlines for responding to the Petition. (Dkt. No. 1).

On October 23, 2007, the Service issued a 90-Day Finding concluding that the Petition had failed to provide substantial information to indicate that listing the BLR whitefish may be warranted at this time. (AR 001-007). Thereafter, on November 17, 2007, WWP sent the Service a 60-day Notice of Intent to Sue pursuant to ESA 16 U.S.C. § 1540(g) claiming the 90-Day Finding violates the ESA, its implementing regulations, and the Service's DPS Policy. On January 25, 2008, WWP filed an amended complaint challenging the 90-Day Finding issued by the Service. (Dkt. No. 10). Both parties have filed the instant motions for summary judgment which the Court now takes up.

Standard of Review

I. Summary Judgment:

Summary judgment is appropriate if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Summers v. A. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997). Federal Rule of Civil Procedure 56 provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

[1] At the time the Petition was submitted Mr. Kempthorne was the Secretary of the Department of the Interior.

[2] In citing to the Administrative Record ("AR") the Court cites to the number appearing on the lower right-hand side of the documents.

material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

> According to the Ninth Circuit, in order to withstand a motion for summary judgment, a party (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

British Motor Car Distrib. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371, 374 (9th Cir. 1989) (citation omitted). Of course, when applying the above standard, the court must view all of the evidence in a light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Hughes v. United States, 953 F.2d 531, 541 (9th Cir. 1992).

II. Administrative Review:

Compliance with ESA is reviewed under the APA. See Northwest Ecosystem Alliance, et al. v. Rey, et al., 380 F.Supp.2d 1175, 1184 (W.D. Wash. 2005) (citations omitted); 5 U.S.C. § 706(2)(A). The APA provides that an agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Northwest Ecosystem Alliance v. United States Fish and Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007) (quoting 5 U.S.C. § 706(2)(A)). An agency decision is arbitrary or capricious if: 1) the agency entirely failed to consider an important aspect of the issue; 2) the agency offered an explanation for its decision that was counter to the evidence before it; 3) the agency relied on factors that Congress did not intend for it to consider; or 4) the agency's decision is so implausible that it could not be ascribed to the product of agency expertise. Northwest Ecosystem, 380 F.Supp.2d at 1184; see also Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).

"This standard of review is 'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" Northwest Ecosystem, 475 F.3d at 1140 (quoting Independent Acceptance Co. v. California, 204 F.3d 1247, 1251 (9th Cir. 2000) (citations omitted)). In making this determination, the Court "may not consider information outside of the administrative record... and may not substitute our judgment for that of the agency."

Id. (citations and quotations omitted). "Our task is simply to ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." Id. (citations and quotations omitted); see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (The reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment."). "Within this narrow review, [the court] cannot substitute [its] judgment for that of the [agency], but instead must uphold the agency decisions so long as the agencies have 'considered the relevant factors and articulated a rational connection between the facts found and the choice made." Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 954 (9th Cir. 2003) (citation omitted).

The Ninth Circuit has recently clarified the issue of the Court's role in reviewing agency decisions in the context of a suit filed against the United States Forest Service under the National Forest Management Act. See Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008). The Ninth Circuit stated that under the arbitrary and capricious standard of review, "our proper role is simply to ensure that the Forest Service made no 'clear error of judgment' that would render its action 'arbitrary and capricious.'" Id. at 993 (citations omitted). "This approach respects our law that requires us to defer to an agency's determination in an area involving a 'high level of technical expertise.'" Id. at 993. "[T]his approach also acknowledges that [w]e are not free to 'impose on the agency [our] own notion of which procedures are 'best' or most likely to further some vague, undefined public good.' Nor may we impose 'procedural requirements [not] explicitly enumerated in the pertinent statutes.'" Id.

Analysis

I. ESA Standard for Listing Petitions

The ESA was enacted "to provide a program for the conservation of...endangered species and threatened species" and "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Whether a particular species should be listed as either "endangered" or "threatened" is determined by the process set forth

in Section 4 of the ESA, 16 U.S.C. § 1533.[3] This listing may occur upon the Secretary's own initiative or in response to a petition filed by an interested person.[4] 16 U.S.C. § 1533(b)(3)(A). Where such a petition is filed, the Service must "[t]o the maximum extent practicable, within 90 days after receiving the petition of an interested person...make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A). "Substantial information" is the "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). It is the petitioner's burden to provide the Service with the necessary "substantial scientific or commercial information." 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b).

What is required at this 90-Day Finding stage of the listing process is a review of the Petition for a determination of whether it presents substantial information indicating to a reasonable person that the petitioned action may be warranted. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b); see also Moden v. United States Fish and Wildlife, et. al., 281 F.Supp.2d 1193, 1204 (D.Or. 2003). This standard is in "contrast to the 'best scientific and commercial data' standard applied to actually listing a species..." and does not require "conclusive evidence." Id. at 1202-03; see also Center for Biological Diversity v. Morgenweck, 351 F.Supp.2d 1137, 1141 (D. Col. 2004). In making its determination, the Service considers whether the Petition:

(i) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved;

(ii) Contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species;

(iii) Provides information regarding the status of the species over all or a significant portion of its range; and

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[3] An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened species" is "any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

[4] The term "Secretary" can refers to either the Secretary of the Interior or the Secretary of Commerce depending on the species in question; in this case the Secretary of the Interior has jurisdiction.

(iv) Is accompanied by appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps.

50 C.F.R. § 424.14(b)(2)(i)-(iv). The Service's 90-Day findings should be based on information presented by the petitioning party and all information readily available in the Service's files. See 16 U.S.C. § 1533(b)(3)(A). Where such a 90-Day Finding agrees with the petition, the Service must undertake a status review of the species and, within one year, issue a "12-month Finding" concluding whether the petition is warranted, not warranted, or warranted but precluded. 16 U.S.C. § 1533(b)(3)(B). Where, as here, the 90-Day Finding is negative as to the petition's request, the listing or delisting process is at an end and the aggrieved party may seek judicial review of the Service's decision. 16 U.S.C. § 1533(b)(3)(C)(ii).

II. DPS Standard

In order to qualify as a DPS, a population must "be both discrete and significant." Northwest Ecosystem Alliance, 475 F.3d at 1142. Three elements are considered in a decision regarding the status of a possible DPS as endangered or threatened under the Act:

1) Discreteness of the population segment in relation to the remainder of the species to which it belongs;

2) The significance of the population segment to the species to which it belongs; and

3) The population segment's conservation status in relation to the Act's standards for listing.

Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the ESA, 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996). "The purpose of the discreteness standard is to ensure that a DPS is adequately defined and described, allowing for the effective administration of the ESA. This standard distinguishes a population from other members of its species, but does not require absolute separation." National Ass'n of Home Builders v. Norton, 340 F.3d 835, 842 (9th Cir. 2003) (citation omitted). "A population is discrete if (1) '[i]t is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors'; or (2) '[i]t is delimited by international governmental boundaries within which differences in control of

exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.'" Id. (citation omitted). Here, the parties agree that the BLR Whitefish is markedly separated from other populations of the same taxon to be considered discrete. (AR 004).

"If a population segment is considered discrete under one or more of the above conditions, its biological and ecological significance will then be considered in light of Congressional guidance that the authority to list DPS's be used 'sparingly' while encouraging the conservation of genetic diversity. In carrying out this examination, the Services will consider available scientific evidence of the discrete population segment's importance to the taxon to which it belongs. This consideration may include, but is not limited to, the following:

1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon;

2) Evidence that the loss of the discrete population segment would result in a significant gap in the range of taxon;

3) Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range; or

4) Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics."

Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the ESA, 61 Fed. Reg. 4722-01, 4725 (Feb. 7, 1996) (congressional citation omitted). Here, Petition asserts the first and fourth factors listed above apply to the BLR Whitefish.

III. Service's 90-Day Finding

The BLR Whitefish are currently recognized as members of the single species *Prosopium williamsoni*. (AR 002). The Petition seeks recognition of the BLR Whitefish as species or subspecies of whitefish because "all genetic analysis demonstrate that it is a genetically unique stock and constitutes a distinct interbreeding population. The genetic distance observed between [BLR] Whitefish and surrounding populations is at least as large as that seen between other subspecies or even species." (AR 349). The Petition also asks that the BLR Whitefish be listed as a DPS. The Petition cites primarily to a 2006 Ecosystem Sciences Foundation Status Report ("ESF Status Report

2006") and the materials cited therein. The ESA defines a "species" as "any subspecies of fish or wildlife or plants and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16), see also 59 C.F.R. § 424.02(k).

The Service's 90-Day Finding in this case denied the Petition, concluding that "the petition does not present substantial scientific or commercial information indicating that listing the mountain whitefish in the Big Lost River may be warranted. This finding is based on insufficient information indicating that mountain whitefish in the Big Lost River may represent a species, subspecies, or distinct population segment (DPS) and, therefore, a listable entity under section 3(16) of the Act." (AR 001). WWP challenges the 90-Day Finding alleging the Service misapplied the legal standards of the ESA by: 1) failing to consider a significant amount of information referenced in the Petition; 2) misapplying the ESA's low threshold for 90-Day Findings on listing petitions, 3) acting arbitrarily and capriciously in making its finding; and 4) soliciting information from third-parties and relying on the same in denying the Petition. (Dkt. No. 17). The Service counters that it considered the relevant factors and applied the appropriate standards when rendering its 90-Day Finding. (Dkt. No. 20). The Service also contends that the information it considered was proper.

A. 90-Day Finding Standard

The parties agree that what is required at this stage is that the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b); 50 C.F.R. § 424.14(b) ("Substantial information" as "the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted."). "[P]etitions that are meritorious on their face should not be subject to refutation by information and views provided by selected third-parties solicited by [the Service]." Center for Biological Diversity v. Morgenweck, 351 F.Supp.2d 1137, 1143 (D. Colo. 2004) (citing 16 U.S.C. § 1533(b)(3)(A) (if "petition presents substantial scientific or commercial information that the petitioned action may be warranted ... the Secretary shall promptly commence a review of the status of the species concerned.")); see also Colorado River Cutthroat Trout v. Dirk Kempthorne, 448 F.Supp.2d 170, 177 (D. D.C. 2006) ("Both the statute setting forth the 90-day review requirements, 16 U.S.C. § 1533(b)(3)(B), and its implementing regulation, 50 C.F.R. §

424.14(b), make plain that the 90-day review is to be based on the petition alone or in combination with the [Services] own records.").

B. **Material Considered by the Service**

WWP criticizes the Service's failure to consider information cited in the Petition and its substantial reliance on an article authored by Andrew R. Whiteley et al. in 2006 ("Whiteley 2006") which was not cited in the Petition. (Dkt. No. 22, p. 5-6 n. 4). The ESA expressly limits the Service to reviewing the information presented in the Petition and the information contained in the Service's files. See 16 U.S.C. § 1533(b)(3)(A). WWP argues the Service improperly relied on information outside of these sources and solicited information to which the public was given no notice or opportunity to respond. (Dkt. No. 17, p 16). The Service contends that it is required to "evaluate petitions against the information currently contained within its files" and, therefore, looked to data located in its own files including a 2005 Idaho Department of Fish and Game Report and the 2006 Whiteley publication. (Dkt. No. 20, p. 17) (AR 003). In addition, the Service consulted with a fisheries genetics expert within the Service, Dr. Donald E. Campton, to assess the Petition's assertions regarding the potential significance of the genetics differences in the BLR Whitefish. (AR 002).

The Petition relied primarily on the ESF Status Report 2006 which, in turn, cites to "Whiteley and Gamett 2002," an abstract of a presentation given at the Sinks Symposium of the Idaho Chapter of the American Fisheries Society in February 2002. (AR 002, 239-241, 345-363). The Service contacted Mr. Whiteley and Mr. Gamett regarding their material cited in the ESF Report 2006. Based on the Service's contact with Mr. Gamett and Mr. Whiteley, the Service found that the material was based on "the personal opinions of the presenting researchers" and that "no data [is] presented to support the petitioner's claim regarding genetic distance" of the BLR Whitefish. (AR 002). The Service concluded that the Petition overstated the conclusions of the Whiteley and Gamett 2002 presentation. (AR 003). The Service also concluded that the remaining citations in the Petition were for an oral presentation (Gamett et al. (2004)) and abstracts, papers, or posters presented at a meeting of the American Fisheries Society that were not available to the Service. (AR 003).

WWP argues the Service's contact of Mr. Whiteley and Mr. Gamett and the Service's substantial reliance on Whiteley's 2006 article were inappropriate at this 90-Day Finding stage.[5] The Service counters that the information relied upon was either contained in the Petition or in the Service's files and, therefore, properly considered. The Service maintains that their inquiries of Mr. Whiteley and Mr. Gamett were merely clarification of sources cited in the Petition made after the Petition had been filed specifically to assist the Service in its preparation of the 90-Day Finding. (Dkt. No. 24, p. 9). The Service states that it contacted Mr. Gamett "to determine whether any written document was available reflecting the content of that presentation, but found that the abstract was the only written record" and was already contained in the Service's files. (AR 002). Mr Gamett's response email to the Service provided a brief description of the research that had been done and was being done on the genetics of the BLR Whitefish.[6] (AR 396). This kind of follow up does not violate the ESA precepts. Likewise, the Court does not find any problem with the Service's contacting Mr. Whiteley to obtain information regarding his article cited in the Petition. Nor does the Court find Dr. Campton's consideration of Mr. Whiteley's 2002 material inappropriate. That material is clearly cited and relied upon in the Petition and, therefore, the subject of the 90-Day Finding stage. See 16 U.S.C. § 1533(b)(3)(A).

The 2006 Whiteley article, however, was not cited in the Petition and was not even published at the time the Petition was submitted. The Service asserts that Mr. Whiteley "referred" the Service to his 2006 publication. (AR 003). The Service maintains that its consideration of the 2006 Whiteley article is appropriate because 1) the Petition relied upon earlier Whiteley material, 2) Mr. Whiteley referred the Service to his 2006 article, and 3) the 2006 article was already located in the Service files. (Dkt. No. 24, p. 9). In sum, the Service argues it was again following up on information referred to it by a source cited in the Petition. (AR 003, 1193). The Service further

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[5] WWP does not claim error in the Service's consultation of Dr. Donald E. Campton, but only challenges his, and the Service's, analysis of the 2006 Whiteley article. (Dkt. No. 22, p. 10).

[6] Also attached to Mr. Gamett's email is a thesis by Becky Miller which was completed after the Petition in this case was filed. Consideration by the Service of a publication published after the Petition raises problems, as discussed below. However, later emails reveal that the Service reviewed Ms. Miller's paper and concluded it "did not change [its] view regarding 'significance' of the BLR population." (AR 785). It does not appear this material was cited in the 90-Day Finding or that the Service relied upon it in making its findings. (AR 042-043).

disputes WWP's claim that it "substantially relied" upon the 2006 Whiteley article arguing the 2006 article "did nothing more to further the petition's claims" and that it, like the other citations in the Petition, did not provide the necessary substantial information that the petitioned action may be warranted. (Dkt. No. 20, p. 18).

The Court takes issue with the Service's representations regarding the 2006 Whiteley article on two points: first, that Mr. Whiteley "referred" the Service to the article (Dkt. No. 24, p. 9, AR 003) and, second, the amount of weight the Service gave to the article. A review of the Service's email correspondence in the Administrative Record reveals that it was the Service who initiated contact with Mr. Whiteley and solicited his reference to the 2006 article. (AR 998-999).[7] Moreover, Mr. Whiteley was not contacted until after his 2006 article had already been reviewed by Dr. Campton and discussed within the Service. (AR 1000-1001, 1086-1090). The emails in the Administrative Record indicate that the Service located the 2006 Whiteley article on its own, reviewed and analyzed it, and then sought out further information and/or input from Whiteley. (AR 1086-1090).[8] The Service's email to Mr. Whiteley specifically requested that he "direct" it to publications and/or data regarding differences in color and morphology of the BLR Whitefish. (AR 1000-1001).[9] In response to this request, Mr. Whiteley provided a brief description of the basis for

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[7] This email also asked for the data related to the Whiteley 2002 material. (AR 998-999).

[8] On January 31, 2007, the Service emailed Dr. Campton and asked him to review the genetics data in the following materials: Molecular Ecology (Whiteley et al. 2006), Idaho Dept. Of Fish and Game (Campbell and Cegelski 2005), and the Whiteley and Gamett 2002 abstract. (AR 1089-1090). Dr. Campton and the Service exchanged emails regarding his findings on February 2-4, 2007. In particular, the emails discussed Dr. Campton's analysis of the Whiteley et al. (2006) paper. (AR 1086-1090). It was not until February 6, 2007 that the Service emailed Mr. Whiteley (AR 1000-1001), who responded later that same day with an email that attached his 2006 publication (AR 1000).

[9] Dear Mr. Whiteley – I am contacting you in regard to a reference in a publication entitled "Big Lost River Mountain Whitefish Status Report" dated February 2006, and also in regard to a statement made in a poster presentation on which you were an author (presented at the 135th Annual Meeting of the Annual Fisheries Society, I believe, in Anchorage in 2005). In the Status Report, you are quoted as stating (with regard to mountain whitefish) "the Big Lost should be considered as a separate group. This group is highly genetically differentiated from all other populations analyzed to date ... These fish also have coloration and morphological differences, which provides additional evidence that they are highly differentiated from other mountain whitefish populations." The citation provided for this quote is: Whiteley, A.R. 2002. Range-wide population genetic structure of the mountain whitefish (Prosopium williamsoni) with emphasis on the Columbia River Basin. Wild Trout and Salmon Genetics Lab. Div. Biol. Sciences, University of Montana, Missoula. I am not sure what this citation refers to, whether some sort of manuscript, poster, abstract, etc.; it is unclear.

In addition the poster entitled "Mitochondrial DNA phylogeography of mountain whitefish Prosopium williamsoni in

the statements attributed to him as reference in the Service's email and attached his recent 2006 paper. (AR 1000). Thus, Mr. Whiteley's email referencing his 2006 article was made in response to the Service's solicitation. The Court finds the Service acted beyond the precepts of the 90-Day Finding stage by soliciting information from Mr. Whiteley outside of the Petition.

This Court does not fault the Service for attempting to obtain the information cited to in the Petition. However, it is clear that "the 90-day finding is limited to the petition and information available in the files of the FWS." Colorado River Cutthroat Trout v. Kempthorne, 448 F.Supp.2d 170, 176 (D. D.C. 2006). "Even a cursory reading of [the ESA and its implementing regulations] shows that [the regulations] refer to the FWS's right to consult with affected states in the course of a status review or subsequent listing determinations, not at the 90-day review stage." Id. at 176 (the Service "may not solicit information from outside parties until [it] makes a positive 90-day finding and initiates a formal status review."). The statutory purpose at the 90-Day stage is to render a threshold determination of whether the petition has offered substantial scientific or commercial information indicating that the requested action may be warranted. See 16 U.S.C. § 1533(b)(3)(A). The "threshold determination as to 'whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted'...does not authorize the [Service] to weigh the information provided in the petition against information selectively solicited from third parties" and thus converting the "90-day review and process to what is effectively a 12-month status review, but without the required notice and the opportunity for the public to comment." Colorado River, 448 F.Supp.2d at 176 (citations omitted).

Two district court opinions addressed the Service's solicitation of information; Colorado River Cutthroat Trout v. Dirk Kempthorne, 448 F.Supp.2d 170, 175-76 (D. D.C. 2006) and Center for Biological Diversity v. Morgenweck, 351 F.Supp.2d 1137 (D. Colo. 2004). In both of those

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Idaho, Utah, and Montana: Emphasis on the origin and divergence of mountain whitefish in the Big Lost River, Idaho" refers to "research indicating that mountain whitefish in the Big Lost appear morphologically distinct from mountain whitefish in other populations."

Could you please provide me with data indicating that there are significant differences in color and morphology between the Big Lost River population of mountain whitefish and other populations, or direct me to a publication that provides that data? I have been unsuccessful in trying to find any information on the possible morphological differentiation of the Big Lost River mountain whitefish in my web searches of the literature. (AR 1000-1001).

cases the district courts determined that while engaging in its review of plaintiffs' petitions at the 90-Day Finding stage, the Service improperly solicited opinions from third-parties and relied upon those solicited opinions in denying the petitions. This Court has also had occasion recently to address this issue in cases where the Service sought specific information regarding a 90-Day Finding on a petition. Western Watersheds Project v. Hall, 2007 WL 2790404 *5 (D. Idaho 2007) (interior mountain quail); and Western Watersheds Project v. Norton, 2007 WL 2827375 (D. Idaho 2007) (pygmy rabbit). In the case involving the interior mountain quail, the Service conceded that it was improper to consider such information because the public did not have an opportunity to comment. The Court agreed that it was improper for the Service to make the outside solicitation about the Petition. Hall, at *6. However, because the Service's denial of the petition was based on other cited authorities and factors, the Court upheld the Service's 90-Day Finding. In the pygmy rabbit case, the Service sent out mass emails seeking information relating to the status of the pygmy rabbit. Norton, at *7 n. 8. This Court determined that the Service's solicitations by mass email were contrary to the statutory limits for the 90-Day Finding stage. As such, the Court remanded the matter to the Service to issue a new 90-Day Finding. Id. at *9.

The facts of this case are somewhat different from those in Colorado River and Morgenweck. In both of those cases the Service made several inquiries to multiple agencies in making its 90-Day Findings. Here, the Service made fewer inquiries soliciting information from sources cited in the Petition. The solicitations were made after the Petition had been filed and specifically to assist the Service in its preparation of the 90-Day Finding. While the Service may not have engaged in the kind of conduct deemed improper in Morgenweck and this Court's pygmy rabbit case, the Service's actions here as to Mr. Whiteley and his 2006 article exceed the statutory mandates for the 90-Day Finding stage. See 16 U.S.C. § 1533(b)(3)(A) (limiting the Service to reviewing the information presented in the Petition and the information contained in the Service's files). Had the Service's efforts here resulting in it merely obtaining or clarifying the materials cited in the Petition, there would be no problem. Here, however, the contact initiated by the Service with Mr. Whiteley requested information and input not only as to his material cited in the Petition but also to other publications. This is not merely clarification of a reference cited in the Petition or located in the

Service's files. It is a request for information beyond the scope of the 90-Day Finding stage. Because the Service relies heavily on Dr. Campton's analysis of the 2006 Whiteley article in refuting the Petition's claims, as discussed below, and the petitioner had no opportunity to address the Whiteley 2006 article, the Court finds the Service violated the 90-Day Finding stage standard.[10]

The fact that the Petition cited earlier Whiteley materials and that the 2006 Whiteley article was located in the Service files yields some weight to the Service's argument that it was appropriate to consider. This Court does not expect the Service to simply turn a blind eye to the most recent data available. See Morgenweck, 351 F.Supp.2d at 1142. However, the 2006 Whiteley article was not cited in the Petition and was unpublished until after the Petition was filed and after the statutory time period for the Service to issue its 90-Day Finding had expired. (Dkt. No. 22, p. 9 n. 6). As such, there was no possibility of WWP being able to address the 2006 Whiteley article or the Service's analysis of the article. The Service acted beyond its authority at this stage of the proceedings by going beyond merely clarifying the Petition's sources to something more akin to research and investigation; effectively beginning a 12-month status review. See Colorado River, *supra*..[11]

As to the second point of contention, WWP challenges the Service's "substantial reliance" on Mr. Whiteley's 2006 publication as arbitrary and capricious because it was outside of the Petition, unavailable to them, and they were not able to respond to the article as it was not yet published at the time the 2006 ESF Status Report and the Petition were filed. (Dkt. No. 17, pp. 14). WWP

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[10] On a related note, shortly after WWP filed its Petition, on June 21, 2006, the Idaho Department of Fish and Game provided the Service, at its request, with a "brief summary of preliminary information pertaining to the status and management of the mountain whitefish in the Big Lost River drainage." (AR 397-399). This summary includes several bullet points including that the Idaho Department of Fish and Game "does not believe the whitefish population in the drainage will decline in the absence of an emergency listing" and that "there is no immediate threat to their persistence...." (AR 397). In addition, the summary identifies "a group of stakeholders" who have "provided collaborative input to a conservation and management plan to ensure persistence of the population" and a list of the management actions that are completed or underway. (AR 398). Such solicitation of information is not appropriate for the Service to consider. It does not appear that the Service relied upon the information from the face of the 90-Day Finding. However, the Service's emails contained in the Administrative Record, however, make clear that the Service wanted to know the state of Idaho's position regarding the Petition. (AR 1385, 1504).

[11] Further, the Service's email refers to "web searches" the Service had done seeking literature regarding differentiation of the BLR Whitefish. (AR 1000-1001). The Court does not know what "web searches" means and acknowledges that it may have been the Service's attempts to obtain the materials cited in the Petition. However, if such a search was independent research for materials outside of the Petition and Service files, it goes beyond the 90-Day Finding threshold determination to what is "effectively a 12-month status review, but without the required notice and the opportunity for the public to comment." Colorado River, 448 F.Supp.2d at 176 (citations omitted).

argues that the Service improperly used the article to discredit the Petition and required a level of absolute uniqueness beyond what is required at this stage. (Dkt. No. 17, p. 15). The Service disputes the level of reliance given to the article arguing that "the document did nothing more to further the petition's claims." (Dkt. No. 20, p. 18). The Service claims it did not substantially rely upon the 2006 document as it pertains to genetic uniqueness and that its consideration of the material was proper because they acknowledged Mr. Whiteley's position but simply concluded that even accepting Mr. Whiteley's position, the degree of distinction was not significant. The Court disagrees.

As to whether the BLR Whitefish is genetically different from other mountain whitefish populations, the 90-Day Finding discussed at length the occurrences of genetic distinctions between BLR Whitefish and other whitefish populations and why the genetic distinctions that do exist are not such that the BLR Whitefish may represent a distinct species or subspecies. (AR 004). After detailing Mr. Whiteley's 2006 article, the 90-Day Finding concludes the materials do not provide a degree of genetic differentiation that is significant, stating the "[i]nformation in our files indicates that the genetic distance observed between mountain whitefish in the Big Lost River and surrounding populations is substantially less than that observed between other subspecies or species of salmonids" and that "the petition provides no substantial information to support its assertion that the mountain whitefish in the Big Lost River constitute a genetically unique stock." (AR 003-004). In sum, "the degree of genetic differentiation between mountain whitefish in the Big Lost River and surrounding populations is no greater than that observed between other populations of mountain whitefish." (AR 004). In reaching this conclusion, the Service extensively discussed and considered the "additional information supplied by Mr. Whiteley," concluding that the Whiteley 2006 material, even if true, was not substantial information of significance as to the BLR Whitefish. In doing so, the 90-Day Finding discusses and rebuffs the conclusions of the 2006 Whiteley article and uses that as a basis to deny the Petition. (AR 004). Moreover, as to the Service's findings regarding the persistence of the population in an unusual or unique ecological setting determination under the DPS listing, the Whiteley 2006 document is the only material cited. (AR 005).

Having reviewed the Administrative Record, the Court finds the amount of discussion afforded to the 2006 Whiteley article both in the 90-Day Finding itself and by the Service during the drafting of the finding evidences a high level of emphasis was given to it by the Service. (AR 996–999, 1282-1283, 1086-1090). The Service used the extraneous material as a basis to discredit the Petition. In doing so, the Service went beyond the 90-Day Finding stage of the proceedings by relying on material outside of the Petition and unavailable to the petitioner as a basis to issue the negative 90-Day Finding. Regardless of the fact that the Service may have accepted the conclusions from the 2006 Whiteley article that was already contained in the Service's files, the Court finds the Service's use of the extraneous material was prejudicial to the petitioner and beyond the 90-Day Finding stage.

IV. Conclusion

Having found the Service to have violated the mandates of Section 4(b)(3)(A) of the ESA, 16 U.S.C. § 1533(b)(3), the Court has discretion to fashion appropriate relief. Colorado River, 448 F.Supp.2d at 177 (quoting Defenders, 239 F.Supp.2d at 25) ("Congress did not limit district courts' authority to provide equitable relief under the ESA, and indeed, specifically reserved their traditional authority to fashion appropriate equitable relief."); see also 16 U.S.C. § 1540(g)(5) ("[t]he injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have ... to seek any other relief (including relief against the Secretary ...")). WWP asks the Court to reverse the Service's 90-Day Finding and order it to proceed promptly with the ESA listing process. (Dkt. No. 17, p. 20).

The Court finds that ordering a full status review is appropriate in this case. The Service considered information beyond the material in the Petition in issuing the negative 90-Day Finding such that it had effectively began to conduct a status review. See Colorado River, 448 F.Supp.2d at 177, Morgenweck, 351 F.Supp.2d at 1144 (ordering defendants to complete a full status review after finding that its 90-day review was over inclusive because it went beyond the review mandate). The Court has not and does not second guess the Service's conclusions reached in the 90-Day Finding. However, the Service has already considered extraneous material and that bell cannot be

unrung. The Court cannot simply directing the Service to issue a new 90-Day Finding ignoring the material it has previously considered. The only solution is to now proceed with the ESA process and allow a means by which the public can comment on the material. The Service is directed to undertake a status review of the species and, within one year, issue a "12-month Finding" concluding whether the petition is warranted, not warranted, or warranted but precluded. See 16 U.S.C. § 1533(b)(3)(B).

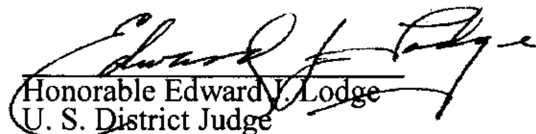
ORDER

Based on the foregoing and being fully advised in the premises, the Court HEREBY ORDERS as follows:

1) Plaintiff's Motion for Summary Judgment (Dkt. No. 17) is **GRANTED**. The Service's 90-Day Finding is **REVERSED** and the matter is **REMANDED** to the Service to undertake a status review of the species and, within one year, issue a 12-Month Finding pursuant to 16 U.S.C. § 1533(b)(3)(B). Such finding shall be issued within twelve months of the issuance of this order.

2) Defendants' Cross-Motion for Summary Judgment (Dkt. No. 19) is **DENIED**.

DATED: **March 31, 2009**



Honorable Edward J. Lodge
U. S. District Judge