

1 Howard Shanker
The Shanker Law Firm, PLC
2 700 East Baseline Road
Building. B
3 Tempe, Arizona 85283
Phone: (480) 838-9300
4 Fax: (480) 838-9433
howard@shankerlaw.net
5

6 Attorney for Plaintiffs
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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ARIZONA

11 **CENTER FOR BIOLOGICAL DIVERSITY; and)**

12 **MARICOPA AUDUBON SOCIETY;)**

13 **Plaintiffs,)**

14 v.)

15 **DIRK KEMPTHORNE, Secretary of the Interior,)**
16 **U.S. Department of the Interior; and)**

17 **DALE HALL, Director,)**
18 **U.S. Fish and Wildlife Service,)**

19 **Defendants.)**

Civil Action No.:

**COMPLAINT FOR
DECLARATORY
JUDGMENT AND
INJUNCTIVE RELIEF**

20 **INTRODUCTION**

21 1. On December 28, 1973, President Richard M. Nixon signed the
22 Endangered Species Act (“ESA”) stating that “Nothing is more priceless and more
23 worthy of preservation than the rich array of animal life with which our country has
24 been blessed.”

25 2. Thirty-three years later, the Bald Eagle exemplifies the ESA’s success—
26 once faced with extinction due to DDT and other threats, today Bald Eagles thrive in
27 many parts of the country.
28

1 3. Unfortunately, the Southwest population of Bald Eagles (“Desert Eagle”)
2 has failed to achieve the recovery success that other Bald Eagle populations have
3 achieved. Described as the “Treasure of the Southwest,” Desert Eagles are still on the
4 brink of extinction. Isolated reproductively, biologically, behaviorally and
5 geographically from all other Bald Eagles, today only 39 breeding pairs of Desert
6 Eagles are known to exist. Moreover, current population viability studies show that,
7 independent of the increasing threats to the population, Desert Eagles will likely go
8 extinct in approximately 75 years.

9 4. In anticipation of just such a scenario as exists in this case, Congress
10 amended the ESA to define the term “species” as including “any distinct population
11 segment of any species of vertebrate fish or wildlife which interbreeds when mature.”
12 ESA § 3(16), 16 U.S.C. § 1532(16). This definition extends the ESA’s safeguards to
13 imperiled populations of vertebrate species, even in cases where the remainder of a
14 particular species is not threatened or endangered.

15 5. Indeed, Congress amended the ESA’s definition of “species” to include
16 “distinct population segments” (“DPS”) with Bald Eagles in mind. When Bald Eagle
17 populations in the contiguous 48 states were on the verge of extinction, Bald Eagle
18 populations in Alaska and Canada were considered stable. The expanded definition of
19 a species allowed the Bald Eagles in the contiguous 48 states to receive ESA
20 protections despite the fact that the species as a whole (due to the Canadian and
21 Alaskan populations) was not threatened with extinction. In other words, Congress
22 recognized that it was not enough to have Bald Eagles in Alaska; the populations in the
23 contiguous 48 states mattered as well. See e.g. S. Rep. No. 96-151, at 7 (1979).

24 6. The Desert Eagle faces the same situation. While most Bald Eagle
25 populations have successfully recovered, the Desert Eagle population has yet to
26 overcome significant obstacles on its own road to recovery. Without continued ESA
27 protections, particularly habitat protection, Desert Eagles will likely go extinct.

28

1 7. In order to prevent the Desert Eagle (*Haliaeetus leucocephalus*) from
2 going extinct, the Center for Biological Diversity and Maricopa Audubon Society
3 (collectively “the Center”) petitioned the U.S. Fish and Wildlife Service (“FWS” or
4 “the Service”), Dirk Kempthorne (Secretary of the Interior), and Dale Hall (Director,
5 U.S. Fish and Wildlife Service), to list the species as “endangered” pursuant to the
6 Endangered Species Act (“ESA”). ESA §§ 2-18, 16 U.S.C. §§ 1531-1544.

7 8. On August 30, 2006, however, despite the well-documented scientific
8 information demonstrating the reproductive isolation and unique characteristics of the
9 Desert Eagle, and despite the fact that for more than three decades now, the Desert
10 Eagle has been described as a “unique” population by both independent scientists and
11 the Service, FWS reversed course and declared that Desert Eagles are no longer
12 “significant” enough to warrant status as a distinct population segment.

13 9. In addition, despite acknowledging that the Center’s Petition detailed
14 numerous threats to Desert Eagles, and despite population viability studies
15 demonstrating (independent of threats) that Desert Eagles may become extinct within a
16 few decades, FWS nonetheless concluded that the Center’s Petition “does not provide
17 substantial scientific or commercial information indicating that [listing of the Desert
18 Eagle] may be warranted.” The Service also determined that Desert Eagles are not in
19 danger of becoming extinct in the foreseeable future despite the fact that the Service has
20 never explained what constitutes adequate population numbers for this population of
21 Bald Eagles.

22 10. In making the negative 90-day finding regarding the Center’s October 6,
23 2004 Petition to list the Desert Eagle Distinct Population Segment, the Service violated
24 Endangered Species Act requirements and the Administrative Procedure Act. This
25 action seeks declaratory and injunctive relief overturning the Service’s finding on the
26 Center’s Desert Eagles Petition and compelling the Service to immediately begin a
27 status review of, and complete a 12-month finding for, the Desert Eagle DPS.

28

1 **JURISDICTION AND VENUE**

2 11. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331
3 (federal question), 28 U.S.C. § 1346 (United States as a defendant), 16 U.S.C. §§
4 1540(c) & (g) (action arising under the Endangered Species Act and citizen suit
5 provision), and 5 U.S.C. §§ 701-706 (Administrative Procedure Act).

6 12. This Court has authority to grant the requested relief pursuant to 28
7 U.S.C. §§ 2201-2202 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706
8 (Administrative Procedure Act).

9 13. As required by the Endangered Species Act (“ESA”), the Center provided
10 the Secretary with written notice of intent to sue more than 60 days ago. ESA §
11 11(g)(2), 16 U.S.C. § 1540(g)(2). Because the Secretary has not remedied the
12 violations of law, there exists an actual controversy between the parties within the
13 meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

14 14. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e) and ESA §
15 11(g)(3)(A), 16 U.S.C. § 1540(g)(3)(A). The Desert Eagle lives in this judicial district,
16 a substantial part of the events giving rise to the cause of action occurred in this judicial
17 district, and defendants maintain an office in this judicial district.

18 **PARTIES**

19 15. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a
20 non-profit corporation with over 25,000 members and offices in Tucson and Phoenix,
21 Arizona; ; Silver City, New Mexico; San Diego, Joshua Tree, Los Angeles, and San
22 Francisco, California; Washington, D.C.; and Portland, Oregon. The Center is
23 dedicated to the preservation, protection, and restoration of biodiversity, native species,
24 ecosystems, and public lands. The Center’s members and/or staff use and enjoy, and
25 intend to continue to use and enjoy, lands where the Desert Eagle is found for
26 observation, research, aesthetic enjoyment, and other recreational, scientific, and
27 educational activities. The Center’s members and/or staff have researched, studied, and
28 observed the Desert Eagle and intend to research, study, and observe the species in the

1 future. The Center's members and/or staff's educational, scientific, aesthetic, spiritual,
2 professional, and conservation interests are being adversely affected and irreparably
3 injured by the Service's continued violations of the Endangered Species Act. The
4 Center brings this suit on its own behalf and on behalf of its adversely affected
5 members and staff.

6 16. Plaintiff MARICOPA AUDUBON SOCIETY ("MAS") is a non-profit
7 organization dedicated to the enjoyment of birds and other wildlife with a primary focus
8 on the protection and restoration of the habitat of the Southwest through fellowship,
9 education and community involvement. MAS is a chapter of the National Audubon
10 Society. MAS has over 2300 members, primarily in central Arizona. MAS, a co-
11 petitioner for ESA listing of the Desert Eagle, has undertaken continuous ongoing
12 activist efforts to protect eagle habitats of the arid Southwest. MAS has played a strong
13 role in protecting endangered species in the Southwest through public education efforts,
14 field surveys, public field trips, and, position papers. MAS leads field trips with
15 members and non-members of the public to habitat areas of the Desert Eagle. MAS
16 brings this action on behalf of itself and its adversely affected members. Defendants'
17 ESA violations facilitate the decline of this species and its habitat. Accordingly, the
18 educational, scientific, aesthetic, conservation and recreational interests of MAS's
19 members and staff have been, are being, and unless the Court grants the requested
20 relief, will continue to be adversely affected and irreparably injured by Defendants'
21 inaction and failure to comply with the law.

22 17. Defendant DIRK KEMPTHORNE is the Secretary of the Interior
23 ("Secretary"). The Secretary is the federal official charged with listing species as
24 endangered or threatened under the ESA. She is sued in her official capacity. The
25 Secretary has delegated his obligation to review listing petitions under the ESA to the
26 U.S. Fish and Wildlife Service.

27 18. Defendant DALE HALL is the Director of the U.S. Fish and Wildlife
28 Service ("the Service") and has been delegated responsibility for implementing the

1 ESA including proposed and final listing and critical habitat decisions and the handling
2 of petitions for such listings.

3 **THE ENDANGERED SPECIES ACT**

4 19. The ESA is a federal statute designed to conserve endangered and
5 threatened species and the ecosystems upon which those species depend. ESA § 2(b),
6 16 U.S.C. § 1531(b).

7 20. To achieve these objectives, the Service is required to protect such
8 imperiled species by listing them as either “threatened” or “endangered” if they are
9 facing extinction due to any one, or any combination of, the following factors:

10 (A) the present or threatened destruction, modification, or
11 curtailment of its habitat or range;

12 (B) over-utilization for commercial, recreational, scientific, or
13 educational purposes;

14 (C) disease or predation;

15 (D) the inadequacy of existing regulatory mechanisms; or

16 (E) other natural or manmade factors affecting its continued
17 existence.

18 ESA § 4(a)(1), 16 U.S.C. § 1533(a)(1).

19 21. A species is “endangered” if it is “in danger of extinction throughout all
20 or a significant portion of its range.” ESA § 3(6), 16 U.S.C. § 1532(6). A species is
21 “threatened” if it is “likely to become an endangered species within the foreseeable
22 future throughout all or a significant portion of its range.” ESA § 3(20), 16 U.S.C. §
23 1532(20).

24 22. Under the ESA, a species is explicitly defined to include “any subspecies
25 of fish or wildlife or plants, and any *distinct population segment* of any species of
26 vertebrate fish or wildlife which interbreeds when mature.” ESA § 3(16), 16 U.S.C. §
27 1532(16) (emphasis added).

28

1 23. Three elements are considered by FWS in a decision regarding the status
2 of a possible distinct population segment (“DPS”) as endangered or threatened under
3 the Act: discreteness of the population segment in relation to the remainder of the
4 species to which it belongs; the significance of the population segment to the species to
5 which it belongs; and the population segment's conservation status in relation to the
6 Act's standards for listing (i.e., is the population segment, when treated as if it were a
7 species, endangered or threatened?). See Policy Regarding the Recognition of Distinct
8 Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722
9 (February 7, 1996).

10 24. A population segment of a vertebrate species may be considered discrete
11 if it satisfies either one of the following conditions: it is markedly separated from other
12 populations of the same taxon as a consequence of physical, physiological, ecological,
13 or behavioral factors (quantitative measures of genetic or morphological discontinuity
14 may provide evidence of this separation); or it is delimited by international
15 governmental boundaries within which differences in control of exploitation,
16 management of habitat, conservation status, or regulatory mechanisms exist that are
17 significant in light of section 4(a)(1)(D) of the Act. Id.

18 25. A population segment of a vertebrate species may be considered
19 significant if it satisfies any of the following: persistence of the discrete population
20 segment in an ecological setting unusual or unique for the taxon; evidence that loss of
21 the discrete population segment would result in a significant gap in the range of a taxon;
22 evidence that the discrete population segment represents the only surviving natural
23 occurrence of a taxon that may be more abundant elsewhere as an introduced
24 population outside its historic range; evidence that the discrete population segment
25 differs markedly from other populations of the species in its genetic characteristics; or
26 other evidence of significance (“because precise circumstances are likely to vary
27 considerably from case to case, it is not possible to describe prospectively all the classes
28

1 of information that might bear on the biological and ecological importance of a discrete
2 population segment”). Id.

3 26. If a population segment is discrete and significant (i.e., it is a distinct
4 population segment), its evaluation for endangered or threatened status will be based on
5 the ESA’s definitions of those terms and a review of the factors enumerated in section
6 4(a) of the ESA. Id.

7 27. A species receives mandatory substantive protections under the
8 Endangered Species Act if and only if it is listed as endangered or threatened. See 50
9 C.F.R. § 402.12(d) (2006). Thus, the listing process is the essential first step in the
10 ESA’s system of species protection and recovery.

11 28. Any interested person can begin the listing process by filing a petition to
12 list a species with the Secretary. ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A); 50
13 C.F.R. § 424.14(a)(2005).

14 29. Upon receipt of a petition to list a species, the Secretary has 90 days to
15 the maximum extent practicable to make a finding as to whether the petition “presents
16 substantial scientific or commercial information indicating that the petitioned action
17 may be warranted.” ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. §
18 424.14(b)(1). This determination is known as a 90-day finding.

19 30. If the Secretary makes a positive 90-day finding, he must promptly
20 publish it in the Federal Register and commence a “status review” of the species. ESA
21 § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A). A status review enables the agency to do a
22 complete assessment of the status of a species, with input from interested members of
23 the public and the scientific community, and determine whether a population qualifies
24 as a DPS and whether it is facing extinction.

25 31. After issuing a positive 90-day finding, the Secretary has 12 months from
26 the date that he received the petition to make one of three findings: (1) the petitioned
27 action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned
28 action is warranted but presently precluded by work on other pending proposals for

1 listing species of higher priority. ESA § 4(b)(3)(B), 16 § 1533(b)(3)(B); 50 C.F.R. §
2 424.14(b)(3).

3 32. If the Secretary finds that listing the species is warranted, he must publish
4 a proposed rule to list the species as endangered or threatened in the Federal Register.
5 ESA § 4(b)(5), 16 U.S.C. § 1533(b)(5).

6 33. Within one year of the publication of a proposed rule to list a species, the
7 Secretary must make a final decision on the proposal. ESA § 4(b)(6)(A), 16 U.S.C. §
8 1533(b)(6)(A).

9 34. Along with a final listing determination, the Service must issue a final
10 decision regarding the designation of critical habitat for the species to the maximum
11 extent prudent and determinable. ESA § 4(a)(3) & ESA § 4(b)(6)(C), 16 U.S.C. §§
12 1533(a)(3) & 1533(b)(6)(C).

13 **THE DESERT EAGLE**

14 35. The Desert Eagle distinguishes itself from other Bald Eagle populations
15 in several important respects: 1) it persists in a unique desert ecological setting (the
16 Sonoran Desert riparian areas of central Arizona and northwestern Mexico); 2) it is a
17 peripheral population that lives on the edge of the Bald Eagle's range; 3) it is smaller
18 than most other Bald Eagles; 4) it possesses behavioral distinctions such as frequent
19 cliff nesting and early season breeding; and 5) it is reproductively isolated, and likely
20 genetically distinct, from other Bald Eagle populations.

21 36. The Desert Eagle population has been considered "unique" for over 30
22 years. The Service itself has pointed out that "this population occupies a southwest
23 desert habitat not found elsewhere and utilizes nest sites unique to the species in the
24 contiguous United States." See e.g. Nomination for Critical Habitat Determination –
25 Bald Eagle Nesting in Southwestern United States, Memorandum to: Director, USFWS,
26 Washington, D.C. (OES); From: Regional Director, Region 2 (SE); September 7, 1978.

27 37. Moreover, as the Service has likewise stated, "20 years of monitoring
28 have resulted in the determination that no eagles have immigrated to and only one

1 eagle has emigrated from the [desert] bald eagle population.” See Petition to List the
2 Sonoran Desert Population of the Bald Eagle as a Distinct Population Segment, List
3 that Distinct Population Segment as Endangered, and Designate Critical Habitat, 71
4 Fed. Reg. 51549, 51554 (August 30, 2006).

5 38. In fact, the Desert Eagle is so behaviorally distinct and reproductively
6 isolated that “should [its] population experience a rapid decline, there are few eagles in
7 neighboring southwestern states or Mexico which could serve as a source population,”
8 and “a decision to release [Bald Eagles] into Arizona from elsewhere should be
9 considered only as a last resort, as the introduction of foreign genes...might disrupt
10 coadapted gene complexes specific to the [Desert Eagle].” 71 Fed. Reg. at 51553.

11 39. The Center’s Petition estimated the Desert Eagle population to be 166
12 individuals. Current estimates by the Arizona Game and Fish Department, however,
13 show an even more dire situation—approximately 100 individuals and only 39 known
14 breeding pairs. In addition, subadults are present in extremely high numbers in the
15 breeding pairs (evidence of high adult mortality), and fledgling mortality is likewise
16 excessive.

17 40. The Desert Eagle faces numerous threats to its habitat such as loss of
18 riparian trees and snags, human development (e.g. dewatering of the Upper Verde
19 River), recreational disturbance, grazing, water diversions, dams, mining, a declining
20 prey base, and toxic pollution.

21 41. Not only does the Desert Eagle face significant threats, its current small
22 population size and reproductive isolation make it extremely vulnerable to loss of
23 genetic variability, which in turn limits the population’s options for adaptation to
24 changing environmental conditions such as global warming.

25 **THE PETITION TO LIST THE DESERT EAGLE DPS**

26 42. On October 6, 2004, Plaintiffs filed a Petition asking the Service to
27 designate Desert Eagles as a distinct population segment (“DPS”) and to list the DPS as
28

1 an endangered species under the ESA. The Petition also requested that the Service
2 designate critical habitat for the Desert Eagle DPS.

3 43. The ESA mandates that the Secretary of the Interior, to the maximum
4 extent practicable, make an initial finding as to whether a petitioned action may be
5 warranted within 90 days after receiving a listing petition (“90-day finding”).
6 Accordingly, the Desert Eagle 90-day finding was due on or about January 11, 2005.

7 44. Because the Service had failed to issue a 90-day finding over a year after
8 the Desert Eagle Petition had been submitted, the Center brought suit against the
9 Service. The Parties reached a settlement in which the Service agreed to issue a 90-day
10 finding by August 23, 2006.

11 45. On August 30, 2006, FWS’ 90-day finding was published in the Federal
12 Register and concluded that the Center’s Petition did not present substantial
13 information that Desert Eagles qualify as a DPS. The Service also concluded that
14 Desert Eagles, if they qualified as a DPS, were not threatened or endangered.

15 46. While acknowledging that Desert Eagles are “discrete” from other Bald
16 Eagle populations, the 90-day finding nonetheless concluded that Desert Eagles are not
17 “significant” enough to warrant listing as a DPS. In making this determination, the
18 Service reversed over 30 years of findings, including its own, regarding the unique
19 nature of Desert Eagles.

20 47. The 90-day finding also concluded that the numerous threats Desert
21 Eagles face are insignificant. The Service simply stated that it believes “awareness,
22 collaboration, flexibility, planning, and willingness of all wildlife, land, and recreation
23 managers” will obviate the threats, and that other voluntary or otherwise unenforceable
24 measures will adequately protect the eagle. 71 Fed. Reg. at 51556-60.

25 48. The 90-day finding did not analyze whether the Desert Eagle population
26 itself is endangered, threatened, or recovered; indeed, the Service currently lacks the
27 tools to perform such an analysis because it has failed to develop (for a recovered
28 population) or to update (for a threatened population) criteria for determining when the

1 Desert Eagle population and habitat have attained these status milestones. The Service
2 insinuated in the 90-day finding that the current number of Desert Eagles is adequate
3 because it is greater than previous population numbers. However, the Service failed to
4 provide an explanation as to why the number of eagles currently present in this
5 reproductively isolated population is sufficient to constitute a secure population.
6 Population viability studies, on the other hand, including ones presented in the Petition,
7 show that independent of increasing threats, Desert Eagles will likely go extinct in
8 approximately 75 years.

9 49. The Center sent a sixty-day notice of intent to sue to the Secretary and
10 Service on November 2, 2006, satisfying statutory notice requirements.

11 **FIRST CLAIM FOR RELIEF**

12 **(Failure to Rely on the Best Scientific and Commercial Data Available)**

13 50. Each of the allegations set forth above are incorporated by reference
14 herein.

15 51. When making a listing determination pursuant to the ESA, the Service
16 must rely on the best scientific and commercial data available. ESA § 4(b)(1)(A), 16
17 U.S.C. § 1533(b)(1)(A).

18 52. In the negative 90-day finding for Desert Eagles, the Service ignored or
19 discounted information, including its own, that Desert Eagles persist in an ecological
20 setting that is unique for the taxon; that loss of the Desert Eagle population would result
21 in a significant gap in the range of the species; that Desert Eagles differ markedly from
22 other populations of the species in their adaptive/genetic characteristics; and that Desert
23 Eagles are significant due to their morphological and behavioral characteristics as well
24 as their reproductive isolation. The Service thus failed to use the best scientific
25 information available in assessing whether Desert Eagles constitute a distinct
26 population segment under the ESA.

27 53. In the negative 90-day finding for the Desert Eagle, the Service also
28 ignored or discounted information, including its own, that threats to Desert Eagles are

1 substantial and serious; and ignored or discounted information (i.e. population viability
2 analyses) demonstrating the imperiled status of Desert Eagles.

3 54. By ignoring or discounting such information as well as selectively
4 choosing from its files which information to rely on, or not rely on, in assessing the
5 Center's Desert Eagle Petition, the Service violated the ESA's requirement that the
6 agency base its listing determinations on the best scientific and commercial data
7 available. ESA § 4(b)(1)(A), 16 U.S.C. § 1533(b)(1)(A). As a result, the agency's
8 Desert Eagle 90-day finding was and is arbitrary, capricious, an abuse of discretion and
9 otherwise not in accordance with the ESA within the meaning of the APA. 5 U.S.C. §
10 706(2).

11 **SECOND CLAIM FOR RELIEF**

12 **(Use of an Improper Standard for a 90-Day Finding)**

13 55. Each of the allegations set forth above are incorporated by reference
14 herein.

15 56. A 90-day finding provides a threshold review of an ESA listing petition.
16 The Service must determine "whether the petition presents substantial scientific or
17 commercial information indicating that [listing] may be warranted." ESA § 1533(b)(3),
18 16 U.S.C. § 1533(b)(3). Substantial information is "information that would lead a
19 reasonable person to believe that the measure proposed in the petition *may* be
20 warranted." 50 C.F.R § 424.14(b) (emphasis added).

21 57. The Service did not determine if the Desert Eagle Petition provided
22 substantial scientific information that would lead a reasonable person to believe that the
23 listing of the Desert Eagle as an endangered species may be warranted. Instead, the
24 Service applied an erroneous legal standard by requiring that the Petition provide
25 conclusive proof that the Desert Eagle is a distinct population segment as well as
26 conclusive proof that the threats to the Desert Eagle will lead to extinction.

27 58. On the whole, the information presented by the Center in its Petition, as
28 well as data possessed by the Service, is more than sufficient to lead a reasonable

1 person to believe that Desert Eagles are significant to the Bald Eagle population as a
2 whole, and thus qualify as a DPS; there is also ample information in the record to lead a
3 reasonable person to believe that Desert Eagles are in danger of extinction. For
4 example, the Raptor Research Foundation, a non-profit organization comprised
5 predominantly of scientists who study and help manage birds of prey and their habitat,
6 commented to the Service as follows: “We continue to be concerned about the viability
7 of the Southwest population of Bald Eagles based on the low number of breeding pairs,
8 relatively low productivity, relatively high adult mortality, and threats of habitat
9 alteration and human disturbance... We are not aware of any data showing a clear, long-
10 term increase in the Southwest Bald Eagle population... Compounding conservation
11 difficulties posed by low numbers, lower productivity, and higher adult mortality, the
12 Southwest population is faced with a variety of threats related to rapidly increasing
13 human populations... In summary, we do not believe that the Southwest Bald Eagle
14 population is secure, and we question whether even current numbers can be sustained
15 without active management and habitat protection. USFWS may wish to reconsider the
16 possibilities of designating the Southwest recovery region as a Distinct Population
17 Segment (DPS) and deferring delisting of the Southwest population until data are
18 available that demonstrate the population is sufficiently large and self-sustaining.” The
19 Service cannot selectively consider only information that supports its preordained
20 conclusions; rather, the agency must consider *all* available information in determining
21 whether a reasonable person could find that a petitioned action may be warranted.

22 59. By applying the wrong legal standard and requiring a higher burden than
23 that imposed by the ESA, the Service violated the ESA’s 90-day finding requirement.
24 ESA § 4(b)(3), 16 U.S.C. § 1533(b)(3). Taken as a whole, the information available to
25 the Service would lead a reasonable person to believe that Desert Eagles are a DPS, and
26 that these eagles are facing extinction. The Service’s negative 90-day finding on the
27 Center’s Petition was and is arbitrary, capricious, an abuse of discretion and otherwise
28 not in accordance with the ESA within the meaning of the APA. 5 U.S.C. § 706(2).

1 **THIRD CLAIM FOR RELIEF**

2 **(Improper DPS Analysis)**

3 60. Each of the allegations set forth above are incorporated by reference
4 herein.

5 61. For over thirty years, the Service has considered Desert Eagles to be a
6 unique population. Such a finding is unremarkable given the fact that these Eagles
7 comprise the only Bald Eagle population in the United States to persist in a desert
8 ecosystem. More precisely, because of their long persistence in, and adaptation to, a
9 hot, dry, desert environment, Desert Eagles display unique adaptations to that
10 environment, namely early season breeding, frequent use of cliffs as nesting sites, and
11 smaller size than most other Bald Eagles. Despite the substantial evidence indicating
12 that Desert Eagles, unlike any other population of Bald Eagles, occupy and have
13 adapted to a desert environment, the Service in its 90-day finding concluded that the
14 Center’s Petition “does not present substantial evidence that the population is persisting
15 in an ecological setting that is unique for the taxon.” 71 Fed. Reg. at 51554.

16 62. The Center’s Petition, and FWS files, also contain substantial evidence of
17 the Desert Eagle’s significance to the entire Bald Eagle population due to the
18 population’s peripheral location, its unique behavioral adaptations, its morphological
19 and genetic characteristics, and its reproductive isolation.

20 63. The Service’s conclusion that Desert Eagles are not “significant” to the
21 Bald Eagle population as a whole and therefore do not qualify as a DPS is not rationally
22 related to the information available to the agency. As a result, FWS’ conclusion in its
23 90-day finding on the Center’s Petition that Desert Eagles do not constitute a DPS is
24 arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the
25 ESA within the meaning of the APA. 5 U.S.C. § 706(2).

26 **FOURTH CLAIM FOR RELIEF**

27 **(Improper Threats Analysis)**

28 64. Each of the allegations set forth above are incorporated by reference

1 herein.

2 65. The Service concluded in its 90-day finding that there are no significant
3 threats to Desert Eagles, an assertion the agency supported by speculating that
4 “awareness, collaboration, flexibility, planning, and willingness of all wildlife, land,
5 and recreation managers” will obviate the threats to Desert Eagles. 71 Fed. Reg. at
6 51557. However, the Service provided no definitive mechanisms by which such action
7 will actually protect the DPS. The Service likewise relies on other future and/or
8 voluntary measures in order to downplay information detailing the significant existing
9 threats to Desert Eagles.

10 66. The Service’s conclusion regarding threats to Desert Eagles also relies in
11 part on references to Biological Opinions finding that proposed federal actions did not
12 pose a risk of “jeopardy” to Bald Eagles. 71 Fed. Reg. at 51557, 51559-60. However,
13 those Biological Opinions based their “jeopardy” conclusion on whether or not the
14 *entire* Bald Eagle population in the contiguous 48 states would be jeopardized, and did
15 not assess risks posed only to Desert Eagles. Since the Service, when addressing a
16 Petition to list a DPS as threatened or endangered, must assess only the conservation
17 status of that particular DPS, Biological Opinions that evaluate a proposed project’s
18 risk to Bald Eagles in the contiguous 48 states are irrelevant.

19 67. The Service believes “that other existing Federal wildlife laws will
20 continue to provide adequate regulatory protections to the Sonoran Desert bald eagle if
21 the bald eagle is delisted.” 71 Fed. Reg. at 51558. However, the Service failed to
22 explain how other regulatory measures will provide the protections that the ESA
23 currently does for the eagle. Unlike the ESA, neither the Bald and Golden Eagle
24 Protection Act nor the Migratory Bird Treaty Act protect habitat.

25 68. The Service also failed to assess the cumulative impacts of the threats the
26 Desert Eagle faces. While each of the threats—such as development, dewatering
27 projects, grazing, mining, pollution, climate change, fishing line, and toxics—
28 independently poses a significant threat to the continued viability of Desert Eagles,

1 collectively they pose a very significant and serious threat to the continued viability of
2 the DPS.

3 69. Moreover, population viability analyses (“PVA”) are both appropriate and
4 reliable for determining the extinction risk for small populations like the Desert Eagle.
5 Three different PVAs have all similarly found that Desert Eagles face a high threat of
6 extinction. The most recent PVA, completed in 2006, shows that even independent of
7 the increasing threats to the population, Desert Eagles face a median time to extinction
8 of 75 years. Many species facing a similar risk of extinction are currently listed as
9 threatened or endangered under the ESA.

10 70. By relying on improper, voluntary, uncertain, and/or unenforceable
11 protections to conclude that the Desert Eagle does not face substantial threats, and by
12 failing to consider the cumulative impact of the threats the DPS faces, the Service
13 arbitrarily concluded that Desert Eagles are not in danger of extinction or are not likely
14 to become endangered in the foreseeable future. As a result, the Desert Eagle 90-day
15 finding was and is arbitrary, capricious, an abuse of discretion and otherwise not in
16 accordance with the ESA within the meaning of the APA. 5 U.S.C. § 706(2).

17 **FIFTH CLAIM FOR RELIEF**

18 **(Failure to Adequately Assess the Desert Eagle’s Status)**

19 71. Each of the allegations set forth above are incorporated by reference
20 herein.

21 72. In its 90-day finding, the Service asserted that the current number of
22 Desert Eagles is adequate because the population is currently larger than its previous
23 numbers. 71 Fed. Reg. at 51565. However, the mere fact that the Desert Eagle
24 population has increased since the time at which the population was literally near
25 extinction says nothing about whether the Desert Eagle population is endangered,
26 threatened, or recovered. 71 Fed. Reg. at 51551. Without rational criteria for
27 identifying a “recovered” population of Desert Eagles, it is impossible to conclude that
28 the DPS no longer requires the protections of the ESA.

1 73. The Service's theory of population stability based purely on increasing
2 population numbers, but disregarding small population size, high adult and juvenile
3 mortalities, and increasing threats, is not reasonable. The negative 90-day finding
4 offers no evidence that the current number of Desert Eagles is sufficient to assure the
5 continued existence of the population and no assessment has yet been completed to
6 determine what constitutes a stable Desert Eagle population. Without such information,
7 the Service cannot claim that the current numbers are adequate, especially given that
8 Desert Eagle population viability analyses show otherwise.

9 74. Not only has the Service never developed criteria for defining a
10 "recovered" population of Desert Eagles, the Service has likewise failed to develop
11 updated criteria by which to differentiate between an endangered Desert Eagle
12 population and one which is threatened within the meaning of section 4 of the ESA. By
13 purporting to assess the status of Desert Eagles without reference to meaningful
14 biological standards, the Service's conclusion that Desert Eagles are not threatened or
15 endangered was and is arbitrary, capricious, an abuse of discretion and otherwise not in
16 accordance with the ESA within the meaning of the APA. 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

17
18 Plaintiffs request that this Court enter judgment providing the following relief:

- 19 1. Issue a Declaratory Judgment that Defendants are in violation of
20 the law for each and every Count as alleged herein;
- 21 2. Declare unlawful and set aside the Service's negative 90-day
22 finding on the Center's listing petition for Desert Eagles;
- 23 3. Issue an injunction compelling the Service to promptly conduct a
24 full status review for Desert Eagles in accordance with ESA listing
25 procedures and requirements, to be completed within a reasonable
26 time after the Court's Order;
- 27 4. Issue an injunction preventing the Service from removing ESA
28 protection for Desert Eagles until the Service has complied with

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the terms of this injunction and the ESA's requirements for delisting species;

- 5. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees as provided in the ESA, the Equal Access to Justice Act and/or any other applicable law; and
- 6. Any other such relief as the Court deems just and proper.

Respectfully submitted this 5th day of January, 2007,

Howard Shanker
The Shanker Law Firm, PLC
700 East Baseline Road
Building. B
Tempe, Arizona 85283
Phone: (480) 838-9300
Fax: (480) 838-9433
howard@shankerlaw.net

Attorney for Plaintiffs