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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ARIZONA

12 **CENTER FOR BIOLOGICAL DIVERSITY; and**

13 **MARICOPA AUDUBON SOCIETY;**

14 **Plaintiffs,**

15 v.

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

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

20 **Defendants.**

21 **Civil Action No.:**

22 **COMPLAINT FOR
23 DECLARATORY
24 JUDGMENT AND
25 INJUNCTIVE RELIEF**

26 **INTRODUCTION**

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

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

1 3. Unfortunately, the Southwest population of Bald Eagles (“Desert Eagle”) has
2 failed to achieve the recovery success that other Bald Eagle populations have achieved.
3 Described as the “Treasure of the Southwest,” Desert Eagles are still on the brink of
4 extinction. Isolated reproductively, biologically, behaviorally and geographically from all
5 other Bald Eagles, today only 39 breeding pairs of Desert Eagles are known to exist.
6 Moreover, current population viability studies show that, independent of the increasing
7 threats to the population, Desert Eagles will likely go extinct in approximately 75 years.
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9 4. In anticipation of just such a scenario as exists in this case, Congress amended
10 the ESA to define the term “species” as including “any distinct population segment of any
11 species of vertebrate fish or wildlife which interbreeds when mature.” ESA § 3(16), 16
12 U.S.C. § 1532(16). This definition extends the ESA’s safeguards to imperiled populations of
13 vertebrate species, even in cases where the remainder of a particular species is not threatened
14 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 a
19 species allowed the Bald Eagles in the contiguous 48 states to receive ESA protections
20 despite the fact that the species as a whole (due to the Canadian and Alaskan populations)
21 was not threatened with extinction. In other words, Congress recognized that it was not
22 enough to have Bald Eagles in Alaska; the populations in the contiguous 48 states mattered
23 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 populations
25 have successfully recovered, the Desert Eagle population has yet to overcome significant
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1 obstacles on its own road to recovery. Without continued ESA protections, particularly
2 habitat protection, Desert Eagles will likely go extinct.

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

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

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

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

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

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

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

19 14. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e) and ESA §
20 11(g)(3)(A), 16 U.S.C. § 1540(g)(3)(A). The Desert Eagle lives in this judicial district, a
21 substantial part of the events giving rise to the cause of action occurred in this judicial
22 district, and defendants maintain an office in this judicial district.

23 **PARTIES**

24 15. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a non-
25 profit corporation with over 25,000 members and offices in Tucson and Phoenix, Arizona;
26 Silver City, New Mexico; San Diego, Joshua Tree, Los Angeles, and San Francisco,
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1 California; Washington, D.C.; and Portland, Oregon. The Center is dedicated to the
2 preservation, protection, and restoration of biodiversity, native species, ecosystems, and
3 public lands. The Center’s members and/or staff use and enjoy, and intend to continue to use
4 and enjoy, lands where the Desert Eagle is found for observation, research, aesthetic
5 enjoyment, and other recreational, scientific, and educational activities. The Center’s
6 members and/or staff have researched, studied, and observed the Desert Eagle and intend to
7 research, study, and observe the species in the future. The Center’s members and/or staff’s
8 educational, scientific, aesthetic, spiritual, professional, and conservation interests are being
9 adversely affected and irreparably injured by the Service’s continued violations of the
10 Endangered Species Act. The Center brings this suit on its own behalf and on behalf of its
11 adversely affected members and staff.

12 16. Plaintiff MARICOPA AUDUBON SOCIETY (“MAS”) is a non-profit
13 organization dedicated to the enjoyment of birds and other wildlife with a primary focus on
14 the protection and restoration of the habitat of the Southwest through fellowship, education
15 and community involvement. MAS is a chapter of the National Audubon Society. MAS has
16 over 2300 members, primarily in central Arizona. MAS, a co-petitioner for ESA listing of
17 the Desert Eagle, has undertaken continuous ongoing activist efforts to protect eagle habitats
18 of the arid Southwest. MAS has played a strong role in protecting endangered species in the
19 Southwest through public education efforts, field surveys, public field trips, and, position
20 papers. MAS leads field trips with members and non-members of the public to habitat areas
21 of the Desert Eagle. MAS brings this action on behalf of itself and its adversely affected
22 members. Defendants’ ESA violations facilitate the decline of this species and its habitat.
23 Accordingly, the educational, scientific, aesthetic, conservation and recreational interests of
24 MAS’s members and staff have been, are being, and unless the Court grants the requested
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1 (E) other natural or manmade factors affecting its continued
2 existence.

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

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

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

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

20 24. A population segment of a vertebrate species may be considered discrete if it
21 satisfies either one of the following conditions: it is markedly separated from other
22 populations of the same taxon as a consequence of physical, physiological, ecological, or
23 behavioral factors (quantitative measures of genetic or morphological discontinuity may
24 provide evidence of this separation); or it is delimited by international governmental
25 boundaries within which differences in control of exploitation, management of habitat,
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1 conservation status, or regulatory mechanisms exist that are significant in light of section
2 4(a)(1)(D) of the Act. Id.

3 25. A population segment of a vertebrate species may be considered significant if
4 it satisfies any of the following: persistence of the discrete population segment in an
5 ecological setting unusual or unique for the taxon; evidence that loss of the discrete
6 population segment would result in a significant gap in the range of a taxon; evidence that
7 the discrete population segment represents the only surviving natural occurrence of a taxon
8 that may be more abundant elsewhere as an introduced population outside its historic range;
9 evidence that the discrete population segment differs markedly from other populations of the
10 species in its genetic characteristics; or other evidence of significance (“because precise
11 circumstances are likely to vary considerably from case to case, it is not possible to describe
12 prospectively all the classes of information that might bear on the biological and ecological
13 importance of a discrete population segment”). Id.

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

18 27. A species receives mandatory substantive protections under the Endangered
19 Species Act if and only if it is listed as endangered or threatened. See 50 C.F.R. § 402.12(d)
20 (2006). Thus, the listing process is the essential first step in the ESA’s system of species
21 protection and recovery.

22 28. Any interested person can begin the listing process by filing a petition to list a
23 species with the Secretary. ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. §
24 424.14(a)(2005).

1 29. Upon receipt of a petition to list a species, the Secretary has 90 days to the
2 maximum extent practicable to make a finding as to whether the petition “presents
3 substantial scientific or commercial information indicating that the petitioned action may be
4 warranted.” ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). This
5 determination is known as a 90-day finding.
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7 30. If the Secretary makes a positive 90-day finding, he must promptly publish it
8 in the Federal Register and commence a “status review” of the species. ESA § 4(b)(3)(A),
9 16 U.S.C. § 1533(b)(3)(A). A status review enables the agency to do a complete assessment
10 of the status of a species, with input from interested members of the public and the scientific
11 community, and determine whether a population qualifies as a DPS and whether it is facing
12 extinction.

13 31. After issuing a positive 90-day finding, the Secretary has 12 months from the
14 date that he received the petition to make one of three findings: (1) the petitioned action is
15 not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted
16 but presently precluded by work on other pending proposals for listing species of higher
17 priority. ESA § 4(b)(3)(B), 16 § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3).

18 32. If the Secretary finds that listing the species is warranted, he must publish a
19 proposed rule to list the species as endangered or threatened in the Federal Register. ESA §
20 4(b)(5), 16 U.S.C. § 1533(b)(5).

21 33. Within one year of the publication of a proposed rule to list a species, the
22 Secretary must make a final decision on the proposal. ESA § 4(b)(6)(A), 16 U.S.C. §
23 1533(b)(6)(A).

24 34. Along with a final listing determination, the Service must issue a final decision
25 regarding the designation of critical habitat for the species to the maximum extent prudent
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1 and determinable. ESA § 4(a)(3) & ESA § 4(b)(6)(C), 16 U.S.C. §§ 1533(a)(3) &
2 1533(b)(6)(C).

3 **THE DESERT EAGLE**

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

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

17 37. Moreover, as the Service has likewise stated, “20 years of monitoring have
18 resulted in the determination that no eagles have immigrated to and only one eagle has
19 emigrated from the [desert] bald eagle population.” See Petition to List the Sonoran Desert
20 Population of the Bald Eagle as a Distinct Population Segment, List that Distinct Population
21 Segment as Endangered, and Designate Critical Habitat, 71 Fed. Reg. 51549, 51554 (August
22 30, 2006).

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

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

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

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

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

18 42. On October 6, 2004, Plaintiffs filed a Petition asking the Service to designate
19 Desert Eagles as a distinct population segment (“DPS”) and to list the DPS as an endangered
20 species under the ESA. The Petition also requested that the Service designate critical habitat
21 for the Desert Eagle DPS.

22 43. The ESA mandates that the Secretary of the Interior, to the maximum extent
23 practicable, make an initial finding as to whether a petitioned action may be warranted
24 within 90 days after receiving a listing petition (“90-day finding”). Accordingly, the Desert
25 Eagle 90-day finding was due on or about January 11, 2005.
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1 44. Because the Service had failed to issue a 90-day finding over a year after the
2 Desert Eagle Petition had been submitted, the Center brought suit against the Service. The
3 Parties reached a settlement in which the Service agreed to issue a 90-day finding by August
4 23, 2006.

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

9 46. While acknowledging that Desert Eagles are "discrete" from other Bald Eagle
10 populations, the 90-day finding nonetheless concluded that Desert Eagles are not
11 "significant" enough to warrant listing as a DPS. In making this determination, the Service
12 reversed over 30 years of findings, including its own, regarding the unique nature of Desert
13 Eagles.

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

19 48. The 90-day finding did not analyze whether the Desert Eagle population
20 itself is endangered, threatened, or recovered; indeed, the Service currently lacks the tools to
21 perform such an analysis because it has failed to develop (for a recovered population) or to
22 update (for a threatened population) criteria for determining when the Desert Eagle
23 population and habitat have attained these status milestones. The Service insinuated in the
24 90-day finding that the current number of Desert Eagles is adequate because it is greater than
25 previous population numbers. However, the Service failed to provide an explanation as to
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1 why the number of eagles currently present in this reproductively isolated population is
2 sufficient to constitute a secure population. Population viability studies, on the other hand,
3 including ones presented in the Petition, show that independent of increasing threats, Desert
4 Eagles will likely go extinct in approximately 75 years.

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

7 **FIRST CLAIM FOR RELIEF**

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

9 50. Each of the allegations set forth above are incorporated by reference
10 herein.

11 51. When making a listing determination pursuant to the ESA, the Service
12 must rely on the best scientific and commercial data available. ESA § 4(b)(1)(A), 16 U.S.C.
13 § 1533(b)(1)(A).

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

22 53. In the negative 90-day finding for the Desert Eagle, the Service also
23 ignored or discounted information, including its own, that threats to Desert Eagles are
24 substantial and serious; and ignored or discounted information (i.e. population viability
25 analyses) demonstrating the imperiled status of Desert Eagles.

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

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

3 **THIRD CLAIM FOR RELIEF**

4 **(Improper DPS Analysis)**

5 60. Each of the allegations set forth above are incorporated by reference
6 herein.

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

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

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

3 **FOURTH CLAIM FOR RELIEF**

4 **(Improper Threats Analysis)**

5 64. Each of the allegations set forth above are incorporated by reference
6 herein.

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

14 66. The Service’s conclusion regarding threats to Desert Eagles also relies in
15 part on references to Biological Opinions finding that proposed federal actions did not pose a
16 risk of “jeopardy” to Bald Eagles. 71 Fed. Reg. at 51557, 51559-60. However, those
17 Biological Opinions based their “jeopardy” conclusion on whether or not the *entire* Bald
18 Eagle population in the contiguous 48 states would be jeopardized, and did not assess risks
19 posed only to Desert Eagles. Since the Service, when addressing a Petition to list a DPS as
20 threatened or endangered, must assess only the conservation status of that particular DPS,
21 Biological Opinions that evaluate a proposed project’s risk to Bald Eagles in the contiguous
22 48 states are irrelevant.

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

4 68. The Service also failed to assess the cumulative impacts of the threats the
5 Desert Eagle faces. While each of the threats—such as development, dewatering projects,
6 grazing, mining, pollution, climate change, fishing line, and toxics—independently poses a
7 significant threat to the continued viability of Desert Eagles, collectively they pose a very
8 significant and serious threat to the continued viability of the DPS.

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

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

23 **FIFTH CLAIM FOR RELIEF**

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

25 71. Each of the allegations set forth above are incorporated by reference
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1 herein.

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

10 73. The Service’s theory of population stability based purely on increasing
11 population numbers, but disregarding small population size, high adult and juvenile
12 mortalities, and increasing threats, is not reasonable. The negative 90-day finding offers no
13 evidence that the current number of Desert Eagles is sufficient to assure the continued
14 existence of the population and no assessment has yet been completed to determine what
15 constitutes a stable Desert Eagle population. Without such information, the Service cannot
16 claim that the current numbers are adequate, especially given that Desert Eagle population
17 viability analyses show otherwise.

18 74. Not only has the Service never developed criteria for defining a “recovered”
19 population of Desert Eagles, the Service has likewise failed to develop updated criteria by
20 which to differentiate between an endangered Desert Eagle population and one which is
21 threatened within the meaning of section 4 of the ESA. By purporting to assess the status of
22 Desert Eagles without reference to meaningful biological standards, the Service’s conclusion
23 that Desert Eagles are not threatened or endangered was and is arbitrary, capricious, an
24 abuse of discretion and otherwise not in accordance with the ESA within the meaning of the
25 APA. 5 U.S.C. § 706(2).
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PRAYER FOR RELIEF

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

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

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THE SHANKER LAW FIRM, PLC.

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