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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

**CENTER FOR BIOLOGICAL DIVERSITY;  
and**

**MARICOPA AUDUBON SOCIETY;**

**Plaintiffs,**

**v.**

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

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

**Defendants.**

**Civil Action No.: CV07-0038-  
PHX-MHM**

**MEMORANDUM IN  
SUPPORT OF  
PLAINTIFFS' MOTION  
FOR SUMMARY  
JUDGMENT**

**ORAL ARGUMENT  
REQUESTED**

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**Table of Contents**

**I. INTRODUCTION..... 1**

**II. STATUTORY BACKGROUND..... 2**

**A. Listing Species under the ESA ..... 2**

**B. Designating Distinct Population Segments..... 4**

**III. FACTUAL BACKGROUND..... 4**

**IV. STANDARD OF REVIEW ..... 5**

**V. MOOTNESS..... 5**

**VI. ARGUMENT..... 9**

**A. Distinct Population Segment Status for Desert Eagles ..... 10**

**B. The Service’s Negative 90-Day Finding on DPS Status Precluded the Agency**  
        **from Assessing Whether Desert Eagles Warrant Continued Protection Under**  
        **the ESA..... 17**

**VII. RELIEF REQUESTED ..... 22**

**VIII. CONCLUSION ..... 24**

**Table of Authorities**

**Statutes and Regulations**

16 U.S.C. § 1532(16).....	1, 2, 6
16 U.S.C. § 1533 .....	2
16 U.S.C. § 1533(b)(1)(A) .....	2, 4
16 U.S.C. § 1533(b)(3)(A) .....	passim
16 U.S.C. § 1533(b)(3)(B).....	4, 5
16 U.S.C. § 1533(b)(3)(C)(ii).....	3, 4
16 U.S.C. § 1533(b)(5) .....	3
16 U.S.C. §1533(b)(1)(A) .....	3, 12, 17
16 U.S.C. §1533(b)(3)(A) .....	3, 4, 9
5 U.S.C. § 704 .....	5
5 U.S.C. § 706(2)(A) .....	22
5 U.S.C. § 706 .....	5
5 U.S.C. §§ 701-706 .....	24
50 C.F.R. § 402.12(d).....	2
50 C.F.R. § 424.14(a) .....	2
50 C.F.R. § 424.14(b).....	2, 3, 4, 5, 9
50 C.F.R. § 424.15(c) .....	3, 6, 7

**Cases**

<i>American Petroleum Inst. v. United States EPA,</i> 285 U.S. App. D.C. 35 (D.C. Cir. 1990) .....	17
<i>American Wildlands &amp; Native Ecosystems Council v. United States Forest Serv.,</i> 1999 U.S. Dist. LEXIS 22243 (D. Mont. 1999).....	17
<i>Arizonans for Official English v. Arizona,</i> 520 U.S. 43 (1997) .....	9

1	<i>Biodiversity Legal Found. v. Badgley,</i>	
2	309 F.3d 1166 (9 <sup>th</sup> Cir. 2002).....	23
3	<i>Center for Biological Diversity v. Badgley,</i>	
4	335 F.3d 1097 (9th Cir. 2003).....	5
5	<i>Center for Biological Diversity v. BLM,</i>	
6	422 F. Supp. 2d 1115 (D. Cal. 2006) .....	16
7	<i>Center for Biological Diversity v. Kempthorne,</i>	
8	2007 U.S. Dist. LEXIS 4816 (D. Cal. 2007).....	3
9	<i>Center for Biological Diversity v. Morgenweck,</i>	
10	351 F. Supp 2d 1127 (D. Colo. 2004) .....	7, 21, 22, 23
11	<i>Center for Biological Diversity v. Norton,</i>	
12	254 F.3d 833 (9th Cir. 2001).....	7, 23
13	<i>Colo. River Cutthroat Trout v. Kempthorne,</i>	
14	448 F. Supp. 2d 170 (D.D.C. 2006) .....	15, 22
15	<i>Defenders of Wildlife v. Babbitt,</i>	
16	958 F. Supp. 670 (D.D.C. 1997) .....	21
17	<i>FTC v. H.N. Singer, Inc.,</i>	
18	668 F.2d 1107 (9th Cir. 1982).....	22
19	<i>Metcalf v. Daley,</i>	
20	214 F.3d 1135 (9th Cir. 2000).....	17
21	<i>Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.,</i>	
22	463 U.S. 29 (1983) .....	5
23	<i>NEDC v. Bonneville Power Administration,</i>	
24	477 F.3d 668 (9 <sup>th</sup> Cir. 2007).....	22
25	<i>Northern Spotted Owl v. Hodel,</i>	
26	716 F. Supp. 429 (D. Wash. 1988).....	16
27	<i>Ocean Advocates v. United States Army Corps of Eng’rs,</i>	
28	402 F.3d 846 (9th Cir. 2005).....	5

1	<i>Preiser v. Newkirk</i> ,	
2	422 U.S. 395 (1975) .....	9
3	<i>TVA v. Hill</i> ,	
4	437 U.S. 153 (1978) .....	23
5		
6	<b>Other Authorities</b>	
7	H.R. Rep. No.1625, 95 <sup>th</sup> Cong., 2d Sess. 13 (1978).....	2
8	H.R. Rep. Np. 567, 97 <sup>th</sup> Cong. 2d Sess. 19 (1982).....	2
9	S. Rep. No. 96-151, at 1397 (1979).....	1
10	61 Fed. Reg. 4722 (February 7, 1996) .....	4
11	71 Fed. Reg. 6241 (February 7, 2006) .....	3
12	71 Fed. Reg. 70479 (December 5, 2006) .....	21
13	71 Fed. Reg. 74483 (December 12, 2006) .....	8

1 **I. INTRODUCTION**

2 Bald eagles, the United States' national symbol, were saved from likely extinction  
3 by the protections of the Endangered Species Act ("ESA"). Once nearly wiped out by  
4 DDT and other threats, today Bald eagles thrive in many parts of the country.  
5 Unfortunately, Bald eagles of the Sonoran Desert region of the American southwest  
6 (hereinafter referred to as Desert eagles or the Sonoran population) have failed to achieve  
7 the same success. Isolated reproductively, biologically, behaviorally, and geographically  
8 from all other bald eagles, today only 39 breeding pairs of Desert eagles are known to  
9 exist. Moreover, recent population viability studies show that Desert eagles are likely to  
10 become extinct within the next 75 years.

11 In order to prevent such an outcome, the Center for Biological Diversity and  
12 Maricopa Audubon Society (collectively "the Center") petitioned the U.S. Fish and  
13 Wildlife Service ("FWS" or "the Service") to extend special ESA protections to Desert  
14 eagles. In so doing, the Center employed a provision of section 4 of the ESA that defines  
15 the term "species" to include "any distinct population segment of any species of  
16 vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16).  
17 Congress extended the ESA's definition of species eligible for listing to include distinct  
18 population segments ("DPS") in 1979, citing Bald eagles as an example of the need for  
19 this expanded listing authority. *See* S. Rep. No. 96-151, at 1397 (1979) ("[without the  
20 amended definition, the Service] would be required to provide the same amount of  
21 protection for the bald eagle population in Alaska, which is healthy, as for the bald eagle  
22 population in the conterminous states, which is endangered"). Three decades later, use of  
23 this listing authority is once again crucial to protect an imperiled eagle population.

24 Despite analyses by its own scientists that listing of Desert eagles as a DPS may  
25 be warranted, FWS flatly rejected the Center's petition without performing a status  
26 review of the population. Moreover, the Service recently removed all Bald eagles in the  
27 contiguous United States from the list of threatened species. In doing so, FWS expressly  
28 declined to consider whether the Desert eagle population still needs protection under the

1 ESA. Despite admitting that Desert eagles still face threats to their existence, FWS  
2 literally wrote off conservation of Bald eagles in the desert southwest as unnecessary to  
3 the future of Bald eagles in the majority of the United States and thus irrelevant for  
4 purposes of the ESA. The Service's ability to make such a determination hinged on its  
5 decision that Desert eagles do not qualify for separate listing consideration as a DPS.

6 With their beauty, tenacity, and ability to survive under particularly harsh  
7 conditions, Desert eagles are perhaps the best symbol of the United States itself. This  
8 Court should reject the Service's unsupported and improper attempts to avoid even  
9 considering whether to protect this unique eagle population under the ESA.

## 10 **II. STATUTORY BACKGROUND**

### 11 **A. Listing Species under the ESA**

12 The ESA's substantive protections for a species and its habitat are triggered only if  
13 FWS formally lists a species as either "endangered" or "threatened." 16 U.S.C. § 1533;  
14 *see also* 50 C.F.R. § 402.12(d). The statute defines "species" to include a subspecies or  
15 any "distinct population segment of any species of vertebrate fish or wildlife which  
16 interbreeds when mature." *Id.* at § 1532(16). At no point in the ESA listing process may  
17 FWS consider political and economic factors. 16 U.S.C. § 1533(b)(1)(A); *see also* H.R.  
18 Rep. No. 567, 97<sup>th</sup> Cong. 2d Sess. 19 (1982); H.R. Rep. No.1625, 95<sup>th</sup> Cong., 2d Sess. 13  
19 (1978) ("individuals charged with the administration of the act do not have the legal  
20 authority to weigh the political importance of an endangered species").

21 While FWS may independently identify species for listing, interested parties can  
22 initiate the listing process by submitting a petition to the Service. 16 U.S.C. §  
23 1533(b)(3)(A); 50 C.F.R. § 424.14(a). When it receives a listing petition from the public,  
24 the Service has 90 days to determine whether the "petition presents substantial scientific  
25 or commercial information indicating that the petitioned action *may be warranted*" (this  
26 finding is commonly referred to as a "90-day finding"). 16 U.S.C. § 1533(b)(3)(A); 50  
27 C.F.R. § 424.14(b) (emphasis added). This is a low threshold; ESA regulations define  
28 "substantial information" as "the amount of information that would lead a reasonable

1 person to believe that the measure proposed in the petition *may be* warranted.” 50 C.F.R.  
2 § 424.14(b) (emphasis added);<sup>1</sup> *see also* *Center for Biological Diversity v. Kempthorne*,  
3 2007 U.S. Dist. LEXIS 4816, 2-3 (D. Cal. 2007).

4 If, at the 90-day finding stage, the Service concludes that the petition presents  
5 “substantial information,” the agency must conduct a more formal “review of the status  
6 of the species concerned,” to determine whether listing the species *is* “warranted.” 16  
7 U.S.C. § 1533(b)(3)(B). Before conducting the status review, the Service must first  
8 publish a notice of its decision in the Federal Register and provide an opportunity for  
9 public comment. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.15(c). The ESA requires a  
10 status review to conclude within 12 months of the agency’s receipt of the petition; the  
11 resultant finding is commonly referred to as a “12-month finding.” If the Service  
12 determines in its 12-month finding that listing of the species is “warranted,” it must  
13 publish a proposed listing rule in the Federal Register and solicit public comment. 16  
14 U.S.C. § 1533(b)(5). Within 12 months of publishing the proposed rule, and after  
15 considering public comment and all relevant evidence, the agency must make a final  
16 decision whether to adopt a final rule listing the species. *Id.*

17 If the Service concludes in its 90-day finding that a petition does *not* present  
18 substantial information indicating that a petitioned for action may be warranted, it must  
19 publish this negative finding in the Federal Register and the administrative listing process  
20 concludes. 16 U.S.C. § 1533(b)(3)(A). A negative 90-day finding may be challenged in  
21 federal court. 16 U.S.C. § 1533(b)(3)(C)(ii).

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23 <sup>1</sup> In a recent 90 day finding, the Service provided the following explanation of the its  
24 review at the 90 day stage:

Our 90-day findings consider whether the petition states a reasonable case  
for listing on its face. Thus, our finding expresses no view as to the  
ultimate issue of whether the species should be listed. We reach a  
conclusion on that issue only after a more thorough review of the species'  
status.

71 Fed. Reg. 6241 (February 7, 2006) (90-Day Finding on a Petition to List the  
Gunnison's Prairie Dog as Threatened or Endangered).



1 All ESA listing determinations must rely on the best scientific and commercial  
2 data available. 16 U.S.C. § 1533(b)(1)(A).

### 3 **B. Designating Distinct Population Segments**

4 Pursuant to the Service's "Policy Regarding the Recognition of Distinct Vertebrate  
5 Population Segments under the Endangered Species Act" ("DPS Policy"), the agency  
6 must consider two key elements in determining whether a population qualifies as a DPS,  
7 discreteness and significance. *See* 61 Fed. Reg. 4722, 4725 (February 7, 1996). This  
8 case centers on the second of these criteria, whether a population is "significant" to the  
9 taxon to which it belongs. *Id.* In examining whether a population may be significant,  
10 FWS considers the following factors:

11 (1) [p]ersistence of the population segment in an ecological setting unusual or  
12 unique for its taxon, (2) evidence that loss of the discrete population segment  
13 would result in a significant gap in the range of the taxon, (3) evidence that the  
14 discrete population segment represents the only surviving natural occurrence of a  
15 taxon that may be more abundant elsewhere as an introduced population outside of  
16 its historic range, [and] (4) evidence that the discrete population segment differs  
17 markedly from other populations of the species in its genetic characteristics.

18 61 Fed. Reg. at 4725 (noting that the above list is non-exclusive).

19 If the Service concludes that a DPS proposed in a listing petition may be both  
20 discrete and significant, it must then determine whether the petition presents substantial  
21 information that the proposed DPS may be threatened or endangered. *Id.*; *see also* 16  
22 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b). If the Service decides that listing may be  
23 warranted, it must then engage in a full 12-month status review of the proposed DPS to  
24 determine whether designating the population segment as a DPS, and listing it as  
25 threatened or endangered, is warranted. 16 U.S.C. § 1533(b)(3)(B).

### 23 **III. FACTUAL BACKGROUND**

24 The Center's Statement of Undisputed Facts provides a detailed discussion of the  
25 petition and finding that led to this dispute.  
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1 **IV. STANDARD OF REVIEW**

2 Judicial review of administrative decisions involving the ESA, such as the  
3 Service's negative 90-day finding here, is governed by the Administrative Procedure Act,  
4 5 U.S.C. § 706 ("APA"). *Center for Biological Diversity v. Badgley*, 335 F.3d 1097,  
5 1100 (9th Cir. 2003). Under the APA, 5 U.S.C. § 704, an aggrieved person may sue to  
6 set aside a final non-discretionary agency action that is arbitrary, capricious, or otherwise  
7 not in accordance with the law, *id.* at § 706, unless "statutes preclude review." *Id.* at §  
8 701(a). Thus, pursuant to the APA, 5 U.S.C. § 706, a court must invalidate an agency  
9 action if it determines that "the agency has relied on factors which Congress has not  
10 intended it to consider, entirely failed to consider an important aspect of the problem,  
11 offered an explanation for its decision that runs counter to the evidence before the  
12 agency, or is so implausible that it could not be ascribed to a difference in view or the  
13 product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut.*  
14 *Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Ocean Advocates v. United States Army*  
15 *Corps of Eng'rs*, 402 F.3d 846, 858-59 (9th Cir. 2005). Moreover, the "reviewing court  
16 may not supply a reasoned basis for the agency's action that the agency itself has not  
17 given." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Similarly, the reviewing court "must  
18 not rubber-stamp . . . administrative decisions that [courts deem] inconsistent with a  
19 statutory mandate or that frustrate the congressional policy underlying a statute." *Ocean*  
20 *Advocates*, 402 F.3d at 859 (internal citations and quotations omitted).

21 **V. MOOTNESS**

22 It is likely that the Service will assert that this case is now moot based on a  
23 purported finding regarding Desert eagles in the agency's recent decision to delist all bald  
24 eagles in the contiguous United States. In a July 9, 2007 Federal Register notice, the  
25 Service announced its decision to remove ESA protections from all bald eagle  
26 populations in the United States, including in Arizona. *See* Pls.' Statement of Facts  
27 (hereinafter, "SOF") ¶ 12. The Service also made a finding in the same notice that Desert  
28 eagles do not constitute a DPS, a determination the agency asserted "was made after

1 notice and comment . . . and was based on all the relevant information that the Service  
2 has obtained.” SOF ¶ 41. FWS thus claimed, specifically referencing this case, that “any  
3 controversy regarding the August 30, 2006, 90-day finding [regarding Desert eagles] is  
4 now moot.” *Id.* In other words, the Service apparently takes the position that it has  
5 already provided Plaintiffs exactly what this case seeks, namely a status review of Desert  
6 eagles to determine whether they warrant separate protection under the ESA.

7 Despite FWS’ assertions in its July 9<sup>th</sup>, 2007, notice, the agency in fact did not  
8 conduct a lawful status review pursuant to section 4 of the ESA and applicable  
9 regulations. As a consequence, the July 9<sup>th</sup> finding is invalid as a procedural matter and  
10 therefore has no bearing on the present case. Consequently, Plaintiffs can not only still  
11 obtain meaningful relief as part of this action, they can still obtain the same injunctive  
12 and declaratory relief requested in the Complaint. In short, nothing with respect to the  
13 question of Desert eagles’ legal status has changed since FWS issued its 90-day finding  
14 and therefore this case is not moot.

15 Pursuant to the ESA and its implementing regulations, a legally sufficient status  
16 review *must* be preceded by public notice in the Federal Register. 16 U.S.C. §  
17 1533(b)(3)(A); 50 C.F.R. § 424.15(c). Furthermore, such notices of review must  
18 “describe the measure under consideration, briefly explain the reasons for considering the  
19 action, and solicit comments and additional information on the action under  
20 consideration,” and must “invite comment from all interested parties regarding the status  
21 of the species named.” 50 C.F.R. § 424.15(c); 16 U.S.C. § 1532(16). Since the ESA  
22 defines the term “species” to include distinct population segments, a lawful notice of a  
23 status review for a potential DPS must specify that the Service is performing such a  
24 review and invite comments from all interested parties on the status of the population  
25 under consideration for listing.

26 The solicitation and receipt of public comment is of paramount importance to the  
27 Service’s decision-making for a petition to list a species under the ESA. The public  
28 obviously cannot provide meaningful information and comments for a FWS status review

1 unless the agency specifies that is conducting a status review and identifies clearly the  
2 species, subspecies or DPS that is the subject of the review. Moreover, courts have  
3 recognized the importance of public input to the ESA's petition process. *Cf. Center for*  
4 *Biological Diversity v. Norton*, 254 F.3d 833, 839 (9th Cir. 2001) (noting that the  
5 publication of findings supporting a determination that listing of a species is "warranted  
6 but precluded" is important to the petition process because it provides public notice and  
7 allows interested parties to "respond appropriately"); *Center for Biological Diversity v.*  
8 *Morgenweck*, 351 F. Supp 2d 1127, 1144 (D. Colo. 2004) (noting that before making a  
9 12-month finding, FWS must consult with "all parties with relevant information").

10 FWS has never performed a status review of Desert eagles to formally assess  
11 whether this population qualifies as a DPS and, if so, whether it should be listed as  
12 threatened or endangered. On the contrary, the Service expressly declined to undertake a  
13 status review of Desert eagles in August, 2006, when it issued a negative 90-day finding  
14 on the Center's petition (noting that the agency would "not initiate a further status review  
15 in response to [the Center's petition]"). SOF ¶ 37; AR 3538. FWS was true to its word;  
16 it never sought public comment on whether Desert eagles constitute a DPS, or on whether  
17 the Desert eagle population itself should be listed as threatened or endangered. While it  
18 is true that FWS made its July 9<sup>th</sup>, 2007, "finding" that Desert eagles do not constitute a  
19 DPS after a public notice and comment process, that notice and comment opportunity  
20 involved a question *unrelated* to the status of Desert eagles. Rather than seeking public  
21 input on the status of Desert eagles, the public notice and comment solicitations that  
22 preceded FWS' July 9<sup>th</sup>, 2007, finding focused exclusively on whether to remove bald  
23 eagles in the lower 48 States from the ESA's list of protected species. *See* SOF ¶ 8; AR  
24 6164 (seeking "comments concerning the proposal to delist the bald eagle in the lower 48  
25 States..."); in fact, when FWS reopened the comment period for its proposal to delist  
26 bald eagles on February 16, 2006, FWS explicitly stated that it would *not* "analyze  
27 whether any particular geographic area would constitute a DPS pursuant to our DPS  
28 policy." SOF ¶ 9; AR 6564. Moreover, between August 30, 2006, and July 9, 2007, the

1 Service addressed the bald eagle delisting once more in a Federal Register notice and  
2 made no mention whatsoever of any plans to address the status of any distinct population  
3 segments. SOF ¶ 11; 71 Fed. Reg. 74483 (December 12, 2006). Accordingly, the July  
4 9<sup>th</sup>, 2007, finding on Desert eagles did not constitute a lawful status review.

5 In its July 9<sup>th</sup> 2007 “finding” regarding Desert eagles, the Service asserted that  
6 “this finding addresses the same issues that the Service would have considered as part of  
7 a 12-month finding had the Service made a positive 90-day finding on the petition.” SOF  
8 ¶ 41. FWS is likely to echo this argument in its brief in this case. This contention cannot  
9 be true, however. If the Service had actually notified the public that it was assessing the  
10 status of Desert eagles and sought public comment and information as to whether this  
11 population met the definition of a DPS or faced ongoing threats to its existence, the  
12 agency would have received public input on these issues other than those addressed by  
13 the Service in its July 9<sup>th</sup> notice. *See* SOF ¶ 44; Glinski Declaration at ¶ 3-7. However,  
14 interested experts were not able to offer information to the Service regarding whether  
15 Desert eagles constitute a DPS or should be separately protected under the ESA because  
16 the agency failed to notify the public that it was considering these issues subsequent to its  
17 90-day finding. *See* SOF ¶ 44; Glinski Declaration at ¶ 7. Here, FWS appears to take the  
18 position that it was able to address every conceivable issue relating to the status of Desert  
19 eagles even though the agency never sought public input on the status of this population.<sup>2</sup>  
20 This notion, of course, is directly at odds with the very purpose of providing the public

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22  
23 <sup>2</sup> It is unclear why FWS felt the need to make a second finding that Desert eagles do not  
24 constitute a DPS. Given that the most recent finding largely repeats the Service’s  
25 conclusions in its 90 day finding on the Center’s position, FWS’ only conceivable  
26 reasons for making the second finding include a desire on the part of the agency to  
27 attempt to create an administrative record more favorable to the Service than the record  
28 for the first finding, or to avoid the relatively lenient “may be warranted” standard  
applicable to petitions at the 90 day finding stage by claiming that the second finding is  
the result of a status review. Of course, neither of these are legitimate reasons for seeking  
to abandon the Service’s first finding.

1 with notice and an opportunity to comment on an agency proposal, i.e. to allow informed  
2 and interested parties to submit information regarding a specific proposal that an agency  
3 might otherwise miss or fail to consider. It is also inconsistent with regulations  
4 implementing the ESA's listing process that specifically require public notice and  
5 comment as part of a status review. *See* 16 U.S.C. §1533(b)(3)(A); 50 C.F.R. §  
6 424.14(b).

7 “To qualify as a case fit for federal court adjudication, ‘an actual controversy must  
8 be extant at all stages of review, not merely at the time the complaint is filed.’”  
9 *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v.*  
10 *Newkirk*, 422 U.S. 395, 401 (1975)). In this case, because the Service's July 9<sup>th</sup>, 2007,  
11 “finding” on Desert eagles did not constitute a lawful status review – the principal relief  
12 the Center seeks through this action – there remains an actual controversy between the  
13 Center and the Service. This Court can provide the Center with the relief originally  
14 requested in Plaintiffs' Complaint by declaring the Service's negative 90-day finding  
15 unlawful and compelling the Service to conduct a proper status review – including public  
16 notice and comment – for Desert eagles in accordance with ESA's listing procedures and  
17 requirements.

## 18 **VI. ARGUMENT**

19 Plaintiffs' Petition to list Desert eagles presented substantial information  
20 sufficient to lead a reasonable person to believe that the population may be a DPS.  
21 Indeed, FWS experts who analyzed the petition reached conclusions explicitly supporting  
22 such a determination – until they were instructed by FWS managers to instead develop a  
23 finding that resulted in rejection of DPS status for Desert eagles. The record in this case,  
24 however, contains virtually no information to support the agency's negative finding on  
25 the Center's request to protect Desert eagles as a separate DPS. The Service's DPS  
26 finding is thus arbitrary and capricious

27 As the Center explains below, the 90-day finding also arbitrarily failed to assess  
28 whether Desert eagles may be threatened. Moreover, the Service's determination that



1 this population is not a DPS resulted in Desert eagles losing their previous ESA  
2 protections as a “threatened” species because it allowed FWS, when it removed all bald  
3 eagles in the contiguous United States from the list of threatened species, to avoid  
4 performing an assessment of whether the Sonoran population has recovered or whether it  
5 still deserves to be listed as threatened.

6 **A. Distinct Population Segment Status for Desert Eagles**

7 In its 90-day finding, FWS determined that Desert eagles constitute a “discrete”  
8 population because there is virtually no eagle emigration out of, or immigration into, the  
9 Sonoran population. SOF ¶ 7; AR 3543. However, the agency ultimately concluded that  
10 Desert eagles are not “significant” and thus do not constitute a DPS, rejecting the  
11 Center’s arguments in the petition that Desert eagles persist in a unique ecological  
12 setting, that their loss would create a gap in the species’ range, and that desert birds have  
13 markedly different genetic characteristics than other eagles. SOF ¶ 37; AR 3543-45.  
14 Aside from FWS’ explanation of its findings on the DPS “significance” criteria in the  
15 Federal Register, however, virtually nothing in the administrative record or connected  
16 with FWS’ own past policies regarding Desert eagles supports the agency’s conclusion  
17 that the petition failed to present substantial information indicating that the Desert eagle  
18 population may be significant to the broader species.

19 The Arizona office of FWS took the initial lead in assessing the Desert eagle  
20 petition. The Arizona field staff, comprised of the agency biologists most familiar with  
21 Desert eagles, broke down the petition’s assertions concerning the population’s  
22 “significance” into multiple components, analyzing for each component whether  
23 information in the Service’s files refuted the petition’s assertions and whether the  
24 information in the petition “appears to be substantial.” For virtually every component  
25 related to “significance,” FWS determined that nothing in the Service’s files refuted the  
26 petitions assertions, and that the information in the petition appears to be substantial.  
27 SOF ¶ 28; AR 162-67, 215-22, 271-77, 308-16, 1976-79, 1990-1991. For example, FWS  
28 examined the petition’s contention that Desert eagles persist in “the unique ecological

1 settings of the Sonoran life zones of the desert Southwest,” determining that no  
2 information in the Service’s files refuted this assertion and that the petition’s information  
3 “[a]ppears to be substantial.” *See, e.g.* SOF ¶ 26; AR 271, *see also* AR 162, 215-16, 310-  
4 312, 1983, 1990, 1976-78. The agency made similar findings regarding the petition’s  
5 assertion that “[f]or more than 20 years, USFWS has recognized the fact that the  
6 Southwest represents a significant portion of the Bald Eagle range.” SOF ¶ 27; AR 272,  
7 *see also* AR 162-64, 216-18, 272-74, 1978, 1990-91. “It follows logically then,” noted  
8 the Arizona office, “that loss of the Desert Nesting population would result in a  
9 significant gap in the range of the Bald Eagle.” *Id.*

10 FWS biologists with the Arizona office as well as the Southwest Regional office  
11 also compiled a briefing paper on the issue of whether Desert eagles qualify as a DPS.  
12 The paper concluded that “we find the Sonoran population of bald eagles to be  
13 reproductively isolated, and to occur in a unique environment . . . .” SOF ¶ 26; AR 1976.  
14 The briefing paper supported this finding by detailing several unique aspects of Desert  
15 eagle ecology, including cliff nesting behavior that FWS found was “rare” or “an  
16 exception” in nearly all other eagle populations. SOF ¶ 26; AR 1977-78. The briefing  
17 paper also determined that the Sonoran population “constitutes the bulk of bald eagles  
18 known in the southwestern United States. Consequently loss of the population would  
19 create a significant gap in the range of the taxon.” SOF ¶ 26; AR 1978.

20 Until the date of the briefing paper discussed above – July 18, 2006 – virtually  
21 every piece of information or analysis in the administrative record indicates that FWS  
22 had determined that the Desert eagle population was both discrete and significant and  
23 thus qualified for listing consideration as a DPS. SOF ¶ 28. *On that same day*, however,  
24 biologists from the Arizona and Regional offices had a conference call to discuss FWS’  
25 finding on the petition. *See* SOF ¶ 29; AR 1980-88. During the call, FWS biologist  
26 Chris Nolin asserted that whether or not a population qualifies as a DPS is “largely a  
27  
28



1 policy call.” SOF ¶ 29; AR 1985.<sup>3</sup> He informed the group that “Ben [Tuggle, FWS  
2 Southwest Regional Director] and Ren [Loenhoffer, FWS Associate Director in the  
3 Washington Office] have reached policy call & we need to support.” *Id.* Sarah Quamme  
4 (of FWS’ Regional office in New Mexico) then specified that the “[a]nswer has to be that  
5 its [sic] not a DPS . . . [w]e have marching orders.” SOF ¶ 29; AR 1985, 1987. Doug  
6 Krofta (from FWS’ Washington, D.C. listing office) elaborated, noting that “[w]e’ve  
7 been given an answer now we need to find an analysis that works . . . Need to fit  
8 argument in as defensible a fashion as we can.” SOF ¶ 29; AR 1986-87.

9       After this conference call, the record reflects no further efforts by FWS to analyze  
10 the petition. Instead, agency officials concentrated their efforts on drafting a finding for  
11 publication in the Federal Register concluding that Desert eagles do not meet the  
12 requirements for a DPS. SOF ¶ 30; *see, e.g.* AR 2258 (draft of Federal Register notice).  
13 However, as might be expected for a finding based on “marching orders” from managers  
14 rather than on biological analysis of the petition by FWS biologists, FWS’ conclusions in  
15 its final 90-day finding regarding “significance” of the Desert eagle population find no  
16 support in the administrative record.

17       The Service’s final determination dismisses the petition’s claim that Desert eagles  
18 satisfy the first criterion for significance – persistence in an ecological setting “unique or  
19 unusual” for the species – by asserting that Desert eagles, like all other eagles, favor  
20 riparian areas. SOF ¶ 38; AR 3543. FWS also finds that the Sonoran population merely  
21 occupies “the edge of its range of suitable habitats” rather than a unique or unusual  
22 setting for the species. *Id.* This directly contradicts *virtually all of the information in the*  
23 *record* relevant to the issue of Desert eagles’ persistence in a unique or unusual  
24 ecological setting, including the following: a) FWS’ analyses of this issue in evaluating  
25 the Center’s petition (SOF ¶ 26; AR 311-312: agreeing with the petition that Desert  
26

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27 <sup>3</sup> This assertion was incorrect. In fact, the ESA expressly provides that FWS must make  
28 listing determinations based “solely on the basis of the best scientific and commercial  
data available.” 16 U.S.C. §1533(b)(1)(A).

1 eagles persist in a “unique ecological setting in the Sonoran life zone” with the exception  
2 of three higher altitude breeding areas; SOF ¶ 26; AR 1976-78: “The Sonoran population  
3 persists in an ecological setting unusual/unique for the taxon”); b) previous biological  
4 opinions by FWS itself (SOF ¶ 16a; AR 5898-99: “Because of . . . the unique ecological  
5 conditions to which it has adapted, this [Sonoran eagle] population is both unique and  
6 important;” SOF ¶ 16b; AR 5905: “The Arizona bald eagles are isolated from other  
7 nesting bald eagles by long distances and the unique environment in which they nest  
8 (Sonoran Desert);” SOF ¶ 16d; AR 6185: “Bald eagles in the Southwest are additionally  
9 unique in that they establish their breeding territory in December or January and lay eggs  
10 in January or February, which is early compared with bald eagles in more northerly areas.  
11 It is believed that this is a behavioral adaptation so chicks can avoid the extreme desert  
12 heat of midsummer . . . .”); and c) a myriad of scientific studies and other information  
13 cited by the Center in its listing petition (SOF ¶ 16f; AR 3594). Whereas FWS biologists  
14 who analyzed the petition determined that no information in the Service’s files refutes the  
15 scientific data on uniqueness cited by the Center in the petition (*see* SOF ¶ 26), FWS’  
16 final 90-day finding simply asserts that the Sonoran population does not inhabit a unique  
17 or unusual setting with no effort whatsoever to analyze the scientific information in the  
18 petition. See SOF ¶ 37; AR 3543.

19 FWS’ final determination in its negative 90-day finding that loss of Desert eagles  
20 would not create a significant gap in eagles overall range – another factor for determining  
21 “significance” under FWS’ DPS policy – is similarly devoid of support in the record.  
22 FWS’ Arizona office found that “information [in the petition] was substantial and that we  
23 had no information to refute the following: For more than 20 years the FWS has  
24 recognized the fact that the southwest population represents a significant portion of the  
25 bald eagle range. The loss [of this population] would therefore result in a significant gap  
26 in the range of the species.” SOF ¶ 27; AR 311. FWS biologists at the Arizona and  
27 Regional offices also concluded that “[t]he [Desert eagle] constitutes the bulk of bald  
28 eagles known in the southwestern United States. Consequently loss of the population

1 would create a significant gap in the range of the taxon.” SOF ¶ 27; AR 1978. The 90-  
2 day finding simply ignores these conclusions.

3 In addition to reaching the opposite conclusion from the biologists who analyzed  
4 the petition, FWS in its 90-day finding engaged in particularly tortured logic to conclude  
5 that loss of the Sonoran population would not result in a gap in bald eagles’ overall range.  
6 The agency admits that for over two decades Desert eagles were one of the five  
7 geographic Recovery Regions designated by FWS across the country. *See* SOF ¶ 6; AR  
8 3544. While arguing strenuously that Recovery Regions are not automatically the  
9 equivalent of a DPS, the agency utterly fails to explain why disappearance of one of the  
10 five populations targeted for recovery by the agency would not create a gap in the  
11 species’ range. Finally, FWS admits in the 90-day finding that it formerly considered  
12 Desert eagles to constitute a DPS based on evidence that this population was  
13 reproductively isolated. SOF ¶ 7; AR 3544. The Service then explains that it decided to  
14 treat Desert eagles as part of a single larger nationwide DPS in 1995 because at that time  
15 the Service concluded that the Sonoran population was in fact not reproductively isolated.  
16 *Id.* While the Service cites this change as supporting its new finding that Desert eagles  
17 are not a DPS, it fails to consider a key fact: the reason that the Service decided in 1995  
18 that Desert eagles were not a DPS – that the population is not reproductively isolated –  
19 was determined by FWS to be *incorrect* in its 90-day finding on the Center’s petition.  
20 *See* SOF ¶ 7; AR 3543 (“we believe the data indicating that . . . no eagles have  
21 immigrated to and only one eagle has emigrated from the Sonoran Desert bald eagle  
22 population is substantial”). Since the single reason FWS employed in 1995 to overturn  
23 its former classification of Desert eagles as a DPS is no longer valid, it follows that this  
24 population may indeed once again qualify as a DPS. FWS, however, never explains why  
25 returning Desert eagles to their former status as a DPS is not warranted.

26 Examining one additional factor for determining significance under its DPS  
27 policy, FWS in its 90-day finding concludes that the genetic data is “inconclusive with  
28 regard to significance.” SOF ¶ 38; AR 3545. However, FWS contradicts itself in the

1 finding, noting just three pages earlier that an eagle researcher cautioned in a scientific  
2 paper that “a decision to release birds into Arizona from elsewhere should be considered  
3 only as a last resort, as the introduction of foreign genes into the Sonoran Desert  
4 population might disrupt coadapted gene complexes specific to the desert population.”  
5 SOF ¶ 21; AR 3542. FWS makes no effort to explain why this scientific information  
6 fails to indicate that Desert eagles may differ genetically from other birds.

7 Finally, in addition to lacking any factual support in the record – likely as a result  
8 of the non-biological intervention by FWS managers – the Service’s 90-day finding also  
9 resulted from an improper review process. When making a determination as to whether a  
10 petitioned listing action may be warranted, the Service’s policy is to analyze only the  
11 petition itself and information in the agency’s files. *See Colo. River Cutthroat Trout v.*  
12 *Kemphorne*, 448 F. Supp. 2d 170, 176 (D.D.C. 2006) (“The FWS has explicitly  
13 acknowledged in other findings that the 90-day finding is limited to the petition and  
14 information available in the files of the FWS.”). Only if a positive 90-day finding is  
15 made and a formal status review initiated does the Service solicit information from  
16 outside parties. *Colo. River Cutthroat Trout*, 448 F. Supp. 2d at 176 (“Even a cursory  
17 reading of [the ESA and its implementing regulations] shows that [the regulations] refer  
18 to the FWS’s right to consult with affected states in the course of a status review or  
19 subsequent listing determinations, not at the 90-day review stage.”). In this case,  
20 however, FWS improperly solicited opinions from the Arizona Game and Fish  
21 Department prior to making its 90-day finding, and made changes to the finding in  
22 response to comments received from the state agency. SOF ¶ 36; AR 873, *see also* AR  
23 662, 760-767, 1517, 1538, 2258, 2442, 2617.

24 Ultimately, the litany of agency missteps discussed in this section should make the  
25 outcome of this Court’s review of the DPS issue in this case relatively straightforward.  
26 Based on the overwhelming evidence in the administrative record regarding the  
27 significance of Desert eagles, the clear indications that high-ranking Service officials  
28 improperly influenced what should have been a science-driven determination, and the

1 Service's improper solicitation of outside comments at the 90-day finding stage, FWS'  
2 negative finding as to whether the Center's petition contains substantial information  
3 indicating that Desert eagles may qualify as a DPS presents a quintessential example of  
4 arbitrary agency action. Not only does the record demonstrate the lack of a rational  
5 connection between the facts found by FWS and the conclusions it ultimately reached,  
6 the record quite clearly shows that the agency made a finding that was precisely the  
7 opposite of the result indicated by both the facts and the agency's own analysis of the  
8 petition. That the agency reached such a conclusion is not surprising, however, given  
9 that FWS biologists were simply issued "marching orders" by their superiors to craft a  
10 finding comporting with a management-level decision that Desert eagles do not qualify  
11 for consideration for separate protection as a DPS.

12 Courts strike down agency determinations when they lack support in the record.  
13 *See, e.g. Northern Spotted Owl v. Hodel*, 716 F. Supp. 429 (D. Wash. 1988) (rejecting  
14 FWS decision not to list northern spotted owls as contrary to the evidence before the  
15 agency). Accordingly, based on the above discussion of the vast gulf between the record  
16 in this case and FWS' 90-day finding, the Service's conclusion in its 90-day finding that  
17 the Center's petition failed to present substantial information indicating that Desert bald  
18 eagles may be a DPS was arbitrary and capricious and should be set aside.

19 Further, this Court should not countenance a determination produced by biologists  
20 who noted that they were "given an answer" regarding DPS status for Desert eagles and  
21 told to "find an analysis that works..." SOF ¶ 29; AR 1986. This sort of inclusion of  
22 "policy" factors in making listing decisions expressly contravenes the ESA's directive  
23 that FWS make listing determinations based "solely on the basis of the best scientific and  
24 commercial data available." 16 U.S.C. §1533(b)(1)(A). *See Center for Biological*  
25 *Diversity v. BLM*, 422 F. Supp. 2d 1115, 1127-1128 (D. Cal. 2006) ("while a reviewing  
26 court must show deference to the reasonable decisions of an agency, such deference is  
27 warranted only when the agency utilizes, rather than ignores, the analysis of its experts"  
28 (internal citation omitted)); *see also Metcalf v. Daley*, 214 F.3d 1135, 1145 (9th Cir.

2000) (invalidating an agency’s NEPA findings because the agency made a “firm commitment” to the outcome before preparing its analysis); *American Wildlands & Native Ecosystems Council v. United States Forest Serv.*, 1999 U.S. Dist. LEXIS 22243, 9-10 (D. Mont. 1999) (“If courts are to defer to agency expertise . . . then they must have confidence in the objectivity of the agency's decision making process . . . . Otherwise there would be no check on the ability of an agency to circumvent environmental laws by simply ‘going-through-the-motions.’”).

Lastly, this Court should not sanction a listing determination that FWS made in a manner inconsistent with the agency’s own procedural prescriptions. *American Petroleum Inst. v. United States EPA*, 285 U.S. App. D.C. 35, 38 (D.C. Cir. 1990) (“It is axiomatic that an agency must adhere to its own regulations” (internal quotation marks and citations omitted)).

**B. The Service’s Negative 90-Day Finding on DPS Status Precluded the Agency from Assessing Whether Desert Eagles Warrant Continued Protection Under the ESA**

The Center’s petition requested that the Service list Desert eagles as endangered under the ESA. SOF ¶ 23; AR 3578. FWS ultimately concluded that the petition did not present substantial evidence indicating that “endangered” status may be warranted, but did not also assess whether Desert eagles fit the ESA’s definition of a “threatened” species. SOF ¶ 37; AR 3554.<sup>4</sup> The third criterion in Service’s DPS policy, however, specifies that FWS will consider “[t]he population segment’s conservation status in relation to the Act’s standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).” 61 Fed. Reg. 4725; similarly, FWS normal practice when it receives a petition to list a species as endangered is to not only consider endangered status but threatened status as well. In this case, FWS apparently

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<sup>4</sup> As the Center explains later in this section, FWS also failed to assess whether the Desert eagle population is “threatened” when it removed all eagles in the contiguous United States from the threatened list.



1 did not consider whether Desert eagles' status falls within the ESA's definition of a  
2 threatened species because it assumed that the Center's petition sought a *reclassification*  
3 of Desert eagles from threatened to endangered status. SOF ¶ 35; AR 3538 ("finding on  
4 a petition to reclassify the Sonoran Desert population of the bald eagle"). Such an  
5 assumption, however, missed the whole point of Plaintiffs' petition – separate listing of  
6 Desert eagles as a DPS. Since Desert eagles were protected as threatened only as part of  
7 the entire eagle population in the contiguous United States, they could not be  
8 "reclassified" as endangered unless the entire eagle population was also reclassified as  
9 endangered. The Center's petition, however, sought protection for an entirely new  
10 "species" within ESA's definition of that term, i.e. Desert eagles. As such, in applying its  
11 DPS policy and normal listing practice, FWS should have assessed whether Desert  
12 eagles' status falls within the ESA's definitions of endangered *or* threatened. The  
13 agency's failure to do so renders the 90-day finding procedurally flawed and arbitrary  
14 and capricious.

15 Moreover, the 90-day finding acknowledged the petition's "detailed information  
16 on numerous threats affecting the Sonoran Desert population of bald eagles." SOF ¶ 37;  
17 AR 3554. The Service even concluded that "[l]argely, we are in agreement that these  
18 threats are present, and in some cases are having some level of effect on Sonoran Desert  
19 bald eagles." *Id.* Nonetheless, despite FWS' recognition of the threats this population  
20 continues to face, on July 9, 2007, the agency stripped Desert eagles of any<sup>5</sup> protections  
21 under the ESA. SOF ¶ 12, 41. Incredibly, the Service took this action despite again  
22 acknowledging serious threats to this population's continued existence, and despite

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23  
24 <sup>5</sup> Desert eagles had received ESA protection because they were considered by FWS as  
25 part of the listed bald eagle population in the conterminous U.S. However, such  
26 protection is different than if Desert eagles were listed as a separate DPS. A DPS cannot  
27 be delisted until the DPS itself has recovered; on the other hand, a constituent population  
28 of a broader listed entity can be delisted when the entire broader entity is considered  
recovered, regardless of the status of the constituent population (as happened in the case  
of Desert eagles).

1 expressly refusing to assess whether Desert eagles should remain on the list of  
2 “threatened” species. *Id.* As detailed below, the Center believes that such action was  
3 unlawful.

4 On July 9, 2007, FWS made a decision to remove all eagles in the contiguous  
5 United States – including Desert eagles – from the ESA’s list of threatened species. SOF  
6 ¶ 12, 41. In that finding, FWS admitted that “the limited habitat available in Arizona  
7 makes the bald eagles there particularly vulnerable to habitat threats.” SOF ¶ 42. If  
8 current threats to this population were to wipe it out, this extinction would likely be  
9 permanent given that the Service also acknowledged in its delisting decision that the  
10 likelihood of significant emigration into the Sonoran area from eagles elsewhere in the  
11 United States was “minimal in the foreseeable future.” *Id.* However, despite recognizing  
12 these continuing risks to Desert eagles, FWS expressly refused to assess whether the  
13 Sonoran eagle population should remain listed as “threatened” because the agency  
14 asserted that it does not constitute a DPS or inhabit a “significant portion” of the range of  
15 bald eagles in the lower 48 states.<sup>6</sup> SOF ¶ 43. Rather, FWS determined that conservation  
16 – and indeed the very existence – of Desert eagles is irrelevant under the ESA, noting that  
17 “loss [of the Sonoran population] would not result in a decrease in the ability to conserve  
18 the bald eagle [throughout the rest of the contiguous United States]. *Id.* Said another  
19 way, the Service quite literally wrote off the Sonoran population of bald eagles as  
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21 <sup>6</sup> The Service concluded that the Sonoran Desert area does not constitute a “significant  
22 portion of the range” of bald eagles in the contiguous United States in part because it  
23 found no evidence of a genetic basis for morphological and behavioral differences  
24 between Desert eagles and other birds. SOF ¶ 43. The agency did not discuss its previous  
25 citation to a scientific study noting the possibility of “coadapted gene complexes specific  
26 to the desert population.” SOF ¶ 43; AR at 3542. Ironically, FWS also reasoned that the  
27 Desert eagle population does not make significant contributions to the “representation,”  
28 “resiliency,” or “redundancy” of the broader eagle population because the Sonoran  
population is too small. SOF ¶ 43. The agency thus determined that the desert  
southwest, which the Service designated in the Bald Eagle Recovery Plan and managed  
for a quarter century as one of five bald eagle Recovery Regions across the country, does  
not constitute a “significant portion” of the birds’ range in the Lower 48 states.



1 unimportant under the Endangered Species Act, and thus removed this population from  
2 the threatened list without assessing whether it has “recovered,” and without considering  
3 whether the continued threats to its existence merit continued protection of the population  
4 as “threatened” under the ESA.

5 The Service’s decision to remove ESA protection for Desert eagles in the manner  
6 described above would have been impossible had the agency made a positive 90-day  
7 finding that the Center’s listing petition presented substantial information indicating that  
8 the Sonoran population may be a DPS. Such a finding would have triggered a full status  
9 review of the population<sup>7</sup> to determine whether it in fact constitutes a DPS; until this  
10 process was completed, FWS could not have taken action to remove all bald eagles in the  
11 contiguous United States from the list of threatened species without separately analyzing  
12 whether Desert eagles merit continued protection under the ESA.

13 Accordingly, the Service’s arbitrary negative finding on the Center’s request to  
14 consider separately listing Desert eagles as a DPS was the linchpin for the agency’s  
15 recent decision to remove these birds from the ESA’s list of “threatened” species despite  
16 acknowledging continued danger to this population’s very existence. A decision by this  
17 Court to order a status review of the Desert eagle population would thus require FWS to  
18 make a reasoned, scientifically supportable decision as to whether this population in fact  
19 constitutes a DPS. If the agency were to conclude that the Sonoran population is in fact a  
20 DPS – as FWS biologists’ analyses and virtually all other evidence in the record for this  
21 action suggest is the case – the Service would have to revisit its decision to remove all  
22 ESA protections for Desert eagles by at least assessing the status of this population to  
23 determine whether it continues to warrant protection as a threatened species.

24 The negative 90-day finding’s threats section was also procedurally flawed  
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26 <sup>7</sup> This reference to a “full status review” of the Desert eagle population is meant to  
27 distinguish such a process from the unlawfully curtailed process that the Service carried  
28 out in the context of making its delisting decision for eagles in the contiguous United  
States. See Section V, *supra*.

1 because it applied the wrong legal standard by requiring *conclusive* proof of threats to the  
2 Desert eagle population. Courts, on the other hand, have consistently found that such  
3 conclusive evidence is not even required at the 12-month stage of the listing process, let  
4 alone at the 90-day stage of the petition process:

5 [I]t is clear that the ESA does not contemplate that a petition contain  
6 conclusive evidence of a high probability of species extinction to warrant  
7 further consideration of listing that species. Instead, it sets forth a lesser  
8 standard by which a petitioner must simply show that the substantial  
9 information in the Petition demonstrates that listing of the species may be  
warranted. FWS's failure to apply this appropriate standard renders its  
findings and ultimate conclusion flawed.

10 *Morgenweck, supra*, 351 F. Supp. 2d at 1140-1141; *see also Defenders of Wildlife*  
11 *v. Babbitt*, 958 F. Supp. 670, 679 (D.D.C. 1997) (concluding that conclusive  
12 evidence is not even required at the 12-month stage). As the Service itself has  
13 stated, “[at the 90-day finding stage, the Service does not] subject the petition to  
14 rigorous critical review.” 71 Fed. Reg. 70479, 70480.

15 The record in this case makes clear that the Service set the bar too high for  
16 Plaintiffs’ petition. Indeed, the Service admitted that the petition presented substantial  
17 information regarding threats from (1) cattle grazing, dam operations, dewatering of  
18 rivers, introduction of exotic fishes in native fish habitat, and low-flying aircraft, AR 684,  
19 (2) a declining prey base, AR 694, (3) contaminants (such as DDT and mercury), AR  
20 696, (4) fishing line and tackle, AR 697, and (5) eggshell thinning, AR 700. *See* SOF ¶  
21 32. Instead of issuing a positive 90-day finding, however, the Service claimed that  
22 information was not “conclusive” enough to warrant listing of the DPS. *See* SOF ¶ 34.  
23 For instance, the Service stated that it “[does not] have data to tell us conclusively that  
24 [the Desert eagle] population will tank.” SOF ¶ 34; AR 373. Likewise, the Service  
25 declared that while it “agree[s] with the information presented in the petition,” it does “not  
26 believe that the level of impact due to increased human population expansion will  
27 necessarily endanger the [Desert eagle].” SOF ¶ 34; AR 678. And finally, the Service  
28 had this to say in describing its threats analysis: “Because of . . . the failure of the

petition to conclusively demonstrate increasing threats ... the Service has determined the population is not in danger of extinction.” SOF ¶ 34; AR 977.

In *Morgenweck*, the court concluded that “FWS's failure to apply [the] appropriate standard renders its findings and ultimate conclusion flawed.” 351 F. Supp. at 1141. The situation here is no different; hence, by holding Plaintiffs to an elevated standard at this point in the petition process, the Service’s 90-day finding should be deemed arbitrary and capricious.

## **VII. RELIEF REQUESTED**

The APA provides that courts should hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). However, mere remand of an agency finding determined to be unlawful is not necessarily the sole remedy available to a court; the Ninth Circuit has noted that “in the absence of congressional directive, federal courts retain broad equitable powers in public law matters, including the “authority to grant any ancillary relief necessary to accomplish complete justice.” *NEDC v. Bonneville Power Administration*, 477 F.3d 668, 680 (9<sup>th</sup> Cir. 2007), quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9<sup>th</sup> Cir. 1982) (in which the court also noted, 668 F.2d at 112, that “[p]ower is thereby resident in the District Court, in exercising this [equitable] jurisdiction, to do equity and to mold each decree to the necessities of the particular case.”).

In other cases where district courts have found that FWS improperly reached a negative 90-day finding under the ESA, the courts have ordered the Service to undertake a full status review and issue a 12-month finding. See *Colorado River Cutthroat Trout*, *supra*, 448 F. Supp.2d at 178; *Morgenweck*, *supra*, 351 F.Supp.2d 1144. A similar order is warranted in this case. The record reveals overwhelming evidence that Desert eagles at

1 least “may be” a DPS, the low threshold for triggering a status review.<sup>8</sup> As part of the  
2 status review, FWS should solicit comments and consider whether Desert eagles meet the  
3 definition of threatened or endangered under the ESA. Since timeliness is important,<sup>9</sup> the  
4 Center requests that this Court order FWS to complete its status review within 9 months.

5 Even if FWS eventually decides Desert eagles qualify as a DPS and warrant listing  
6 under the ESA, it could take many more months before this population receives  
7 protection. If the Sonoran eagle population – which FWS acknowledges faces serious  
8 threats at present – remains without ESA protections during that period, it faces very real  
9 prospects of serious and perhaps irreversible harm. *See* SOF ¶ 44; Glinski Declaration at  
10 ¶ 8. As noted above, but for the Service’s arbitrary and improper decision to reject DPS  
11 status for Desert eagles, the agency could not have delisted this population without at  
12 least considering whether it still deserves protection as a threatened species. *See* Section  
13 VI.B., *supra*. Accordingly, this Court should use its equitable authority to ensure that  
14 Desert eagles continue to receive ESA protection until FWS makes a lawful final  
15 determination of their status; the Center thus respectfully request that this Court enjoin  
16 application of the recent delisting rule to the Sonoran eagle population until FWS makes  
17 a final, lawful determination of their eligibility for listing as a DPS. In *TVA v. Hill*, 437  
18 U.S. 153, 194 (1978) the Supreme Court noted that “Congress has spoken in the plainest  
19 of words, making it abundantly clear that the balance has been struck in favor of

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20  
21 <sup>8</sup> Moreover, the Service has already requested and considered input from a third party  
22 on both the issue of Desert eagles’ status as a DPS and the threats facing this population,  
23 which it normally does only at the status review stage (see SOF ¶ 36); because the court  
24 cannot undo the Service’s consideration of comments from a select third party, the logical  
remedy is to require FWS to conduct a proper status review that is open to all interested  
parties.

25 <sup>9</sup> An order requiring the Service to conduct a proper status review is also appropriate to  
26 ensure timely action. As stated in *Biodiversity Legal Found. v. Badgley* 309 F.3d 1166,  
27 1075 (9<sup>th</sup> Cir. 2002), “Congress from the outset recognized that timeliness in the listing  
28 process is essential.” (quoting *Center for Biological Diversity v. Norton*, 254 F.3d 833,  
839-40 (9<sup>th</sup> Cir. 2001). Already, almost 3 years has passed since Plaintiffs presented their  
Petition. Desert eagles should not have to wait any longer.

affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’ Here, caution demands that this Court insure Desert eagles continue to receive the protections of the ESA until FWS remedies its arbitrary and unlawful actions involving this population.

### **VIII. CONCLUSION**

For the reasons discussed above, the Center respectfully asks that this Court enter summary judgment in its favor, and declare that the Service’s negative 90-day finding on the petition was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the ESA within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Plaintiffs also respectfully request that the Court enter the injunctive relief discussed above, award plaintiffs’ counsel reasonable attorneys fees, and order any additional relief it deems just and proper.

Respectfully submitted this 17<sup>th</sup> day of August, 2007,

**/S/ Justin Augustine**

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