

MONTGOMERY & INTERPRETER, PLC

4835 E. Cactus Road, Suite 210

Scottsdale, Arizona 85254

Ph (480) 513-6825

Fax (480) 513-6948

Susan B. Montgomery, AZ Attorney I.D. No. 020595

smontgomery@milawaz.com

Robyn L. Interpreter, AZ Attorney I.D. No. 020864

rinterpreter@milawaz.com

Attorneys for the San Carlos Apache Tribe

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

CENTER FOR BIOLOGICAL DIVERSITY, and)

MARICOPA AUDUBON SOCIETY,)

Plaintiffs,)

**Civ. No: 2:10-cv-02130-PHX-
DGC**

THE SAN CARLOS APACHE TRIBE, a federally)

recognized Indian Tribe; SALT RIVER PIMA-)

MARICOPA INDIAN COMMUNITY, a federally)

recognized Indian Tribe,)

Plaintiff-Intervenors,)

**SAN CARLOS APACHE
TRIBE'S MEMORANDUM IN
SUPPORT OF INJUNCTIVE
RELIEF**

v.)

KENNETH SALAZAR, in his official capacity as)

Secretary of the U.S. Department of the Interior; and)

ROWAN GOULD, in his official capacity as the)

Acting Director of the U.S. Fish and Wildlife Service,)

Defendants.)

_____)

1 **MEMORANDUM IN SUPPORT OF INJUNCTIVE RELIEF**

2 Pursuant to this Court's Order dated November 30, 2011, Plaintiff-Intervenor the
3 San Carlos Apache Tribe ("Apache Tribe" or "Tribe"), a federally recognized Indian
4 Tribe pursuant to the Apache Treaty of 1852 and Section 16 of the Indian
5 Reorganization Act of 1934, files this Memorandum in Support of Injunctive Relief. In
6 order to avoid duplicative filings, the Apache Tribe hereby joins in and incorporates
7 fully the Memorandum seeking injunctive relief filed on this same day by Plaintiffs, the
8 Center for Biological Diversity and Maricopa Audubon Society and Plaintiff-Intervenor
9 the Salt River Pima-Maricopa Indian Community ("CBD Memorandum"). The Apache
10 Tribe writes separately here to address the fragile state of the Desert Nesting Bald Eagle
11 ("Desert Eagle") population within its homeland and to discuss the profound and
12 irreparable harm that the Apache people would suffer should the Desert Eagle fail to
13 receive protection under the Endangered Species Act ("ESA").

14 Accordingly, for the reasons set forth here and in the CBD Memorandum, the
15 Apache Tribe respectfully requests that this Court exercise its broad equitable powers to
16 require the Service to protect the Desert Eagle under the ESA while the Service is **once**
17 **again** required by the Court to perform a status review for this important being.
18 Although the Service has treated the question of whether the Desert Eagle is a Distinct
19 Population Segment ("DPS") as a point of mere academic concern and political
20 gamesmanship, the Apache do not take this matter so lightly. As the Apaches have
21 explained to the Service before:
22

1 We depend on the Bald Eagle for our health, happiness, and wellbeing. Our
 2 spiritual practices require healthy Bald Eagles in their natural homes. Bald
 3 Eagle populations within our traditional country have plummeted over the
 4 last century and a half. Losing or harming the Bald Eagle, or its natural
 5 home, will result in devastating harm to us that no amount of mitigation,
 6 apology, or compensation can remedy. [Emphasis added].¹

7 **A. Injunctive Relief is Necessary to Protect the Fragile Remaining**
 8 **Population of Desert Nesting Bald Eagles and their Habitat**
 9 **Under the ESA**

10 Upon finding a violation of the ESA, courts have broad discretion to fashion
 11 injunctive relief. *See National Wildlife Federation v. National Marine Fisheries Service*,
 12 481 F.3d 1224, 1242 (9th Cir. 2007). Stated generally, the “traditional bases for
 13 injunctive relief are irreparable injury and inadequacy of legal remedies.” *Idaho*
 14 *Watersheds Project v. Hahn*, 307 F.3d 815, 832-33 (9th Cir. 2002). Both of these tests
 15 are met in this instance.

16 In sharp contrast to the position of the United States Fish and Wildlife Service
 17 (“Service”), that concludes that there has been an increase in “known breeding areas in
 18 Arizona since 1971”,² the Apaches have detailed a longstanding **decline** in resident
 19 Desert Eagles and their breeding locations and habitat over approximately the last one
 20 and a half centuries. *See, e.g.*, AR C0000076, C000079-80, C000246, C000282-83,
 21

22 ¹ *See* Letter to Dale Hall, Director U.S. Fish and Wildlife Service, dated July 2, 2008,
 attaching the Bald Eagle report compiled by Western Apache cultural and traditional
 authorities from the San Carlos Apache, White Mountain Apache, and Tonto Apache
 Tribes and the Yavapai-Apache Nation (“Bald Eagle Report”) [Administrative Record
 (“AR”) C000074].

² *See* 75 Fed. Reg. 8601, 8605 (February 10, 2009).

1 C000295-96, C000315-16.³ Apache knowledge regarding the overall decline of Desert
 2 Eagles was cited by the Service as important in its prior draft findings in favor of
 3 “significance.” For example, in a draft finding circulated by the Service on September
 4 25, 2009, (which incorporated a substantial amount of Tribal traditional ecological
 5 knowledge or “TEK”), the Service found:

6 Traditional ecological knowledge from the **Apache tribes report more**
 7 **breeding bald eagles 150 years ago than are present today.** Specifically,
 8 many areas that were considered nesting sites on the San Carlos Apache
 9 Reservation such as Warm Springs Canyon, Black River Canyon, and Salt
 10 Creek Canyon no longer contain active bald eagle nests. Bald eagles are no
 11 longer found out of the seven areas that have Apache place-names that
 12 reference bald eagles. **On July 2, 2008, testimony by tribal elders**
 13 **knowledgeable about bald eagles locations in Arizona indicated that**
 14 **desert bald eagles are declining.** Traditional ecological knowledge shared
 15 by cultural experts from the four Western Apache Tribes and Nation
 16 supports scientific data which reports that bald eagles are absent from the
 17 following locations in Arizona: Chiricahua Butte, areas around Sedona,
 18 areas within Black Canyon, F Bar F [Bar F Bar] outside Globe, and Box
 19 Canyon. More bald eagles were observed below Coolidge Dam and at
 20 Talkalai Lake than currently exist. [AR 007332-33]

21 There are less than 50 breeding pairs documented within the homeland of the
 22 Desert Eagle today. This is a far cry from the abundant population of Desert Eagles that
 once existed within the homeland shared by both the Desert Eagle and the Western

3 Given the important role that the Desert Eagle plays in virtually every aspect of
 Apache spiritual practice, the Apache have always been keen observers of the Desert
 Eagle. This form of TEK is deemed to be valuable by the Service. Indeed, during the
 Service’s status review on the Desert Eagle, the Director of the Service’s Arizona
 Ecological Field Office, Steve Spangle, explained to Tribal Leaders that any Tribal TEK
 about known “threats” to the Desert Eagle would be “very informative” and “scientific.”
 [AR 002610]. By way of example, Mr. Spangle noted that the Fort McDowell Yavapai
 Nation had informed the Service that there were historically up to fifteen breeding pairs
 on their land. *Id.* Mr. Spangle described this sort of information as “hugely important”
 for the Service, as this was not available in the published literature. *Id.*

1 Apache. Apache elders attribute the decline of the Desert Eagle and its habitat to
2 “human irresponsibility” and “disrespect”, noting that “[o]ver the past century and a
3 half, the balance with the natural world that Apaches have nurtured for millennia has
4 been seriously threatened.” [AR C000080]. They explain that pressures such as urban
5 growth, agriculture, mining, and resulting climate change (among other things) have
6 “brought this earth, and Bald Eagle habitat, to a crises point.” *Id.*

7 More recently, other threats have emerged in Arizona that only compound the
8 danger that the Desert Eagle faces within its homeland today. For example, certain
9 interests throughout Arizona are presently planning for the development of large
10 pipelines for the delivery of water from rural watersheds and basin areas to larger
11 metropolitan areas across the state, such as Phoenix, Prescott/Prescott Valley, Payson,
12 and other places.⁴ Apaches know that the development of such large scale water
13 projects, which permanently remove life giving water from watersheds and groundwater
14 basins in rural areas across the State, have the very real potential to dangerously deplete
15 watersheds and riparian areas critical to the Desert Eagle’s survival and the continued
16 sustainability of the Eagle’s habitat. Furthermore, Arizona (like the rest of the country)
17 is witnessing a significant increase in the development of wind energy projects, which
18
19

20 ⁴ See <http://www.paysonroundup.com/news/2011/jul/29/blue-ridge-pipeline-tangled-red-tape/>;
21 *see also* <http://verdenews.com/main.asp?SectionID=1&subsectionID=1&articleID=31122>;
22 http://azdailysun.com/news/local/govt-and-politics/article_3e203dfe-d21f-58a0-831b-c72c91f73b7a.html.

1 pose a serious threat to various species of birds, including Bald Eagles.⁵ In a recent
2 petition prepared by the American Bird Conservancy (“ABC”), the ABC pointed to
3 Service estimates from 2009 showing that at least 440,000 birds were killed (including
4 Bald Eagles) as a result of the operation of 22,000 turbines across the United States.⁶
5 These same estimates predict a loss of more than 1 million birds (including Bald Eagles)
6 by 2020, given the likely development of over 100,000 wind turbines countrywide,
7 several of which are being developed within the homeland of the Desert Nesting Bald
8 Eagle.⁷

9 If the Desert Eagle is not listed under the ESA, the Eagle will not have the benefit
10 of valuable protections (as described in greater detail in the CBD Memorandum) under
11 Section 7 (consultation) and Section 9 (prohibitions against “take”) as these projects are
12 being planned and developed. This presents a very real threat to the Desert Eagle.

13 It is noteworthy that in the Court’s previous injunction in this matter, the Court
14 observed:

15 The discrete population of Desert bald eagles, which the FWS
16 acknowledges can easily be cordoned off and is still particularly vulnerable
17 to habitat threats, should not face increased risks to its existence prior to a
18 lawful decision on Plaintiff’s petition to list Desert bald eagles as a DPS.
The Court is not willing to risk the continued vitality of the Desert bald
eagle pending the FWS lawful determination of whether listing the Desert

19 ⁵ See <http://www.businessweek.com/ap/financialnews/D9JSH45O0.htm>; see also American Bird
20 Conservancy’s Rulemaking Petition to the U.S. Fish and Wildlife Service for Regulating the
Impacts of Wind Energy Projects on Migratory Birds, December 14, 2011 (“ABC Petition”) at 6.

21 ⁶ See *id.*

22 ⁷ *Id.*

1 eagle as a DPS is warranted, and if so, whether the Desert eagle DPS
2 should continue to receive ESA protections.⁸

3 Based on the foregoing, the Court determined that injunctive relief would serve to
4 maintain the “status quo” with respect to the Desert bald eagle population and that such
5 relief was warranted “in light of the many threats facing Desert bald eagles and the harm
6 that the Desert eagle might suffer in the interim should the FWS find that the Desert
7 Eagle is a DPS worthy of continued ESA protection....” *CBD v. Kempthorne*, Order at
8 22-23. The reasoning behind Judge Murguia’s decision to issue injunctive relief in *CBD*
9 *v. Kempthorne* is no less applicable today then it was the day the Court entered its Order.
10 If anything, the equities tip even more strongly in favor of injunctive relief today, given
11 the repeated failings of the Service to perform a lawful status review and in light of the
12 cumulative nature of the threats facing the Desert Eagle today. Accordingly, in light of
13 the fragile state of Desert Eagles within their homeland (where the loss of even a single
14 breeding pair could represent a serious threat to the Desert Eagle population as a whole),
15 the Service should be enjoined from removing the Desert Eagle from the list of
16 threatened species subject to further Service action. Anything less risks irreparable
17 injury to a Desert Eagle population that is already in longstanding decline.

18 **B. The “Balance of Hardships” Weighs Heavily in Favor of the Issuance
19 of an Injunction**

20 As part of its examination of the equities in this matter, the Court considers the
21 balance of hardships between the plaintiff and defendant. *See, e.g., Monsanto Co. v.*

22 ⁸ *Center for Biological Diversity v. Kempthorne*, No. 07-0038, 2008 WL 659822 (D.
Ariz. 2008, March 6, 2008 Order at 23.

1 *Geertson Seed Farms*, 130 S.Ct. 2743, 2756 (2010). In this case, the balance of
2 hardships tips strongly in Plaintiffs' favor.

3 On the one hand, the Defendants would bear only nominal administrative costs if
4 it is required to once again place the Desert Eagle under the protections of the ESA. The
5 Service has already demonstrated that this task can be accomplished efficiently and with
6 little substantive effort on the part of the Service. *See* 73 Fed. Reg. 23966 (May 1,
7 2008). Furthermore, as already noted above and in the CBD Memorandum, in balancing
8 the hardships, it should be recalled that the Service would not be in this situation, had it
9 engaged in a lawful status review in the first instance.

10 On the other hand, the relationship between the Desert Eagle and members of the
11 Apache Tribe is not one of mere scientific, aesthetic or recreational interest. Rather, the
12 Apaches' relationship with the Desert Eagle is "strong and personal" as Apaches have
13 always recognized that their fate and the fate of the Desert Eagle are intertwined. *See*
14 Bald Eagle Report at 1 [AR C000076]. Thus, "[w]hen the Eagle is happy, so are we.
15 When the Eagle suffers, so do we. When the Eagle is threatened, we are threatened,
16 too." *Id.*

17 The importance of the Desert Eagle to the Apache people cannot fairly be
18 explained to this Court in a short brief or even in the Tribe's larger Statement of Facts
19 (Docket 62). Traditional and cultural experts and leaders from the Western Apache
20 Tribes have explained to the Service **in their own words** how much the continued
21 existence of the Desert Eagle means to the health and well being of Apache people. *See*
22 July 2, 2008, Transcript of the Western Apache Bald Eagle Presentation [AR C000272,

1 C000279, C000281, C000288, C000310-311]; Bald Eagle Report [AR C00074-81]; *see*
2 *also* Photograph Submissions from three American Museums portraying Apache people
3 and certain holy and sacred objects with Bald Eagle feathers [AR C000771-000874].

4 For example, Wendsler Nosie, Sr., former Chairman of the San Carlos Apache
5 Tribe, has explained: “The eagle that we call in the English name is a human being. It’s
6 a person. It’s a person that has been blessed of great teachings to us * * * * So this
7 human being that we’re talking about plays a very big part in everyday life, not only the
8 native people but all people, because it was a blessed in the very beginning.” [AR
9 C000259]. Ronnie Lupe, Chairman of the White Mountain Apache Tribe, also made
10 clear that: “Our survival in life is dependent on eagle. It sings the old songs.” [AR
11 C000272]. Mr. Lupe also cautioned:

12 It [the Eagle] is with us. We have it in our domain. It is so important that
13 this eagle must never go away. I don’t want to just to see that brass eagle
14 on top of the United States flag. I want [the Eagle] alive right here in our
15 presence. And that’s how we feel we as Indian people.

16 Similarly, Mr. Vincent Randall, former Chairman of the Yavapai-Apache Nation and the
17 moderator for the July 2, 2008, Bald Eagle meeting with the Service explained: “The
18 eagle has to be protected. The eagle is a barometer of life in Arizona, in our country . . .
19 He goes, that’s our spiritual religious side. But if he goes and now the water can be
20 sucked up and used by development of subdivisions and so forth, then we all go
21 physically, because we need water to live.” [AR C000311].

22 The Service’s view of the Desert Eagle’s importance is much different. In their
briefing before the Court, they have belittled the overall importance of the Desert Eagle,

1 urging that the Desert population is simply not important due to the “limited number of
2 eagles in the Desert eagle population and the limited amount of suitable habitat in the
3 Sonoran Desert [which is] **too low to be significant to the species as a whole.**”
4 Defendants’ Memorandum at 22 (emphasis added). They have also argued that even if
5 the Desert Eagle were to be extirpated from the homeland it shares with the Apache, this
6 would be of little consequence, as “Bald eagles likely would still inhabit other areas of
7 the Southwest Bald Eagle Recovery Region....” *Id.*

8 While the Service’s view of the Desert Eagle is obviously highly offensive to and
9 disrespectful of the Apache religious, traditional and cultural beliefs, this may not be the
10 relevant point here. Rather, what is significant about this position is that the Service
11 **also** administers the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 *et seq.* (“MBTA”) and
12 the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (“BGEPA”). Since
13 the Bald Eagle was delisted in the lower 48 states, the Service has undertaken a number
14 of measures to loosen protections for Bald Eagles under these Acts, including providing
15 for a the “take” for Eagles (now including Desert Eagles) for certain activities. *See* 50
16 C.F.R. §§ 22.26-27.⁹ Under these changes, the Service can authorize take of Bald
17 Eagles if the proposed “take” is compatible with the preservation of the Bald Eagle **as a**
18

19 ⁹ Since the Desert Eagle’s delisting, the Service has also undertaken to change
20 regulations under the BGEPA to permit the “hybridization” or the crossbreeding of Bald
21 Eagles with Golden Eagles, mainly for sport falconry purposes. *See* 76 Fed. Reg. 39367
22 (July 6, 2011). The forced crossbreeding of Bald and Golden Eagles is unnatural and
highly disturbing to Apaches. The Tribe does not believe the Service would have
contemplated these changes if the Bald Eagle were still listed under the ESA.

1 **whole**, so long as the proposed “take” remains “consistent with the goal of stable or
2 increasing breeding populations.” *Id.* (emphasis added). Given the Service’s view
3 expressed in filings before the Court, the Service plainly does not believe that the Desert
4 Eagle (once delisted) warrants any additional substantive protections under the MBTA
5 and BGEPA because (according to the Service) the Desert Eagle’s continued existence is
6 neither significant overall nor important to stable or increasing breeding populations
7 within the region or the lower 48 states.¹⁰

8 **C. Conclusion**

9 A highly respected Apache elder and the traditional religious leader of Bylas,
10 Arizona (who passed away this summer at the age of 97), observed in 2008: “The Bald
11 Eagle blesses the land and us. The Land blesses the Eagle and us. We bless the Eagle
12 and the land.” [AR C000076]. The Apache Tribe therefore respectfully requests that the
13 Court enter an injunction requiring the Service to continue protections for the Desert
14 Eagle under the ESA.

15 RESPECTFULLY SUBMITTED this 16th day of December 2011.

16
17 **MONTGOMERY & INTERPRETER, PLC**

18
19 ¹⁰ A similar approach was taken by the Service in its Post-Delisting Monitoring Plan for
20 the Bald Eagle. *See* 75 Fed. Reg. 31811 (July 4, 2010). Under this Plan, which focuses
21 on protecting larger regional and national populations of the Bald Eagle since their
22 delisting in the lower 48 States, the Desert Eagle could be **entirely extirpated** without
triggering any meaningful action under the Plan. Given the Service’s view regarding the
significance of the Desert Eagle expressed to this Court, this is a very real possibility.

By s/Susan B. Montgomery
Susan B. Montgomery
Robyn L. Interpreter
Attorneys for the San Carlos Apache Tribe

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December 2011, I electronically transmitted the following document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Daniel John Rohlf
rohlf@lclark.edu

Howard M Shanker
howard@shankerlaw.net

Justin J Augustine
jaugustine@biologicaldiversity.org

Thomas P Schlosser
t.schlosser@msaj.com

Thane D Somerville
t.somerville@msaj.com

Hao-Chin Yang
hubert.yang@usdoj.gov

M. Reed Hopper
mrh@pacificlegal.org

By s/Susan B. Montgomery