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20 IN THE UNITED STATES DISTRICT COURT
21 FOR THE DISTRICT OF ARIZONA

22 CENTER FOR BIOLOGICAL DIVERSITY; and)
23 MARICOPA AUDUBON SOCIETY;)
24 Plaintiffs,)

Civil Action No.: 2:10-cv-02130-PHX-DGC

25 SAN CARLOS APACHE TRIBE, a federally)
26 recognized Indian Tribe; and SALT RIVER PIMA-)
27 MARICOPA INDIAN COMMUNITY, a federally)
28 recognized Indian Tribe;)
Plaintiff-Intervenors,)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF

v.)

ORAL ARGUMENT REQUESTED

29 KENNETH SALAZAR, in his official capacity as)
30 Secretary of the U.S. Department of the Interior; and)
31 ROWAN GOULD, in his official capacity as the)
32 Acting Director of the U.S. Fish and Wildlife)
33 Service,)
34 Defendants.

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I. INTRODUCTION AND RELIEF REQUESTED

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2 Plaintiffs Center for Biological Diversity and Maricopa Audubon Society, and
3 Plaintiff-Intervenors, (collectively “Plaintiffs”) jointly respond to this Court’s order dated
4 November 30, 2011 requesting briefing on Plaintiffs’ request for injunctive relief.

5 This Court’s decision regarding relief involves very high stakes. Just weeks prior
6 to release of FWS’ new finding in February 2010, FWS Director Sam Hamilton prepared
7 a memorandum for the Secretary of Interior explaining the legal protections that would
8 apply to desert eagles after the decision was announced. The memo provided that “[i]f we
9 determine that the Sonoran Desert population of the bald eagle is warranted, listing would
10 be precluded by higher priority listing actions, and the population will be put on the
11 candidate list until funds are available to draft and publish a proposed rule. While on the
12 candidate list, the population will not have the protections of the ESA.” AR 008769. As
13 explained below in Section III.B., desert eagles would likely remain on the candidate list
14 without Endangered Species Act (ESA) protections for at least six years, and perhaps
15 longer. Therefore, absent a grant of the injunctive relief requested by Plaintiffs, it will
16 be many years before desert eagles once again receive protection under the ESA *even if*
17 *FWS determines on remand that it should have never removed this population from the*
18 *threatened list in the first place.*

19 Accordingly, for the reasons set forth below, Plaintiffs respectfully request that
20 this Court enter an injunction similar to that entered by the court in *Center for Biological*
21 *Diversity v. Kempthorne*, No. 07-0038, 2008 WL 659822 (D. Ariz. 2008) (hereinafter
22 *CBD v. Kempthorne*). Specifically, Plaintiffs request an order vacating the final rule
23 removing desert eagles from the list of threatened species (76 Fed. Reg. 54711, Sept. 2,
24 2011) and enjoining the U.S. Fish and Wildlife Service (FWS) from removing the
25 discrete population of desert eagles from the list of threatened species pursuant to its July
26 9, 2007 delisting rule pending one of the following events: a) a final rule by FWS listing
27 desert eagles as threatened or endangered under the ESA; or b) resolution of the instant
28

1 litigation, either by a joint agreement of the parties to dismiss the case or as a result of a
2 final order by this Court dismissing the case.

3 Additionally, the Center respectfully requests that this Court vacate FWS' finding
4 in its July 9, 2007 delisting rule that desert eagles are not "significant" within the
5 meaning of this term under the agency's Distinct Population Segment (DPS) Policy. In its
6 order of November 30, 2011, this Court found that the 2007 delisting rule "failed to
7 comport with the notice, comment, and consultation requirements of the law," and ruled
8 that FWS had abused its discretion by relying primarily on this delisting rule as the basis
9 for its negative 12 month finding on remand. *See* Order partially granting summary
10 judgment at 14. Vacature of the delisting rule's finding that desert eagles are not
11 "significant" would foreclose FWS from once again considering, or relying upon, this
12 determination in complying with this Court's remand.

13 **II. STANDARD OF REVIEW**

14 In *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010), the U.S.
15 Supreme Court noted that "a plaintiff seeking a permanent injunction must satisfy a four-
16 factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it
17 has suffered an irreparable injury; (2) that remedies available at law, such as monetary
18 damages, are inadequate to compensate for that injury; (3) that, considering the balance
19 of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4)
20 that the public interest would not be disserved by a permanent injunction," citing *eBay*,
21 *Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

22 In *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985,
23 1000 (9th Cir. 2000) (citing *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986 (9th
24 Cir. 1994)), the Ninth Circuit noted that district courts have "broad latitude in fashioning
25 equitable relief when necessary to remedy an established wrong." Preserving the status
26 quo is an important function of injunctive relief. *See Southeast Alaska Conservation*
27 *Council v. U.S. Army Corps of Engineers*, 479 F.3d 1148, 1151 (9th Cir. 2007) ("the plan
28 would not maintain the status quo, which is the whole point of the injunction."); *Oregon*

1 *Natural Resources Council v. U.S. BLM*, 470 F.3d 818, 823 (9th Cir. 2006) (holding that
2 BLM violated NEPA and instructing district court “to enjoin the... remainder of the
3 project until the BLM provides a revised Environmental Assessment.”). Maintaining the
4 status quo is particularly important in environmental cases given that environmental
5 injury is generally irreparable. *See Alliance for the Wild Rockies v. Cottrell*, 632 F. 3d
6 1127, 1135 (9th Cir. 2011) (“the Supreme Court has instructed us that ‘[e]nvironmental
7 injury, by its nature, can seldom be remedied by money damages and is often permanent
8 or at least of long duration, i.e. irreparable”).

9 **III. LEGAL AND FACTUAL BACKGROUND**

10 **A. ESA Requirements and Protections**

11 Congress amended the ESA in 1982 to make it clear that economics, political
12 considerations, or other factors cannot play a role in making listing determinations. The
13 statute directs FWS to make listing decisions “solely on the basis of the best scientific
14 and commercial data available....” 16 U.S.C. §1533(b)(1)(A).

15 Once a species is listed as threatened or endangered, section 7 of the ESA sets
16 forth both substantive as well as procedural requirements applicable to all federal agency
17 actions that may affect listed species, including all actions funded or permitted by federal
18 agencies. The statute bans federal actions that are likely to “jeopardize the continued
19 existence of” species listed as endangered or threatened. *Id.* at §1536(a)(2). To assist
20 federal agencies in complying with this mandate, section 7 and its implementing
21 regulations set forth a detailed process for consultation between FWS and an agency
22 proposing an action that may affect a listed species. *See id.*, 50 C.F.R. §402.

23 Section 9 of the ESA also sets forth a list of prohibitions to protect listed species
24 that apply to federal and non-federal entities alike. *See* 16 U.S.C. §1538(a)(1).¹ One of

25
26 ¹ These prohibitions apply on their face only to endangered species, but section 9 also
27 makes it illegal to violate regulations the FWS must promulgate to protect threatened
28 species (and which include all of the prohibitions set forth under section 9 unless the
agency adopts a special rule for a given species with lesser protections). *See id.* at

1 the most consequential elements of section 9 is the ban on “take” of protected species. In
2 addition to outlawing actions that directly cause death or injury, ESA regulations define
3 take to include “harm,” which regulations in turn define to include impacts to habitat that
4 result in actual death or injury to members of a protected species. *See* 16 U.S.C.
5 §1532(18); 50 C.F.R. §17.3 (definition of “harm”). Additionally, the ESA contains a
6 citizen suit provision which enables anyone with standing to seek injunctive relief to
7 enforce this take prohibition. *See* 16 U.S.C. §1540(g); *Forest Conservation Council v.*
8 *Rosboro Lumber Co.*, 50 F.3d 781, 784-788 (9th Cir. 1995).

9 The Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird
10 Treaty Act (MBTA) also contain provisions prohibiting “take” of bald eagles. *See* 16
11 U.S.C. § 668(a); *id.* at §703. Unlike the ESA, neither statute contains a citizen suit
12 provision that allows anyone other than federal officials to enforce these provisions. The
13 MBTA’s comparatively narrow definition of “take” does not protect bird habitat. *See e.g.*
14 *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004). In 2007, FWS defined
15 “disturb” within BGEPA’s definition of take to include disturbance caused by habitat
16 manipulation that results in death or injury to specific eagles. *See* 72 Fed. Reg. 31,132,
17 31,139 (2007). In a draft “threats assessment” of desert eagles (which was never finalized
18 after FWS’ Washington, D.C. office concluded that the populations was not a DPS),
19 FWS biologists in Arizona reached the following conclusion regarding protections
20 afforded to desert eagle habitat by the MBTA and BGEPA:

21 We therefore must evaluate the protections currently provided by the Eagle Act
22 and Migratory Bird Treaty Act. The bald eagle in the United States declined
23 precipitously despite the protections afforded by these two laws and prior to its
24 gaining protection under the Act. The cause of such declines is widely believed to
25 be the application of organochlorine pesticides following World War II, and the
Eagle Act and MBTA did not regulate such applications. It is therefore difficult to

26 §§1533(d) and 1538(a)(1)(G); 50 C.F.R. §17.31(a). FWS never adopted a special rule for
27 bald eagles, so all of the prohibitions set forth in section 9 applied to this species when it
28 was listed as threatened.

1 judge the effectiveness of these laws at the population level, but under current
2 laws and regulations bald eagle habitat would not receive substantial protection
3 under these statutes and their implementing regulations. Enforcement on and off
tribal lands will also continue to be a challenge.

4 AR 006388.

5 **B. Factual Circumstances Relevant to Relief**

6 Judge Murgia's opinion in *CBD v. Kempthorne* recognized that the agency's
7 negative petition finding – which it found to “exemplify an arbitrary and capricious
8 agency action” – was the reason FWS was able to remove desert eagles from the ESA's
9 threatened list in 2007 without conducting a lawful status review of the population. *See*
10 *id.* at * 11,14. The court's order on remand enjoining FWS from applying its 2007
11 delisting rule to desert eagles thus maintained the status quo that would have prevailed
12 had FWS acted lawfully. The court's opinion explained the situation clearly:

13 If the FWS had applied the appropriate evidentiary standard at the 90-day stage
14 and published the requisite positive 90-day finding, and then proceeded with a
15 status review of the Desert bald eagle population, the FWS would have been
16 required to determine whether to list the Desert bald eagle as a DPS. And if the
17 FWS had concluded that the Desert eagle population was a DPS, then the FWS
18 would have been required to separately assess the status of the Desert bald eagle
DPS, as opposed to merely assessing the status of the entire bald eagle population,
to determine whether the Desert bald eagle DPS continued to warrant ESA
protections.

19 *Id.* This means that had FWS acted lawfully on the Center's initial listing petition, desert
20 eagles would have remained listed as threatened under the ESA at least until FWS
21 completed a lawful status review of the population. As this Court determined in its recent
22 order partially granting Plaintiffs' motion for summary judgment, a lawful status review
23 of desert eagles still has yet to take place.

24 Even if FWS were to find on remand that desert eagles are a distinct population
25 segment that merits listing as threatened or endangered – and thus never should have
26 been removed from the threatened list – the birds will not receive protection under the
27 ESA for years to come absent an injunction by this Court. As noted above, shortly before
28 releasing its 2010 12-month finding, FWS informed the Secretary of Interior that it would

1 not add desert eagles to the threatened or endangered lists even in the event it found
2 desert eagles to be a DPS and in need of protection under the ESA. AR 008769. Instead,
3 the agency noted that it would categorize the desert eagle DPS as a “candidate” for listing
4 pursuant to its authority under the ESA to defer a warranted listing action in favor of
5 higher priority listing decisions. *Id.*; see 16 U.S.C. §1533(b)(3)(B)(iii) (the so-called
6 “warranted but precluded” category, which FWS refers to as “candidates” for listing).
7 Many other species are currently classified as “candidates” in need of final listing action.
8 FWS recently entered into litigation settlements under which the agency agreed to act on
9 the 251 species currently in this “warranted but precluded” category over a six year
10 period. *See Silver Dec.* at ¶ 23. As a consequence, even if it determines on remand that
11 desert eagles are a valid DPS and never should have been delisted in 2007, FWS likely
12 would not even propose to list desert eagles as threatened or endangered for more than
13 six years. *Id.*

14 Accordingly, without an injunction from this Court similar to the one issued by
15 Judge Murgia, desert eagles face years without the protections of the ESA – even if FWS
16 determines that it never should have delisted the population in the first place.

17 **INJUNCTIVE RELIEF IS APPROPRIATE IN THIS CASE**

18 At its core, the remedy analysis in this case should be very straightforward. When
19 FWS unlawfully delists a species, the agency deprives a species of ESA protections to
20 which it is legally entitled. The remedy for such conduct should be an injunction
21 preserving the status quo, i.e. the species’ listed status, until FWS makes a lawful
22 decision about the species’ listing status.

23 **A. Desert eagles will suffer widespread harm absent an injunction.**

24 FWS did not address the conservation status of desert eagles in its final 12-month
25 finding because, reversing a finding by Arizona and Region 2 biologists, the agency’s
26 Washington, D.C. office determined that the population is not eligible for listing
27 consideration as a distinct population segment (DPS). However, before their DPS finding
28 was overturned by officials in Washington, FWS’ Arizona biologists prepared several

1 drafts of a “threats assessment” for the desert eagle population. These analyses
2 catalogued extensive ongoing and future harm to this small population and their habitat
3 that section 7 consultation under the ESA would likely prevent or at least ameliorate:

4 AR 006368-006371: After an extensive discussion of how groundwater pumping
5 for municipal water use and other human needs is a leading cause of adverse impacts to
6 desert eagles’ riparian habitat, FWS noted that a large proposed housing development
7 could further threaten stream flows within eagle habitat along the Verde River. However,
8 the development would require a land exchange between the private developers and U.S.
9 Forest Service. FWS notes that “[t]he Forest Service is ready to initiate necessary [section
10 7] consultation under the Act to accomplish the land exchange at this time.”

11 AR 006372-006373: FWS discusses how federal funding to the state of New
12 Mexico could be used to divert up to 14,000 acre-feet of water per year from the Gila
13 River system, a project that would “impair the river’s natural flows, impede the growth of
14 riparian vegetation, and threaten native fish and birds” and reduce desert eagle
15 productivity in three breeding areas. Proposed use of federal funds for this project would
16 trigger section 7 consultation if desert eagles are listed under section 7 of the ESA.

17 AR006383-006384: FWS discusses the importance of the Arizona Bald Eagle
18 Nest Watch Program, which from 1983-2005 helped rescue 9.4% of fledgling eagles.
19 Funding for this program comes in part from “minimization and mitigation measures
20 through section 7 of the Act.” FWS concludes that this program may “face funding
21 shortages” if desert eagles are delisted. It reports that a variety of entities have signed a
22 Memorandum of Understanding to “maintain, and where possible, enhance the breeding
23 bald eagle in Arizona,” but notes that the MOU includes “no funding commitments.”

24 The FWS threats assessment reports additional and extensive ongoing and future
25 activities linked to federal agency actions that have adverse impacts on the already small
26 desert eagle population and their habitat. *See* Declaration of Robin Silver at ¶ 17-21. If
27 desert eagles are listed as a threatened species, the federal agencies proposing to take or
28 continue to implement these actions would have to consult with FWS to ensure that these

1 activities would not jeopardize desert eagles' continued existence.

2 In addition to specific harm likely to result unless this Court grants Plaintiffs'
3 request for injunctive relief, loss of protection under the ESA will generally deprive
4 desert eagles of important procedures prescribed by the ESA that safeguard the species
5 and their habitat against substantive harm. Congress described the ESA's section 7
6 prohibitions and associated consultation process as the "institutionalization of... caution."
7 *TVA v. Hill*, 437 U.S. at 178 quoting H.R.Rep.No.93-412, pp. 4-5 (1973)). In *Thomas v.*
8 *Peterson*, 753 F.2d 754, 764 (9th Cir. 1985), the Ninth Circuit noted that "[i]f a project is
9 allowed to proceed without substantial compliance with [section 7's]procedural
10 requirements, there can be no assurance that a violation of the ESA's substantive
11 provisions will not result. The latter, of course, is impermissible."

12 Recognizing the importance of the ESA's precautionary procedures under section
13 7, courts have used their equitable authority to maintain these protections in cases, like
14 this one, when unlawful agency actions involving ESA listing decisions and critical
15 habitat designations threaten to eliminate the protections a species enjoys under section 7.
16 In *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995), the
17 Ninth Circuit determined that FWS had violated the ESA's procedural requirements in
18 listing Bruneau Hot Springs snails as endangered. Despite this holding, however, the
19 court refused to vacate FWS' listing decision pending the agency's work to remedy the
20 procedural deficiencies. It found that "equitable concerns weigh toward leaving the
21 listing rule in place" during the remand period, in significant part due to adverse impacts
22 and ongoing threats to snail habitat. *See id.* at 1405-1406. Similarly, in *Natural*
23 *Resources Defense Council v. U.S. Department of Interior*, 275 F.Supp.2d 1136 (C.D.
24 Cal., 2002), the court allowed critical habitat designations it determined FWS made
25 without following proper procedures to remain in place during remand; the court
26 explained that leaving the designations in place would afford the species at issue extra
27 protection against habitat threats while the agency was reconsidering the designations.

28 This Court should likewise refuse to allow illegal listing actions by FWS to

1 deprive desert eagles of the procedural and substantive protections of section 7. For
2 example, over half of desert eagle nests are located within national forests. AR L1892-94.
3 The U.S. Forest Service is currently in the process of revising the land and resource
4 management plans for all but one of Arizona's national forests. *See Silver Dec.* at ¶ 12-
5 13. Since FWS will not list desert eagles for years even if the agency finds such action
6 warranted, absent entry of the requested injunction the Forest Service will complete these
7 plan revisions without consulting with FWS under section 7 of the ESA regarding the
8 effects of these revisions on eagles and their habitat. In *Pacific Rivers Council v. Thomas*,
9 30 F.3d 1050, 1055 (9th Cir. 1994) the Ninth Circuit noted that adopting and
10 implementing a forest plan affects listed species because such a plan "sets guidelines for
11 logging, grazing and road-building activities within its boundaries. Furthermore, the
12 plans establish the allowable sale quantity of timber as well as production targets and
13 schedules for forage, road construction, and other economic commodities." The court
14 therefore enjoined ongoing forest management activities affecting newly listed salmon
15 until the Forest Service had initiated section 7 consultation on the applicable forest plan.
16 *See id.* at 1057. Similarly, an injunction in this case is necessary to prevent the Forest
17 Service from establishing forest management policies that directly affect desert eagles
18 and their habitat without consulting with FWS.

19 **B. The other factors justifying injunctive relief are present in this case.**

20 Injury to desert eagles likely to occur unless this Court enjoins application of the
21 2007 delisting rule to this population would of course not be remedied by money
22 damages. *See Alliance for the Wild Rockies v. Cottrell, supra*, 632 F. 3d at 1135.
23 Moreover, Ninth Circuit caselaw has made it very clear that "[t]he balance of hardships
24 and the public interest tip heavily in favor of endangered species . . . [and a reviewing
25 court] may not use equity's scales to strike a different balance." *Sierra Club v. Marsh*,
26 *supra*, 816 F.2d at 1383; see also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-14
27 (1982).

28 **C. Circumstances here warrant a remand and injunction.**

1 In *CBD v. Kempthorne*, Judge Murgia held that circumstances warranted a remand
2 to the agency to complete a status review of desert eagles as well as an injunction against
3 delisting the population. *See slip op.* at 15 (citing *Earth Island Institute v. Hogarth* 494
4 F.3d 757, 770 (9th Cir. 2007) (noting “the government's intransigence in following
5 Congress's mandate”). This Court’s recent order partially granting Plaintiffs’ motions for
6 summary judgment makes the case for entry of a similar injunction now even more
7 compelling. Despite diligent and science-based work by Arizona and Region 2 experts,
8 FWS officials in Washington D.C. have repeatedly – and arbitrarily – reversed these
9 offices’ recommended findings to determine that desert eagles are ineligible for listing
10 under the ESA. These findings allowed the agency to delist desert eagles in 2007 without
11 performing a status review of the population. Moreover, unless this Court grants
12 Plaintiffs’ request for injunctive relief, desert eagles would face years without ESA
13 protections even if FWS concludes in April, 2012 that the birds are a valid DPS and in
14 fact warrant listing as threatened or endangered.

15 These circumstances provide a compelling case for action by this Court to once
16 again to maintain the status quo that would have prevailed absent repeated arbitrary
17 action by FWS. In so doing, this Court will ensure that the desert eagle will not “face
18 increased risks to its existence prior to a lawful decision on Plaintiffs' petition to list the
19 Desert bald eagle as a DPS.” *CBD v. Kempthorne* at *15. *See Alaska Center for*
20 *Environment v. Browner*, 20 F.3d 981, 986-987 (9th Cir. 1994) (“[t]he district court has
21 broad latitude in fashioning equitable relief when necessary to remedy an established
22 wrong....When [agency] dereliction occurs, it is up to the courts in their traditional,
23 equitable, and interstitial role to fashion a remedy.”); *National Wildlife Federation v.*
24 *NMFS*, 524 F.3d 917, 937-938 (9th Cir. 2008) (“[t]he district court’s chosen remedy was
25 ‘reasonably necessary to remedy an established wrong’” (citation omitted)).

26 **IV. CONCLUSION**

27 For the reasons set forth above, Plaintiffs respectfully request that this Court enter
28 the injunction set forth in the initial section of this memorandum.

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DATED: December 16, 2011

Respectfully Submitted,

/s/ DANIEL J. ROHLF

Attorneys for Plaintiffs

/s/ THANE D. SOMERVILLE

Attorneys for Salt River Pima-Maricopa Indian Community

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2011 I electronically filed a copy of Plaintiffs' Memorandum in Support of Injunctive Relief with the Clerk of Court using the CM/ECF system, which will automatically notify all counsel of record of the filing via e-mail.

/S/ Daniel J. Rohlf