

United States Department of the Interior  
Fish and Wildlife Service  
Ecological Services  
500 Gold Ave SW  
Albuquerque, New Mexico 87102

*Copies to Debra, Greg, Mary,  
me ... SLS.*

## FAX/MEMO

Date: 2/2/06

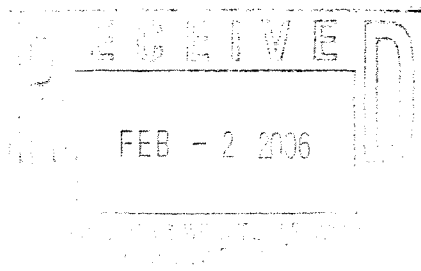
To: Steve Spangle, Debra Bills, AZ ESFO

From: Melanie Ikenson  
Litigation / FOIA Coordinator  
phone: (505) 248-6284  
fax: (505) 248-6788  
email: melanie\_ikenson@fws.gov

# of pages (including this page):

4

re: Bald eagle NOI





SAN FRANCISCO BAY AREA OFFICE

*Protecting endangered species and wild places through science, policy, education, and environmental law*

January 19, 2006

**VIA FACSIMILE AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

Gale Norton, Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240  
Fax: 202-208-5048

Dale Hall, Director  
U.S. Fish and Wildlife Service  
1849 C Street, N.W.  
Washington, D.C. 20240  
Fax: 202-208-6965

**RE: Sixty-day Notice of Intent to Sue for Failure to Respond to Petition to list the Southwestern Desert Nesting Bald Eagle (*Haliaeetus leucocephalus*) Distinct Population Segment and Failure To Issue a 12-Month Finding**

Dear Secretary Norton and Director Hall:

This letter provides you with 60 days notice that the Center for Biological Diversity ("the Center") and Maricopa Audubon Society ("the Society") intend to sue the U.S. Fish and Wildlife Service ("the Service") for violating Section 4 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1533, and its implementing regulations in failing to issue a 90-day finding or a 12-month finding regarding the Center/Society's petition requesting listing for the Southwestern Desert Nesting Bald Eagle (*Haliaeetus leucocephalus*) Distinct Population Segment. This letter is issued pursuant to the 60 day notice requirement of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g).

Congress enacted the ESA to ensure the protection and conservation of threatened and endangered species. 16 U.S.C. § 1531(b). The fundamental express purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend. *Id.* To achieve this purpose, the statute requires the Service to list species of plants and animals that are facing extinction as either "threatened" or "endangered." 16 U.S.C. § 1533(c)(1). Upon receiving a petition to list a species, the Service has approximately 90 days to make a finding as to whether the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). Twelve months after receipt of the petition, the Service must make one of three determinations: 1) listing is not warranted, 2) listing is warranted, or 3) listing is warranted but presently precluded by

Tucson • Phoenix • Joshua Tree • San Diego • San Francisco • Portland • Silver City

Justin Augustine, Esq.  
1095 Market Street, Suite 511 • San Francisco, CA 94103  
PHONE: (415) 436 9682 x 302 • FAX: (415) 436-9683  
jaugustine@biologicaldiversity.org • www.biologicaldiversity.org

other pending proposals for listing species, provided other circumstances are met. 16 U.S.C. § 1533(b)(3)(B). If the Service determines that listing a species is warranted, it must then promptly publish in the Federal register a proposed rule to list the species. 16 U.S.C. § 1533(b)(5).

On October 6, 2004, the Center/Society submitted a formal petition to list the Southwestern Desert Nesting Bald Eagle (*Haliaeetus leucocephalus*) Distinct Population Segment as a threatened or endangered species. Certified mail receipts confirm that the Fish and Wildlife Service (FWS) received the petition on October 12, 2004, and the Secretary received the petition on October 13, 2004. Accordingly, the 90-day finding was due on or about January 11, 2005 and a 12 month finding was due on or about October 13, 2004.

The petition outlined in explicit detail the varied reasons why the Southwestern Desert Nesting Bald Eagle qualifies as a Distinct Population Segment under the ESA. Not only does the Southwestern Desert Nesting Bald Eagle persist in a unique ecological setting, it is also known to be smaller than other bald eagles, is behaviorally unique, and is reproductively isolated.

Moreover, the petition unequivocally demonstrated that the Southwestern Desert Nesting Bald Eagle faces significant obstacles that ESA protection can help alleviate. The population consists of extremely low numbers, mortality is excessive, reproductive rates are low, breeding areas are increasingly threatened, habitat loss is on the rise, toxic substances such as pesticides still remain a problem, heat stress continues to be a significant issue especially due to global warming, and riparian areas that the eagle depends upon are under severe pressure due to grazing, dewatering, and dam operations.

On February 11, 2005, the Service requested clarification from the Center/Society regarding the "geographic extent of the desert nesting bald eagle population." On March 9, 2005, the Service received a fax containing the Center/Society's clarification. The fax also contained updated and new information describing why the Desert Nesting Bald Eagle Population should be listed under the ESA.

The Service has not published a 90-day finding or a 12-month finding for the Southwestern Desert Nesting Bald Eagle Distinct Population Segment despite the fact that over 15 months have passed since the Service received the petition. In *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166 (9<sup>th</sup> Cir. 2002), the Ninth Circuit explicitly held that 90-day and 12-month findings on a citizen petition to list a species under the ESA must in all cases be made within 12 months of receipt of the petition. As a result, the Service is currently in indisputable violation of the ESA, 16 U.S.C. § 1533.

This letter puts you on statutory notice that we intend to file suit in federal court to remedy these ESA violations. We will seek injunctive and declaratory relief and legal fees and costs regarding these violations. If you have any intention of making the required 90-day finding or 12-month finding within the next two months please inform us

FEB-02-06 THU 11:31 AM

FAX NO.

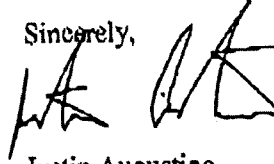
P. 04/04 003738

01/31/2006 TIME 16:53 FAX 703 358 1735 DTE --- DC R-2 ENDANG SPECIES

0006/006

immediately. If you have any questions, wish to discuss this matter, or feel the notice is in error, please contact me at 415-436-9682 ext. 302.

Sincerely,

A handwritten signature in black ink, appearing to be 'JA' followed by a stylized flourish.

Justin Augustine

For Center for Biological Diversity  
and  
Maricopa Audubon Society