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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.

GALE NORTON, Secretary of the Interior; and  
 UNITED STATES FISH AND WILDLIFE  
 SERVICE,

Defendants.

Civil Action No.:

**COMPLAINT FOR  
 DECLARATORY JUDGMENT  
 AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. This is an action for declaratory and injunctive relief in which Plaintiffs, the Center for Biological Diversity and Maricopa Audubon Society, challenge Defendants' continued failure to fulfill their mandatory duty to issue a 90-day finding for the Southwestern

1 Desert Nesting Bald Eagle (*Haliaeetus leucocephalus*) Distinct Population Segment ("SW Bald  
2 Eagle DPS") pursuant to the Endangered Species Act.

3 2. Biologically, behaviorally, and ecologically distinct from other bald eagle  
4 populations, the SW Bald Eagle DPS can be found only in the Sonoran life zones of the desert  
5 Southwest. It is known to be smaller than other eagle populations, is reproductively isolated  
6 from other eagle populations, persists in a region that is much drier and hotter than other eagle  
7 populations, and possesses unique behavioral characteristics such as cliff nesting and early  
8 season breeding.

9 3. While the SW Bald Eagle DPS is a unique treasure, it faces a serious uphill battle  
10 against extinction. Numerous threats include: a significant decline in the fishery upon which the  
11 eagle depends; toxic substances such as mercury; global warming; eggshell thinning; and severe  
12 habitat loss.

13 4. In fact, current population viability studies show that the DPS will likely go  
14 extinct in approximately 75 years.

15 5. In order to prevent the SW Bald Eagle DPS from going extinct, Plaintiffs, Center  
16 for Biological Diversity and Maricopa Audubon Society, petitioned Defendants, Gale Norton,  
17 Secretary of the Interior, and the U.S. Fish and Wildlife Service, to list the species as  
18 "endangered" pursuant to the Endangered Species Act ("ESA"). ESA §§ 2-18, 16 U.S.C. §§  
19 1531-1544.

20 6. Under the ESA, the Secretary of the Interior has a non-discretionary duty to  
21 determine within 90 days, to the maximum extent practicable, whether a petition presents  
22 substantial information indicating that the listing of a species may be warranted. If the Secretary  
23 makes a positive 90-day finding, she must then determine whether the listing is or is not  
24 warranted within 12 months of receiving the petition.

1           7.       In the present case, the Secretary has violated her duties under the ESA by failing  
2 to make a 90-day finding within the statutory deadlines. This action seeks to compel the  
3 Secretary to rule on the SW Bald Eagle petition.

4                                   **JURISDICTION AND VENUE**

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

8           9.       This Court has authority to grant the requested relief pursuant to 28 U.S.C. §§  
9 2201-2202 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706 (Administrative  
10 Procedure Act).

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

16          11.      Venue lies in this Court pursuant to 28 U.S.C. § 1391(e) and ESA § 11(g)(3)(A),  
17 16 U.S.C. § 1540(g)(3)(A). The SW Bald Eagle DPS lives in this judicial district, a substantial  
18 part of the events giving rise to the cause of action occurred in this judicial district, and  
19 Defendant, United States Fish and Wildlife Service maintains an office in this judicial district.

20                                   **PARTIES**

21          12.      Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a non-  
22 profit corporation with over 18,000 members and offices in San Diego, Joshua Tree, Los  
23 Angeles, and San Francisco, California; Washington, D.C.; Portland, Oregon; Tucson and  
24 Phoenix, Arizona; and Silver City, New Mexico. The Center is dedicated to the preservation,  
25 protection, and restoration of biodiversity, native species, ecosystems, and public lands. The  
26 Center's members and/or staff use and enjoy, and intend to continue to use and enjoy, lands  
27  
28

1 where the SW Bald Eagle DPS is found for observation, research, aesthetic enjoyment, and  
2 other recreational, scientific, and educational activities. The Center's members and/or staff have  
3 researched, studied, and observed the SW Bald Eagle DPS and intend to research, study, and  
4 observe the species in the future. The Center's members and/or staff are being adversely  
5 affected and irreparably injured by the Service's continued violations of the Endangered Species  
6 Act. The Center brings this suit on its own behalf and on behalf of its adversely affected  
7 members and staff.

8       13. Plaintiff MARICOPA AUDUBON SOCIETY ("MAS") is a non-profit  
9 organization dedicated to the enjoyment of birds and other wildlife with a primary focus on the  
10 protection and restoration of the habitat of the Southwest through fellowship, education and  
11 community involvement. MAS is a chapter of the National Audubon Society. MAS has over  
12 2300 members, primarily in central Arizona. MAS, a co-petitioner for ESA listing of the SW  
13 Bald Eagle DPS, has undertaken continuous ongoing activist efforts to protect eagle habitats of  
14 the arid Southwest. MAS has played a strong role in protecting endangered species in the  
15 Southwest through public education efforts, field surveys, public field trips, and, position  
16 papers. MAS leads field trips with members and non-members of the public to habitat areas of  
17 the SW Bald Eagle DPS. MAS brings this action on behalf of itself and its adversely affected  
18 members. Defendants' failure to make timely petition findings regarding the SW Bald Eagle  
19 DPS facilitates the decline of this species and its habitat. Accordingly, the educational,  
20 scientific, aesthetic, conservation and recreational interests of MAS's members and staff have  
21 been, are being, and unless the Court grants the requested relief, will continue to be adversely  
22 affected and irreparably injured by Defendants' inaction and failure to comply with the law.

23       14. Defendant GALE NORTON is the Secretary of the Interior ("Secretary"). The  
24 Secretary is the federal official charged with listing species as endangered or threatened under  
25 the ESA. She is sued in her official capacity. The Secretary has delegated her obligation to  
26 review listing petitions under the ESA to the U.S. Fish and Wildlife Service.

1           15. Defendant UNITED STATES FISH AND WILDLIFE SERVICE (“the Service”)  
 2 has been delegated responsibility for implementing the ESA including proposed and final listing  
 3 and critical habitat decisions and the handling of petitions for such listings.

4                                   **THE ENDANGERED SPECIES ACT**

5           16. The ESA is a federal statute designed to conserve endangered and threatened  
 6 species and the ecosystems upon which those species depend. ESA § 2(b), 16 U.S.C. § 1531(b).

7           17. To achieve these objectives, the Service is required to protect such imperiled  
 8 species by listing them as either “threatened” or “endangered” if they are facing extinction due  
 9 to any one, or any combination of, the following factors:

10           (A) the present or threatened destruction, modification, or curtailment  
 11 of its habitat or range;

12           (B) over-utilization for commercial, recreational, scientific, or  
 13 educational purposes;

14           (C) disease or predation;

15           (D) the inadequacy of existing regulatory mechanisms; or

16           (E) other natural or manmade factors affecting its continued existence.

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

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

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

25           20. A species receives mandatory substantive protections under the Endangered  
 26 Species Act if and only if it is listed as endangered or threatened. Thus, the listing process is the

1 essential first step in the ESA's system of species protection and recovery.

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

5 22. Upon receipt of a petition to list a species, the Secretary has 90 days to the  
6 maximum extent practicable to make a finding as to whether the petition "presents substantial  
7 scientific or commercial information indicating that the petitioned action may be warranted."  
8 ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). This determination is  
9 known as a 90-day finding.

10 23. If the Secretary makes a positive 90-day finding, she must promptly publish it in  
11 the Federal Register and commence a "status review" of the species. ESA § 4(b)(3)(A), 16  
12 U.S.C. § 1533(b)(3)(A).

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

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

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

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

**THE SW BALD EAGLE DPS**

28. The SW Bald Eagle DPS is under serious threat of extinction. The entire population consists of approximately 166 individuals and less than 60 breeding pairs. Moreover, mortality for both breeding adults and for fledglings is excessive and current population viability studies show that the DPS will likely go extinct in approximately 75 years.

29. This DPS is distinguishable from other bald eagle populations in several important respects: 1) it persists in the unique ecological setting of the Sonoran region of the desert Southwest; 2) it is smaller than other bald eagles; 3) it is behaviorally unique; and 4) it is reproductively isolated.

30. Numerous obstacles must be surmounted by this DPS however, if it is ever to fully recover from its current situation.

31. First, its dominant food source is tenuous. The native fishery of the desert Southwest, with which the SW Bald Eagle DPS evolved, is currently suffering a significant decline. Of the 20 native fish of the Gila River Basin, one is extinct, six are extirpated, nine are listed as threatened or endangered, and nine of the ten others merit greater protection due to their status.

32. Second, toxic substances continue to be a serious issue. Despite being banned long ago, DDT and its derivatives persist in Arizona. Heavy metals, particularly mercury, likewise cause significant health issues for the SW Bald Eagle DPS.

33. Third, despite their seemingly innocuous nature, fishing line and tackle are known to be present in eagle nests and are known to cause deaths.

34. Fourth, while living in Arizona's harsh environment is already a challenge, global warming will only make it more difficult for the eagle to survive. Heat stress is already a recognized leading cause of mortality for nestlings, and the situation is growing worse as warming and its associated increasing temperatures and drought conditions cause even greater stress.

1           35.     Fifth, although the cause is unknown, it is recognized that eggshell thinning  
2 remains a problem for successful eagle breeding.

3           36.     Sixth, water issues plague the eagle and its habitat. Cattle grazing harms the  
4 riparian (i.e. waterside) habitat upon which the eagle depends, dam operations fail to release  
5 water at the times necessary for the needs of riparian nest trees, and dewatering of remnant free-  
6 flowing rivers continues to harm habitat and diminish the fish population.

7           37.     Not only does the DPS face numerous threats, its current small population size  
8 and reproductive isolation are likewise problematic. Small population size and reproductive  
9 isolation make the DPS extremely vulnerable to loss of genetic variability<sup>1</sup> which in turn limits  
10 the species options for adaptation to changing environmental conditions such as global warming.

11          38.     Each problem alone renders ESA protection necessary for the future well-being  
12 of the SW Bald Eagle DPS. Together, it is transparently clear that the SW Bald Eagle warrants  
13 listing as endangered.

14                   **THE PETITION TO LIST THE SW BALD EAGLE DPS**

15          39.     On October 6, 2004, the Center and MAS filed their Petition to list the SW Bald  
16 Eagle DPS as an endangered species under the ESA and requested that the Service designate  
17 critical habitat for the DPS as well.

18          40.     Certified mail receipts confirm that Service received the petition on October 12,  
19 2004, and the Secretary received the petition on October 13, 2004. The ESA mandates that the  
20 Secretary of the Interior issue a 90-day finding in response to a listing petition. Accordingly, the  
21 SW Bald Eagle DPS's 90-day finding was due on or about January 11, 2005 and a 12-month  
22 finding was due on or about October 13, 2005.

23  
24  
25  
26 <sup>1</sup>       With a small population, the loss of just one eagle can mean the loss of an entire gene  
27 which can mean the loss of an entire genetic adaptation.

41. The Secretary and Service have failed to take any action on the Petition and have not made a 90-day finding. The 90-day finding on the Petition is now more than 14 months overdue and the 12-month finding is now 5 months overdue.

42. The Center and MAS sent a sixty-day notice of intent to sue to the Secretary and Service on January 19, 2006, satisfying statutory notice requirements. The Secretary and Service did not respond.

### **CLAIM FOR RELIEF**

(Violation of Section 4 of the ESA)

43. Paragraphs 1-42 are incorporated herein, by reference.

44. Under the ESA, the Secretary must determine whether a petition to list a species “presents substantial scientific or commercial information indicating that the petitioned action may be warranted” within 90 days of receiving the petition, to the maximum extent practicable. ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A). The Secretary must publish the finding in the Federal Register.

45. By failing to make and publish a 90-day finding on Plaintiffs’ Petition to list the Southwestern Desert Nesting Bald Eagle Distinct Population Segment, the Secretary has failed to perform non-discretionary acts or duties within the meaning of the ESA’s citizen suit provision. ESA § 4(g)(1)(c), 16 U.S.C. § 1540(g)(1)(c), and/or is acting in a way that violates the ESA within the meaning of the APA, 5 U.S.C. § 706.

### **PRAYER FOR RELIEF**

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

1. Declaratory judgment that the Secretary is violating the ESA and APA by failing to comply with her non-discretionary duty under ESA Section 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A) to make and publish in the Federal Register a 90-day finding regarding the Petition to list the Southwestern Desert Nesting Bald Eagle Distinct Population Segment;

2. Injunctive relief compelling the Secretary to make and publish in the Federal Register a 90-day finding on Plaintiffs' Petition to list the Southwestern Desert Nesting Bald Eagle Distinct Population Segment by a date certain;
3. An order awarding Plaintiffs their costs of litigation, including reasonable attorneys' fees as provided in the ESA, 16 U.S.C. § 1540(g)(4); and
4. Any other such relief as the Court deems just and proper.

Respectfully submitted this 27th day of March 2006,

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