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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CENTER FOR BIOLOGICAL DIVERSITY; and)

MARICOPA AUDUBON SOCIETY;)

Plaintiffs,)

v. **PLAINTIFFS')**

DIRK KEMPTHORNE, Secretary of the Interior, **UNOPPOSED MOTION TO)**
U.S. Department of the Interior; and **AMEND COURT ORDER)**

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

Defendants.)

1 Plaintiffs respectfully request that the Court amend its March 6, 2008, Order and
2 extend the date for completion of the Desert eagle status review until October 12, 2009.
3 As explained below, an extension is necessary in order to conduct a thorough and
4 adequate status review for the Desert eagle. On August 20, 2008, undersigned counsel
5 discussed this request with Lisa Russell, counsel for the federal defendants, and was
6 informed that the United States Fish and Wildlife Service (“FWS”) would not oppose this
7 request.

8 On March 6, 2008, this Court entered judgment in favor of Plaintiffs declaring that

- 9 a) “the United States Fish and Wildlife Service (“FWS”) violated the
10 Endangered Species Act (“ESA”) by failing to make the requisite positive
11 90-day finding that Plaintiffs’ October 6, 2004 petition to list the bald eagle
12 population of the Sonoran Desert region of the American southwest (“the
13 Desert bald eagle”) as a distinct population segment (“DPS”) pursuant to
14 the ESA may be warranted;” and
15 b) “the FWS’s August 30, 2006 negative 90-day finding on Plaintiffs’ petition
16 was arbitrary and capricious, and contrary to law, under the Administrative
17 Procedure Act;”

18 Moreover, the Court ordered Defendants to

- 19 a) “conduct a status review of the Desert bald eagle population pursuant to the
20 ESA to determine whether listing the Desert eagle population as a DPS is
21 warranted, and if so, whether listing the Desert bald eagle DPS as
22 threatened or endangered pursuant to the ESA is warranted;” and to
23 b) “issue a 12-month finding on whether listing the Desert bald eagle
24 population as a DPS is warranted, and if so, whether listing the Desert eagle
25 DPS as threatened or endangered is warranted . . . within nine months.”

26 On May 20, 2008, in response to the Court’s Order, the FWS initiated a status
27 review for the Desert eagle. See *Endangered and Threatened Wildlife and Plants;*
28 *Initiation of Status Review for the Bald Eagle (Haliaeetus leucocephalus) in the Sonoran*

1 *Desert Area of Central Arizona and Northwestern Mexico*, 73 Fed. Reg. 29096. The
2 notice “encourage[d] all interested parties to provide [FWS] with information regarding
3 the status of, and any potential threats to, the Sonoran Desert area bald eagle,” but
4 mandated that all comments be received by July 7, 2008. *Id.*

5 As stated in the attached Declaration of Diane Enos (exhibit A), FWS convened a
6 multi-tribal meeting regarding the status review on July 3, 2008, just a few days before
7 the comment deadline. Enos Dec. at ¶ 11. FWS apologized for the brief time available to
8 the tribes but attributed it to this court’s deadline of December 5, 2008, and the need for
9 internal review at the FWS Washington D.C. office. Enos Dec. at ¶¶ 13, 11. Ms. Enos
10 declares that the Salt River Pima-Maricopa Indian community is developing comments
11 and scientific support for the listing but needs additional time for the work. Enos Dec. at
12 ¶¶ 14-17

13 Similarly, the 20-member Inter Tribal Council of Arizona adopted the attached
14 resolution (exhibit B), urging an extension of the court’s deadline until October 2009 in
15 order to prepare and complete comments for a comprehensive administrative record. The
16 attached Declaration of Joe P. Sparks (exhibit C) explains that traditional knowledge
17 regarding Desert eagles held by American Indian spiritual practitioners is both seasonally
18 and gender specific and cannot effectively be gathered within a brief time span.

19 As does the Governor of Arizona, who has written a letter to the FWS urging them
20 to extend the comment period for the Desert eagle (exhibit D), Plaintiffs support the
21 tribes in their effort to submit important information about the Desert eagle. Plaintiffs
22 believe that the FWS cannot conduct an adequate status review without the tribal
23 information and therefore respectfully request that the court extend the period in which
24 FWS can complete its status review until October 12, 2009. This will allow all tribes and
25 all interested parties to submit the necessary documentation and allow FWS to fulfill its
26 duties to tribes and to the ESA’s mandates.

1 Respectfully submitted this 27th day of August, 2008,

2
3 /s/ Justin Augustine

4 Justin Augustine (CA Bar No. 235561)
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Attorneys for Plaintiffs

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**

EXHIBIT LIST

1 Pursuant to the District of Arizona Electronic Case Filing Administrative Policies
2 and Procedures Manual, Part II, K ("Exhibits), the following is a list of exhibits to
3 Plaintiffs' Unopposed Motion to Amend Court Order:

4 Exhibit A: Declaration Of Diane Enos, President Of Salt River Pima-Maricopa
5 Indian Community;

6 Exhibit B: Inter Tribal Council of Arizona, Resolution 0608, "Support for
7 Extension of Time to Complete Status Review Regarding the Listing of the
8 Desert-Nesting Bald Eagle Pursuant to the Endangered Species Act";

9 Exhibit C: Declaration of Joe P. Sparks;

10 Exhibit D: Letter from Janet Napolitano, Governor of Arizona, to Secretary
11 Kempthorne (Department of the Interior), requesting an extension of time for the
12 comment period for the Desert eagle status review

13
14 Respectfully submitted this 27th day of August, 2008,

15
16 /s/ Justin Augustine

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24 Attorneys for Plaintiffs
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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 CENTER FOR BIOLOGICAL DIVERSITY;) No. CV-07-038-PHX-MHM
12 and MARICOPA AUDUBON SOCIETY,)

13 Plaintiffs,)

14 vs.)

15 DIRK KEMPTHORNE, Secretary of Interior;) DECLARATION OF DIANE
16 U.S. Department of the Interior; and DALE) ENOS, PRESIDENT OF SALT
17 HALL, Director, U.S. Fish and Wildlife) RIVER PIMA-MARICOPA
18 Service) INDIAN COMMUNITY

18 Defendants.)

19 I, Diane Enos, state and declare as follows:

20 1. I am the elected President of the Salt River Pima-Maricopa Indian
21 Community (the "SRPMIC").

22 2. The SRPMIC has participated in this litigation regarding the status of the
23 Desert Nesting Bald Eagle as an *amicus curiae*.

24 3. As explained in this declaration, the SRPMIC respectfully requests that
25 the Court modify its March 5, 2008 order and extend the current deadline for
26 completion of the pending status review to October 12, 2009, in order to allow the
27 SRPMIC adequate time to prepare and submit meaningful comments in support of
28 listing the Desert Nesting Bald Eagle as a distinct population segment under the

1 Endangered Species Act (“ESA”). Such extension is necessary to ensure that the
2 decision made by the United States Fish and Wildlife Service (“FWS”) is based on a
3 complete record and the best available evidence.

4 **INTEREST AND PARTICIPATION OF THE SRPMIC**

5 4. The SRPMIC is located near the City of Scottsdale, Arizona. The
6 SRPMIC and the other of the Four Tribes of Arizona (the “Four Tribes”) possessed
7 aboriginal territory of 3.8 million acres of South Central Arizona as adjudicated in
8 1970 by the U.S. Indian Claims Commission, Docket 228. The Four Tribes consisting
9 of the SRPMIC, the Gila River Indian Community, the Ak-Chin Indian Community,
10 and the Tohono O’Odham Nation, share languages, history, cultures, and religious
11 beliefs. The SRPMIC consists of a confederation of the O’Odham and the Piipash
12 people, which are two distinct cultures with unique histories and languages.

13 5. The Desert Nesting Bald Eagle and its habitat are deeply intertwined with
14 O’Odham and Piipash traditional beliefs regarding cultural origins, cultural history,
15 and the nature of the world. They play a significant role in the development and
16 continuance of O’Odham and Piipash history, culture, religion, and way of life. The
17 Eagle and its habitat are prominently featured in both creation stories and song culture
18 for both tribes. The Eagle and its habitat are considered holy and vital to the
19 continuation of our way of life to both the O’Odham and Piipash people.

20 6. The SRPMIC has designated the habitat of the Arizona Desert Bald Eagle
21 within our Reservation as part of a nature preserve.

22 7. On May 2nd, 2007, the SRPMIC Council passed Resolution
23 SR-2561-2007, which resolved that the SRPMIC “strongly opposes the removal of the
24 Bald Eagle from within the protections of the Endangered Species Act through
25 de-listing.”

26 8. On February 4, 2008, the SRPMIC filed an *amicus curiae* brief in this
27 litigation supporting the Plaintiffs’ motion for summary judgment and supporting the
28

1 Plaintiffs' position that the Desert Nesting Bald Eagle should remain listed under the
2 protections of the Endangered Species Act as a distinct population segment.

3 **NEED FOR ADDITIONAL TIME TO COMMENT**

4 9. On March 5, 2008, the Court ruled in favor of the Plaintiffs and SRPMIC
5 and ordered the United States Fish and Wildlife Service ("FWS") to conduct a status
6 review of the Desert Bald Eagle population pursuant to the ESA and issue its finding
7 no later than December 5, 2008.

8 10. On May 13, 2008, SRPMIC staff met with the United States Fish and
9 Wildlife Service ("FWS") in Phoenix, Arizona, to discuss the FWS process for
10 convening tribal consultations regarding the status review.

11 11. On June 10, 2008, the SRPMIC received a letter from FWS notifying it
12 of a multi-tribal meeting regarding the ESA status review on July 3, 2008, and stating
13 that the formal comment period for the status review would close July 7, 2008. It is
14 the SRPMIC's understanding that the July 7 comment deadline was based on the fact
15 that FWS requires approximately six months from the close of the applicable comment
16 period to prepare its final determination and obtain the necessary internal review at its
17 Washington D.C. office.

18 12. The SRPMIC objected that it would not have sufficient time to prepare
19 meaningful comments by July 7, 2008 and requested an extension of time.

20 13. The FWS declined to grant an official extension of the comment period,
21 citing the court-ordered deadline of December 5, 2008. For example, at the July 3
22 multi-tribe meeting, FWS representative Dr. Benjamin Tuggle stated: "I want to
23 apologize again for not being able to have more time. But once again, we are under a
24 court-mandated deadline, and this was the best schedule that we could put together."

25 14. The SRPMIC is currently developing comments in support of the listing
26 of the Desert Nesting Bald Eagle as a distinct population segment under the ESA.
27 These comments will support the scientific rationale for listing the Eagle as a distinct
28 population segment and may also provide evidence on issues such as the historical

1 abundance of the Eagle, the off-reservation threats to Eagle populations, and the lack
2 of sufficient regulatory mechanisms outside of the ESA to ensure protection of the
3 Eagle.

4 15. As stated above, the Desert Bald Eagle and its habitat are of critical
5 cultural importance to the SRPMIC. The SRPMIC has no interest in unnecessarily
6 delaying the court-ordered status review. However, at the same time, the SRPMIC
7 believes that providing additional time for the submission of information will benefit
8 the status review process and ensure that the final decision is made based on all of the
9 best available information and a complete record.

10 16. The SRPMIC understands the need for finality in this matter, but we
11 believe that it is critically important that the decision is made on a complete record and
12 with all available input from affected tribal communities such as the SRPMIC. A
13 complete administrative record will increase the likelihood that the FWS will
14 appropriately recognize the Desert Bald Eagle as a distinct population segment under
15 the ESA, benefiting the species over the long-term.

16 17. The SRPMIC requests that the Court extend its current December 5, 2008
17 deadline to October 12, 2009, to allow sufficient time for the SRPMIC, and other
18 interested tribal communities, to secure, organize, compile, finalize, and submit their
19 comments relevant to the ongoing status review.

20 I declare under penalty of perjury under the laws of the United States of
21 America that the foregoing is true and correct.

22 Executed this 25th day of AUGUST 2008 at Scottsdale, Arizona.

23
24 
25 Diane Enos, President

26 T:\WPDOCS\0319\10097\Decl_President Enos082008_01.doc
27 nmc:8/20/08
28



INTER TRIBAL COUNCIL of ARIZONA

RESOLUTION 0608

MEMBER TRIBES

AK-CHIN INDIAN COMMUNITY
COCOPAH TRIBE
COLORADO RIVER INDIAN TRIBES
FORT McDOWELL YAVAPAI NATION
FORT MOJAVE TRIBE
GILA RIVER INDIAN COMMUNITY
HAVASUPAI TRIBE
HOPI TRIBE
HUALAPAI TRIBE
KAIBAB-PAIUTE TRIBE
PASCUA YAQUI TRIBE
PUEBLO OF ZUNI
QUECHAN TRIBE
SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY
SAN CARLOS APACHE TRIBE
TOHONO O'ODHAM NATION
TONTON APACHE TRIBE
WHITE MOUNTAIN APACHE TRIBE
YAVAPAI APACHE NATION
YAVAPAI PRESCOTT INDIAN TRIBE

Support for Extension of Time to Complete Status Review Regarding the Listing of the Desert-Nesting Bald Eagle Pursuant to the Endangered Species Act

- WHEREAS,** The Inter Tribal Council of Arizona ("ITCA"), an organization of twenty tribal governments in Arizona, provides a forum for tribal governments to advocate for national, regional and specific tribal concerns and to join in united action to address those concerns; and
- WHEREAS,** The member Tribes of the ITCA have the authority to act to further their collective interests as sovereign tribal governments; and
- WHEREAS,** On August 30, 2006, the US Fish and Wildlife Service ("USFWS") made a negative ruling on a petition to define the Desert-Nesting Bald Eagle as a distinct population segment ("DPS") and declined to list the Desert-Nesting Bald Eagle DPS as "endangered" pursuant to the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et. seq. ("ESA"); and
- WHEREAS,** On July 9, 2007, the USFWS announced its intent to remove the Bald Eagle as a listed species under the ESA, thereby eliminating the longstanding and critical protections for the Bald Eagle and its Habitat in Arizona and throughout the United States; and
- WHEREAS,** On July 19, 2007, the ITCA resolved that the Tribes in Arizona are opposed to the decision of the USFWS to de-list the Bald Eagle and remove it from the crucial protections of the ESA; and
- WHEREAS,** On March 5, 2008, the United States District Court for the District of Arizona enjoined the USFWS from removing the discrete and significant population of Desert-Nesting Bald Eagles from the threatened species list of the ESA and ordered the USFWS to conduct and complete a status review by December 5, 2008, to determine whether the Desert-Nesting Bald Eagle population is a DPS, and if so, whether the Desert-Nesting Bald Eagle DPS should be listed as endangered or threatened under the ESA; and
- WHEREAS,** The USFWS formal comment period for the court-ordered status review expired on July 7, 2008, and the USFWS has declined officially to extend the comment deadline based on the need to complete the status review prior to the court-ordered deadline of December 5, 2008; and
- WHEREAS,** Section 4(b) of the ESA requires that the Secretary shall make determinations regarding a species or its habitat based on the best scientific and commercial data available after conducting a status review of the species and after taking into account governmental efforts to protect the species within any area under its jurisdiction; and

- WHEREAS,** The President William Jefferson Clinton issued Executive Order 13175 dated November 6, 2000 directing Executive Agencies to institute an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications and the Secretary of Interior issued Secretarial Order 3206 dated June 5, 1997 clarifying the responsibilities of the component agencies, bureaus and offices of the Department of Interior and the Department of Commerce when actions taken under the authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights, including the proclamation of Five (5) Principles for effective intergovernmental consultation with Indian tribes; and
- WHEREAS,** The Desert Nesting Bald Eagle has considerable historic and continuing cultural and religious significance to Indian tribes in Arizona; and
- WHEREAS,** Certain member Tribes of the ITCA are preparing comments relating to the USFWS status review in support of the listing of the Desert-Nesting Bald Eagle as a DPS under the ESA, but additional time is necessary to complete these comments; and
- WHEREAS,** Allowing additional time for submission of information and comments prepared by member Tribes will benefit the status review process and ensure that the USFWS' decision is made based on all of the best available information and a complete record.

NOW THEREFORE BE IT RESOLVED THAT, The Tribes in Arizona re-affirm their opposition to the decision of the USFWS to de-list the Desert Nesting Bald Eagle and remove it from the crucial protections of the ESA, especially here in Arizona where increased pressures from development and water use has and will have profoundly adverse consequences for the fragile population of Desert-Nesting Bald Eagles and the continuous sustainability of their riparian habitat which is indispensable for the survival and continued recovery of this important bird; and

BE IT FURTHER RESOLVED THAT, The Tribes in Arizona believe that the pending USFWS status review regarding the Desert-Nesting Bald Eagle must be based on a complete and comprehensive administrative record that takes into account tribal cultural and religious considerations and perspectives, and is a process that affirms the spirit and intent of Executive Order 13175 and Secretarial Order 3206; and

BE IT FURTHER RESOLVED THAT, The Tribes in Arizona support an extension of the current December 5, 2008 deadline to an October 2009, for completion of the USFWS status review to allow member Tribes adequate time to prepare their comments and adequate time for USFWS to give meaningful consideration to those comments; and

BE IT FURTHER RESOLVED THAT, The President of ITCA shall forward the foregoing resolution to the Department of Interior and the USFWS, and to the District Court for the District of Arizona by such means and documents as may be legally appropriate to place this Resolution and the request by ITCA before the District Court and other institutions and agencies as deemed appropriate to support a six-month extension of the current court-ordered status review deadline.

CERTIFICATION

The foregoing resolution was presented and duly adopted at a meeting of the Inter Tribal Council of Arizona on August 8, 2008, where a quorum was present.



Shan Lewis
President, Inter Tribal Council of Arizona
Vice Chairman, Fort Mohave Indian Tribe

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CENTER FOR BIOLOGICAL DIVERSITY;) No. CV-07-038-PHX-MHM
and MARICOPA AUDUBON SOCIETY,)

Plaintiffs,)

vs.)

DECLARATION OF
JOE P. SPARKS

DIRK KEMPTHORNE, Secretary of Interior;)
U.S. Department of the Interior; and DALE)
HALL, Director, U.S. Fish and Wildlife)
Service)

Defendants.)

I, Joe P. Sparks, declare and state as follows:

1. I am an attorney licensed to practice in Arizona, Bar No. 002383. I have served as General Counsel *pro bono publico* for the 20-member Inter Tribal Council of Arizona since 1969. I have served since 1969 as an attorney for several federally recognized Indian tribes within the State of Arizona. I appeared as Counsel to file a brief *amicus curiae* for the San Carlos Apache Tribe, Tonto Apache and Yavapai-Apache Nation earlier in this proceeding.

2. Because of my long experience working with Arizona tribes, I have personal knowledge of compelling practical reasons why the pending status review

DECLARATION OF JOE P. SPARKS - 1

1 deadline for the U.S. Fish and Wildlife Service should be extended through at least
2 July 3, 2009.

3 3. Completion of the status review by December 5, 2008, will lead to the
4 Fish and Wildlife Service acting with incomplete vital scientific information known to
5 traditional American Indian people in Arizona. This information may be revealed by
6 the spoken word only by specific spiritual leaders. Among the many tribes, the
7 information concerning location, behavior and habitat of the Bald Eagle in Arizona is
8 restricted as to that which may be spoken to by a female spiritual leader and that which
9 may be addressed by only the appropriate male spiritual leader. In addition, certain
10 information may only be addressed during certain seasons of the solar year. As a
11 result, a full year is necessary under even ideal circumstances to obtain information
12 from knowledgeable people.

13 4. Official consultation with the United States Fish and Wildlife Service
14 occurred primarily on July 2 and 3, 2008, which means that it would be necessary to
15 extend the time through at least July 3, 2009 to complete the cycle.

16 5. It has already thundered in Arizona, *i.e.*, the thunderstorm season
17 began in June 2008. Thereafter certain matters cannot be discussed by appropriate
18 American Indian spiritual leaders until after the first frost, late in 2008. Certain other
19 aspects concerning the Bald Eagle can only be addressed within the period during
20 which the leaves of the cottonwood tree are the size of a mouse's ear and the time the
21 cottonwood seeds fly on the wind. The period following the flight of the cottonwood
22 seeds is a different period during which certain other matters may be addressed until
23 the first thunder of the summer rains is heard.

24 6. In addition, the male and female gender specific responsibilities of the
25 practices and knowledge concerning the Bald Eagle require that translators of the
26 correct gender be present at the time that the specific information appropriate to that
27 season can be conveyed by the spiritual leaders. This process cannot be completed by
28 December 5, 2008.

DECLARATION OF JOE P. SPARKS - 2

7. Due to the importance of providing a full body of information upon which to base the status review of the Bald Eagle in Arizona, and the centrality of information held by American Indian people in Arizona concerning the abundance and location of Bald Eagles in Arizona in the past, and subsequent population shifts and changes, additional time must be permitted to the U.S. Fish and Wildlife Service to complete the status review.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, as I have been taught, instructed, and authorized to reveal.

Executed this 15th day of August, 2008, at Scottsdale, Arizona.

~~Joe~~ P. Sparks

DECLARATION OF JOE P. SPARKS - 3



STATE OF ARIZONA

OFFICE OF THE GOVERNOR

1700 WEST WASHINGTON STREET, PHOENIX, AZ 85007

JANET NAPOLITANO
GOVERNOR

MAIN PHONE: 602-542-4331
FACSIMILE: 602-542-7601

August 13, 2008

Secretary Dirk Kempthorne
United States Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Dear Secretary Kempthorne:

I write this letter in support of the Inter Tribal Council of Arizona and Arizona's tribal leadership to request an extension of the comment period for the court ordered status review in the matter addressing whether the Arizona bald eagle population, also known as the Desert-Nesting Bald Eagle, is a distinct population qualifying for protection under the Endangered Species Act. The bald eagle holds special spiritual and cultural significance for Native Americans. Bald eagles in Arizona play a significant role in the cultural life ways and belief systems of the members of Arizona Tribes.

We understand that pursuant to the District Court's March 5, 2008 order, the U.S. Fish and Wildlife Service ("USFWS") must complete its status review of this matter by December 5, 2008. As part of this process, the USFWS solicited formal comments until July 7, 2008. We in Arizona believe that extending that comment period for a reasonable amount of time will allow the USFWS to make a complete record by including comments that will shed considerable light on this issue and thus make a decision based upon the best available information.

I thank you for your consideration of this request. Should you have questions, please contact Marnie Hodahkwen, my policy advisor for tribal affairs, at (602) 542-1442.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Janet Napolitano", written over a horizontal line.

Janet Napolitano
Governor