

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

FOREST GUARDIANS;	)	
CHIHUAHUAN DESERT CONSERVATION	)	Civ. No. 06-231 WJ/KBM
ALLIANCE;	)	
PUBLIC EMPLOYEES FOR	)	
ENVIRONMENTAL RESPONSIBILITY;	)	
NEW MEXICO AUDUBON COUNCIL;	)	
SIERRA CLUB; and	)	
SOUTHWEST ENVIRONMENTAL CENTER,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
UNITED STATES FISH AND WILDLIFE	)	
SERVICE,	)	
	)	
Defendant.	)	
	)	

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**FIRST AMENDED COMPLAINT**  
**FOR DECLARATORY AND INJUNCTIVE RELIEF**

**I. INTRODUCTION**

1. Pursuant to the Court’s Order of August 4, 2006, Plaintiffs file their First Amended Complaint in this action. This First Amended Complaint adds both additional plaintiffs and additional claims in response to Defendant, the U.S. Fish and Wildlife Service’s (“FWS”) Final Rule establishing a nonessential and experimental population of Northern Aplomado Falcons in New Mexico and Arizona published in the Federal Register on July 26, 2006. 71 Fed. Reg. 42298. This First Amended Complaint also adds additional claims arising from FWS’ preparation of an Environmental Assessment under the National Environmental Policy Act in connection with this final rule.

2. On March 27, 2006 the three original plaintiffs, Forest Guardians, Chihuahuan Desert Conservation Alliance (“CDCA”), and Public Employees for Environmental Responsibility (“PEER”), filed the original complaint in this action. In the original complaint these three plaintiffs sought declaratory and injunctive relief for violations by FWS of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* in connection with FWS’s failure to take action on Forest Guardians’, CDCA’s and PEER’s Petition to Revise the Critical Habitat Designation for the Endangered Northern Aplomado Falcon submitted to FWS on September 3, 2002.

3. The original complaint asserted that by failing to take any action on the Critical Habitat Petition for more than three years FWS had violated Section 4(b)(3)(D)(i) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(i), and Section 4(b)(3)(D)(ii) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(ii). The original complaint also asserted that FWS was unreasonably delaying and/or unlawfully withholding action on the Petition, in violation of the APA, 5 U.S.C. § 706(1). Forest Guardians, CDCA, and PEER preserve and restate these claims in this First Amended Complaint. Forest Guardians, CDCA and PEER continue to seek judicial relief under both the citizen suit provision of the ESA and the APA ordering FWS to make the required findings on the Petition immediately.

4. In this First Amended Complaint the three original plaintiffs, Forest Guardians, CDCA, and PEER are joined by three new plaintiffs, New Mexico Audubon Council, Sierra Club, and Southwest Environmental Center (“SWEC”). All six plaintiffs now challenge FWS’ Final Rule establishing a nonessential and experimental population of Northern Aplomado Falcons in New Mexico and Arizona published in the Federal

Register on July 26, 2006. 71 Fed. Reg. 42298. Plaintiffs allege this Final Rule violates Section 10(j) of the ESA, 16 U.S.C. § 1539(j), and the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* within the meaning of the APA, 5 U.S.C. § 706(2). Pursuant to the APA Plaintiffs seek declaratory and injunctive relief for these new violations of law.

## **II. JURISDICTION AND VENUE**

5. This Court has jurisdiction over this matter pursuant to 16 U.S.C. § 1540(g) (ESA citizen suit provision), 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1346(a)(2) (civil action against the United States), 28 U.S.C. §§ 2201-2202 (declaratory judgment and injunctive relief), and 5 U.S.C. §§ 702, 706 (APA).

6. For those claims brought pursuant to the ESA's citizen suit provision, in compliance with 16 U.S.C. § 1540(g)(2)(C), Plaintiffs furnished the Secretary of Interior and FWS with written notice of their violations of the ESA more than sixty days ago.

7. Venue is proper in this judicial district pursuant to 16 U.S.C. § 1540(g)(3)(A), as all or part of the violations of the ESA alleged occurred in the District of New Mexico, and 28 U.S.C. §1391(e) because this is an action against an agency of the United States, because a substantial part of the events and omissions giving rise to the claims occurred in New Mexico, and because several Plaintiff organizations reside in New Mexico.

8. There exists now between the parties an actual, justiciable controversy with the meaning of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

### **III. PARTIES**

9. Plaintiff FOREST GUARDIANS is a New Mexico non-profit corporation with its principal office in Santa Fe, New Mexico. Forest Guardians has approximately 1,650 members, the majority of whom reside in New Mexico and Arizona. Forest Guardians' mission is to defend and restore the wildlands and wildlife of the greater American Southwest through fundamental reform of public policies and practices. Two of Forest Guardians' main endeavors are its Endangered Species Program and its Deserts and Grasslands Program. Forest Guardians has directed substantial resources toward the conservation of the Northern Aplomado Falcon (hereinafter "Falcon"). In addition to submitting the extensive petition to revise the Falcon's critical habitat designation, Forest Guardians has challenged specific threats to Falcons and their habitat. For example, Forest Guardians has challenged the U.S. Bureau of Land Management's (BLM) leasing of over 200,000 acres in New Mexico for oil and gas development, in part, because this land possesses habitat suitable for Falcons. In addition, since 2002 Forest Guardians has actively promoted full endangered species status for the Falcon, as opposed to an experimental, non-essential designation in New Mexico and Arizona, which waives Falcon habitat protections. Forest Guardians testified at the FWS hearing in Socorro, New Mexico on the need to protect Falcon habitat and the illegality of a non-essential experimental designation in February 2003, and at both the Albuquerque and Las Cruces FWS hearings held on this issue in October 2005. Forest Guardians submitted timely technical comments to FWS on its Falcon ESA Section 10(j) proposal in November 2005. Forest Guardians has continually reminded FWS of the need to preserve ESA protection for wild Falcons in New Mexico. Members of Forest Guardians frequently use and enjoy

the deserts and grasslands of the Southwest, including the areas proposed for consideration as critical habitat or within the current range of the Falcon, for wildlife viewing, recreational, aesthetic, and scientific activities and will continue to do so. Forest Guardians' members are particularly concerned with the conservation of the Falcon and the native ecosystems on which it depends for survival. Forest Guardians, its staff, and its members have a substantial interest in this matter and are adversely affected and aggrieved by Defendant's failure to comply with the ESA, NEPA, and the APA. Forest Guardians brings this action on behalf of itself and its adversely affected members. The requested relief will redress Forest Guardians' and its members' injuries.

10. Plaintiff CHIHUAHUAN DESERT CONSERVATION ALLIANCE (CDCA) was founded in 1986 as the Carlsbad Concerned Citizens for Responsible Land Management. The name was changed to CDCA in 1995. CDCA has approximately 200 members who reside in about seven or eight states. Most of CDCA's members live in southern New Mexico. CDCA is actively involved in environmental issues relating to the Chihuahuan Desert. CDCA engages in a wide variety of activities, including outdoor and public education, tree-planting and soil conservation projects, construction of nesting platforms for herons, monitoring of wild populations of birds and other animals, bird-banding activities, and other conservation activities. CDCA also gets involved in various environmental and environmental justice issues, many of which are related to the Chihuahuan Desert. Members of CDCA frequently use and enjoy the deserts and grasslands of the Southwest, including the areas proposed for consideration as critical habitat for the Falcon, for wildlife viewing, recreational, aesthetic, and scientific activities and will continue to do so. CDCA's members are particularly concerned with

the conservation of the Falcon and the native ecosystems on which it depends for survival. CDCA and its members have a substantial interest in this matter and are adversely affected and aggrieved by the Defendant's failure to comply with the ESA, NEPA and the APA. Plaintiff CDCA brings this action on behalf of itself and its adversely affected members. The requested relief will redress CDCA's and its members' injuries.

11. Plaintiff, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (PEER) represents public employees who are working to protect, preserve and restore native ecosystems in the southwestern United States. Thus, any local, state or federal actions, or inactions, that interferes with recovery of threatened or endangered species or their habitat undermines the work and employment of PEER members. PEER has approximately 300-400 members who reside in the American Southwest, including southern New Mexico. PEER's members are particularly concerned about the protection and recovery of the Northern Aplomado Falcon because of its importance to native southwestern ecosystems. Members of PEER frequently use and enjoy the deserts and grasslands of the Southwest, including the areas proposed for consideration as critical habitat for the Falcon, for wildlife viewing, recreational, aesthetic, and scientific activities and will continue to do so. PEER and its members have a substantial interest in this matter and are adversely affected and aggrieved by the Defendant's failure to comply with the ESA, NEPA and the APA. Plaintiff PEER brings this action on behalf of itself and its adversely affected members. The requested relief will redress PEER's and its members' injuries.

12. Plaintiff NEW MEXICO AUDUBON COUNCIL is a not-for-profit corporation organized under the laws of New Mexico, consisting of four autonomous local chapters of the National Audubon Society in New Mexico. The Council represents over 4,000 members in New Mexico that are dedicated to conserving and restoring natural ecosystems, focusing on birds, other wildlife and their habitats for the benefit of humanity and the Earth's biological diversity. The Council is active in the management of natural resources at the local, state, and federal level through education and participatory activities including commenting on governmental and private actions, providing ecologically-based alternatives to damaging proposals, filing administrative appeals of federal actions, and filing lawsuits when necessary to protect public resources. The New Mexico Audubon Council has strong concerns for the vitality of the Chihuahuan grassland ecosystem, and particularly habitat conservation and restoration; and with the actions of federal agencies that may have a negative effect on that habitat and the survival of obligate species to that habitat, such as the Northern Aplomado Falcon. Members of the New Mexico Audubon Council and the Council itself have participated in public meetings, agency proceedings, and other matters relating to the Chihuahuan desert ecosystem broadly, and the survival and recovery of the Falcon specifically. The New Mexico Audubon Council has commented upon a number of federal actions affecting the Chihuahuan desert ecosystem and its dependent species, such as the Falcon and projects proposed or undertaken by the U.S. Bureau of Land Management and FWS including the proposal to open the area known as Otero Mesa to expanded oil and gas development, the proposal to release Northern Aplomado Falcons in Arizona and New Mexico under Section 10(j) of the ESA, and others. Members of the

New Mexico Audubon Council frequently use and enjoy the Chihuahuan desert grasslands and shrublands for recreational, scientific, aesthetic, spiritual, commercial and other purposes. Council members regularly hike in the desert, take photographs, birdwatch, and otherwise enjoy these lands. New Mexico Audubon Council members derive recreational, scientific, aesthetic, spiritual, and commercial benefits from the existence in the wild of native Northern Aplomado Falcons, as well as other wildlife species through observation, study, photography, and other pursuits. Members of the Council are primarily interested in observing the native Northern Aplomado Falcon population that has re-colonized New Mexico in the last decade and a half; captive-bred birds that are released are little more to members of the New Mexico Audubon Council than zoo specimens. Council members have frequently visited the Chihuahuan desert to observe its native plant and animal life for many personal and professional reasons, including the sheer aesthetic joy of observing these creatures in their native habitat. Council members have a deep concern for the dwindling numbers of many such species and their habitat. Members of the New Mexico Audubon will certainly continue visiting the Chihuahuan desert regularly, at least several times a year, for the foreseeable future for purposes of observing wildlife and habitat conditions, for recreational and aesthetic reasons, and to observe the Northern Aplomado Falcon population that has re-colonized southern New Mexico. The destruction of Chihuahuan desert habitat critical to the survival of the Falcon is of profound concern to members of the New Mexico Audubon Council. Members of the New Mexico Audubon Council have seen photographs, read reports and published scientific papers, and heard stories from agency and independent biologists, all documenting the re-colonization of Southern New Mexico by the Northern



Aplomado Falcon. The prospect that this Falcon population will lose its protections under the ESA harms the interests of the Council and its members. The Council and its members have a substantial interest in this matter and are adversely affected and aggrieved by the Defendant's failure to comply with the ESA, NEPA and the APA. Plaintiff New Mexico Audubon Council brings this action on behalf of itself and its adversely affected members. The requested relief will redress the Council's and its members' injuries.

13. Plaintiff SIERRA CLUB was founded in 1892 and is the nation's oldest grass-roots environmental organization. The Sierra Club has more than 770,000 members nationwide, including over 8,000 members in New Mexico. The Sierra Club is dedicated to the protection and preservation of the natural and human environment, including protecting endangered wildlife. The Sierra Club's purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments. One of the Sierra Club's national priorities is the protection of wildlife, including but not limited to protecting species from extinction. The Sierra Club has members in New Mexico whose recreational, aesthetic business and/or environmental interests have been, are being, and will be adversely affected by Defendant's actions as set forth herein. Members of the Sierra Club use and enjoy the deserts and grasslands of the Southwest, including the areas proposed for consideration as critical habitat for the Aplomado Falcon, for outdoor recreation and scientific study of various kinds, including nature study, falcon-watching, photograph, backpacking, camping, solitude, and a variety of other activities. Sierra Club

members have an aesthetic interest in protecting the Falcon, because members enjoy observing Falcons while doing the above described recreational activities. Sierra Club and its members have a substantial interest in this matter and are adversely affected and aggrieved by the Defendant's failure to comply with the ESA, NEPA and the APA. Plaintiff Sierra Club brings this action on behalf of itself and its adversely affected members. The requested relief will redress Sierra Club's and its members' injuries.

14. Plaintiff SOUTHWEST ENVIRONMENTAL CENTER (SWEC) is a New Mexico non-profit corporation with its principal office in Las Cruces, New Mexico. SWEC has approximately 1,000 members, the majority of whom reside in New Mexico. SWEC's mission is to protect and restore native wildlife and their habitats in the Southwestern boarderlands through education, advocacy and restoration projects. As part of its Desert Lands and Wildlife Program, SWEC has actively worked to protect and restore Aplomado Falcons within the historic range of the species. For instance, SWEC has challenged BLM leasing, for oil and gas development, over 200,000 acres in New Mexico that possess suitable Aplomado Falcon habitat. SWEC also testified at the FWS hearing in Las Cruces, New Mexico held on this issue in October 2005. SWEC has also offered educational programs to the public about the Aplomado Falcon issue. Members of SWEC frequently sue and enjoy the deserts and grasslands of the Southwest, including the areas proposed for consideration as critical habitat or within the current range of the Aplomado Falcon, for wildlife viewing, recreational, aesthetic, and scientific activities and will continue to do so. For example, SWEC offers three or four trips annually to its members and the public to Otero Mesa. SWEC's members are particularly concerned with the conservation of the Northern Aplomado Falcon and the native ecosystems on

which it depends for survival. SWEC, its staff, and its members have a substantial interest in this matter and are adversely affected and aggrieved by the Defendant's failure to comply with the ESA, NEPA, and APA. Plaintiff SWEC brings this action on behalf of itself and its adversely affected members. The requested relief will redress SWEC's and its members' injuries.

15. Defendant UNITED STATES FISH AND WILDLIFE SERVICE (FWS) is an agency of the United States within the Department of Interior. FWS is the agency responsible for reviewing and acting on petitions for revision of critical habitat for species such as the Northern Aplomado Falcon under the ESA. 16 U.S.C. § 1533(b)(3). FWS is also the federal agency responsible for the challenged actions under Section 10(j) of the ESA and NEPA. FWS is headquartered in Washington, D.C., but maintains a regional office directly responsible for the challenged decisions within this judicial district.

#### **IV. LEGAL BACKGROUND**

##### **A. THE ESA**

##### **1. Critical Habitat**

16. The ESA is designed to provide a program for the conservation of endangered or threatened species and the ecosystems or "critical habitat" upon which these species depend. See 16 U.S.C. § 1531(b).

17. The first step in the Act's system of protection requires FWS to officially "list" vanishing species as either "threatened" or "endangered" and to officially designate protected "critical habitat" for each listed threatened or endangered species. 16 U.S.C. § 1533. The Act's other substantial protections for species and their habitat all flow from

listing and critical habitat designation. The ESA does not provide any substantial protection for a species unless it is first “listed” under the terms of the Act. The species’ habitat must also be designated as “critical habitat” to receive important procedural and substantive protections provided by the ESA.

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

19. In reaching this listing decision, FWS is governed by five listing factors. 16 U.S.C. § 1533(a)(1)(A)-(E). If any of the five factors indicate the species is threatened or endangered FWS must list the species. Id. The five factors are:

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

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

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

Id. FWS must base its decision on whether or not to list a species solely on the basis of the best scientific and commercial data available. 16 U.S.C. § 1533(b)(1)(A).

20. “Concurrently” with listing a species as threatened or endangered, FWS must designate critical habitat for the species to the maximum extent prudent and

determinable. 16 U.S.C. § 1533(a)(3)(A)(i), see also 16 U.S.C. § 1533(b)(6)(C). FWS “may, from time-to-time thereafter as appropriate, revise such designation.” 16 U.S.C. § 1533(a)(3)(A)(ii). FWS must base its critical habitat determination on the best scientific data available and take into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. 16 U.S.C. § 1533(b)(2).

21. “Critical habitat” is defined as:

(i) the specific areas within the geographic area occupied by the species, at the time it is listed in accordance with the provisions of [the ESA] on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographic area occupied by the species at the time it is listed in accordance with the provisions of [the ESA], upon a determination by [FWS] that such areas are essential for the conservation of the species. 16 U.S.C. § 1532(5)(A).

22. The ESA defines “conservation” as the “use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided ... are no longer necessary.” 16 U.S.C. § 1532(3).

23. The ESA provides only two exceptions to the Secretary’s duty to designate critical habitat concurrently with listing a species: (1) where critical habitat is not “determinable,” or (2) where it would not be “prudent” to designate critical habitat. 16 U.S.C. § 1533(a)(3); see also 16 U.S.C. § 1533(b)(6)(C).

24. According to regulations published by FWS, critical habitat designation is considered “not determinable” only when either or both of the following exist: “(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or (ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.” 50 C.F.R. § 424.12(a)(2).

25. If FWS determines that critical habitat is “not determinable” it may extend the deadline for designating critical habitat for one year. 16 U.S.C. § 1533(b)(6)(C)(ii). However, at the close of that additional year, FWS must publish a final critical habitat regulation based on the data then available. Id.

26. According to regulations published by FWS, it may determine that a critical habitat designation for a species is “not prudent” only when: (1) the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or (2) designation of critical habitat would not be beneficial to the species. 50 C.F.R. § 424.12(a)(1).

27. Designation of critical habitat for listed species provides additional protection and benefits a species’ conservation because all federal agencies must consult with FWS to “insure that any action authorized, funded, or carried out by [federal agencies] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [its critical habitat].” 16 U.S.C. § 1536(a)(2) (emphasis added).

28. When Congress established the critical habitat designation process, it clearly articulated that the “not prudent” exception was to be used sparingly. “It is only in rare circumstances where the specification of critical habitat concurrently with the

listing would not be beneficial to the species.” H.R.Rep.No. 1625, 95<sup>th</sup> Cong., 2d Sess. 17, reprinted in 1978 U.S.C.C.A.N. 9453, 9467.

29. Any interested person can petition FWS to revise a critical habitat designation. 16 U.S.C. § 1533(b)(3)(D)(i). The ESA specifies mandatory deadlines for FWS to respond to petitions from the public for revisions of critical habitat designations. FWS must, to the maximum extent practicable, within ninety days of receiving such a petition, “make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted.” Id. In addition, FWS must, within twelve months after receiving such a petition “determine how [it] intends to proceed with the requested revision,” and “promptly publish notice of such decision in the Federal Register,” unless it has previously found that the petition failed to present substantial scientific information indicating that the revision may be warranted. 16 U.S.C. § 1533(b)(3)(D)(ii).

30. Outside of the ESA’s specific provisions providing for petitions to revise critical habitat designations, the APA provides a general right to petition FWS to designate critical habitat. See 5 U.S.C. § 553(e).

## **2. Experimental Populations**

31. The ESA authorizes FWS to “release a population of an endangered or threatened species outside the current range of such species” if FWS “determines that such release will further the conservation” of the species. 16 U.S.C. § 1539(j)(2)(A)(emphasis added).

32. The ESA defines an “experimental population” as a “population (including any offspring arising solely therefrom) [authorized by FWS for release under

16 U.S.C. § 1539(j)(2)] but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.” 16 U.S.C. § 1539(j)(1)(emphasis added).

33. Before authorizing the release of any experimental population FWS must identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of the endangered or threatened species. 16 U.S.C. § 1539(j)(2)(B).

34. Each individual member of an experimental population is treated as a threatened species under the ESA. 16 U.S.C. § 1539(j)(C). Except a non-essential experimental population is not entitled to Section 7 consultation under the Act unless it occurs in an area within the National Wildlife Refuge System or the National Park System. 16 U.S.C. § 1539(j)(C)(i). Section 10(j) also precludes critical habitat designation for any experimental population determined to be not essential to the continued existence of a species. 16 U.S.C. § 1539(j)(C)(ii). Accordingly, an essential experimental population is entitled to both Section 7 consultation and critical habitat designation, but a non-essential experimental population is not entitled to Section 7 consultation, unless it occurs on a National Wildlife Refuge or National Park, and is not entitled to critical habitat designation.

## **B. NEPA**

35. The National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, is our nation’s basic charter for the protection of our environment. It “contains ‘action forcing’ provisions to make sure that federal agencies act according to the letter and spirit of the Act.” 40 C.F.R. § 1500.1.



36. The Council on Environmental Quality (“CEQ”) was created under NEPA to promulgate regulations “to tell federal agencies what they must do to comply with the procedures and achieve goals” of NEPA. Id.

37. The fundamental purpose of NEPA is to improve the decision making of federal agencies by requiring an analysis of the environmental impacts of a proposed action and an exploration of alternatives to that action that would reduce or eliminate such impacts. The primary vehicle for such an analysis is an Environmental Impact Statement (“EIS”) prepared by the acting agency. 42 U.S.C. § 4332(2)(c).

38. An EIS is required for all federal actions that significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(c). An EIS must be prepared and circulated for public review and comment prior to any major federal action that may have a significant effect on the environment. Id. 40 C.F.R. §§ 1502.5, 1508.3. Federal actions include the adoption of “formal documents establishing an agency’s policies which will result in or substantially alter agency programs,” the adoption of “formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources,” and the adoption “of programs, such as a group of concerted actions to implement a specific policy or plan.” 40 C.F.R. §§ 1508.18(b)(1), (2), (3). There are several indicators of a significant action; one such indicator is whether the action “may adversely affect an endangered or threatened species or its habitat that has been determined to be critical” under the ESA. 40 C.F.R. § 1508.27(b)(9).

39. When a federal agency is not certain whether an EIS is required, it must prepare an Environmental Assessment (EA). 40 C.F.R. §§ 1501.3, 1501.4, 1508.9. If the

EA concludes that the proposed project will have no significant impact on the human environment, the agency may issue a Finding of No Significant Impact (FONSI), and proceed with the proposed action. If the agency concludes that there may be a significant effect, then it must prepare an EIS. 40 C.F.R. § 1501.4. By requiring agencies to prepare NEPA documents, Congress intended to help prevent or eliminate damage to the environment by focusing government and public attention on the environmental effects of a proposed agency action.

40. A key component of NEPA is the requirement to disclose the underlying purpose and need for the proposed action. 40 C.F.R. §§ 1502.10(d), 1502.13.

41. Once defined, the agency must also describe the “affected environment” of the proposed action. 40 C.F.R. § 1502.15.

42. Furthermore, NEPA and its implementing regulations require that when preparing an EA, agencies must take a hard look at the potential impacts of a project, and ensure that when a FONSI is made, the EA convincingly concludes that no significant impacts will occur in order to forego an EIS. An agency must supply a convincing statement of reasons why potential effects are insignificant. The agency’s statement of reasons is crucial to determining whether the agency took a “hard look” at the potential impacts of a project.

43. CEQ regulations implementing NEPA recognize that intelligent decision-making can only derive from high quality information. EAs must provide “evidence and analysis” to support a conclusion that a FONSI is appropriate or whether a full EIS is required. 40 C.F.R. § 1508.9. Information included in NEPA documents “must be of high quality. Accurate scientific analysis ... [is] essential to implementing NEPA.” 40

C.F.R. § 1500.1(b). Where an agency has outdated, insufficient, or no information on potential impacts, it must develop the information as part of the NEPA process.

44. In preparing an EIS, a federal agency must consider alternatives to the proposed action. 42 U.S.C. § 4332(2)(c)(iii). The identification and consideration of these alternatives is the “heart” of the NEPA process. NEPA regulations require federal agencies to “rigorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a).

45. NEPA and its implementing regulations require that federal agencies also take a “hard look” at measures to mitigate environmental impacts. Agencies are required to develop, discuss in detail, and identify the likely environmental consequences of proposed mitigation measures. 40 C.F.R. §§ 1508.25(b), 1502.14(f), 1502.16(h), 1505.2(c).

46. Furthermore, a decision to proceed with a project must not be based on arbitrary assumptions about the success of mitigation measures or promises of proposed future action. Federal case law has made abundantly clear that a perfunctory description or mere listing of mitigation measures is insufficient to support a FONSI. Rather, mitigation measures must be sufficiently evaluated in order to enable the agency and the public to properly evaluate the severity of the adverse effects of a proposed project before making a final decision.

47. The CEQ’s implementing regulations provide that federal agencies must consider cumulative impacts in determining the scope of an EIS. 40 C.F.R. § 1508.25(c)(3).

48. Cumulative impacts are impacts on the environment which result from a combination of the incremental impact of the proposed action, and other past, present, and reasonably foreseeable future actions whether taken by the federal government or others. 40 C.F.R. § 1508.7.

49. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. Id.

50. In determining the scope of an EIS, agencies shall consider cumulative actions that have cumulatively significant impacts when viewed with other proposed actions. See 40 C.F.R. § 1508.25(c)(3).

## **V. FACTS GIVING RISE TO PLAINTIFFS' CLAIMS**

51. The Northern Aplomado Falcon (“Falcon”) is a medium-sized, colorful raptor endemic to regions of the southwestern United States and Mexico.



Aplomado Falcon photo by Dean Keddy-Hector.

52. Historically, the Falcon ranged across southeastern Arizona, southern New Mexico, southern Texas, much of Mexico, and the western coast of Guatemala. The Falcon was considered locally common within its U.S. range until about 1930. However, largely as a result of DDT poisoning and habitat destruction, the Falcon population in the U.S. declined dramatically. By 1952, there was only one active nest site documented in the United States, in southwestern New Mexico.

53. The Northern Aplomado Falcon inhabits prairies and desert grasslands with scattered yuccas and other woody vegetation. It does not build its own nests, but uses nests of other birds, typically in tall yuccas, mesquites, or crucifixion bushes.



Aplomado Falcon habitat on Otero Mesa, photo by Nicole Rosmarino.

54. FWS listed the Northern Aplomado Falcon as an endangered species on February 25, 1986. 51 Fed. Reg. 6686. Factors FWS cited as contributing to the need for the listing included destruction and modification of Falcon habitat due to brush encroachment on open rangelands caused by “severe overgrazing, suppression of range

fires, and other vegetative disturbances,” the failure of existing regulatory mechanisms to protect habitat for the falcon, and “continued use of persistent organochlorine pesticides within the range” of the Falcon, which cause eggshell thinning and nesting failure. Id.

55. When it listed the Aplomado Falcon as endangered, FWS chose not to designate any critical habitat. FWS stated only:

Section 4(a)(3) of the Act, as amended [16 U.S.C. § 1533(a)(3)] requires that, to the maximum extent prudent and determinable, the Secretary designate any habitat of a species that is considered to be critical habitat at the time the species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not prudent for the northern aplomado falcon at this time, because there are no known active nesting areas within the past 25 years in the United States. Critical habitat is not designated in areas outside U.S. jurisdiction (50 CFR 424.12(h)).

Id.

56. Between 1952 and 2002, with the exception of re-introduced Falcons in South Texas, Falcons were considered extirpated as a breeding species in the United States. Small breeding populations continued to exist in Northern and Eastern Mexico. However, between 1952 and 2002 Falcons were sighted in Southern New Mexico and elsewhere in their historic range in the United States.

57. In 2000, a pair of Aplomado Falcons was observed near Deming, New Mexico. This pair attempted to nest unsuccessfully in both 2001 and early 2002. In late July or early August 2002, the pair successfully nested and produced three fledglings. Falcons have been continually observed in this area at least since 2000.

58. A pair of Falcons was observed on Otero Mesa in November 2001. Since 2001, Falcons have been sighted on seven occasions on Otero Mesa. These sightings have included pairs, adults, and young Falcons.

59. Falcons have been observed recently in New Mexico on at least the following occasions:

(a) On March 9, 2005, a female Falcon was observed for over an hour by Ray Meyer, a Falcon biologist, in Luna County, New Mexico. The bird was believed to be the resident female of the Luna territory. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(b) On March 21, 2005, a female Falcon was observed for over an hour by Ray Meyer, a Falcon biologist, in Luna County, New Mexico. The bird was believed to be the resident female of the Luna territory. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(c) On April 1, 2005, a female Falcon was observed for approximately a half hour by Ray Meyer, a Falcon biologist, in Luna County, New Mexico in the vicinity of the 2002 nest site. The bird was believed to be the resident female of the Luna territory. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(d) On April 7, 2005, a female Falcon was observed for approximately four hours by Ray Meyer, a Falcon biologist, in Luna County, New Mexico in the vicinity of the 2002 nest site. The bird was believed to be the resident female of the Luna territory and was observed defending a nest. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(e) On April 11, 2005, a female Falcon was observed for approximately two hours by Ray Meyer, a Falcon biologist, in Luna County, New Mexico in the vicinity of the 2002 nest site. The bird was believed to be the resident female of the Luna territory

and was observed defending the territory. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(f) On April 20, 2005, a Falcon believed to be female was observed for approximately an hour by Ray Meyer, a Falcon biologist, in Luna County, New Mexico. The bird was believed to be a resident of the Luna territory. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(g) On May 15, 2005, a Falcon believed to be female was observed for approximately two hours by Ray Meyer, a Falcon biologist, in Luna County, New Mexico. The bird was believed to be a resident of the Luna territory. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(h) On June 21, 2005, a Falcon was observed for approximately two hours by Ray Meyer, a Falcon biologist, in Luna County, New Mexico. The bird was believed to be a resident of the Luna territory. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(i) On August 11, 2005, two Falcons (and possibly a third) were observed by Matt Attencio and Ray Aguilar, BLM range conservationists, on State land on the Bennett Ranch on Otero Mesa. One bird was photographed. A written report of this observation was prepared. On information and belief, FWS has a copy of these photographs and report;

(j) On August 13, 2005, an unbanded Falcon, possibly female was observed by Ray Meyer, a Falcon biologist on the Bennett Ranch on Otero Mesa. This observation was recorded in a telephone conversation with a Mike Howard. On information and belief, FWS has a record of this observation;



(k) On August 27, 2005, a Falcon was observed by Doug Burkett and Laura Burkett on the White Sands Missile Range. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(l) On September 1, 2005, an adult Falcon, probably female was observed in Luna County, New Mexico in the Luna territory by Sandy Williams and Patricia Mehlhop of the New Mexico Game and Fish Department. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(m) On October 3, 2005, an unbanded Falcon probably female (and possibly a second Falcon) were observed on the McGregor Range, Otero Mesa by Ray Meyer, a Falcon biologist. The Falcon was photographed. A written report of this observation was prepared. On information and belief, FWS has copies of these photographs and report;

(n) On October 8, 2005, a Falcon was observed by James Christensen of the BLM in Texas, just south of the Otero County, New Mexico line, near Otero Mesa. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(o) On October 31, 2005, an adult Falcon was observed by Steve West, at the North edge of the Seven Rivers Waterfowl Management Area, North of Brantley Reservoir, Eddy County, New Mexico. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(p) On November 23, 2005, an adult Falcon was observed by J.R. Oldenettel in Luna County, New Mexico. The Falcon was photographed and videotaped. On information and belief, FWS has a record of this observation;

(q) On November 25, 2005, an adult Falcon was observed by M. J. Baumann and N.D. Pederson in Luna County, New Mexico. On information and belief, FWS has a record of this observation;

(r) On December 20, 2005, an unbanded adult Falcon, probably female, was observed for over an hour by Ray Meyer, a Falcon biologist, in the Luna County Falcon territory, Luna County, New Mexico. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(s) On December 28, 2005, an adult Falcon was observed and photographed by J.P. Batkin in Luna County, New Mexico. On information and belief, FWS has a record of this observation and photographs;

(t) On January 25, 2006, a Falcon was observed by Jennifer Frey, a New Mexico State University wildlife biologist and professor, on Otero Mesa, New Mexico. On information and belief, FWS has a record of this observation;

(u) On January 29, 2006, an unbanded adult female Falcon was observed for approximately forty-five minutes by Ray Meyer, a Falcon biologist, in Luna County, New Mexico. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(v) On February 25, 2006, a Falcon was observed by A.M. Craig, D. Danforth, and A. Moorhouse in Luna County, New Mexico. On information and belief, FWS has a record of this observation;

(w) On February 27, 2006, a Falcon was observed by R.E. Webster, A.M. Craig, N. Moore, Craig R. and A. Rowlett in Luna County, New Mexico. On information and belief, FWS has a record of this observation;

(x) On April 12, 2006, an unbanded subadult Falcon was observed for approximately forty-five minutes and photographed by Ross Rasmussen of GeoMarine, Inc., while conducting surveys for the Department of Defense, on Otero Mesa, New Mexico. On information and belief, FWS has a record of this observation and photographs;

(y) On May 24, 2006, a Falcon was observed for approximately 15 seconds on Otero Mesa by Ray Meyer, a Falcon biologist. A written report of this observation was prepared. On information and belief, FWS has a copy of this report;

(z) On May 25, 2006, a Falcon was observed for approximately 10 minutes in the Luna County, Falcon territory by Sandy Williams, a New Mexico Department of Fish and Game biologist. A written report of this observation was prepared. On information and belief, FWS has a copy of this report; and

(aa) On June 6, 2006, an adult Falcon was observed in the Luna County, Falcon territory by Ray Meyer, a Falcon biologist. A written report of this observation was prepared. On information and belief, FWS has a copy of this report.

60. The best available science now indicates that there is an Aplomado Falcon population spanning southern New Mexico and northern Chihuahua. Southern New Mexico is within the current range of the Aplomado Falcon. The Falcon territory in Luna County, at which three young Falcons were fledged by a wild Falcon pair in 2002, has been occupied from 2000-2006. The eighteen Falcon sightings in the Luna territory in 2005 – 2006 are a good sign that the territory has been regularly occupied since 2000 and the same adult female may be present. Scientists believe the increase in regular and frequent Falcon sightings cannot solely be attributed to increased survey efforts. It is

very difficult to detect Falcons in their native habitat. Most likely there are undetected wild Falcons in New Mexico.

61. On September 3, 2002, Plaintiffs, Forest Guardians, CDCA and PEER sent by U.S. registered mail to FWS their “Petition to the U.S. Fish and Wildlife Service to Revise the Critical Habitat Designation for the Northern Aplomado Falcon.” FWS received this Petition on September 9, 2002. The Petition requests that FWS revise the critical habitat designation for the Aplomado Falcon from zero – its current level – to an amount of habitat sufficient to conserve and protect the species. The Petition points out that the sole rationale offered in 1986 by FWS, to justify its refusal to designate any critical habitat at that time, was that there had been no known active nesting areas within the United States within the previous 25 years. With the successful Falcon nesting in 2002, increased observations of Falcons, and at least two additional recent attempts to nest, that assertion is no longer applicable. Because designation of critical habitat for the Aplomado Falcon is both “prudent” and “determinable,” such designation is required by ESA Sections 4(a)(3)(A), 4(b)(2), and 4(b)(6)(C). 16 U.S.C. §§ 1533(a)(3)(A), (b)(2), and (b)(6)(C).

62. FWS’s decision at the time it listed the Aplomado Falcon as endangered not to designate any critical habitat was not a failure to make a decision on critical habitat designation but rather a decision to designate critical habitat in the amount of zero.

63. FWS has not issued a determination on Plaintiffs’ critical habitat petition.

64. Rather than take action on Plaintiffs’ critical habitat petition, in response to a request from The Peregrine Fund and political pressure, FWS elected to pursue a strategy of establishing a non-essential experiment population of Falcons, covering the

entirety of the States of Arizona and New Mexico. FWS proposed such a rule on February 9, 2005, 70 Fed. Reg. 6819, and finalized the rule on July 26, 2006, 71 Fed. Reg. 42298. FWS prepared an EA pursuant to NEPA in connection with the proposed and final rule.

65. The experimental designation treats all Falcons occurring in New Mexico and Arizona as a threatened species rather than an endangered species. See 16 U.S.C. § 1539(j)(C). The “non-essential” designation removes ESA Section 7 consultation protects for Falcons in Arizona and New Mexico unless they occur in an area within the National Wildlife Refuge System or the National Park System. See 16 U.S.C. § 1539(j)(C)(i). The “non-essential” designation also precludes critical habitat designation in Arizona and New Mexico, but not Texas. See 16 U.S.C. § 1539(j)(C)(ii).

66. Falcons also currently exist in both South and West Texas. Falcons have been released on private lands under “safe harbor” agreements and on the Laguna Atascosa, Matagorda Island, and Aransas National Wildlife Refuges in Texas. Falcons released in Texas that exists on non-“safe harbor” lands or National Wildlife Refuges are entitled to the full protection of the ESA as endangered species, including ESA Section 7 consultation protections and the designation of critical habitat.

67. As early as 2002, FWS determined that the only option it would seriously consider for the release of Falcons in New Mexico was a non-essential experimental designation covering the entirety of the States of Arizona and New Mexico. On or about July 22, 2002, Dale Hall, Regional director of FWS and others attended a meeting at which it was decided that the ESA Section 10(j) designation for Arizona and New Mexico would not carve out sections of either State. It was also decided at this meeting,

that the 10(j) designation would not be contingent upon ongoing surveys which could locate Falcons in either State. The attendees at this meeting further determined how they wanted the NEPA document for the proposed action to turn out and worked the NEPA process in reverse to determine that the only acceptable alternative was an experimental non-essential designation covering both Arizona and New Mexico.

## **VI. CLAIMS FOR RELIEF**

### **First Claim For Relief (Violation of ESA Section 4(b)(3)(D)(i) Requirement to make a 90-day finding) (by Plaintiffs Forest Guardians, CDCA and PEER)**

68. Each and every allegation contained in the preceding paragraphs of this Complaint is incorporated herein by reference as if fully set forth herein.

69. Defendant FWS is in violation of Section 4(b)(3)(D)(i) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(i), and its implementing regulations, by failing to issue a 90-day finding on Plaintiffs' Petition to Revise the Critical Habitat Designation for the endangered Northern Aplomado Falcon received by FWS on September 9, 2002, and by failing to demonstrate that making such a finding within 90 days was impracticable.

70. The failure of FWS to make a finding as to whether the Petition presents substantial scientific information indicating that the revision may be warranted, as required by Section 4(b)(3)(D)(i) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(i), constitutes a violation of a non-discretionary duty within the meaning of the ESA's citizen suit provision.

**Second Claim for Relief  
(Violation of ESA Section 4(b)(3)(D)(ii) Requirement to make a 12-Month finding)  
(by Plaintiffs Forest Guardians, CDCA and PEER)**

71. Each and every allegation contained in the preceding paragraphs of this Complaint is incorporated herein by reference as if fully set forth herein.

72. Pursuant to § 4(b)(3)(D)(ii) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(ii), within 12 months after receiving a petition that is found under § 4(b)(3)(D)(i) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(i), to present substantial information indicating that the requested revision may be warranted, FWS is required to determine how it intends to proceed with the requested revision and to promptly publish notice of such intention in the Federal Register.

73. FWS did not make the required determination within 12 months after September 9, 2002, the date that the petition for revision was received by FWS. As of today, four years after September 9, 2002, FWS has still failed to make a determination regarding how it intends to proceed with the petition to revise critical habitat or publish notice of such intention in the Federal Register.

74. FWS's failure to make a determination as to how it intends to proceed with the requested revision of critical habitat, and to promptly publish notice of such intention in the Federal Register, constitutes an ongoing violation of § 4(b)(3)(D)(ii) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(ii). Defendant FWS is in violation of Section 4(b)(3)(D)(ii) of the ESA, and its implementing regulations, 50 C.F.R. § 424.14(b)(3), by failing to perform its mandatory act or duty of issuing a 12-month finding on Plaintiffs' Petition to Revise the Critical Habitat Designation for the endangered Northern Aplomado Falcon.

75. The failure of FWS to make a determination within 12 months as to how it intends to proceed with the requested revision of critical habitat and to promptly publish notice of such intention in the Federal Register as required by Section 4(b)(3)(D)(ii) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(ii), constitutes a violation of a non-discretionary duty within the meaning of the ESA's citizen suit provision.

**Third Claim for Relief  
(Unlawfully Withheld or Unreasonably Delayed Action in Violation of the APA, 5  
U.S.C. § 706(1) and (2))  
(by Plaintiffs Forest Guardians, CDCA and PEER)**

76. Each and every allegation contained in the preceding paragraphs of this Complaint is incorporated herein by reference as if fully set forth herein.

77. The failure of FWS to make a finding as to whether the Petition presents substantial scientific information indicating that the revision may be warranted, as required by § 4(b)(3)(D)(i) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(i), constitutes a violation of a non-discretionary duty.

78. The failure of FWS to make a determination within 12 months as to how it intends to proceed with the requested revision of critical habitat and to promptly publish notice of such intention in the Federal Register, as required by § 4(b)(3)(D)(ii) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(ii), constitutes a violation of a non-discretionary duty.

79. The failure of FWS to make any decision on Plaintiffs' September 2002 Petition to Revise Critical Habitat constitutes a violation of a non-discretionary duty.

80. The failure of FWS to take any action on Plaintiffs' September 2002 Petition also constitutes agency action unlawfully withheld or unreasonably delayed, and FWS's failure to take action is arbitrary and capricious, an abuse of discretion, and



otherwise not in accordance with law, in contravention of the APA, 5 U.S.C. §§ 706(1) and (2).

**Fourth Claim for Relief**  
**(Violation of ESA Section 10(j)(2)(A), 16 U.S.C. § 1539(j)(2)(A) and**  
**APA, 5 U.S.C. § 706(2))**  
**(by all Plaintiffs)**

81. Each and every allegation contained in the preceding paragraphs of this Complaint is incorporated herein by reference as if fully set forth herein.

82. Section 10(j)(2)(A) of the ESA, 16 U.S.C. § 1539(j)(2)(A), allows FWS to release an experimental population of an endangered species “outside the current range of such species” if FWS determines that such release will further the conservation of the species.

83. The current range of the Northern Aplomado Falcon, a listed endangered species, includes Southern New Mexico and Northern Chihuahua, Mexico. FWS’ final rule authorizing an experimental population of Falcons in New Mexico and Arizona is inside the current range of the species and thus violates Section 10(j)(2)(A) of the ESA, 16 U.S.C. § 1539(j)(2)(A), and is therefore arbitrary, capricious, an abuse of discretion and contrary to law in violation of the APA, 5 U.S.C. §§ 551 *et seq.*, and is subject to judicial review thereunder.

**Fifth Claim for Relief**  
**(Violation of ESA Section 10(j)(1), 16 U.S.C. § 1539(j)(1) and**  
**APA, 5 U.S.C. § 706(2))**  
**(by all Plaintiffs)**

84. Each and every allegation contained in the preceding paragraphs of this Complaint is incorporated herein by reference as if fully set forth herein.

85. Section 10(j)(1) of the ESA, 16 U.S.C. § 1539(j)(1), defines an “experimental population” of an endangered species as one authorized for release by FWS outside the current range of the species, but only “at such times as, the [experimental] population is wholly separate geographically from nonexperimental populations of the same species.”

86. Non-experimental populations of endangered Northern Aplomado Falcons exist in Northern Chihuahua Mexico, extending into Southern New Mexico, and in West Texas, entering Southeastern New Mexico. These non-experimental populations are not wholly separate geographically from FWS’ experimental population of Falcons in New Mexico and Arizona. FWS’ final rule authorizing an experimental population of Falcons in New Mexico and Arizona that is not wholly separate geographically from non-experimental populations of the same species thus violates Section 10(j)(1) of the ESA, 16 U.S.C. § 1539(j)(1), and is therefore arbitrary, capricious, an abuse of discretion and contrary to law in violation of the APA, 5 U.S.C. §§ 551 *et seq.*, and is subject to judicial review thereunder.

**Sixth Claim for Relief  
(Violation of ESA Section 10(j)(2)(B), 16 U.S.C. § 1539(j)(2)(B) and  
APA, 5 U.S.C. § 706(2))  
(by all Plaintiffs)**

87. Each and every allegation contained in the preceding paragraphs of this Complaint is incorporated herein by reference as if fully set forth herein.

88. Section 10(j)(2)(B) of the ESA, 16 U.S.C. § 1539(j)(2)(B), requires FWS to determine “on the basis of the best available information” whether or not an experimental population is essential to the continued existence of an endangered species.

89. In determining that the experimental population of Northern Aplomado Falcons authorized by FWS in Arizona and New Mexico was not essential to the continued existence of the species FWS did not use the best available information. FWS' final rule authorizing a non-essential experimental population of Falcons in New Mexico and Arizona without using the best available information thus violates Section 10(j)(2)(B) of the ESA, 16 U.S.C. § 1539(j)(2)(B), and is therefore arbitrary, capricious, an abuse of discretion and contrary to law in violation of the APA, 5 U.S.C. §§ 551 *et seq.*, and is subject to judicial review thereunder.

**Seventh Claim for Relief  
(Violation of NEPA, 42 U.S.C. §§ 4321 *et seq.*, and its implementing regulations,  
and APA, 5 U.S.C. § 706(2))  
(by all Plaintiffs)**

90. Each and every allegation contained in the preceding paragraphs of this Complaint is incorporated herein by reference as if fully set forth herein.

91. The outcome of FWS' NEPA analysis of its rule to release an experimental, non-essential population of Northern Aplomado Falcons in Arizona and New Mexico was predetermined in 2002. FWS' action is a major federal action and will significantly affect the human environment within the meaning of NEPA, 42 U.S.C. §§ 4321 *et seq.*, and its implementing regulations, 40 C.F.R. §§ 1500 *et seq.*. FWS' action will adversely affect naturally occurring endangered Falcons. See 40 C.F.R. § 1508.27(b)(9). FWS did not prepare an EIS in violation of NEPA. 42 U.S.C. § 4332(2)(C), 40 C.F.R. §§ 1502.5, 1508.3. FWS failed to honestly identify the purpose and need for its action, failed to adequately describe the affected environment, and failed to take a "hard look" the impacts of its action, including the foreclosure of critical habitat designation for Falcons in Arizona and New Mexico, the waiver of ESA Section 7

consultation provisions, and impacts on wild Falcons, in violation of NEPA. 40 C.F.R. §§ 1502.10(d), 1502.13, 1502.15. FWS' NEPA analysis also failed to use the best available scientific information in violation of NEPA. 40 C.F.R. § 1500.1(b). FWS failed to honestly and adequately consider a range of reasonable alternatives to the proposed action, including designating less than all of Arizona and New Mexico for inclusion in the experimental population area and designating the experimental population as essential, in violation of NEPA. 42 U.S.C. § 4332(2)(c)(iii), 40 C.F.R. § 1502.14(a). FWS further failed to adequately discuss how proposed mitigation measures will reduce the environmental impacts of the final rule in violation of NEPA. 40 C.F.R. §§ 1508.25(b), 1502.14(f), 1502.6(h), 1505.2(c). Finally, FWS failed to adequately analyze the cumulative impacts of its plan in violation of NEPA. 40 C.F.R. §§ 1508.25(c)(3), 1508.7.

92. FWS' actions in failing to comply with NEPA and its implementing regulations are arbitrary, capricious, an abuse of discretion and contrary to law in violation of the APA, 5 U.S.C. §§ 551 *et seq.*, and are subject to judicial review thereunder.

## **VII. PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

(1) Order, declare, and adjudge that FWS has violated the ESA in failing to make a 90-day finding in response to Plaintiffs' Petition to Revise Critical Habitat;

(2) Order, declare, and adjudge that FWS has separately violated the ESA in failing to make a 12-month finding in response to Plaintiffs' Petition to Revise Critical Habitat;

(3) Order, declare, and adjudge that FWS has violated the APA in failing to make a decision or take any action on Plaintiffs' Petition to Revise Critical Habitat;

(4) In the alternative, order, declare, and adjudge that FWS has unreasonably delayed and/or unlawfully withheld the Petition findings and otherwise failed to act, in violation of the ESA and APA, by its failure to make 90-day and 12-month findings and/or its failure to make a decision in response to Plaintiffs' Petition to Revise Critical Habitat;

(5) Compel FWS to publish the 90-day and 12-month findings, and/or make a decision on Plaintiffs' Petition, and issue a preliminary and permanent injunction, or other similar judicial relief requiring FWS either to make a decision on Plaintiffs' Petition or to issue a 90-day finding on Plaintiffs' Petition within 30-days of the Court order. Further, if the 90-day finding concludes that the Petition presents substantial scientific information indicating that the revision may be warranted, require FWS to issue a 12-month finding on Plaintiffs' Petition within 30 days thereafter, and promptly publish such findings in the Federal Register;

(6) Enjoin FWS from issuing any "not likely to adversely affect" concurrences or findings under Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), on any action which may affect the Northern Aplomado Falcon until FWS rules on the Critical Habitat Petition;

(7) Order, declare, and adjudge that FWS' final rule authorizing an experimental non-essential population of Northern Aplomado Falcons in Arizona and New Mexico violates Section 10(j) of the ESA, 16 U.S.C. § 1539(j), and the APA;

(8) Order, declare, and adjudge that FWS' final rule authorizing an experimental non-essential population of Northern Aplomado Falcons in Arizona and New Mexico violates NEPA and the APA;

(9) Enjoin FWS from implementing the final rule authorizing an experimental non-essential population of Northern Aplomado Falcons in Arizona and New Mexico until such time as FWS complies with all requirements of the ESA and NEPA;

(10) Enter such temporary, preliminary, or permanent injunctive relief as specifically prayed for by Plaintiffs hereinafter;

(11) Retain jurisdiction over this matter until such time as FWS has complied fully with the requirements of 16 U.S.C. § 1533(b)(3)(D) and the APA;

(12) Award Plaintiffs their costs of litigation, including reasonable expert witness fees and attorneys fees, pursuant to the citizen suit provision of the ESA, Equal Access to Justice Act, 28 U.S.C. § 2412, and/or any other applicable law; and

(13) Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Dated: September 11, 2006

Respectfully submitted,

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Counsel for Plaintiffs

**CERTIFICATE OF SERVICE**

I herby certify that on September 11, 2006 copies of PLAINTIFFS' FIRST AMENDED COMPLAINT were served by U.S. mail on the following counsel of record:

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