

THE NEED TO PRESERVE APLOMADO FALCON SAFEGUARDS: THE U.S. FISH AND WILDLIFE SERVICE'S PROPOSAL TO REINTRODUCE APLOMADO FALCONS AS NONESSENTIAL, EXPERIMENTAL IS TROJAN HORSE REINTRODUCTION



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On February 9, 2005, the U.S. Fish and Wildlife Service (FWS) published a proposed rule that provides for the reintroduction of up to 150 northern aplomado falcons annually for ten or more years into New Mexico under a non-essential experimental designation. Such a designation would remove nearly all Endangered Species Act protections for both wild falcons which currently exist in New Mexico, as well as reintroduced falcons and their progeny.

While Forest Guardians does not oppose reintroduction of falcons, we oppose stripping away their Endangered Species Act protections under a nonessential, experimental designation. We have encouraged FWS for the past three years to adopt a cautious approach on this reintroduction so that it does not come at the expense of the wild falcon population which exists in southern New Mexico. Our message of precaution has been resolutely ignored.

Why Forest Guardians Opposes the Falcon Reintroduction Proposal Design

Reason 1: There are already wild falcons in New Mexico.

These falcons successfully bred in the wild (near Hachita) in 2002. Falcons have been detected in this area every year from 2000-2004. These birds should be considered a "population," especially when considering their proximity to falcons detected along the New Mexico/Mexico border and in northern Chihuahua. In addition, a falcon pair was observed on Otero Mesa in November 2001, and two falcons were spotted on Otero Mesa in August 2005. Also in August 2005, a juvenile falcon was seen on White Sands Missile Range. Falcon surveys have been inadequate across the bird's range, and further surveys may lead to more detection of falcons. The nonessential experimental designation would include both wild and reintroduced falcons and would therefore deny vital Endangered Species Act safeguards to these wild falcons.

Reason 2: The primary cause of the falcon's imperilment is habitat destruction, yet the proposal would undercut legally enforceable habitat protections.

Under the nonessential, experimental designation, falcons would have no Endangered Species Act protection from lawful land management activities (such as oil and gas, military operations, livestock grazing, recreation, etc.) on either private or public land even if such activities were resulting in take of falcons (including death, impaired breeding) and destruction of their habitat. Federal agencies will not have to ensure that their actions will not jeopardize the survival of falcons.¹

On the ground implications include:

- The Bureau of Land Management (BLM) would no longer need to consult on the impacts of its oil and gas program (including leasing, drilling permitting, authorization of pipelines and other infrastructure) on falcon habitat – including Otero Mesa – throughout New Mexico, although oil and gas has been cited by the Fish and Wildlife Service and BLM as a significant threat to falcons and their habitat.
- Neither the BLM nor the U.S. Forest Service would need to consult on the impacts of livestock grazing on falcons, although livestock grazing is a significant threat to the falcon, given their contribution to brush encroachment and prey base depletion. If the experimental, non-essential proposal is finalized, grazing permittees will have decreased incentive to work with federal land managers to ensure falcon survival and recovery.
- The Department of Defense would no longer need to consult on the impacts of military operations – including overflights and bombing – on falcons on White Sands Missile Range, Fort Bliss, or McGregor Range, despite the biological threat posed to falcons from these activities.
- The Environmental Protection Agency would no longer need to consult on the impacts of pesticides on the aplomado falcon, although pesticides are believed to be one of the factors leading to the falcon's imperilment.

In terms of direct take (killing, harassment, etc.) of falcons, birds within the experimental population area would be treated as threatened under the Endangered Species Act, and the proposed rule includes a special 4(d) rule provides for incidental take of falcons in the course of lawful activities. Intentional take of falcons – for example, shooting – would remain illegal.

Reason 3: This proposal substitutes political expedience for biological wisdom.

The reintroduction proposal is aimed at paving the way for oil and gas drilling on Otero Mesa, which includes valuable falcon habitat. In addition, as we discuss below, FWS wants to avoid designating critical habitat for the falcon, an issue which is currently in

¹There would still be a duty of federal agencies to consult on impacts to falcons on National Park Service and National Wildlife Refuge. However, this consultation will likely add little to the overall conservation of falcons given the lack of suitable falcon habitat managed under these two jurisdictions within New Mexico.

litigation. Also, just over the past two years, BLM has leased over 110,000 acres of falcon habitat to oil and gas drilling.

Ironically, the falcon reintroduction proposal was released on the same day that the Union of Concerned Scientists and Public Employees for Environmental Responsibility issued a press release on survey results entitled “Politics Trumps Science at U.S. Fish & Wildlife Service: Survey Reveals Inappropriate Orders to Alter Scientific Findings, Decisions,” which documents hundreds of FWS biologists currently under pressure to substitute political expedience for sound biology.²

The UCS/PEER report shows that scientists within the southwestern region of FWS (NM, AZ, TX and OK) are under particularly strong pressure, with a higher percentage (29%) of biologists in this region than any other in the nation reporting that they have been “directed to inappropriately exclude or alter technical information from a USFWS scientific document.” In addition, some 41% of the agency’s scientists – again, more than in any other region – reported that FWS did not “routinely provide complete and accurate information to the public on ESA issues.” A shocking 95% of responding scientists in the southwest region stated that they do not regard FWS as acting effectively to recover listed species.

The draft EA released in conjunction with the aplomado nonessential proposal is a striking case in point of the substitution of biology with political expedience. Forest Guardians received an electronic version of the draft EA, which included FWS’s editing comments. These comments revealed the deletion of important statements pertaining to consequences of the proposal, including that the proposal would 1) result in the termination of existing habitat protections for falcons on federal land; 2) preclude the designation of critical habitat for the falcon; and 3) fail to safeguard increasingly degraded, fragmented, and endangered Chihuahuan desert grasslands.

Reason 4: The proposal will forego the possibility of using public lands as a flagship in falcon recovery.

The rule notes that “There is a vast amount of public land in New Mexico and Arizona (about 40 percent in the proposed reintroduction area). Therefore, the public land will be very important for recovery of the falcon in this area. Not only is the public land important because of its high percentage in the NEPA [Nonessential Experimental Population Area]... but it is important because of its habitat characteristics... The historic range in the NEP [Nonessential Experimental Population] area is Chihuahuan desert grassland, and public lands make up a higher percentage of the Chihuahuan desert grassland than does private land” (p. 6822). Yet, the reintroduction rule will do away with Endangered Species Act provisions to safeguard this public land habitat. In the New Mexico context, there is a tremendous opportunity to use public lands as a flagship for falcon recovery, yet the reintroduction rule will undermine the Endangered Species Act’s ability to safeguard these public lands for the falcon.

²See report at: http://www.ucsusa.org/news/press_release.cfm?newsID=459.

Reason 5: The proposal would foreclose the opportunity to designate critical habitat for the falcon.

The proposed rule does not mention that, if this rule is finalized, no critical habitat can be designated within the experimental, non-essential population area. We believe a critical habitat designation is crucial for protecting the unoccupied (or not known to be occupied) habitat of the aplomado falcon and for relying on public lands to recover falcons. The proposed rule would eliminate the potential for such critical habitat designation in the future. A recently published article in *BioScience* shows that species with critical habitat designations are twice as likely to be recovering as those without critical habitat.³

Reason 6: The experimental population area is too broad.

Even if it were reasonable to reintroduce falcons into New Mexico under a nonessential, experimental designation, there is no defense for the extremely overbroad reintroduction area. The proposed experimental area – all of New Mexico and all of Arizona – greatly exceeds the historic range (see AZ and southern NM) of the falcon in these two states. Usually, experimental, non-essential population areas are drawn conservatively within the historic range of the species. The vast geographic extent of the area in the proposed rule, and the provision for FWS to translocate falcons which are detected outside of the experimental area back into the experimental area, is aimed at eliminating Endangered Species Act protections for the falcon across its range in the U.S. (when combined with Safe Harbor agreement for falcon reintroduction into Texas).

Reason 7: Repopulation of falcons to New Mexico and Arizona may occur without this reintroduction.

The proposed rule states that natural recolonization by falcons of Arizona and New Mexico would likely take decades. Yet, there has been an increase number of credible sightings in Arizona and New Mexico since the falcon's listing in 1986, and Meyer and Williams (2005) report 43 credible sightings just since 1990.⁴ Several biologists have noted the difficulty of detecting falcons in their rugged grassland terrain. FWS is presuming to know the extent of the falcon population in Arizona and New Mexico when, in reality, neither FWS, nor the respective land managing agencies have conducted regular, comprehensive surveys to detect falcons. It may be that the wild falcons detected southwest of Deming are just the tip of the iceberg in terms of the total existing wild falcon population in New Mexico. In recent years, the New Mexico Department of Game and Fish, BLM, and FWS itself have all described a natural repopulation of falcons into New Mexico as occurring (documents corroborating this available from Forest Guardians).

³M.F.J Taylor, K.F. Suckling, and J.J. Rachlinski. 2005. The Effectiveness of the Endangered Species Act: A Quantitative Analysis. *BioScience* 55(4):360-367.

⁴Meyer, Raymond A., and Sartor O. Williams III. 2005. "Recent nesting and current status of Aplomado Falcon (*Falco femoralis*) in New Mexico." *North American Birds* 59(2): 352-356.

The proposed rule reads: “If natural recolonization does occur in significant numbers, then we may amend this rule. However, we do not think this action will be necessary since any falcons that occur in the proposed NEP area will be considered part of the proposed NEP area and will be subject to the protective measures in place for the proposed NEP” (p. 6825). This is little reassurance, as falcons are provided with negligible protective measures in the experimental population area.