

**Synopsis of Proposed Rule to Reintroduce Northern Aplomado Falcons into NM  
Under a Non-Essential, Experimental Designation  
(Nicole Rosmarino, Forest Guardians, February 9, 2005: our  
comments in bold)**

Proposal published in Federal Register on February 9, 2005: 70 Fed. Reg. 6819-28.

Available on-line at:

<http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-2415.pdf>.

- Public hearing scheduled for March 15, 2005 at NMSU in Las Cruces
- Public comment accepted until April 11, 2005

Proposed rule. The proposed rule 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.

Geographic extent. The proposed rule would designate all of New Mexico and Arizona as a Nonessential Experimental Population area. If falcons move outside this vast area, they can be relocated back into the area. **This area greatly exceeds the historic range (se Arizona 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 is aimed at eliminating ESA protections for the falcon range-wide (when combined with Safe Harbor agreement for falcon reintroduction into Texas).**

Waiver of ESA consultation requirements. Within the Non-essential Experimental Population area, falcons would have no ESA 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 have no duty to consult (as provided under ESA Section 7(a)(2)) on the impacts of their activities on falcons, except where falcons occur on National Park Service and National Wildlife Refuge lands.<sup>1</sup>

- **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.**

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<sup>1</sup>Consultation on National Park Service and National Wildlife Refuge actions 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.

- **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. In addition, cattle violently shook the very soaptree yucca on which falcons were nesting southwest of Deming. Cattle impacts on yucca – including nest disturbance of this rare raptor – have been cited as a significant threat to falcons by BLM.**
- **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.**

The rule states: “We do not expect this rule to have any significant effect on recreational, agricultural, or development activities within the proposed NEP area because the proposed NEP designation provides no restrictions on most Federal...and all non-Federal actions that may affect falcons...” (p. 6826) and “We do not expect conflicts between falcon management and agricultural, oil and gas development, military, or recreational activities” (p. 6824), **despite acknowledgment by BLM and FWS in the past of biological impacts from all of these activities (except perhaps recreation) on falcons.** If such activities do harm falcon habitat, the proposal specifies that relevant government agencies can “work with the other agencies and stakeholders in an attempt to avoid such impacts” (p. 6824). **In other words, even if harms from these land uses are documented, no enforceable mechanisms are available to safeguard the falcons or their habitat.**

Lessened ESA protections against take. Falcons within the experimental population area would be treated as threatened under the ESA, and the proposed rule includes a special 4(d) rule which provides for incidental take of falcons in the course of lawful activities. Intentional take of falcons – for example, shooting – would remain illegal.

Impacts on wild population. Use of the non-essential, experimental designation requires that the reintroduced falcons and the reintroduction area be geographically separate from existing wild populations. The proposed rule addresses this issue by defining the wild falcons inhabiting New Mexico’s bootheel as not constituting a population. In addition, the proposed rule asserts that the reintroduction area (all of NM and AZ) is separated by a sufficient distance from Mexico and Texas populations to be geographically isolated, **even though falcons have been detected along the Mexico/New Mexico border (near Palomas) in the past several years, and falcons are being reintroduced birds into west Texas, approximately 80 miles from the New Mexico border (which is within falcon flying distance, the farthest flight distance recorded for northern aplomado falcons is 155 miles).**

**For the first time in 50 years, wild falcons bred successfully in New Mexico in 2002, when a pair was monitored southwest of Deming, in the state's bootheel. Falcons have been documented in this area every year from 2000-2004. In 2002, along with the pair and the three fledglings, at least 4 other falcons were sighted in the area. The proposed rule would eliminate almost all ESA protections for these falcons. Biologists have indicated that these NM falcons are part of a larger falcon metapopulation which includes northern Chihuahuan falcons.**

Pace of recolonization/extent of current wild population. The proposed rule states that natural recolonization by falcons of Arizona and New Mexico would likely take decades. **There has been an increase number of credible sightings in Arizona and New Mexico since the falcon's listing in 1986 (list of sightings available from Forest Guardians). 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 – primarily BLM, DOD, and USFS – 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 recolonization of falcons into New Mexico as occurring (documents corroborating this available from Forest Guardians). BLM has written that recolonization is underway as recently as 2003.**

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.**

The role of public lands 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 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 ESA 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 ESA's ability to safeguard these public lands for the falcon.**

**What the rule doesn't mention.**

- **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 know to be occupied) habitat of the aplomado falcon. The proposed rule would eliminate the potential for such critical habitat designation in the future. According to research (based on FWS data) by the Center for Biological Diversity, species with critical habitat are twice as likely to be recovering as those without critical habitat.**
- **The potential harms to wild falcons from genetic swamping (the captive-bred falcons came from southern Mexico breeding stock) or competition from reintroduced birds. The New Mexico Department of Game and Fish raised this issue with FWS several years ago.**

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