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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WISHTOYO FOUNDATION; ANTHONY PRIETO; LEIF BIERER; PHYSICIANS FOR SOCIAL RESPONSIBILITY; CENTER FOR BIOLOGICAL DIVERSITY; and NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiffs, v. **MICHAEL FLORES, as PRESIDENT, BOB HATTOY, as VICE PRESIDENT, JIM KELLOGG, as MEMBER, RICHARD ROGERS, as MEMBER, CINDY GUSTAFSON, as**	Case No. _____ **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** **ENVIRONMENTAL**

MEMBER, and JOHN CARLSON, JR., as EXECUTIVE DIRECTOR, OF THE CALIFORNIA FISH AND GAME COMMISSION; and RYAN BRODDRICK, as DIRECTOR OF THE CALIFORNIA DEPARTMENT OF FISH AND GAME,

Defendants.

INTRODUCTION

1. This lawsuit seeks to cure continuing harm, injury, and death to California condors (*Gymnogyps californianus*) ("California condor" or "condor"), a federally protected endangered species and one of the world's most imperiled birds, from lead poisoning. Condors are poisoned when they ingest fragments of lead ammunition in the animal carcasses on which they feed. The poisoning of California condors from lead ammunition is the predictable and documented consequence of actions by defendants, who issue regulations and licenses that permit hunters to use lead ammunition in condor habitat despite the availability of alternative ammunition that does not expose condors to lead. The use of lead ammunition within the condor's range threatens the species with extinction and renders them incapable of sustaining populations in the wild.

2. The California condor is one of the United States' most iconic species and is so closely identified with the State of California that its image is found on the California version of the U.S. quarter. The bird has been listed as "endangered" under the federal Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq*., since its enactment in 1973, and prior to that, under a predecessor statute, the Endangered Species Preservation Act, since 1967.

3. Despite its protected status, condor populations declined to such a low level that, by 1982, only twenty-two individuals remained in the wild. The last

free-flying bird was captured by 1987 and brought into a captive breeding program.

4. All condors remaining in the wild were placed into a captive breeding program because of the high risks the birds faced, particularly from lead poisoning.

5. Condors in the wild experience highly elevated blood-lead levels, and numerous instances of individual bird mortalities associated with lead poisoning have been recorded. Unequivocal evidence shows that lead ammunition causes lead poisoning.

6. As scavengers, condors encounter carcasses of animals that have been shot with lead ammunition. When lead ammunition hits an animal, it fragments and persists in the carcass. Condors are poisoned when they ingest the bullet fragments or lead-tainted meat.

7. Because of lead poisoning, free-flying condors must be captured repeatedly for blood tests, and often need to undergo an intrusive chemical therapy, known as chelation, to reduce dangerous blood-lead levels. Wild condors are regularly fed "clean" carcasses, with the hopes that they will not actively forage for carrion that might contain lead. However, notwithstanding these efforts, condors continue to perish because of lead poisoning, which remains the single greatest threat to their survival and recovery.

8. The ESA prohibits any person from causing the "take" of an

endangered species. 16 U.S.C. §§ 1532(19), 1538. The death, injury, and harm to California condors from lead poisoning constitute a prohibited "take" under the ESA and its implementing regulations.

9. The take of condors from the ingestion of lead ammunition is the direct result of actions by the defendants, who regulate hunting in California, but continue to permit the use of lead ammunition in condor habitat. By promulgating regulations and issuing hunting licenses that predictably result in the take of the endangered California condor, defendants are violating the ESA and jeopardizing the long-term survival of the species.

10. Action to protect the endangered California condor from lead ammunition poisoning is long overdue. Until and unless defendants act decisively to protect these extremely endangered birds, California condors will continue to be injured and killed by their exposure to lead ammunition.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 16 U.S.C. §§ 1540(c) and (g) (actions arising under the ESA). The relief sought is authorized by 28 U.S.C. § 2201 (declaratory relief) and § 2202 (further relief).

12. Venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) (a citizen suit may be brought in the District where the violation occurs) and 28

U.S.C. § 1391(b) (suit may be brought in the District where a substantial part of the activities that are the subject of the action are situated).

13. Pursuant to 16 U.S.C. § 1540(g), plaintiffs provided defendants and the Secretary of the Interior with sixty days' notice of the violations embodied in this complaint. See Attachment 1. The notice was received by all defendants on or before September 29, 2006. Defendants have not taken adequate action to remedy the violations of law set forth herein.

PARTIES

Plaintiffs

14. Plaintiff Wishtoyo Foundation ("Wishtoyo") is a not-for-profit, Native American organization with headquarters in Ventura, California. Wishtoyo represents traditional Chumash Native Americans to protect indigenous cultural and environmental values and practices. The Chumash people have lived for centuries in the condor's range along the California coast between Malibu and San Luis Obispo. As evidenced by condor pictographs, condor ceremonies, and condor dances, the Chumash people have a long history of interacting with the California condor for a variety of purposes, including religious and ceremonial ones. Wishtoyo seeks to conserve and protect the California condor, and is specifically committed to restoring self-sustaining, wild condor populations in California. Wishtoyo brings this action on behalf of its members.

15. Plaintiff Physicians for Social Responsibility ("PSR") is a not-for-profit public policy organization with offices in Los Angeles, Ventura County, and Santa Barbara, California, headquarters in Washington, D.C, and twenty-seven other local chapters across the nation. PSR has over 24,000 members, representing the medical and public health professions and concerned citizens, and works to protect human health and the environment. PSR's members are concerned about lead poisoning to condors and the impacts to human health from exposure to lead ammunition, particularly risks to hunters and their families from accidentally ingesting lead fragments in game meat. PSR brings this action on behalf of its members.

16. Plaintiff Anthony Prieto is an individual hunter who resides in Santa Barbara, California. Mr. Prieto has been hunting for over twenty years and is deeply concerned about the preservation of the California condor. Mr. Prieto hunts black-tail deer and wild pigs on a regular basis and has first-hand experience hunting in condor habitat, including in the counties of Monterey, San Luis Obispo, Kern, Santa Barbara, and Ventura, California. To protect the California condor, Mr. Prieto uses non-lead ammunition made of copper, which exhibits performance equal or superior to that of lead ammunition. Mr. Prieto has invested considerable effort in advocating for the preservation and recovery of the California condor. He has over a decade of volunteer experience with the U.S. Fish and Wildlife

Service's California Condor Recovery Program and is a founder of Project Gutpile, a volunteer organization dedicated to educating the hunting community about the dangers of lead ammunition to California's wildlife and promoting the use of non-lead ammunition.

17. Plaintiff Leif Bierer is an individual hunter who resides in Ukiah, California. Mr. Bierer has been hunting for over twelve years and is deeply concerned about the preservation of the California condor. Mr. Bierer hunts deer on a regular basis and occasionally other big game, such as pig, bear, and elk. He has first-hand experience hunting, fishing, scouting, camping, backpacking, and recreating in condor habitat, including in the counties of Monterey, Kern, Santa Barbara, and Ventura, California. Additionally, as a Native American, his cultural values include respecting, caring for, and ensuring the survival of the California condor. Earlier this year, Mr. Bierer's mother was poisoned by accidentally ingesting fragments of lead ammunition in deer meat, from game that he shot. Because ingesting lead presents toxic risks to himself and his family, and to protect the California condor, Mr. Bierer will only use non-lead ammunition.

18. Plaintiff Natural Resources Defense Council, Inc. ("NRDC") is a not-for-profit, environmental membership organization with offices in Los Angeles and San Francisco, California, and Washington, D.C., and its headquarters in New York, New York. NRDC has over 520,000 members nationwide, more than

90,000 of whom live in California. NRDC's membership and staff of lawyers, scientists, and other environmental specialists have a long-standing interest in protecting the planet's wildlife and wild places and ensuring a safe and healthy environment for all living things. NRDC works on conserving and protecting the California condor and its habitat, and is specifically committed to restoring self-sustaining, wild condor populations in California. NRDC brings this action on behalf of its members.

19. Plaintiff Center for Biological Diversity (the "Center") is a national, not-for-profit organization with regional offices in Joshua Tree, Los Angeles, San Diego, and San Francisco, California, and its headquarters in Tucson, Arizona. The Center's mission is to protect endangered species and wild places through science, policy, education, and environmental law. The Center has approximately 25,000 members, many of whom reside in California. The Center's members and supporters have a direct interest in conserving and protecting southern California's unique native animals and plants, and specifically in ensuring the survival and recovery of the California condor. The Center brings this action on behalf of its members.

20. Plaintiffs' members derive scientific, recreational, conservation, aesthetic, religious, and cultural benefits from the existence of California condors in the wild. Plaintiffs' members engage in activities such as hunting, hiking, bird

watching, camping, scientific research, and ceremonial and religious activities within the habitat of the California condor, and have an interest in removing toxic lead contamination from the condor's environment. Defendants' violation of the ESA, which results in the continued deposit of toxic lead ammunition into condor habitat, and resulting injury and death to California condors, harms the interests of plaintiffs and their members by causing palpable harm to condors, thereby diminishing the benefits and enjoyment plaintiffs or plaintiffs' members derive from the aesthetic, recreational, and other activities in which they engage within condor habitat. Defendant's ESA violation also harms human health by exposing hunters and their families to lead fragments in game meat.

21. If defendants curtail or eliminate the use of lead ammunition in the habitat of California condors, then the harm such ammunition now causes to condors, and to hunters and their families, will be reduced or eliminated, thus redressing plaintiffs' injuries.

Defendants

22. Defendant Michael Flores, President of the California Fish and Game Commission ("Commission"), has voting power on the Commission and shares authority for establishing policy and regulations. He is legally responsible for the Commission's acts and omissions relevant to the ESA, and is sued in his official capacity.

23. Defendant Bob Hattoy, Vice President of the Commission, has voting power on the Commission and shares authority for establishing policy and regulations. He is legally responsible for the Commission's acts and omissions relevant to the ESA, and is sued in his official capacity.

24. Defendant Jim Kellogg, Member of the Commission, has voting power on the Commission and shares authority for establishing policy and regulations. He is legally responsible for the Commission's acts and omissions relevant to the ESA, and is sued in his official capacity.

25. Defendant Richard Rogers, Member of the Commission, has voting power on the Commission and shares authority for establishing policy and regulations. He is legally responsible for the Commission's acts and omissions relevant to the ESA, and is sued in his official capacity.

26. Defendant Cindy Gustafson, Member of the Commission, has voting power on the Commission and shares authority for establishing policy and regulations. She is legally responsible for the Commission's acts and omissions relevant to the ESA, and is sued in her official capacity.

27. Defendant John Carlson, Jr., Executive Director of the Commission, has specified ministerial and administrative duties on the Commission. He is legally responsible for the Commission's acts and omissions relevant to the ESA, and is sued in his official capacity.

28. Defendant Ryan Broddrick, Director of the California Department of Fish and Game ("Department"), directs the Department and, *inter alia*, is responsible for ensuring that the Department functions in accordance with Commission policies. He is legally responsible for the Department's acts and omissions relevant to the ESA, and is sued in his official capacity.

LEGAL FRAMEWORK

The Federal Endangered Species Act

29. Congress enacted the ESA in order to protect animals and plants that "have been so depleted in numbers that they are in danger of or threatened with extinction." 16 U.S.C. § 1531(a)(2). The ESA was enacted in response to growing public concern about the extinction and near-extinction of a number of populations of animals and plants, and in recognition that they provide "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." *Id*. § 1531(a)(3).

30. California condors are listed as an "endangered" species under the ESA.

31. Section 9 of the ESA prohibits any person from "taking" an endangered species, and from attempting to commit or soliciting another to commit such an act. *Id*. § 1538. Congress broadly defined "take" in the ESA to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to

attempt to engage in any such conduct." *Id.* § 1532(19). The U.S. Fish and Wildlife Service ("FWS"), which administers the Act, has further defined "harass" to mean any "act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patters which include, but are not limited to, breeding, feeding or sheltering." 50 C.F.R. § 17.3. The term "harm" includes any "significant habitat modification or degradation where it . . . injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.*

32. The ESA's prohibition on "take" applies to all "persons." 16 U.S.C. § 1538(a)(1). The Act defines a "person" to include any "officer, employee, agent, department, or instrumentality of the Federal Government, or any State," or of local governments. *Id*. § 1532(13).

33. Defendants are "persons" within the meaning of the ESA and its implementing regulations, and are subject to the Act's take prohibition.

34. The ESA's citizen suit provision authorizes suits to enforce the ESA and its implementing regulations against any person, including any governmental instrumentality or agency. *Id.* § 1540(g)(1).

35. Defendants are subject to suit under the ESA citizen suit provision.

PERTINENT FACTS

Background of the California Condor

36. The California condor (*Gymnogyps californianus*) is a member of the Vulture family (*Cathartidae*). Weighing up to twenty-two pounds and with a wingspan greater than nine feet, California condors are North America's largest terrestrial bird.

37. Condors have uniformly black plumage, except for white wing linings, with naked skin on the head and neck that ranges from gray to shades of yellow, red, and orange. Males and females cannot be distinguished by size or plumage characteristics.

38. California condors are remarkable aerialists, often reaching altitudes in excess of 15,000 feet, and are able to travel over 140 miles in a single day.

39. Condors do not kill for food; they are exclusively carrion feeders. Their feet are adapted for walking, rather than seizing prey, and their bald heads are distinctively suited to feeding in carcasses.

40. Typical adult condor foraging behavior includes long-distance reconnaissance flights, lengthy circling flights over a carcass, and hours of waiting for opportunities to feed. Scientists believe that, prior to the arrival of Europeans, the California condor's diet included mule deer, tule elk, pronghorn antelope, smaller mammals, whales, sea lions, and other marine species.

41. Today, condors feed mainly on carcasses of large terrestrial mammals, such as deer and feral pigs, but also on smaller species, such as coyotes and ground squirrels, and, rarely, on whale carcasses. Many California condors are also provided with calf carcasses as supplemental food in an attempt to reduce their potential exposure to lead poisoning through ingestion of bullet fragments in contaminated animal carcasses.

42. Historically, the condor ranged from northern Baja California, Mexico, to southern British Columbia, Canada, primarily along the coast but also extending inland in the southwestern United States.

43. By 1850, condors had mostly disappeared from Canada, Washington, and Oregon, and, by the 1930s, from Baja California. By the 1980s, condors in the coastal portion of the range were generally found no farther north than San Luis Obispo County. The condor population was estimated to be about 150 birds in the 1950s, 60 birds by 1970, and 22 birds by 1982.

44. FWS listed the California condor as endangered on March 11, 1967 under the predecessor to the ESA, the Endangered Species Preservation Act. The State of California listed the species as endangered on June 27, 1971 under the California Endangered Species Act, California Fish and Game Code ("C.F.G.C.") §§ 2050 *et seq*. The California condor also was given special state protection as a "Fully Protected" species in California, meaning it may not be taken or possessed

at any time. C.F.G.C. § 3511. Critical habitat for the California condor was designated on September 24, 1976, and consists of 570,400 acres in nine units throughout the California condor's range.

45. By the 1980s, California condors were so close to extinction that the last twenty-two wild birds were captured and, in 1985, an expensive captive breeding program was initiated because of the high risks the birds faced in the wild, including from lead poisoning.

46. Efforts to reintroduce condors to the wild in southern California and, later, Arizona and Baja, Mexico, began in 1992, but despite intensive recovery efforts, California condors are still unable to maintain self-sustaining populations in any of these locations.

47. Although captive breeding has been relatively successful, mortality rates for California condors in the wild are high. On information and belief, of the 127 condors released in California from 1992 through July of 2006, 46 birds (36 percent) have already died or disappeared, and are presumed dead.

48. Today, the California condor remains one of the world's rarest and most imperiled birds. On information and belief, as of June 1, 2006, there were a total of 290 condors, 138 of whom were in the wild in California, Arizona, and Baja California, Mexico. Only 61 of them fly free in California.

Harm to California Condors from Lead Ammunition

49. Condor recovery efforts have not succeeded because the birds are being released back into an environment with dangers that are similar to those that forced them to the edge of extinction twenty years ago. Lead poisoning is the most serious threat to the long-term survival of the California condor. Other major sources of human-related mortality are shooting, collision with power lines, and the ingestion of small pieces of garbage.

50. The primary source of this lead poisoning is hunter-shot carrion, which often contains fragments of lead ammunition. The associated exposure mechanism is well understood and widely recognized:

i. as obligate scavengers, condors encounter bullet-killed carrion, gut piles from animals cleaned in the wild, and the carcasses of animals that survived hunting after being shot with lead ammunition;

ii. condors accidentally ingest or mistake bullet fragments for the calcium-rich bone fragments they require;

iii. the specialized, scavenging-adapted digestive systems of condors retain bullet fragments in a portion of the crop where lead rapidly leaches into the bloodstream; and

iv. condors suffer injury or death from paralysis of the crop and/or the

impacts of lead on their neurological systems.

51. Scientists agree that lead exposure from lead ammunition remains a serious threat to California condors. By analyzing blood samples from affected condors and tracing blood-lead isotopes, which act as chemical signatures for the source of lead, scientists have definitively concluded that "incidental ingestion of ammunition in carcasses of animals killed by hunters is the principal source of elevated lead exposure that threatens the recovery in the wild of this endangered species." Molly Church, *Ammunition is the Principal Source of Lead Accumulated by California Condors Re-introduced to the Wild*, Env. Sci. and Tech. (forthcoming 2006).

52. This conclusion is supported by the high numbers and geographic locations of lead-poisoned condors. As of 2001, an estimated thirty-five percent of released condors had experienced acute lead poisoning, and the greatest number of California exposures occurred in high-intensity hunting areas in the south. Based on this and other evidence, numerous researchers have concluded that "[t]he long-term survival in the wild of a self-sustaining population of California condors in southern California is clearly dependent upon the replacement of lead bullets with… non-toxic ammunition." R. W. Risebrough, et al., *Absence of demonstrable toxicity to turkey vultures, Cathartes aura, of copper and tungsten-tin-bismuth-composite pellets* (The Bodega Bay Institute, ed.) (2001).

53. Moreover, the problem is geographically expansive and condors are at risk of lead toxicosis, throughout their range, wherever hunters use lead ammunition. After examining and comparing all sources of condor mortalities, biologists have determined that the most important of these is lead poisoning, and "[u]ntil sources of lead contamination are effectively countered, releases cannot be expected to result in viable populations." Vicky J. Meretsky, et al., *Demography of the California condor: Implications for reestablishment*, Conservation Biology Vol. 14 at 957-967 (2000).

54. Both FWS and the Department have reached similar conclusions. The California Condor Lead Exposure Reduction Steering Committee, a subcommittee of FWS's California Condor Recovery Team, concluded in a 2003 report that "lead poisoning is a demonstrable obstacle in the recovery of the California condor." U.S. Fish and Wildlife Service, *A Report from the California Condor Lead Exposure Reduction Steering Committee, a Subcommittee of the California Condor Recovery Team* (March 20, 2003). This committee is made up of wildlife biologists, conservationists, and game managers, as well as hunting and gun advocates.

55. The Department commissioned a recent study by University of California, Davis researchers that came to a similar conclusion: "The risk of lead exposure to condors is high…. When all potential sources of lead in the

environment are compared, carcasses of ground squirrels, coyotes, deer and wild pigs, and the gut piles of deer and wild pigs appear to be the most likely sources of lead exposure to condors." Michael D. Fry & Jeffrey R. Maurer, *Assessment of lead contamination sources exposing California condors*, Final Report, Cal. Dept. of Fish & Game (2003).

56. On August 24, 2006, FWS recognized that a clear scientific consensus had emerged: eleven of thirteen condor papers submitted to the American Ornithologists' Union in 2005 identify lead as the single most important threat to the survival of condors, and three of these papers state that as long as lead remains in the food source of condors there will never be a self-sustaining population. U.S. Fish and Wildlife Service, California Condor Program, *Public Hearing of the Cal. Fish & Game Commission* (August 24, 2006).

57. On information and belief, lead poisoning has caused eleven confirmed condor deaths since 1992, and is implicated in the death or disappearance of at least fifteen other condors. At least twenty-six more condors have required life-saving emergency blood treatment involving intrusive chemical therapy after ingesting lead.

58. The treatment for lead poisoning, called chelation therapy, itself causes harm to condors. The lengthy procedure is painful and stressful for the birds, involving capture and manual injections twice daily until blood lead

concentrations drop to background levels. Whether chelated condors ever regain fully functional behavior is unknown, as are the long-term side effects of recapture and treatment.

59. Mortality is not the only danger posed to condors from lead exposure. Even microscopic lead traces from ammunition can paralyze digestive systems in the endangered birds and cause them to starve to death. Non-lethal lead exposure can cause anorexia and impair vision and motor activity in condors, thus increasing their susceptibility to trauma, starvation, and disease.

60. Physical and mental impairment from even low levels of lead may well play a role in susceptibility to other documented mortality factors for condors such as collisions with power lines and electrocutions, drowning, ingestion of trash, and loss to predation. Additionally, sub-lethal lead poisoning may affect the fitness of condor parents and put their chicks at increased risk.

61. Other wildlife, including large birds such as golden and bald eagles, also are susceptible to toxic poisoning from ingesting lead bullet fragments.

62. Harmful exposure of California condors to lead ammunition occurs on a routine basis in California. As recently as June 12, 2006, free-flying California condors were observed feeding on hunter-shot squirrel carcasses at Pinnacles National Monument. Biologists captured ten of the eleven condors that fed on these carcasses and tested them for lead. Initial tests revealed that four juvenile

condors had elevated levels of lead in their bloodstream and had ingested significant amounts of lead.

63. Recent poisonings have also been documented among other condor populations. In June 2006, a California condor in Baja California, Mexico died of lethal lead levels and was found with a lead-bullet slug in its digestive tract. In January 2005, two condors in Arizona died of lethal lead levels and, similarly, were found with lead pellets or fragments in their digestive tracts.

The Use of Alternative Ammunition to Protect California Condors

64. There is a ready solution to problems the California condor faces from lead poisoning: the use of non-lead ammunition. Alternatives to the use of lead in bullets (used in hunting rifles and handguns) and in shot (used in shotguns) are now available, and some of them have equivalent, and even superior, performance characteristics to their lead counterparts. These alternatives could protect the species, while allowing hunters to continue their activities in condor habitat.

65. Federal regulations prohibiting the use of lead shot for hunting waterfowl have been implemented nationwide since 1991. 50 C.F.R. § 20.21(j). These regulations were promulgated to protect waterfowl and eagles from lead poisoning. By September 1, 1991, every state was designated as a non-toxic shot zone for hunting waterfowl, coots, and certain other bird species. *Id*. § 20.108. Since then, lead poisoning of loons, swans, upland game, and the continued

poisoning of eagles has prompted additional restrictions on lead shot and lead fishing tackle in National Parks, National Wildlife Refuges, and on public lands in twenty-five states. In addition, the Commission promulgated its own regulations, parallel to federal laws, that require the use of lead-free shot when hunting waterfowl in California. Title 14 Cal. Code of Regulations ("C.C.R.") § 507.1.

66. Because it is already required for waterfowl hunting, non-lead shot is both readily available and affordable. FWS has approved nontoxic shot composed of bismuth-tin, iron, iron-tungsten, iron-tungsten-nickel, tungsten-bronze, tungsten-iron-copper-nickel, tungsten-matrix, tungsten-polymer, tungsten-tin-iron, tungsten-tin-bismuth, or tungsten-tin-iron-nickel. The Commission additionally has approved nontoxic shot made with steel, copper-plated steel, nickel-plated steel, tin-plated steel, zinc-plated steel, zinc chloride-plated steel, or zinc chromate-plated steel.

67. Some hunters already use non-lead bullets on a regular basis. The process of switching to a new type of ammunition is simple, the downsides are minimal, and the potential benefits to California condors and other wildlife are enormous.

Human Health Effects from Using Lead Ammunition

68. Human beings are also at risk from use of lead ammunition. Lead is an extremely toxic metal that can cause brain damage, kidney disease, high blood

pressure, and numerous reproductive and neurological disorders. Hunters using lead ammunition risk poisoning themselves through inhalation of lead dust. They and their families may also be poisoned by eating shot or bullet residue embedded in meat.

69. The flesh of any game animal killed with lead ammunition can become contaminated with high concentrations of lead. Health effects in human beings following ingestion of whole lead shot pellets have been reported in scientific journals, and ingestion of meat tissues containing minute flakes or fragments of metallic lead from the passage of lead shot or lead bullet fragments through the tissues is also possible.

Defendants' Unlawful Take of California Condors

70. Defendants are vested with broad power and responsibility to regulate hunting and protect wildlife in California. The Commission and the Department extensively regulate the hunting of deer, pigs, and other animals in condor habitat.

71. All state agencies, including those whose decisions are governed in part by defendants, are directed by the California Endangered Species Act to conserve endangered species and utilize their authority in furtherance of this goal. The California Fish and Game Code further establishes the policy of the State to "perpetuate all species of wildlife for their intrinsic and ecological values, as well as for their direct benefits to all persons." C.F.G.C. § 1801.

72. The Commission is charged with promulgating regulations to govern hunting in the State of California. C.F.G.C. §§ 200, 202, 203. Among other things, the Commission requires hunters to carry licenses, prescribes the manner and means by which harvest can take place, sets the dates for hunting seasons, limits the number of animals that each person can kill, sets hunting territorial boundaries, and establishes restrictions based on the physical characteristics of game.

73. The Commission already restricts the type and caliber of ammunition that can be used to hunt certain game, including resident small game and upland game birds, big game, furbearing mammals, nongame birds and mammals, and migratory birds. 14 C.C.R. §§ 1.04, *et seq*.

74. The Commission does not require the use of bullets that protect condors from lead poisoning in California condor habitat.

75. The Department prepares, issues, and enforces the terms of hunting licenses for the State of California in accordance with regulations issued by the Commission. C.F.G.C. §§ 850, 853, & 1050. Hunting licenses are issued upon the payment of license fees and proof of completion of a hunter education course or passing of an equivalency test. A California hunting license is required for taking any bird or mammal, and must be carried and shown if requested.

76. The Department is legally responsible for administering hunting

licenses that allow the use of lead ammunition in California condor habitat.

77. California's regulatory scheme for hunting varies by season, area, and species. For example, deer seasons are primarily in September and October, with archery deer seasons about a month earlier; bear season generally coincides with deer season; and the season for wild pig is open all year. Hunting zones or areas are designated for several species, including deer, bear, and elk, some of which overlap with California condor habitat. Six deer and bear hunting zones (A, D7, D8, D9, D10, and D13) and two elk hunting areas have significant overlap with California condor habitat. Wild pig hunting is not limited by hunting zones.

78. The following animals are hunted within the range of the California condor: deer, wild pig, bear, elk, bobcat, tree squirrels, ground squirrels, jackrabbits, coyote, and upland birds.

79. Hunting statistics on thirty-five species of birds and mammals are tracked by the Department.

80. In 2000, approximately 91,388 animals were shot and 47,968 carrion or gut piles (excluding ground squirrels) were left in the field in California counties within the condor's range. In 2005, hunters killed 10,509 deer, 2,637 wild pigs, and 109 bear in California counties within the range of the California condor.

81. As a direct and predictable result of the Commission's and the Department's regulatory and licensing practices, hunters shoot animals with lead

ammunition and leave carcasses within the range of released California condors.

82. California condors regularly encounter the carcasses of animals shot with lead ammunition, as permitted by the Commission's regulations and the Department's licenses, and sometimes feed on the remains of those carcasses.

83. As a result of feeding on the remains of carcasses shot with lead ammunition, condors are exposed to lead, a toxic metal.

84. Exposure of California condors to lead ammunition in carcasses shot by hunters in California causes condors harm and injury and can lead to condor mortality.

85. Plaintiffs have repeatedly urged the State of California, and defendants specifically, to restrict the use of lead ammunition in California condor habitat and protect California condors from lead poisoning. To date, defendants have failed to take such action.

CLAIM FOR RELIEF

86. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

87. Defendants are "persons" within the meaning of the ESA.

88. By authorizing and issuing permits to use ammunition in California condor habitat without any restrictions on the type of ammunition used, defendants

are authorizing the use of lead ammunition.

89. Hunters with permits to use lead ammunition are acting within the scope of defendants' authorization.

90. The use by hunters of lead ammunition is reasonably certain to cause a take of California condors, as defined by the ESA and its implementing regulations, 16 U.S.C. § 1538, by exposing condors to poisoning from ingesting fragments of lead ammunition.

91. Such poisoning is predictably caused by state-authorized exposure, and, therefore, defendants have committed and cause to be committed the take of California condors in violation of the ESA. *Id*. § 1538.

92. On information and belief, defendants will continue to authorize and allow the use of lead ammunition in California condor habitat in violation of 16 U.S.C. § 1538.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court enter judgment as follows:

1) Declare that defendants, and each of them, have violated the ESA;

2) Direct defendants to remedy their violation of the ESA within a reasonable time;

3) Retain jurisdiction over this matter until such time as defendants have complied fully with the requirements of the ESA;

4) Award plaintiffs their costs and attorneys' fees in this action pursuant to the ESA, 16 U.S.C. § 1540(g)(4); and

5) Grant plaintiffs such other and further relief, including injunctive relief, as the Court may deem just and proper.

Dated: November 30, 2006

Respectfully submitted,

Andrew E. Wetzler
James M. Birkelund
NATURAL RESOURCES DEFENSE COUNCIL, INC.

By: _____
James M. Birkelund

Adam F. Keats
Justin J. Augustine
CENTER FOR BIOLOGICAL DIVERSITY

By: _____
Adam F. Keats

Attorneys for Plaintiffs

ATTACHMENT 1

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

VIA CERTIFIED MAIL AND FACSIMILE
RETURN RECEIPT REQUESTED

September 29, 2006

Michael Flores, President
Bob Hattoy, Vice President
Jim Kellogg, Member
Richard Rogers, Member
Cindy Gustafson, Member
John Carlson, Jr., Executive Director
California Fish and Game Commission
1416 Ninth Street
P.O. Box 944209
Sacramento, CA 94244
Facsimile: (916) 653-5040

Ryan Broddrick, Director
California Department of Fish and Game
1416 Ninth Street
Sacramento, CA 95814
Facsimile: (916) 653-7387

Re: *Notice of Intent to Sue for Violations of Section 9 of the Federal Endangered Species Act for Taking California Condors from Exposure to Lead Ammunition*

Dear Mr. Flores, Mr. Hattoy, Mr. Kellogg, Mr. Rogers, Ms. Gustafson, Mr. Carlson, and Mr. Broddick:

On behalf of the Center for Biological Diversity ("CBD"), the Natural Resources Defense Council ("NRDC"), Physicians for Social Responsibility, Wishtoyo Foundation, Anthony Prieto, and Lief Bierer, we write to inform you of our intent to commence a civil action against you, acting in your official capacities as Commissioners and Executive Director of the California Fish and Game Commission and Director of the California Department of Fish and Game, for violations of section 9 of the federal Endangered Species Act ("ESA"). 16 U.S.C. § 1538(a)(1)(B). This letter is provided to you pursuant to the 60-day notice requirement of the ESA's citizen suit provision. 16 U.S.C. § 1540(g)(2). The reasons for this notice are set forth below.

The California condor (*Gymnogyps californianus*) is one of California's most iconic species and is so closely identified with the State that its image is found on the California version of the U.S. quarter. America's largest terrestrial bird, California condors can have a wingspan in excess of nine feet. They are remarkable aerialists, often reaching altitudes of in excess of 15,000 feet and are able to travel over 140 miles in a single day.

Unfortunately, the condor is also one of the world's most imperiled birds. The California condor is listed under the ESA as an endangered species[1] and, in 1982, condors were so close to extinction that the last twenty-two wild birds were captured and a captive-breeding program was initiated. Measured by head count, the captive breading of California condors has been a remarkable success. From an initial population of less than two dozen, the condor population has grown to 299 birds. California condors have also been released in the wild in California, Arizona, and Baja California, Mexico. Today 140 birds make up these three wild populations, with 67 flying free in California.

Yet despite the progress that has been made, the future of the California condor is far from assured. Mortality rates for condors released into the wild are extreme. Of the 67 condors released into the wild in Southern California from 1992 to 2002, 32 are dead or presumed dead.[2] Much of this mortality and injury to condors is attributable to lead poisoning.

Indeed, both the California Department of Fish and Game ("DFG") and the U.S. Fish and Wildlife Service's ("FWS") California Condor Recovery Team have concluded that lead poisoning is a major obstacle to the recovery of the California condor.[3] The FWS has plainly stated that "lead ammunition in carcasses has been identified as a major threat to California condors" and, on that basis, recommended that lead ammunition be phased out in condor habitat on Fort Hunter Liggett.[4] These conclusions are also supported by numerous researchers who have concluded that reintroduction efforts cannot be expected to result in viable condor populations until sources of lead contamination in the environment are effectively addressed.[5]

The primary source of this lead poisoning is hunter-shot carrion, which often

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[1] The condor also is state listed as an endangered species under the California Endangered Species Act ("CESA"), Cal. Fish & Game Code ("CFGC") §§2050-2116, and given special state protection as a Fully Protected species, meaning it may not be taken or possessed at any time, CFGC § 5511.

[2] U. S. Fish and Wildlife Service (USFWS). 2004. Status of released condors. Hopper Mountain NWR Complex California Condor Recovery Program. Unpublished report dated 7/09/04.

[3] Fry, D. M. and J. R. Maurer. 2003. Assessment of lead contamination sources exposing California condors. Final report. California Department of Fish and Game, Habitat Conservation Planning Branch, Sacramento, CA; U. S. Fish and Wildlife Service (USFWS). 2003. A Report from the California Condor Lead Exposure Reduction Steering Committee, a Subcommittee of the California Condor Recovery Team. Unpublished report dated 5/20/03.

[4] U. S. Fish and Wildlife Service (USFWS). 2005. Programmatic Biological Opinion for Activities Conducted at Fort Hunter Liggett, Monterey County, California (1-8-02-F-29R). Biological Opinion dated March 28, 2005, p. 57.

[5] *See* Beissinger, S. R. 2001. The California condor: A flagship adrift. *Conservation Biology* **13**:1197-1199; Beissinger, S. R. 2002. Unresolved problems in the condor recovery program: Response to Risebrough. *Conservation Biology* **16**:1158-1159; Meretsky, V. J., N. F. R. Snyder, S. R. Beissinger, D. A. Clendenen, and J. W. Wiley. 2000. Demography of the California condor: Implications for reestablishment. *Conservation Biology* **14:4**:957-967. Meretsky, V. J., N. F. R. Snyder, S. R. Beissinger, D. A. Clendenen, and J. W. Wiley. 2001. Quantity versus quality in California condor reintroduction: Reply to Beres and Starfield. *Conservation Biology* **15**:1449-1451; Snyder, N. F. R. and H. A. Snyder. 2000. The California condor: A saga of natural history and conservation. Academic Press, San Diego, California; Snyder, N. F. R. and J. Schmitt. 2002. California condor (*Gymnogyps californianus*). *The Birds of North America*, No. 610 (A. Poole and F. Gill, eds.). The Birds of North America, Inc., Philadelphia, PA.

contains fragments of lead ammunition.[6] The associated exposure mechanism is well understood and widely recognized:

(i) as obligate scavengers, condors encounter carcasses or gut piles that contain lead bullets or shot, or fragments thereof. The carcasses come from hunter-killed animals left in the wild or wounded prey that survive hunting but later die with lead ammunition in their bodies, while the gut piles come from hunter-killed animals that are cleaned in the wild;

(ii) condors ingest lead-tainted meat[7] or mistake lead shot and/or bullet fragments for the calcium-rich bone fragments they require; and

(iii) condors suffer lead poisoning causing serious injury or death.

The known lead poisoning incidents of monitored condors further corroborate this phenomenon.[8]

It is important to emphasize that mortality is far from the only danger posed to condors from lead exposure. Non-lethal lead exposure can cause anorexia and impair vision and motor activity in condors, thus increasing their susceptibility to trauma, starvation, and disease.[9] Lead levels much less than the accepted "background" level, even as low as 0.05 ppm, can cause neurological impairment in human beings and may be causing widespread neurological impairment in condors.[10] Physical and mental impairment from even low levels of lead may well play a role in other documented mortality factors for condors such as collisions with power lines and electrocutions, drowning, ingestion of trash, and susceptibility to predation. Additionally, sub-lethal lead poisoning may affect the fitness of condor parents and put chicks at increased risk. At least some wild-hatched chicks that have died had parents that are thought to have fed on hunter-shot deer and/or shown high blood levels previously.[11]

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[6] Snyder, N. F. R. and H. A. Snyder. 2000. The California condor: A saga of natural history and conservation. Academic Press, San Diego, California.

[7] Numerous lead fragments disperse well outside of the wound channel. Hunt, G. 2006. Bullet fragments in deer remains: Implications for lead exposure in avian scavengers. Wildlife Soc. Bull. **34**:1:167-170.

[8] Id.; Cade, T. J., S. A. H. Osborn, W. G. Hunt, and C. P. Woods. 2004. Commentary on released California condors *Gymnogyps californianus* in Arizona. *Raptors Worldwide* (R. D. Chancellor and B. U. Mayburg, eds.); U. S. Fish and Wildlife Service (USFWS). 2004. Status of released condors. Hopper Mountain NWR Complex California Condor Recovery Program. Unpublished report dated 7/09/04.

[9] Fry, D. M. 2004. Toxic effects of lead on condors and other wildlife. Presentation at Condors and Lead Action Summit, October 15, 2004, San Francisco, CA. Stratus Consulting, Inc., Boulder, CO.

[10] Id.; Eisler, R. 1988. Lead hazards to fish, wildlife, and invertebrates: a synoptic review. U.S. Fish Wildl. Serv. Biol. Rep. 85(1.14); Agency for Toxic Substances and Disease Registry (ATSDR). 1999. Toxicological profile for lead. U. S. Department of Health and Human Services, Public Health Service, Atlanta, GA; Canfield, R. L., C.R. Henderson, Jr., D.A.Cory-Slechta, C. Cox, T.A. Jusko, B.P.Lanphear. 2003. Intellectual impairment in children with blood lead concentrations below 10 µg per deciliter. *New England Journal of Medicine* **348**:1517-26.

[11] U. S. Fish and Wildlife Service (USFWS). 2004. Status of released condors. Hopper Mountain NWR Complex California Condor Recovery Program. Unpublished report dated 7/09/04; U. S. Fish and Wildlife Service (USFWS). 2004. Blood lead test results from field exposure. Hopper

Moreover, birds suffering from lead poisoning must often undergo chelation therapy, a highly intrusive and expensive treatment. The lengthy procedure is painful and stressful for the birds, involving capture and manual injections twice daily until blood lead concentrations drop to background levels. Whether chelated birds ever regain fully functional behavior is unknown, as are the long-term side effects of treatment.

Section 9 of the ESA specifically prohibits the "take" of a listed species, 16 U.S.C. § 1538(a)(1)(B), a term broadly defined to include harassing, harming, pursuing, wounding or killing such species, 16 U.S.C. § 1532(19). This prohibition applies to any "person," 16 U.S.C. § 1538(a)(1), including state agencies, 16 U.S.C. § 1532(13). The ESA further makes it unlawful for any person or state agency to "cause to be committed" the take of a species. 16 U.S.C. § 1538(g). Violations of Section 9 are enforceable under the ESA's citizen-suit provision. 16 U.S.C. § 1540(g).

Courts have repeatedly held that government regulations authorizing third parties to engage in harmful actions can constitute an illegal taking under Section 9 of the ESA. See Strahan v. Coxe, 127 F.3d 155, 158, 163 (1st Cir.1997), cert. denied, 525 U.S. 830 (1998) (state agency caused takings of the endangered right whale because it "licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in violation of [the ESA]"); Defenders of Wildlife v. Administrator, Envtl. Protection Agency, 882 F.2d 1294, 1300-01 (8th Cir.1989) (federal agency caused takes of the endangered black-footed ferret through its "decision to register pesticides" even though other persons actually distributed or used the pesticides); Loggerhead Turtle v. City Council of Volusia City, 148 F.3d 1231, 1253 (11th Cir. 1998) (county's inadequate regulation of beachfront artificial light sources may constitute a taking of turtles in violation of the ESA).

The death, injury, and impairment of California condors from lead poisoning constitute a prohibited "take" under the ESA. Moreover, this take is the direct result of the California Fish and Game Commission's ("Commission") and DFG's regulation, licensing, and enforcement of hunting in condor habitat. Your agencies are vested with the broad power and responsibility to regulate hunting and protect wildlife in California. CFGC §§ 1054.2, 1801, 3007; Title 14 Cal. Code of Regulations ("CCR") § 700. Indeed, the Commission and DFG extensively regulate the hunting of deer, pigs, and other game in condor habitat. These regulations require hunters to carry hunting licenses (14 CCR § 700), limit the number of animals that each hunter can kill (14 CCR §§ 300 (upland game birds), 360 (deer), 362 (bighorn sheep), 363 (pronghorn), 364 (elk), 365 (bear), 368 (wild pig), 478 (bobcat)), and restrict the manner in which that harvest can take place, including regulations restricting the type and caliber of ammunition that can be used to hunt certain game (14 CCR §§ 311 (resident small game and upland game birds), 353 (big game), 465 (furbearing mammals), 475 (nongame birds and mammals), 507 (migratory birds)). What these regulations do *not* require, however, is the use of ammunition that protects condors from lead poisoning. Currently available alternative ammunition, whose performance is equal or superior to traditional lead bullets, is either made completely from lead-free materials, such as copper, or constructed so that its lead interior is protected from exposure upon impact.

Mountain NWR Complex California Condor Recovery Program. Unpublished report updated 12/04.

As a direct and predictable result of the Commission's and DFG's licensing practices, hunters use lead ammunition within the range of released California condors. Lead fragments persist in carrion, gut piles, and wounded animals, and the condors continue to be poisoned by ingesting lead fragments and/or lead-tainted meat from these sources. The Commission and DFG are thus violating Section 9 of the ESA by issuing hunting licenses that result in harm, injury, and death to endangered California condors in violation of Section 9(a)(1)(B) of the Act, 16 U.S.C. § 1538(a)(1)(B).

Accordingly, and pursuant to the citizen suit provisions of the ESA, 16 U.S.C. § 1540(g)(1)(A) & (2)(A), we put you on sixty-days' notice of our intention to commence a civil action against you, acting in your official capacities, to challenge the foregoing violations of law and any violations that may occur after service of this notice letter, and to seek their remediation in a court of law.

It is our practice to pursue negotiations whenever possible. In keeping with this policy, we invite all alleged violators to discuss their obligations under the ESA with us. If you have any questions about the issues raised in this letter, please contact Adam Keats at CBD or Andrew Wetzler at NRDC.

Sincerely,

Adam Keats by JMB

Adam Keats
Center for Biological Diversity

Andrew Wetzler
Natural Resources Defense Council

cc: Ann Malcolm, General Counsel
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Hon. Dirk Kempthorne
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