

Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, Oregon 97219
phone (503) 768-6736
email cassidy@lclark.edu
website www.peaclaw.org

May 15, 2012

VIA REGISTERED MAIL
RETURN RECEIPT REQUESTED

Tom Tidwell, Chief
United States Forest Service
1400 Independence Ave., SW
Washington, D.C. 20250-0003

Kenneth Salazar, Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Tom Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Re: 90-Day Notice of Intent to Sue Under the Resource Conservation and Recovery Act For Contributing to an Imminent and Substantial Endangerment and 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act Related to California Condors

Dear Sirs:

This letter provides notice that the Sierra Club, the Grand Canyon Wildlands Council, and the Center for Biological Diversity (collectively, "the Citizen Groups") intend to file suit pursuant to Section 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, ("RCRA"), and Section 11(g)(1)(A) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g)(1)(A), against the United States Forest Service ("USFS") for knowingly allowing the use of lead ammunition on USFS-managed public land.

The threat posed to wildlife, and birds in particular, by spent lead ammunition in the environment is well documented. The National Park Service's ("NPS") website highlights the extensive body of scientific research on this subject: "More than 500 scientific studies

published since 1898 have documented that worldwide, 134 species of wildlife are negatively affected by lead ammunition.” NPS website, <http://www.nps.gov/pinn/naturescience/leadinfo.htm> (accessed May 7, 2012). Wildlife exposure to spent lead ammunition compelled the federal government, more than 30 years ago, to begin a nationwide program to prohibit the use of lead ammunition for hunting migratory waterfowl. More recently, scientists have begun to recognize and understand the health threat to humans who consume wild game killed with lead ammunition.

The plight of California condors (*Gymnogyps californianus*) serves to bring the threat posed by spent lead ammunition in the environment sharply into focus. There is widespread scientific consensus that the most significant and immediate threat to the California condor, one of the rarest birds in the world and a listed endangered species under the ESA (and its predecessor legislation) since 1967, is exposure to lead ammunition in the form of lead shot or fragments of lead bullets left behind in offal or “gut piles” and in carcasses of shot but not retrieved animals on which condors feed. The Southwest Condor Recovery Team (“SCRT”) has documented an association between deer hunting seasons in the Kaibab National Forest in Arizona and elevated levels of lead in blood of condors known to forage there.

States have acted to address the threat to wildlife posed by spent lead ammunition. Many states have promulgated regulations that restrict or prohibit hunting with lead ammunition where it is known to have adverse, and often deadly, effects on wildlife. Specifically with regard to condors, California enacted legislation restricting the use of lead ammunition in the condors’ known range. Although it has not promulgated any regulations, Arizona has undertaken a voluntary program to encourage hunters to switch to non-lead ammunition, including providing free non-lead ammunition to hunters hunting within the condors’ range. While Arizona’s efforts in promoting and subsidizing a voluntary switch by hunters to non-lead ammunition are commendable, condors and other wildlife continue to be exposed to and sickened or killed by lead ammunition far too often. Only extreme intervention efforts by the SCRT have prevented the condor population in Arizona from being completely decimated by this threat.

The USFS is aware of (1) overwhelming scientific evidence documenting the threat to wildlife and humans posed by spent lead ammunition in the environment; (2) actual harm to condors and other wildlife attributed to lead poisoning from ammunition; and (3) the acknowledgement of the problem and actions taken to address it by various arms of the federal government and many states. Despite this knowledge, the USFS continues to allow hunting with lead ammunition on USFS-managed public lands. The USFS also issues Special Use Permits for commercial hunting on USFS land. Accordingly, the USFS has contributed and is contributing to an imminent and substantial endangerment to the environment and human health. The danger condors face on land managed by USFS also highlights the agency’s failure to comply with its affirmative duty under ESA § 7(a)(1), 16 U.S.C. § 1536(a)(1), to develop a program, in consultation with the U.S. Fish and Wildlife Service (“FWS”), for using its authority to carry out actions to conserve condors.

I. Imminent and Substantial Endangerment Under the Resource Conservation and Recovery Act

Section 7002(a)(1)(B) of RCRA allows citizens to bring suit in order to stop an “imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B). It provides that any person may commence an action:

against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment of the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment[.]

The “imminent and substantial endangerment” provision thus extends to activities related to either non-hazardous and/or hazardous waste. Courts have held that spent lead shot is solid waste. See *Connecticut Coastal Fishermen’s Ass’n. v. Remington Arms Co.* 989 F.2d 1305, 1316 (2d Cir. 1993) (“[T]he statutory definition of solid waste [encompasses] lead shot . . . [because] the materials are discarded because they have been left to accumulate long after they have served their intended purpose.”); see also *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp.2d 1210, 1222 (D. Or. 2009) (lead shot held to be solid waste). The Environmental Protection Agency (“EPA”) also has concluded that “spent lead shot (or bullets), left in the environment, is subject to the broader definition of solid waste written by Congress and used in sections [6972] and [6973] of the RCRA statute.” U.S. EPA, *Best Management Practices for Lead at Outdoor Shooting Ranges (BMP)*, EPA-902-B-01-001, at p. 1-8 (June 2005).¹

A. Spent Lead Ammunition Presents or May Present an Imminent and Substantial Endangerment to California Condors, Other Wildlife, and Humans on USFS Land in Arizona

1. Hunting with Lead Ammunition Occurs on All of the National Forests in Arizona

The USFS manages six national forests in Arizona.² Hunting, including big-game hunting for deer and elk, occurs on all of them. Hunters must obtain the proper hunting licenses from the state of Arizona and follow Arizona Game and Fish hunting regulations while hunting on national forest land. Other than one state regulation restricting the use of lead ammunition when hunting for waterfowl, hunting with lead ammunition is permitted on national forest land

¹ Available at <http://www.epa.gov/region2/waste/leadshot/> (accessed May 7, 2012).

² The national forests in Arizona are the Apache-Sitgreaves, the Coconino, the Coronado, the Kaibab, the Prescott, and the Tonto.

in Arizona. Many species of wildlife that are susceptible to lead poisoning from exposure to lead ammunition in the form of lead shot or fragments of lead bullets left behind in “gut piles” and in carcasses of shot but not retrieved animals inhabit the national forests in Arizona, including: Bald Eagles, Northern Goshawks, Ferruginous Hawks, and Turkey Vultures.

National forest land in Arizona is also home to the California condor. On December 12, 1996, the first condors were released in northern Arizona as part of the FWS’s condor reintroduction program. Today, approximately 70 condors live in the wild in northern Arizona and Utah. Due to sophisticated tracking devices (radio telemetry, satellite tracking, etc.) the range of these condors is well known. It includes, among other areas, large tracts of USFS-managed public land. Specifically, the Kaibab National Forest in northern Arizona provides critical breeding habitat and foraging range for condors. *See generally* Hunt, W.G., et al. In Press. *Movements of introduced California condors in Arizona in relation to lead exposure. In California Condors in the 21st Century* (A. Mee, et al., Eds.) (2007), American Ornithologists’ Union and Nuttall Ornithological Club (Attached as **Exhibit 1**); *see also* SCRT, *A Review of the Second Five Years of the California Condor Reintroduction Program in the Southwest* (“Second SCRT Report”), at 14 (2007) (“Frequent condor movements to the Kaibab Plateau over the past five years have been the cause of both optimism and concern.”).³

Accordingly, as described in more detail below, the USFS’s actions and inactions with regard to these public lands have direct adverse effects on the health of condors and other wildlife species. Moreover, due to the condor’s status under the ESA, the USFS has a statutory obligation to use its resources and authorities to promote the condor’s conservation.

2. The SCRT Has Identified Lead Poisoning as the Leading Cause of Condor Mortality and Spent Ammunition as the Primary Source of Lead Contamination to Condors in Arizona

In 2007, the SCRT completed a five-year review of the condor recovery program in Arizona that concluded that lead poisoning was the leading cause of condor mortality in Arizona, and that spent lead ammunition was the primary source of the condors’ exposure.⁴ Overall, of the 63 condor fatalities since the reintroduction, the SCRT attributes 19 to lead poisoning with an additional two deaths that were likely related to lead exposure. In the spring of 2011, six condors---nearly 10% of the wild population in Arizona and Utah---showed toxic levels of lead in their bodies. Three of those birds died of lead poisoning.⁵ The SCRT

³ Available at www.fws.gov/southwest/es/arizona/Documents/SpeciesDocs/CA_Condor/2nd_5YR-07_Final.pdf (accessed May 7, 2012).

⁴ The FWS conducted the review with representatives of the Bureau of Land Management (“BLM”), The Peregrine Fund, Arizona Game and Fish Department, and the Utah Division of Wildlife Resources serving on the review team.

⁵ The San Diego Zoo’s Institute for Conservation Research performed necropsies on the three dead condors. X-rays showed 18 shotgun pellets in the digestive system of one bird and six in

administered chelation treatment, a painful and expensive treatment that removes lead from the blood stream, to the other three condors, which were eventually released back into the wild.

SCRT members “believe that significantly more [condor] deaths would have occurred had [they] not performed some 89 chelations” in the period between reintroduction in 1996 and 2006. Second SCRT Report at 18. The SCRT has performed many more chelation treatments for poisoned condors since 2006. Other known mortality factors, such as coyote predation, remained constant or trended down during the program’s second five years. However, deaths due to lead poisoning have increased dramatically. Thus, while other mortality factors are being mitigated, mortality from lead poisoning is becoming a greater threat primarily as a result of condors’ increased reliance on wild carrion, which has a higher likelihood of being contaminated by lead. *Id.* Accordingly, “whereas the [condor] population can apparently tolerate the impact of the aggregate of other mortality factors, the added impact of lead-related deaths resulting from lack of treatment would likely prevent the establishment of a self-sustaining population.” *Id.* at 20-21.

The recognized primary sources of lead contamination to condors in Arizona are “shotgun pellets and rifle bullet fragments in animal carcasses.” *Id.* at 18. As with the three condor fatalities from lead poisoning in the spring of 2011, the SCRT reported in 2007:

[r]adiographs allowed observations of lead pellets and fragments in the digestive tracks [sic] of lead-poisoned condors and bullet fragments in rifle-killed deer and coyotes known to have been fed upon by condors. Moreover, radiographs of the remains of deer killed with standard lead-based rifle bullets revealed a profusion of metal fragments as the normal conditions (Hunt *et al.* in press).

Id. Further, data collected by The Peregrine Fund linked blood lead levels in condors to hunting on the Kaibab Plateau:

With the aid of GPS-satellite telemetry, [The Peregrine Fund] found that an abrupt increase of blood lead levels corresponded with increased use of deer-hunting areas on the Kaibab Plateau in 2002 and thereafter. Spikes in blood lead levels were associated with condor visitation there during and just after the 2002-06 deer seasons, and there were significantly higher lead levels among condors visiting the Kaibab Plateau in the weeks prior to testing.

Id. The report concluded that “lead contamination is a major factor that may hinder the success of the program” and “[i]f the program is to succeed in the establishment of a self-

the other, while the third bird had remains of a spent bullet in its system. This evidence led the head of the condor recovery program in Arizona to conclude that the condors died as a result of scavenging on carcasses of animals that had been shot.

sufficient population of condors, the effects of lead contamination must be reduced or eliminated.” *Id.* at 59-60.

3. Many Federal Agencies Recognize that the Most Significant Threat to California Condors is Lead Poisoning

Not surprisingly, the SCRT’s conclusion that lead poisoning from spent ammunition is by far the leading threat to condors is widely shared within the federal government. In 2008, after California passed regulations prohibiting the use of lead ammunition for big game hunting within the condor range, the U.S. Army at Fort Hunter Liggett (“FHL”) in California extended the lead ammunition restrictions to hunting for small game bird and mammal species. FHL Memo at 2 (Attached as **Exhibit 2**). The Army’s stated purpose for the restrictions recognized the role spent lead ammunition played in endangering condors and other wildlife:

This policy contributes to the conservation of wildlife by reducing wildlife exposure to lead poisoning from spent lead ammunition deposited on the ground and in carcasses and ‘gut piles’ generated from game and non-game hunting on FHL. The intent is to reduce the potential for take of California condors from the sport hunting use of lead ammunition at FHL.

Id. at 1.⁶

The U.S. Department of the Interior also recognizes the fact that lead poisoning poses a serious threat to condors:

Scientific studies have reached a consensus: lead poisoning is the biggest threat facing the successful recovery of the California condor. Since 1997, at least 18 condors from the California population have been confirmed or strongly suspected to have died from lead poisoning. Additionally, in Arizona at least 15 other condors have been documented as dying from lead poisoning.

National Park Service (“NPS”) website, <http://www.nps.gov/pinn/naturescience/leadinfo.htm> (accessed May 7, 2012). Dr. Barnett Rattner, a U.S. Geological Survey contaminant expert, has commented, “The magnitude of [lead] poisoning in some species such as waterfowl, eagles, California condors, swans and loons, is daunting.” USGS Website, http://www.nwhc.usgs.gov/disease_information/lead_poisoning/index.jsp (accessed May 7, 2012).

⁶ Recently, as part of its transition to non-lead ammunition, the Army has fielded approximately 30 million rounds of its new 5.56mm M855A1 ammunition in Afghanistan. The new cartridge is sometimes known as the “green bullet” because it has an environmentally friendly copper core instead of the traditional lead. See U.S. Army website, <http://www.army.mil/article/56157/> (accessed May 7, 2012).

The NPS reported on its website about the fragmentation that occurs when lead bullets strike their targets:

Scientific studies have documented that the primary source of lead is from spent ammunition that remains in carcasses after they are shot. When a lead rifle bullet traveling at almost 3 times the speed of sound strikes animal tissue, it quickly begins to expand and loses hundreds of tiny pieces as it continues its journey. The entrails and areas that are trimmed away and left behind are often contaminated with these lead fragments. Because condors feed on carrion, are group feeders, and even small amounts of lead can sicken or kill a condor, condors are more frequently exposed to lead bullet hazards than most wildlife.

NPS website, <http://www.nps.gov/pinn/naturescience/leadinfo.htm> (accessed May 7, 2012). The BLM warns hunters “[w]hen condors, eagles, vultures, and ravens feed on carrion which contains lead bullet fragments, their digestive tract [sic] stops functioning and the birds die a slow agonizing death.” BLM Website, <http://www.blm.gov/ca/st/en/fo/bakersfield/Programs/carrizo/hunting.html> (accessed May 7, 2012).

The single most important factor for federal agencies tasked with promoting the conservation of condors to address is exposure to spent lead ammunition: “Any discussion of the biological challenges confronting the condor program must begin with the issue of lead.” Walters, J. et al., Status of the California Condor (*Gymnogyps Californianus*) and Recovery Efforts to Achieve Its Recovery, in *The Auk* 127(4):969-1001 (2010), at 974 (“Blue Ribbon Panel Study”) (Attached as **Exhibit 3**). There is nearly unanimous agreement in the scientific community that the most significant threat to California condors is lead poisoning. See Index of Scientific Studies and Reports (Attached as **Exhibit 4**); see also Statement of Scientific Agreement: Science Links Lead Ammunition to Lead Exposure in California Condors (*Gymnogyps californianus*) (July 10, 2007) (Attached as **Exhibit 5**). In the most recent review of the condor program conducted by a Blue Ribbon Panel⁷ established by the American Ornithologists’ Union, the panelists reached this conclusion:

Although the significance and source of lead exposure in reintroduced condors were debated just a few years ago (Beissinger 2002, Risebrough 2002), there is now widespread consensus and considerable evidence that poisoning from ingestion of lead ammunition fragments in carcasses currently precludes the establishment of viable populations in the wild (Cade 2007, Watson, et al. 2009).

⁷ The Blue Ribbon Panel was comprised of the following authors: Jeffrey R. Walters (Virginia Tech University), Scott R. Derrickson (Smithsonian Institution, National Zoological Park), D. Michael Fry (American Bird Conservancy), Susan M. Haig (U.S. Geological Survey, Forest and Rangeland Ecosystem Science Center), John M. Marzluff (University of Washington), and Joseph M. Wunderle, Jr. (International Institute of Tropical Forestry, USDA Forest Service).

Blue Ribbon Panel Study at 974. The panel dismissed alternative views about the threat posed by lead and sources of lead exposure as “no longer credible.” *Id.* Ultimately, the panel concluded that the potential for condor recovery could not “be realized until the lead problem is solved.” *Id.* at 88.

4. Exposure to Lead Poses a Threat to Many Other Bird Species Such as Eagles, as well as to Humans Who Consume Wild Game Killed with Lead Ammunition

The federal government has long recognized the threat posed to wildlife, and to birds in particular, by lead ammunition. According to the NPS, “lead poisoning through ingestion of spent lead bullets and shell shot has been demonstrated as being a serious factor for many other wildlife species . . . including our national symbol, the Bald Eagle . . . Golden Eagles, Ravens, and Turkey Vultures.” NPS website, <http://www.nps.gov/pinn/naturescience/leadinfo.htm> (accessed May 12, 2012) (“More than 500 scientific studies published since 1898 have documented that worldwide, 134 species of wildlife are negatively affected by lead ammunition.”). Moreover, the federal government has acknowledged its duty to act to address this problem. As early as 1976, the FWS began to phase in a prohibition on the use of lead ammunition for hunting certain species of waterfowl. The stated purpose of the rule was:

to eliminate further deposition of lead pellets in areas used by aquatic birds. Spent lead pellets are known to be consumed by these birds, causing lead intoxication and death to a portion of the resource each year. The net environmental result of the proposed action would be the alleviation and eventual elimination of lead poisoning from lead shotgun pellets as a significant mortality factor among these birds.

41 Fed. Reg. 31386, 31386 (July 28, 1976). In 1991---20 years ago---the phase-in of the prohibition was complete. 56 Fed. Reg. 22100-01 (May 13, 1991). The ban on lead shot for hunting waterfowl has been successful in conserving migratory bird species, however, the federal government recognizes that non-waterfowl species continue to be at risk of lead poisoning:

Research on lead poisoning has been focused on bird species, with at least two studies indicating that the ban on the use of lead shot for hunting waterfowl in North America has been successful in reducing lead exposure in waterfowl. The authors found that upland game, like doves and quail, and scavenging birds, such as vultures and eagles, continue to be exposed to lead shot, putting some populations (*condors in particular*) at risk of lead poisoning.

USGS Website, http://www.nwhc.usgs.gov/disease_information/lead_poisoning/index.jsp (accessed May 7, 2012) (emphasis added). In the past five years, FWS has promulgated no fewer than eight separate regulations requiring the use of non-lead shot for depredation and

control of certain birds.⁸ As recently as December 2, 2010, FWS issued a final rule requiring that non-lead shot or bullets be used in most cases when depredating blackbirds, cowbirds, grackles, crows, and magpies. 75 Fed. Reg. 75153-01 (December 2, 2010). In response to comments objecting to the non-lead ammunition requirement, FWS acknowledged that it “asserted no effects of lead shot from bird control under the depredation order on any particular wildlife taxon.” *Id.* at 75154. However, FWS found that poisoning of bird species generally was so well documented as to justify the ban on the use of lead shot in bird control under the order. *Id.* (“Wildlife professionals have recognized that lead shot and lead in bullets are hazardous in the environment.”).

More recently, scientific studies have focused on the threat posed to humans who consume wild game killed with lead ammunition. In 2008, the North Dakota Department of Health and the Center for Disease Control conducted a study in North Dakota after lead fragments were found in venison there. The results showed that, among study participants, those who consumed wild game had higher blood-lead levels than those who did not. See Iqbal, S., et al., Hunting with lead: Association between blood lead levels and wild game consumption. *Environ. Res.*, Vol. 109, Issue 8, pp. 952-59 (2009).⁹ Also in 2008, the Agency for Toxic Substances and Disease Registry (“ATSDR”) provided a health consultation regarding the potential for ingestion exposure to lead fragments in venison in Wisconsin.¹⁰ The consultation concluded that complete exposure pathways existed for the ingestion of lead-contaminated meat and predicted risk of elevated lead levels in blood among children who consumed venison shot with lead ammunition. Michigan’s Department of Community Health, in conjunction with ATSDR, provided a similar health consultation in 2009.¹¹ In that study, modeling suggested that, based on the concentrations of lead found in the venison studied, “between 38 and 58 percent of Michigan children eating this meat twice per month could have unacceptable blood-lead levels as a result.” ATSDR. 2009. Health Consultation: Lead in Venison in Michigan. Prepared by: the Michigan Department of Community Health.

Both health consultations and the CDC study in North Dakota recommended the use of non-lead ammunition as the most effective solution to preventing lead poisoning in both humans and wildlife.

5. Many States Have Recognized the Need to Regulate to Protect Wildlife from Lead Poisoning

⁸ See 50 C.F.R. §§ 21.43, 21.47-49, 21.51-54.

⁹ Available at www.sorraptors.org/Documents/NorthDakotaCDCreport.pdf (accessed May 7, 2012).

¹⁰ Available at www.atsdr.cdc.gov/HAC/pha/LeadFragmentsinVenison/Venison%20and%20Lead%20HC%20110408.pdf (accessed May 7, 2012).

¹¹ Available at http://www.michigan.gov/mdch/0,1607,7-132-54783_54784_54785_54803_55912-231191--,00.html (accessed May 7, 2012).

States also have recognized the serious threat to wildlife and humans posed by lead ammunition. In 2007, California enacted legislation restricting the use of lead ammunition in the condor's range. See Ridley-Tree Condor Preservation Act, AB 821 ("It is the intent of the Legislature to protect vulnerable wildlife species, including the California condor . . . from the ongoing threat of lead poisoning."). At least 42 other states have regulations restricting or prohibiting the use of lead ammunition when hunting under certain circumstances or in certain areas. For example, New Mexico requires hunters to use non-lead shot when hunting on all state game commission owned lands. NMAC 19.31.5.9(H)(3). Arizona already prohibits the use of lead shot when taking several species of migratory game birds, including ducks, geese, swans, mergansers, common moorhens, and coots. See A.A.C. R12-4-304(B)(3)(d). Prohibiting or restricting the use of lead ammunition where there are documented adverse effects on wildlife, as there are in the case of condors and eagles, is clearly a norm among state and federal regulatory agencies, which is all the more reason USFS should not and cannot abdicate its clear statutory duties.

The Citizen Groups are aware of and commend the efforts by the Arizona Game and Fish Department to encourage hunters to voluntarily switch to non-lead ammunition. Those efforts have undoubtedly benefited condors in Arizona and Utah. However, more than 15 years after their reintroduction to Arizona, condors are still dying from exposure to lead ammunition, and only continued and extensive intervention by the SCRT in the form of chelation treatments prevents the death toll from being higher than it is. Not surprisingly, the Blue Ribbon Panel concluded that it was skeptical that "even with excellent compliance, voluntary programs promoting the use of non-lead ammunition can reduce lethal exposure to lead sufficiently to wean condor populations from constant veterinary care." Blue Ribbon Panel Study at 15.

B. The U.S. Forest Service Has the Authority to Regulate Activities on USFS-Managed Land so as to Reduce or Eliminate Exposure to Lead Ammunition

The Property Clause of the U.S. Constitution gives Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The "complete power" that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there." *Kleppe v. New Mexico*, 426 U.S. 529, 540-41 (1976).

Congress has exercised this authority in establishing the U.S. Forest Service to manage public lands and resources within the National Forest system. Through the Organic Administration Act of 1897 (codified as amended at 16 U.S.C. §§ 473-82, 551), the National Forest Management Act ("NFMA") of 1976, 16 U.S.C. 1600 et seq., and other legislation, Congress has vested the Forest Service with broad authority to regulate activities on and occupancy of the National Forests. 16 U.S.C. § 551.

The USFS has interpreted its broad statutory authorities to include the ability to issue orders and regulations that prohibit and restrict activities in areas and regions for the purpose

of, *inter alia*, protecting “threatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish, or special biological communities.” 36 C.F.R. 261.70(a)(4). The regulations provide that each Forest Supervisor has the authority to restrict the manner in which the public uses the particular Forest Service lands over which the supervisor has jurisdiction. *See id.* § 261.50(a); *see also Otteson v. United States*, 622 F.2d 516, 519 (10th Cir. 1980) (“The Forest Service regulations allow each Forest Supervisor, among others, to close or restrict the use of forest areas and roads.”). Accordingly, the USFS has both the authority and the obligation to act to prevent the continued poisoning of wildlife on USFS-managed public lands due to exposure to spent lead ammunition.

II. Endangered Species Act Violations

The ESA places certain affirmative obligations on federal agencies with respect to endangered species. Section 7(a)(1) provides that all federal agencies “shall, in consultation with and with the assistance of the Secretary [of the Interior], utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species.” 16 U.S.C. § 1536(a)(1). 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 pursuant to this chapter are no longer necessary.” *Id.* § 1532(3).

The USFS has failed in its duties to consult with the FWS regarding California condors, a listed endangered species since 1967, and to carry out meaningful programs for the conservation of that species. The USFS has no program in place to further the conservation of condors that range in the Kaibab National Forest in Arizona. The USFS’ failure to develop and carry out a program to use its authority to conserve condors is particularly glaring given the fact that hunting with lead ammunition on USFS lands contributes to the endangerment of condors. Accordingly, the USFS’s failure to develop and implement any program to address the known and significant problem of lead exposure of condors on USFS-managed public lands is a clear abdication of its duty under § 7(a)(1) and a violation of the ESA.

A. The U.S. Forest Service Has a Duty Under § 7(a)(1) to Carry Out Meaningful Conservation Programs

The ESA seeks to provide a program for the conservation of threatened and endangered species so that at some point the protections of the ESA are no longer required. *See Tennessee Valley Authority (“TVA”) v. Hill*, 437 U.S. 153, 180 (1978). Under § 7(a)(1), there is an affirmative obligation for federal agencies to further the conservation and recovery of listed species. *See Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1416 (9th Cir. 1990) (“conservation,” i.e. recovery, is the “key term” of Section 7(a)(1)).

The specific duty under § 7(a)(1) requires all federal agencies to take action to conserve listed species regardless of whether such action is included within the agency’s primary mission. The Supreme Court has interpreted § 7 to “require agencies to afford first priority to the

declared national policy of saving [listed] species,” noting that the “pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *TVA*, 437 U.S. at 185; *see also Pyramid Lake*, 898 F.2d at 1417–18 (“The Court’s discussion of the [ESA] in *TVA* makes clear that . . . the Navy’s ‘primary mission’ construction is not viable because it understates the Navy’s duty to conserve.”).

Federal agencies have some discretion in fulfilling their obligation under § 7(a)(1). *See Pyramid Lake*, 898 F.2d at 1418. However, that discretion is not unbridled. *See Sierra Club v. Glickman*, 156 F.3d 606, 617–18 (5th Cir. 1998) (“A mission agency’s discretion to make the final substantive decision under its program authorities does not mean that the agency has unlimited, unreviewable discretion.”). Agencies must consult with the appropriate Service in determining what conservation measures to implement. In addition, agencies must demonstrate that their conservation plans provide some actual benefits for listed species. The Eleventh Circuit put it this way:

while agencies might have discretion in selecting a particular program to conserve-an issue we do not decide here-they must in fact carry out a program to conserve, and not an ‘insignificant’ measure that does not, or is not reasonably likely to, conserve endangered or threatened species. To hold otherwise would turn the modest command of section 7(a)(1) into no command at all by allowing agencies to satisfy their obligations with what amounts to total inaction.

Florida Key Deer v. Paulison, 522 F.3d 1133, 1146 (11th Cir. 2008) (following the standard set forth by the Ninth Circuit in *Pyramid Lake*). Thus, a conservation program that has no effect or is “insignificant” cannot satisfy the requirements of § 7(a)(1).

B. The U.S. Forest Service Has Not Engaged in Meaningful Consultation with the FWS and the USFS Has No Program in Place to Further the Conservation of California Condors

In the 15 years since the FWS reintroduced condors in Arizona, the USFS has had limited involvement with the FWS’s condor recovery program. Such involvement does not satisfy the consultation requirement of § 7(a)(1). Moreover, USFS’s interactions with the recovery program have not resulted in the USFS undertaking any meaningful conservation programs with respect to condors in Arizona and have done little, if anything, to further the program’s goal of establishing a self-sustaining condor population in Arizona. The USFS’s limited actions, to the extent that any have been undertaken, amount to insignificant efforts that do not satisfy its statutory conservation obligations under § 7(a)(1).

As part of the first five-year review of the California Condor Reintroduction Program, the FWS asked federal agencies about their compliance with § 7(a)(1) of the ESA. First SCRT Five-

Year Report (Feb. 14, 2002), at 28 (“First SCRT Report”).¹² Specifically, each agency was asked if it was aware of its responsibilities under § 7(a)(1), and then asked to list and describe any actions “accomplished for the conservation of California condors under the requirements of section 7(a)(1).” *Id.* at 29. In response to these questions, the USFS did not report any activities.¹³ *Id.* at 30. The USFS also did not provide a representative to participate in the five-year review report. *Id.* at i (FWS, BLM, and NPS all had representatives on the review team). In addition, the USFS was not listed as an agency actively coordinating on condor recovery programs. *Id.* at 26–27 (“The direct and active participation of Arizona Game and Fish Department, BLM, and NPS in coordination with FWS and The Peregrine Fund has proved critical to the condor reintroduction program in northern Arizona.”). Finally, the USFS also provided “no response[] concerning any costs incurred due to condors.” *Id.* at 44.

The Second SCRT Review further indicated the USFS’s continued failure to take action. The SCRT asked agencies to “report effects on land-use practices due to the presence of the condor, and to list and describe projects for which section 7 consultations were conducted during 2002-06.” Second SCRT Report at 37. Again, USFS demonstrated little, if any, conservation planning with regard to the condors or lead exposure reduction, responding only that the “incorporation of conservation measures brought forward by the FWS has been easy to implement and they hope to be able to expand their cooperation.” *Id.* USFS did not indicate what measures it was implementing, how effective, if at all, such efforts were, or provide any other details. Notably, the budget section of the review failed to provide any further details on USFS activities, despite including specific information about other agencies’ actions. USFS (Kaibab) reported spending only \$1,700 for five days of staff time per year on meetings, consultations, and outreach with public and USFS personnel related to the condor. *Id.* at 51. Again, the USFS failed to participate in the assessment of the condor recovery program that resulted in the five-year report.

¹² Available at www.fws.gov/southwest/es/arizona/Documents/SpeciesDocs/CA_Condor/10jReviewReport_FINAL2.pdf (accessed May 7, 2012).

¹³ By contrast, Grand Canyon National Park reported the following activities: (1) raptor-proofed power lines within the developed zone where condors frequently perch and roost; (2) affixed perching and roosting deterrent device to the Orphan Mine tower to prevent condors from frequenting the mine area; (3) provided a condor technician to aid in the monitoring of condors and to prevent human/condor interactions; (4) developed a standard operating procedure to ensure the safety of NPS and The Peregrine Fund staff while hazing and monitoring condors; (5) developed an observation record for the Fire and Aviation Program; (6) developed guidelines for interdivisional and interagency use pertaining to management of condors within park boundaries; (7) developed a response and protection protocol for construction contractors to follow should condors perch, roost, or forage at or near a construction site; and (8) developed a protocol for the removal and relocation of wildlife road mortalities to ensure that condors are not feeding in areas of risk or hazards associated with roads. First SCRT Report at 30.

The importance of § 7(a)(1) conservation programs to endangered species cannot be overstated. As the SCRT concluded in its Second Five-Year Report, the “continued implementation of section 7(a)(1) responsibilities by Federal agencies is very important in meeting the recovery objectives for California condors.” Second SCRT Report, at 37. Thus, it is essential to condor conservation that federal agencies fulfill their duties under § 7(a)(1) and carry out meaningful conservation measures in coordination with FWS. By failing to undertake conservation programs on behalf of condors that are at risk on national forest land in Arizona, the USFS not only is ignoring its own statutory duty, it is also diminishing the efforts made on behalf of the condor by multiple other federal and state agencies and recovery team partners. Unless and until all federal agencies perform their duties, condors will continue to be in danger of lead exposure in the wild.

C. The Condor’s Section 10(j) Status in Arizona Does Not Excuse the USFS from its Section 7(a)(1) Duties

Nonessential experimental populations are afforded the full protections of § 7 (a)(1). Section 10(j)(C) provides:

For the purposes of this chapter, each member of an experimental population shall be treated as a threatened species; except that – (i) solely for the purposes of section 1536 of this title (*other than subsection (a)(1) thereof*), an experimental population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 1533 of this title.

16 U.S.C. § 1539(j) (emphasis added). Accordingly, the ESA specifically preserved federal agencies’ § 7(a)(1) duties, even for nonessential, experimental populations. The FWS’s final rule regarding the reintroduction of condors to Arizona and Utah confirmed this interpretation. See 61 Fed. Reg. 54044, 54044 (Oct. 16, 1996) (“Thus, for nonessential experimental populations, only two provisions of section 7 would apply outside National Wildlife Refuge System and National Park Service lands; section 7(a)(1), which requires all Federal agencies to use their authorities to conserve listed species, and section 7(a)(4)...”).

The requirements of § 7(a)(1) are particularly important for nonessential experimental populations under § 10(j) because many of the other protections of the ESA do not apply to such populations. For example, critical habitat is not designated for nonessential experimental populations. 16 U.S.C. § 1539(j)(C)(ii). Accordingly, the conservation efforts required of federal agencies by § 7(a)(1) become even more significant for ensuring that the purpose of the ESA is fulfilled with respect to such populations.

III. Persons Giving Notice and Representing Attorney

The name, address and telephone number of the parties providing this notice are:

Sierra Club
85 Second Street, 2d Floor
San Francisco, CA 94105-3441
415-977-5500

Sierra Club/Grand Canyon Chapter
202 E. McDowell Rd., Suite 277
Phoenix, AZ 85004
602-253-8633

Grand Canyon Wildlands Council
P.O. Box 1594
Flagstaff, AZ 86002
928-556-9306

Center for Biological Diversity
P.O. Box 710
Tucson, AZ 85702-0710
520-623-5252

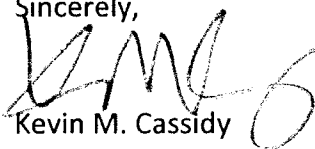
The attorney representing the Citizen Groups in this matter is:

Kevin M. Cassidy
Pacific Environmental Advocacy Center
P.O. Box 445
Norwell, MA 02061
781-659-1696

IV. Conclusion

The fall hunting season on the Kaibab Plateau will soon arrive, and the USFS has an obligation to act to prevent further avoidable condor deaths under its watch due to lead poisoning. The Citizen Groups are open to engaging in constructive dialogue to obtain a workable solution for their members, the California condors and other wildlife needlessly exposed to spent lead ammunition on USFS land, and the USFS. If the USFS has a similar interest it should immediately contact me. Otherwise, please expect the Citizen Groups to file a lawsuit upon the expiration of 90 days from the date of this notice.

Sincerely,

A handwritten signature in black ink, appearing to read 'KMC', with a large, stylized flourish at the end.

Kevin M. Cassidy
Pacific Environmental Advocacy Center

Copies to:

Lisa Jackson, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Mail Code: 1101A
Washington, D.C. 20460

Jared Blumenfeld
EPA Regional Administrator
Pacific Southwest Region (Region 9)
75 Hawthorne St.
San Francisco, CA 94105

Eric Holder, Attorney General
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

Corbin Newman, Jr., Southwest Regional Forester
333 Broadway SE
Albuquerque, NM 87102

Mike Williams, Kaibab Forest Supervisor
800 South Sixth Street
Williams, AZ 86046

Henry R. Darwin, Director
Arizona Department of Environmental Quality
1110 West Washington St.
Phoenix, AZ 85007