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National Rifle Association

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PRESCOTT DIVISION

CENTER FOR BIOLOGICAL DIVERSITY Plaintiff, v. U.S. BUREAU OF LAND MANAGEMENT; RON WENKER, Acting Director of U.S. Bureau of Land Management; JAMES KENNA, BLM Arizona State Director; KEN SALAZAR, Secretary of Interior, and U.S. FISH AND WILDLIFE SERVICE, Defendants, and NATIONAL RIFLE ASSOCIATION, Proposed Defendant-Intervenor.	CASE NO. 3:09-cv-08011-PCT-PGR **REPLY IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE OF NATIONAL RIFLE ASSOCIATION** Judge Paul G. Rosenblatt, presiding Date: December 14, 2009 Time: 1:30 p.m. Courtroom: 601

I. INTRODUCTION

Plaintiff Center for Biological Diversity's ("CBD") Opposition ("Opposition" or "Opp.") to proposed Defendant-Intervenor National Rifle Association's ("NRA") Motion for Leave to Intervene ("Motion") on behalf of all of the defendants to this action (the "Current Defendants") proffers two central arguments against NRA's request for leave to intervene.

First, that "NRA intends to introduce thousands of pages of extra-record evidence." (Opp., Document No. 47, at p. 5, lns. 12-14).[1,2] CBD's arguments on this point are baseless, as NRA's Motion (and any other document it has filed) states nothing of the sort. A brief review of the documents CBD cites in its Opposition regarding NRA's alleged intention definitively disproves CBD's assertions.

Second, CBD contends NRA should not be allowed to intervene based on the supposition that NRA was not involved in the "administrative process" upon which this action is based. (*See* Opp. at p. 7, lns. 17-28; p, 8, lns. 1-16). CBD's argument again fails, because not only is it legally insignificant, but also because NRA has already demonstrated it was directly in the relevant pre-litigation administrative process through its affiliates and members. Accordingly, CBD's Opposition is meritless.

II. ARGUMENT

A. CBD's Allegation Regarding NRA's Intent Is an Unqualified Misrepresentation

The Opposition consistently argues that NRA intends to introduce "thousands of pages of" or "voluminous" extra-record evidence. (Opp. at p. 5, Ln. 13; p. 10, lns. 17-18; p. 11, lns. 12-13; p. 14, ln. 17; p. 15, lns. 18-19; p. 18, lns. 2-3) That contention is simply untrue.

The Opposition cites generally (i.e., without pinpoint cites) *only* the Motion (at p. 14), and the Declaration of C.D. Michel, filed therewith (at p. 3), to establish the factual basis for the assertion regarding NRA's supposed intent to introduce "thousands of pages of

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[1] As the Opposition does not include line numbering, all references to lines therein are approximate. Also, as a matter of clarification, this Reply uses the Court's pagination of the Opposition, which is different than the Oppositions' original pagination.

[2] The Current Defendants filed a Response to NRA's Motion to Intervene ("Response") indicating no objection to intervention being granted, but requesting "the Court impose reasonable conditions on NRA's participation in the case [including precluding NRA from] conduct[ing] discovery or introduc[ing] extra-record materials . . . ." (Response, Document No. 48, p. 5, lns.2-6). Because the arguments of the Response are basically addressed by the Opposition as well, this Reply will address these issues as they are raised in the Opposition, unless otherwise specifically noted.

documents." NRA will not reproduce the text of all those pages here, but sufficed to say, neither actually states NRA intends on introducing "voluminous" evidence into the administrative record. (Opp. at p. 10, lns. 17-18). Rather, NRA's Motion merely states that NRA is familiar with much of the available material regarding the condor/lead ammunition issue, that NRA is prepared to rebut CBD's interpretation of the data in the administrative record, and that if CBD attempted to introduce records from outside the administrative record, NRA had documents to counter that attempt. (Motion at p. 14; Michel Decl. at p. 3).

In fact, it is hypocritical for CBD's Opposition to focus so heavily on the alleged threat of extra-record documents being introduced by NRA, considering the Joint Case Management Report ("Report," filed just two months ago, Document No. 37) tends to suggest that CBD itself intends to attempt to introduce extra-record evidence. (Report, p. 5, lns. 11-12). CBD's intention is reflected in the Report itself, which states "the parties anticipate that there may be motions by Plaintiff challenging the scope of the administrative record." *Id*. This statement seems to conflict, perhaps disingenuously, with CBD's recent assertion that "this action [is limited to] an existing Administrative Record . . . ." (Opp. at p. 11, lns. 5-6).

So while NRA has not expressed an intention to expand the administrative record, issues regarding the scope of administrative record appear to have already been placed before the Court by CBD.

In summary, CBD's statements about NRA's intentions are both antithetical to the treatment CBD itself seems to be seeking (i.e., modification of the scope of the administrative record) and are factually baseless because NRA does not anticipate attempting to supplement the administrative record unless in response to another parties' efforts. Accordingly, the Court should disregard CBD's arguments about NRA's alleged intent.

B. CBD's Contentions Regarding the Timeliness Are Specious

The Opposition's discussion of the timeliness of NRA's Motion reiterates CBD's central arguments discussed above, despite the fact that those arguments, even if they were well-founded, are not relevant to timeliness.

Specifically, CBD apparently asserts that, as to the "prejudice" factor of the timeliness

inquiry, NRA's proposed intervention is a "threat to further delay and complicate the case." (*Id.; Id.* at p. 16, lns. 8-10). Indeed, "[t]he question is whether existing parties may be prejudiced by the delay in moving to intervene[,] 'not whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change' . . . ." Schwarzer et al., *Federal Civil Procedure Before Trial* § 7:191 (2009) (citing *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995); *Edwards v. City of Houston*, 78 F.3d 983, 1002 (5th Cir. 1996); *Smith v. Marsh*, 194 F.3d 1045, 1051 (9th Cir. 1999)). Because CBD's arguments concern theoretical *post-intervention* prejudice, they are not appropriately raised.

Similarly, the Opposition's timeliness argument alleges NRA failed to participate in the relevant administrative process, but fails to explain how the allegation is in any way relevant to timeliness. (Opp. at pp. 15-16, lns. 25-27, 1-1). As the Opposition states, the timeliness inquiry includes "three factors: (1) the stage of the proceeding, (2) prejudice to the other parties, and (3) the reason for and length of the delay. [Citation]" (*Id.* at lns. 13-16). As an alleged failure to participate in a prior administrative process plainly has nothing to do with any of the three factors, CBD's argument is irrelevant.[3] Thus, CBD's allegations regarding timeliness are unsound and should be disregarded by the Court.

C. The NRA's Interests In this Action Are Obvious and Significant

NRA's interest in protecting the status quo for its members who hunt in Arizona is at least three fold. NRA has an interest in protecting hunters' rights: as incorporated in 50 C.F.R. Part 17.24(j)(2)(I) and other laws, by representing hunters should the Current Defendants attempt to settle this case in disregard of hunters' rights, and, as described directly

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[3] Similarly irrelevant to timeliness is CBD's comment that the relevant administrative record has been distributed to the parties. (*Id.* at 24-25). First, CBD fails to mention that the administrative record was distributed *after* the Motion was filed, which likely precludes the possibility of prejudice on this issue. (*See* Motion ("Filed 10/15/09"); Response, p. 3, lns. 9-10 (stating the administrative record was produced to CBD on Oct. 15, 2009). Second, though the administrative record has not been produced to NRA, NRA believes it totals over 50,000 pages. (*See* Joint Case Management Report, Document No. 37, lns. 26-27). Accordingly, it is quite possible the Motion will be decided before CBD even completes its review of the record, which further suggests there is no prejudice vis-à-vis the administrative records.

below, by defending against the threat of injunctive relief impacting hunting in the relevant portion of Arizona.

CBD both misstates and misunderstands the Motion's reference to *Nat'l Wildlife Federation v. Hodel*, Case No. S-85-0837 EJG, 1985 U.S. Dist. LEXIS 16490 (E.D. Cal. Aug. 25, 1985). Without citation, the Opposition states that the Motion cites *Hodel* "for the proposition that injunctive relief in this case would result in a hunting ban in the Arizona Strip." The Motion however, makes no such statement. In fact, it states that "this action, whether resolved by court order or settlement, has a reasonable chance of resulting in a lead ammunition ban or similar use restriction . . . ." (Motion at p. 10, lns. 7-9).

Additionally, CBD misunderstands *Hodel*. CBD attempts to factually distinguish *Hodel* because the plaintiff therein sought injunctive relief affecting hunting, whereas CBD supposedly only seeks injunctive relief regarding certain motor vehicle usage issues, and not to "enjoin any hunting at all . . . ."[4] (Opp. at p. 9, n.1).[5]

First, the Opposition fails to address the fact that CBD prayed for "such other and further relief as the court [sic] deems just and proper" and sought judicial review under 16 U.S.C. Section 1540(g), *both* of which allow for injunctive relief. (Amended Complaint, p. 29, lns. 26-27; p.36, lns. 25-26).

Second, regardless of what relief CBD requested, and especially in light of the fact that

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[4] Though it may be true CBD has not explicitly asked this Court for an injunction banning lead use in the relevant areas, statements on CBD's website indicate that such injunction may be CBD's ultimate goal. "[CBD's] Get the Lead Out campaign has called on California and Arizona to require the use of nonlead ammunition within the condor's range . . . . When management plans by the U.S. Bureau of Land Management and U.S. Fish and Wildlife Service failed to protect condors in on [sic] public lands near the Grand Canyon, we took both agencies to court in 2009." (Exhibit "1").

[5] Note one in the Opposition states NRA has not raised the motor vehicle use issue. *Id.* This is not accurate. Though NRA's intervention is obviously focused on the condor/lead ammunition issue, NRA's Proposed Answer filed shows NRA intends to oppose any "claims that infringe on hunting, including but not limited to the use of lead ammunition." (Proposed Answer, Document No. 40, p. 15, lns. 3-4). To the extent the administrative record (which NRA does not posses) indicates motor vehicle use impacts hunting, NRA's intervention would be directed at that narrow issue as well.

CBD contends "any take of condors from the use of lead ammunition would be a *per se* violation of the ESA," the Court may determine it is *required* to grant injunctive relief restricting hunting. *See Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994) ("In cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings . . .", as "[t]he "language, history, and structure" of the ESA demonstrates Congress' determination that the balance of hardships and the public interest tips heavily *in favor* of protected species.) (Emphasis added). Tellingly, the Opposition omits the fact that temporary injunctive relief may be granted if CBD is successful and this matter is returned to the administrative review stage. (Opp. at p. 10, lns. 5-11).

Based on the foregoing, NRA has sufficiently shown an interest that is directly related to this case, and meets that requirement for intervention as of right.

D. CBD Fails to Show Resolution of this Action Will Not Impair NRA's Interests

Revisions to Federal Rules of Civil Procedure Rule 24 in 1966 were

> obviously designed to liberalize the right to intervene in federal actions. Interestingly, an earlier draft would have required that the judgment "substantially" impair or impede the interest, but that higher barrier was deleted in the course of approving the amendment. See Cohn, The New Federal Rules of Civil Procedure, 54 GEO.L.J. 1204, 1232 (1966).

Nuesse v. Camp, 385 F.2d 694, 701-702 (D.C. Cir. 1967) (cited by *Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir. 1977) (noting *Nuesse* held "that stare decisis by itself may, in the proper case, furnish the practical disadvantage required for the petitioner to be entitled to intervention as of right.

There is no doubt that hunters' rights, both generally and as to 50 C.F.R. part 17.24(j)(2)(I), are implicated in this action. NRA is ready and willing to appear in this action to represent and protect hunters' rights. Any judicial interpretation of 50 C.F.R. Part 17.24(j)(2)(I) arising in this action will likely bind NRA and its members in the future, so there is reason to believe the resolution of this action may impair NRA's interests. Regardless, CBD contends that instead of NRA raising its defenses in the instant action, NRA should wait and participate in administrative proceedings that may never occur, or, if CBD's

suit fails as to the condor/lead issue, NRA could file a subsequent lawsuit.

NRA seeks to challenge CBD's assertions in *this action*, especially as they relate to 50 C.F.R. Part 17.24(j)(2)(I). NRA can only do that in the present litigation. NRA is unaware of any other action by which to obtain declaratory relief regarding the scope and application of 50 C.F.R. Part 17.24(j)(2)(I); NRA could not bring an independent declaratory relief action, as the only "case or controversy" is this action. 28 U.S.C. § 2201.

Because this is the only action in which NRA can defend against CBD on the relevant issues, and that resolution of this action (by judgment or settlement) may have the reasonable possibility of impairing NRA's interests, NRA has proven a potential impairment of interest that is sufficient for a party seeking to intervene as of right.

E. Current Defendants Will Not Adequately Defend NRA's Interests

1. NRA Was Involved in the Relevant Administrative Process

> [CBD contends d]ecisions in which the Ninth Circuit has allowed . . . public interest groups to intervene as defendants in cases challenging federal agency actions generally share a common thread: direct involvement in the administrative proceedings out of which the litigation arose by the group seeking intervention. *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th [sic] Cir. 1996) (citations omitted).

(Opp. at p. 7, lns. 19-25). This is nearly a direct quote from *Northwest*, with one glaring exception: *Northwest* states a common thread runs through potential intervenors who "were directly involved *in the enactment of the law or* in the administrative proceedings out of which the litigation arose." *Northwest*, 82 F.3d at 837 (italics added). Furthermore, though the Opposition does not mention it, the *Northwest* court expressly stated it cannot "rule out the possibility that a public interest organization might adduce sufficient interest to intervene even where it had not participated in or supported the legislation." *Id.* at 838.

Here, CBD contends that, because "[t]he administrative record for this case indicates that the NRA did not submit comments . . . at any stage of the public review process[,]" NRA must not have participated in the relevant administrative proceedings. (Opp. at p. 8, lns. 3-5). Accordingly, CBD argues, NRA should now be precluded from intervening.

CBD's analysis on this issue is myopic. The Declaration of Don Martin, filed with the

Motion, indicates NRA membership was active in discussions with the Arizona Game and Fish Department (which was one of the entities that introduced the California condor to Arizona, see Fish and Wildlife Service, 61 Fed. Reg. 54,044 (Oct. 16, 1996)) regarding the Condors' introduction. (Martin Decl., Document 39-2, p. 2, lns. 9-18). In fact, Mr. Martin, a professional hunting guide since approximately 1986, lobbied the Mohave County Board of Supervisors to support the condor introduction (which it did) once it was confirmed that the introduction "would not affect current hunting or grazing practices." (*Id.*). Accordingly, Mr. Martin's Declaration is evidence that NRA members, associated affiliates took part in the administrative process that led to the adoption of 50 C.F.R. Part 17.24(j)(2)(I). *See* Fish and Wildlife Service, 61 Fed. Reg. 54,044, 54,056 (Oct. 16, 1996).

Significantly, in large part because of the adoption of 50 C.F.R. Part 17.24(j)(2)(I), there was little reason for NRA to submit comments into the administrative record regarding the alleged link between condor mortality and the use of lead ammunition. Indeed, NRA's position was the law. To suggest NRA should have submitted written comments supporting a law already on the books, as CBD suggests, is not logical. Administrative proceedings are already complicated. Parties are not required to "make the record" in support of existing law against every potential challenge (whether direct or indirect). NRA's intervention would be based in no small part on 50 C.F.R. Part 17.24(j)(2)(I), as NRA affiliates supported the condor introduction effort from which the Part arose.

2. Current Defendants' Affirmative Defenses are Insufficient to Prevent Intervention

It is worth noting the Opposition fails to address *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995). Thus, CBD apparently concedes the Motion's recap of *Forest Council* is correct in stating there is no assumption of adequate representation by a federal agency defendant when it is "required to represent a broader view than the more narrow, parochial interests" of a proposed intervenor. *Id.* (cited in the Motion at pp. 12-13, lns. 27-28, 1-2); *see* 3B *Moore's Federal Practice* ¶24.07[4] at 24-78 (2d ed. 1995) ("Inadequate representation is most likely to be found when the applicant asserts a

personal interest that does not belong to the general public.").

The Opposition does not, and cannot, rebut the plain truth that NRA and the Current Defendants have markedly different interests. NRA's interest in preserving rights related to hunting are a perfect example of "narrow, parochial interests" that, at best, is one of a disparate bundle of interests the Current Defendants must defend. It is perhaps because of the foregoing that CBD attempts to wedge NRA's and the Current Defendants' interests into one alleged "interest," namely "an order upholding the BLM's approval of the RMP and the Biological Opinion of the FWS." (Opp. at p. 13, lns. 12-14).

Aside from the fact CBD proffers no authority to support its narrow definition of interest, any presumption of representational adequacy is overcome in situations, like here, when there is a "likelihood that the government will abandon or concede a potentially meritorious reading of the [law at issue]." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 444 (9th Cir. 2006); *see United States v. State of Oregon*, 839 F.2d 635, 638 (9th Cir. 1998) (holding the U.S. did not adequately represent the interest of a proposed intervenor with claims broader than the U.S.').

Current Defendants' Answer flatly denies CBD is entitled to any relief whatsoever (Answer, Document No. 31, p. 13, lns. 4-6); NRA's Proposed Answer, however, requests this Court "[i]ssue a Declaratory Judgment against [CBD] on all claims for which [CBD] sought declaratory relief. (Proposed Answer, p. 14, lns. 27-28). That request is based, in part, on affirmative defenses NRA, but not Current Defendants, has pleaded, including harmless error and that CBD's lawsuit conflicts with 50 C.F.R. Part 17.24(j)(2)(I). (*Id.* at pp. 18-19, lns. 26-28, 1-2).

Thus, as Current Defendants have not pleaded defenses that NRA obviously believes are meritorious, there "are far more than differences in litigation strategy between the United States and the proposed intervenors." *Lockyer*, 450 F.3d at 444. Accordingly, here, as in *Lockyer*, because the "proposed intervenors bring a point of view to the litigation not presented by either the plaintiffs or the defendants[,]" NRA overcomes the presumption. *Id.* at 445.

F. Permissive Intervention Is Both Practically and Procedurally Appropriate

The Motion establishes that NRA meets the requirements for permissive intervention,[6] but the discretionary factors at issue also weigh in favor of permissive intervention. "[T]he decision to grant or deny [permissive] intervention is discretionary, subject to considerations of equity and judicial economy." *Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1991), *cert. denied*, 498 U.S. 1028 (1991). "[I]t will often be the case that a private party has greater first hand knowledge of the impact of legislation on private individuals than the government. Such knowledge *may support* a trial judge's discretionary grant of permissive intervention . . . ." *Prete v. Bradbury*, 438 F.3d 949, 959 n.13 (9th Cir. 2006).

There can be no doubt that NRA's membership has exactly the kind of "first hand knowledge" that supports permissive intervention. NRA is aware of no other hunting rights organization operating in Arizona that has the inclination, experience, and wherewithal to participate in this action and represent those hunters that are directly impacted by the agency actions at issue and by 50 C.F.R. Part 17.24(j)(2)(I). If NRA is not allowed to intervene, judicial economy (not to mention administrative economy) will not be served, *regardless of the result.* That is, if CBD obtains a verdict or settlement in its favor, NRA envisions a declaratory relief action will be filed regarding the impact of 50 C.F.R. Part 17.24(j)(2)(I). If the Current Defendants prevail, it will likely only be after fully litigating the substance of CBD's claims (something that could be avoided if NRA's harmless error or statutory preclusion affirmative defenses are upheld), and will leave unresolved the proper interpretation and effect of 50 C.F.R. Part 17.24(j)(2)(1).

Because 50 C.F.R. Part 17.24(j)(2)(I) will likely be raised in a future lawsuit if not

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[6] The Opposition states "NRA has not established there is an independent basis for jurisdiction." (Opp. at p. 17, lns. 18-19). Though independent jurisdiction may be required for *new claims* of a plaintiff intervenor, there is no reason for a defendant intervenor to prove jurisdiction. Intervention is an "ancillary proceeding," and the jurisdictional issue can be established (and are plainly established in this federal question case) by the original parties. *See Vill. of Oakwood v. State Bank & Trust Co.*, 481 F.3d 364, 367 (6th Cir. 2007) (citing generally 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1917 (3d ed. 1998), which states "[i]n federal question cases there should be no problem of jurisdiction with regard to an intervening defendant . . . .").

addressed in this action, and because intervention will, without undue prejudice,[7] provide a unified voice in this action for thousands of hunters that will be affected by the resolution of this action, NRA requests the Court grant it permissive intervention.

III. CONCLUSION

NRA should be allowed to intervene as a party on issues that will potentially affect hunting in Arizona. CBD's suggestion that NRA should be ordered to file joint briefs with Current Defendants is untenable (Opp. at p. 18, ln. 22-27). Obvious prejudice would result to all defendants if joint briefs were ordered, as NRA's arguments and interests are not fully aligned with those of the Current Defendants, hence NRA's Motion. Furthermore, CBD's requests that NRA be precluded from independently filing briefs or participating herein prior to the remedial phase are not based on any factual threat of prejudice, but appear to be a surreptitious attempt to prevent NRA from making arguments that would prevent the necessity for a decision on the merits.

Based on the foregoing, NRA respectfully requests the Court grant it leave to intervene in this matter.

Dated: November 2, 2009

MICHEL & ASSOCIATES, P.C.

/s/ C.D. Michel
Attorneys for Proposed Defendant-Intervenor the National Rifle Association

[7] CBD claims that, "in cases seeking to enforce environmental laws in the public interest, delays due to intervention are especially prejudicial to parties and the public because they can stall the resolution of important environmental issues." (Opp. at p. 18, lns. 6-8 (citations omitted). CBD's actions, however, indicate that CBD itself is not particularly concerned about this matter being "stalled." First, CBD has not sought preliminary relief herein. Second, CBD's Notice of Intent to Sue dated December 9, 2008 (attached as Exhibit "2"), raises most, if not all of CBD's arguments regarding condors, and yet, CBD's Complaint filed January 27, 2009 (Document No. 1), barely mentions the condor; CBD did not raise any condor-specific arguments until 2 months later, in CBD's Amended Complaint (Document No. 21, filed March 25, 2009).

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2009, I electronically transmitted the document Reply in Support of Motion for Leave to Intervene of National Rifle Association to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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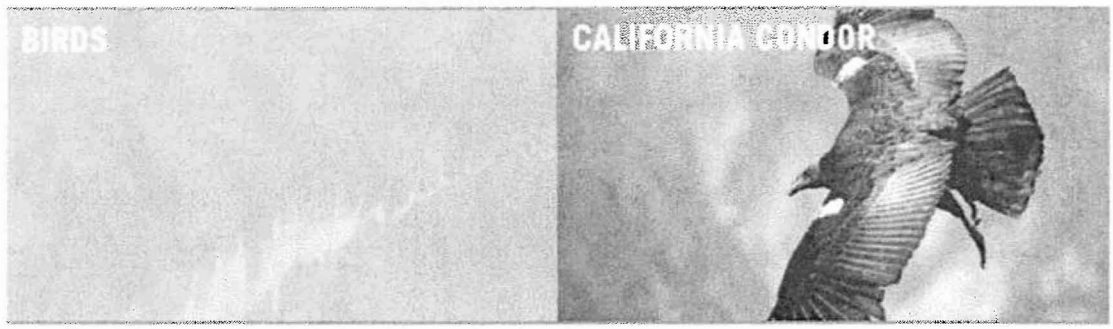
EXHIBIT 1



SAVING THE CALIFORNIA CONDOR

A cherished icon of the West, the prehistoric-looking California condor remains one of the world's most endangered species. North America's largest avian narrowly escaped extinction in the mid-1980s when the last 22 wild California condors became star participants in a captive-breeding program. Thanks to those efforts, more than 140 condors flew freely in California and Arizona by 2007. But recovery is still in jeopardy: More than 40 percent of all released condors have died or been returned to captivity.

Poisoning by ingestion of lead shot — scavenged along with carcasses left behind by hunters — is one of the most widespread and preventable causes of condor deaths. The Center's Get the Lead Out Campaign has called on California and Arizona to require the use of nonlead ammunition within the condor's range, resulting in California's historic Ridley-Tree Condor Preservation Act, as well as a settlement with California's wildlife agencies eliminating lead ammunition for depredation hunting (the hunting of "nuisance" animals). When management plans by the U.S. Bureau of Land Management and Fish and Wildlife Service failed to protect condors in on public lands near the Grand Canyon, we took both agencies to court in 2009. We're also campaigning to reduce habitat loss, leading a broad coalition to preserve Tejon Ranch (a biodiversity hotspot containing vital habitat for the condor) as a national or state park — even after other conservation groups signed a compromise with the ranch's owners that would allow development in condor critical habitat. We've fought to block a series of sprawling developments that would forever change Tejon and moved against a proposal to grant the ranch's owners a "license to kill" condors to make development easier. And when two condors were found shot with lead bullets in central California in spring 2009, we launched an in-depth investigation and announced a $40,000 reward to help bring the shooter or shooters to justice.

We opposed the Bush administration's plans to expand oil and gas drilling in Los Padres National Forest, including surface drilling next to the Sespe Condor Sanctuary. We submitted a comprehensive conservation plan for Southern California's four national forests to protect condors, and we're challenging the

KEY DOCUMENTS

Petition to California Fish and Game Commission to address lead poisoning of condors
Scientific reports
Letter from scientists to Governor Schwarzenegger on saving Tejon Ranch
Event timeline: A brief history of condor controversy in Tejon
California Condor Activity in the Tejon Ranch Region
Center comments on Tehachapi Uplands Multiple Species Habitat Conservation Plan
Scientist comments on Tehachapi Uplands Multiple Species Habitat Conservation Plan

ENDANGERED SPECIES ACT PROFILE

ACTION TIMELINE

NATURAL HISTORY

MEDIA

Press releases
Media highlights
Search our newsroom for the California condor

RELATED ISSUES

Get the Lead Out
Save Tejon Ranch
Oil and Gas
Southern California Forests
The Endangered Species Act

DETRITUS

California Department of Fish and Game explanation of lead ammunition ban
Event timeline: a brief history of condor controversy in Tejon
Pinnacles National Park Web page on lead and condors
Download California condor ringtone for your cell phone

Contact: Jeff Miller

Forest Service's management plans for these forests, which would harm condor habitat. Our influence on past management plans for these forests has resulted in the inclusion of protective measures such as using nontoxic antifreeze in vehicles and retrofitting power lines to prevent condor electrocutions.

Photo © David Clendenen, USFWS

EXHIBIT 2

CENTER *for* BIOLOGICAL DIVERSITY

December 9, 2008

VIA FACSIMILE AND CERTIFIED MAIL/RETURN RECEIPT

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Linda Price
Dirk Kempthorne
Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
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Re: 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act Concerning the Resource Management Plans/Final Environmental Impact Statement for the Grand Canyon-Parashant National Monument, the Arizona Strip Field Office, and the Vermilion Cliffs National Monument

Dear Ms. Christian, Ms. Price, Mr. Bradybaugh, and Secretary Kempthorne:

This letter provides notice that the Center for Biological Diversity intends to sue the U.S. Bureau of Land Management (BLM) and the National Park Service (NPS) for violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544. Section 7 of the ESA requires the BLM and NPS to ensure that their actions do not jeopardize the continued existence of threatened or endangered species or destroy or adversely modify designated critical habitat. Id. § 1536(a)(2). The agencies are violating this duty in connection with their management of the Grand Canyon-Parashant National Monument, the BLM lands managed by the Arizona Strip Field Office, and the Vermilion Cliffs National Monument,

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pursuant to the recently-adopted BLM Resource Management Plans and NPS General Management Plan for those areas. These plans threaten the survival of a host of imperiled species, including the desert tortoise and the California condor. This letter constitutes the required 60-day notice under 16 U.S.C. § 1540(g)(2)(A).

I. BACKGROUND

On November 7, 2007, BLM and the Park Service completed a formal section 7 ESA consultation with the U.S. Fish and Wildlife Service (FWS) evaluating the impacts of the management plans for the Grand Canyon-Parashant National Monument, Vermilion Cliffs National Monument, and Arizona Strip (collectively, "Arizona Strip plans") on threatened and endangered species and designated critical habitat. See 16 U.S.C. § 1536(a)(2).

In the biological opinion completing the consultation, FWS concluded that the Arizona Strip plans are not likely to jeopardize the continued existence of the California condor, Mexican spotted owl, southwestern willow flycatcher, Yuma clapper rail, desert tortoise, Virgin River chub, woundfin, Brady pincushion cactus, Holmgren milk vetch, Jones' Cycladenia, Siler pincushion cactus, and Welsh's milkweed. FWS also concluded the plans are not likely to destroy or adversely modify designated critical habitat for the Virgin River chub, woundfin, desert tortoise, southwestern willow flycatcher, and Holmgren milk vetch.

For a variety of reasons, these conclusions are arbitrary and capricious and violate the ESA. Accordingly, BLM and NPS's reliance on this unlawful biological opinion violates their substantive duty under section 7 of the ESA.

Desert Tortoise

First, the biological opinion fails to adequately evaluate the impacts of the plans' activities on the desert tortoise.

For example, the biological opinion concludes that the plans will not jeopardize the tortoise or destroy or adversely modify its critical habitat because they are allegedly "largely in accordance" with the 1994 Desert Tortoise Recovery Plan. However, many of the activities authorized under the Arizona Strip Plans are contrary to the prescriptions and direction of the Recovery Plan. The biological opinion does not explain how FWS reached its conclusion that the Arizona Strip plans comply with the Recovery Plan when it is clear that they do not. See Southwest Center for Biological Diversity v. Bartel, 470 F. Supp. 2d 1118, 1136-37 (S.D. Cal. 2006) ("FWS must make a conscientious and educated effort to implement the plans for the recovery of the species."). As a result, the biological opinion fails to adequately evaluate whether and how the plans will affect the tortoise's recovery. This failure violates the ESA. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 931-33 (9th Cir. 2008) (holding ESA regulations require consideration of recovery in jeopardy analysis). Similarly, the biological opinion fails to address how the plans that allow significant adverse impacts to designated critical habitat

through, *inter alia*, continued grazing and ORV use will affect the value of the tortoise's designated critical habitat for recovery. See, e.g, Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1069 (9th Cir. 2004) (requiring agencies to consider impacts on recovery in critical habitat analysis).

The biological opinion failed to adequately consider the impacts to the tortoise and its critical habitat on a recovery unit basis. A recovery unit as set out in the Desert Tortoise Recovery Plan "is a geographic unit harboring an evolutionary distinct population segment of the desert tortoise (Mojave unit)." Desert Tortoise Recovery Plan at footnote page i The goal of the Recovery Plan is to protect and recover each of these unique populations of desert tortoise; "[p]reserving viable populations of desert tortoises within each of these units is essential to the long-term recovery, viability, and genetic diversity of the species." Id. at pg. 31. The biological opinion ignored new genetics information that shows that there are substantial genetic distinctions between the tortoise populations in many of the recovery units. This underscores the need to preserve healthy tortoise populations in each recovery unit in order to achieve recovery of the species and fulfill the goals of the ESA. See Murphy, Robert W., Berry, Kristin H., Edwards, Taylor, and McLuckie, Ann M., "A Genetic Assessment of the Recovery Units for the Mojave Population of the Desert Tortoise, Gopherus agassizii," Chelonian Conservation and Biology, 2007, 6(2); 229-251.

An analysis of the impacts on the tortoise's recovery is essential because the tortoise population continues its downward population decline despite federal listing and recovery plan which was published in 1994. Its habitat continues to shrink and the threats to its survival are increasing. Although the biological opinion acknowledges the deteriorating condition of the tortoise's designated critical habitat in this area and others, the agency approves activities that will increase the threats to the tortoise and its designated critical habitat, including grazing, roads and motorized recreation, construction of power lines, oil and gas exploration and drilling, and uranium mining. Regarding roads in particular, FWS assumed the plans will close enough roads to protect the tortoise even though BLM had not completed its route transportation plan before the end of the consultation. In approving this unknown road plan and other damaging activities, FWS failed to adequately evaluate how the Arizona Strip plans' activities, in concert with the area's already degraded conditions, will affect the tortoise's critical habitat and its value for recovery. See 50 C.F.R. § 402.14(g) (describing requirements for biological opinion); id. § 402.02 (defining effects of the action that must be analyzed in section 7 consultation).

FWS also failed to adequately analyze particular threats and impacts to the tortoise, including the threat from the spread of upper respiratory tract disease and the cumulative impacts from non-federal activities on the tortoise. See 50 C.F.R. § 402.14(g); id. § 402.02 (defining cumulative effects). Further, for many areas that are already degraded, FWS simply notes that they are lost, without evaluating what that loss means for the tortoise. For example, FWS approves the disposal of approximately 1,800 acres of desert tortoise habitat and acknowledges that these lands will be developed and become unsuitable for the tortoise, but fails to analyze how this loss of acreage will affect

the tortoise's survival or recovery cumulatively. Similarly, FWS dismisses critical habitat located outside the specific desert tortoise protection areas as already degraded, without addressing how that degraded habitat affects the tortoise's ability to survive and recover.

In approving the Arizona Strip plans' damaging activities, the biological opinion also relies on incomplete information and ignores the best available science. See 16 U.S.C. § 1536(a)(2) (requiring FWS and action agencies to use "best scientific and commercial data available"). For example, the agency ignores many of the indirect impacts on tortoises associated with both paved and unpaved roads as well as the most current science relating to impacts of roads on tortoises and the current science on the impacts of grazing on desert tortoise. Both grazing and ORVs are known to have significant impacts on the desert tortoise and its habitat. See, e.g., Brooks, M.L. and B. Lair. 2005. Ecological Effects of Vehicular routes in a Desert Ecosystem. U.S. Geological Survey, Western Ecological Research Center, Las Vegas Field Station, Henderson, Nevada, 23p; Von Seckendorff Hoff, K., and R. Marlow. 2002. Impacts of vehicle road traffic on desert tortoise populations with consideration of conservation of tortoise habitat in southern Nevada. Chelonian Conservation and Biology 4:449-456; Jennings, W. B. 1997. Habitat use and food preferences of the desert tortoise, *Gopherus agassizii*, in the western Mojave Desert and impact of off-road vehicles. Proceedings: Conservation, Restoration, and Management of Tortoises and Turtles - An International Conference. New York Turtle and Tortoise Society, pp. 42-45.

For example, both activities can increase the spread of non-native invasive weeds which crowd out native flora. This can have both a direct and indirect impact on tortoises by decreasing essential, nutritious native forage and by directly harming tortoises. See, e.g., Brooks, M.L. and Berry, K.H. 2006 Dominance and environmental correlates of alien annual plants in the Mojave Desert, USA Journal of Arid Environments (67): 100-124; Brooks, M.L., Matchett, J.R., and Berry, K.H. 2006. Effects of livestock watering sites on alien and native plants in the Mojave Desert, USA, Journal of Arid Environments (67): 125-147; Gelbard, J. L. and J. Belnap. 2003. Roads as conduits for exotic plant invasions in a semiarid landscape. Conservation Biology 17:420-432. Effects of livestock watering sites on alien and native plants in the Mojave Desert, USA, Journal of Arid Environments (67): 125-147; Jennings, W.Bryan, "Diet Selection by the Desert Tortoise in Relation to the Flowering Phenology of Ephemeral Plants," Chelonian Conservation and Biology, 2002, 4(2):353-358; Oftedal, Olav T., Hillard, Scott, and Morafka, David J., "Selective spring foraging by juvenile desert tortoises (*Gopherus agassizii*) in the Mojave Desert: evidence of an adaptive nutritional strategy." Chelonian Conservation and Biology, 2002, 4(2):341-352. Without a diverse assemblage of plant species upon which to forage, desert tortoises cannot maintain an appropriate nutritive balance. Oftedal, O.T., 2005, Fast Plants, Slow Tortoises: How nutrition could constrain recovery of the desert tortoise. Abstract of paper presented at the Thirtieth Annual Meeting and Symposium of the Desert Tortoise Council. The impacts on juveniles from lack of nutritious forage are known to be even more severe; See, e.g., Id.; Oftedal, O.T. 2001. Low rainfall affects the nutritive quality as well as the total quantity of food available to the desert tortoise. Abstract of paper presented at the Twenty-sixth Annual

Meeting and Symposium of the Desert Tortoise Council. The biological opinion also fails to adequately assess the indirect impacts of the activities authorized by RMP which may increase fire frequency and raven predation. It is well known that raven predation of juvenile tortoises is a threat to the species and that raven populations increase along with human activities which provides subsidies for raven populations such as water sources for livestock, roadkill, and increased trash.

Further, as early as the 2007, at the Desert Tortoise Symposium, which many FWS staff attended, there was clear evidence that tortoises may be suffering from direct injuries and infections due to attempts to consume unpalatable weeds spread by ORVs and grazing. Medica, Philip A. and Sara E. Eckert, USGS, Invasive Annual Grass Bromus madritensis ssp. rubens and Mechanical Injury to the Desert Tortoise, Poster presented at Desert Tortoise Symposium, February 2007. None of these issues were adequately addressed in the biological opinion.

The biological opinion also improperly relies on unknown and unproven mitigation measures. "Mitigation measures must be reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002). For example, even though FWS admits that uranium mining is incompatible with desert tortoise habitat, the biological opinion concludes that any such mining will not jeopardize the tortoise or adversely modify its critical habitat because the agency will adopt measures, not yet known, to protect the tortoise if mining is permitted. FWS also acknowledges that signage for road closures and rehabilitation will only take place when funding becomes available. Thus, road closures may be largely ineffective as mitigation measures to reduce impacts to the tortoise until that funding is secured by BLM. Relying on these and other speculative future actions to avoid jeopardizing listed species or adversely modifying or destroying critical habitat violates the ESA.

For those mitigation measures that are identified in the biological opinion, FWS fails to support its conclusion that they will be effective in alleviating the threats to the species and critical habitat. For example, to protect the desert tortoise from grazing impacts, FWS relies primarily on a requirement that livestock be moved when they have eaten 45% of the available forage in desert tortoise habitat. However, FWS fails to explain the basis for its assumption that this measure is sufficient or how the agencies will enforce this limitation. Indeed, recent scientific data suggests that this 45% threshold is too high and does not adequately protect the tortoise. In fact, utilization rates for the Mojave desert are recommended at a 25-35% threshold with 4-8 inches of annual rainfall. Holecheck, J.L., R.D. Pieper and C.H. Herbell 1998. Range Management: Principles and Practices. Prentice-Hall . Table 8.7 pg 207. This recommendation does not include an analysis of grazing with rare species forage needs which would need to be even lower. FWS did not address this information in the biological opinion.

Similarly, FWS relies solely on seasonal livestock restrictions, but fails to explain how or why these limitations alone will sufficiently protect the tortoise and its critical habitat. There is no evidence these restrictions will adequately protect the desert tortoise or allow the tortoise to recover. Moreover, the RMP allows for ephemeral grazing on the Tuweep and Pakoon allotments, in spite of these areas being critical to desert tortoise recovery. As FWS is well aware, ephemeral grazing has particularly damaging effects and most importantly can undermine recovery of native plant species and the desert tortoise by competing for and consuming native plants necessary for the tortoise to recover from past nutritive and forage deficits in "good" years. The biological opinion completely fails to address this issue.

California Condor

The biological opinion also fails to adequately address impacts to the condor. As FWS is well aware, ingestion of lead ammunition is the primary source of elevated lead exposure and poisoning in the endangered California condor. Although the agencies were repeatedly urged to do so, the final Plan fails to ban the use of lead shot and other lead ammunition on these public lands or to provide any mitigation for likely severe ongoing impacts to the Condor. Because it has been left unaddressed in these plans and in other areas, the lead poisoning problem could negate the efforts of the condor reintroduction and recovery program.

Since the southwestern condor reintroduction program began in 1996, lead poisoning has been the leading cause of death for reintroduced condors in Arizona. At least 12-14 condors have died of lead poisoning in Arizona. An increasing and appalling percentage of the wild condor population in the southwest must now periodically receive emergency chelation treatment for lead poisoning. In 2005, over 50% of all Arizona condors had lead exposure and 23% (18 birds) required chelation treatment. In 2006, 95% of all Arizona condors (54 birds) had lead exposure and 40 condors (70% of the Arizona population) were chelated. Although no condors died in Arizona of lead poisoning in 2007, there were 50 cases of condor lead exposure documented and 25 required chelation. See, e.g., Second Five Years of the California Condor Reintroduction Program in the Southwest, April 2007, prepared for the California Condor Recovery Team and U.S. Fish and Wildlife Service, California/Nevada Operations Office, Sacramento, California. Data has not yet been released for 2008.

There is overwhelming evidence that the lead poisoning condors is coming from ammunition used in hunting and plinking. Condors scavenge bullet-killed carrion left by hunters, which often contains small fragments of lead. Every fall since 2002 there has been an abrupt increase in the blood lead levels of Arizona condors corresponding with increased condor use during hunting season of deer-hunting areas on the Kaibab Plateau. Metallic lead fragments deposited onto soils and aquatic sediments are not chemically or environmentally inert, although tens or hundreds of years may be required for total breakdown and dissolution of pellets.

The biological opinion recognizes this problem and "recommends" that lead ammunition be banned but fails to address the survival and recovery of the Condor in light of these impacts.

Although voluntary efforts in Arizona have had some positive effect, they are not sufficient to protect the condor. Even with a positive response from hunters there are still significant and lethal amounts of lead available to condors. There have been at least a dozen condor deaths in Arizona from lead poisoning. It is clear from the 5-year review of the condor recovery program that without further reductions in lead exposure, condors will continue to die of lead poisoning and require frequent and intrusive chelation treatments, and that the condor population will not achieve the recovery goals for the species.

Pursuant to the ESA, for nonessential experimental populations, only two provisions of section 7 would apply outside the National Park System lands; section 7(a)(1), which requires all Federal agencies to use their authorities to conserve listed species, and section 7(a)(4), which requires Federal agencies to informally confer with the Service on actions that are likely to jeopardize the continued existence of a proposed species. Thus, FWS must confer on the likelihood of jeopardy to this species outside of the NPS lands in the same way as it would for a species that is proposed for listing. It failed to do so. Moreover, by failing to protect the condor from further, avoidable lead poisoning due to the use of lead ammunition on BLM lands, the agency has failed to utilize its authority to further survival and recovery of the condor as it is required to do under section 7(a)(1).

Most importantly, FWS' assumption that impacts to the 10(j) population need not be considered as "take" if the impact occurs outside of NPS lands is inaccurate. FWS has failed to properly assess the legal import of the use of lead ammunition in condor habitat. The special rule issued under section 10(j) states that it is not a violation of the take provisions of the ESA if a California condor is *unavoidably and unintentionally* taken (including killing or injuring) where the activity was *non-negligent* and incidental to a lawful activity, such as hunting. However, it is incontrovertible that the use of lead ammunition is entirely avoidable, as there are numerous alternative ammunitions that do not contain lead available for most hunting activities. Further, given the current scientific evidence it is clear that the use of lead ammunition in any California condor habitat is not only negligent but amounts to reckless disregard. Thus, any take or harm resulting to the California condor from the use of lead ammunition in the Plan area would be *per se* unlawful and a violation of the ESA. See 16 U.S.C. § 1532(19) (The term "take" includes harm).

Other Species

The deficiencies in the biological opinion's evaluation of the desert tortoise and the Condor similarly plague the various analyses of the plans' impacts on other threatened and endangered species and the designated critical habitat.

For example, the biological opinion fails to adequately analyze the Arizona Strip plans' impacts on the ability of any of the listed species, including for example the Southwestern willow flycatcher and Mexican spotted owl, to recover. It also fails to evaluate how these plans will affect the value of designated critical habitat for recovery of the species. Both analyses are required by the ESA and its implementing regulations. Nat'l Wildlife Fed'n, 524 F.3d 917, 931-33 Gifford Pinchot Task Force, 378 F.3d at 1069 (9th Cir. 2004).

Further, as with the tortoise, the biological opinion fails to adequately evaluate the baseline conditions of any of the other listed species or their critical habitat, the specific impacts caused by the activities approved by the plans, or the cumulative impacts. Not only are these analyses insufficient in isolation, but the biological opinion also fails to connect these analyses to comprehensively analyze the myriad threats presented by the plans and non-federal actions in the area.

In addition, the biological opinion fails to evaluate certain impacts altogether for the listed species. For example, the biological opinion concludes generally that closed routes are beneficial to most species, but fails to evaluate how many routes must be closed to protect any species or critical habitat. Thus, the biological opinion fails to evaluate how the plans' particular route designations allow for or preclude survival and recovery of any of these species, including the desert tortoise and the condor. Indeed, as a general matter, the biological opinion's conclusions are unsupported by the data and analysis in the document and are therefore arbitrary and capricious. In addition, the analysis of the impacts of the plan on listed plant species including the Brady pincushion cactus, Siler pincushion cactus, and Holmgren milk vetch and its critical habitat is woefully inadequate. FWS admits that there is insufficient data on many of the impacts from grazing, ORVs and the spead of invasive weeds leading to type conversion but nonetheless simply concludes the impacts will be slight. However, absence of evidence is not evidence that significant impacts will not occur.

Moreover, as with the desert tortoise, the biological opinion relies on unlawful mitigation measures to alleviate the plans' impacts on other species. The biological opinion primarily consists of an "adaptive management" strategy, which means BLM and NPS will determine at some later date whether their actions are jeopardizing species or adversely modifying critical habitat and then decide whether to take any remedial steps. For example, FWS states that roads or routes causing or contributing to mortality of individuals of listed species or degradation of their habitat "will be identified." Those routes will either be closed, or, if it is "not practical" to close those routes, the BLM or NPS will impose other, unidentified mitigation measures. FWS does not explain what standards or thresholds will be used to determine when a route is degrading habitat or contributing to mortality, nor whether it is practical to close a route. FWS also fails to explain when this process will occur, how it will be funded, how any monitoring of closed routes will be funded, or how FWS can conclude that the route network will not jeopardize listed species or adversely modify critical habitat before it is completed.

Relying on these and other speculative future actions to avoid jeopardizing listed species or adversely modifying or destroying critical habitat violates the ESA. See Rumsfeld, 198 F. Supp. 2d at 1152. Because FWS has not identified the future mitigation measures, there is no evidence that these measures will be effective or that they are reasonably certain to occur. In addition, as with the desert tortoise analysis, the biological opinion fails to adequately support its reliance on those mitigation measures that are identified.

Finally, as with the desert tortoise, the biological opinion fails to consider the "best available scientific and commercial data available" in relation to the other listed species as required by § 7(a)(2) of the ESA.

In sum, the biological opinion violates the ESA in several ways for each species evaluated in the consultation, including its failure to adequately evaluate the impacts of the Arizona Strip plans on the recovery of the species and critical habitat, its failure to adequately evaluate the impacts of the Arizona Strip plans alone or in concert with the environmental baseline and cumulative impacts, its reliance on speculative mitigation measures and adaptive management strategies that are ineffective and not reasonably certain to occur, and its failure to rely on the best available science. Further, the biological opinion's conclusions are unsupported by the evidence in the biological opinion and are based on inadequate and flawed analyses. For these and other reasons, the 2007 biological opinion is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. See 5 U.S.C. § 706(2).

II. VIOLATIONS OF THE ESA

A. Violations of Section 7(a)(2); Unlawful Reliance on Inadequate Biological Opinions for Listed Species.

Pursuant to section 7(a)(2) of the ESA, BLM and NPS have a substantive duty to avoid jeopardy to listed species regardless of the conclusion reached by the consulting agency. See Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993) ("Consulting with the [FWS] alone does not satisfy an agency's duty under the Endangered Species Act."); Rumsfeld, 198 F. Supp. 2d at 1157 ("under the ESA, the Army has an independent duty to insure that its actions satisfy § 7 and the jeopardy standard"). Here, the BLM and NPS are failing to ensure that their actions are not jeopardizing the listed species or adversely modifying or destroying designated critical habitat in the Grand Canyon-Parashant National Monument, the BLM lands managed by the Arizona Strip Field Office, and Vermilion Cliffs National Monument because they are relying on an arbitrary and capricious biological opinion. Federal agencies may not take action that could harm listed species or designated critical habitat until they have completed consultation and received a valid biological opinion. Further, the BLM and NPS failed to rely on the best scientific and commercial data available as required by the ESA. See 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

As detailed above, the biological opinion on which BLM and NPS relied in adopting the disputed plans is substantially flawed and thus FWS's conclusions that the management of these lands pursuant to those plan amendments would not jeopardize listed species or destroy or adversely modify critical habitat for listed species are unsupported. Therefore, the FWS's issuance of the biological opinion and the BLM's and NPS' implementation of the plans in reliance on the biological opinion violate the substantive and procedural provisions of Section 7 of the ESA.

The deficiencies in the biological opinion render the FWS's "no jeopardy" and "no adverse modification" conclusions and the BLM's and NPS' reliance on those conclusions arbitrary and capricious and therefore unlawful under the ESA and the APA. The BLM and NPS therefore are in violation of their substantive mandate to insure against jeopardy and adverse modification of critical habitat for listed species within the lands that they manage.

B. Violation of Section 7(b)(4); Unlawful Reliance on Inadequate ITS.

The FWS is required under Section 7(b)(4) of the ESA to issue an incidental take statement ("ITS") with each biological opinion for animal species that specifies the amount and extent of incidental take authorized to the action agency. Additionally, the ITS must specify reasonable and prudent measures necessary to minimize such impacts. Finally, the ITS must include terms and conditions implementing the reasonable and prudent measures.

The ITS in the biological opinion is inadequate in many ways including, but not limited to, the failure to provide a clear trigger for re-consultation. For example, the biological opinion's ITS provides that up to "[t]hirty desert tortoises may be injured or killed by project activities and BLM authorizations over the next 20 years" but fails to provide a specific number of deaths or injuries that will trigger re-consultation.

For the condor, FWS assumes that take can only occur when the individual condors are physically on NPS lands, where they are treated as "threatened species" under the ESA. Under this logic, the harm to a condor experiencing lead poisoning would only be "counted" as a take when the individual condor is on NPS lands and the same injury to the same individual would not be considered as "take" when the condor is on BLM lands. Assuming for the sake of argument alone that this is a correct analysis of the law, FWS has still failed to provide a valid ITS for the condor. As the 2007 report showed, nearly all condors in this area have been exposed to lead and well over half have been treated for lead exposure. (Second Five Years of the California Condor Reintroduction Program in the Southwest, April 2007, Figure 6). Even if, as FWS states, these condors "occur only rarely" on NPS lands, there would still be some amount of take that must be recognized for these condors and which is not accounted for in the ITS.

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C. Violation of Section 9; Unlawful Taking of Listed Species.

The ESA also prohibits any "person" from "taking" threatened and endangered species. 16 U.S.C. § 1538, 50 C.F.R. § 17.31. The definition of "take," found at 16 U.S.C.§ 1532(19), states, "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

The BLM and NPS are in violation of Section 9 of the ESA. Because the BLM and NPS are in violation of Sections 7(a)(2), 7(d) and 50 C.F.R.§ 402.16, and because the biological opinion and the accompanying ITS are inadequate and unlawful, no take of listed species is properly authorized.

In addition, the biological opinion fails to provide any authorization for take of the condor and yet take continues to occur primarily through lead poisoning. Most egregiously, the BLM continues to allow use of lead ammunition for hunting on BLM lands although this activity is known to cause harm to condors. This source of harm to the condor is entirely avoidable and the use of lead ammunition is intentional. Moreover, the threat to the condor from lead ammunition is well known to hunters, and as a result, the continued use of lead ammunition in condor habitat in hunting (an otherwise lawful activity) is clearly both negligent and reckless. Therefore, harm to the condor from lead poisoning due to hunting with lead ammunition does not and cannot fall within the exemptions provided for the non-essential experimental population under 50 C.F.R. § 17.84(j)(2)(i).

D. Violation of Section 7(a)(1) and 2(c); Failure to Conserve Listed Species.

Section 7(a)(1) of the ESA directs that the Secretary review "…other programs administered by [her] and utilize such programs in furtherance of the purposes of the Act." 16 U.S.C. § 1536(a)(1). The purpose of the ESA is to conserve endangered or threatened species. Among the "other programs administered by" the Secretary of the Interior is the administration of these lands by the BLM and NPS. Section 7(a)(1) applies to all listed species and specifically applies even to the non-essential experimental population of the condor on BLM lands covered by these plans. Given the extensive evidence that the use of lead ammunition has and will continue to directly harm the condor population in this area, BLM's failure to prohibit or limit in any way the use of lead ammunition on the lands covered by the Arizona Strip RMP violates its duties under Section 7(a)(1).

Section 2(c) of the ESA establishes that it is "…the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c)(1). The ESA defines "conservation" to mean "…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 Act are no longer necessary." 16 U.S.C. § 1532(3).

The BLM's and NPS' implementation of the plans and authorization of activities including route designations and grazing is violating section 2(c) of the ESA because the agencies refuse to use their authorities to further the purpose of the ESA and species conservation on these lands. For example, the BLM has failed to fully implement the recovery plan for the Mojave population of the desert tortoise on these lands which calls for eliminating grazing from critical habitat and limiting off-road vehicle activity in desert tortoise habitat. Similarly, the FWS is violating section 2(c) of the ESA because the biological opinion fails to apply the Secretary's affirmative responsibility to conserve listed species by including measures required to conserve these species as mandatory terms and conditions of any ITS.

III. Remedy

If the BLM, NPS, and the FWS do not act within 60 days to correct these violations of the ESA, the Conservation Groups will pursue litigation in federal court against the agencies and officials named in this letter. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations.

If you have any questions, or would like to discuss this matter further, please contact me at your earliest convenience.

Sincerely,

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Oftedal, O.T. 2001. Low rainfall affects the nutritive quality as well as the total quantity of food available to the desert tortoise. Abstract of paper presented at the Twenty-sixth Annual Meeting and Symposium of the Desert Tortoise Council.

Second Five Years of the California Condor Reintroduction Program in the Southwest, April 2007, prepared for the California Condor Recovery Team and U.S. Fish and Wildlife Service, California/Nevada Operations Office, Sacramento, California