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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PRESCOTT DIVISION

CENTER FOR BIOLOGICAL
DIVERSITY; SIERRA CLUB; and
GRAND CANYON WILDLANDS
COUNCIL,

Plaintiffs,

vs.

UNITED STATES FOREST SERVICE,

Defendant.

Case No: 3:12-cv-08176-SMM

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO THE FOREST
SERVICE'S MOTION TO DISMISS**

COME NOW Plaintiffs Center for Biological Diversity, Sierra Club and Grand
Canyon Wildlands Council (collectively "Plaintiffs"), and file this Response in

1 Opposition to the United States Forest Service's ("Forest Service") Motion to Dismiss
2 (Doc. 46).

3 INTRODUCTION

4
5 As the landowner and manager of the Kaibab National Forest (KNF), the Forest
6 Service has control over and is actively involved in activities that occur there, including
7 waste disposal. As detailed in the Complaint, that control and involvement form the
8 basis of Plaintiffs' claim for liability under Section 7002(a)(1)(B) of the Resource
9 Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(1)(B). The Forest
10 Service's attempt to disavow, without ever actually denying, its Congressionally-
11 delegated authority in an attempt to avoid liability is unavailing and this Court should
12 reject Defendant's 12(b)(6) challenge.

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15 Supreme Court and Ninth Circuit precedent have resoundingly held that a party's
16 allegations need only put a defendant on notice of its claims to enable the defendant to
17 defend itself effectively. There is no mystery lurking behind Plaintiffs' Complaint: the
18 Forest Service is liable under section 7002(a)(1)(B) of RCRA for contributing, through
19 its management of the KNF, to the disposal of solid waste, in the form of spent lead
20 ammunition, that may present an imminent and substantial endangerment. *See, e.g.,*
21 Compl. ¶¶ 45, 46. The Complaint also alleges sufficient facts such that this Court may
22 conclude the Defendant is liable for the alleged endangerment.

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25 With regard to standing, Plaintiffs' members allege particularized injuries,
26 causally linked to the Forest Service's management practices in the KNF, which would
27 be redressed by a favorable court decision. The Complaint and attached declarations
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1 establish that Plaintiffs’ members suffer injuries to their aesthetic and recreational
 2 enjoyment of the KNF because of the poisoning of wildlife from spent lead ammunition.
 3 These injuries are “fairly traceable” to the Forest Service because, as the landowner and
 4 sole guardian of lands held in the public trust, it has control over activities occurring on
 5 National Forest System (NFS) lands. The power to require the use of non-lead
 6 ammunition, or otherwise abate the endangerment caused by spent lead ammunition in
 7 the environment, is in full accord with established precedent recognizing Forest Service
 8 authority over National Forests. Finally, it is likely that the injury complained of—
 9 endangerment to wildlife on the KNF—will be redressed by a court decision ordering
 10 the Forest Service, as the responsible landowner, to address the cause of the
 11 endangerment.
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14 **ARGUMENT**

15 **I. Plaintiffs Have Standing**

16 To satisfy the requirements of Article III, a plaintiff must demonstrate: (1) an
 17 injury in fact, (2) that is causally connected to the conduct complained of, and (3) may
 18 be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S.
 19 555, 560–61 (1992) (citations omitted). Defendant argues that Plaintiffs’ Complaint
 20 “fails to satisfy . . . any of the three elements.” Motion to Dismiss (MTD) at 8. In
 21 reaching its conclusion, Defendant ignores or mischaracterizes the Complaint’s
 22 allegations, and misapplies the law on standing.
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26 As an initial matter, general factual allegations of injury suffice at the motion to
 27 dismiss stage. *See Oregon v. Legal Serv. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009)
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(quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). This is in accord with the Supreme Court's holding that a court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the [plaintiff]." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Moreover, courts are not confined to the initial complaint in evaluating standing for purposes of a motion to dismiss. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

Plaintiffs have alleged sufficient facts in the Complaint to survive a standing challenge at this early stage. Should the Court wish to see further particularized evidence, however, Plaintiffs provide the sworn declarations of five organizational members¹ and incorporate the statements therein by reference.² Plaintiffs' allegations and factual evidence are more than adequate to defeat Defendant's Motion to Dismiss for want of standing.

¹ See Declaration of Robin Silver ("Silver Dec.") (attached as Exhibit 1); Declaration of Taylor McKinnon ("McKinnon Dec.") (attached as Exhibit 2); Declaration of Tom Martin ("Martin Dec.") (attached as Exhibit 3); Declaration of Thomas Hulen ("Hulen Dec.") (attached as Exhibit 4); Declaration of Kim Crumbo ("Crumbo Dec.") (attached as Exhibit 5). In providing these declarations in response to a motion to dismiss, Plaintiffs do not waive their right to submit, as necessary, additional evidence of standing at the summary judgment stage.

² An organization has standing if it can show that at least one member would have standing individually, the interests sought to be protected are germane to the purposes of the organization, and the case does not require the participation of individual members. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342–43 (1977). As discussed below, each Plaintiff organization has members with standing to sue on their own. The Plaintiff organizations can sue on behalf of these members because their purposes are germane to the interests sought to be protected in this lawsuit. See Declaration of Peter Galvin (attached as Exhibit 6); Declaration of Aaron Isherwood (attached as Exhibit 7); Crumbo Dec. ¶¶ 4–9. Finally, this suit, which seeks only declaratory and injunctive relief, may be successfully accomplished without the participation of Plaintiffs' individual members as parties. See *Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv.*, 78 F.3d 1360, 1367 (9th Cir. 1996).

A. Plaintiffs' Allegations of Injury in Fact Are Sufficient

Plaintiffs have alleged sufficient injury in the Complaint to overcome a motion to dismiss. *See* Compl. ¶¶ 11, 12, 14, 15. The law recognizes the Plaintiffs' members' desire to observe animals as "undeniably a cognizable interest for purposes of standing." *Defenders*, 504 U.S. at 562–563. Additionally, "reasonable concern" of harm to the Plaintiffs' interests is a sufficient injury. *Covington v. Jefferson Cnty.*, 358 F.3d 626, 639 (9th Cir. 2004) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000)).

Defendant first argues that Plaintiffs have not established the injury element of standing because Plaintiffs' allegations of use are only at a "regional level" and that Plaintiffs offer "no concrete plans to return to and recreate on the [KNF] itself." MTD at 9. This is not so.

First, the Complaint alleges injury to the Plaintiffs' interests in the KNF, as well as the region generally. Compl. ¶ 11. Specifically, the Complaint alleges:

Plaintiffs, their members and their families have hiked, backpacked, camped, taken river trips, bird-watched, and recreated in areas of northern Arizona known to be important habitat for a variety of wildlife known to be adversely affected by spent lead ammunition in the environment, including in the Kaibab National Forest and Grand Canyon National Park.

Id. The Complaint also alleges ongoing use of these areas, including the KNF (*see id.*), and explicitly describes the recreational and aesthetic interests at stake for the Plaintiffs' members: "the opportunity to view, photograph, study, and experience wildlife in their natural habitat." *Id.* ¶ 12. The Ninth Circuit recognizes this type of "[r]epeated recreational use itself, accompanied by a credible allegation of desired future use, can

1 be sufficient, even if relatively infrequent, to demonstrate that environmental
2 degradation of the area is injurious to that person.” *Ecological Rights Found. v. Pac.*
3 *Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000).
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5 Second, Plaintiffs’ declarations flesh out the details of their members’ past use of
6 and intent to visit the KNF in the future, demonstrating a clear connection to the KNF.
7 *See, e.g.*, Crumbo Dec. ¶ 12 (stating plans to return to KNF this year and in the future);
8 McKinnon Dec. ¶ 5 (trip planned to KNF in February or March 2013); Hulen Dec. ¶¶ 5,
9 8 (describing regular visits to KNF and plans to return this year).
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11 Further, the harm resulting from lead contamination in the KNF extends beyond
12 the boundaries of the KNF. As Defendant acknowledges, standing requires establishing
13 injury to the plaintiff, not the environment. MTD at 9. Here, the injury alleged is harm
14 to the aesthetic and recreational interests of the Plaintiffs who derive benefits from
15 condors and other wildlife exposed to lead within the KNF. Accordingly, those Plaintiff
16 members that visit, recreate, hunt, and otherwise enjoy those areas *adjacent to the KNF*,
17 where condors and other wildlife also range, have suffered injuries. As alleged in the
18 Complaint, Plaintiff members are concerned that “lead contamination on Forest Service
19 lands in Arizona presents serious threats to wildlife, both within [the KNF] as well as on
20 adjacent public lands, such as Grand Canyon National Park.” Compl. ¶¶ 11, 16; *see*
21 *also* Martin Dec. ¶ 8–14 (describing observations of wildlife in areas adjacent to KNF,
22 including Grand Canyon National Park and Vermillion Cliffs, where wildlife from the
23 KNF is also known to range); Silver Dec. ¶ 12 (same); Hulen Dec. ¶ 8 (describing
24 observation of condors in Grand Canyon National Park).
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1 Courts have recognized that the area of a plaintiff's injury may extend beyond
2 the location of the injury to the animal Plaintiff enjoys observing. The D.C. District
3 Court put it best in the context of birds: "Because [] birds fly from island to island, if
4 birds are killed on [one island], the number of birds that [the Plaintiff] will be able to
5 view at any given time on the nearby islands will be diminished. This is sufficient
6 injury to support standing." *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161,
7 172–73 (D.D.C. 2002), *vacated on other grounds sub nom.*, *Ctr. for Biological*
8 *Diversity v. England*, Nos. 02-5163, 02-5180, 2003 WL 179848 (D.C. Cir. Jan. 23,
9 2003); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, n.4
10 (1986) (holding an injury was sufficient when the "whale watching and studying of their
11 members will be adversely affected by continued whale harvesting" by Japan); *Laidlaw*,
12 528 U.S. at 181–82 (recognizing the broad "affected area" in which plaintiffs may
13 establish injury). Defendant does not dispute that condors, and other wildlife, do not
14 limit their travel to the borders of the KNF. *See* Compl. ¶ 36 (describing the population
15 of condors in Arizona and Utah as the "Southwest population"). Plaintiffs' Complaint
16 and declarations establish their members' clear past, present and future connection to
17 areas affected by wildlife's exposure to lead in the KNF, including connections to the
18 KNF itself.

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23 Finally, Defendant argues that Plaintiffs' members' concerns about lead
24 contamination are not a sufficiently concrete and particularized injury. MTD at 9.
25 Tellingly, Defendant cites no case law in support of its attack on Plaintiffs' allegations
26 of concern. And indeed, the Ninth Circuit has unequivocally found that reasonable
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concern is sufficient in this very context: “the relevant inquiry here is not whether there has been a breach of RCRA by [Defendants], but whether Appellees’ actions have caused ‘reasonable concern’ of injury to the [Plaintiffs].” *Covington*, 358 F.3d at 639 (quoting *Laidlaw*, 528 U.S. at 183). Plaintiffs’ concerns are reasonably based on “many scientific studies and reports documenting the threat to human health and wildlife posed by spent lead ammunition in the environment, as well as documenting the actual harm to condors and other wildlife attributed to lead poisoning from spent lead ammunition.” Compl. ¶ 15; *see also id.* ¶ 14 (concern about lead contamination in KNF and toxic pollutants entering the environment).³ The Forest Service does not seriously dispute, nor can it, the body of scientific evidence linking spent lead ammunition to poisoning in condors, among other wildlife. Therefore, Plaintiffs’ members have established a concrete and particularized injury to their cognizable interests in observing, photographing, experiencing, and enjoying wildlife in their natural habitat.

B. Plaintiffs Have Sufficiently Alleged Causation and Redressability

Plaintiffs’ injury must be “fairly traceable” to the challenged activity, and not “th[e] result [of] the independent action of some third party not before the court.” *Defenders*, 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976)). Here, Plaintiffs’ injuries—decreased recreational and aesthetic enjoyment of the KNF and surrounding areas due to endangerment of wildlife

³ *See also, e.g.*, Martin Dec. ¶ 10 (personally observing a condor being treated for lead poisoning); McKinnon Dec. ¶ 10 (describing concern due to awareness of impacts of lead poisoning on condors); Silver Dec. ¶ 15 (same); Crumbo Dec. ¶¶ 18-19 (describing deep sense of responsibility relating to suffering of wildlife exposed to lead); Hulen Dec. ¶¶ 7, 11 (describing scientific evidence of lead’s harm to wildlife and concern of losing condor species to preventable lead poisoning).

1 on the KNF—are directly traceable to Defendant’s contribution to that endangerment
2 through its management of the KNF and can be redressed by the relief sought in the
3 Complaint.
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5 Plaintiffs must establish by a preponderance of the evidence that its theory of
6 causation is “plausib[le].” *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985,
7 995 (9th Cir. 2000). For example, in *Nat’l Audubon Soc’y v. Davis*, the Ninth Circuit
8 held causation was established to challenge a regulation that prohibited certain types of
9 game traps because “[r]emoval of the traps lead to a larger population of predators,
10 which in turn decreases the number of birds and other protected wildlife.” 307 F.3d
11 835, 849 (9th Cir. 2002). The Ninth Circuit explained that a “chain of causation [may
12 have] more than one link, but [may not be] hypothetical or tenuous.” *Id.*
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15 Defendant argues, without citing to authority, that Plaintiffs’ chain of causation
16 does not meet standing requirements because the Forest Service defers, as a matter or
17 “longstanding federal land management policy,” regulation of hunting on its National
18 Forest lands to the states. MTD at 10. However, the choice generally to defer to the
19 State neither relieves Defendant of its potential liability under RCRA as a landowner,
20 nor severs the causal link between endangerment on Forest Service land and Plaintiffs’
21 injury. Compl. ¶¶ 16, 45; *infra* pp 12–17. The Forest Service attempts to create a
22 chain where none exists. With respect to hunters who use lead ammunition, they must
23 comply with Forest Service land management decisions in order to use the KNF. And
24 as explained in detail below, the Forest Service control and authority over waste
25 disposal activities on National Forest land trumps the state of Arizona’s regulations
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1 allowing the use of lead ammunition. At bottom, the causal chain analysis centers not
2 on the number of persons involved, but rather, whether their “independent decisions”
3 sever the causal connection to Plaintiffs’ injury. *See Maya*, 658 F.3d at 1070 (finding a
4 causal connection based on the indirect effect of the defendants’ actions on third
5 parties). Here, there are no “independent decisions” being made on the KNF; Plaintiffs’
6 injuries are directly traceable to Forest Service decisions to manage the KNF in such a
7 way as to allow spent lead ammunition to be disposed there.
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10 Plaintiffs also meet the test for redressability. It must be “likely” that the injury
11 complained of will be redressed by a favorable court decision. *Cent. Delta Water*
12 *Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002). The Complaint’s request
13 for this Court to enjoin the Forest Service from contributing to endangerment within the
14 KNF sufficiently establishes redressability. Compl. ¶ 47; *see also Interfaith Comm.*
15 *Org. v. Honeywell Intern., Inc.*, 399 F.3d 248, 257 (3d Cir. 2005) (finding in RCRA
16 7002(a)(1)(B) case, injunctive relief “will materially reduce [Plaintiffs’] reasonable
17 concerns about . . . endangerments”); *see also* 42 U.S.C. 6972(a)(2) (describing the
18 district court’s discretion to order injunctive relief against any person, including the
19 United States, in RCRA endangerment cases). In *Salmon Spawning & Recovery*
20 *Alliance v. Gutierrez*, the Ninth Circuit held because the “remedy rests in the hands of
21 federal officials,” it was redressable. 545 F.3d 1220, 1229 (9th Cir. 2008) (finding “a
22 court order requiring the agencies to reinitiate consultation [under the ESA] would
23 remedy the harm asserted”). That is the case here as well.
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27 Any uncertainty regarding the precise method by which Defendant or this Court
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1 will ultimately seek to address the alleged endangerment does not eliminate
2 redressability under Article III standing. The Ninth Circuit does not require a precise
3 showing where the substance of potential regulations that might be ordered by the court
4 remains unknown. *Natural Res. Def. Council v. Env'tl. Prot. Agency*, 542 F.3d 1235,
5 1245–46 (9th Cir. 2008) (plaintiffs seeking order requiring EPA to promulgate
6 regulations to address storm water discharge). To do so “would mean that *no* plaintiff
7 would have standing to bring such a suit, as one cannot demonstrate the efficacy of
8 regulations that have yet to be issued.” *Id.* (citations omitted). Defendant’s contention
9 that a potential process of promulgating regulations⁴ affects redressability for Article III
10 purposes is unfounded in Ninth Circuit law.

11 **II. Plaintiffs Have Adequately Alleged a Claim for Relief Under RCRA**

12 This Court should reject Defendant’s 12(b)(6) motion for three reasons. First,
13 the pleading requirements under Rule 8 simply require a short and plain statement that
14 itself creates a plausible claim for relief, which Plaintiffs’ Complaint supplies here.
15 Second, despite the incomplete picture painted by Defendant’s brief, the Forest Service
16 has considerable authority to regulate for the protection of wildlife on public lands.
17 Third, Plaintiffs have sufficiently alleged that the Forest Service has contributed and is
18 contributing to the disposal of solid waste on the KNF that may present an imminent
19 and substantial endangerment to health or the environment.

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25 ⁴ The one case Defendant cites, *American Public Transit Ass’n v. Lewis*, 655
26 F.2d 1272 (D.C. Cir. 1981), is inapposite. Plaintiffs do not dispute the general
27 proposition that federal agencies are given opportunities to exercise discretion. But, this
28 case simply has nothing to do with standing or the Court’s authority to craft a remedy to
abate an imminent and substantial endangerment under RCRA.

A. Plaintiffs' Complaint Satisfies Rule 8's Lenient Standards

The text of Rule 8(a)(2) makes clear that a “short and plain” statement can itself establish a plausible claim for relief. *See* Fed. R. Civ. P. 8(a)(2). To survive a Rule 12(b)(6) dismissal, a complaint need not contain “detailed factual allegations.” *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1048–49 (9th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A complaint need only plead “‘enough facts to state a claim to relief that is plausible on its face.’” *Weber v. Dept. of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Though recent Supreme Court decisions have moved courts away from pure notice pleading, Defendant attempts to raise the Rule 8 pleading requirements well beyond what the Supreme Court contemplated, as reinforced more recently by the Ninth Circuit.

First, Plaintiffs allege a valid legal claim in their Complaint. Rule 8 does not require a plaintiff to lay out in the complaint every nuance of the legal theories that it will pursue in the case, but instead only requires a “cognizable legal theory.” *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–1122 (9th Cir. 2008). The Ninth Circuit has made clear that this is “not an onerous burden.” *Id.* at 1122 (quotation omitted). A complaint need only contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Here Plaintiffs gave the Forest Service ample notice of the legal theory upon which the Complaint rests. Compl. ¶3.

Second, Plaintiffs' factual allegations are sufficient. A complaint states

1 sufficient facts “when the plaintiff pleads factual content that allows the court to draw
2 the reasonable inference that the defendant is liable for the alleged misconduct.” *Lacey*
3 *v. Maricopa Cnty.*, 693 F.3d 896, 911 (9th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678)
4 (citations omitted). The bar to allege a plausible claim “is not akin to a ‘probability
5 requirement,’” but merely requires the plaintiff to establish “more than a sheer
6 possibility that the defendant has acted unlawfully.” *Id.* What constitutes a “plausible
7 claim for relief will . . . be a context-specific task that requires the reviewing court to
8 draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679 (citations
9 omitted). Defendant emphasizes that “in the entirety of the ‘Facts’ section of
10 [Plaintiffs’ Complaint], Plaintiffs make only two assertions regarding the Service: 1)
11 that the agency manages the [KNF], and 2) that the agency does not prohibit or restrict
12 the use of lead ammunition[.]” MTD at 14. But, Plaintiffs are not required to plead any
13 additional facts, as these alone support *more than a plausible* claim under RCRA’s
14 imminent and substantial endangerment provision. *See infra*, Section III.C.

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18 **B. The Forest Service Has Control Over Waste Disposal on the KNF**

19 The Forest Service improperly attempts to abrogate its broad authority granted
20 by Congress over public lands. First, the relevant statutes and implementing
21 regulations, as well as decades of case law, reinforce the preeminence of the Forest
22 Service in the management of public lands. Second, contrary to Defendant’s argument,
23 the Federal Land Policy and Management Act (FLPMA) has no effect on the Forest
24 Service’s obligation to comply with provisions of applicable law, such as RCRA.
25 Finally, as the landowner “at the time of the [waste] disposal,” the Forest Service has
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1 the requisite “measure of control” over that disposal on the KNF to support contributor
2 liability under RCRA. *See Hinds*, 654 F.3d at 852.

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4 **1. Defendant Paints an Incomplete Picture of its Broad Authority**

5 Defendant’s brief ignores the broad basis for the Forest Service’s authority to
6 manage the KNF and focuses only on the few exemplary regulations Plaintiffs cited in
7 the Complaint. MTD at 14. A more thorough analysis of the legal basis for the Forest
8 Service’s authority reveals a significant “measure of control,” and in fact, complete
9 control over activities in the KNF, that easily satisfies the test established in *Hinds* for
10 contributor liability under RCRA.

11
12 The Supreme Court in *Kleppe v. New Mexico* established that Congress has
13 “complete power” over public lands, including “the power to regulate and protect the
14 wildlife living there.” 426 U.S. 529, 540–41 (1976). Accordingly, Congress has
15 enacted numerous statutes conferring the Forest Service with authority over public lands
16 and resources. Compl. ¶ 22. For example, pursuant to the Organic Administration Act
17 of 1897 (16 U.S.C. §§ 473-82, 551), the Forest Service may regulate the use of public
18 lands to improve and protect those areas. *United States v. Weiss*, 642 F.2d 296, 298 (9th
19 Cir. 1981) (“The authority of the Secretary [of Agriculture] to regulate activity on
20 national forest land pursuant to [16 U.S.C. § 551] has been upheld in a variety of . . .
21 instances.”). The Forest Service Manual⁵ explicitly recognizes the basic authority
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26 ⁵ See United States Forest Service, Forest Service Manual § 1013.01a (May 6,
27 1992), available at [http://www.fs.fed.us/im/directives/fsm/1000/1013-1016_zero_](http://www.fs.fed.us/im/directives/fsm/1000/1013-1016_zero_code.txt)
28 [code.txt](http://www.fs.fed.us/im/directives/fsm/1000/1013-1016_zero_code.txt) (“The basic authority of the Secretary to issue regulations regarding occupancy
and use of the National Forest System is the Organic Administration Act”) (citing 16
U.S.C. § 551) (last accessed Feb. 4, 2013).

1 granted by the Organic Act.⁶ The Multiple-Use Sustained Yield Act (MUSYA)
2 likewise permits the Forest Service to balance different uses on public lands, including
3 outdoor recreation and wildlife purposes. *See, e.g.*, 16 U.S.C. § 528 (“It is the policy of
4 Congress that the national forests are established and shall be administered for outdoor
5 recreation, range, timber, watershed, and wildlife and fish purposes.”). Courts have
6 construed the Forest Service’s broad authority to permit it to regulate “NFS lands for
7 multiple uses . . . such as ‘outdoor recreation,’ ‘watershed,’ and ‘wildlife and fish
8 purposes.’” *Wyoming v. U.S. Dep’t of Agric.*, 661 F.3d 1209, 1235 (10th Cir. 2011).
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10 The Forest Service’s regulations at 36 C.F.R. § 261.50–.58 establish that the
11 Forest Service does and can prohibit hunting on NFS land, although Plaintiffs do not
12 seek such a prohibition here. Compl. ¶ 23. For example, 36 C.F.R. § 261.58(v)
13 specifically permits the Forest Service to prohibit by order “[h]unting or fishing.”
14 Defendant attempts to dodge liability by citing potentially applicable processes the
15 agency may need to follow. Those provisions, however, have no bearing on the Forest
16 Service’s authority. Moreover, the fact that the agency has to comply with
17 administrative procedural requirements does not discharge its vested statutory authority.
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22 ⁶ This Court may take judicial notice of agency manuals, such as the Forest
23 Service Manual, where it is not the subject of reasonable dispute. Fed. R. Evid. 201(b)
24 (establishing that judicial notice is appropriate for facts “capable of accurate and ready
25 determination by resort to sources whose accuracy cannot reasonably be questioned”);
26 *see also Karuk Tribe of Cal. v. U.S. Forest Serv.*, 379 F. Supp. 2d 1071, 1090 (N.D. Cal.
27 2005), *rev’d on other grounds*, 681 F.3d 1006 (9th Cir. 2012) (judicial notice in APA
28 case of the Forest Service Manual); *Campbell v. PricewaterhouseCoopers, LLP*, 642
F.3d 820, 824 (9th Cir. 2011) (taking “judicial notice of certain extrinsic materials,”
including agency manuals, basis statements, and former federal regulations).

1 Defendant's exclusive focus on the few exemplary regulations cited in Plaintiffs'
2 Complaint does not undermine Plaintiffs' legal theory: because the Forest Service
3 manages and controls the KNF, it manages and controls the disposal of solid waste,
4 including spent lead ammunition, on the land.
5

6 Defendant also raises the procedural requirements of NEPA. MTD at 15. While
7 the Forest Service must conduct a NEPA analysis for a major federal action
8 substantially affecting the quality of the human environment, the Forest Service
9 Handbook⁷ and applicable regulations governing NEPA analysis provide that "[o]rders
10 issued pursuant to 36 CFR part 261—Prohibitions to provide short-term resource
11 protection" are *categorical exclusions* and are not subject to NEPA. 36 C.F.R. §
12 220.6(d)(1). One example of such an order is "[c]losing a road to protect bighorn sheep
13 during lambing season." 36 C.F.R. § 220.6(d)(1)(i). A short-term ban on lead
14 ammunition during the hunting seasons to protect wildlife, for example, is certainly
15 within the bounds of these regulations. Moreover, even if the Forest Service needed to
16 conduct a NEPA analysis, Defendant fails to explain why this negates its authority to
17 manage the lands in such a way to prevent an endangerment.
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21 Further, while an order issued pursuant to 36 C.F.R. § 261.50–.58 must be
22 "consistent with the land management plans," contrary to Defendant's assertion (MTD
23 at 15) there is no reference, let alone an affirmative obligation, to consult with the State
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27 ⁷ Forest Service Handbook 1909.15, National Environmental Policy Act
28 Handbook Chapter 30 – Categorical Exclusion From Documentation, *available at*
http://www.fs.fed.us/emc/nepa/nepa_procedures/index.htm (last accessed Feb. 4, 2013).

1 of Arizona. 16 U.S.C. § 1604(i). As explained by the Draft Kaibab Forest Plan,⁸ the
2 Forest Service is the “responsible official” that must make a consistency determination.⁹

3 Defendant also notes the Administrative Procedure Act (APA) is applicable to
4 some Forest Service actions. MTD at 14–15. Plaintiffs agree; the APA generally
5 applies to any final agency action. *See Sackett v. Env'tl. Prot. Agency*, 132 S. Ct. 1367,
6 1371–72 (2012). But again, like compliance with NEPA, compliance with APA
7 procedural requirements has no bearing on the Forest Service’s land management
8 practices in the KNF that allow the disposal of solid waste and undermine the protection
9 of wildlife. *See* 36 C.F.R. § 261.70(a)(4).
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12 Indeed, courts have long confirmed the Forest Service’s broad authority over
13 forest lands. As early as 1928, the Supreme Court not only affirmed the Forest
14 Service’s authority to manage NFS lands, but squarely permitted the Forest Service to
15 mitigate the serious injury caused by the dramatic upsurge in the deer population on the
16 KNF, the very same federal lands at issue in this case. *United States v. Hunt*, 278 U.S.
17 96, 99–100 (1928). The State of Arizona arrested federal officials exercising their
18 authority to protect public lands under the theory that hunting was solely under state
19 domain. *Id.* at 100. The Court disagreed, holding that the “power of the United States
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23 ⁸ United States Forest Service, Kaibab National Forest Draft Forest Plan, at 4,
24 available at [http://prdp2fs.ess.usda.gov/detail/kaibab/landmanagement](http://prdp2fs.ess.usda.gov/detail/kaibab/landmanagement/planning/?cid=STELPRDB5106605)
25 [/planning/?cid=STELPRDB5106605](http://prdp2fs.ess.usda.gov/detail/kaibab/landmanagement/planning/?cid=STELPRDB5106605) (last visited Jan. 27, 2013).

26 ⁹ Indeed, the Kaibab National Forest Draft Forest Plan prioritizes the creation
27 and maintenance of “natural communities and habitats,” with a specific focus on
28 reestablishing “naturally occurring species which have been affected by anthropogenic
activities,” such as “the California condor.” *Id.* at 45. Accordingly, the Forest Service
cannot dispute that action taken to protect wildlife from needless poisoning due to
exposure to spent lead ammunition would be consistent with the Plan.

1 to thus protect its lands and property does not admit of doubt . . . the game laws or any
 2 other statute of the state.” *Id.*

3 *Hunt* represented the cornerstone right recognized by courts upholding the
 4 federal government’s authority to protect lands in the public trust.¹⁰ Since *Hunt*, courts
 5 have continued to uphold the Forest Service’s authority to regulate many activities on
 6 public lands. *See, e.g., California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572,
 7 582 (1987) (recognizing the Forest Service’s authority to regulate surface mining on
 8 NFS lands). Most recently, the Ninth Circuit considered the scope of the Forest
 9 Service’s authority under the Organic Administration Act to restrict motor vehicle use
 10 related to mining activities. *Pub. Lands for the People, Inc. v. U.S. Dept. of Agric.*, 697
 11 F.3d 1192, 1197 (9th Cir. 2012). The court reasoned, “the Forest Service’s extensive
 12 statutory authority dooms this challenge.” *Id.* Thus, notwithstanding the narrow picture
 13 painted by Defendant’s brief in this case, the Forest Service has the power to control the
 14 use of lead ammunition on its land, and hence the endangerment Plaintiffs seek to abate.

15 **2. FLPMA Does Not Diminish the Forest Service’s Authority to** 16 **Protect Public Lands**

17 Defendant attempts to equate Plaintiffs’ request for relief, Compl. ¶ 47, with a
 18 request for a complete ban on hunting in conflict with FLPMA. MTD at 11. First,
 19 Plaintiffs do not seek a ban on hunting. Second, the relief actually sought by Plaintiffs
 20 in this case, the proper management of spent lead ammunition on public lands, is
 21 contemplated by FLPMA and supported by relevant case law.

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 27 ¹⁰ *See* James C. Foster, *The Deer of Kaibab Federal-State Conflict in Arizona*, 12
 28 J. of the Southwest 3, 255–68 (1970) (explaining that *Hunt* “established the first
 precedents for federal control over wildlife on its own lands”).

1 FLPMA places an affirmative duty on the Secretary of Interior to protect the
2 public lands. 43 U.S.C. § 1732(b) (“the Secretary shall . . . take any action necessary to
3 prevent unnecessary or undue degradation of the lands”). Defendant cites section
4 302(b) of FLPMA for the proposition that the Forest Service cannot permit hunting or
5 encroach upon state management of wildlife. *Id.*; MTD at 16. Yet there are exceptions
6 to the state’s general authority over “management of fish and resident wildlife.” *Id.*
7 (“[T]he Secretary concerned may designate areas of public land and of lands in the
8 [NFS] where, and establish periods when, no hunting or fishing will be permitted for
9 reasons of public safety, administration, or *compliance with provisions of applicable*
10 *law.*”) (emphasis added). Thus, FLPMA authorizes the regulation of hunting on NFS
11 lands to ensure *compliance* with RCRA.

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15 Courts have upheld the Forest Service’s authority to regulate hunting under
16 FLPMA. For example, in *Meister v. U.S. Department of Agriculture*, the Sixth Circuit
17 held the Forest Service abused its discretion and violated NEPA by failing to consider a
18 proposed ban on gun hunting and snowmobiling in specific portions of national forests.
19 623 F.3d 363, 379 (6th Cir. 2010). The Forest Service argued, as Defendant attempts to
20 here, that “Congressional policy favors leaving the entire Forest open to hunting.” *Id.* at
21 378. Looking to section 302(b) of FLPMA, the court concluded that the Forest Service
22 has the authority to prohibit hunting. *Id.* at 378. The court also looked to the Forest
23 Service’s own guidelines, which require compliance with state hunting and fishing laws
24 to the extent those laws do not conflict with (1) Federal law, (2) the “land and resource
25 management responsibilities of the Forest Service[,] or . . . [3] are inconsistent with
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direction in forest plans.”¹¹ *Id.* at 379 (quotation omitted). The court grounded its reasoning in the fact that there was “no lawful policy that *ties the Service’s hands in this regard.*” *Id.* (emphasis added). The authority affirmed in *Meister* is closely analogous to the authority the Forest Service attempts to disavow in this case—the ability to regulate hunting activities where they affect the environment.

This Court recently distinguished the Sixth Circuit’s reasoning in *Meister* as inapplicable to the Bureau of Land Management’s (BLM) authority to regulate hunting on public lands, but in doing so, it *confirmed* the Forest Service’s authority to so regulate. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. 09-CV-8011-PCT-PGR, 2011 WL 4551175, at *1 (D. Ariz. 2011). The Court distinguished *Meister* “because BLM is not subject to the same regulations as the Forest Service, which *permit federal regulation of hunting in certain circumstances.*” *Id.* at *11 (emphasis added). Defendant’s interpretation of FLPMA is thus in conflict with precedent from this Court.

C. Plaintiffs Have Sufficiently Alleged the Forest Service’s Liability Under Section 7002(a)(1)(B) of RCRA

Plaintiffs have adequately alleged that the Forest Service has contributed and is contributing to the disposal of solid waste on the KNF that may present an imminent and substantial endangerment. First, RCRA plainly imposes potential liability on “any person, including the United States.” 42 U.S.C. § 6972(a)(1)(B); *see also* MTD at 2. Second, Defendant has a measure of control over the waste at the time of its disposal in the KNF; in fact, as described above, Defendant has complete control. Third,

¹¹ As discussed above, any relief ordered by the Court requiring compliance with RCRA is in accord with the Kaibab National Forest Draft Forest Plan. *See supra* note 9.

1 Defendant's argument relating to the State of Arizona's ability to regulate hunting has
2 no bearing on the Forest Service's liability under RCRA.

3
4 **1. Defendant Is a Contributor Under RCRA**

5 RCRA 7002(a)(1)(B) claims require plaintiffs to show a defendant has
6 contributed or is contributing to the disposal of solid waste that may present an
7 imminent and substantial endangerment. Plaintiffs' legal theory, as set forth in the
8 Complaint, alleges the Forest Service's liability as a contributor due to its ownership,
9 management, control of and responsibility for the KNF. *See, e.g.*, Compl. ¶¶ 8, 13, 21–
10 24, 33–34, 45–46. Defendant's 12(b)(6) motion contests the Forest Service's liability as
11 a contributor, essentially arguing it is not actively involved in waste disposal that it
12 knows is occurring on its own property. As the plain language of the statute, case law,
13 and federal guidance all make clear, Defendant's argument is wrong.

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16 First, RCRA applies to "any person, including the United States." 42 U.S.C. §
17 6972(a)(1)(B). Moreover, the statute explicitly contemplates "owners" as potentially
18 liable parties. *Id.* (describing potentially liable parties as "owners *or* operators")
19 (emphasis added). Although RCRA does not define "contributing," as the
20 government's motion acknowledges, the governing case in the Ninth Circuit on the
21 meaning of "contributing" is *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846, 851 (9th
22 Cir. 2011). MTD at 13. In *Hinds*, the Ninth Circuit established two bases for a party to
23 be liable as a contributor: either a party "had a measure of control over the waste at the
24 time of its disposal or was otherwise actively involved in the waste disposal process."
25 *Hinds*, at 852.

1 In *Hinds*, the Ninth Circuit held that an equipment manufacturer was not liable
2 because it was wholly disconnected from the waste disposal activities that created the
3 RCRA endangerment. *Id.* But the court recognized that a defendant may be liable
4 where it “‘had authority to control . . . any waste disposal.’” *Hinds*, 654 F.3d at 851–52
5 (quoting *United States v. Aceto*, 872 F.2d 1373, 1383 (8th Cir. 1989)). Plaintiffs are not
6 pursuing the legal theory rejected in *Hinds*, for example, by suing every potential gun or
7 ammunition manufacturer for endangerment in the KNF. Rather, Plaintiffs’ theory, as
8 set forth in the Complaint, is based on the well-established principle of landowner
9 liability for solid waste disposal that may present an imminent and substantial
10 endangerment. *Conn. Coastal Fisherman’s Ass’n v. Remington Arms Co., Inc.*, 989 F.2d
11 1305, 1316 (2d Cir. 1993) (holding a gun club liable for allowing lead shot disposal in
12 contravention of RCRA); *see also Potomac Riverkeeper v. Nat’l Capital Skeet and Trap*
13 *Club*, 388 F. Supp. 2d 582 (D. Md. 2005) (denying motion to dismiss against state
14 official in his official capacity where state owned property where gun club operations
15 were causing endangerment).

16 The United States itself has already addressed the issue in this case, in the
17 context of Environmental Protection Agency (EPA) Section 7003 enforcement actions.
18 Section 7002(a)(1)(B) of RCRA uses the same standard of liability as Section 7003, and
19 thus is “similarly interpreted.” *Cox v. City of Dallas*, 256 F.3d 281, 294 n.22 (5th Cir.
20 2001). In its *Guidance On The Use Of Section 7003* EPA explains that “the phrase ‘has
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1 contributed to or is contributing to' be broadly construed."¹² EPA established that the
 2 "plain meaning of 'contributing to' is 'to have a share in any act or effect.'" EPA
 3 explicitly recognized that "contributors" include "a person who *owned the land on*
 4 *which a facility was located during the time that solid waste leaked* from the facility."
 5 *Id.* at 18 (emphasis added).¹³ In this regard, the Forest Service is a liable landowner like
 6 any other party subject to RCRA.¹⁴

8 2. Defendant Misapplies the *Hinds* Case

9
 10 Defendant attempts to avoid the outcome the *Hinds* "measure of control" test
 11 produces in this case by, again, disavowing its broad authority over activities occurring
 12 on the KNF. Incredibly, the Forest Service suggests that it has less control over waste
 13 disposal on National Forest land than private landowners do over their property. MTD
 14 at 14. Congress made no such distinction in RCRA, however. Moreover, Plaintiffs are
 15 aware of no cases—and Defendant has cited to none—where a current property owner
 16 has escaped liability under RCRA for ongoing waste disposal on its property.
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 20 ¹² Environmental Protection Agency, Guidance On The Use Of Section 7003, at
 21 17, available at [http://www.epa.gov/compliance/resources/policies/civil/rcra/
 22 rcrasect7003-rpt.mem.pdf](http://www.epa.gov/compliance/resources/policies/civil/rcra/rcrasect7003-rpt.mem.pdf) (last accessed Feb. 4, 2013).

23 ¹³ Accordingly, several courts have found liability based on this interpretation of
 24 section 7002(a)(1)(B). *See Remington Arms*, 989 F.2d at 1317; *Benjamin v. Douglas*
 25 *Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1222 (D. Or. 2009) (reasoning that liability
 26 under RCRA can be established by allowing lead shot to accumulate on land).

27 ¹⁴ EPA's interpretation of "contributor" is persuasive authority, given that EPA is
 28 the agency empowered with administering the statute. *See Ashoff v. City of Ukiah*, 130
 F.3d 409, 410 (9th Cir. 1997) ("Were we to find RCRA ambiguous, we would defer to
 the EPA's interpretation so long as it is reasonable and supported by the language of the
 statute."); *Gonzales v. Oregon*, 546 U.S. 243, 254–61 (2006) (indicating that deference
 should be given to the agency with the relevant expertise).

1 RCRA’s language should not be manipulated such that persons with control over
2 land, and the authority to prevent waste disposal at the time the disposal is taking place,
3 can dodge liability. The cases cited in *Hinds* buttress this conclusion. *See Aceto*, 872
4 F.2d at 1383 (an “explicit allegation of ‘control’” is not required to establish liability
5 under RCRA); *United States v. Valentine*, 885 F. Supp. 1506, 1512 (D. Wyo. 1995)
6 (same); *Marathon Oil Co. v. Texas City Terminal Ky. Co.*, 164 F. Supp. 2d 914, 920–21
7 (S.D. Tex. 2001) (applying the broad standard from *Cox*, 250 F.3d at 292, that a party is
8 liable if it had “a part or share in producing an effect”). Importantly, these cases, based
9 on “some degree of control,” do not make “active involvement” a condition precedent to
10 establish liability. *See Hinds*, 654 F.3d at 851–52; *accord United States v. Waste*
11 *Indust.*, 734 F.2d 159, 164 (4th Cir. 1984) (interpreting Section 7003 and concluding
12 “unlike the provisions of [RCRA’s] subtitle C, [Section 7003] does not regulate conduct
13 but regulates and mitigates endangerments”).

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17 Even if this court focuses on the “active involvement” language from *Hinds*, the
18 Forest Service’s management of the KNF goes beyond mere “passive conduct,” and
19 falls within the realm of active involvement in waste disposal.¹⁵ For example, the Forest
20 Service issues special use permits that allow the disposal of spent lead ammunition in
21 the KNF. 36 C.F.R. § 251.50–.65 (requiring a permit for commercial guiding and
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24 ¹⁵ Defendant emphasizes the Ninth Circuit’s citation of *Sycamore Industries Park*
25 *Associates v. Ericsson, Inc.*, yet that case is distinguishable factually and does not
26 address the current issue before the court. In *Sycamore*, the Seventh Circuit addressed if
27 there had been a “disposal” creating RCRA liability, 546 F.3d, 847, 853 (7th Cir.
28 2008),—yet here Defendant does not contest that spent lead ammunition has been
disposed of on the KNF. *Sycamore* did not address liability outside the context of
property transactions and culpability for past versus current owners.

1 outfitting for hunting trips). That *certain* types of hunting may not require a special use
 2 permit does not undermine the fact that the Forest Service does issue some commercial
 3 permits, and is therefore actively involved in, hunting on the KNF. MTD at 16. The
 4 bottom line is that the Forest Service has the authority over the KNF and ongoing waste
 5 disposal activities there, and therefore is both actively involved and has the requisite
 6 control under *Hinds*.
 7

8 **3. Defendant's Liability Based on its Measure of Control is in** 9 **Accord with RCRA and Relevant Case Law**

10 While there are very few cases regarding government liability due to land
 11 management, several cases discuss government liability in terms of its ability to control
 12 waste disposal practices. *See Foster v. United States*, 922 F. Supp. 642, 660 (D.D.C.
 13 1996) (finding it could not “be said that the United States lacked actual control over the
 14 disposal of wastes from the neighboring military reservation or the Canal itself,” but
 15 that disputed facts meant that the entry of summary judgment was inappropriate); *Smith*
 16 *v. Potter*, 187 F. Supp. 2d 93, 97 (S.D.N.Y. 2001) (analyzing whether a preliminary
 17 injunction against the United States Postal Service was warranted due to an anthrax
 18 threat, and explaining that “Congress sought to increase enforcement of this legislation
 19 by authorizing affected citizens to bring suit against any RCRA offender whose solid
 20 waste handling practices may pose ‘an imminent and substantial endangerment to health
 21 or to the environment.’”) (citing 42 U.S.C. § 6972(a)(1)(B)).
 22

23 The case most directly on point is *Holy Cross Neighborhood Ass’n v. U.S. Army*
 24 *Corps of Engineers*. No. Civ.A. 03-370, 2003 WL 22533671 (E.D. La. Nov. 3, 2003).
 25 There, a citizen suit was filed against the Army Corps of Engineers (Corps) under
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1 RCRA § 7002(a)(1)(B). *Id.* at *5. One basis for liability was because of the Corps’
2 “maintaining and having custody over the Industrial Canal.” *Id.* The Corps sought
3 dismissal of the RCRA claim under Rule 12(b)(6), arguing that the plaintiffs did not
4 show “how the Corps has contributed to the handling, storage, treatment, transportation,
5 or disposal of hazardous waste.” *Id.* at *8. The court found the complaint adequate and
6 that the plaintiffs satisfied the requirements in Rule 8(a) because the plaintiffs had put
7 the “Corps on notice that the RCRA claim rests on the *management of* and plan to
8 dredge the Industrial Canal.” *Id.* (emphasis added).
9

11 *Holy Cross* establishes that governmental liability exists based on management
12 and control over activities that affect natural resources. Plaintiffs’ allegations are thus
13 based on a recognized and cognizable legal theory, warranting the rejection of
14 Defendant’s 12(b)(6) motion. *See also Potomac Riverkeeper* 388 F. Supp. 2d 582 (state
15 ownership of land where gun club operating sufficient to survive motion to dismiss). In
16 short, the fact that Plaintiffs have sued over a unique factual scenario not squarely
17 addressed by a previous court does not mean it falls outside the liability standards
18 established in *Hinds*.
19

21 In summary, Defendant attempts to contest the validity of a legal theory that is
22 grounded in the statute, supported by EPA guidance, and consistent with the Ninth
23 Circuit’s decision in *Hinds*. Defendant is surely on “fair notice of what the claim is and
24 the grounds upon which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 127 (2007)
25 (citations omitted). Moreover, the State of Arizona’s prerogative to regulate hunting
26 practices is inapposite. The weight of federal statutes granting the Forest Service
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1 authority, the Forest Service's own regulations, and relevant case law interpreting the
2 same demonstrate the Forest Service is the sole authority managing waste disposal
3 activities in the KNF.
4

5 CONCLUSION

6 For the foregoing reasons, Plaintiffs respectfully request this Court deny
7 Defendant's Motion to Dismiss.

8 Respectfully submitted,
9

10 Dated: February 5, 2013

/s/ Kevin Cassidy

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing, which will send notification of such filing to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PRESCOTT DIVISION

CENTER FOR BIOLOGICAL
DIVERSITY;
SIERRA CLUB; and
GRAND CANYON WILDLANDS
COUNCIL,

No. CIV 12-CV-08176-GMS

**DECLARATION OF ROBIN
SILVER**

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,
a United States Government Agency,

Defendant.

DECLARATION OF ROBIN SILVER

I, ROBIN SILVER, declare as follows:

1. The facts set forth in this declaration are based on my personal knowledge and if called as a witness, I could and would competently testify thereto under oath. As to those matters which reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I currently reside in Flagstaff, Arizona, and I have lived here for over 4 years. Before moving to Flagstaff I lived in Phoenix, where I was born and raised and resided almost all of my life.

3. I co-founded the Center for Biological Diversity (“the Center”) in 1989. I had been working with the Arizona Game and Fish Department and the U.S. Fish and Wildlife Service to photograph threatened and endangered wildlife. This work exposed me to many of the threats facing much of the biodiversity in the desert Southwest, including northern Arizona and the Kaibab National Forest. Combined with my experiences working with the public agencies, my photographic work led to my founding the Center in order to effectively advocate for endangered species and their habitat.

4. Since its founding, I have been a member of the Center’s Board of Directors, serving as Board Chair, Conservation Director, and other roles during that time. I have also been a member of the Center since its founding. Although I have worked for much of the Center’s history as an emergency medicine physician, I have devoted most of my time outside of my physician career to my environmental advocacy and nature photography interests.

5. The Center is a non-profit organization committed to the preservation, protection, and restoration of native species and the ecosystems they depend upon. Among many species, the Center advocates for protection and recovery of bald and

golden eagles and the California condor and protection of these species' habitat. I rely upon the Center to represent my interests in protecting endangered species and their habitat.

6. I have been an avid wildlife and nature photographer for more than 25 years. I have worked as a professional photographer since the late 1980's, when I first started to have my photographs published and sold. I continue to work as a professional photographer and pursue the craft as a personal hobby as well.

7. I have visited the Kaibab National Forest on a number of occasions, both recreationally and professionally. I have visited the area to photograph wildlife and nature, to hike, camp, observe nature and wildlife, and to experience the area's intense solitude and beauty. I have taken particular pleasure with the Kaibab National Forest's remoteness, starkness, wildness, diverse vegetation, contrasting landscapes, and incredible changing colors. These qualities have also been important to my photography and draw me to the area year after year both recreationally and professionally.

8. I have frequently visited the North Kaibab National Forest. I have visited this area more than 20 times. I have also visited the North Kaibab National Forest Grand Canyon overlooks more than a dozen times. I intend and expect to return to these areas frequently in the future. I have photographed these areas and wildlife within them extensively.

9. I have visited many other parts of the Kaibab National Forest in the past twenty years, including nearly every area where the Forest Service has offered a timber sale. My most recent visit to the Kaibab National Forest was last August and I expect to return to some or all of these parts of the Kaibab National Forest in the near future.

10. I have witnessed bald eagles in the North Kaibab National Forest on several occasions and in the Grand Canyon National Park, especially in winter with the last sighting being winter 2011 when I was teaching a photography class. I have witnessed golden eagles in the Kaibab National Forest primarily on the eastern edges, last in

summer 2008. I have also spent dozens, if not hundreds, of hours watching and photographing bald and golden eagles in the greater northern Arizona region and intend to do so in the future. I believe that some, if not many, of the birds that I have witnessed utilize the Kaibab National Forest for foraging activities. I believe that the protection of bald and golden eagles from lead poisoning incidents in the Kaibab National Forest would affect my ability to witness and photograph these species in many areas both inside and outside of the Kaibab National Forest in the future.

11. I have visited the Kaibab National Forest with the hope of observing California condors, although as of yet I have not been so lucky to have witnessed these majestic birds. I hope someday to witness and photograph them. Their presence and natural wild existence in the Kaibab National Forest are important to me, even if I never am able to actually see them (let alone photograph them), as they provide a connection for me to the incredible diversity of life supported within the Kaibab National Forest.

12. I plan on visiting the North Kaibab National Forest next in June of this year. Specifically, I plan on first visiting the condor release site just off the Forest boundary, where I plan to photograph the landscape and hope to photograph wildlife, including (if I am so fortunate) eagles, condors, hawks, and falcons.

13. The Forest Service's failure to prevent the needless and unnecessary poisoning of wildlife in the Kaibab National Forest has adversely affected and will adversely affect in the future my recreational, professional, and aesthetic enjoyment of the area.

14. Much of my professional, aesthetic, recreational, and spiritual interests are dependent upon the conservation of the Kaibab National Forest and its wildlife. Protection of these species and their habitat under the Resources Conservation and Recovery Act would ensure those interests are preserved and remain free from injury.

15. I have read about the impacts of lead poisoning on wildlife, including eagles and condors and am aware that it is a major cause of harm to these species,

including preventing condors from being able to exist independently, even in a place as rugged and wild as the Kaibab National Forest. I am aware that lead poisoning from hunter-shot lead ammunition is the leading cause of mortality of the species and not only threatens to prevent condors from ever recovering but also has the potential to push it further towards extinction. I am deeply concerned for the future of this species, especially for its ability to continue flying free throughout the Kaibab National Forest and the surrounding lands and for my ability to continue to travel to the Kaibab National Forest to witness it in person.

16. Although I have never seen a condor in the Kaibab National Forest, when traveling in the area I am acutely aware that I am in their habitat and that I am among them. I intend to visit this habitat again with the hopes of one day witnessing this amazing creature. But just knowing that they exist and are in close proximity is important to me and is an important reason for why I visit the Kaibab National Forest.

17. As someone who is deeply concerned about the fate of our imperiled wildlife and health of our public lands, I am troubled by the failure of the Forest Service to prevent the continued degradation of the Kaibab National Forest ecosystem, which is home to so many protected species that depend on such protection to survive. If species like the California condor do not continue to survive in areas like the Kaibab National Forest, I will suffer a great loss, because it is our goal to recover these magnificent species, and that goal cannot be achieved without protecting them from significant threats to their well-being, particularly from hunter-shot lead ammunition. Personally, I will suffer: 1) a loss of biological health, as the environment will be degraded by the reduction in protected species, which are integral parts of the ecosystem; 2) a loss of moral and spiritual health, from knowing that these species would be in decline; 3) an aesthetic loss, from the reduced chance and potential loss of a chance to see these species thrive in the wild; 4) a recreational loss, as my outdoor enjoyment is diminished when animals such as the condors and eagles are extirpated from areas where I like to recreate; and 5) a

professional loss, as my work as a nature and wildlife photographer will be greatly negatively impacted.

18. In sum, I derive concrete, ongoing recreational, aesthetic, professional, spiritual, moral, and other benefits from the Kaibab National Forest and the wildlife it harbors, and my interests will be harmed if the Forest Service does nothing to address the continuing and future threat posed by hunter-shot lead ammunition and fails to insure against further degradation and loss of these native species and their habitat.

Executed on January 31, 2013, at Flagstaff, Arizona.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PRESCOTT DIVISION

CENTER FOR BIOLOGICAL
DIVERSITY; SIERRA CLUB; and
GRAND CANYON WILDLANDS
COUNCIL,

Plaintiffs,

vs.

UNITED STATES FOREST SERVICE,

Defendant.

Case No: 3:12-cv-08176-SMM

**DECLARATION OF TAYLOR
MCKINNON**

1 I, TAYLOR MCKINNON, declare as follows:

2 1. I currently reside in Flagstaff, Arizona, where I have lived for the vast
3 majority of my life. One of the main reasons I chose Flagstaff for my home is due to its
4 proximity to the Kaibab National Forest and the surrounding wilderness and natural areas.

5 2. I have been employed by and a member of the Center for Biological
6 Diversity ("the Center") since 2007. In my capacity as the Center's Public Lands
7 Campaigns Director I work to ensure that the country's public lands are managed for the
8 benefit of their species and ecosystems in a warming planet. The Center is a non-profit
9 organization committed to the preservation, protection, and restoration of native species
10 and the ecosystems they depend upon. Among many species, the Center advocates for
11 protection and recovery of bald and golden eagles, California condors and the species'
12 habitat. I rely upon the Center to represent my interests in protecting endangered,
13 threatened, and otherwise protected species and their habitat. Prior to joining the Center, I
14 was a natural history and river guide in southeast Utah and worked as the Grand Canyon
15 Trust's forest conservation director.

16 3. I first visited the Kaibab National Forest approximately 32 years ago, and
17 have since returned hundreds of times. These visits have influenced me greatly, and my
18 interest in the Kaibab National Forest, its wildlife, and natural beauty has increased with
19 each successive visit.

20 4. I have visited the Kaibab National Forest dozens of times. I have visited
21 each of the Kaibab National Forest's three ranger districts and have frequently explored the
22 Kaibab National Forest's Kaibab Plateau. One of my intents in visiting the Kaibab
23 National Forest is to observe wildlife, including bald and golden eagles and California
24 condors.

25 5. I plan to return to the Kaibab National Forest frequently in the near future,
26 most immediately on a trip I have planned to the Tusayan Ranger District in February or
27 March of 2013. As I do on every trip to this region, I will devote a significant amount of
28

1 my time to witnessing and observing wildlife, including, I hope, bald and golden eagles,
2 California condors and other raptors.

3 6. I have also visited the wildlands near and adjacent to the Kaibab National
4 Forest, including Grand Canyon National Park and Grand Canyon-Parashant National
5 Monument. Most recently I visited the Grand Canyon-Parashant National Monument in
6 2012. One of my intents in visiting these areas is to observe wildlife, including bald and
7 golden eagles and California condors, which I believe utilize the Kaibab National Forest
8 for foraging and roosting activities. I thus believe that the wildlife I seek to observe in
9 areas near the Kaibab National Forest can be and is harmed by consumption of lead
10 ammunition within the Kaibab National Forest.

11 7. One of my hobbies is landscape photography. I have traveled to the Kaibab
12 National Forest to photograph its breathtaking and expansive vistas in the infinite varieties
13 of light experienced throughout the year and even throughout a single day. I plan on
14 returning in the spring of 2013 to take more photos of this landscape and will return
15 frequently in the near future.

16 8. I derive strong recreational, aesthetic, scientific, professional, moral and
17 spiritual benefits from visiting the Kaibab National Forest, from knowing that this public
18 land continues to exist in its natural state and as a functioning and wondrous ecosystem,
19 from observing endangered and protected species, from recreating in their habitat, and from
20 knowing that they live and thrive as and where they do.

21 9. One of my goals in traveling to the Kaibab National Forest has been to
22 witness and observe California condors. I have had the great fortune of being able to
23 observe condors soaring overhead in the Kaibab National Forest as well as in the nearby
24 wildlands, including along Grand Canyon National Park's south rim, above the Colorado
25 River in Grand Canyon, in Marble Canyon, and upriver of Lee's Ferry. These spectacular
26 birds' incredible wingspans, ancient-looking appearance, and gentle, beautiful soaring
27 behavior invoke for me a deep appreciation and understanding of the landscape, the
28 ecosystem, the winds and the weather of the Kaibab. These experiences observing condors

1 in turn have invoked in me a deeper understanding of my relationship to these natural
2 places as well as to the larger region of northern Arizona and to Earth in general.

3 10. I have read about the impacts of lead poisoning on condors and am aware that
4 it is a major cause of the species not being able to exist independently, even in a place as
5 rugged and wild as the Kaibab. I am aware that lead poisoning from hunter-shot lead
6 ammunition is the leading cause of mortality of the species and not only threatens to
7 prevent the species from ever recovering but also has the potential to push it further
8 towards extinction. I am deeply concerned for the future of this species, especially for its
9 ability to continue flying free throughout the Kaibab National Forest and the surrounding
10 lands and for my ability to continue to travel to the Kaibab to witness it in person.

11 11. I have witnessed bald eagles in the Kaibab National Forest near Garland
12 Prairie, Bill Williams Mountain and White Horse Reservoir during the winter each of the
13 past several years. I have witnessed golden eagles on the eastern and western flanks of the
14 Kaibab Plateau and on the Tusayan Ranger District of the Kaibab National Forest in many
15 of my dozens of visits there over the past two decades. I have also spent dozens of hours
16 observing and looking for bald and golden eagles and other birds in the greater northern
17 Arizona region and intend to do so in the future. I believe that some, if not many, of the
18 birds that I have witnessed outside of the Kaibab National Forest utilize the Kaibab
19 National Forest for foraging activities. I believe that the protection of bald and golden
20 eagles from lead poisoning incidents in the Kaibab National Forest would affect my ability
21 to observe these species in many areas both inside and outside of the Kaibab National
22 Forest in the future.

23 12. The Forest Service's failure to prevent the needless and unnecessary
24 poisoning of wildlife in the Kaibab National Forest has adversely affected and will
25 adversely affect in the future my recreational, professional, and aesthetic enjoyment of the
26 area.

27 13. Much of my professional, aesthetic, recreational, and spiritual interests are
28 dependent upon the conservation of the Kaibab National Forest and its wildlife. Protection

1 of these species and their habitat under the Resources Conservation and Recovery Act
2 would ensure those interests are preserved and remain free from injury.

3 14. As someone who is deeply concerned about the fate of our imperiled wildlife
4 and health of our public lands, I am troubled by the failure of the Forest Service to prevent
5 the continued degradation of the Kaibab National Forest ecosystem, which is home to so
6 many protected species that depend on such protection to survive. If species like the
7 California condor do not continue to survive in areas like the Kaibab National Forest, I will
8 suffer a great loss, because it is our goal to recover these magnificent species, and that goal
9 cannot be achieved without protecting them from significant threats to their well-being,
10 particularly from hunter-shot lead ammunition. Personally, I will suffer: 1) a loss of
11 biological health, as the environment will be degraded by the reduction in protected
12 species, which are integral parts of the ecosystem; 2) a loss of moral and spiritual health,
13 from knowing that these species would be in decline; 3) an aesthetic loss, from the reduced
14 chance and potential loss of a chance to see these species thrive in the wild; and 4) a
15 recreational loss, as my outdoor enjoyment is diminished when animals such as the condors
16 and eagles are extirpated from areas where I like to recreate.

17 ///

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2 15. In sum, I derive concrete, ongoing recreational, aesthetic, professional,
3 spiritual, moral, and other benefits from the Kaibab National Forest and the wildlife it
4 harbors, and my interests will be harmed if the Forest Service does nothing to address the
5 continuing and future threat posed by hunter-shot lead ammunition and fails to insure
6 against further degradation and loss of these native species and their habitat.

7
8 Executed on January 10th, 2013, at Flagstaff, Arizona.

9
10 I declare under penalty of perjury under the laws of the United States of America that the
11 foregoing is true and correct.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PRESCOTT DIVISION

CENTER FOR BIOLOGICAL
DIVERSITY; SIERRA CLUB; and
GRAND CANYON WILDLANDS
COUNCIL,

Plaintiffs,

vs.

UNITED STATES FOREST SERVICE,

Defendant.

Case No: 3:12-cv-08176-SMM

DECLARATION OF TOM MARTIN

1 I, TOM MARTIN, declare under penalty of perjury that the following is true and
2 correct and within my personal knowledge.

3 1. I reside at 419 West Navajo Road, Flagstaff, Arizona, 86001. I have resided
4 at this location for 15 years. I grew up in Tucson, Arizona.

5 2. My father, Dr. Paul S. Martin, worked his entire life as a professor at the
6 University of Arizona. My father studied the recent Pleistocene, especially the short time
7 period where we as a species arrived and the die-off of a huge contingent of Pleistocene
8 mega fauna, such as camel, elephant, sloth and bison, occurred. The discussion of condors
9 feeding on these animals captivated me at an early age, and as the decades went by, my
10 father and I would regularly discuss the condors and their role in the North American
11 ecosystem. He and I were keenly interested in the reintroduction and survival of the condor
12 up to the time of his death, and I carry on this interest to this day.

13 3. I have been a member of the Sierra Club since 2003. The Sierra Club is a
14 nationwide non-profit organization dedicated to protecting and restoring the quality of the
15 environment. It is comprised of over 1.4 million members and supporters, in all 50 states,
16 including 12,000 plus members in Arizona.

17 4. The Sierra Club has, as one of its top priority campaigns, the Grand Canyon
18 Protection campaign. This campaign encompasses the entire Grand Canyon ecoregion,
19 including the Kaibab National Forest and entire Grand Canyon watershed. We have
20 worked for many years to stop new water diversion projects from the Colorado River,
21 including a previous proposal for a water pipeline from Jackass Canyon, as well as
22 excessive groundwater pumping; we work to restore natural flows out of Glen Canyon
23 Dam and thus protect the ecological integrity of the Colorado river ecosystem; we advocate
24 for the protection of threatened and endangered species in the watershed, including the
25 California condor, humpback chub and the desert tortoise; we work to protect the water
26 quality and quantity of the Grand Canyon's fragile seeps and springs; we also work to
27
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1 protect the region's watershed from excessive grazing and from bad logging projects. We
2 have been supportive of California condor recovery since prior to their reintroduction and
3 have been advocating for limiting and banning lead ammunition in the condor's recovery
4 area for at least the past five years.

5 5. I joined the Sierra Club in part because of my concern over protecting our
6 national forests, national parks, and other wildlands. This present lawsuit, designed to
7 protect the California condor and the public lands that are important habitat for the condor,
8 advances the reasons I joined and remain a member of the Sierra Club.

9 6. As a member of the Sierra Club, I also serve on the Executive Committee for
10 the Plateau Group of the Grand Canyon Chapter of the Sierra Club, the Grand Canyon
11 Chapter Executive Committee and on a national Sierra Club recreation committee. In these
12 capacities I assist with monitoring activities of the National Park Service, the Bureau of
13 Land Management, and the U.S.D.A. Forest Service on the three national forests in
14 Arizona, including the Kaibab National Forest. I also am involved in wilderness and
15 wildlife habitat area recommendations and attend numerous meetings on public land
16 management and wildlife habitat protection.

17 7. For the last forty years I have been hiking and river running in and around
18 Grand Canyon National Park, including in the Kaibab National Forest. I enjoy recreating in
19 this region because of the area's tremendous scenery and rich wildlife habitat, among other
20 resources. In the foreseeable future, I intend to continue these activities. I have seen
21 condors from both a distance and very close up on my hikes and river trips. My wife and I
22 go to this area many times each year, and for the last 20 years average at least 30 days
23 camping and hiking in this region yearly. We intend to continue to do so as this is why we
24 live in Northern Arizona.

25 8. I was hiking once in Soap Creek, a tributary of the Colorado River in Grand
26 Canyon National Park but managed by the Bureau of Land Management, and flushed out a
27
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1 condor, which flew right over my head. I felt the wind off the condor's wings as it flew by,
2 and heard the kite-like rustle of its feathers.

3 9. On another occasion, it was an honor as an American to observe the majesty
4 of a condor release at the Vermillion Cliffs on the Arizona Strip. This act represents the
5 ultimate example of species preservation. I had no idea at the time we watched these birds
6 set free into the wilds of the Southwestern United States that they would need to be
7 repeatedly recaptured and treated for hunting related lead poisoning. I am sure those who
8 watched the release that day understand these birds need all the help they can get from us
9 for their future survival to be assured.

10 10. As a physical therapist at the small health clinic at the South Rim of Grand
11 Canyon National Park, I was able to observe a condor being x-rayed at the clinic for lead
12 shot. Sadly, the x-ray of the condor showed a few clear round white spots in the bird's
13 gullet, indicating lead shot. The clinic smelled like dead carrion for a week and I was
14 ecstatic, for I knew I was smelling the Pleistocene, when these majestic birds numbered in
15 the millions. While the smell faded, lead poisoning is a real threat to birds, and mortality
16 due to lead toxicity is well demonstrated in the literature. It greatly concerned me then, as
17 it still does today, that these magnificent creatures are being killed and or sickened by lead
18 poisoning. These magnificent birds, on the very edge of extinction, are not allowed a fair
19 chance at survival simply due to an activity that can easily be modified to eliminate
20 collateral damage in the form of death by lead poisoning.

21 11. I have observed and photographed condors in Northern Arizona at many
22 different locations, including the Kaibab National Forest, Grand Canyon National Park and
23 Bureau of Land Management areas while driving and hiking through these areas. The
24 photograph attached to this declaration was taken by me on November 17, 2008. It took us
25 two days of hard backpacking off trail to arrive at the top of the Redwall Limestone above
26 the Cranberry Canyon Route. Arriving about noon, we were stunned and thrilled to see this
27 magnificent condor effortlessly glide back and forth in front of us as we stood on the top of
28 a 700 foot high cliff. We had started our backpack by camping in the North Kaibab

1 National Forest, at the head of the Thunder River Trail, where we left our vehicles.

2 Observing and being observed by this condor was a highlight of that five day journey.

3 12. I have seen condors as they have explored our river camp on river trips, and
4 have had to haze them away from our camps on at least two occasions. After one such
5 interaction with a condor in Marble Canyon, Arizona, a few months later I heard this same
6 condor was seen over two hundred miles away near Lake Mead, by Las Vegas, Nevada. It
7 is clear to me that these birds fly great distances and jurisdictional boundaries mean
8 nothing to them.

9 13. In 2012, as we rafted our first day on the Colorado River, a friend of ours
10 yelled down to us from the Canyon rim as we approached our first major rapid. Looking
11 up, we saw our friend, Velma McMeekin. She was standing there on the Rim, waving at us,
12 as two condors flew above her. We would never see her again as she would pass away
13 unexpectedly later in the year. I will always remember her, happily waving to us with the
14 condors flying above her.

15 14. On another hike on the rim of Grand Canyon I found a recently killed elk,
16 partially covered and being eaten by a mountain lion no doubt. As I looked at the elk kill, I
17 noted a condor feather lying next to the elk carcass. It was a very large feather, the biggest
18 I had ever seen. On other occasions while driving in the North Kaibab National Forest, I
19 have seen multiple gut piles from large animals, either deer or elk, killed by hunters during
20 hunting season. The risk of ingestion of lead ammunition in these intestinal piles by all
21 carrion feeding birds is great, and lead poisoning of these birds, such as ravens, eagles,
22 hawks, owls and vultures, is of concern to me as well.

23 15. On January 17, 2013, I spent three days backpacking from South Canyon to
24 36.7 Mile Canyon. This backpack started and ended in North Kaibab National Forest
25 managed land. We hiked into Grand Canyon National Park and followed the top of the
26 Redwall Limestone cliffs for miles without a trail. I assumed I would see condors on this
27 hike, and was saddened that I did not see any. It occurred to me that I may never see these
28 incredible fliers in the wild again. Ever. That would be a tragedy, not only to me, but for all

1 Americans. Clearly, seeing condors on these types of explorations is the highlight of the
2 journey for me, and not seeing them lessens the experience of traveling in such remote
3 country. It seems clear to me that should the USFS step up to the plate and protect condors
4 from lead ammunition exposure, these animals, on the doorstep of extinction, may yet have
5 a chance at not only population recovery in sheer numbers, but in population health as well.
6 A robust and healthy population of condors ensures hatch success with viable condor
7 chicks. This in turn directly benefits my recreational experience by being able to see these
8 great creatures.

9 16. Condors are expert fliers, and are a key part of our American Heritage. I am
10 concerned that continued use of lead ammunition will hinder and possibly halt the recovery
11 of these incredible animals. Eliminating lead ammunition will not stop hunting in any way,
12 and yet limiting this specific type of ammunition will help these magnificent birds recover
13 from the very edge of extinction. It pains me to contemplate how much effort has been
14 expended by so many people to save these rare and magnificent creatures, only to have the
15 condors damaged by the unknowing consumption of lead ammunition.

16 17. The loss of this species would be incalculable to us as Americans and to me
17 personally, given the incredible connection these birds have to the recent past when sabre
18 toothed cats walked the land. Their presence elevates the spirit of man, adding real and
19 tangible value to our wild lands, representing an ecological wholeness. What pains me so is
20 that this is such an easy issue to solve, but if this continues, I may be one of the last human
21 beings to see these great birds fly and that is a truly chilling thought.

22
23 I declare under penalty of perjury that the foregoing is true and correct.

24
25 Executed on February 4, 2013, at Flagstaff, Arizona
26
27
28



By: _____

Tom Martin
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FOR THE DISTRICT OF ARIZONA
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CENTER FOR BIOLOGICAL
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GRAND CANYON WILDLANDS
COUNCIL,

Plaintiffs,

vs.

UNITED STATES FOREST SERVICE,

Defendant.

Case No: 3:12-cv-08176-SMM

**DECLARATION OF THOMAS
HULEN**

I, THOMAS HULEN, declare as follows:

1 1. My name is Thomas Hulen and I have lived in Arizona for most of my 57 years
2 on Earth. I consider myself an outdoorsman. I have been employed in conservation most of
3 my adult life and my university education reflects my interest in wildlife biology, natural
4 history and anthropology.

5 2. I am a big game hunter and avid sports fishing person, bird watcher, hiker,
6 backpacker, runner amongst other pursuits.

7 3. Currently, I am employed as the Executive Director of the environmental
8 advocacy non-profit Friends of the Sonoran Desert National Monument. I serve on the
9 Board of Directors of the Arizona Heritage Alliance and as a member of the Sierra Club's
10 Grand Canyon Chapter conservation and wildlife committees. I have been a Sierra Club
11 member since 2009. In 2012, I was appointed by Secretary of Interior Ken Salazar to serve
12 on Arizona's Bureau of Land Management Resource Advisory Council.

13 4. As a citizen and an outdoorsman I feel it is my responsibility to do my part in
14 protecting our natural and cultural resources and I help meet this responsibility by being
15 involved at many levels. From enjoying the outdoors conscientiously by obeying hunting
16 regulations and maintaining outdoor ethics to advocacy at the local through the national
17 level by participating with organizations such as the Sierra Club and the Arizona Heritage
18 Alliance. In addition to my profession managing the Friends of the Sonoran Desert
19 National Monument, I work with the Bureau of Land Management, U.S. Fish and Wildlife
20 Service, the Arizona Game and Fish Department, the National Park Service, and others to
21 ensure that our natural and cultural resources receive the attention they deserve.

22 5. About seven years ago, I drew a bull elk tag for an Arizona Game Management
23 unit south of the Grand Canyon in the Kaibab National Forest. Even though this area is
24 outside the primary California condor recovery zone, it was recommended by the Arizona
25 Game and Fish Department that hunters consider using lead free ammunition for this area. I
26 did some research on lead free ammunition and spoke with a friend of mine who has been
27 using lead free ammunition for many years. My research convinced me that lead free
28 ammunition was the best alternative available to limit lead poisoning in California condors

1 that scavenge the carcasses and gut piles left by hunters in the field. In addition, I
2 discovered that lead free bullets may be superior in ballistic performance than traditional
3 lead bullets.

4 6. Presently, lead free ammunition is widely available in numerous calibers. At the
5 time I drew my elk tag, however, lead free ammunition was fairly hard to come by, but
6 because of a program sponsored by the Arizona Game and Fish Department I was able to
7 purchase premium lead free ammunition from Arizona Sportsmen's Warehouse in Phoenix,
8 AZ. Today I use exclusively lead free ammunition for hunting throughout the western
9 United States. The price is comparable to premium lead ammunition. I also use non-lead
10 fishing tackle to demonstrate my commitment to the environment.

11 7. Scientific evidence unequivocally demonstrates that lead is poisonous to people,
12 California condors, eagles, ducks and other living beings. I believe that it is time that lead
13 is eliminated from all uses for which there are suitable substitutes. We have had this
14 argument numerous times before with lead in pipes, paint, ceramic glazes and gasoline
15 with the same result. Lead is poisonous to living beings.

16 8. In the past few years I have had the delightful occasion to see California condors
17 on both the north and south rims of the Grand Canyon and I plan to return with my family
18 to the Vermillion Cliffs area in the spring of 2013 to see condors and other wildlife soaring
19 over those majestic cliffs, and again in the fall, with lead free shotgun ammunition, to hunt
20 dusky (formerly blue) grouse and wild turkey in the Kaibab National Forest.

21 9. Having free flying California condors is just as important as having healthy deer
22 and elk herds and the management of any species should not negatively impact others
23 species. Lead free ammunition provides the opportunity for wildlife to live without risk of
24 lead poisoning and hunters the ability to go to the field and hunt.

25 10. At this time, we have the opportunity to manage the California condor and other
26 species for the benefit all species including people who enjoying hunting, bird watching or
27 for people being satisfied knowing that California condors are once again flying over the
28 southwest.

1 11. Not having the opportunity to see healthy free flying condors, after that species
2 was rescued from the brink of extinction, due to a preventable illness such as lead
3 poisoning, would break my heart and greatly diminish my recreational, aesthetic and
4 spiritual experiences on the Kaibab National Forest and other areas where condors roam. I
5 believe that since the Kaibab National Forest in Arizona is an important feeding area for
6 the California condor in the southwest it would be beneficial for this species' survival if lead
7 hunting ammunition is banned from the Kaibab National Forest. A lead free environment
8 in the Kaibab National Forest will make my experience there more fulfilling because it will
9 increase the opportunity for me to see healthy condors in their natural habitat and know
10 that condors and other wildlife are not being poisoned by lead.

11 12. My memory of the north Kaibab plateau is populated by mule deer, pronghorn,
12 bison, Golden eagles, condors, turkeys and many more animals. I hate to contemplate a
13 Kaibab plateau without any of these magnificent creatures. If we allow the California
14 condor to go locally extinct because of preventable lead poisoning, shame on us.

15
16 Executed on February 4, 2013, at Tempe, Arizona.

17
18 I declare under penalty of perjury under the laws of the United States of America that the
19 foregoing is true and correct.

20
21 

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COUNCIL,

Plaintiffs,

vs.

UNITED STATES FOREST SERVICE,

Defendant.

Case No: 3:12-cv-08176-SMM

DECLARATION OF KIM CRUMBO

I, KIM CRUMBO, declare under penalty of perjury that the following is true and correct and within my personal knowledge.

1 1. I was born in Provo, Utah, in 1947. I am a Vietnam Veteran, having served as
2 a Navy SEAL on over 70 combat operations. I worked as a professional river guide on the
3 Colorado River from 1971-1980, and worked for the National Park Service as a River
4 Ranger and Wilderness Coordinator at Grand Canyon National Park from 1980-1999,
5 retiring after 20 years.

6 2. Since 1999, I have worked primarily for Grand Canyon Wildlands Council, a
7 non-profit organization dedicated to protecting and restoring Wild Nature in the Grand
8 Canyon Ecoregion, which includes the Kaibab National Forest.

9 3. Between 1981 and 2010, I resided at Grand Canyon Village. Currently, I
10 reside at 3275 Taylor Avenue, Ogden, Utah. I have resided at this location for 2.5 years.

11 4. I am one of three co-founders of Grand Canyon Wildlands Council (GCWC),
12 which was established in 1996 to Protect and Restore Wild Nature in the Grand Canyon
13 ecoregion of northern Arizona and southern Utah. GCWC is a regional conservation
14 organization with approximately 300 members and affiliates. I have continually served on
15 the board of directors or as staff member since the organization's founding.

16 5. GCWC's mission is to create and apply a dynamic conservation area network
17 that ensures the existence, health, and sustainability of all native species and natural
18 ecosystems in the Grand Canyon ecoregion. The goals of the organization include, among
19 others, protecting key species and restoring extirpated species and natural processes.

20 6. GCWC is active in Kaibab National Forest planning efforts, with an
21 emphasis on protecting and restoring all native species, including avian and mammalian
22 species dependent on the mixed conifer, ponderosa pine, woodlands, and grasslands, and
23 those species susceptible to lead poisoning from exposure to lead ammunition. The species
24 vulnerable to lead poisoning from spent ammunition include raptors such as bald and
25 golden eagles, and goshawks; and, of course, the endangered California condor.

1 7. I have been active for many years on behalf of GCWC in efforts to reduce the
2 needless incidents of lead poisoning of wildlife in Arizona. On July 23, 2007, I co-
3 authored a letter on behalf of several conservation groups to the Arizona Game and Fish
4 Commission requesting it “amend the Arizona state hunting regulations to require the use
5 of non-lead ammunition for the taking of big game, small game, and non-game birds and
6 mammals, as well as for all depredation shooting.”

7
8 8. On March 23, 2010, I authored an op-ed piece on behalf of GCWC to the
9 Arizona Daily Sun entitled “Save the Condors by Getting the Lead Out.” Protection of and
10 restoration of native wildlife has been my life-long passion, and most of my adult life has
11 involved me with Grand Canyon efforts to do just that.

12 9. On November 11, 2012, I co-authored an op-ed piece on behalf of GCWC for
13 the Arizona Republic entitled “Wildlife Agency Needs to Restrict Lead Ammunition.”

14 10. Since 1969, and continuing today, my family and I have extensively explored
15 by hiking and by four-wheel drive the public lands north of Grand Canyon National Park
16 and the Kaibab National Forest, including the North Kaibab Ranger district and much of
17 House Rock Valley. The southern portion of House Rock lies within the eastern section of
18 the North Kaibab Ranger District, while the northern portion lies directly below the condor
19 release site and is administered by the Bureau of Land Management. Both areas are
20 important condor forage areas, and lie within the AZGFD Game Units 12A, 12AF, and 12b
21 (specific hunting areas designated by the Arizona Department of Game and Fish).

22
23 11. Until our recent move back to Utah in the summer of 2010, the Tusayan
24 Ranger District was essentially our backyard for thirty years, and we explored the forest
25 from our home on the South Rim of Grand Canyon National Park by hiking and 4-wheel
26 drive, as well as regularly jogged its many trails leading in and out of Grand Canyon
27 National Park.
28

1 12. I regularly return to Grand Canyon and both the Tusayan and North Kaibab
2 Ranger District—at least a half-dozen times a year - not only for recreational activities, but
3 as part of my professional responsibilities with GCWC. For example, last year, I visited
4 the KNF no less than eight times for enjoyment, and once to conduct a tour for TV
5 celebrities (Modern Family). I plan to return this year and in the future both for
6 recreational activities and as part of my professional responsibilities for GCWC. I have one
7 extended visit planned for mid-May to provide logistic support for the Grand Canyon
8 portion of an epic Mexico to Canada hiking and biking journey called Trek West
9 (<http://trekwest.org/>).
10

11 13. For over 40 years, Grand Canyon National Park and its native wildlife have
12 played a central role in my life. From my first hike in 1969 (a week before my first
13 deployment to Vietnam), to my eight years as a Grand Canyon river guide, to the 20 years
14 as a National Park river ranger and wilderness manager, and including the additional ten
15 years as a resident, “The Canyon” and its wildlife (especially its mammalian carnivores and
16 raptors, all vulnerable to lead poisoning) remain essential to me on an intellectual and
17 ethical level. The knowledge of their continued presence and well being is very important
18 to me, as I continue to hike the Park’s wild places, and when the opportunity arises, run the
19 river.
20

21 14. My years spent on the river, side canyons and forests of Grand Canyon
22 National Park and the Kaibab National Forest provided me with great opportunities to
23 study, monitor, and marvel at the region’s diversity of life. I participated in a difficult
24 peregrine falcon rescue from the depths of Grand Canyon. In addition, my fellow river
25 ranger and I made the first recorded summer observation of an osprey, a fish-eating raptor
26 (Reference: Brown, Bryan T., Steve W. Carothers, and R. Roy Johnson. 1987. Grand
27 Canyon Birds. University of Arizona Press. Page 169).
28

1 15. Since their reintroduction in 1996, a glimpse of California condors evoke
2 excitement in even the most seasoned of naturalists. I have had the pleasure of observing
3 on numerous occasions wild condors roosting on as well as soaring over the Vermilion
4 Cliffs (the release site), on the Colorado River within Marble Canyon (adjacent to House
5 Rock Canyon), and many times at the South Rim of Grand Canyon. I had the distinct
6 pleasure of sharing with a very close condor fly by over the Grand Canyon School senior
7 graduating class of 2008. Other raptors I enjoy watching, and that are vulnerable to lead
8 poisoning from ingesting lead ammunition fragments, include bald and golden eagles,
9 sharp-shinned, Cooper's and red-tailed hawks, and the uncommon Swainson's, ferruginous
10 and rough-legged hawks.

11
12 16. I have a number of interesting, personal encounters with goshawks, an
13 impressive avian predator and important keystone species of the Kaibab plateau. Goshawks
14 aggressively defend their nest, and on at least two occasions I wandered too close to their
15 home for the parent's comfort who swooped and screeched until I figured out which way I
16 needed to run. Once, while on my mountain bike and rounding a tight turn in the South
17 Rim forest, a panic-stricken dove with a goshawk inches away on its tail came with a foot
18 of my face before I could react. I didn't crash, but by the time I recovered and look behind
19 me both creatures had vanished in the woods.

20
21 17. Mammalian species susceptible to impairment and death from lead poisoning
22 include ecologically valuable keystone species such as the mountain lion, as well as
23 bobcats, coyotes, and the rarely observed badger and black bear. On several occasions
24 while hiking the inner canyon, or jogging on the forested rims, I've come across mountain
25 lion tracks and kill sites. Bobcats are rare, but I have observed them on the South Rim. My
26 encounters with coyotes, ranging from mundane to comic, were frequent on the rim and
27 forest, and to a lesser degree on the river. I enjoyed their nighttime chorus. Sometimes a
28 youngster would accompany me (at a respectful distance) on portions of my morning runs.

1 I don't know why, other than out curiosity. One late fall day my river party landed at a
2 beach camp occupied by a coyote pair that reluctantly departed up the hillside. One would
3 frequently turn around and bark at us, while his more realistic partner encouraged him to
4 continue their brisk retreat.

5
6 18. Long ago, my knowledge of the ecological relationships, and the often
7 adverse effects of our decisions and subsequent actions on the native diversity of life,
8 including individual creatures, instilled in me a deep sense of responsibility. The return of
9 the condor not only symbolized humanities' attempts to make amends for past blunders,
10 but also in a very personal way heightens my appreciation and enjoyment of the vast, yet
11 vulnerable Kaibab forest and Grand Canyon. The condor's second extirpation, perhaps
12 ultimate extinction, and the continued suffering of other wildlife due to unnecessary
13 exposure to spent lead ammunition for me would constitute an immense betrayal and
14 profound sense of loss. The likelihood of seeing fewer healthy condors in the wild also
15 would significantly decrease my enjoyment of my time spent in the Grand Canyon or in the
16 Kaibab National Forest.

17
18 19. Resolution of some compelling issues often lies beyond our ability to
19 immediately secure. Lead poisoning of the Kaibab wildlife is not one of those. The
20 poisoning of condors and other wildlife on Kaibab National Forest land due to exposure to
21 lead ammunition is preventable. The enjoyment and delight of thousands of Americans
22 visiting the Grand Canyon and the adjacent Kaibab ranger districts who catch a glimpse of
23 condors would continue. I certainly am one whose appreciation and enjoyment would
24 endure.

25
26 20. In summary, my four decades experience in Grand Canyon and the Park's
27 adjacent forest and grasslands, including the Kaibab National Forest, has heightened my
28 appreciation for its diversity of life, and instilled in me a commitment to allow them to live

1 out their lives as nature intended. Inflicting the needless agony of lead poisoning on these
2 creatures is totally unnecessary and morally reprehensible. I consider their well being as
3 one of my primary responsibility as an American, as well as a world citizen, and I intend to
4 make the most out of the time I have left to defend their interest and enjoy their presence,
5 observed or otherwise.
6
7

8 I declare under penalty of perjury that the foregoing is true and correct.
9

10 Executed on February 4, 2013
11

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13 Kim H. Crumbo
14 3275 Taylor Avenue
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PRESCOTT DIVISION

CENTER FOR BIOLOGICAL
DIVERSITY; SIERRA CLUB; and
GRAND CANYON WILDLANDS
COUNCIL,

Plaintiffs,

vs.

UNITED STATES FOREST SERVICE,

Defendant.

Case No: 3:12-cv-08176-SMM

DECLARATION OF PETER GALVIN

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I, PETER GALVIN, declare as follows:

1 1. The facts set forth in this declaration are based on my personal knowledge
2 and if called as a witness, I could and would competently testify thereto under oath. As
3 to those matters that reflect a matter of opinion, they reflect my personal opinion and
4 judgment upon the matter.

5 2. I am one of the founders of the Center for Biological Diversity (“the
6 Center”) and helped create its purposes and goals. Currently, I serve on the Center’s
7 Board of Directors and am the Conservation Director of the organization.

8 3. The Center is a tax-exempt, non-profit organization with over 40,000
9 members, approximately 1,986 of which reside in Arizona and Utah, and offices in
10 Tucson and Flagstaff, Arizona; San Francisco, Los Angeles, and Joshua Tree,
11 California; Silver City, New Mexico; Washington, D.C.; Portland, Oregon; Anchorage,
12 Alaska; and Duluth, Minnesota. The mailing address of the Center’s main office is P.O.
13 Box 710, Tucson, AZ 85702-0710.

14 4. The Center is dedicated to the preservation, protection, and restoration of
15 biodiversity, native species, ecosystems, and public lands. The Center’s Articles of
16 Incorporation state that the specific purpose of the Center is “to advance conservation
17 efforts.” The Center is one of the leading conservation groups advocating for protection
18 of threatened and endangered species in the United States.

19 5. Since the organization’s founding in 1989, the activities of the Center
20 have focused on the protection of threatened or endangered species and their habitats.
21 The Center has several programs in place to address the many components of such
22 advocacy including its Endangered Species Program, Wildlands Program, Urban
23 Wildlands Program, Oceans Program, and its Climate Law Institute. The Center holds
24 the belief that the health and vigor of human societies and the integrity and wildness of
25 the natural environment are closely linked. Beyond their extraordinary intrinsic value,
26 animals and plants, in their distinctness and variety, offer irreplaceable emotional,
27 spiritual and physical benefits to our lives and play an integral part in culture. Their
28 loss, which parallels the loss of diversity within and among human civilizations,

1 impoverishes humankind beyond repair.

2 6. In helping to create the Center, I sought to establish a non-profit
3 organization that focused on protecting threatened and endangered species from the
4 many threats they face such as habitat loss, exposure to toxic pollutants, urban sprawl,
5 and climate change. The Center was created to protect the interests of its staff,
6 members, board, and all others in regard to the future well-being of threatened and
7 endangered species, as well as species that may become threatened or endangered.

8 7. An important part of the Center's purpose is to protect the habitat used by
9 species so that they do not become endangered in the first place.

10 8. The Center also believes that protecting and promoting the ability of our
11 members to use, enjoy, recreate on, and study the habitat used by species that are or
12 may become imperiled is essential to the success of our mission. We encourage the
13 Center's members to do these things because, the Center believes, the more they learn
14 about and enjoy the habitats of various species, the more likely they are to work to
15 protect those species' habitats, as well as the species themselves.

16 9. As part of its mission, the Center regularly engages in protection efforts
17 and campaigns to ensure that our nation's environmental laws, including the Resource
18 Conservation and Recovery Act ("RCRA"), are enforced so as to protect imperiled
19 wildlife and its habitat.

20 10. The Center engages in citizen actions to enforce RCRA because its goals
21 are consistent with ours: Congress made the protection of health and the environment
22 and the conservation of valuable material and energy resources the Act's overarching
23 objectives. 42 U.S.C. § 6902(a).

24 11. The Center has been advocating for the elimination of lead from hunter-
25 shot ammunition for almost 10 years, when evidence started to clearly demonstrate that
26 the primary mortality threat to the endangered California condor was lead poisoning
27 through the ingestion of lead bullet fragments and shot from hunter-shot ammunition.

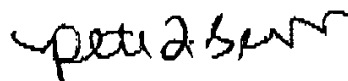
28 12. The Center is aware, and was aware at the time the complaint was filed in

1 this case, that the California condor, a federally-listed endangered species, has been
2 identified in the Kaibab National Forest and its immediate surroundings. The Center is
3 aware, and was aware at the time the complaint was filed in this case, that bald and
4 golden eagles, protected under the federal Bald and Golden Eagle Protection Act, have
5 been identified in the Kaibab National Forest and its immediate surroundings.

6 13. The Center's interests are protected by this lawsuit because of the
7 potential harm to California condors, bald and golden eagles, and other species that are
8 known to ingest hunter-shot lead bullets fragments and shot in the Kaibab National
9 Forest. Taking action to stop the ongoing discharges of this substance that is known to
10 be toxic to scavenging and predatory wildlife is directly germane to the Center's
11 purpose in insuring the protection and working for the recovery of threatened and
12 endangered species and their habitat.

13
14
15 Executed on February 1, 2013, at Whitethorn, California.

16
17 I declare under penalty of perjury under the laws of the United States of America that
18 the foregoing is true and correct.

19
20 

21
22 _____
PETER GALVIN

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**DECLARATION OF AARON
ISHERWOOD**

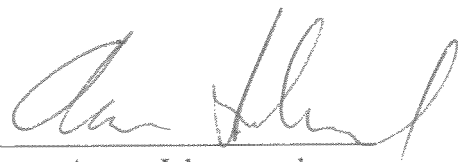
1 I, AARON ISHERWOOD, declare as follows:

- 2 1. I am over 18 years of age, and I am competent to testify and have personal
3 knowledge of the matters set forth herein.
- 4 2. I represent the Sierra Club as a Managing Attorney in Sierra Club's national
5 headquarters in San Francisco, California.
- 6 3. The Sierra Club's Articles of Incorporation, the current version of which has
7 been in effect since 1981, provides, in part, that the Sierra Club's purposes are
8 "[t]o explore, enjoy, and protect the wild places of the Earth; to practice and
9 promote the responsible use of the Earth's ecosystems and resources; to educate
10 and enlist humanity to protect and restore the quality of the natural and human
11 environment; and to use all lawful means to carry out these objectives."
- 12 4. As part of carrying out its purposes and goals, the Sierra Club Grand Canyon
13 (Arizona) Chapter was formed in 1966. Among other priorities, the Grand
14 Canyon Chapter seeks to restore and protect Grand Canyon and the greater
15 Grand Canyon ecoregion and to protect Arizona's native wildlife with special
16 emphasis on sensitive, threatened and endangered species.

17
18 Executed on the 4th day of February, 2013, at San Francisco, California.

19
20 I declare under penalty of perjury under the laws of the United States of America that the
21 foregoing is true and correct.

22
23 Signed:



24 Aaron Isherwood
25
26
27
28