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8
9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

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13 Center for Biological Diversity; Sierra
Club; and Grand Canyon Wildlands
14 Council,

15 Plaintiffs,

16 v.

17 United States Forest Service,

18 Defendant,

19 and

20 National Shooting Sports Foundation,
Inc.

21 Applicant for
22 Intervention

No. CV-12-8176-PCT-SMM

**LODGED: Proposed ANSWER OF
NATIONAL SHOOTING SPORTS
FOUNDATION, INC. Attached**

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20 Inc.

21 Intervenor-Defendant
22

No. CV-12-8176-PCT-SMM

**ANSWER OF NATIONAL SHOOTING
SPORTS FOUNDATION, INC.**

23 National Shooting Sports Foundation, Inc. (“NSSF”), a Connecticut corporation,
24 hereby answers the Complaint for Declaratory and Injunctive Relief (“Complaint”) filed
25 by plaintiffs Center for Biological Diversity; Sierra Club; and Grand Canyon Wildlands
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1 Council (collectively “Plaintiffs”) against defendant United States Forest Service (“Forest
2 Service”), and states as follows:

3 **NATURE OF THE CASE**

4 1. In response to the allegations contained in paragraph 1 of the Complaint,
5 NSSF alleges that this paragraph constitutes Plaintiffs’ statement of the case and does not
6 require a response. To the extent that a response is required, NSSF denies the allegations
7 contained in paragraph 1 of the Complaint.

8 2. In response to the allegations contained in paragraph 2 of the Complaint,
9 NSSF admits that this action is brought under the Resource Conservation and Recovery
10 Act (“RCRA”) but lacks sufficient information at this time to admit or deny that the suit is
11 “authorized.” To the extent that a response is required to the second allegation in
12 paragraph 2 of the Complaint, NSSF denies the allegation.

13 3. In response to the allegations contained in paragraph 3 of the Complaint,
14 NSSF denies the allegation that “[s]pent ammunition disposed of on Forest Service land
15 presents an ‘imminent and substantial endangerment to health or the environment’ [and
16 that the alleged] endangerment is ongoing as of the date of this complaint.” To the extent
17 that paragraph 3 sets forth other factual allegations, NSSF states that it is without
18 knowledge sufficient to form a belief as to the truth of the factual allegations contained in
19 this paragraph.

20 4. In response to the allegations contained in paragraph 4 of the Complaint,
21 NSSF alleges that this paragraph constitutes Plaintiffs’ statement of the case and does not
22 require a response. To the extent that paragraph 4 sets forth other factual allegations,
23 NSSF states that it is without knowledge sufficient to form a belief as to the truth of the
24 factual allegations contained in this paragraph.

1 **JURISDICTION AND VENUE**

2 5. NSSF admits the allegations contained in paragraph 5 of the Complaint
3 regarding the jurisdiction of the court over this action. To the extent that paragraph 5 sets
4 forth conclusions of law, no response is required.

5 6. Paragraph 6 of the Complaint sets forth conclusions of law to which no
6 response is required. To the extent that paragraph 6 sets forth any factual allegations,
7 NSSF is without knowledge sufficient to form a belief as to the truth of the factual
8 allegations contained in paragraph 6.

9 7. Answering paragraph 7 of the Complaint, NSSF admits that the Kaibab
10 National Forest is within this judicial district and that the Prescott Division of this Court
11 includes Coconino County. The balance of paragraph 7 sets forth conclusions of law
12 concerning venue to which no response is required.

13 **PARTIES**

14 8. NSSF admits the first two sentences of paragraph 8 of the Complaint. The
15 balance of paragraph 8 sets forth conclusions of law concerning the Forest Service's
16 authority and duties to which no response is required.

17 9. Answering paragraph 9 of the Complaint, NSSF is without knowledge
18 sufficient to form a belief as to the truth of the allegations concerning the Plaintiff entities
19 and their members.

20 10. Answering paragraph 10 of the Complaint, NSSF is without knowledge
21 sufficient to form a belief as to the truth of the allegations concerning the activities of
22 Plaintiff entities and their members but specifically denies that the California condor or
23 any other species is "particularly susceptible" to impacts from lead ammunition.

24 11. Answering paragraph 11 of the Complaint, NSSF is without knowledge
25 sufficient to form a belief as to the truth of the allegations concerning the activities of
26

1 Plaintiff entities and their members but specifically denies that a “variety” of wildlife
2 exists that is “known to be adversely affected” by lead ammunition.

3 12. Answering paragraph 12 of the Complaint, NSSF is without knowledge
4 sufficient to form a belief as to the truth of the allegations concerning the activities of
5 Plaintiff entities and their members.

6 13. In response to the allegations contained in paragraph 13 of the Complaint,
7 NSSF denies the allegation that “Forest Service’s action and inaction with respect to the
8 use of lead ammunition . . . may present an imminent and substantial endangerment to
9 health or the environment.” The balance of paragraph 13 sets forth conclusions of law
10 concerning the Forest Service’s authority to which no response is required. NSSF is
11 without knowledge sufficient to form a belief as to the truth of the remaining allegations
12 in paragraph 13 concerning the manner in which the Forest Service administers National
13 Forest System lands.

14 14. Answering paragraph 14 of the Complaint, NSSF is without knowledge
15 sufficient to form a belief as to the truth of the allegations concerning the beliefs and
16 activities of Plaintiff entities and their members but deny that traditional ammunition is a
17 toxic contaminant or pollutant.

18 15. Answering paragraph 15 of the Complaint, NSSF is without knowledge
19 sufficient to form a belief as to the truth of the allegations concerning the activities of
20 Plaintiff entities and their members, but deny that the use of lead ammunition adversely
21 affects wildlife population or poses a human health risk.

22 16. Answering paragraph 16 of the Complaint, NSSF is without knowledge
23 sufficient to form a belief as to the truth of the allegations concerning the beliefs and
24 activities of Plaintiff entities and their members. To the extent paragraph 16 sets forth
25 conclusions of law concerning the Forest Service’s authority, no further response is
26 required.

1 **LEGAL BACKGROUND**

2 **A. Citizen Suits under the Resource Conservation and Recovery Act**

3 17. Paragraph 17 of the Complaint consists of legal argument concerning the
4 enactment of RCRA, to which no response is required. NSSF affirmatively alleges that
5 RCRA and its implementing regulations speak for themselves. To the extent any further
6 response is required, NSSF denies the remaining allegations in paragraph 17.

7 18. Paragraph 18 of the Complaint consists of legal argument concerning the
8 enactment of RCRA, to which no response is required. NSSF affirmatively alleges that
9 RCRA and its implementing regulations speak for themselves. To the extent any further
10 response is required, NSSF denies the remaining allegations in paragraph 18.

11 19. Paragraph 19 of the Complaint quotes a section of RCRA to which no
12 response is required. NSSF affirmatively alleges that RCRA and its implementing
13 regulations speak for themselves. To the extent any further response is required, NSSF
14 denies the remaining allegations in paragraph 19.

15 20. Paragraph 20 of the Complaint quotes a section of RCRA to which no
16 response is required. NSSF affirmatively alleges that RCRA and its implementing
17 regulations speak for themselves. To the extent any further response is required, NSSF
18 denies the remaining allegations in paragraph 20.

19 **B. Forest Service Authority to Regulate Activities on Forest Service Land**

20 21. Paragraph 21 of the Complaint consists of legal argument concerning the
21 Property Clause of U.S. Constitution, decisions of the U.S. Supreme Court and acts of the
22 U.S. Congress to which no response is required. NSSF affirmatively alleges that the laws
23 and opinions referenced speak for themselves. To the extent any further response is
24 required, NSSF denies the remaining allegations in paragraph 21.

25 22. Paragraph 22 of the Complaint consists of legal argument regarding various
26 acts of Congress to which no response is required. NSSF affirmatively alleges that the

1 laws referenced speak for themselves. To the extent any further response is required,
2 NSSF denies the remaining allegations in paragraph 22.

3 23. Paragraph 23 of the Complaint consists of legal argument regarding various
4 Forest Service regulations to which is no response is required. NSSF affirmatively alleges
5 that the regulations referenced speak for themselves. To the extent any further response is
6 required, NSSF denies the remaining allegations in paragraph 23.

7 24. Paragraph 24 of the Complaint consists of legal argument regarding various
8 Forest Service regulations to which is no response is required. NSSF affirmatively alleges
9 that the regulations referenced speak for themselves. To the extent any further response is
10 required, NSSF denies the remaining allegations in paragraph 24.

11 **FACTS**

12 25. Answering paragraph 25 of the Complaint, NSSF denies that the use of lead
13 ammunition adversely affects wildlife population or poses a human health risk, and denies
14 the balance of said paragraph as vague and overbroad.

15 26. Answering paragraph 26 of the Complaint, NSSF admits that lead is used in
16 many forms of ammunition, including bullets used for hunting.

17 27. Answering paragraph 27 of the Complaint, NSSF states that it is without
18 knowledge sufficient to form a belief as to the truth of the factual allegations contained in
19 paragraph 27. To the extent any further response is required, NSSF denies the allegations
20 contained in paragraph 27 of the Complaint as vague and overbroad.

21 28. Answering paragraph 28 of the Complaint, NSSF states that it is without
22 knowledge sufficient to form a belief as to the truth of the factual allegations contained in
23 paragraph 28. To the extent any further response is required, NSSF denies the allegations
24 contained in paragraph 28 of the Complaint as vague and overbroad.

25 29. Answering paragraph 29 of the Complaint, NSSF states that it is without
26 knowledge sufficient to form a belief as to the truth of the factual allegations contained in

1 paragraph 29. To the extent any further response is required, NSSF denies the allegations
2 contained in paragraph 29 of the Complaint as vague and overbroad.

3 30. Answering paragraph 30 of the Complaint, NSSF states that it is without
4 knowledge sufficient to form a belief as to the truth of the factual allegations contained in
5 paragraph 30. To the extent any further response is required, NSSF denies the allegations
6 contained in paragraph 30 of the Complaint as vague and overbroad.

7 31. Answering paragraph 31 of the Complaint, NSSF states that it is without
8 knowledge sufficient to form a belief as to the truth of the factual allegations contained in
9 paragraph 31. To the extent any further response is required, NSSF denies the allegations
10 contained in paragraph 31 of the Complaint as vague and overbroad.

11 32. Paragraph 32 of the Complaint consists of legal argument regarding various
12 Federal regulations to which no response is required. NSSF affirmatively alleges that the
13 regulations referenced speak for themselves. To the extent any further response is
14 required, NSSF denies the remaining allegations in paragraph 32.

15 33. Answering paragraph 33 of the Complaint, NSSF admits the Forest Service
16 manages Kaibab National Forest and allows lead ammunition to be used for hunting.
17 NSSF is without knowledge sufficient to form a belief as to the truth of the remaining
18 factual allegations contained in this paragraph.

19 34. Answering paragraph 34 of the Complaint, NSSF admits that the Forest
20 Service issues special use permits for various outdoor activities, such as hunting, and that
21 the Arizona Game and Fish Department does not prohibit or restrict the use of lead
22 ammunition for hunting within the Kaibab National Forest. NSSF is without knowledge
23 sufficient to form a belief as to the truth of the remaining factual allegations contained in
24 this paragraph. To the extent any further response is required, NSSF denies the
25 allegations contained in paragraph 34 of the Complaint.

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1 35. Answering paragraph 35 of the Complaint, NSSF admits that condors are
2 scavengers that feed on the remains of dead animals. NSSF is without knowledge
3 sufficient to form a belief as to the truth of the factual allegations contained in this
4 paragraph. To the extent any further response is required, NSSF denies the allegations
5 contained in paragraph 35 of the Complaint as vague and overbroad.

6 36. Answering paragraph 36 of the Complaint, NSSF states that it is without
7 knowledge sufficient to form a belief as to the truth of the factual allegations contained in
8 this paragraph.

9 37. Answering paragraph 37 of the Complaint, NSSF states that it is without
10 knowledge sufficient to form a belief as to the truth of the factual allegations contained in
11 this paragraph. To the extent any further response is required, NSSF denies the
12 allegations contained in paragraph 37 of the Complaint.

13 38. Answering paragraph 38 of the Complaint, NSSF states that it is without
14 knowledge sufficient to form a belief as to the truth of the factual allegations contained in
15 this paragraph. To the extent any further response is required, NSSF denies the
16 allegations contained in paragraph 38 of the Complaint.

17 39. Answering paragraph 39 of the Complaint, NSSF states that it is without
18 knowledge sufficient to form a belief as to the truth of the factual allegations contained in
19 this paragraph. To the extent paragraph 39 refers to the "SCRT 2012 Report," the report
20 speaks for itself. To the extent any further response is required, NSSF denies the
21 allegations contained in paragraph 39 of the Complaint.

22 40. Answering paragraph 40 of the Complaint, NSSF states that it is without
23 knowledge sufficient to form a belief as to the truth of the factual allegations contained in
24 this paragraph. To the extent paragraph 40 refers to documents, the documents speak for
25 themselves. To the extent any further response is required, NSSF denies the allegations
26 contained in paragraph 40 of the Complaint.

1 41. Answering paragraph 41 of the Complaint, NSSF admits that condors often
2 feed in groups. NSSF is without knowledge sufficient to form a belief as to the truth of
3 the factual allegations contained in this paragraph. To the extent any further response is
4 required, NSSF denies the allegations contained in paragraph 41 of the Complaint.

5 42. Answering paragraph 42 of the Complaint, NSSF states that it is without
6 knowledge sufficient to form a belief as to the truth of the factual allegations contained in
7 this paragraph. To the extent paragraph 42 refers to the 2012 “SCRT study,” NSSF states
8 the study speaks for itself. To the extent any further response is required, NSSF denies
9 the allegations contained in paragraph 42 of the Complaint.

10 **FIRST CLAIM FOR RELIEF**

11 43. In response to paragraph 43 of the Complaint, NSSF realleges and
12 incorporates by reference the responses contained in paragraph 1 through 42, hereinabove.

13 44. Paragraph 44 of the Complaint consists of legal argument regarding RCRA
14 to which no response is required. NSSF affirmatively alleges that RCRA and its
15 implementing regulations speak for themselves. To the extent any further response is
16 required, NSSF denies the allegations contained in paragraph 44 of the Complaint.

17 45. Paragraph 45 of the Complaint sets forth conclusions of law to which no
18 response is required. To the extent paragraph 45 contends “[t]he Forest Service . . . has
19 contributed and is contributing to the past or present disposal of solid or hazardous waste,
20 which may present an imminent and substantial endangerment to health or the
21 environment[.]” that contention is expressly denied. To the extent that any further
22 response is required, NSSF denies the allegations of paragraph 45.

23 46. Paragraph 46 of the Complaint sets forth conclusions of law to which no
24 response is required. To the extent that any further response is required, NSSF denies the
25 allegations of paragraph 46.

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1 47. Each and every allegation of fact in the Complaint which is not specifically
2 admitted hereinabove is denied.

3 **REQUEST FOR RELIEF**

4 48. Paragraph 47 of the Complaint sets forth Plaintiffs’ Request for Relief to
5 which no response is required. To the extent a response is required, NSSF denies that
6 Plaintiffs are entitled to the relief sought or any relief under its RCRA claim.

7 **ADDITIONAL AND AFFIRMATIVE DEFENSES**

8 **First Affirmative Defense**

9 **(Failure to State a Claim for Relief)**

10 49. As a separate and distinct affirmative defense to the Complaint and to each
11 claim for relief contained therein, NSSF is informed and believes, and on that basis
12 alleges, that the Court should dismiss some or all of Plaintiffs’ claims for failure to state a
13 claim upon which relief can be granted.

14 **Second Affirmative Defense**

15 **(50 C.F.R. § 17.84)**

16 50. As a separate and distinct affirmative defense to the Complaint and to each
17 relevant claim for relief contained therein, NSSF is informed and believes, and on that
18 basis alleges, that any claims based on the alleged impact of lead ammunition use on
19 California condors are prohibited by or would frustrate the intent of 50 C.F.R.
20 § 17.84(j)(2)(i).

21 **Third Affirmative Defense**

22 **(Failure to Join Indispensable Parties)**

23 51. As a separate and distinct affirmative defense to the Complaint and to each
24 relevant claim for relief contained therein, NSSF is informed and believes, and on that
25 basis alleges, that the Court should dismiss some or all of Plaintiffs’ claims for failure to
26 join an indispensable party.

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WHEREFORE, having fully answered Plaintiffs' Complaint with respect to the Forest Service's alleged violation of RCRA and its implementing regulations, NSSF prays that judgment be entered against Plaintiff and in favor of the Defendants herein on such claim, and that all relief requested by Plaintiffs arising out of or relating to their first claim for relief be denied.

DATED this 7th day of April, 2016.

FENNEMORE CRAIG, P.C.

By s/ Norman D. James
Norman D. James
Rhett A. Billingsley
Attorneys for National Shooting Sports
Foundation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2016, I electronically lodged the foregoing PROPOSED ANSWER OF NATIONAL SHOOTING SPORTS FOUNDATION, INC. with the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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s/Norman D. James _____