

1 MARK BRNOVICH, AGO #1400
Arizona Attorney General
2 Linda Pollock, SBA #004722
Assistant Attorney General
3 Linda.pollock@azag.gov
Office of the Attorney General
4 Public Advocacy Division
1275 West Washington Street
5 Phoenix, Arizona 85007-2926
Telephone: (602) 542-8566
6 Facsimile: (602) 542-7798

7 Attorneys for Defendants

8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ARIZONA

11
12 DARLENE BRAASTAD, an unmarried
13 woman,

14 Plaintiff,

15 v.
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17 RAUL VEGA, Regional Supervisor,
18 State of Arizona Game and Fish
Department and
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20 STATE OF ARIZONA GAME AND
21 FISH DEPARTMENT,

22 Defendants.
23

Case No. CV2015-00031-DCB

**MOTION TO DISMISS UNDER
RULE 12(B) FOR LACK OF
SUBJECT MATTER JURISDICTION
AND FAILURE TO STATE A CLAIM**

24
25 Defendants the Arizona Game and Fish Department and Raul Vega hereby
26 request an order dismissing this action on the basis of lack of subject matter jurisdiction,
27 Fed. R. Civ. Pro. 12(b)(1) and failure to state a claim upon which relief may be granted,
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1 Fed. R. Civ. Pro. 12(b)(6). In the alternative, Defendant Vega requests entry of summary
2 judgment on the basis that he is entitled to judgment as a matter of law. Fed. R. Civ. Pro.
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4 56(a). This Motion is supported by the following Memorandum of Points and Authorities
5 and the attached Affidavit of defendant Raul Vega.
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7 MEMORANDUM OF POINTS AND AUTHORITIES

8 **1. Defendant Arizona Game and Fish Department, as an agency of the**
9 **State, has absolute immunity to this suit.**

10 The Eleventh Amendment prohibit federal courts from hearing suits brought by
11 private citizens against state governments without the state's consent. *Natural Resources*
12 *Def. Council v. Calif. Dept. of Transp.*, 96 F.3d 420, 421-22 (9th Cir. 1996). This
13 immunity extends to state agencies. *Id.*; *Pennhurst State Sch. & Hosp. v. Halderman*,
14 465 U.S. 89, 99-100 (1984); *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy,*
15 *Inc.*, 506 U.S. 139, 146 (1993) (holding that *Ex Parte Young* is inapplicable to suit
16 against state agencies regardless of the relief requested); *In Re Pegasus Gold Corp.*, 394
17 F.3d 1189, 1195 (9th Cir. 2005) (agencies of the state are immune from suits for private
18 damage actions or suits for injunctive relief brought in federal court). The Eleventh
19 Amendment absolutely bars this suit against the Arizona Game and Fish Department.
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1 **2. This Court lacks subject matter jurisdiction because defendant Vega**
2 **has qualified immunity to suit.**

3 The *Ex parte Young* exception to Eleventh Amendment immunity allows suits
4 against state officials accused of acting in violation of federal law, on the theory that such
5 an action is not considered an action of the state and is not shielded by the state's
6 sovereign immunity. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997); *Pennhurst*
7 *State Sch. & Hosp. v. Halderman*, 465 U.S. 89 at 102-3; *Natural Resources Def. Council*
8 *v. Calif. Dept. of Transp.*, 96 F.3d at 422.

9 A motion to dismiss a state official from a § 1983 suit on the basis of qualified
10 immunity requires the Court to determine as a threshold matter whether the complaint
11 plausibly states a claim that the official is violating federal law so as to subject the
12 official to the burdens of federal court litigation. In evaluating a 12(6)(1) motion to
13 dismiss, a district court may look beyond the complaint and consider affidavits furnished
14 by both parties. The party opposing the motion must furnish affidavits or other evidence
15 to satisfy its burden of establishing subject matter jurisdiction. *Savage v. Glendale Union*
16 *High School*, 343 F.3d 1036, 1039 ftnt. 2 (9th Cir. 2003).

17 The doctrine of qualified immunity shields government officials from liability for
18 discretionary functions if their conduct does not violate clearly established statutory or
19 constitutional rights of which a reasonable person should have known. *Harlow v.*
20 *Fitzgerald*, 457 U.S. 800 (1982). The doctrine protects those officials "who are required
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1 to exercise their discretion, and who “routinely make close decisions in the exercise of
2 the broad authority” delegated to them. *Meyers v. Redwood City*, 400 F.3d 770 (9th Cir.
3 2005), quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978).

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5 The qualified immunity defense is both a defense to liability and a limited
6 “entitlement not to stand trial or face the other burdens of litigation”. *Ashcroft v. Iqbal*,
7 556 U.S. 662, 672 (2009), quoting *Mitchell v. Forsyth*, 472 U.S. 511 (1985).
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10 An order rejecting qualified immunity is a final decision subject to interlocutory
11 appeal under the collateral-order doctrine. *Ashcroft v. Iqbal*, 556 U.S. 662, 671-75
12 (2009).
13

14 The threshold inquiry before this Court is whether the factual allegations in the
15 complaint plausibly state a claim for relief against defendant Vega under Rule 8(a) of the
16 Federal Rules of Civil Procedure sufficient to overcome a motion to dismiss. *Id.*; *Bell*
17 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007). If no act or acts by
18 defendant violating plaintiff’s constitutional rights are sufficiently alleged, there is no
19 need to conduct a further inquiry concerning qualified immunity. This ruling is to be
20 made early in the proceedings to avoid the cost and expenses of trial where the defense is
21 dispositive, and to avoid excessive disruption of government and permit the resolution of
22 insubstantial claims. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001); *Meyers v.*
23 *Redwood City*, 400 F.3d 765, 769-70 (9th Cir. 2005).
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1 **3. The verified complaint fails to state a claim for which relief may be**
2 **granted pursuant to Fed. R. Civ. Pro. 8 (a).**

3 a. The complaint consists of conclusory allegations insufficient to
4 sustain a dismissal under Fed. R. Civ. Pro. 12 (b)(6).

5 A procedural due process claim hinges on proof of two elements: (1) a protected
6 liberty or property interest, and (2) a denial of adequate procedural protections. *Pinnacle*
7 *Armor, Inc. v. U.S.*, 648 F.3d 708, 716 (9th Cir. 2011).

8 Plaintiff alleges that defendant unlawfully summarily suspended her license,
9 depriving her of property without due process of law and is further depriving her of
10 property rights in wildlife in her possession by requiring her to transfer the wildlife to the
11 Arizona Game and Fish Department. *Iqbal* requires a constitutional tort plaintiff to
12 plausibly plead facts sufficient to establish a violation of federal constitutional rights
13 against officials entitled to assert the defense of qualified immunity. 556 U.S. at 678.
14 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
15 statements, do not suffice” and will not survive a motion to dismiss. *Id.*

16 Here, the complaint alleges nothing more than the fact that defendant Vega
17 suspended Plaintiff’s wildlife rehabilitation license without first conducting a pre-
18 deprivation hearing. From this conclusory allegation alone this Court is asked to draw
19 the inference that defendant’s mere act of suspending plaintiff’s license deprived plaintiff
20 of her state and federal constitutional due process rights.

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1 Only factual allegations, not legal conclusions, are entitled to an assumption of
2 truth under *Iqbal*. 129 S.Ct at 1951. There are no factual allegations of defendant's
3 allegedly unconstitutional conduct other than the fact that defendant suspended plaintiff's
4 wildlife rehabilitation license and is requiring the surrender of wildlife in her possession.
5

6 No presumption of truth should attach to such legal conclusions as "[p]laintiff has
7 a liberty and property interest in holding wild animals under her wildlife rehabilitation
8 permit as her own personal property". Complaint at ¶19. Plaintiff has no protected
9 property interest in live wildlife. All wildlife, resident and migratory, found in this state,
10 and including wildlife and birds held in captivity under a special license are property of
11 the state. A.R.S. § 17-102¹. Without alleging a legally cognizable ownership interest in
12 the wildlife in her possession, plaintiff cannot demonstrate any irreparable injury or
13 likelihood of success on the merits in seeking an injunction prohibiting the Department
14 from requiring the surrender of the wildlife to the Department.
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20 Likewise the complaint at ¶18 concludes that she has a constitutionally-protected
21 liberty and property interest "in continuing her work as a wildlife rehabilitator". Here,
22 the alleged constitutional property interest at issue does not involve her livelihood but
23 instead involves the temporary possession of restricted live wildlife², which is subject to
24 reasonable government regulation. Nor is plaintiff deprived of the liberty to engage in
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28 ¹ The concept of wildlife as property of the state to be professionally managed and conserved as a public trust resource arose from the unregulated overexploitation of wildlife caused by 19th century market hunters.

² "Restricted live wildlife" are wildlife that cannot be possessed without a special license or lawful exemption. A.A.C. R 12-4-401(24); 12-4-406.

1 wildlife rehabilitation. Notwithstanding the summary suspension, plaintiff can continue
2 her work as a rehabilitator of non-restricted live wildlife such as pigeons, Eurasian
3 collared doves, and English sparrows, as well as domestic ducks, geese, and rabbits.
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5 b. The complaint fails to state sufficient factual allegations to show that
6 defendant engaged in clearly-established unconstitutional conduct.

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8 To state a § 1983 claim against a state official in his official capacity, a plaintiff
9 must plead that the official, acting under color of state law, caused the deprivation of a
10 federal rights. There is no doubt that defendant Vega was acting under color of state law,
11 but the complaint contains no plausible factual allegations that defendant Vega acted in a
12 manner that deprived plaintiff of her constitutional due process rights, or that an official
13 in defendant's position should have known that his conduct violated plaintiff's rights, or
14 that the post-deprivation hearing process afforded plaintiff under Arizona law is
15 unconstitutional on its face.
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19 The complaint instead assumes that the defendant's pre-deprivation suspension
20 *ipso facto* violates plaintiff's Fourteenth Amendment constitutional due process rights.
21 Not mentioned in the complaint is the statutory authority under which the defendant
22 acted, as cited in his Amended Notice of Summary Suspension (Affidavit of Raul Vega).
23 Arizona Game and Fish Commission regulations authorized defendant Vega to order a
24 pre-deprivation license suspension under these circumstances, Ariz. Admin. Code
25 (A.A.C.) R 12-4-409.I (Department shall immediately order a cessation of operation
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1 under the special license if a disease or other emergency condition exists that poses an
2 immediate threat to the public or the welfare of wildlife), and to require the return of all
3 restricted live wildlife in plaintiff's possession. A.A.C. R 12-4-423.D.11.c.

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5 The Arizona Administrative Procedure Act, which governs all appealable agency
6 actions of the Department, requires pre-deprivation notice and opportunity for a hearing
7 before a license suspension. A.A.C. R 41-1092.11.B. But the same statute also
8 authorizes summary suspension of a license pending proceedings for revocation or other
9 action if the agency finds that the public health, safety and welfare requires emergency
10 action, and incorporates a finding to that effect in its order. A.R.S. § 41-1092.11. The
11 Amended Notice of Summary Suspension contains these requisite findings. Where a
12 summary suspension is imposed, the Administrative Procedure Act statute requires a
13 post-deprivation hearing, which "shall be promptly instituted and determined". *Id.*

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15 Here, the Department's summary suspension findings that plaintiff's violations of
16 wildlife captivity standards poses an immediate risk to the health, safety and welfare of
17 wildlife in her possession justified the taking of emergency action to prevent plaintiff
18 from taking in even more injured wildlife and potentially subjecting that wildlife to the
19 structurally dilapidated and unhealthful conditions found at her facility. Affidavit of Raul
20 Vega. The necessity of quick action by the state, coupled with the availability of a
21 prompt post-deprivation hearing to assess the propriety of the state's action, satisfies the
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1 requirements of procedural due process. *Cagle v. King County*, 70 Fed. Appx. 450, 452-
2 53, 2003 WL 21580486 (9th Cir. 2003); *Carepartners LLC v. Lashway*, 428 Fed. Appx.
3 734, 2011 WL 1522475 (9th Cir. 2011).
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5 Emergencies are a well-recognized exception to the requirement of notice before
6 seizure of property. *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008).
7 Defendant's conduct comported with both state and federal due process.
8

9 WHEREFORE, Defendant Arizona Game and Fish Department requests dismissal
10 of the action in its entirety; and Defendant Vega requests dismissal on the grounds of
11 qualified immunity or, in the alternative, summary judgment in his favor.
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13 RESPECTFULLY SUBMITTED this 27th day of January, 2015.
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MARK BRNOVICH
Arizona Attorney General

/s/ Linda Pollock
Linda Pollock
Assistant Attorney General
Attorneys for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2015, 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.

/s/ Linda Pollock