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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

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| Center for Biological Diversity, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>United States Forest Service,<br><br>Defendant. | No. CV-12-8176-PCT-SMM<br><br>**DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**<br><br>**Oral Argument Requested** |

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6), the United States of America ("United States") on behalf of Defendant the United States Forest Service (the "Service"), through the undersigned counsel, hereby files this reply in support of its motion to dismiss (Dkt. No. 46) all claims against the Service in this matter. Plaintiffs in their opposition fail to establish causation or redressability, and therefore this case must be dismissed for lack of standing. Even if jurisdiction existed, Plaintiffs fail to rebut the Service's argument that the allegations in the Complaint regarding the Service's unexercised Federal regulatory authority do not give rise to liability under Section

7002(a)(1)(B) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B). Dismissal is therefore required under Rule 12(b)(6).

**A. Plaintiffs Have Not Established Causation or Redressability, and the Case Must Therefore Be Dismissed for Lack of Standing.**

When "'causation and redressability ... hinge on response of the regulated (or regulable) third party to the government action', more particular facts are needed to show standing." *National Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992); *see also id.* at 561 (plaintiffs have the burden to establish standing). Plaintiffs' theories of causation and redressability are not plausible, and further are unsupported by sufficient factual allegations in the Complaint, requiring dismissal under Rule 12(b)(1).

If Plaintiffs' alleged injuries are "th[e] result [of] the independent action of some third party not before the court," Plaintiffs cannot establish causation. *Lujan*, 504 U.S. at 560. Further, a chain of causation cannot be "hypothetical or tenuous." *Davis*, 307 F.3d at 849. In their opposition, Plaintiffs fail to rebut the Service's argument that it is the independent actions of third parties—the State of Arizona's regulations permitting the use of lead ammunition, and the hunters who use lead ammunition on the Kaibab National Forest—that are the cause of Plaintiffs' alleged injuries. Plaintiffs assert that the Service has the authority to pre-empt Arizona's regulations, but offer no explanation or authority for how the Service's having *not* pre-empted Arizona's regulations places the Service in the chain of causation.[1] Plaintiffs also claim that hunters "must comply with [Service] land management decisions in order to use" the Kaibab National Forest. *Id.* While the Complaint alleges that the Service has authority over the Kaibab National Forest, there are no allegations regarding how regulatory action by the Service would

[1] *Davis* does not support Plaintiffs' theory. That case involved a challenge to a regulation that prohibited the use of certain traps. 307 F.3d at 849; Opp. at 9. Here, however, Plaintiffs challenge the Service's failure to exercise its regulatory authority, not an actual regulation promulgated by the Service.

redress Plaintiffs' alleged injuries. With no supporting factual allegations in the Complaint, let alone the "more particular facts" required, *Lujan*, 504 U.S. at 561-62, Plaintiffs' theory of causation is "tenuous" at best. Plaintiffs thus fail to meet their burden to establish a plausible theory of causation, especially as their alleged injuries are caused by independent third parties not before the court. *See Lujan*, 504 U.S. at 560; *see also San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) (finding lack of standing where economic injury was traceable to actions of third parties, not government defendants).

Nor does the Complaint allow for a finding that a favorable order is *likely* to redress Plaintiffs' alleged injuries. Plaintiffs' reliance on *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220 (9th Cir. 2008), is misplaced. Opp. at 10. In the portion quoted out of context by the Plaintiffs, the Ninth Circuit held that petitioners had established causation and redressability under *the relaxed standard for procedural injuries*, where the court could grant relief by ordering the defendant government agency to re-initiate consultation under Section 7 of the Endangered Species Act ("ESA"). *Gutierrez*, 545 F.3d at 1229. A critical distinction is that if the petitioners' claims there were successful, the government agency would have had a *non-discretionary duty* to re-initiate ESA consultations. *See id.* (citing 50 C.F.R. § 402.16). *Natural Resources Defense Council v. EPA*, 542 F.3d 1235 (9th Cir. 2008), is inapposite for the same reason: that case involved a claim that the Administrator of the Environmental Protection Agency ("EPA") had failed to perform a non-discretionary duty. *Id.* at 1241-42. As such, the court could order EPA to perform its non-discretionary duty to promulgate certain regulations under the Clean Water Act, and plaintiffs there were able to show that the subject regulations were likely to redress their injuries, such that a "precise showing" of the substance of the regulations was unnecessary. *Id.* at 1246.[2]

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[2] Contrary to Plaintiffs' argument, *Gutierrez* does not establish a rule that a "precise showing" of the substance of sought-after regulations is never required for redressability.

These cases do not support Plaintiffs' theory of redressability because the Complaint here does not allege a failure by the Service to perform a non-discretionary duty. In *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), the Supreme Court observed that the Administrative Procedure Act ("APA") "empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing *how* it shall act.'" *Id.* at 64, quoting Attorney General's Manual on the Administrative Procedure Act 108 (1947) (emphasis original).[3]

Plaintiffs have not filed a lawsuit under APA seeking to "compel agency action," yet that is the outcome they seek. Nor can they seek review of the Service's decision not to exercise its discretionary authority under the APA. *See Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006) ("A 'failure to regulate' claim must be based upon a clearly imposed duty to take some discrete action.") citing *Southern Utah Wilderness Alliance*, 542 U.S. at 64. And although Plaintiffs' Complaint effectively seeks reversal of a longstanding, discretionary, national federal policy, "programmatic challenges" to agency policy are improper. *Matejko*, 468 F.3d at 1110, citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990).

Even if this Court could compel the Service to exercise its discretionary authority, this Court certainly cannot dictate the outcome of such an exercise of authority. *See Southern Utah Wilderness Alliance*, 542 U.S. at 65 ("Thus, when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, *but has no power to specify what the action must be*.") (emphasis added). In *Gutierrez*, the Ninth Circuit evaluated whether plaintiffs had standing to bring claims under the ESA challenging the United States' participation in a treaty with Canada addressing the harvesting of salmon. The court upheld dismissal of a claim brought under the ESA, in which plaintiffs alleged their

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[3] The APA waives the United States' sovereign immunity to suits to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1).

injuries were caused by the United States not "exercising the authority to withdraw from the Treaty or requesting additional conservation measures to benefit listed salmon." 545 F.3d at 1228. The court, observing that a finding that the agencies had violated the ESA would result in the agencies determining how to bring themselves into compliance, ruled plaintiffs had not established redressability:

> The court cannot order renegotiation of the Treaty, and *discretionary efforts by the agencies are too uncertain to establish redressibility*. That a favorable judicial decision would leave matters to the discretion of the State Department and [National Marine Fisheries Service] makes equally likely the possibility that the agencies would decide to take no "agency action" with respect to Canada's fisheries—so as not to be constricted by § 7's "no jeopardy" requirement—as the possibility that they would renegotiate a Treaty that would more aggressively limit the Canadians' take.

*Id.* at 1228-29 (emphasis added).

Just as in *Gutierrez* where the Ninth Circuit noted the possible "no agency action" outcome, so too does that possibility exist here, where the Service must consult with the State of Arizona, conduct an analysis pursuant to the National Environmental Policy Act ("NEPA") and consider alternatives including the no action alternative, accept and consider public comments, and balance competing interests, all in the course of exercising its *discretionary* authority. *See infra* at 9-10, 13-15. Because the Court cannot dictate the outcome of this process, it is speculative at best that a favorable order would redress Plaintiffs' alleged injuries. *See also Fernandez v. Brock*, 840 F.2d 622, 628 (9th Cir. 1988) (rejecting redressability where relief requested—compelling the issuance of regulations—might benefit plaintiffs depending on content of regulations and behavior of regulated third parties); *see also Levine v. Vilsack*, 587 F.3d 986, 994 & n.8 (9th Cir. 2009) (no redressability where: 1) relief would not compel agency rulemaking; 2) regulations would be "of uncertain content" and thus could not be said to be "likely" to redress the alleged injuries; and 3) regulated third parties would have to comply).

**B. Plaintiffs' Allegations Regarding the Service's Unexercised Federal Regulatory Authority Do Not Establish that the Service Has or Is Contributing to Waste Disposal.**

The question presented to the Court by the Service's Rule 12(b)(6) motion to dismiss is whether the allegations in the Complaint of two sources of *unexercised Federal regulatory authority*, which Plaintiffs allege could be used to control prohibit or restrict the disposal of spent lead ammunition on the Kaibab National Forest, is sufficient to establish that the Service is liable under section 7002 of RCRA for "contributing" to the disposal of solid or hazardous waste that may present an alleged imminent and substantial endangerment (hereinafter referred to as "contributor liability"). The State of Arizona regulates hunting in the Kaibab National Forest; for the Service to regulate the choice of ammunition, the Service would have to reverse national policy of deferring the regulation of hunting to the States and pre-empt Arizona law. Then, the Service's unexercised Federal regulatory authority could be exercised only with significant legal process that, by design, means the potential outcomes of the use of those authorities is uncertain. Therefore, and as explained in detail below, the allegations fail to establish a "measure of control," or active involvement in waste disposal, sufficient to state a claim for "contributor" liability, and the motion to dismiss for failure to state a claim must be granted.

In their opposition, Plaintiffs offer numerous arguments for why the Service's motion to dismiss should be denied. Plaintiffs argue that the cases cited by *Hinds Inv., LP v. Angioli*, 654 F.3d 846, 850 (9th Cir. 2011), make clear that the Service is liable here, but each of those cases is distinguishable by the nature of control over waste disposal that was exercised by the defendants. Plaintiffs also contend that Rule 8 is so lenient as to allow a complaint to survive with as vague a legal theory as that the Service "manages" the Kaibab National Forest and ergo is liable for any potential imminent and substantial endangerment that occurs there. Asserting incorrectly that the Service is the

"landowner" of the Kaibab National Forest,[4] Plaintiffs then describe at length the source and breadth of the Service's general authority. The Service addresses each of these arguments below. Critically, however, Plaintiffs never rebut the Service's central contention that the Complaint fails to state a cause of action under RCRA section 7002 because the specific allegations regarding the Service's unexercised Federal regulatory authority under the provisions cited by Plaintiffs are insufficient to establish a "measure of control" over disposal of spent lead ammunition and liability as a contributor.[5]

In *Hinds*, the Ninth Circuit considered the meaning of "has contributed or [ ] is contributing to" in RCRA section 7002(a)(1)(B). 654 F.3d at 850.[6] The court held Plaintiffs had two possible bases to state a viable claim that a defendant is liable as a contributor: 1) allege that defendant "had a measure of control over the waste at the time of its disposal," or 2) allege that the defendant "was otherwise actively involved in the waste disposal process." *Id.* at 852. In discussing the "measure of control" test, the Ninth Circuit stated: "Courts that have not explicitly held that RCRA liability requires active involvement by defendants have nonetheless suggested that substantial affirmative action is required and have permitted RCRA claims to survive only with some allegation of defendants' continuing control over waste disposal." *Id.* at 851. The court then cited

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[4] Per its delegated authority, the Service administers the Kaibab National Forest. The United States of America, as sovereign, owns the lands. *See* 16 U.S.C. § 1609(a). Regardless, as discussed *infra* at 9-10, 15, the Service here is wholly unlike a private landowner for purposes of a contributor liability analysis.

[5] Plaintiffs contend, without merit, that the United States has addressed the issue in this case in guidance issued by EPA regarding section 7003 of RCRA. While Plaintiffs are correct that RCRA sections 7002 and 7003 are similar, the EPA Guidance upon which Plaintiffs rely did not address the issue here: whether unexercised Federal regulatory authority gives rise to RCRA contributor liability.

[6] While *Hinds* is the most recent decision by the Ninth Circuit on contributor liability under RCRA section 7002, the issue of unexercised Federal regulatory authority was not before the *Hinds* court.

*United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989), *Marathon Oil Co. v. Texas City Terminal Ry. Co.*, 164 F. Supp. 2d 914, 920-21 (S.D. Tex. 2001), and *United States v. Valentine*, 885 F. Supp. 1506, 1512 (D. Wyo. 1995), as examples of cases in which plaintiffs' claims survived based on allegations of control over waste disposal. *Id.* at 851-52. Plaintiffs' reliance here on *Aceto*, *Valentime*, and *Marathon Oil*, however, is unavailing. *See* Opp. at 24.

Plaintiffs argue, incorrectly, that the Service "disavow[ed] its broad authority" and that the Service suggested it "has less control over waste disposal" than private landowners do on their property. Opp. at 23. What the Service actually argued is that the unexercised Federal regulatory authority relied on by Plaintiffs is "[u]nlike" the control wielded by a private landowner or the defendants in *Aceto*, *Marathon Oil*, and *Valentine*. Mot. at 14-15. This is critical: the question here is whether the nature of the Service's control as alleged by the Plaintiffs is sufficient to give rise to contributor liability. A close examination of *Aceto*, *Marathon Oil* and *Valentine* reveals that those cases do not support Plaintiffs' novel theory of liability here.

In *Aceto*, the United States and the State of Iowa brought claims under RCRA section 7003 against companies alleged to have contributed to the handling, storage or disposal of hazardous or solid wastes by virtue of their contracts with a defunct business (Aidex) to manufacture pesticides. 872 F.2d at 1375-76, 1378. Defendants moved to dismiss the section 7003 claims on the basis that the complaint did not establish contributor liability. *Id.* at 1383. On interlocutory appeal, the Eighth Circuit held that the complaint alleged "sufficient facts from which a trier of fact could infer defendants 'contributed to' Aidex's disposal of wastes," citing to the allegations that the defendants contracted with Aidex to manufacture the pesticides and "retained ownership of the pesticide through the process," and that waste generation was inherent in the process. *Id.* Further, "[d]efendants supplied the specifications … to Aidex; it may reasonably be inferred that they had the authority to control the way in which the pesticides were formulated, as well as any waste disposal." *Id.* Finally, the Eighth Circuit emphasized

that the defendants maintained ownership of the materials throughout the process, and had hired Aidex to manufacture the pesticides for them. *Id.* at 1384.

In *Marathon Oil*, the court denied defendant Burlington Northern Santa Fe Corporation's ("BNSF") motion to dismiss RCRA section 7002 claims. 164 F. Supp. 2d at 921. The court found that plaintiffs had adequately alleged contributor liability, based on allegations that defendant BNSF owned tank cars that transported hazardous materials to a "tank car rack" where such materials were loaded, unloaded, and released into the environment, and allegations that BNSF controlled the practices at the tank car rack. *Id.* at 916, 920.

In *Valentine*, the court ruled on summary judgment that defendant Jim's Water Service was liable under RCRA section 7003(b). 885 F. Supp. at 1516. The court found there was no genuine dispute of material fact that Jim's Water Service transported and disposed of materials at the contaminated site, which was "more than sufficient" to find Jim's Water Service liable as a contributor. *Id.* at 1509, 1510, 1512, 1514.

In each of these three cases, the defendants had a measure of control over waste disposal that is simply not present here. The *Aceto* defendants dictated every step of the manufacturing of its pesticides through their contracts with Aidex. BNSF controlled the practices at the loading and unloading of its tank cars. Jim's Water Service transported and disposed of hazardous materials. Further, as noted by the *Hinds* court, each case involved alleged or undisputed facts that the defendants' substantial affirmative action resulted in continuing control over the waste disposal. Here, the Plaintiffs point to no affirmative action by the Service analogous to the facts in those cases.

The Service here is also unlike the defendants in *Aceto, Marathon Oil* and *Valentine* because its authority is dictated by federal statutes. The Service is charged by Congress with administering federal lands held by the United States for the benefit of its citizens. The enabling statutes under which the Service operates mandate that the Service balance competing interests and provide for multiple uses of the national forests. *See, e.g.*, 16 U.S.C. § 528 (establishing multiple purposes for which national forests shall be

administered and preserving State jurisdiction over wildlife); *id.* § 531 (defining "multiple use"); *see also* 36 C.F.R. § 219.10 (Service implementing regulations specifying planning requirements for addressing multiple use responsibilities). Consistent with this Congressional direction, the Service defers to the State of Arizona in the regulation of hunting. In order to regulate hunting in the Kaibab National Forest, the Service would have to reverse national policy, pre-empt the State's regulatory authority, act within the confines of the authority delegated to it by Congress, follow all applicable procedures (*e.g.*, NEPA),[7] and engage in a balancing of competing interests. As such, the Service here in the potential exercise of its authority differs significantly from private landowners and the defendants in *Aceto*, *Marathon Oil* and *Valentine*.

Plaintiffs also cite cases that they allege "discuss government liability in terms of its ability to control waste disposal practices." Opp. at 25-26. First, Plaintiffs misrepresent the discussion they quote from *Foster v. United States*, 922 F. Supp. 642 (D.D.C. 1996). Opp. at 25, citing *Foster*, 922 F. Supp. at 660. The quoted portion of the decision examined whether summary judgment was appropriate under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") on whether defendants, including the United States, were owners or operators (pursuant to CERCLA, *see* 42 U.S.C. § 9607(a)) of the site at issue at the time hazardous substances were disposed. *Id.* at 658-60. Plaintiffs' quotations are taken out of context, and are not part of a RCRA contributor liability analysis.[8] *Foster* is thus irrelevant here.

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[7] *See, e.g.*, *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and gives "the public the assurance that the agency has indeed considered environmental concerns in its decision making process").

[8] In fact, there is an analogous CERCLA decision in the Ninth Circuit that supports the Service's position here. In *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002), the court found that the United States' unexercised authority to control oil companies'

*Footnote continued…*

Plaintiffs also cite *Smith v. Potter*, 187 F. Supp. 2d 93 (S.D.N.Y. 2001), a case in which the district court denied a motion for a preliminary injunction under RCRA after concluding that the United States Postal Service's response to an anthrax threat did not pose an imminent and substantial endangerment. *Id.* at 98. The court did not address contributor liability. Plaintiffs' quotation, Opp. at 25, conveniently omits the first phrase, "By enacting a citizen-suit provision under RCRA." *Smith v. Potter*, 197 F. Supp. 2d at 97. Read in its entirety, the text quoted by Plaintiffs is only an introductory background discussion of RCRA and not an analysis of Federal liability premised on unexercised authority to control waste disposal.

Plaintiffs also selectively quote from *Holy Cross Neighborhood Ass'n v. United States Army Corps of Engineers*, No. Civ. A. 03-370, 2003 WL 22533671 (E.D. La. Nov. 3, 2003), a case in which plaintiffs sought to enjoin the Corps from dredging the Inner Harbor Navigational Canal as part of a broader lock replacement project. *Id.* at *1. Plaintiffs there contended the dredging would stir up contaminated sediment and on that basis alleged the Corps was liable under RCRA section 7002.[9] *Id.* at *2. Plaintiffs alleged two bases for the Corps' contributor liability under RCRA: 1) its planning to dredge the canal; and 2) "maintaining and having custody over the Industrial Canal." *Id.* at *5. The Corps moved to dismiss the second claim on the basis that "plaintiffs fail[ed] to allege detailed facts indicating that the *maintenance* of the Canal amounts to 'handling, storage, treatment, transportation, or disposal' of solid or hazardous waste as required under the RCRA." *Id.* (emphasis added); *see also id.* at *8. In an unreported decision, the court denied the Corps' motion to dismiss the RCRA claims. *Id.*. Specifically, the court relied upon the following factual allegations in the complaint as the basis for finding the plaintiffs had satisfied Rule 8:

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waste disposal practices was legally insufficient in that case to make the United States liable as an "arranger" for disposal under CERCLA. *Id.* at 1057.

[9] Plaintiffs also brought a claim under the APA, seeking review of the Army Corps' compliance with NEPA. *Holy Cross*, 2003 WL 22533671 at *2.

> The plaintiffs allege numerous facts in their Second Amended Complaint to support their contention that the Corps currently owns, operates, controls, and maintains a site already contaminated with toxins and metals. For example, throughout their complaint, plaintiffs contend that the Corps is directing and organizing the Project. Further, plaintiffs aver that the Industrial Canal contains toxins … at levels that exceed standards for non-industrial and industrial sites. Plaintiffs further allege that the toxic contaminates are located in the lower levels of the Industrial Canal bottom and that these contaminates will be released into the environment when the upper levels are dredged away. Plaintiffs satisfy the requirements of notice pleading by putting the Corps on notice that the RCRA claim rests on the management of and plan to dredge the Industrial Canal.

*Id.* at *8 (internal citations omitted).

The differences between the allegations highlighted by the court in *Holy Cross* and the allegations here are significant. Plaintiffs mistakenly claim that *Holy Cross* "establishes government liability exists based on management and control over activities that affect natural resources" and thus supports their legal theory of the Service's liability. Opp. at 26. First and foremost, the "control over activities" Plaintiffs emphasize involved physical dredging by the Corps. Here, Plaintiffs have alleged no actual or planned involvement by the Service in the disposal of spent lead ammunition.[10] Second, as is apparent from the above quotation, the court in *Holy Cross* emphasized the allegations that the Corps was "directing and organizing" the dredging project and that the Corps' dredging—not the activities of third parties—would cause the endangerment. The denial of the motion to dismiss in *Holy Cross* cannot be divorced from the Corps' plan to dredge the canal. Indeed, *Holy Cross* further demonstrates that Plaintiffs cannot muster support for their novel theory of liability.[11]

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[10] Plaintiffs' allegations regarding special use permits on this point are meritless. *See infra* at 18.

[11] Plaintiffs grossly misrepresent *Potomac Riverkeeper v. National Capital Skeet and Trap Club*, 388 F. Supp. 2d 582 (D. Md. 2005). Opp. at 26. State ownership of the land upon which a skeet club operated was not relevant to either of the RCRA claims in that

*Footnote continued…*

**C. Plaintiffs' Discussion of Rule 8 and the Service's Authority Misses the Mark.**

Plaintiffs contend that paragraph 3 of the Complaint provides "ample notice of the legal theory upon which the Complaint rests." Opp. at 12. In fact, Paragraph 3 merely states that the Service manages the Kaibab National Forest and has broad authority. Compl. ¶ 3. Contrary to Plaintiffs' contentions, Opp. at 12-13, the Complaint offers nothing more than a "sheer possibility" of actionable conduct. Rule 8 and Supreme Court and Ninth Circuit case law require more. *See* Mot. at 7-8; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Hinds*, 654 F.3d at 850 (citing *Johnson v. Riverside Health Care Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008)). Further, none of the RCRA decisions upon which Plaintiffs rely provides support for Plaintiffs' position that such a broad, general allegation is sufficient to establish a viable theory of liability. *See supra* at 8-12.

In an attempt to remedy this deficiency, Plaintiffs discuss at length the Service's authority to manage the Kaibab National Forest. Opp. at 14-18. However, as discussed above, Plaintiffs mischaracterize the Service's argument in its motion to dismiss. The question before the Court is whether the Service's unexercised Federal regulatory authority, as alleged in the Complaint, is within the scope of the "measure of control" that the Ninth Circuit held in *Hinds* gives rise to contributor liability under RCRA. Critical to this analysis is that the State is the primary regulatory authority over hunting in the Kaibab National Forest, and the exercise of the alleged authorities would have uncertain outcomes, and require the reversal of national policy, pre-emption of the State's authority, and significant legal process.

The Service, responding to the allegations in the Complaint, articulated some of the requirements and process involved in the exercise of the authority sought by

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case. *See id.* at 586-89 (analyzing claims under RCRA sections 7002(a)(1)(A) and (B)). The court there did not address contributor liability, but rather denied summary judgment because there was a genuine dispute of material fact as to whether there was an imminent and substantial endangerment. *Id.* at 589. The motion to dismiss the RCRA section 7002(a)(1)(A) claim, not the 7002(a)(1)(B) claim, was denied for reasons wholly unrelated to ownership of the land. *Id.* at 587 and n.7.

Plaintiffs. Exercise of the authority in 36 C.F.R. § 261.70(a)(4) can occur only through the promulgation of regulations pursuant to the APA. *Id.* § 261.70(c). Prior to exercising that authority or the order authority in 36 C.F.R. § 261.50(a), the Service must consult with the State of Arizona[12] and must comply with NEPA. Plaintiffs admit as much when they contend that orders issued pursuant to 36 C.F.R. part 261 are encompassed by categorical exclusions. Opp. at 16.

Plaintiffs' arguments regarding categorical exclusions are incorrect. The potential applicability of a categorical exclusion does not excuse a proposed action from NEPA or NEPA analysis, as Plaintiffs contend. To the contrary, the Service cannot even presume at the outset of a potential action that a categorical exclusion is the appropriate level of NEPA or what the outcome may be. For any proposed action subject to NEPA requirements, including an order or regulation affecting the use of lead ammunition on the Kaibab National Forest, *see* 36 C.F.R. § 220.4(a), the Service must at a minimum fulfill certain requirements for scoping. *See id.* § 220.4(e); *see also id.* § 220.6(c) (setting forth process subsequent to scoping). Required NEPA analyses may need to consider other alternatives, potentially including the "no action alternative," and could not presume that any restriction on lead ammunition would be an outcome of the NEPA process. *See id.* at § 220.5(e); 40 C.F.R. § 1502.14. Further, NEPA mandates public involvement in the decision-making process, *see, e.g., id.* at §§ 1503.1, 1506.6; 36 C.F.R. § 220.4(c), and in the factual circumstances alleged here, the Arizona Game and Fish Commission would be entitled to participate as a cooperating agency. *See* MOU at ¶

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[12] Plaintiffs' contention that the Service would not have to consult with the State of Arizona prior to issuing an order addressing lead ammunition under this section is incorrect. Opp. at 16-17. A Master Memorandum of Understanding ("MOU") between the Service and the Arizona Game and Fish Commission and Department establishes a consultation process with the State. *See, e.g.*, MOU at ¶ IV.A.15. The MOU is attached as Exhibit 1 and as an official, signed, government agreement, is properly subject to judicial notice pursuant to Federal Rule of Evidence 201. *See also* Forest Service Manual at Chapter 2640 (indicating consultation with the State is appropriate).

IV.A.5; 40 C.F.R. § 1501.6. A possible *outcome* of the NEPA process is that a proposed action is covered by a categorical exclusion. *See* 36 C.F.R. § 220.6(c). Additionally, the categorical exclusion is for *short-term* resource protection, and Plaintiffs indisputably seek a long-term (if not permanent) ban on the use of lead ammunition.[13] The categorical exclusion Plaintiffs rely on is thus irrelevant to the analysis here.

Consulting with the State of Arizona, ensuring compliance with the management plan for the Kaibab National Forest, NEPA, and in some instances APA-style rulemakings, are applicable legal processes regardless of the source of the Service's authority (alleged in the Complaint or otherwise). As explained above, through these processes, the Service must engage in a balancing of competing interests. The potential outcome of any proposed action by the Service is thus uncertain, as the Service weighs competing interests, public input, potential alternatives, and more. And again, the relief sought by Plaintiffs would require the pre-emption of State regulation. For these reasons, the Service's unexercised Federal regulatory authority, as alleged in the Complaint, is unlike the control exercised by private landowners and the defendants in the cases discussed above, and is insufficient to support a claim under RCRA section 7002.

In their opposition, Plaintiffs also discuss FLPMA, contending that section 302(b) "authorizes the regulation of hunting on [National Forest System] lands to ensure compliance with RCRA." Opp. at 19 (emphasis omitted). This argument is not supported by the statute, which allows the Secretary to *prohibit* (not regulate) hunting in certain areas for certain periods in order to comply with applicable law. 43 U.S.C. § 1732(b). Critically, Plaintiffs' argument relies on the implicit assumption that the Service is not in compliance with RCRA. However, Plaintiffs have not alleged in the Complaint

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[13] Plaintiffs' analogy to closing a road during bighorn sheep lambing season (Opp. at 16) is flawed. As the plain language suggests, a road closure for lambing season would be a short-term limit on motor vehicle use on discrete roads, whereas Plaintiffs' Complaint appears to seek a broad, permanent ban on lead ammunition, not limited to the hunting season or to big game hunting. *See, e.g.*, Compl. at ¶¶ 10, 35 and at 15 (Prayer for Relief ¶ 2). The potential effects of these two actions are not comparable.

that the Service is failing to comply with any applicable RCRA requirement, such as an obligation to obtain a RCRA permit.

Plaintiffs also misrepresent the holding in *Meister v. United States Department of Agriculture*, 623 F.3d 363 (6th Cir. 2010). First, Plaintiffs contend that the court in *Meister* "concluded that the Forest Service has the authority to prohibit hunting." Opp. at 19, quoting *Meister*, 623 F.3d at 378. This authority is irrelevant, as Plaintiffs are not seeking a prohibition on hunting (*see* Opp. at 15, 18), and Plaintiffs offer no authority for their implicit contention that the authority to *prohibit* hunting necessarily encompasses the authority to *regulate* hunting, including the choice of ammunition.

Second, contrary to Plaintiffs' argument, Opp. at 19-20, the Sixth Circuit in *Meister* did not rule on the existence or extent of the Service's authority to regulate hunting. Rather, *Meister* involved, in relevant part, a challenge brought under NEPA to the sufficiency of the Service's land and resource management plan and accompanying final environmental impact statement for the Huron-Manistee National Forests. *Meister*, 623 F.3d at 368, 377-79. The court, noting the authority in section 302(b) of FLPMA to prohibit hunting, held that the Service had violated NEPA when it did not consider a proposed alternative of banning gun hunting and snowmobiling in the 6.75% of the forests designated as primitive and semiprimitive nonmotorized areas. *Id.* at 378-79. The court did not, however, analyze whether FLPMA section 302(b) gives the Service the authority to go beyond prohibitions and *regulate* hunting, including the choice of ammunition.

Plaintiffs' argument regarding this Court's holding in *Center for Biological Diversity v. United States Bureau of Land Management*, No. 09-cv-8011, 2011 WL 4551175 (D. Ariz., Sept. 30, 2011), also fails. *See* Opp. at 20. In that case, these same Plaintiffs made the same argument regarding *Meister*. The Court rejected the application of *Meister* to those proceedings, and Plaintiffs' selective quotation comes from the Court's explanation of why *Meister* was inapposite. *See Ctr. for Biological Diversity*, 2011 WL 4551175 at *11. The Court was not asked to interpret the scope of authority

provided by section 302(b) of FLPMA and did not do so. Plaintiffs' argument that the Service's interpretation of FLPMA conflicts with this Court's precedent is meritless.

Plaintiffs' extensive discussion of the authority held by the Service misses the mark. The issue here is whether the Service's unexercised Federal regulatory authority as identified in the Complaint subjects the Service to liability as a contributor to an alleged imminent and substantial endangerment, given that the State is the primary regulator of hunting in the Kaibab National Forest, that the Service would have to reverse national policy and pre-empt the State's authority to regulate the choice of ammunition, that significant legal processes are involved in the exercise of the authorities Plaintiffs rely on, and that the potential outcome of any action proposed by the Service is uncertain. *Meister* and *Center for Biological Diversity* only confirm the applicability of these processes (and availability of judicial review) to the Service's authority. They do not change the fact that the allegations regarding the Service's unexercised regulatory authority here are not within the scope of what the Ninth Circuit contemplated in *Hinds* as giving rise to contributor liability.[14] Plaintiffs thus have not pled a cognizable legal theory, requiring dismissal under Rule 12(b)(6). *See Hinds*, 654 F.3d at 850 (citing *Johnson v. Riverside Health Care Sys., LP*, 534 F.3d at 1121).

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[14] Plaintiffs' reliance on other cases examining the extent of the Service's authority is also misplaced. *See* Opp. at 17-18, citing *Hunt v. United States*, 278 U.S. 96 (1928); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987); and *Pub. Lands for the People, Inc. v. United States Dep't of Agric.*, 697 F.3d 1192 (9th Cir. 2012), *cert. denied*, No. 12-766, 2013 WL 656076 (Feb. 25, 2013). These cases do not address whether the existence of the unexercised Federal regulatory authority at issue here is sufficient to find that a federal agency is liable as a contributor under RCRA section 7002, nor do they address the question of whether the Service's authority is akin to the control over waste disposal possessed by and actual conduct of the defendants in *Aceto*, *Marathon Oil*, and *Valentine*.

**D. Plaintiffs' Allegations Regarding Special Use Permits Fail to Establish that the Service is Actively Involved in Waste Disposal.**

There is no meaningful dispute as to whether the Service can be held liable as a contributor under the "active involvement" component of *Hinds*. Plaintiffs' sole response on this issue is to point once again to special use permits. Opp. at 24-25. As the Service made clear in its motion, special use permits are not required to hunt in the Kaibab National Forest. Mot. at 4, 16. Special use permits are required only for commercial activities. *Id.* at 4; 36 C.F.R. § 251.50(a). Special use permits do not authorize or regulate hunting, they do not have any effect on a hunter's choice of ammunition, they do not apply to or allow the act of hunting or shooting, and they do not authorize or control the act of disposal in any way. Although Plaintiffs prefer to ignore the State of Arizona's regulation of hunting, *see* Opp. at 26, the fact remains that hunters are subject to Arizona's hunting rules and regulations, including those governing choice of ammunition, and any Service attempt to regulate choice of ammunition would require pre-emption of State regulation. *See* Mot. at 4-5.

Even if the Court accepts paragraph 34 of the Complaint as well pled and assumes it to be true for purposes of the motion to dismiss, it is insufficient to support an "active involvement" theory of contributor liability. The Complaint alleges only that the Service issues special use permits to hunting outfitters and guides and that the Service "does not prohibit or restrict the use of lead ammunition within the Kaibab National Forest." Compl. ¶ 34. These allegations do not amount to active involvement by the Service with spent lead ammunition. *See Hinds*, 654 F.3d at 851 ("'Contributing' requires a more active role with a more direct connection to the waste, such as by handling it, storing it, treating it, transporting it, or disposing of it"); *see also id.* (citing *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 844 (D.N.J. 2003) (holding active human involvement with waste is required for liability), *aff'd*, 399 F.3d 248 (3d Cir. 2005)). As Plaintiffs plead no other facts alleging that the Service is actively involved in the disposal of lead ammunition, Plaintiffs' "active involvement" theory of liability must fail.

**E. Conclusion**

Plaintiffs attempt to employ a novel theory of RCRA section 7002 liability to overturn longstanding federal policy. Ultimately, however, Plaintiffs cannot establish Article III standing or state a viable claim. For the foregoing reasons, the Complaint should be dismissed.

Respectfully submitted,

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Dated: March 25, 2013

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of March, 2013, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

| | |
|---|---|
| Center for Biological Diversity, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>United States Forest Service,<br><br>Defendant. | No. CV-12-8176-PCT-SMM<br><br>**DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**<br><br>**EXHIBIT 1** |

# MASTER MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF AGRICULTURE FOREST SERVICE SOUTHWESTERN REGION AND THE ARIZONA GAME AND FISH COMMISSION AND DEPARTMENT

This **MEMORANDUM OF UNDERSTANDING (MOU)** is hereby entered into by and between the Forest Service, U.S. Department of Agriculture, Southwestern Region, hereinafter referred to as U.S. Forest Service and the Arizona Game and Fish Commission hereinafter referred to as the Commission and the Arizona Game and Fish Department hereinafter referred to as the Department. The U.S. Forest Service, the Commission and Department are together herein referred to as "the Parties".

## I. PURPOSE

The purpose of this MOU is to establish a framework for statewide cooperation, coordination, and collaboration between the U.S. Forest Service and the Department for management and conservation of fish and wildlife populations and habitats on National Forest System lands in Arizona. This MOU describes respective roles, responsibilities, jurisdictional authority, and expertise of the Parties.

## II. JOINT POLICY STATEMENT

The U.S. Forest Service and the Arizona Game and Fish Department work cooperatively to manage fish and wildlife resources on National Forest System Lands throughout the State of Arizona. The U.S. Forest Service is responsible for managing fish and wildlife habitat on National Forest System Lands, and the Department and Commission have statutory authority and public trust responsibility to manage fish and wildlife populations in Arizona, including on National Forest System Lands. The Parties consider the management of fish and wildlife resources as a high priority and agree to work cooperatively to achieve a shared goal to actively manage, sustain, and enhance those resources.

The parties support Executive Order 13443 – Facilitation of Hunting Heritage and Wildlife Conservation (Appendix A) to facilitate the expansion and enhancement of hunting opportunities and the management of game species and their habitat. The parties support the use of safe recreational shooting areas, and agree that the development of formal shooting facilities is an appropriate use of Forest Service lands.

The Department's mandate to meet statutory trust responsibilities to manage fish and wildlife populations is supported by the U.S. Forest Service and incorporated where appropriate in Forest Land and Resource Management Plans. Similarly, the Department recognizes the responsibility of the U.S. Forest Service to manage for sustainable ecosystems. Implementation level plans and site-specific projects will be evaluated and finalized through appropriate coordination, partnerships, and processes that reflect the spirit and intent of this MOU.

## III. AUTHORITIES

**A. The authorities of the U.S. Forest Service to enter into this MOU include, but are not limited to:**

1. National Forest Management Act of 1976.
2. Federal Land Policy and Management Act of 1976, as amended.
3. Endangered Species Act of 1973, as amended.
4. Sikes Act of 1974, as amended.
5. Wilderness Act of 1964, as amended.
6. Public Rangelands Improvement Act of 1978.
7. National Environmental Policy Act of 1969, as amended.
8. Council on Environmental Quality regulations (40 CFR Part 1501).
9. Alternative Dispute Resolution Act of 1998.
10. Intergovernmental Cooperation Act of 1968, as amended.

**B. The authorities of the Department, acting as administrative agent for the Commission, to enter into this MOU include, but are not limited to:**

1. Arizona Revised Statutes (A.R.S.) §§ 17-231(A)(2) and 17-231(B)(7).
2. A.R.S. § 17-452(C).
3. MOU between Region 2, U.S. Fish and Wildlife Service, and Department for State Wildlife Agency Participation in Implementing the Endangered Species Act: State of Arizona dated June 26, 2002.
4. Fish and Wildlife Coordination Act (16 U.S.C. 661-667e; the Act of March 10, 1934; Ch. 55; 48 Stat. 401), as amended 1946, 1958, 1978 and 1995.
5. Endangered Species Act, Section 6.

## IV. ROLES AND RESPONSIBILITIES

The U.S. Forest Service, through legislation enacted by Congress, administers the National Forests for outdoor recreation, range, timber, watershed, fish and wildlife (includes all wild birds, mammals, amphibians, reptiles, invertebrates, and fish, whether classified as game or nongame, predators, beneficial or detrimental) habitat purposes. The Secretary of Agriculture, through the U.S. Forest Service, is authorized to cooperate with interested State agencies in the development and management of National Forests and National Grasslands.
The U.S. Forest Service is directed to conform to the provisions of Federal law including but not limited to the National Environmental Policy Act of 1969 (NEPA), National Forest Management Act of 1976 (NFMA), the Endangered Species Act of 1973 (ESA), and subsequent Executive Orders. The Sikes Act of 1960 authorizes the U.S. Forest Service to plan, develop, maintain, and coordinate comprehensive conservation and rehabilitation programs for fish and wildlife on National Forests and Grasslands in consultation and cooperation with State Game and Fish agencies.

The Commission has been created under the laws of the State of Arizona to provide a system of control, propagation, protection, regulations, management or use of all wildlife as well as administrative and enforcement activities necessary to provide for public safety and education,

and protection of fish and wildlife resources. The Department's actions are directed through policy and strategic planning documents approved by the Commission. The Commission and Department serve the people of Arizona as stewards of the State's wildlife. These resources are a public trust, managed for the benefit of present and future generations. The Department's mission is to conserve, enhance, and restore Arizona's diverse wildlife resources and habitats through aggressive protection and management programs, and to provide wildlife resources and safe watercraft and off-highway vehicle recreation for the enjoyment, appreciation, and use by present and future generations.

It is the mutual desire of the Parties to work in harmony for the common purpose of developing, maintaining, and managing fish and wildlife populations and their habitats on the National Forests in Arizona for the best interests of the people of Arizona and of the United States.

**A. The U.S. Forest Service agrees:**

1. To uphold its responsibility for managing National Forest System lands for the multiple use benefits in accordance with federal laws, regulations, policies, and applicable land management plans.

2. To maintain healthy ecosystems for fish and wildlife through coordination of uses within the National Forests following the direction and guidance found in individual Arizona Forest Land and Resource Management Plans.

3. To recognize the Commission and Department as having primary responsibility for managing fish and wildlife populations consistent with state and federal law.

4. To give prior notice of proposed and scheduled management activities and provide opportunities for inclusion of input and recommendations in the National Environmental Policy Act (NEPA) process, as early as possible, at the appropriate project or program level.

5. To invite the Department to participate in the NEPA process as authorized under 40 CFR 1501.6, 1508.5, and Title II, Section 204(b) of the Unfunded Mandates Act, as a cooperating agency and/or member of interdisciplinary teams and to receive, review, and consider Department recommendations regarding impacts to fish and wildlife from land management activities and document their input including recommendations in the NEPA process. The U.S. Forest Service will make efforts to address the Department's recommendations throughout the planning process, and notify the Department of the actions taken in final decision documents.

6. To cooperatively develop management programs and projects with the Department for the conservation and recovery of federally listed fish and wildlife and their associated habitats, and seek the involvement of the Department to provide expertise concerning federally listed species and their habitats in Arizona during the Section 7 consultations with the U.S. Fish and Wildlife Service.

7. To recognize and give full consideration to conservation of the State's fish and wildlife species of concern and their habitats, including Species of Greatest Conservation Need, federally listed species, and U.S. Forest Service designated species, and to treat these fish and wildlife populations as desirable and co-equal with other resources on the National Forests under the multiple resource management concept of the U.S. Forest Service.

8. To coordinate requests for renewal of existing Department Special Use Permits per 36CFR 251(F)(1)(i). Where no change in use is anticipated, the U.S. Forest Service will issue the renewal within 60 days, or notify the Department in writing as to the cause of the delay and the projected date for a decision on the request.

9. To coordinate development and issuance of free special-use permits for the construction and maintenance of structures needed to facilitate fish and wildlife management activities of the Department within the National Forests; provided such structures and intended uses conform in character and location with law, regulation and policy.

10. To coordinate approval of radio communication abilities to the Department for interagency use under the appropriate instrument to facilitate timely communications during emergency and law enforcement actions and jointly conducted projects.

11. To cooperate with the Department in all ways practical to aid in the enforcement of applicable Arizona laws affecting wildlife, watercraft, and off-highway vehicles on national forest system lands and/or waters.

12. To meet with the Animal and Plant Health Inspection Service (APHIS) Regional Director, and the Department as needed or required, to coordinate animal (fish and wildlife) damage management operations on National Forest System Lands.

13. To recognize the Commission's and Department's responsibility to make determinations as to which fish and wildlife species are native or naturalized to the state of Arizona, and in which areas of the state those species should be established or maintained.

14. To coordinate with the Department when the State controls undesirable or diseased fish, aquatic animals, and wildlife populations on National Forest System Lands.

15. To notify the Department in advance, except in emergency circumstances, of closures on National Forest System Lands, including OHV, pre- and post-fire management activities, and recreational shooting.

16. To allow cooperative projects under this MOU with appropriately tiered project agreements and fiscal instruments.

17. Coordinate with the Department to facilitate their administrative access needs consistent with laws, regulation, and policy.

18. Coordinate with the Department to minimize potential effects on sport hunting and fishing from future federal permit considerations.

**B. The Department agrees:**

1. To uphold its responsibility for managing statewide fish and wildlife populations and enforcing applicable laws on the National Forests.

2. To recognize the U.S. Forest Service as the agency responsible for regulating the use of National Forest system lands in a sustainable manner to maintain healthy ecosystems for fish and wildlife, and to secure proper use of the habitat, in coordination with the Department, compatible with other land uses under their administration.

3. To cooperate with the U.S. Forest Service in all ways practical to aid in the enforcement of applicable laws and regulations affecting national forest system resources, lands, and/or waters.

4. To provide the opportunity for the U.S. Forest Service to review and comment on environmental documents, and coordinate with the U.S. Forest Service when controlling undesirable or diseased fish, aquatic animals, and wildlife on National Forest System Lands.

5. To coordinate Department project proposals with the U.S. Forest Service in appropriate environmental documentation, land use applications, etc., and assure approval is acquired, if necessary, from the appropriate U.S. Forest Service Line Officer prior to implementation of projects on National Forest System Lands.

6. To notify the Forest Supervisor when special permits to take fish and wildlife out of season are issued, including the locality, wildlife species involved, and time period of the permits.

7. To participate early in the National Environmental Policy Act (NEPA) process and to make meaningful and timely input regarding impacts to fish and wildlife and their associated habitats from proposed land management activities.

8. To coordinate with the U.S. Forest Service regarding the development of strategic documents and proposals for hunting, fishing, and other wildlife conservation programs affecting National Forest System Lands so as to allow U.S. Forest Service timely input into the process whereby regulations are set; and to notify the U.S. Forest Service of its actions taken in the final decision document.

9. To seek input and coordination from the U.S. Forest Service regarding the listing of species and conservation actions necessary for State designated fish and wildlife species of concern, including Species of Greatest Conservation Need, and their habitats on U.S. Forest Service Lands.

10. To annually notify the Regional Forester of changes in State fish and wildlife laws or regulations.

11. To seek early U.S. Forest Service input regarding the Department's evaluations to make determinations of native or indigenous species that could potentially occur on National Forest System Lands and coordinate prior to introductions on National Forest System Lands.

12. To coordinate with the U.S. Forest Service on any proposals for release, introduction, or establishment of fish and wildlife populations (including threatened and endangered species) within National Forests; and, in the event of unanticipated introduction, transplant, or stocking, provide notice (in advance to the fullest extent possible) to the U.S. Forest Service for review of environmental analysis and documentation (where appropriate) and coordination.

13. To work cooperatively with the U.S. Forest Service to identify and resolve impacts to fish and wildlife resources and habitats on National Forest System Lands.

**C. The U.S. Forest Service and the Department mutually agree:**

1. To pursue opportunities for cooperatively funding and accomplishing projects and studies of mutual interest and benefit, pending availability of funds and resources and to convey those funds or accomplish these projects through appropriate instrument(s) and statutory authority(ies) consistent with the requirements of both agencies.

2. To coordinate the use of facilities and equipment as may be needed in connection with the administration of fish and wildlife programs and projects, provided that the extent of such service is made under the appropriate instrument, citing federal statutory authority and is consistent with Parties' respective needs, regulations, and funds availability, and that such service is coordinated with Parties' designated line officers and Regional Supervisor.

3. That both parties recognize the other's law enforcement authority and agree that cooperative law enforcement efforts are beneficial to each other's respective mission. Both parties will communicate and coordinate as needed and appropriate regarding significant actions or issues that affect each other's enforcement missions.

4. To work closely and continuously to jointly develop proposals for habitat improvement projects and management of populations, including working with the U.S. Fish and Wildlife Service when Federally-listed species are involved.

5. To work together at the District, Forest, State, and Regional levels to integrate both agencies' conservation efforts into U.S. Forest Service fish and wildlife programs.

6. To work cooperatively to obtain conservation and access easements for purposes of fish and wildlife resource conservation and to work toward long-term public access to National Forest System lands consistent with laws, regulation, and policy.

7. To coordinate management of National Forest System Lands adjacent to properties or wildlife areas established pursuant to A.R.S. 17-231(B)(2) which the Commission owns, or on which the Commission has easements, for fish and wildlife related benefits and in ways that are consistent with Forest Land and Resource Management Plans and Department Management Plans.

8. To coordinate efforts that ensure continued conservation of the State's fish and wildlife species of concern, including Species of Greatest Conservation Need, Species of Economic and Recreational Importance, federally listed species, and U.S. Forest Service designated species. The U.S. Forest Service and the Department will meet no less than yearly, as part of an interagency endangered species committee, to share information and develop strategies for conservation and recovery of these species.

9. To coordinate on proposals for establishing, transplanting, and supplementing fish and wildlife populations to or from National Forest System Lands following the processes outlined within this MOU.

10. To recognize fish and wildlife as important wilderness resources and work collaboratively to ensure that within designated wilderness, fish and wildlife management programs are consistent with the Wilderness Act (1964), and to work cooperatively in following the purpose and intent of the "Policies and Guidelines for Fish and Wildlife Management in National Forest and Bureau of Land Management Wilderness (as amended June, 2006)" (Appendix B).

11. To cooperate at appropriate organizational levels in the development, implementation, and revision of fish and wildlife programs to provide integrated activities consistent with each agency's programs to obtain efficiency and capture collaborative opportunities.

12. To share and exchange information on fish, wildlife, and habitat. Specific data sharing agreements will be developed as needed and appropriate. Any information furnished to the Parties under this instrument is subject to the Freedom of Information Act (5 U.S.C. 552) and Arizona's Public Records Law.

13. To hold a joint meeting each year attended by the Director of the Department or his or her representative, the Regional Forester or his or her representative, the Forest Supervisors, the Department Branch Chiefs, Regional Supervisors, and other appropriate personnel, for discussion of matters of mutual interests relating to the management of the National Forests and National Grasslands and fish and wildlife resources.

14. To hold a joint meeting with each National Forest each year attended by the Forest Supervisors, the Department Regional Supervisors, and other appropriate personnel, for discussion of matters of mutual interest.

15. That publicity referring to the fish and wildlife programs shall identify the cooperative nature of the work undertaken by the Department and the U.S. Forest Service.

16. To provide reports and copies of vital correspondence relating to matters of mutual interest.

17. That each and every provision of this Memorandum of Understanding is subject to the laws and regulations of the State of Arizona and the laws of the United States.

18. That this MOU creates no right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity. The Parties will manage their respective resources and activities in a separate, coordinated, and mutually beneficial manner to meet the purpose(s) of this MOU. Nothing in this MOU authorizes any of the Parties to obligate or transfer funds. Specific projects or activities that involve the transfer of funds, services, or property among the Parties require execution of separate agreements and are contingent upon the availability of appropriated funds. These activities must be independently authorized by statute. This MOU does not provide that authority. Negotiation, execution, and administration of these agreements must comply with all applicable law. Each Party will be operating under its own laws, regulations, and policies, subject to the availability of appropriated funds. Nothing in this MOU is intended to alter, limit, or expand the Parties' statutory and regulatory authority.

19. Any communications affecting the operations covered by this agreement given by the Forest Service or the Department is sufficient only if in writing and delivered in person, mailed, or transmitted electronically by e-mail or fax, as follows:

    a. To the Forest Service Program Manager, at the address specified in the grant/agreement.
    b. To the Department, at the Department's address shown in the grant/agreement or such other address designated within the grant/agreement.
    c. Notices are effective when delivered in accordance with this provision, or on the effective date of the notice, whichever is later.

20. That any supplemental or specific agreements shall be prepared consistent with the framework of this MOU.

21. That this MOU is not intended to, and does not create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by any person or entity against the State of Arizona, the United States, or any of their officers or employees.

22. That this MOU supersedes the MOU between the Southwestern Regional Forester and the Department made the 16th day of March, 1991, the associated Amendments 1 and 2, dated April 14, 1993 and February 8, 1996 respectively, and the 1980 Supplement to the April, 1958 Master MOU regarding consultation on projects

affecting state listed species or habitats. Notwithstanding the foregoing, this MOU does not invalidate any additional supplemental agreements that may be in force not identified herein, or that may be hereafter entered between the Parties covering special projects or other activities of mutual concern.

23. That all work performed under the MOU shall be in compliance with all applicable state and federal laws and regulations.

24. That neither Party assumes liability for any third party claims for damages arising out of this instrument.

25. The Department shall immediately inform the Forest Service if they or any of their principals are presently excluded, debarred, or suspended from entering into covered transactions with the Federal Government according to the terms of 2 CFR Part 180. Additionally, should the Department or any of their principals receive a transmittal letter or other official Federal notice of debarment or suspension, then they shall notify the Forest Service without undue delay. This applies whether the exclusion, debarment, or suspension is voluntary or involuntary.

26. This instrument in no way restricts the Forest Service or the Department from participating in similar activities with other public or private agencies, organizations, and individuals.

27. Any Department contributions made under this agreement or subsequent project agreement(s) do not by direct reference or implication convey Forest Service endorsement of any Department products or activities.

28. Pursuant to 41 U.S.C. 22, no United States member of, or United States delegate to, Congress shall be admitted to any share or part of this instrument, or benefits that may arise therefrom, either directly or indirectly.

29. Public access to grant or agreement records must not be limited, except when such records must be kept confidential and would have been exempted from disclosure pursuant to Freedom of Information regulations (5 U.S.C. 552) and Arizona's Public Records Laws.

30. Modifications within the scope of this instrument shall be made by mutual consent of the Parties, by the issuance of a written modification signed and dated by all properly authorized, signatory officials, prior to any changes being performed. Requests for modification should be made, in writing, at least 30 days prior to implementation of the requested change.

31. This instrument is executed as of the date of the last signature and shall remain in effect without expiration from the date of execution unless terminated pursuant to the provisions of this section. This MOU will be reviewed at least every 5 years by both Parties to determine appropriateness and viability.

32. Either Party may terminate this MOU in whole, or in part, at any time with a 60-days' written notice to the other Party. This MOU is also subject to termination pursuant to A.R.S. § 38-511.

33. That this Master MOU constitutes the entire MOU agreement between the Parties.

34. That the remainder of the MOU shall be enforced should any of its provisions be deemed unenforceable.

## V. CONFLICT RESOLUTION

### A. The U.S. Forest Service and the Department mutually agree:

1. To respect each Party's respective statutory authorities and mission, and to work cooperatively in the management of fish and wildlife resources.

2. To provide adequate consideration of the biological needs and benefits when proposing fish and wildlife management projects.

3. To work cooperatively to minimize and mitigate negative impacts to land and wildlife resources from land management proposals.

4. To work cooperatively to identify and resolve issues with proposed projects at the individual Forest and Department Regional level consistent with Item 5 in this section.

5. To acknowledge the accepted policies and plans of the other Party and to resolve conflicts at the lowest level within both agencies following the process outlined below, and to ensure that all questions pertaining to the cooperative work of the Parties which arise in the field will be discussed on-the-ground by the local representative of the Department, and the U.S. Forest Service District Ranger.

    a. Upon determination by the individual Ranger District Office and/or the Department Regional Office that agreement or resolution cannot be reached, a letter documenting the conflict will be issued to the other Party, but only after exhausting all appropriate and reasonable good faith efforts to resolve the issue. Issues and conflicts identified in the letter that cannot be resolved within a timely manner at the individual Ranger District/Department Regional Office level will then be elevated to the Forest Supervisor's Office and Department Regional Supervisor for dispute resolution within 10 business days of receipt of the letter.
    b. Upon determination by appropriate staff at the Forest Supervisor's Office and/or the Department Regional Supervisor that agreement or resolution cannot be reached, a letter will be issued to the other Party, but only after exhausting all appropriate and reasonable good faith efforts to resolve the issue. Issues and conflicts that cannot be resolved within a timely manner at the Forest Supervisor's Office/Department Regional Supervisor level will then

be elevated to the Regional Forester and the Department's Director for final dispute resolution within 10 business days of receipt of the letter.

6. The parties agree to engage in any alternative dispute resolution procedures authorized by their statutes, and regulations, including but not limited to 5 U.S.C. § 575 and A.R.S. § 12-1218.

7. Nothing in this section shall be construed as a delegation of the legal authority of either Party.

## VI. PRINCIPLE CONTACTS AND SIGNATURES

### A. The U.S. Forest Service and the Department mutually agree:

1. That by signature the Parties certify that the individuals listed in this document are authorized to act in their respective areas for matters related to this agreement.

2. That the principal contacts for this instrument are:

| | Arizona Game & Fish Department Contact |
|---|---|
| Don DeLorenzo, Director<br>Wildlife, Fish, and Rare Plants<br>U.S. Forest Service,<br>Southwestern Region,<br>333 Broadway Blvd. SE<br>Albuquerque, NM 87102<br>Phone: (505) 842-3260<br>Fax: (505) 842-3152<br>e-mail: ddlorenzo@fs.fed.us | Josh Avey, Habitat Branch Chief<br>Wildlife Management Division<br>Arizona Game and Fish Department<br>5000 W. Carefree Hwy<br>Phoenix, Arizona 85086<br><br>Phone: (623) 236-7605<br>Fax: (623) 236-7366<br>e-mail: javey@azgfd.gov |

| | Arizona Game & Fish Administrative Contact |
|---|---|
| Carmen Melendez<br>Grants & Agreements Specialist<br>U.S. Forest Service,<br>Southwestern Region,<br>333 Broadway Blvd. SE<br>Albuquerque, NM 87102<br>Phone: (505) 842-3199<br>Fax: (505) 842-3111<br>e-mail: cmelendez@fs.fed.us | Rick Miller<br>Funds and Planning Manager<br>Arizona Game and Fish Department<br>5000 W. Carefree Hwy<br>Phoenix, Arizona 85086<br><br>Phone: (623) 236-7522<br>Fax: (623) 236-7358<br>e-mail: rmiller@azgfd.gov |

IN WITNESS WHEREOF, the Parties hereto have executed this Memorandum as of the last date shown below.

**For Arizona Game and Fish Commission and Department:**

Larry D Voyles Feb 8, 2010

LARRY D. VOYLES Date
Secretary to the Commission and Director
Arizona Game and Fish Department

**For the U.S. Forest Service:**

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE
SOUTHWESTERN REGION

C. L. Newman Jr Feb 12, 2010

CORBIN NEWMAN Date
Regional Forester

U.S. FOREST SERVICE
LAW ENFORCEMENT AND INVESTIGATIONS

Robin L. Poague 2/11/10

ROBIN POAGUE Date
Acting Special Agent in Charge

The authority and format of this instrument has been reviewed and approved for signature.

Carmen Melendez 3/11/2010

CARMEN MELENDEZ Date
FS Grants and Agreements Specialist

**Enclosures**

**Appendix A:**
*'Executive Order 13443 – Facilitation of Hunting Heritage and Wildlife Conservation (August 16, 2007)'*
**Appendix B:**
*'Policies and Guidelines for Fish and Wildlife Management in National Forest and Bureau of Land Management Wilderness (as amended June, 2006)'*