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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Center for Biological Diversity, et al., Plaintiffs, v. United States Forest Service, Defendant.	No. CV-12-8176-PCT-SMM **DEFENDANT'S MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the United States of America ("United States") on behalf of Defendant the United States Forest Service (the "Service"), through the undersigned counsel, hereby moves for dismissal of all claims against the Service in this matter. In support of this motion, the United States submits the accompanying memorandum of points and authorities. As Plaintiffs have failed to plead facts sufficient to state a claim upon which relief can be granted, the Court must dismiss the Complaint.

I. STATUTORY AND REGULATORY BACKGROUND

A. Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-92k, establishes a "cradle-to-grave" regulatory scheme that governs the treatment, storage and disposal of regulated wastes. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); *see also Hinds Inv., LP v. Angioli*, 654 F.3d 846, 850 (9th Cir. 2011). RCRA and its implementing regulations impose detailed standards for the management and handling of hazardous wastes "so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b).

RCRA includes a provision that permits citizens to bring suit against any person, including the United States, in certain circumstances. Specifically, section 7002(a)(1)(B) of RCRA authorizes any person who has provided the statutorily prescribed notice of intent to sue to commence a civil action

> against any person, including the United States . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . .

42 U.S.C. § 6972(a)(1)(B). This citizen suit provision also states the relief available in such an action:

> The district court shall have jurisdiction, . . . to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both . . . .

42 U.S.C. § 6972(a).

B. Relevant Federal Land Management Statutes and Regulations

Congress has preserved the States' traditional broad trustee and police powers over wild animals within their jurisdictions, including wildlife on federal lands, except where in conflict with federal law. *Kleppe v. New Mexico*, 426 U.S. 529, 545-46 (1976);

Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1248 (D.C. Cir. 1980); *see also Fund for Animals v. Thomas*, 932 F. Supp. 368, 369-70 (D.D.C. 1996) ("The common law has always regarded the power to regulate the taking of animals *ferae naturae* to be vested in the states to the extent their exercise of that power may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.") (citation omitted), *aff'd* 127 F.3d 80 (D.C. Cir. 1997). This Congressional deference to the States in the field of wildlife management on National Forest System lands is codified in the Multiple-Use Sustained-Yield Act of 1960 ("MUSYA"), 16 U.S.C. §§ 528-531, and the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-87. *See Andrus*, 627 F.2d at 1248-50.

Consistent with the common law, MUSYA and FLPMA affirm the States' primary responsibility for the management of wildlife on National Forests. MUSYA expressly preserves States' jurisdiction over wildlife management: "Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests." 16 U.S.C. § 528.[1] FLPMA explicitly provides that "nothing in this Act shall be construed as authorizing the Secretary [of Agriculture] to require Federal permits to hunt and fish on . . . lands in the National Forest System." 43 U.S.C. § 1732(b); *see also Ctr. for Biological Diversity v. United States Bureau of Land Mgmt.*, No. 09-cv-8011, 2011 WL 4551175 *10 (D. Ariz. Sept. 30, 2011) (noting that "under FLPMA, the management of hunting on public lands is reserved to the states."). Although the Secretary does have authority to "designate areas of . . . lands in the National Forest System where, and establish periods when, no hunting or fishing will

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[1] Congress' preservation of the States' traditional role is found throughout public land law statutes. *See, e.g.*, 16 U.S.C. § 668dd(c) (same deference in National Wildlife Refuge System Administration Act); 16 U.S.C. § 1284(a) (same deference in Wild and Scenic Rivers Act); 16 U.S.C. § 6813(a) (same deference in Federal Lands Recreation Enhancement Act); 16 U.S.C. § 1133(d)(7) (same deference in Wilderness Act); *Andrus*, 627 F.2d at 1248.

be permitted," this authority is to be exercised "for reasons of public safety, administration, or compliance with provisions of applicable law." 43 U.S.C. § 1732(b). In other words, the Secretary has authority to *prohibit* hunting in certain limited circumstances. *See also Meister v. United States*, 623 F.3d 363, 380 (6th Cir. 2010); *Ctr. for Biological Diversity*, 2011 WL 4551175, at *11 ("the Forest Service in *Meister* was not prohibited from considering a ban on gun hunting"). Further, Congress requires that except in emergencies, the Secretary consult with state fish and game departments prior to exercising its authority to close areas to hunting and fishing. 43 U.S.C. § 1732(b).

Consistent with MUSYA and FLPMA, the Service does not regulate or permit private recreational hunting on National Forest System lands. 36 C.F.R. § 251.50(c). Further, each national forest is required to cooperate with state wildlife agencies to allow hunting in "accordance with the requirements of State laws." *See* 36 C.F.R. § 241.2. The Service prohibits hunting activities in very limited circumstances to address public safety, *e.g.*, prohibiting shooting near areas with human occupancy (such as buildings and campgrounds). *See* 36 C.F.R. § 261.10(d). The Service does not regulate the type of ammunition used by a state-licensed hunter; instead, States promulgate such regulations. Hunters on National Forests are required by federal laws and regulations to comply with state laws. 16 U.S.C. § 551, 36 C.F.R. § 261.8.

The Service does require individuals or companies who engage in commercial activities on National Forest System lands to obtain special use permits. *Id.* §§ 251.50, 251.51 (requiring special use authorization for commercial uses and activities on National Forest System lands and defining "commercial use or activity"). This includes entities such as outfitters and guides who provide commercial services to individual hunters. *See id.* § 251.51 (defining certain terms, including "guiding" and "outfitting," but not "hunting"). However, these special use permits authorize and condition the commercial activities of outfitters and guides, not the recreational hunting activities of their clients. *See* 36 C.F.R. § 251.50(c) ("A special use authorization is not required for

noncommercial recreational activities, such as . . . hunting . . .”). No Service permit of any kind is required to hunt on National Forest System lands.

C. Arizona Hunting Regulations

Similar to other States, Arizona, through the Arizona Game and Fish Commission (“State Commission”), regulates all aspects of hunting in Arizona. Among the State Commission’s powers and duties is the authority to establish hunting, trapping and fishing rules, and to prescribe the manner and methods for taking wildlife. A.R.S. § 17-231(A)(2), (3).

Hunting is authorized within the national forests in Arizona by State Commission order. *See* A.R.S. § 17-234 (State Commission shall by order open, close, or alter seasons statewide or any portion of the State); Doc. 8, 3 (“Hunters must obtain the proper hunting licenses from the state of Arizona and follow Arizona Game and Fish hunting regulations while hunting on national forest land.”). The State Commission establishes by order bag and possession limits, A.R.S. § 17-234, and prescribes by rule lawful methods for taking wildlife. A.A.C. R12-4-304. The State Commission also has adopted rules specifying the types of weapons and ammunition that are authorized in taking wildlife on national forests. *See, e.g.*, A.A.C. R12-4-303(A). Ammunition prohibited statewide includes tracer, armor-piercing, or full-jacketed ammunition designed for military use. A.A.C. R12-4-303(A)(2). The State Commission also prohibits statewide the use or possession of lead shot for taking waterfowl. A.A.C. R12-4-304(B)(3)(e). The rules of the State Commission allow any individual, organization or agency to petition the Commission to make, amend or repeal any of its rules, including the manner and methods of taking game. A.A.C. R12-4-601.

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II. FACTUAL BACKGROUND[2]

The Forest Service administers the lands and resources in the National Forest System. Doc. 1, Compl. ¶¶ 21-22. The Complaint focuses on the Kaibab National Forest ("Kaibab") and alleges that an imminent and substantial endangerment to the environment exists there. *See* Compl. ¶ 33 & at 15. The Kaibab is a popular destination for hunting deer and elk. *Id.* ¶ 33. Plaintiffs allege that wildlife species are exposed to spent lead ammunition that is used and subsequently disposed of by hunters in the Kaibab. *Id.* ¶ 35. Specifically, Plaintiffs allege that wildlife species are exposed to spent lead ammunition in the Kaibab in two ways: 1) through animal carcasses shot with lead ammunition but not retrieved; and 2) through remains of animals that have been field-dressed, known as "gut piles." *Id.* ¶¶ 28-29.

Lead is a toxin that, when ingested by wildlife, can cause lead poisoning, which results in adverse health effects. *Id.* ¶¶ 23, 31. Plaintiffs allege that California condors suffer from lead poisoning by eating from gut piles and wildlife carcasses that are shot but not retrieved by hunters in Arizona. *Id.* ¶ 27-29, 35, 37. Plaintiffs contend that "[s]pent lead ammunition has been and continues to be the primary source of the condors' lead exposure in Arizona," *id.* ¶ 39, and that the "condor population's blood lead levels peak during the fall deer hunting season" in the Kaibab. *Id.* ¶ 42.

Specifically with respect to the Service, Plaintiffs contend that the agency "manages the Kaibab National Forest in northern Arizona." *Id.* ¶ 33. Further, Plaintiffs allege that the Service issues special use permits to hunting outfitters and guides, who take clients hunting in the Kaibab. *Id.* ¶ 34. Plaintiffs contend that the Service "does not prohibit or restrict the use of lead ammunition within" the Kaibab through its special use permits. *Id.* Finally, Plaintiffs note that the "Arizona Game and Fish Department hunting

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[2] The facts stated herein are taken from Plaintiffs' Complaint and are assumed to be true only for purposes of this motion.

regulations do not prohibit or restrict the use of lead ammunition for hunting within the Kaibab National Forest." *Id.*

III. CALIFORNIA CONDOR RECOVERY EFFORTS IN THE SOUTHWEST

In 1996, the United States Fish and Wildlife Service reintroduced California condors to northern Arizona, southern Utah and southeastern Nevada as a non-essential experimental population under Section 10(j) of the Endangered Species Act. 61 Fed. Reg. 54,044, 54,049 (Oct. 16, 1996).[3] *See also* Ariz. Mot. to Interv., Doc. 22, Ex. B, 1 (A REVIEW OF THE THIRD FIVE YEARS OF THE CALIFORNIA CONDOR REINTRODUCTION PROGRAM IN THE SOUTHWEST (2007-2011), (MAY 2012) [hereinafter THIRD FIVE YEARS REVIEW]) (cited in Compl. ¶¶ 38-40, 42). The Fish and Wildlife Service acknowledged, in reintroducing the California condors, that lead exposure was a "potential management issue for the Southwest condor reintroduction program." THIRD FIVE YEARS REVIEW at 11; 61 Fed. Reg. at 54,054/3-55/1.[4] The Fish and Wildlife Service further explained its intention not to request any "modifications or restrictions to the current hunting regulations" in the experimental population area, preferring instead to rely on a "hunter education program" and voluntary use of non-lead ammunition. 61 Fed. Reg. at 54,054/3-55/1.

Since 1996, the Forest Service has partnered with the Fish and Wildlife Service and other federal and state agencies in the Southwest Condor Working Group to help grow the California condor population in northern Arizona and southern Utah. *See, e.g.*, THIRD FIVE YEARS REVIEW at 1, 20. Although the potential threat posed by spent lead ammunition to condors has been known since the re-introduction program began, *see, e.g.*, 61 Fed. Reg. at 54,544/3-55/1, the Fish and Wildlife Service and the Working Group

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[3] *See* 61 Fed. Reg. at 54,044 (explaining Section 10(j) of the Endangered Species Act and non-essential experimental populations).

[4] Citations to /# refer to the column of the Federal Register notice.

have not recommended banning the use of lead ammunition by hunters in the southwest. *See id.*; THIRD FIVE YEARS REVIEW at 37-39. Instead, the Working Group has supported the condor reintroduction efforts through, for example, monitoring and evaluation of the condor population, and education and outreach to hunters about the use of non-lead ammunition and other steps that could be taken to reduce wildlife exposure to spent lead ammunition in the condors' range, including the Kaibab. THIRD FIVE YEARS REVIEW at 19-21, 38-39, 81-85.

IV. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the complaint. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). A claim may be dismissed under Rule 12(b)(6) either because it asserts a legal theory that is not cognizable as a matter of law or because it fails to allege sufficient facts to support a cognizable legal claim. *See Kjellvander v. Citicorp*, 156 F.R.D. 138, 141 (S.D. Tex. 1994). In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court clarified the specificity in pleading required by Rule 8 to survive a motion to dismiss. The Court stated that a plaintiff's obligation to set forth the "grounds" of its entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citations omitted). The Court added that "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), citing *Twombly*, 550 U.S. at 555. In *Iqbal*, the Supreme Court stated that a claim must have facial plausibility, which "asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* at 678 (internal quotation marks, brackets and citations omitted).

Further, federal courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). "[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). Under Rule 12(b)(6), "[d]ismissal is proper where there is either a lack of a cognizable legal theory or the *absence of sufficient facts* alleged under a cognizable legal claim." *Hinds*, 654 F.3d at 850 (citing *Johnson v. Riverside Health Care Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008)) (emphasis added).

V. ARGUMENT

Plaintiffs bear the burden of alleging facts sufficient to state a claim upon which relief can be granted. As discussed in detail below, Plaintiffs have not done so here.

A. The Ninth Circuit Established in *Hinds* the Test for a Motion to Dismiss for Failure to State a Claim that a Defendant is a RCRA "Contributor."

To state a claim under RCRA section 7002(a)(1)(B), Plaintiffs must plead sufficient facts to allege that the Service: 1) "has contributed or [ ] is contributing to," 2) "the past or present handling, storage, treatment, transportation, or disposal," 3) "of any solid or hazardous waste," 4) "which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). The United States in this motion addresses only the first "contributor" element, but does not concede any other element.

The Ninth Circuit in *Hinds* considered as a matter of first impression the meaning of "has contributed or [ ] is contributing to" in reviewing an appeal of the district court's dismissal of a section 7002(a)(1)(B) claim. 654 F.3d at 850. The court found that liability under section 7002(a)(1)(B) did not extend to defendants who manufactured dry-cleaning machines, and were alleged to have designed the machines to cause contaminated wastewater to flow into drains and the sewer system, and further to have instructed users to dispose of contaminated wastewater in that manner. *Id.* at 848-49. The court held that to state a claim under section 7002(a)(1)(B), plaintiffs must allege that the defendant 1)

"had a measure of control over the waste at the time of its disposal," or 2) "was otherwise actively involved in the waste disposal process." *Id.* at 852.

The court concluded that the defendant manufacturers did not meet either prong, explaining: "a plaintiff must allege that the defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process. Mere design of equipment that generated waste, which was then improperly discard by others, is not sufficient." *Id.* at 852.[5] In so doing, the court rejected the argument that liability may attach to a defendant who "assist[s] in creating waste but do[es] not actually generate or produce it." *Id.* at 850. The court "decline[d] to give such an expansive reading to the term 'contribute'." *Id.* at 851.

We discuss below the *Hinds* court's development of each prong of this test and then apply the test to the facts alleged by the Plaintiffs. Because Plaintiffs' allegations fall, at best, within the much broader scope of "contribute" rejected by the Ninth Circuit, the Complaint should be dismissed for failure to plead sufficient facts to state a claim that the Service has contributed or is contributing to the disposal of lead ammunition.

1. Measure of control

The court developed the first prong of the contributor test—"measure of control"—through its discussion of three cases "that have not explicitly held that RCRA liability requires active involvement by defendants [but] have nonetheless suggested that substantial affirmative action is required and have permitted RCRA claims to survive

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[5] In assessing whether the relationship between the manufacturer of the dry-cleaning machine and the disposed waste was sufficient to satisfy the contributor test, the *Hinds* court noted that:

> Designing machinery that has a purpose helpful to society, like the dry cleaning of clothes, even when that machinery may produce waste as a byproduct, does not render the manufacturer a contributor to waste disposal. 'Contributing' requires a more active role with a more direct connection to the waste . . . .

Id. at 851.

only with some allegation of defendants' continuing control over waste disposal." *Id.* at 851, discussing *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989); *Marathon Oil Co. v. Texas City Terminal Ry. Co.*, 164 F. Supp. 2d 914 (S.D. Tex. 2001); and *United States v. Valentine*, 885 F. Supp. 1506 (D. Wyo. 1995). A close examination of *Aceto*, *Marathon Oil*, and *Valentine* suggest what is necessary in the Ninth Circuit for a relationship between a party and the act of disposal to satisfy the contributor test.

In *Aceto*, the United States and the State of Iowa brought claims under RCRA section 7003[6] against companies alleged to have contributed to the handling, storage or disposal of hazardous or solid waste by virtue of their contracts with a defunct business (Aidex) to manufacture pesticides. 872 F.2d at 1375-76, 1378. The district court granted defendants' motion to dismiss the section 7003 claims on the grounds that the complaint did not establish contributor liability. *Id.* at 1383. On interlocutory appeal, the Eighth Circuit reversed, holding that the complaint alleged "sufficient facts from which a trier of fact could infer defendants 'contributed to' Aidex's disposal of wastes." *Id.* The Court cited to allegations that the defendants contracted with Aidex to manufacture the pesticides, "retained ownership of the pesticide throughout 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

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[6] Plaintiffs in *Aceto* also pled claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and the allegations in the complaint related to both the CERCLA and RCRA claims. *See Aceto*, 872 F.2d at 1382, 1384. Section 7003 of RCRA, which authorizes the Administrator of EPA to bring suit, has a similar standard of liability as RCRA section 7002(a)(1)(B), which authorizes citizens to bring suit. *Compare* 42 U.S.C. § 6973(a) *with* 42 U.S.C. § 6972(a)(1)(B) (both establishing liability for any person who has "contributed or who is contributing" . . .).

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 section 7002 claims. 164 F. Supp. 2d at 921. The court found that plaintiffs had adequately alleged contributor liability, based on allegations that 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 that BNSF controlled the practices at the tank car rack. *Id.* at 916, 920. As the *Hinds* court described it, the RCRA claims could proceed in *Marathon Oil* because the plaintiffs had alleged that BNSF by "virtue of [its] control over the practices that caused the contamination" had played a role in the contamination of the site. *Hinds*, 654 F.3d at 852.

In *Valentine*, the court ruled on summary judgment that defendant Jim's Water Service was liable under RCRA section 7003. 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 waste 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.

The defendants in each of these three cases had an obvious measure of control over the disposed waste. The *Aceto* defendants dictated every step of the manufacturing of its pesticides through their contracts with Aidex, and maintained ownership throughout the process. BNSF actively controlled the practices at the loading and unloading of its tank cars which resulted in the disposal. Jim's Water Service possessed, contracted for disposal of, and transported hazardous materials to the facility where they were disposed. Further, as noted by the *Hinds* court, each case involved alleged or undisputed facts that the defendants' substantial affirmative actions resulted in "continuing control over waste disposal." *Hinds*, 654 F.3d at 851.

2. Active involvement

As it did in developing the measure of control prong of the contributor test, the *Hinds* court looked primarily at two cases outside the Ninth Circuit to develop the "active

involvement" prong of its test: *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847 (7th Cir. 2008), and *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 844 (D.N.J. 2003) (holding that active human involvement with the waste is required, and noting legislative history in support), *aff'd*, 399 F.3d 248 (3d Cir. 2005). In *Sycamore*, the defendant left an old heating system that was insulated with asbestos-containing material in place when it sold industrial property to the plaintiffs. 546 F.3d at 848. The Seventh Circuit held that the defendant's "passive conduct–such as leaving a heating system in place when selling the real estate that houses it" was not a sufficient basis for contributor liability under section 7002(a)(1)(B). *Id.* at 854.

B. The Complaint Fails the *Hinds* Test and Must be Dismissed for Failure to State a Claim that the Service is a RCRA "Contributor" to the Disposal of Lead Ammunition Waste.

Plaintiffs in their Complaint have not made sufficient allegations to state a claim that the Service is a contributor under RCRA section 7002(a)(1)(B). Applying the *Hinds* test, the Service's management of the Kaibab as alleged does not provide the Service a legally sufficient "measure of control" over lead waste disposal for RCRA liability. Similarly, the Service's issuance of special use permits as alleged in the Complaint does not make the Service "actively involved" in the disposal of lead ammunition.

1. The Complaint does not establish that the Service has a requisite measure of control over disposal of lead waste in the Kaibab.

The Complaint fails to establish that the Service has the requisite measure of control over the disposal[7] of spent lead ammunition in the Kaibab sufficient to satisfy the *Hinds* test. In the entirety of the "Facts" section of their Complaint, ¶¶ 25-42, Plaintiffs make only one assertion regarding the Service's measure of control: that the agency

[7] We focus here on "disposal" because Plaintiffs have not alleged that the Service has contributed or is contributing to "the past or present handling, storage, treatment" or "transportation" of lead ammunition.

manages the Kaibab. *See* Compl. ¶ 33. Only in Paragraph 23 do they identify specific authority that they allege gives the Service control over the disposal of spent lead ammunition by individual hunters. The authorities Plaintiffs cite are 36 C.F.R. § 261.70(a)(4) and 36 C.F.R. § 261.50(a). Compl. ¶ 23. The former provides that the Service "may issue regulations prohibiting acts or omissions" for protection of threatened or endangered species, and requires that such regulations be promulgated pursuant to the Administrative Procedure Act. *Id.* §§ 261.70(a)(4), (c). The latter, section 261.50(a), provides that certain Service officials:

> may issue orders which close or restrict the use of described areas within the area over which he has jurisdiction. An order may close an area to entry or may restrict the use of an area by applying any or all of the prohibitions authorized in this subpart or any portion thereof.

36 C.F.R. § 261.50(a); *see also* Subpart B, §§ 261.50-.58 (enumerated prohibitions); Compl. ¶ 23 (alleging that section 261.50(a) gives "each Forest Supervisor . . . the authority to restrict the manner in which the public uses" the lands in their jurisdiction).

Management of the Kaibab and the cited Service regulations are insufficient to satisfy the measure of control prong here for several reasons. First, as Congress intended, Arizona—not the Service—regulates hunting and specifies allowable types of ammunition for hunting in the Kaibab. *See supra* at 2-5. Second, the individual hunter independently chooses whether to use lead or non-lead ammunition, and whether to take steps to prevent disposal of spent lead in a manner that could impact wildlife (such as through removal of the shot carcass or burial of gut piles).

Third, even if Plaintiffs correctly allege that sections 261.70(a)(4) and 261.50(a) provide the Service the ability to control the hunters' disposal of lead ammunition in the Kaibab, the mere existence of those authorities falls far short of the *Hinds* court's threshold for measure of control necessary to state a claim under RCRA against the Service, particularly given that the Service's exercise of those authorities would involve significant legal process, opportunities for public participation, and a lengthy series of steps by the Service. Specifically, under section 261.70(a)(4), the Service would have to:

A) act contrary to established federal policy deferring regulation of hunting on federal lands to States; B) consult with the State Commission; C) issue a proposed rule; D) take public comment on the rule; and E) promulgate a final rule, which would be reviewable in federal court. 43 U.S.C. § 1732(b); 5 U.S.C. §§ 553, 706; 36 C.F.R. § 261.70(a)(4), (c).

The use of section 261.50(a) to issue a long-term restriction or prohibition on the use of lead projectiles on the Kaibab would also require steps A and B above, and further, the Service would have to comply with procedural laws such as the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4371-74, its implementing regulations, 40 C.F.R. Part 1500, and the Service's NEPA implementation regulations at 36 C.F.R. § 220.1-.7, and comply with section 7 of the Endangered Species Act, 16 U.S.C § 1536, and its implementing regulations at 50 C.F.R. Part 402, Subpart B. These laws require the Service to evaluate the potential impacts to the environment generally, to wildlife, to public safety, and to National Forest System resources before ordering a long-term restriction or ban of lead projectiles. For example, there may be effects from the alternatives to lead projectiles that would be used that present equal or greater concerns than those associated with the use of lead. And the exercise of this authority would also be subject to judicial review under the Administrative Procedure Act. *See* 5 U.S.C. § 706.

These regulatory processes demonstrate that these sources of unexercised regulatory authority are nothing like the measure of control over waste disposal wielded by the companies in *Aceto*, *Marathon Oil*, and *Valentine*. The nature of the Service's alleged "continuing control over waste disposal" and thus "contribution" is too far removed from what the Ninth Circuit held in *Hinds* to be necessary to state a claim under RCRA. Indeed, the Service here has a more remote connection to the alleged waste disposal than the equipment manufacturers in *Hinds*. While the manufacturers in *Hinds* did not control how businesses that purchased their equipment disposed of waste produced by the dry cleaning machines and thus were not RCRA "contributors," they did provide both the polluting machines and instructions to the purchasers on how to dispose of the contaminated waste water. *Hinds*, 654 F.3d at 849, 852. Here the Service is not

manufacturing lead-based ammunition or permitting hunting. The Service does not authorize or control hunters' choice of ammunition when hunting on the Kaibab; rather, consistent with Congress' direction, the Service defers to Arizona, and the State Commission establishes allowable types of ammunition. And the hunters themselves control any actual disposal. The Ninth Circuit rejected the "expansive" definition of "contribution" proffered in *Hinds*. Plaintiffs' theory that unexercised federal regulatory authority, wholly dissimilar to the authority exercised in the cases examined in *Hinds*, should cause the Service to be deemed a RCRA "contributor" relies on just such an "expansive" definition that the Ninth Circuit declined to adopt.

2. The Service is not actively engaged in the disposal of spent lead in the Kaibab.

In the "Facts" section of their complaint, ¶¶ 25-42, Plaintiffs make only one allegation of the Service being actively involved in the disposal of lead ammunition: that the Service does not prohibit or restrict the use of lead ammunition through special use permits issued to outfitters and guides in the Kaibab. Compl. ¶ 34. This is not sufficient to state a claim under the "active involvement" prong of the *Hinds* test.

Special use permits are required in order to engage in commercial activities on the Kaibab. 36 C.F.R. §§ 251.50, 251.51 (requiring special use authorization for commercial uses and activities on National Forest System lands and defining "commercial use or activity"); *see supra* at 4-5. Special use permits are not required to hunt in the Kaibab. 36 C.F.R. § 251.50(c). Indeed, consistent with federal law and policy, no Service permit is required to hunt in the Kaibab, and the Service defers regulation of hunting to the State. *See supra* at 2-4 (discussing federal statutes explicitly preserving the traditional role of States in the management of hunting on National Forest System lands); *see also Ctr. for Biological Diversity*, 2011 WL 4551175 at *10 ("under FLPMA, the management of hunting on public lands is reserved to the states."). Rather, as Congress intended, the Service defers to Arizona, and hunters are subject to the State Commission's regulation and management of hunting, including any state permit or tag requirements. *Supra* at 4-5.

Outfitters and guides must obtain special use permits in order to lead paying clients on trips on National Forest System lands (including the Kaibab). The issuance of special use permits to such outfitters and guides does not translate into the Service being actively involved with the disposal of lead ammunition. By alleging only that the Service does *not* condition special use permits on permittees not allowing their clients to use lead ammunition, Plaintiffs' Complaint relies entirely on allegations of unexercised regulatory authority. Plaintiffs do not allege that special use permits specifically authorize the disposal of lead ammunition, because they cannot. Indeed, similar to the manufacturer defendants in *Hinds*, the Service does not play an "active role with a [ ] direct connection" to the disposal of spent lead waste in the Kaibab. *Hinds*, 654 F.3d at 851.

V. CONCLUSION

Since the reintroduction of the California condor to the wild, the Service has been an active partner in reducing condors' exposure to spent lead ammunition. The Service, Plaintiffs allege, is liable under RCRA for an alleged imminent and substantial endangerment because it has not exercised certain regulatory authorities as to the disposal of lead ammunition on the Kaibab. However, the Complaint fails to allege facts sufficient to state a claim that the Service, through the existence of its unexercised regulatory authority, has a measure of control over the disposal of lead ammunition by hunters in the Kaibab or is actively involved in the disposal of spent lead ammunition in the Kaibab, sufficient to be contributing to an imminent and substantial endangerment. As such, the Court should grant this motion to dismiss.

Respectfully submitted,

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Dated: August 12, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2016, 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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