JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division
DUSTIN J. MAGHAMFAR
California State Bar No. 274414
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
Tel: (202) 514-1806
Fax: (202) 514-8865
dustin.maghamfar@usdoj.gov

Attorneys for Defendant
United States Forest Service

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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

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 files this reply in support of its motion to dismiss (Dkt. No. 123, "USFS Mot.") all claims against the Service in this matter. 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). Because the Complaint falls "short of the line

between possibility and plausibility of entitlement to relief," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), dismissal is required.

I. ARGUMENT[1]

The Complaint identifies two sources of *unexercised Federal regulatory authority* that Plaintiffs allege could be used to regulate the disposal of spent lead ammunition on the Kaibab National Forest ("Kaibab"). The question presented by the Service's Rule 12(b)(6) motion to dismiss is whether the identification of those regulatory provisions is sufficient to state a claim that the Service is liable for "contributing" to the disposal of solid or hazardous waste that may present an alleged imminent and substantial endangerment (hereinafter "contributor liability"). Because Plaintiffs' allegations fail to satisfy either the "measure of control" or "active involvement" tests set forth by the Ninth Circuit in *Hinds Inv., LP v. Angioli*, 654 F.3d 846 (9th Cir. 2011), the motion to dismiss for failure to state a claim should be granted.

In their Opposition (Dkt. No. 130), Plaintiffs attempt to reframe the issues presented in the Service's motion to dismiss by contending that the Service is a "landowner" and therefore *ipso facto* liable under RCRA section 7002[2] (*see* Opp. at 7, conceding theory of liability is based on landowner liability). At the outset, a fatal flaw in Plaintiffs' theory is that the Service does not "own" the Kaibab in the same manner as someone owns private land. The United States as sovereign—not the Service as an executive agency—owns the land that constitutes the Kaibab. *See* 16 U.S.C. § 1609(a). Plaintiffs' discussion of Constitutional and statutory authority, as well as all of their cited authorities (Opp. at 8), describe *Congress'* control over federal land. The Service has been delegated certain authority by Congress to administer the Kaibab, and that authority is dictated by federal statutes. *See, e.g.*, USFS Mot. at 2-4. Congress has not authorized

---

[1] The United States addresses only arguments raised in its motion to dismiss, but would provide briefing on issues raised by the intervenors' motions upon the Court's request.

[2] References to "RCRA section 7002" herein are to 42 U.S.C. § 6972(a)(1)(B).

the Service to exercise all of the traditional rights that come with private property ownership, *i.e.*, the so-called "bundle of sticks" of property rights. For example, the Service cannot simply decide to sell the Kaibab or develop it into housing. As such, the Service is not a "landowner" in the sense required by Plaintiffs' theory.

Critically, even if the Service could be considered the "owner" of the Kaibab, Plaintiffs' theory fails because landowner status does not automatically result in contributor liability. Rather, RCRA section 7002 requires *contribution* to the disposal of spent lead ammunition, and the Complaint fails to state a claim that the Service is contributing to the disposal of spent lead ammunition under either of the *Hinds* tests.

A. Plaintiffs' "Landowner" Theory of Contributor Liability Fails to Satisfy the "Measure of Control" Test Established by *Hinds*.

Plaintiffs fail in their attempt to fit the alleged facts here within the "measure of control" test. The limited allegations in the Complaint do not establish that the Service is at all akin to the private land or facility owner defendants in the cases considered by the Ninth Circuit in developing the "measure of control" test.[3] USFS Mot. at 14-16. 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.* § 529 (requiring the Service to consider "multiple use and sustained yield" of national forest resources); *id.* § 531(a) (defining "multiple use").

Consistent with these Congressional directives, the Service defers to the State of Arizona in the regulation of hunting. In order to regulate hunting in the Kaibab, the

---

[3] *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) ("*Aceto*"); *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).

Service would have to depart from its policy of cooperating with state wildlife management and preempt Arizona's regulatory authority; act within the confines of the authority delegated to it by Congress; follow all applicable procedures (*e.g.*, the National Environmental Policy Act ("NEPA"));[4] and otherwise balance various 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*. The nature of the Service's alleged "continuing control over waste disposal" is too far removed from what the Ninth Circuit held in *Hinds* to be necessary to state a claim under RCRA.

While Plaintiffs attempt to downplay the relevance of *Aceto*, *Marathon Oil* and *Valentine* (Opp. at 12-14), the Ninth Circuit's "measure of control" test can only be understood by considering the *Hinds* court's discussion of those cases. As Plaintiffs acknowledge, Opp. at 12-13, the Ninth Circuit described these cases as "suggest[ing] that substantial affirmative action is required" and requiring "some allegation of defendants' continuing control over waste disposal." *Hinds*, 654 F.3d at 851. Plaintiffs' allegations that the Service owns and manages the Kaibab and has authority to regulate it pale in comparison to the detailed factual allegations that led the courts in *Aceto* and *Marathon Oil* to conclude that the complaints stated claims for contributor liability, and the court in *Valentine* to find the defendant Jim's Water Service liable as a contributor under RCRA section 7003.

Plaintiffs argue that *Aceto* supports them, but that case involved defendants who *contracted* with a business to manufacture pesticides, and the Eighth Circuit's decision was driven by the defendants' ongoing ownership of the pesticides, supply of the

---

[4] *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 decisionmaking process").

specifications for manufacturing, and the inherent waste generation involved. 872 F.2d at 1375-76, 1378, 1384. *Aceto* would perhaps help Plaintiffs here if the Service owned the lead ammunition at the time of its disposal, but there are no such allegations in the Complaint. *Hinds* noted that *Aceto*, as well as *Marathon Oil* and *Valentine*, involved alleged or undisputed facts that the substantial affirmative action of the defendants in each case 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.[5]

Ultimately, *Hinds* explicitly rejected the argument that contributor liability may attach to a defendant who "assist[s] in creating waste but do[es] not actually generate or produce it." 654 F.3d at 850. Plaintiffs here do not allege that the Service generates or produces the spent lead ammunition waste; at best, their argument is that the Service should be found liable because not exercising the federal regulatory authorities identified in the Complaint "assists in creating waste." *Id.* Plaintiffs thus ask this Court to adopt precisely the expansive reading of "contribute" that the Ninth Circuit rejected in *Hinds*.[6] Such an expansive theory could, among other things, subject regulatory agencies at multiple levels of government to increased numbers of unwarranted RCRA "contributor" claims (in lieu of or in addition to more traditional avenues of redress) whenever an agency does not exercise its regulatory authority and an imminent and substantial endangerment is alleged to exist.[7]

---

[5] *Cox v. City of Dallas*, 256 F.3d 281 (5th Cir. 2011) is plainly inapposite. *See* Opp. at 10. The City of Dallas generated waste and contracted for its disposal. 256 F.3d at 286, 296-97. No similar facts are alleged here.

[6] Plaintiffs' attempts to rely on this Court's earlier decision regarding the causation prong of Article III standing are unavailing. As the Ninth Circuit recognized, causation and contributor liability are different questions, and the latter is for this Court to determine in the first instance. *See Ctr. for Biological Diversity v. USFS*, 640 Fed. Appx. 617, 619 (9th Cir. 2016).

[7] The district court in *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1273-75 (E.D. Cal. 1997), rejected just such an expansive theory in the context of the

Footnote continued…

1. Plaintiffs' Cited Case Law Does Not Support Their Novel Interpretation of RCRA Contributor Liability.

The three primary cases cited by Plaintiffs regarding their landowner theory of liability (Opp. at 7-8) do not support their argument that federal ownership of land *ipso facto* results in contributor liability under RCRA section 7002. In *Conn. Coastal Fisherman's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1308 (2d Cir. 1993) and *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1211 (D. Or. 2009), the defendants were not only the owners but also the active operators of private shooting ranges. Neither case involved government entities. Moreover, *Douglas Ridge* did not involve contributor liability or allegations of an imminent and substantial endangerment; rather, plaintiffs pled under RCRA section 7002(a)(1)(A) that the operator was in violation of RCRA for "allow[ing] lead waste to accumulate on its property without a permit to do so." 673 F. Supp. 2d at 1221. Plaintiffs here have not pled such a claim against the Service, and *Douglas Ridge* is irrelevant.

The third case relied upon by Plaintiffs (Opp. at 7-8)—*Potomac Riverkeeper v. National Capital Skeet and Trap Club*, 388 F. Supp. 2d 582 (D. Md. 2005)—similarly does not support their theory. There, a private organization owned and operated a skeet and trap range on lands owned by a state agency. *Id.* at 584. Plaintiffs brought claims under both RCRA sections 7002(a)(1)(A) and (B). *See id.* at 586-89. The cited decision contains no analysis of contributor liability or the relevance of state ownership of the

---

third party defense (42 U.S.C. § 9607(b)(3)) in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The court held that "the United States' failure to regulate mining as to prevent environmental contamination" was not the proximate or legal cause of the release of hazardous substances from lands owned by the United States and mined by third parties. *Id.* at 1275. The court explained that the failure to regulate or legislate could not "be the threshold for legal or proximate cause, [because] [i]f it were, the United States would be one of the 'causes' of contamination in every CERCLA action because the federal government always could have enacted legislation regulating industrial activity." *Id.* So too here, the Court should reject Plaintiffs' theory that the Service bears contributor liability solely because it has not exercised the two regulatory authorities identified in the Complaint.

land. *See id.* The court denied cross-motions for summary judgment because there was a genuine dispute of material fact as to whether an imminent and substantial endangerment existed. *Id.* at 589. The court's denial of the range operator's motion to dismiss the RCRA section 7002(a)(1)(A) claim similarly did not address ownership of the land. *Id.* at 587 & n.7.

Plaintiffs also rely (Opp. at 14) on *United States v. Price*, 523 F. Supp. 1055, 1073 (D.N.J. 1981), which was repudiated by a later decision of the same court. The *Price* decision,[8] issued five years after RCRA was enacted, embraced a "passive indifference" theory of RCRA liability with respect to private property owners who were aware of the property's prior use as a landfill but failed to fulfill their duty to conduct due diligence into the environmental condition of the property and took no action to address hazardous conditions after learning of the conditions subsequent to acquiring the property. *Id.* at 1073. Twenty years later, a decision of the same district court, cited in *Hinds—Interfaith Community Org. v. Honeywell Int'l., Inc.*, 263 F. Supp. 2d 796 (D.N.J. 2003)—expressly repudiated the *Price* theory of liability.

Specifically, the court in *Honeywell* concluded that "the plain language of RCRA makes clear that liability should only be imposed on those who actively manage or dispose solid or hazardous waste" and held that there was "no basis for imposing liability on the present owners" of the site at issue, whom the court found were "innocent purchasers when they obtained the property." *Id.* at 831. The *Honeywell* court had in fact earlier concluded in the case that one of the current owners *could* be held liable under RCRA section 7002(a)(1)(B) "based solely on its alleged 'passive indifference' as a property owner." *Id.* at 844 n.7. The court later reversed itself, concluding that its earlier ruling was "not in accordance with the plain language of RCRA, controlling Third Circuit precedent, and all other post-*Price* federal court decisions that have addressed the

---

[8] Affirmed on other grounds not relevant here in *United States v. Price*, 688 F.2d 204 (3d Cir. 1982).

liability of land owners under RCRA." *Id.*; *see also id.* at 844-45. *Price* therefore provides no support to Plaintiffs' theory that land ownership *ipso facto* results in RCRA section 7002 liability.

Next, Plaintiffs are wrong in suggesting (Opp. at 14-15) that decisions finding landowners liable under CERCLA as "owners" solely by virtue of their land ownership are relevant here. CERCLA on its face expressly identifies past or current owners among classes of potentially responsible parties. *See* 42 U.S.C. § 9607(a)(1). In contrast, the basis for liability under RCRA section 7002 is that a person "has contributed or [] is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . ." RCRA section 7002 plainly establishes elements of liability that are not present in CERCLA, and Plaintiffs' attempt to equate RCRA contributor liability with CERCLA "owner" liability fails.

Plaintiffs also cite (Opp. at 11 n.6) two cases that they contend "discuss government liability in terms of its ability to control waste disposal practices." Neither supports Plaintiffs.

In *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), plaintiffs sought under RCRA section 7002 to enjoin the Corps from dredging a canal, alleging that the dredging would stir up contaminated sediment. *Id.* at *1-2. One basis for the Corps' alleged contributor liability was that it maintained and had custody over the canal. *Id.* at *5. The Corps moved to dismiss this claim on the grounds 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 because it identified extensive factual allegations in the complaint sufficient to satisfy Rule 8. *Id.* For example, plaintiffs alleged that the Corps "currently owns, operates, controls, and maintains a site already contaminated with toxins and metals," that the Corps "is directing and organizing the Project," that the

dredging would release contaminants, and that the "RCRA claim rests on the management of and plan to dredge the [canal]." *Id.* at *8.

There are significant differences between the key allegations in *Holy Cross* and the allegations here. There the Corps controlled the waste disposal practices *resulting from its own dredging*; here the Service is not disposing of lead ammunition. There the Corps was "directing and organizing" the dredging project, *id.* at *8, and the Corps' dredging—not the activities of third parties—would cause the endangerment; here the Service has no direct role in the handling of lead ammunition.

Plaintiffs' reliance on *Foster v. United States*, 922 F. Supp. 642 (D.D.C. 1996) is equally unavailing. The portion of that decision that Plaintiffs cite involved CERCLA, not RCRA contributor liability. *Id.* at 658-60. *Foster* is thus irrelevant here.

Finally, Plaintiffs rely (Opp. at 5-6, 14-15) on guidance issued by EPA addressing section 7003 of RCRA. While Plaintiffs are correct that RCRA sections 7002 and 7003 are similar, the guidance did not address the issue here: whether unexercised Federal regulatory authority gives rise to RCRA contributor liability. Nor do the examples in the guidance relied upon by Plaintiffs involve sovereign ownership or management by a federal agency. Accordingly, the guidance does not address the relevant question here.[9]

B. Plaintiffs Offered No Meaningful Response to the Service's Argument that the Complaint Fails to Satisfy the "Active Involvement" Test.

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 effectively concede as much by relegating their response on this issue to a footnote. Opp. at 7 n.3. Plaintiffs did not respond at all to the Service's arguments that the issuance of special use permits does not establish contributor liability. *See* Mot. at 16-17. Contrary to Plaintiffs'

---

[9] Plaintiffs' assertion that the Service's positions here are inconsistent with EPA's positions taken elsewhere is meritless. The Department of Justice represents the United States government as a unitary entity, which means that the legal standards articulated in the briefs represent the views of the United States as a whole.

conclusory statement, even if the Court accepts paragraph 34 of the Complaint as true for purposes of the motion to dismiss, it is insufficient to support an "active involvement" theory of contributor liability. In 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. These allegations do not amount to active involvement by the Service with spent lead ammunition. 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 ("'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"). 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.

C. Plaintiffs Have Numerous Alternative Avenues for Recourse.

Plaintiffs' hyperbolic prediction that citizens will be left without recourse if the Court dismisses the Complaint (*see* Opp. at 16) is divorced from reality and belied by Plaintiffs' own advocacy history regarding lead ammunition.

These same Plaintiffs challenged the Service's most recent revision to the Kaibab Forest Land Management Plan because it did not include a ban on the use of lead ammunition. Plaintiffs appealed that decision administratively within the Service, and the appeal was denied. The final administrative decision is subject to judicial review. Moreover, in this Court, Plaintiff Center for Biological Diversity ("the Center") unsuccessfully challenged the Bureau of Land Management's Resource Management Plans for public lands near the Kaibab. Specifically, the Center argued that the agency violated NEPA by not evaluating the impact of hunting with lead ammunition on condors. *Ctr. for Biological Diversity v. United States Bureau of Land Mgmt.*, No. 09-cv-8011, 2011 WL 4551175 (D. Ariz. Sept. 30, 2011). The Center, among many others, has also twice petitioned EPA to regulate spent lead ammunition under the Toxic Substances

Control Act. EPA's denial of both of those petitions was unsuccessfully challenged by the Center and others in district court. On appeal of one of those decisions, the D.C. Circuit held that EPA lacks the authority to regulate lead ammunition under the Toxic Substances Control Act. *Trumpeter Swan Society v. EPA*, 774 F.3d 1037 (D.C. Cir. 2014).

Plaintiffs have other potential options. They could petition the Arizona Game and Fish Commission to restrict or ban the use of lead ammunition. *See* USFS Mot. at 5 (citing A.A.C. R12-4-601). They could also pursue legal action against the Commission.

Thus, Plaintiffs have multiple avenues of redress. Their lack of success in those forums is not a reason for this Court to endorse Plaintiffs' unprecedented theory under RCRA.

II. CONCLUSION

The Ninth Circuit in *Hinds* rejected an expansive interpretation of what it means to be a "contributor" under RCRA section 7002. Plaintiffs' theory of contributor liability—which has no precedent to support it—cannot stand without such an expansive interpretation. For the reasons discussed in our opening brief and here, the Court should dismiss the Complaint with prejudice.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

Dated: October 14, 2016

/s/ Dustin J. Maghamfar
DUSTIN J. MAGHAMFAR
United States Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044

Tel: (202) 514-1806
Fax: (202) 514-8865
dustin.maghamfar@usdoj.gov

Attorneys for Defendant
United States Forest Service

OF COUNSEL:

GARY FREMERMAN
Natural Resources and Environment Division
United States Department of Agriculture
Office of the General Counsel
1400 Independence Avenue, SW
Room 2013-S
Washington, DC 20250
Tel: (202) 720-8041
Fax: (202) 720-0973
Gary.Fremerman@ogc.usda.gov

DAWN DICKMAN
United States Department of Agriculture
Office of the General Counsel
P.O. Box 586
Albuquerque, NM 87103-0586
Tel: (505) 248-6020
Fax: (505) 248-6013
Dawn.Dickman@ogc.usda.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 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:

Attorneys for Plaintiffs:

Allison LaPlante
Kevin M. Cassidy
Earthrise Law Center
laplante@lclark.edu
cassidy@lclark.edu

Adam Keats
Center for Biological Diversity
akeats@biologicaldiversity.org

Attorney for the State of Arizona:

James Odenkirk
Office of the Arizona Attorney General
james.odenkirk@azag.gov

Attorneys for NRA/SCI:

C.D. Michel
W. Lee Smith
Scott M. Franklin
Michel & Associates, PC
cmichel@michelandassociates.com
sfranklin@michellawyers.com

Douglas S. Burdin
Anna M. Seidman
Safari Club International
dburdin@safariclub.org
aseidman@safariclub.org

Attorneys for NSSF:

Norman D. James
Rhett Billingsley
Fennemore Craig, P.C.
njames@fclaw.com
rbilling@fclaw.com

/s/ Dustin J. Maghamfar
DUSTIN J. MAGHAMFAR

Counsel for the Defendant
United States Forest Service