

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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

Plaintiffs,

v.

United States Forest Service,

Defendant.

No. CV-12-08176-PCT-SMM

ORDER

Pending before the Court is Defendant United States Forest Service’s Motion to Dismiss and Memorandum of Points and Authorities in Support. (Doc. 123.) Defendant moves to dismiss Plaintiffs’ suit for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6).

Also pending before the Court is Intervenor-Defendant National Shooting Sports Foundation’s Motion for Judgment on the Pleadings and Supporting Memorandum. (Doc. 124.) Intervenor-Defendant National Shooting Sports Foundation moves the Court for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c).

Finally, pending before the Court is Intervenor-Defendants National Rifle Association of America and Safari Club International’s Motion to Dismiss. (Doc. 125.) These Intervenor-Defendants move to dismiss Plaintiffs’ suit for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiffs filed one response to these motions (Doc. 132), to which Defendant and Intervenor-Defendants filed separate replies (Docs. 133, 134, 135). Thus, each pending

1 motion is fully briefed. The Court now issues the following rulings.

2 **I. BACKGROUND¹**

3 Plaintiffs Center for Biological Diversity, Sierra Club, and Grand Canyon
4 Wildlands Council (collectively, “Plaintiffs”) bring this suit against Defendant United
5 States Forest Service (“USFS” / “Defendant”) under the citizen’s suit provision of the
6 Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972 (a)(1)(B), “to
7 limit the disposal of a known toxin on public lands in northern Arizona and to protect
8 wildlife species threatened by exposure to spent lead ammunition in the foraging range
9 within [USFS] land in Arizona.” (Doc. 1 at ¶ 1.) Plaintiffs seek “judicial review, as well
10 as declaratory and/or injunctive relief, from this Court to stop the continued
11 endangerment to wildlife species occurring within the Kaibab National Forest, and to
12 prevent harm to the Plaintiffs and their members that has resulted and is resulting from
13 the ongoing endangerment.” (*Id.* at ¶ 4.) Plaintiffs state that “an actual, justiciable
14 controversy” exists between them and the Forest Service, and that their request for relief
15 is proper under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the
16 citizen’s suit provision of the RCRA, 42 U.S.C. § 6972(e). (*Id.* at ¶ 5.)

17 In an earlier proceeding, Defendant moved to dismiss for lack of Article III
18 standing pursuant to Fed. R. Civ. P. 12(b)(1), or alternatively, for failure to state a claim
19 pursuant to Fed. R. Civ. P. 12(b)(6). (Doc. 46.) This Court granted Defendant’s Fed. R.
20 Civ. P. 12(b)(1) motion (Doc. 81), and Plaintiffs appealed. The United States Court of
21 Appeals for the Ninth Circuit reversed, concluding that Plaintiffs had Article III standing.
22 (Doc. 86-1 at 2.) The Court of Appeals remanded to this Court the question of “whether
23 there is a valid cause of action sufficient to survive the Forest Service’s motion to dismiss
24 under Rule 12(b)(6).” (*Id.* at 5.) Defendant then renewed its motion to dismiss for failure
25 to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. 123) – the motion at bar.

26 The Court does not reach Defendant’s motion to dismiss for failure to state a claim

27
28 ¹ The Court will review only the relevant procedural background upon which Defendant’s motion is based. A more comprehensive background can be found in a previous Order. (Doc. 81 at 1-2.)

1 pursuant to Fed. R. Civ. P. 12(b)(6), or Intervenor-Defendants' motions, because the
2 Court cannot regard Plaintiffs' suit as other than a request for an advisory opinion, which
3 this Court is without power to render. See Henderson ex rel. Henderson v. Shinseki, 562
4 U.S. 428, 434 (2011) ("Courts do not usually raise claims or arguments on their own. But
5 federal courts have an independent obligation to ensure that they do not exceed the scope
6 of their jurisdiction, and therefore they must raise and decide jurisdictional questions that
7 the parties either overlook or elect not to press.").

8 **II. LEGAL STANDARD**

9 Article III, Section 2 of the United States Constitution limits the federal judicial
10 power to cases and controversies. U.S. Const. art III, §2; see also Flast v. Cohen, 392
11 U.S. 83, 94 (1968) ("The jurisdiction of federal courts is defined and limited by Article
12 III of the Constitution."); Preiser v. Newkirk, 422 U.S. 395, 401 (1975) ("The exercise of
13 judicial power under [Article] III of the Constitution depends on the existence of a case
14 or controversy."); Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 239
15 (1937) (noting that there is no meaningful distinction between the terms "cases" and
16 "controversies"). The Supreme Court in Flast explained the case and controversy
17 limitation as follows:

18 Embodied in the words 'cases' and 'controversies' are two complementary
19 but somewhat different limitations. In part those words limit the business of
20 federal courts to questions presented in an adversary context and in a form
21 historically viewed as capable of resolution through the judicial process.
22 And in part those words define the role assigned to the judiciary in a
tripartite allocation of power to assure that the federal courts will not
intrude into areas committed to the other branches of government.
Justiciability is the term of art employed to give expression to this dual
limitation placed upon federal courts by the case-and-controversy doctrine.

23 Flast, 392 U.S. at 95 (emphasis added). If a dispute is not a proper case or controversy,
24 "[the court has] no business deciding it, or expounding the law in the course of doing so."
25 DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006); see also Simon v. Eastern
26 Kentucky Welfare Rights Organization, 426 U.S. 26, 37 (1976) ("No principle is more
27 fundamental to the judiciary's proper role in our system of government than the
28 constitutional limitation of federal-court jurisdiction to actual cases or controversies.").

1 No justiciable controversy exists “when the parties seek adjudication of only a
2 political question, when the parties are asking for an advisory opinion, when the question
3 sought to be adjudicated has been mooted by subsequent developments, and when there is
4 no standing to maintain the action.”² Flast, 392 U.S. at 95. The Supreme Court has
5 emphasized that “the oldest and most consistent thread in federal law of justiciability” is
6 the prohibition against advisory opinions. Id. at 96 (internal quotations and further
7 citations omitted). As described by the Supreme Court in U.S. v. Fruehauf, 365 U.S. 146
8 (1961), advisory opinions are:

9 “[A]dvance expressions of legal judgment upon issues which remain
10 unfocused because they are not pressed before the Court with that clear
11 concreteness provided when a question emerges precisely framed and
12 necessary for decision from a clash of adversary argument exploring every
13 aspect of a multifaceted situation embracing conflicting and demanding
14 interests.”

13 Fruehauf, 365 U.S. at 157.

14 Although a somewhat indefinite definition, courts have applied the prohibition on
15 advisory opinions with precision. For example, in Chicago & Southern Air Lines v.
16 Waterman S.S. Corp., 333 U.S. 103, 113-14 (1948), the Supreme Court ruled that federal
17 courts could not review certain decisions of the Civil Aeronautics Board made pursuant
18 to the Civil Aeronautics Act. The decisions at issue were subject to the approval of the
19 President of the United States. Chicago & Southern, 333 U.S. at 113-14. The Court noted
20 that rendering a judgment after the Board made its decision, but before the President
21 made his decision, would be the equivalent of a making a recommendation to the

22
23 ² As is apparent from this quotation, there are many grounds upon which
24 controversies can be found non-justiciable. Flast, 392 U.S. at 95, 98. Importantly,
25 “[w]hen *standing* is placed in issue in a case, the question is whether the person whose
26 standing is challenged is a proper party to request an adjudication of a particular issue
27 and *not whether the issue itself is justiciable.*” Id. at 98-100 (emphasis added).
28 Accordingly, a party may have standing in a particular case, but the federal court “may
nevertheless decline to pass on the merits of the case” if, for example, the parties ask for
an advisory opinion. Id. at 95, 100.

27 This is precisely the juncture at which the Court finds itself: despite the fact that
28 Plaintiffs have Article III standing to bring this suit (see supra page 2), the suit will not
proceed because the Court finds that the parties seek to obtain an advisory opinion from
this Court.

1 President. Id. The Court, describing the unconstitutional nature of judicial review under
2 these circumstances, said:

3 To revise or review an administrative decision, which has only the force of
4 a recommendation to the President, would be to render an advisory opinion
5 in its most obnoxious form – advice that the President has not asked,
6 tendered at the demand of a private litigant, on a subject concededly within
7 the President’s exclusive, ultimate control.

8 Id. The Court added that it is *not* the practice of federal courts to render judgments that
9 are “not binding and conclusive on the parties” and “subject to later review or alteration
10 by administration action.” Id. (further citations omitted). Judgments, the Court said,
11 “within the powers vested in courts by the Judiciary Article of the Constitution, may not
12 lawfully be revised, overturned, or refused faith and credit by another Department of the
13 Government.” Id.

14 With this as a backdrop, the Court now turns to the Declaratory Judgment Act.
15 The Declaratory Judgment Act provides that in a case of “*actual* controversy within its
16 jurisdiction” a court “*may* declare the rights and other legal relations of any interested
17 party seeking such declaration.” 28 U.S.C. § 2201(a) (emphasis added). As is readily
18 apparent from the statutory language, a federal court is not obligated to make such a
19 declaration; rather, it has “unique and substantial discretion in deciding whether to
20 declare the rights of [the] litigants.” Medimmune, Inc. v. Genentech, Inc., 549 U.S. 118,
21 136 (2007) (quoting Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995)); see also
22 Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111, 111 (1962) (“[The Declaratory
23 Judgment Act] gave the federal courts competence to make a declaration of rights; it did
24 not impose a duty to do so.”). A federal court is vested with such discretion because
25 “facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of
26 the case for resolution, are peculiarly within [its] grasp.” Medimmune, 549 U.S. at 136
27 (quoting Wilton, 515 U.S. at 289).

28 Significantly, a federal court first must be satisfied that the lawsuit passes
constitutional muster and fulfills statutory jurisdictional prerequisites before it exercises
its discretion. Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1222-23 (9th

1 Cir. 1998). To pass constitutional muster means that the lawsuit seeking federal
2 declaratory relief presents a case or controversy within the meaning of Article III, Section
3 2 of the United States Constitution. Dizol, 133 F.3d at 1222 (citing Haworth, 300 U.S. at
4 239-40). To be sure, when presented with a claim for declaratory judgment, federal courts
5 “must take care to ensure presence of an actual case or controversy, such that the
6 judgment does not become an unconstitutional advisory opinion.” Rhoades v. Avon
7 Products, Inc., 504 F. 3d 1151, 1157 (9th Cir. 2007).

8 **III. DISCUSSION**

9 Review of Plaintiffs’ Complaint and in-Court statements reveal that there is no
10 real and substantial controversy before this Court; to the contrary, the Court finds that the
11 relief requested by Plaintiffs would necessarily take the form of an advisory opinion.

12 In the Complaint, Plaintiffs state that they seek “judicial review, declaratory
13 and/or injunctive relief, from this Court to stop the continued endangerment to wildlife
14 species occurring within the Kaibab National Forest, and to prevent the harm to the
15 Plaintiffs and their members that has resulted and is resulting from the ongoing
16 endangerment.” (Doc. 1 at ¶ 4.) More specifically, Plaintiffs request that the Court
17 declare the USFS to be a “contributor” under the RCRA and permanently enjoin the
18 USFS from contributing to the endangerment to the condors posed by lead ammunition.
19 (Id. at ¶ 47.) Importantly, Plaintiffs’ prayer for relief is built upon the repeated assertion
20 that the USFS has the authority to stop the disposal of lead ammunition on USFS lands,
21 but has failed to take action on the matter. (Id. at ¶¶ 3, 6, 13, 16, 34.)

22 At an April 2016 hearing, Plaintiffs’ counsel summarized their request for relief as
23 follows: “[t]he relief we’re seeking is an order from this Court to abate the endangerment
24 so the United States would have some discretion in terms of how it carries out the Court’s
25 order, but what we want is the endangerment abated.” (Doc. 116 at 14.) Counsel
26 continued: “we don’t necessarily think the Court’s order needs to direct the [USFS] to
27 issue a regulation, rather, it needs to direct the [USFS] to abate the endangerment, leaving
28 the [USFS] some discretion as to how it complies with the Court’s order.” (Id.)

1 The Court finds that these in-Court statements and the Complaint excerpts show
2 that Plaintiffs seek to obtain an advisory opinion from this Court. First, were the Court to
3 issue the requested order – directing the USFS to “abate the endangerment” and allowing
4 the USFS to execute this directive in whatever way it chooses (*Id.* at 14) – the Court
5 would be issuing nothing more than a recommendation to the USFS. “[T]o revise or
6 review an administrative decision, *which has only the force of a recommendation*
7 ...would be to render an advisory opinion in its most obnoxious form.” Chicago &
8 Southern Air Lines, 333 U.S. at 437 (emphasis added). Prohibition of lead ammunition
9 in national forests is a matter over which the USFS has control. Indeed, the Court has
10 already ruled that the USFS *has* the authority to prohibit lead ammunition in national
11 forests *but has decided not* to exercise that authority:

12 [The USFS] has authority to regulate activities in the National Forests. This
13 broad authority includes the right to issue regulations that restrict actions
14 that threaten endangered species of animals, such as the California condor.
15 [The USFS] opts not to exercise this authority and instead allows the use
16 and disposal of lead on the land which it administers. Although [The USFS]
may choose not to ban certain types of ammunition in deference to
Arizona’s regulation of hunting, it is not thereby automatically relieved of
its affirmative duty to stop the disposal of environmental contaminants in
the [Kaibab].

17 (Doc. 81 at 5.). Thus, for the Court to direct the USFS to exercise its authority on a
18 matter within the USFS’s control would amount to nothing more than a recommendation
19 to the USFS that the USFS would be free to disregard. The Court is not authorized to
20 render such a judgment.

21 Second, rather than a conclusive, binding order, Plaintiffs seek a generalized order
22 in which the Court directs the USFS to “abate the endangerment” and affords the USFS
23 discretion in how to execute that directive. (Doc. 116 at 14.) It is *not* the practice of
24 federal courts to render judgments that are “not binding and conclusive on the parties.”
25 Chicago & Southern Air Lines, 333 U.S. at 113-14. This is precisely the type of order
26 Plaintiffs seek from the Court. Plaintiffs seek an order requiring a generalized outcome,
27 with no clear terms for attainment. Rather, Plaintiffs ask the Court to allow USFS to
28 create its own terms. The Court is not authorized to issue such an order. Furthermore, the

1 order Plaintiffs seek would necessarily be subject to later review, input, or alteration by
2 other entities.³ It is not the practice of federal courts to render judgments that would be
3 “subject to later review or alteration by administration action.” Chicago & Southern Air
4 Lines, 333 U.S. at 114.

5 Finally, the Court finds that directing the USFS to exercise its authority and “abate
6 the endangerment” (i.e., prohibit lead ammunition) would be an improper intrusion into
7 the domain of the USFS. “That by the Constitution of the United States, the government
8 thereof is divided into three distinct and independent branches, and *that it is the duty of*
9 *each to abstain from, and to oppose, encroachments on either.*” Muskrat v. U.S., 219
10 U.S. 346, 352 (1911) (citation omitted) (emphasis added); see also Flast, 392 U.S. at 96

11
12 ³ For example, the Court notes the following laws and regulations:

13 “It is the policy of the Congress that the national forests are established and shall
14 be administered for outdoor recreation, range, timber, watershed, and wildlife and fish
15 purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental
16 to, but not in derogation of, the purposes for which the national forests were established
17 as set forth in section 475 of this title. Nothing herein shall be construed as affecting the
18 jurisdiction or responsibilities of the several States with respect to wildlife and fish on the
19 national forests. Nothing herein shall be construed so as to affect the use or
20 administration of the mineral resources of national forest lands or to affect the use or
21 administration of Federal lands not within national forests.” 16 U.S.C. § 528.

22 “In the effectuation of sections 528 to 531 of this title the Secretary of Agriculture
23 is authorized to cooperate with interested State and local governmental agencies and
24 others in the development and management of the national forests.” 16 U.S.C. § 530.

25 “Officials of the Forest Service designated by the Secretary of Agriculture shall, in
26 all ways that are practicable, aid in the enforcement of the laws of the States or
27 Territories with regard to stock, for the prevention and extinguishment of forest fires, and
28 for the protection of fish and game, and with respect to national forests, shall aid the other
Federal bureaus and departments on request from them, in the performance of the duties
imposed on them by law.” 16 U.S.C. § 553.

“Provided further, [t]hat nothing in this Act shall be construed as authorizing the
Secretary concerned to require Federal permits to hunt and fish on public lands or on
lands in the National Forest System and adjacent waters or as enlarging or diminishing
the responsibility and authority of the States for management of fish and resident
wildlife.” 43 U.S.C. § 1732(b).

“All forest officers will cooperate with State officials, insofar as practicable, to
enforce State fire, game, and health laws.” 36 C.F.R. § 211.3.

“Officials of the Forest Service will cooperate with State, county, and Federal
officials in the enforcement of all laws and regulations for the protection of wildlife.” 36
C.F.R. § 241.1(a)

1 (“When the federal judicial power is invoked to pass upon the validity of actions by the
2 Legislative and Executive Branches of the Government, the rule against advisory
3 opinions implements the separation of powers prescribed by the Constitution and
4 confines federal courts to the role assigned them by Article III.”); United Public Workers
5 of America (C.I.O.) v. Mitchell, 330 U.S. 75, 89 (1947) (“The Constitution allots the
6 nation’s judicial power to the federal courts. Unless these courts respect the limits of that
7 unique authority, they intrude upon powers vested in the legislative or executive
8 branches.”). As previously discussed, prohibition of lead ammunition in national forests
9 is a matter over which the USFS has control. See supra, page 7 (“Prohibition of lead
10 ammunition in national forests is a matter over which the USFS has control. Indeed, the
11 Court has already ruled that the USFS *has* the authority to prohibit lead ammunition in
12 national forests *but has decided not* to exercise that authority[.]”). It is a matter on which
13 the USFS has knowledge and expertise. It is also a matter involving, and sometimes
14 requiring, input from and cooperation with other entities.⁴ The Court is not authorized,
15 nor is it in any position, to supplant the USFS’s authority, knowledge, and expertise on
16 this matter in the form of a judgment ordering the USFS to take a certain course of action.
17 To do so would be an improper intrusion into the domain of the USFS.

18 For these reasons, the Court finds that there is no controversy before it and that
19 Plaintiffs seek to obtain an advisory opinion. The lack of a controversy also nullifies
20 Plaintiffs’ request for relief under the Declaratory Judgment Act. See Golden v. Zwickler,
21 394 U.S. 103, 959 (1969) (“Federal courts...do not render advisory opinions. For
22 adjudication of constitutional issues, concrete legal issues, presented in actual cases, not
23 abstractions are requisite. This is as true for declaratory judgments as any other field.”)
24 (internal quotations and further citations omitted).

25 **IV. CONCLUSION**

26 Although Plaintiffs allege that an “actual, justiciable controversy exists” (Doc. 1 at
27 ¶ 5), the fact is no actual, justiciable controversy exists: what exists is a request for an

28 ⁴ See n. 3, supra page 8.

1 advisory opinion, which this Court lacks power to render. “Without jurisdiction the court
2 cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it
3 ceases to exist, the only function remaining to the court is that of announcing the fact and
4 dismissing the cause.” Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94
5 (1998) (quoting Ex parte McCardle, 74 U.S. 506, 514 (1868)). Pursuant to this clear
6 directive, the Court will grant Defendant and Intervenor-Defendants’ motions and
7 dismiss this suit, albeit it on grounds different than those which Defendant and
8 Defendant-Intervenors have argued.

9 Accordingly,

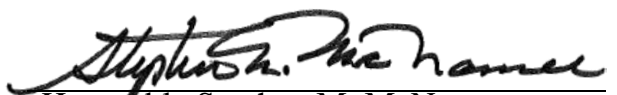
10 **IT IS HEREBY ORDERED** dismissing without prejudice all of Plaintiffs’ claims
11 in this suit. The Clerk of Court shall terminate this case.

12 **IT IS FURTHER ORDERED** granting United States Forest Service’s Motion to
13 Dismiss and Memorandum of Points and Authorities in Support. (Doc. 123.)

14 **IT IS FURTHER ORDERED** granting Intervenor-Defendant National Shooting
15 Sports Foundation’s Motion for Judgment on the Pleadings and Supporting
16 Memorandum. (Doc. 124.)

17 **IT IS FURTHER ORDERED** granting Intervenor-Defendants National Rifle
18 Association of America and Safari Club International’s Motion to Dismiss. (Doc. 125.)

19 Dated this 15th day of March, 2017.

20
21
22 
23 Honorable Stephen M. McNamee
24 Senior United States District Judge
25
26
27
28