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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** **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 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 establish Article III standing or 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 hazardous 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 traditionally reserved the authority to manage wildlife on federal lands to the states, except where Congress has acted to assert federal interests in wildlife management. *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 is codified in 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, FLPMA affirms the states' primary responsibility for the management of wildlife on federal lands, explicitly providing 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 Center for Biological Diversity v. United States Bureau of Land Management*, 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 limited authority to "designate areas of ... lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted," this authority may only be exercised "for reasons of public safety, administration, or compliance with provisions of applicable law." 43 U.S.C. § 1732(b). Congress also required that, except in emergencies, the Secretary consult with state fish and game departments prior to promulgating regulations closing areas to hunting and fishing. *Id.*

Congressional deference to the states in wildlife management is also reflected in the Multiple Use-Sustained Yield Act of 1960 ("MUSYA"), 16 U.S.C. §§ 528-531. MUSYA expressly reserves to the states their 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." *Id.* § 528. *See also* 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); *Andrus*, 627 F.2d at 1248.

With respect to hunting, the Service has promulgated limited regulations consistent with FLPMA and MUSYA. Most notably, 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). Service regulations do not regulate the method of hunting or the type of ammunition used by a state-licensed hunter, as the Service defers such regulation to the states.

The Service requires individuals or companies who engage in commercial activities on National Forest System lands to obtain special use permits. *Id.* § 251.50(a). This includes entities such as hunting outfitters and guides who provide commercial services. *See id.* § 251.51 (defining certain terms, including "guiding" and "outfitting," but not "hunting"). However, special use permits are not required to hunt in any national forest, and they do not regulate hunting in any manner. 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

Unlike the Service, the Arizona Game and Fish Commission ("State Commission") does regulate hunting on the Kaibab National Forest and other National Forest System lands in Arizona, including the manner and methods of taking game. Among the State Commission's powers and duties is the authority to establish policies for the management, preservation and harvest of wildlife, 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).

The State Commission regulates all aspects of hunting in Arizona. Hunting is authorized within the national forests in Arizona by 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). 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)(d). 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.

II. FACTUAL BACKGROUND[1]

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 and alleges that an imminent and substantial endangerment to the environment exists there. *See* Compl. ¶ 33 & at 15. The Kaibab National Forest is a popular hunting destination for 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 National Forest. *Id.* ¶ 35. Specifically, Plaintiffs allege that wildlife species are exposed to spent lead ammunition in the Kaibab National Forest in two ways: 1) through

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

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, a listed endangered species, suffer from lead poisoning by eating from gut piles and shot but not retrieved carcasses 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 National Forest. *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 National Forest. *Id.* ¶ 34. Plaintiffs contend that the Service "does not prohibit or restrict the use of lead ammunition within" the Kaibab National Forest through its special use permits. *Id.* Finally, Plaintiffs note that the "Arizona Game and Fish Department hunting regulations do not prohibit or restrict the use of lead ammunition for hunting within the Kaibab National Forest." *Id.*

III. STANDARD OF REVIEW

The burden of establishing standing falls squarely on the party invoking federal court jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Each element of standing must be supported "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*; *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Id.*, (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a

motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (internal quotation omitted). However, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Summers v. Earth Island Institute*, 555 U.S. 488, 493-94 (2009), quoting *Lujan*, 504 U.S. at 562.

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).

IV. ARGUMENT

Plaintiffs bear the burden of establishing Article III standing and to allege facts sufficient to state a claim upon which relief can be granted. As discussed in detail below, Plaintiffs have not done either here.

A. Plaintiffs Have Not Alleged a Sufficient Basis for Article III Standing.

Before addressing Plaintiffs' substantive claims, this Court must first address the "threshold jurisdictional question" of whether Plaintiffs possess Article III standing to pursue this action. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). The "irreducible constitutional minimum" of standing requires proof of three elements: injury in fact, causation, and redressability. *See Lujan*, 504 U.S. at 560-61. Plaintiffs, as the parties asserting federal court jurisdiction, have the burden of establishing their standing. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). The Complaint fails to satisfy this burden as to any of the three elements.

First, Plaintiffs' alleged injuries to enjoyment of aesthetics and recreational opportunities do not meet the requirements that the injury in fact be "to a cognizable interest ... [and] that the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 563; *see also id.* at 560 (injury must be "concrete and particularized" and "actual or imminent"). In *Earth Island Institute*, the Supreme Court specifically rejected as insufficient to establish injury in fact allegations and affidavits that did not specify precise locations where plaintiffs' interests are harmed and that evince only vague, "some day" intentions to visit the allegedly affected areas. 555 U.S. at 494-96.

Here, Plaintiffs make only general statements about recreating in "areas of northern Arizona," "including in the Kaibab National Forest and Grand Canyon National Park," and that they "intend to continue to use the *region* on an ongoing basis in the future." Compl. ¶ 11 (emphasis added). In contrast to the focused nature of the Complaint on the alleged imminent and substantial endangerment in the *Kaibab National Forest*, Plaintiffs' assertions about their members' use of the area are only at the *regional* level. Further, Plaintiffs offer no indication of concrete plans to return to and recreate on the Kaibab National Forest itself. These allegations are insufficient to meet Plaintiffs' burden to demonstrate the "when" and "where" necessary to establish an actual or imminent injury in fact. *Earth Island Institute*, 555 U.S. at 496; *see also Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181, 183 (2000) (injury in fact sufficiently alleged only if plaintiffs "aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity," such that the injury established is to the plaintiff, not the environment) (internal quotation marks and citation omitted).

Plaintiffs have not offered concrete assertions about injury to them or their members that is directly connected to their use of the Kaibab National Forest, let alone declarations to support such statements, but rather state merely that Plaintiffs and their members, having "read many scientific studies and reports," are "concerned" about lead contamination in the Kaibab National Forest and "advocate for the protection of wildlife species" there. Compl. ¶¶ 10, 14-15.

These broad, generic statements about regional use and concern are insufficient to establish an actual and concrete injury in fact. *Steel Co.*, 523 U.S. at 102-03. At best, Plaintiffs' RCRA claim here is an impermissible generalized grievance about the conduct of government, *see United States v. Richardson*, 418 U.S. 166, 174-75 (1974), and in no sense concerns a concrete, injury-in-fact to any Plaintiff. Plaintiffs' allegations do nothing to establish that they "use the affected area [of the Kaibab National Forest] and are persons for whom the aesthetic and recreational values of the [Kaibab National

Forest] will be lessened by the challenged activity," as the law requires. *Laidlaw*, 528 U.S. at 183 (quotations omitted).

Second, Plaintiffs have not adequately alleged that the Service's actions or inactions have caused the injuries they allege. The causation element of the standing inquiry requires that there be "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. Thus, there must be "a fairly traceable connection between the plaintiffs' injury and the complained-of conduct of the defendant." *Steel Co.*, 523 U.S. at 103. The Supreme Court and the Ninth Circuit have found that plaintiffs cannot establish standing at the pleading stage "where a chain of causation involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries." *Centex Corp.*, 658 F.3d at 1070 (internal quotations omitted).

Plaintiffs' chain of causation does not support standing here. As explained above, the Service defers regulation of hunting, including choice of ammunition, to the states, except in rare and limited circumstances. *See supra* at 4 (discussing regulations for public safety). This lack of federal regulatory control is consistent with FLPMA, other applicable statutory and regulatory authorities, and longstanding federal land management policy. *See supra* at 2-4. Thus it is the State of Arizona, *not* the Service, that exercises control over the types of ammunition permitted for big game hunting in the Kaibab National Forest. The injury Plaintiffs complain of—adverse effects on their recreational enjoyment of Northern Arizona federal lands due to lead poisoning of avian wildlife—cannot be traced to the Service, but rather to the State of Arizona's regulations allowing the use of lead ammunition, and further, to the hunters themselves who use lead ammunition. The existence of the Service's unexercised regulatory authority is not sufficient to establish causation. Plaintiffs have not established that the Service has caused their alleged injuries, and Plaintiffs therefore fail to satisfy the causation requirement of Article III standing.

To satisfy the redressability prong of the standing test, Plaintiffs must demonstrate that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal citations and quotations omitted). Although RCRA section 7002(a) confers broad discretion on the Court to fashion injunctive relief, it is speculative at best that Plaintiffs could obtain relief for their alleged injuries through this action.

With this suit, Plaintiffs seek to overturn longstanding federal law and Executive Branch policy deferring regulation of hunting to the states. Congress has not exercised its authority under the Property Clause, U.S. Const. art. I, § 8, cl. 17, to compel the Service to regulate hunting on National Forest System lands. To the contrary, multiple federal statutes, including FLPMA, and applicable regulations are clear that the "management of hunting on public lands is reserved to the states." *Ctr. for Biological Diversity*, 2011 WL 4551175 at *10. The Court of Appeals for the District of Columbia Circuit noted that FLPMA section 1732(b) gives the Secretary limited ability to preempt state hunting regulations to close an area to hunting, but does not require the Secretary to do so. *Andrus*, 627 F.2d at 1250 (noting use of "may" in the statute, as opposed to "shall"). The language of the statute, the D.C. Circuit found, was a Congressional grant of only a "cautious and limited permission to intervene in an area [wildlife management] of state responsibility and authority." *Id.* Consistent with the statute, the Service has a longstanding policy of deferring to state regulation of hunting on National Forest Service lands. Plaintiffs' attempt to exploit the availability of injunctive relief under RCRA to force a change in Congressional and Executive land management policy is inappropriate and must fail.

Plaintiffs do not appear to seek a complete ban on hunting, *see* Compl. at 14-15, but do specifically cite two regulatory provisions, 36 C.F.R. §§ 261.70(a)(4) and 261.50(a), and implicitly allege that those provisions give the Service the authority to control the use of lead ammunition on the Kaibab National Forest. *See* Compl. ¶ 23. But for the Service to regulate the use of lead ammunition in the Kaibab National Forest

pursuant to 36 C.F.R. § 261.70(a)(4), the agency would have to reverse established federal policy, affirmatively preempt state regulation of hunting, and promulgate regulations controlling the types of ammunition allowed for hunting on National Forest System lands. *See* 36 C.F.R. § 261.70;[2] *see also infra* at 15-16 (discussing process, including NEPA analysis, involved in issuing orders pursuant to 36 C.F.R. § 261.50(a) and similar uncertainty and discretion in outcome). This could happen only after the Service consulted with the Arizona Game and Fish Department, and then only through a rulemaking in accordance with the Administrative Procedure Act. *Id.* § 261.70(c); 43 U.S.C. § 1732(b); 5 U.S.C. § 553. But this Court cannot order the Service to initiate such a rulemaking, and certainly cannot dictate the outcome of the administrative consultation and rulemaking process. *See, e.g.*, *American Public Transit Ass'n v. Lewis*, 655 F.2d 1272, 1279 (D.C. Cir. 1981) (courts must give agencies the opportunity to exercise their discretion). As such, it is merely speculative at best that a favorable decision here would redress Plaintiffs' alleged injuries.

Accordingly, Plaintiffs have failed to establish any of the three elements of Article III standing. Their alleged injuries are too generalized and not tied specifically to the Kaibab National Forest; those injuries are not fairly traceable to the conduct of the Service but rather to third parties; and Plaintiffs have not shown—and cannot show—that their injuries are likely to be redressed by a favorable decision of this Court. The Complaint must therefore be dismissed for lack of standing.

B. Plaintiffs Have Failed to Plead Facts Sufficient to Establish a Claim that the Service Has Contributed to an Imminent and Substantial Endangerment under RCRA.

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

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[2] 36 C.F.R. § 261.70(a) relates to the issuance of regulations for certain delineated purposes, but does not specifically address hunting.

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 two elements, but does not concede the latter two.

The Ninth Circuit in *Hinds* considered as a matter of first impression the meaning of "has contributed or [ ] is contributing to" in RCRA section 7002(a)(1)(B). 654 F.3d at 850. The court found that liability under section 7002(a)(1)(B) did not extend to defendants who designed a dry-cleaning machine, which generated waste, that was later improperly discarded by others. *Id.* at 848. The court held that to state a claim under RCRA section 7002(a)(1)(B), plaintiffs 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." *Id.* at 852. The court determined that "'[c]ontributing' 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." *Id.* at 851. The court found support for this interpretation in decisions of and in other circuits. *See, e.g.*, *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 854 (7th Cir. 2008) (section 7002(a)(1)(B) "requires active involvement in handling or storing of materials," and thus leaving asbestos-insulated equipment in place when selling property does not give rise to liability under that section); and *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 844-45 (D.N.J. 2003) (holding active involvement is required, and noting legislative history in support), *aff'd*, 399 F.3d 248 (3d Cir. 2005).

The Ninth Circuit also considered cases in which courts "permitted RCRA claims to survive only with some allegation of defendants' continuing control over waste disposal." *Hinds*, 654 F.3d at 851-52 (discussing *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989)) (allegations that pesticide manufacturers had authority to control waste disposal sufficient to defeat motion to dismiss); *Marathon Oil Co. v. Texas City Terminal Ry. Co.*, 164 F. Supp. 2d 914, 920-21 (S.D. Tex. 2001) (allegations that defendants had control of practices that caused contamination sufficient

to defeat motion to dismiss); *United States v. Valentine*, 885 F. Supp. 1506, 1509-10, 1512 (D. Wyo. 1995) (denying summary judgment, finding "control over the ultimate decisions concerning waste disposal" not necessary for contributor liability where defendant transported material to and disposed of it at the contaminated site, and noting defendant could raise a defense of not having control or authority over disposal).

Here, Plaintiffs in their Complaint have not made sufficient allegations of any measure of control over or active involvement in the waste disposal process by the Service that could give rise to liability for "contribution" under section 7002(a)(1)(B). Indeed, in the entirety of the "Facts" section of their complaint, ¶¶ 25-42, Plaintiffs make only two assertions regarding the Service: 1) that the agency manages the Kaibab National Forest, and 2) that the agency does not prohibit or restrict the use of lead ammunition through special use permits issued to hunting outfitters and guides in the Kaibab National Forest. *See* Compl. ¶¶ 33-34. Although Plaintiffs refer to the Service's authority multiple times (*see, e.g.,* Compl. ¶¶ 3, 13, 22, 23, 45), only in Paragraph 23 do they identify specific authority that they presumably believe gives the Service control over the disposal of spent lead ammunition.

The first provision cited, 36 C.F.R. § 261.70(a)(4), provides that the Service may exercise its authority by promulgating regulations pursuant to the APA. *Id.* § 261.70(c); *see supra* at 11-12. As discussed above, this process would involve consulting with the applicable state, issuing a proposed rule, taking public comment, and promulgating a final rule, review of which would be available in federal court. The outcome of such a rulemaking cannot be pre-determined or dictated by this Court or the Service. Therefore, the Service's unexercised regulatory authority alone is too speculative and not sufficient to establish a "measure of control" as contemplated by the Ninth Circuit in *Hinds*. Unlike the control over waste disposal wielded by a private landowner, or a company such as those in *Aceto*, *Marathon Oil*, and *Valentine*, unexercised regulatory authority is too far

removed from the type of control contemplated by the Ninth Circuit.[3] So here: Plaintiffs' allegation that the Service possesses unexercised regulatory authority that theoretically could be used to control the disposal of spent lead ammunition in the Kaibab National Forest does not constitute "continuing control over waste disposal" in the Ninth Circuit. *Hinds*, 654 F.3d at 851.

Plaintiffs also allege that 36 C.F.R. § 261.50(a) gives "each Forest Supervisor [ ] the authority to restrict the manner in which the public uses" the lands in their jurisdiction. Compl. ¶ 23. This regulation 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, §§ 261.51 – 261.58 (enumerated prohibitions). Even if this regulation provided the Service with the authority to control the use of lead ammunition on the Kaibab National Forest, as with section 261.70(a)(4) discussed above, this unexercised regulatory authority is too far removed from the control discussed in *Hinds*. To issue an order addressing lead ammunition on the Kaibab National Forest pursuant to this section, the Service would need to consult with the State of Arizona, ensure consistency with the land management plan of the Kaibab National Forest, *see* 16 U.S.C. § 1604(i), and comply with the National Environmental Policy Act ("NEPA"), *see* 36 C.F.R. § 220.4 (general NEPA requirements on actions proposed by the Service); 40 C.F.R. §§ 1508.18 (describing major federal actions) and 1508.27 (discussing "significantly" in the NEPA context). The Service's NEPA analysis and final order would both be subject to judicial review under the APA. The exercise of this regulatory authority thus involves significant legal process, and again, the final outcome is

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[3] *cf. Proffitt v. Davis*, 707 F. Supp. 182, 187 (E.D. Pa. 1989).

uncertain.[4] Accordingly, Plaintiffs' allegation that unexercised regulatory authority over lead ammunition exists in section 261.50(a) does not establish Service control over the disposal of spent lead ammunition sufficient to state a claim under RCRA section 7002(a)(1)(B) as interpreted by *Hinds*.

Plaintiffs' allegation that the Service issues special use permits to hunting outfitters and guides, and that those permits do not include restrictions on the use of lead ammunition, is also insufficient to establish that the Service "contributed to" the disposal of spent lead ammunition. Compl. ¶ 34. Special use permits are not required to hunt in the Kaibab National Forest, nor do they authorize or regulate hunting in any manner. 36 C.F.R. § 251.50(c). Consistent with federal law and policy, no Service permit is required to hunt in the Kaibab National Forest, and the Service defers regulation of hunting to the State. *See supra* at 2-4 (discussing federal statutes explicitly reserving the management of hunting on federal lands to the states); *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."). Therefore, the Service's issuance of special use permits to hunting outfitters and guides does not affect whether individuals can hunt in the Kaibab National Forest or what types of ammunition they may use. Rather, hunters are subject to the State of Arizona's regulation and management of hunting, including any state permit or tag requirements. Plaintiffs have thus not alleged facts sufficient to establish that the Service has an "active role with a [ ] direct connection" to the spent lead ammunition. *Hinds*, 654 F.3d at 851.

In sum, Plaintiffs have failed to state a claim against the Service under RCRA section 7002(a)(1)(B), and the complaint must therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

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[4] Further, the decision whether to exercise the regulatory authority set forth in 36 C.F.R. §§ 261.50(a) or 261.70(a)(4) is committed to the discretion of the Service and its officials.

V. CONCLUSION

For the foregoing reasons, the United States respectfully requests that this motion be granted and that the Complaint be dismissed.

Respectfully submitted,

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Dated: December 14, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2012, 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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