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 UNITED STATES FOREST SERVICE'S MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule 7.2, the United States of America hereby moves to dismiss the sole claim Plaintiffs have asserted against the United States Forest Service ("Service") under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B). In its recent decision, the Ninth Circuit found that jurisdiction exists and remanded so this Court can consider the Service's legal challenges to the Complaint. *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, 925 F.3d 1041, 1053 (9th Cir. 2019). The court further suggested that Plaintiffs might want to amend their Complaint to more fully "spell out" the legal basis for the RCRA claim. *Id.* However, Plaintiffs have opted to stand on the very same allegations and single claim they made in 2012.

As explained in this motion and memorandum, Plaintiffs have not pled a cognizable legal theory supported by the facts necessary to obtain relief against the Service under RCRA. *See Hinds Inv., L.P. v. Angioli*, 654 F.3d 846, 850 (9th Cir. 2011) (affirming the dismissal of a RCRA § 6972(a)(1)(B) claim under Rule 12(b)(6)); *see also generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (emphasizing that a complaint must contain "more than labels and conclusions," and that a "formulaic recitation of the elements of a cause of action" will not suffice); *Forbes v. SGB Corp.*, No. CV-12-1250-PHX-SMM, 2012 WL 6194197, at *2 (D. Ariz. Dec. 12, 2012) (courts are not required to accept conclusory allegations, or unwarranted or unreasonable inferences when evaluating a motion to dismiss).

The Complaint alleges that the Service's failure to regulate the public's use of lead ammunition to hunt in the Kaibab National Forest ("Kaibab") creates an imminent and substantial endangerment to wildlife, including California condors. *Ctr. for Biological Diversity*, 925 F.3d at 1046 (discussing the "two grounds" for Plaintiffs' theory in the Complaint). These allegations fail because "more active involvement" is necessary to establish that the Service "contributed" or is "contributing" to the alleged disposal of spent ammunition *by others* within the Kaibab. *See Hinds*, 654 F.3d at 850 (holding that

RCRA § 6972(a)(1)(B) requires active involvement or control over the waste at the time of disposal); *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 854 (7th Cir. 2008) (holding that liability under RCRA § 6972(a)(1)(B) requires "affirmative action rather than merely passive conduct"). Here, the Complaint contains no assertion that the Service actually generates or disposes of spent ammunition containing lead, and the allegations that the Service plays a passive role with respect to hunting practices on federal lands are legally insufficient under RCRA § 6972(a)(1)(B).

II. REGULATORY BACKGROUND

A. Federal Land Management Statutes and Regulations

Congress preserved the states' traditional powers to manage wildlife and hunting on federal lands, including the Kaibab, except where Congress has acted affirmatively to assert federal interests. *See 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, Inc. 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 and internal quotations omitted), *aff'd*, 127 F.3d 80 (D.C. Cir. 1997). This Congressional deference to the states in the field of wildlife management and hunting 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. Earlier this year, Congress reaffirmed in the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019 that it is national policy to "facilitate the expansion and enhancement of hunting, fishing, and recreational shooting opportunities" on federal land in consultation with state wildlife agencies and others. 16 U.S.C. § 7901(a)(1); *see also id.* § 7912(a) (declaring that federal land generally "shall be open" to hunting, fishing, and recreational shooting in accordance with applicable law).

Consistent with the common law, MUSYA and FLPMA affirm the states' primary responsibility for managing 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 on the national forests." 16 U.S.C. § 528. 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) (emphasis added); *see also Ctr. for Biological Diversity v. U.S. 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.").[1] Although the Secretary possesses authority to "designate areas" in the National Forest System "where, and establish periods when, no hunting or fishing will 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 circumstances. *See Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 380 (6th Cir. 2010). Except in emergencies, the Secretary also must 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); *see also* 16 U.S.C § 7913(b)(1) (generally requiring consultation and public notice and comment before closing federal land to hunting, fishing, and recreational shooting).

In accordance with federal law, the Service does not issue permits allowing private recreational hunting on National Forest System lands or do so for other noncommercial recreational activities, such as camping, hiking, or fishing. 36 C.F.R. § 251.50(c).

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[1] Congress' endorsement of the states' traditional role with respect to wildlife and hunting is reflected in various other public land statutes. *See, e.g.*, 16 U.S.C. § 668dd(c) (National Wildlife Refuge System Administration Act); 16 U.S.C. § 1284(a) (Wild and Scenic Rivers Act); 16 U.S.C. § 6813(a) (Federal Lands Recreation Enhancement Act); 16 U.S.C. § 1133(d)(7) (Wilderness Act); *Andrus*, 627 F.2d at 1248.

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 certain circumstances, *e.g.*, to address public safety by 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. Congress has "repeatedly prohibited" the Service from spending funds to regulate the lead content of ammunition. *See Ctr. for Biological Diversity*, 925 F.3d at 1044 n.1. 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 those who engage in commercial activities on National Forest System lands to obtain special use permits. 36 C.F.R. §§ 251.50, 251.51 (discussing permits and defining "commercial use or activity"). The regulations are not directed to hunting but apply generally to any commercial use, including outfitters and guides who are hired by individual members of the public or groups for recreational purposes. *See id.* § 251.51 (defining certain terms, including "guiding" and "outfitting," but not "hunting"). The Service does not regulate noncommercial recreation activities like hunting. *See* 36 C.F.R. § 251.50(c) ("A special use authorization is not required for noncommercial recreational activities, such as . . . hunting . . ."). Moreover, special use permits only authorize the commercial activities on National Forest System lands, and do not supplant any associated state or local requirements, such as hunter licensing or other regulations that directly regulate the activities of individual hunters. In sum, the Service does not authorize any individual or the general public to hunt: no permit of any kind is required from the Service to hunt in the Kaibab. *See Ctr. for Biological Diversity*, 925 F.3d at 1045 ("Nor does the agency require a permit for hunting in the Kaibab.").

B. Arizona Hunting Regulations

The State of Arizona, through the Arizona Game and Fish Commission

("State Commission"), regulates all aspects of hunting in Arizona, including on federal lands. 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. *See* A.R.S. § 17-231(A)(2), (3). *See Ctr. for Biological Diversity*, 925 F.3d at 1046 ("USFS defers to Arizona's hunting regulations").

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, Ex. 1 at 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). Arizona allows hunters to use lead ammunition except when hunting waterfowl. *See Ctr. for Biological Diversity*, 925 F.3d at 1045 (citing A.A.C. R12-4-304(B)(3)(e)). Any individual, organization, or agency may 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. Plaintiffs do not allege that they have petitioned or raised their concerns about the hunting public's use of lead ammunition in the Kaibab directly with the State Commission.

C. California Condor Recovery Efforts in the Southwest

In 1996, the United States Fish and Wildlife Service ("FWS") 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. *See* 61 Fed. Reg. 54,044, 54,049 (Oct. 16, 1996). *See also* Ariz. Mot. to Intervene, 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 FWS explained that Section 10(j) provided flexibility to manage the experimental condor population without unduly restricting "current and future land, water, or air uses" and activities, including hunting, which was essential to gain local support and promote cooperation for the reintroduction of an endangered species in the area. 61 Fed. Reg. at 54,050/2-3.[2] The potential for California condors to be exposed to spent lead ammunition was considered, and the FWS explained that its intention was to initiate a "hunter education program" and to investigate ways to encourage the voluntary use of non-lead ammunition, as opposed to imposing new "modifications or restrictions" on hunting regulations in Arizona and other parts of the non-essential experimental population area. *Id.* at 54,054/3-55/1-3 ("This action [to reintroduce California condors] does not impose land use restriction or otherwise affect land management activities.").

Since the FWS's Section 10(j) decision in 1996, the Service has partnered with Arizona and other federal and state agencies in the Southwest Condor Working Group to promote the growth of the California condor population in northern Arizona and southern Utah. *See, e.g.*, THIRD FIVE YEARS REVIEW at 1, 20. As the Ninth Circuit recognized, "Arizona has taken steps to reduce the impact of spent lead ammunition on the condor and other species." *See Ctr. for Biological Diversity*, 925 F.3d at 1045-46. Notwithstanding the allegations in the Complaint, the Working Group has not recommended an outright ban on 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 continued monitoring and evaluation of the experimental California condor population, continued education and outreach to hunters about the use of non-lead ammunition, and steps the public can take to reduce wildlife exposure to spent lead ammunition in the

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

condors' range, including the Kaibab. THIRD FIVE YEARS REVIEW at 19-21, 38-39, 81-85; *see generally* www.fws.gov/southwest/es/arizona/CA_Condor.htm (Working Group report recommending the same policies after conducting the Fourth Review in 2017).

III. THE RCRA CLAIM FAILS AS A MATTER OF LAW

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). RCRA allows citizens to sue any person, including the United States, in certain circumstances after providing proper notice of intent to sue, as prescribed by the statute. Specifically, RCRA authorizes 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) (emphasis added). To state a claim under this provision, Plaintiffs must plead sufficient facts to show that the Service: (1) has contributed or is contributing to (2) the past or present handling, storage, treatment, transportation, or disposal (3) of a solid or hazardous waste, (4) which may present an imminent and substantial endangerment to health or the environment. *See Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 874 F.3d 1083, 1100-01 (9th Cir. 2017) (granting summary judgment where the plaintiff failed to show that defendant "actually contributed" to the disposal of waste); *City of W. Sacramento, Cal. v. R & L Bus. Mgmt.*, No. 2:18-cv-900-WBS-EFB, 2018 WL 3198118, at *4 (E.D. Cal. June 27, 2018) (granting motion to dismiss RCRA § 6972(a)(1)(B) claim for failing to allege sufficient facts to satisfy the "contributor" standard); *see also* 2018 WL 4204799, at *2 (E.D. Cal. Sept. 4, 2018) (dismissing the City of West Sacramento's first amended complaint in the absence of allegations that a corporate owner and executive "actually participated" in the disposal of waste); 2018 WL 6019340, at *2-3 (E.D. Cal. Nov. 16, 2018) (finding that the City of

West Sacramento's third amended complaint still did not demonstrate that the defendant participated in or had control over disposals).

Against this legal backdrop, the Complaint here plainly does not contain the facts necessary to satisfy RCRA's requirement that the Service "contributed" or is "contributing" to the disposal of lead ammunition by others in the Kaibab. Plaintiffs assert that wildlife, including scavengers such as the California condor, are exposed to spent lead ammunition that some hunters use in the Kaibab. Compl. ¶ 35. Specifically, Plaintiffs allege that wildlife species are exposed to harmful levels of lead in two ways: (1) through access to animal carcasses that hunters have shot with lead ammunition, but do not recover or retrieve; and (2) through scavenging remains – sometimes called "gut piles" – left on the ground after hunters have completed field dressing. *Id.* ¶¶ 28-29. Notably, the Complaint contains no claim against the hunters who allegedly conduct these activities in the Kaibab or against the Arizona Game and Fish Department, which regulates hunting practices in Arizona. Rather, Plaintiffs contend that the Service is liable under RCRA § 6972(a)(1)(B) for failing to use its legal authority to "prohibit or restrict" the public's use of lead ammunition, alleging that the Service, for example, does not impose conditions or restrictions in the special use permits sought by commercial outfitters and guides who take individual members of the public on hunting excursions in the Kaibab. *Id.* ¶¶ 33-34; *see Ctr. for Biological Diversity*, 925 F.3d at 1046 (describing the Complaint). These allegations fell short in 2012 under governing Ninth Circuit law, and it is even more evident now that they do not support a cognizable RCRA claim against the Service. *See Hinds*, 654 F.3d at 851 (holding that RCRA § 6972(a)(1)(B) "requires a more active role with a more direct connection to the waste"); *Ingalls v. AMG Demolition & Envtl. Servs.*, No. 17-cv-2013-AJB-MDD, 2018 WL 2086155, at *3 (S.D. Cal. May 4, 2018) (granting a motion to dismiss a RCRA claim and stating that the "Ninth Circuit could not have been clearer" in holding that a "contributor" must have an active role in connection with the disposal of the waste).

A. The Existence of Unexercised Regulatory Authority Does Not Render the Service a "Contributor" Under *Hinds*.

The Ninth Circuit in *Hinds* considered the meaning of "contributed" or "is contributing to" and rejected an "expansive reading" of the statute that would have imposed RCRA liability merely for assisting in creating waste without generating it or having active involvement in or control over the disposal process. 654 F.3d at 850-51 (affirming the dismissal of RCRA claims). The Ninth Circuit specifically found that "contributor" liability did not extend to defendants who designed and manufactured dry-cleaning machines that generated wastewater that was disposed by users into drains and sewer systems in a manner consistent with defendants' instruction manuals. *Id.* at 848-49. The court held that to state a claim under RCRA § 6972(a)(1)(B), 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." *Id.* at 852 (emphasis added). Inattention or passivity, without more, is insufficient to impose "contributor" liability under RCRA. *Id.* at 851 (RCRA's terms address "active functions with a direct connection to waste itself"); *see also 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), *aff'd*, 399 F.3d 248 (3d Cir. 2005).

Here, Plaintiffs do not allege that the Service actually creates or generates the subject waste by using lead ammunition to hunt in the Kaibab, or that the Service is a direct participant in any alleged disposals in the Kaibab. The Service does not dictate hunters' choice of ammunition or regulate general hunting practices such as the hunting seasons or bag limits in the Forest. Rather, those matters are regulated by the State of Arizona. Merely continuing a longstanding federal policy of deferring to state hunting regulations is not active involvement. Nor does the Complaint otherwise point to any direct involvement by the Service or significant supervision or control over the hunters who allegedly are responsible for the spent lead ammunition in the Kaibab. *See generally Nat'l Exch. Bank and Tr. v. Petro-Chem. Sys., Inc.*, 2013 WL 12180537, at *2-3 (E.D.

Wis. Oct. 7, 2013) (finding that a general contractor did not "contribute" to its subcontractor's actions, i.e., faulty repairs that caused contamination at a job site).

In the "Facts" section of their Complaint, ¶¶ 25-42, Plaintiffs merely allege that the agency manages the Kaibab. *See* Compl. ¶ 33. Only in Paragraph 23 do they identify specific regulatory authority that theoretically would allow the Service to "control" 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. 36 C.F.R. §§ 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.

Id. § 261.50(a); *see also* 36 C.F.R. Part 261 (enumerated prohibitions); Compl. ¶ 23 (alleging that § 261.50(a) gives "each Forest Supervisor . . . the authority to restrict the manner in which the public uses" the lands in their jurisdiction). Thus, the allegation at the heart of the Complaint is that the Service has *potential* authority to ban or regulate use of lead ammunition in the Forest. But merely because the Service may have the unexercised potential to regulate lead ammunition in the *future* is not sufficient to state a RCRA contribution claim regarding past or present actions because there must be active involvement or control over the waste "at the time of its disposal." *Hinds*, 654 F.3d at 852. Presumably, that is why the recent Ninth Circuit panel in this case, without deciding the issue, expressed skepticism regarding the legal viability of Plaintiffs' unexercised regulatory authority claim against the Service. *See Ctr. for Biological Diversity*, 925 F.3d at 1052-53 (stating that the Service "may be correct that the Center's first argument based on USFS's unexercised authority is foreclosed" by *Hinds*).

Furthermore, *Hinds*' statement regarding the necessary exercise of control must be understood in the context of the cases it examined. *See Hinds*, 654 F.3d at 851-52 (citing *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1384 (8th Cir. 1989); *Marathon Oil Co. v. Tex. City Terminal Ry. Co.*, 164 F. Supp. 2d 914, 920-21 (S.D. Tex. 2001); *United States v. Valentine*, 885 F. Supp. 1506, 1512 (D. Wyo. 1995)). Each of these cases involved defendants who were alleged to have taken substantial affirmative action resulting in control over waste disposal. In *Aceto*, the defendants contracted with a business to manufacture pesticides, maintained ongoing ownership of the pesticide, and dictated the terms of manufacturing, which inherently generated waste. 872 F.2d at 1375-76, 1378, 1384. In *Marathon Oil*, the railway company transported hazardous waste on its tank cars and controlled the loading, unloading, and cleaning practices which resulted in the waste being leaked, dumped, or spilled into the environment. 164 F. Supp. 2d at 920-21. Similarly, in *Valentine*, the defendant physically possessed and transported hazardous waste, maintaining continuing control over the waste until it reached the disposal facility. 885 F. Supp. at 1509, 1512. After examining these cases in depth, *Hinds* declared that passivity is insufficient to impose RCRA contributor liability and that active involvement or substantial affirmative action resulting in control over the waste at the time of its disposal is necessary. 654 F.3d at 851-52; *cf. El Paso Nat. Gas Co., LLC. v. United States*, 390 F. Supp. 3d 1025, 1041-42, 1048-49 (D. Ariz. 2019) (holding that the Government's mere authority to control uranium mining on federal land through federal permitting and other regulations, in addition to its power as the sole purchaser of uranium in the 1950s and 1960s, was insufficient to impose "operator" and "arranger" liability on the United States under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")); *United States v. Iron Mountain Mines*, 987 F. Supp. 1263, 1273-75 (E.D. Cal. 1997) (rejecting the notion that the failure to regulate or legislate is a proper basis to find the United States liable under CERCLA).

Even if Plaintiffs correctly allege that §§ 261.70(a)(4) and 261.50(a) provide the Service the ability to potentially regulate the hunters' disposal of lead ammunition in the

Kaibab, the mere existence of those legal authorities falls far short of the *Hinds* threshold to state a claim, 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. Specifically, under 36 C.F.R. § 261.70(a)(4), the Service would have to: act contrary to established federal policy deferring regulation of hunting to states; consult with the State Commission; issue a proposed rule; take public comment on the proposed rule; and 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). Similarly, before issuing an order relating to lead ammunition under 36 C.F.R. § 261.50(a), the Service again would have to consult with the State Commission; ensure consistency with the Forest's land and resource management plan, *see* 16 U.S.C. § 1604(i); comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321-35; and potentially solicit public comment. These legal structures and processes serve to underscore that the Service currently exercises no affirmative control over how hunters use and allegedly dispose of spent lead ammunition in the Kaibab for purposes of RCRA § 6972(a)(1)(B). The Service cannot possibly be deemed to regulate lead ammunition use in the Forest *until* these procedures have been followed. Logically, the Service also cannot exercise "continuing control" over spent lead ammunition or its disposal when it has never affirmatively taken control over such ammunition in the first place.

In sum, *Hinds* rejected an "expansive" theory and cannot be read to support an even more extreme argument that the mere existence of unexercised regulatory authority is sufficient to impose RCRA liability on the Service. Plaintiffs' unprecedented theory would effectively eliminate all meaningful boundaries on RCRA liability in this context. If the failure to regulate a particular subject matter alone were sufficient to impose RCRA "contributor" liability on a government agency, countless government agencies could be targeted in RCRA actions because plaintiffs could always allege that an agency could have promulgated regulations, issued orders, or otherwise done more to prevent the disposal of waste by others. This would be flatly inconsistent with common sense and

the plain language of RCRA, as interpreted by *Hinds*, and thus this Court should reject Plaintiffs' meritless unexercised authority theory in this case.

B. Mere Federal "Landownership" Is Insufficient to State a Viable RCRA "Contributor" Claim Against the Service.

In the appeal to the Ninth Circuit, Plaintiffs argued that the Service could be a "contributor" for RCRA purposes merely because the United States is a "landowner" of national forests and the Service is allegedly not abating the disposal of spent lead ammunition by others in the Kaibab. *See Ctr. for Biological Diversity*, 925 F.3d at 1052-53 (suggesting there may be some "ambiguity" in other circuits regarding the potential for "landowner abatement liability"). Even assuming *arguendo* the Service itself could be deemed a "landowner" as opposed to an "administrator" of National Forest System lands, *but see* 16 U.S.C. § 1609(a) (defining the National Forest Service as including lands *administered* by the Service), Plaintiffs' theory fails because there is no meaningful distinction for purposes of RCRA § 6972(a)(1)(B) between the Service's role as a federal administrator of National Forest System lands and its alleged status as a landowner. The source of the Service's legal authority over National Forest System lands is the same regardless. Thus, attributing "landowner" status to the Service does not convert unexercised regulatory authority into the active involvement required by *Hinds*.

Plaintiffs' argument also overlooks that *Hinds* specifically relied on cases that repudiated the notion that mere landownership confers RCRA "contributor" liability. *See id.* at 851 (citing *Honeywell*, 263 F. Supp. 2d at 844). *Hinds* approvingly cited *Honeywell*, which 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 current owners of the site at issue, who allegedly displayed indifference to the spread of contamination after purchasing the property. 263 F. Supp. 2d at 831, 846. Similarly, the Ninth Circuit quoted and followed the Seventh Circuit's RCRA decision in *Sycamore Industries*, 546 F.3d at 854 (holding that an owner who sold a building with an abandoned heating

system containing asbestos insulation was not liable under RCRA for leaving the asbestos in place, which was "merely passive conduct"). *See Hinds*, 654 F.3d at 851.[3]

In addition, a recent case in the Ninth Circuit confirms that "mere ownership of contaminated land" is insufficient under *Hinds* to establish "contributor" liability under RCRA. *See City of Imperial Beach v. Int'l Boundary & Water Comm'n*, 356 F. Supp. 3d 1006, 1022-23 (S.D. Cal. 2018) (emphasizing the necessity for active involvement to satisfy RCRA § 6972(a)(1)(B) and stating that a defendant "must have a sufficiently direct connection to the waste disposal process."). Although they urge this Court to rule otherwise, Plaintiffs have not identified a single decision that has endorsed its passive "landowner" theory in this Circuit since *Hinds*. Their allusions to common law nuisance cannot alter the Ninth Circuit's definitive interpretation of the statute's plain text, *see Hinds*, 654 F.3d at 850 (endorsing the plain and ordinary meaning of "contribute"), or its proper application to preclude a RCRA claim against the Service here.[4]

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3 Even if some ambiguity exists in other decisions, the *Hinds* Court presumably was aware of the landowner abatement liability cases mentioned in the May 2019 panel decision because they all predated *Hinds*. In fact, the *Hinds* cited the leading case mentioned by the panel – *Cox v. City of Dallas*, 256 F.3d 281 (5th Cir. 2011) – and nevertheless held that active involvement or control over waste disposal is necessary for RCRA "contributor" liability. *Hinds*, 654 F.3d at 850. Moreover, *Cox'* discussion of nuisance law was tangential to the result. The City actually generated waste and affirmatively contracted for disposal of its own waste at two landfills, while maintaining continuing oversight over the disposal process. *Cox*, 256 F.3d at 286, 296-97. The City's direct and active role in the disposals at issue in *Cox* is obviously distinguishable from the Service's passive role with respect to public hunting in the Kaibab.

4 Imperial Beach alleged that a federal agency was liable for disposing wastewater flowing from Mexico through the agency's flood control conveyances and structures into the Tijuana River in the United States. Despite federal ownership of the infrastructure through which the waste flowed on this side of the border, the court in *Imperial Beach* ruled that allowing waste flows to occur was passive conduct insufficient to impose RCRA liability. 356 F. Supp. 3d at 1023-24. Here, the Service at most plays a passive role in deferring to the State of Arizona's regulation of hunting, including the types of ammunition that may be used, rather than federally regulating hunting in the Kaibab.

Plaintiffs' reliance on public nuisance doctrine is misguided for additional reasons. There is nothing in RCRA or its legislative history to suggest that a public nuisance claim would lie against the United States when acting in its sovereign capacity as a federal regulator. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) ("legislative history cannot supply a waiver that does not appear clearly in any statutory text"). Congress also provided no indication that RCRA liability would arise when the United States gives the public access to federal lands in accordance with federal law to conduct lawful recreational activities authorized by state hunting permits. In addition – and contrary to Plaintiffs' assertions – *Hinds* is consistent with the principle that a person is liable for a public nuisance only when that person actively created or assisted in creating it. *See Redevelopment Agency of City of Stockton v. BNSF Ry. Co.*, 643 F.3d 668, 673-74 (9th Cir. 2011). Thus, "nuisance liability requires more than a passive or attenuated causal connection to contamination." *Id.* at 674 n.2 (stating that a public nuisance must be premised on "affirmative conduct that assisted in the creation of a hazardous condition") (internal citation and quotation omitted). As the Ninth Circuit held, active involvement or an affirmative act leading to an actual control over the waste at the time of disposal is necessary for RCRA contributor liability. *Hinds*, 654 F.3d at 851 (emphasizing the need for a "direct connection").

C. Issuing Special Use Permits to Commercial Outfitters and Guides Does Not Make the Service Responsible for the Disposal of Spent Lead Ammunition by Others.

Plaintiffs make only one allegation that arguably accuses the Service of taking an affirmative action, albeit indirectly, with respect to ammunition use in the Kaibab: that the Service issues permits to commercial outfitters and guides without restricting the use of lead ammunition. Compl. ¶ 34. But this argument adds nothing new because, at best, the issuance of a special use permit without banning lead ammunition is just another example of unexercised authority, which is insufficient to establish liability under RCRA § 6972(a)(1)(B). *See supra* 9-12. Moreover, as explained below, the Service does not regulate noncommercial recreational activities like hunting in the Kaibab. The special use permit provisions for commercial guiding or outfitting on National Forest System

lands do not supplant Arizona's hunting regulations, and do not constitute active and direct involvement in how hunters conduct themselves in the field. *See Hinds*, 654 F.3d at 851 (RCRA requires active functions with a "direct connection" to the waste itself); *Nat'l Exch. Bank and Tr. v. Petro-Chem. Sys. Inc.*, 2012 WL 6020023, *3 (E.D. Wis. Dec. 3, 2012) (finding that Congress did not intend the term "contributed" to be an "invitation to string together an expansive causal chain of tangential defendants").

Special use permits are required for those who engage in commercial activities on National Forest System lands, but the Service's regulations do not specifically address hunting or hunting practices, nor do they dictate the types of ammunition hunters may use in the Kaibab. 36 C.F.R. §§ 251.50, 251.51 (generally requiring authorization for commercial uses and activities on National Forest System lands and defining "commercial use or activity"); *see supra* at 3-5. 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 of any kind is required to hunt, and the Service defers to the State of Arizona to regulate hunting in the Kaibab. *See supra* at 2-4 (discussing federal statutes explicitly preserving the states' traditional role in managing hunting on National Forest System lands). The limited applicability of special use permits for commercial endeavors does not alter or supersede the State's regulation of hunting, including any individual permit or ammunition requirements applicable to hunters in the Kaibab.

In sum, the issuance of special use permits to commercial outfitters and guides in accordance with existing federal regulations does not legally equate to the Service being actively involved in the disposal of lead ammunition. By alleging that the Service does not condition special use permits on permit holders' prohibiting their clients from using lead ammunition, the Complaint at best places the Service in an indirect, passive role as a federal agency that is not exercising regulatory authority in the manner Plaintiffs prefer. It is notable that Plaintiffs do not (and cannot) allege that special use permits authorize the disposal of lead ammunition on National Forest System lands. As the Service does not play an active role in or have a direct connection to the disposal of spent lead

ammunition in the Kaibab merely by issuing a special use permit for outfitting and guiding on National Forest System lands, these allegations are legally deficient and do not save the RCRA claim from dismissal under Rule 12(b)(6). *See Hinds*, 654 F.3d at 849-51 (concluding that a manufacturer's design and instructions regarding wastewater handling were insufficient to impose RCRA liability on the manufacturer for disposals resulting from the manner in which others used the manufacturer's machines).

IV. CONCLUSION

Since the reintroduction of the experimental California condor population to northern Arizona more than 20 years ago, the Service has played a positive role in increasing the species' prospects for survival and has continued to manage the Kaibab in accordance with federal law. With the State of Arizona and other stakeholders, the Service has supported a host of measures that have substantially reduced the condors' exposure to spent lead ammunition. The allegations in Plaintiffs' now seven-year old Complaint remain insufficient to establish that the Service is legally responsible under RCRA for the disposal of lead ammunition by hunters in the Kaibab. The Service's unexercised regulatory authority cannot serve as a legal basis for imposing RCRA "contributor" liability under Ninth Circuit law. Accordingly, the Court should grant this motion and dismiss the Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October 2019, I caused the attached Forest Service motion and memorandum 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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