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8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF ARIZONA**

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

11 Plaintiffs,

12 v.

13 United States Forest Service,

14 Defendant,

15 and

16 The National Rifle Association of America;  
17 Safari Club International; and National  
Shooting Sports Foundation, Inc.,

18 Intervenor-Defendants.  
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No. CV-12-8176-PCT-SMM

**NATIONAL SHOOTING SPORTS  
FOUNDATION'S MOTION FOR  
JUDGMENT ON THE  
PLEADINGS AND SUPPORTING  
MEMORANDUM**

**(Oral Argument Requested)**

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**TABLE OF CONVENTIONS**

AGFD	Arizona Game and Fish Department
Condor Report	U.S. Fish and Wildlife Service, <i>A Review of the Third Five Years of the California Condor Reintroduction Program in the Southwest</i> (2012)
Condor Rule	U.S. Fish and Wildlife Service, <i>Establishment of a Nonessential Experimental Population of California Condors in Northern Arizona</i> ; Final Rule, 61 Fed. Reg. 54,044 (Oct. 16, 1996)
ESA	Endangered Species Act, 16 U.S.C. §§ 1531 to 1544
FWS	U.S. Fish and Wildlife Service
Kaibab NF	Kaibab National Forest
NSSF	National Shooting Sports Foundation
RCRA	Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 to 6992k

**MOTION**

1  
2 Intervenor-Defendant National Shooting Sports Foundation, Inc. (“NSSF”) hereby  
3 moves for a judgment on the pleadings pursuant to Rule 12(c), Fed.R.Civ.P. Such relief is  
4 appropriate because, even accepting the well-pled facts in the Complaint as true,  
5 Plaintiffs’ claim is defective as a matter of law. In the alternative, NSSF moves for  
6 dismissal of the complaint pursuant to Rule 12(b)(7) and Rule 19(b), Fed.R.Civ.P., for  
7 failing to join the State of Arizona, a required party with significant interests that will be  
8 impaired by the relief being sought by Plaintiffs.

9 NSSF also requests that the Court take judicial notice of certain undisputed facts  
10 set forth in the U.S. Fish and Wildlife’s (“FWS’s”) official rulemaking notice concerning  
11 the introduction of California condors, which are set forth below. *See Establishment of a*  
12 *Nonessential Experimental Population of California Condors in Northern Arizona; Final*  
13 *Rule*, 61 Fed. Reg. 54,044 (Oct. 16, 1996) (codified at 50 C.F.R. § 17.84(j)) (“Condor  
14 Rule”)<sup>1</sup>; *see also Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (holding  
15 that a court may take judicial notice of undisputed matters of public record without  
16 converting a motion to dismiss into a motion for summary judgment).

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION.**

17  
18  
19 Plaintiffs have brought a citizens’ suit under Section 7002(a)(1)(B) of the Resource  
20 Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(B), in which they  
21 allege that recreational hunting on the Kaibab National Forest (“Kaibab NF”) is resulting  
22 in the “disposal” of “solid waste” in the form of spent lead ammunition. Compl. ¶ 1 (ECF  
23 Doc. 1). According to Plaintiffs, this spent ammunition presents an “imminent and  
24 substantial endangerment to health or the environment” because it may be consumed by

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25 <sup>1</sup> For the Court’s convenience, a complete copy of the Condor Rule is attached hereto.  
26

1 California condors when feeding on animal carcasses, leading to lead poisoning. Compl.  
2 ¶¶ 1, 35-42 (quoting 42 U.S.C. § 6972(a)(1)(B)). Defendant Forest Service is alleged to  
3 be “contributing” to this endangerment, and hence liable under the RCRA citizen suit  
4 provision, by failing to prohibit the use of lead ammunition by hunters. According to  
5 Plaintiffs, whenever a hunter fires his rifle at a deer, he is discarding his round, generating  
6 solid waste that is subject to RCRA.

7 Frankly, this is nonsensical. There is no evidence that Congress intended RCRA to  
8 apply to hunting wildlife. “Congress enacted RCRA in an effort to ‘solv[e] the problems  
9 associated with the 3-4 billion tons of discarded materials generated each year, and the  
10 problems resulting from the anticipated 8% annual increase in the volume of such waste.’”  
11 *Ctr. for Cmty. Action v. BNSF Ry. Co.*, 764 F.3d 1019, 1026 (9th Cir. 2014) (quoting H.R.  
12 Rep. No. 94-1491, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239). Spent  
13 ammunition discharged while hunting is not discarded material because it enters the  
14 environment as an expected consequence of its intended use. Therefore, it is not a “solid  
15 waste” under RCRA. *See Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d  
16 502, 518 (9th Cir. 2013). Moreover, cases addressing spent ammunition in the context of  
17 shooting ranges have concluded that spent ammunition must accumulate over time before  
18 it constitutes “solid waste.” *See, e.g., Water Keeper All. v. U.S. Dep’t of Def.*, 152 F.  
19 Supp. 2d 163, 168 (D.P.R. 2001). Plaintiffs have not alleged that there are any  
20 accumulations of spent lead ammunition in the Kaibab NF. The claim thus fails as a  
21 matter of law.

22 Plaintiffs also ignore the FWS’s findings in the Condor Rule, which governs the  
23 introduction of California condors into northern Arizona. As the Condor Rule explains,  
24 FWS evaluated the impact of hunting with lead ammunition on condors and found that  
25  
26



1 this impact was acceptable and no restrictions needed to be placed on hunting. 61 Fed.  
2 Reg. at 54,050/2-3, 54,052/3, 54,054/3-55/1.<sup>2</sup> Further, the Condor Rule authorizes the  
3 taking of condors, provided that such take is non-negligent and incidental to a lawful  
4 activity such as hunting. 50 C.F.R. § 17.84(j)(2)(i). If FWS – the federal agency  
5 responsible for introducing and managing the experimental population – has concluded  
6 that hunting with lead ammunition is an acceptable environmental threat and that  
7 incidental take of condors from hunting is allowed, Plaintiffs cannot establish a substantial  
8 endangerment under RCRA Section 7002(a)(1)(B), and its claim must fail as a matter of  
9 law.

## 10 **II. STATEMENT OF MATERIAL FACTS.**

11 Defendant Forest Service is an agency within the Department of Agriculture and is  
12 responsible for the administration of the Kaibab NF. Compl. ¶ 8.<sup>3</sup> Located in northern  
13 Arizona, this national forest contains about 1.6 million acres of land and, in places,  
14 borders on the Grand Canyon. *Id.* The Kaibab NF is a popular hunting location  
15 especially for large mammals such as deer and elk. *Id.* ¶ 33. The Forest Service issues  
16 special use permits to hunting guides and outfitters who take clients on hunting trips  
17 within the national forest. *Id.* ¶ 34.

18 The Forest Service does not prohibit or restrict the use of lead ammunition by  
19 hunters on the Kaibab NF. *Id.* Likewise, the Arizona Game and Fish Department  
20 (“AGFD”), which regulates hunting in Arizona, does not prohibit or restrict the use of  
21 lead ammunition. *Id.*; *see also* A.R.S. §§ 17-102 (providing that wildlife “are property of  
22 the state and may be taken at such times, in such places, in such manner and with such

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23  
24 <sup>2</sup> Citations to the Federal Register notice for the Condor Rule refer to the column(s) of the  
notice by adding to the page citation “/column number.”

25 <sup>3</sup> The facts set forth below are accepted as true for the purpose of this motion. NSSF reserves  
26 the right to contest the facts alleged in Plaintiffs’ Complaint should this motion be denied.

1 devices as provided by law or rule of the commission”), 17-231 (setting forth the powers  
2 and duties of the Arizona Game and Fish Commission, including establishing hunting  
3 rules and the manner and methods of taking wildlife).

4 Hunters that are successful in killing a deer or elk may field dress the animal and  
5 leave a portion of the carcass behind. Compl. ¶ 35. In that case, scavengers such as  
6 California condors may find and feed on the abandoned carcass. *Id.* ¶ 29, 35. Also, a  
7 hunter may wound an animal, and the animal may escape and later die in the forest. *Id.*  
8 ¶ 28, 35. If that occurs, condors may find and feed on the carcass. *Id.* ¶ 35. In these  
9 cases, if the hunter used lead ammunition, condors may ingest lead fragments found in the  
10 carcass and be poisoned. *Id.* ¶¶ 30-31.

11 There were 73 California condors in northern Arizona and southern Utah when the  
12 Complaint was filed in 2012. *Id.* ¶ 36. As stated, the FWS introduced these birds as a  
13 nonessential experimental population pursuant to a special regulation issued under Section  
14 10(j) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1539(j). *See* Condor Rule, 61  
15 Fed. Reg. 54,044/1; Compl. ¶ 40. The introduced condors are wide-ranging and have  
16 travelled into eastern Nevada, southwestern Arizona, along the Mogollon Rim to the New  
17 Mexico border, and as far north as Flaming Gorge, Wyoming. U.S. Fish and Wildlife  
18 Service, *A Review of the Third Five Years of the California Condor Reintroduction*  
19 *Program in the Southwest (2007-2011)* 11 (2012) (“Condor Report”).<sup>4</sup>

20 In its 1996 rulemaking, the FWS stated that Section 10(j) is designed to allow the  
21 experimental population to be managed “in a manner that will ensure that current and  
22 future land, water or air uses and activities should not be restricted ....” Condor Rule, 61

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23 <sup>4</sup> The FWS Condor Report is referenced in the Complaint as the “SCRT 2012 Report.”  
24 *See* Compl. ¶ 39. This report is an official public document issued by the FWS, and  
25 Plaintiffs have cited and quoted from the report in their Complaint. It is available at  
[https://www.fws.gov/cno/es/calcondor/PDF\\_files/3rd-5YR-Review-Final%20.pdf](https://www.fws.gov/cno/es/calcondor/PDF_files/3rd-5YR-Review-Final%20.pdf). NSSF  
26 therefore references this report as well.

1 Fed. Reg. at 54,049/1. The FWS evaluated “[c]urrent and future land, water [and] air  
2 uses” within the experimental population area, including “sport hunting,” and concluded  
3 that these uses “should not be restricted due to the designation of the nonessential  
4 experimental population of California condors.” *Id.* at 54050. The FWS acknowledged  
5 that lead poisoning from hunting could result in condor deaths. *Id.* at 54054-55. The  
6 FWS explained that notwithstanding this threat, no restrictions would be placed on public  
7 hunting or other outdoor recreational activities. *Id.* at 54052, 54055.

8 Plaintiffs allege in their Complaint that lead poisoning has been the leading cause  
9 of condor deaths. Compl. ¶ 37. Of the 46 condor deaths in the southwest from 1996,  
10 when the species was introduced, to 2011, 21 deaths (48%) have been attributed to lead  
11 poisoning – an average of 1.4 condor deaths per year. *Id.* ¶ 38 (citing Condor Report).  
12 According to the Condor Report, spent ammunition incidentally consumed by scavenging  
13 condors is the primary source of lead exposure. *Id.* ¶ 39. “[R]adiographs have continued  
14 to reveal lead pellets and fragments in the digestive tracks of lead-poisoned condors and  
15 bullet fragments in deer and coyotes collected in the condor’s range.” *Id.* (quoting Condor  
16 Report at 14). Condors have been detected with elevated levels of lead in their blood and  
17 in some cases have been treated with chelation to prevent lead poisoning. *Id.* ¶ 40.

18 Hunting with lead ammunition occurs throughout the condor’s experimental  
19 population area, including the Arizona Strip and southern Utah. *See* Condor Rule, 61 Fed.  
20 Reg. 54,050/2-3 (describing current and future activities within the experimental  
21 population area), 54052/3 (discussing hunting in the vicinity of the Vermillion Cliffs  
22 reintroduction area), 54054/3-55/1 (discussing hunting and the potential for lead  
23 poisoning).

24 Plaintiffs do not allege that lead ammunition has been disposed or discarded at any  
25 specific locations within the Kaibab NF. *See generally* Compl. Likewise, Plaintiffs do  
26 not allege that lead ammunition has been allowed to accumulate at any specific disposal

1 sites within the Kaibab NF. *Id.* Furthermore, Plaintiffs do not allege that any California  
2 condor deaths have been caused by exposure to lead ammunition at any specific locations  
3 within the Kaibab NF. *Id.*

### 4 **III. STANDARD OF REVIEW.**

5 “Judgment on the pleadings is properly granted when, accepting all factual  
6 allegations in the complaint as true, there is no issue of material fact in dispute, and the  
7 moving party is entitled to judgment as a matter of law.” *Chavez v. United States*, 683  
8 F.3d 1102, 1108 (9th Cir. 2012) (quoting *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir.  
9 2009)) (alterations from original not shown). “Analysis under Rule 12(c) is ‘substantially  
10 identical’ to analysis under Rule 12(b)(6) because, under both rules, a court must  
11 determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a  
12 legal remedy.” *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1155 (9th Cir.  
13 2015) (quoting *Chavez*, 683 F.3d at 1108). Accordingly, dismissal is proper if a party  
14 fails to assert a cognizable legal theory or fails to allege sufficient facts to support a legal  
15 claim. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).  
16 Furthermore, conclusory allegations and unwarranted inferences are insufficient to defeat  
17 a motion for judgment on the pleadings. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d  
18 969, 973 (9th Cir. 2004); *see also Chavez*, 683 F.3d at 1108 (“[A] court discounts  
19 conclusory statements, which are not entitled to the presumption of truth, before  
20 determining whether a claim is plausible”).

21 Based on these well-settled principles, NSSF is entitled to judgment on the  
22 pleadings and Plaintiffs’ RCRA claim should be dismissed with prejudice.

### 23 **IV. ARGUMENT.**

#### 24 **A. Legal Background.**

25 RCRA provides both regulatory and remedial authorities with regard to solid and  
26 hazardous wastes. RCRA’s regulatory program imposes a comprehensive “cradle-to-

1 grave” regulatory structure for tracking wastes from their generation to their ultimate  
2 disposal, including a requirement to obtain a permit for the treatment, storage, and  
3 disposal of any hazardous wastes. *See generally* 42 U.S.C. §§ 6921-6939e; 40 C.F.R.  
4 §§ 260-68, 270-73; *see also Conn. Coastal Fishermen’s Ass’n v. Remington Arms Co.,*  
5 *Inc.*, 989 F.2d 1305, 1313 (2d Cir. 1993). RCRA’s remedial program, on the other hand,  
6 authorizes the United States to bring “imminent hazard” lawsuits under Section 7003 of  
7 RCRA, 42 U.S.C. § 6973, against persons who have contributed or who are contributing  
8 to the disposal of a solid or hazardous waste that may present an imminent and substantial  
9 endangerment to health or the environment.

10 RCRA also authorizes a citizen to commence a civil action on his own behalf

11 . . . against any person, including the United States . . . [1] who has  
12 contributed or who is contributing [2] to the past or present handling,  
13 storage, treatment, transportation, or disposal [3] of any solid or hazardous  
14 waste [4] which may present an imminent and substantial endangerment to  
15 health or the environment . . . .

16 42 U.S.C. § 6972(a)(1)(B) (numbering added for reference purposes). Plaintiffs bring the  
17 present action against the Forest Service under this provision, alleging that the agency is  
18 contributing to the disposal of a solid waste by failing to ban the use of lead ammunition.

19 **B. Lead Ammunition Used in Hunting Is Not RCRA “Solid Waste.”**

20 Determining whether spent ammunition constitutes “solid waste” under RCRA  
21 “begin[s] with the language of the statute.” *Safe Air for Everyone v. Meyer*, 373 F.3d  
22 1035, 1041 (9th Cir. 2004) (citation omitted). RCRA defines “solid waste” as “any  
23 garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air  
24 pollution control facility and *other discarded material*, including solid, liquid, semisolid,  
25 or contained gaseous material resulting from industrial, commercial, mining, and  
26 agricultural operations and from community activities . . . .” 42 U.S.C. § 6903(27)  
(emphasis added). Plaintiffs contend that lead ammunition discharged while hunting

1 constitutes “discarded material” and therefore a “solid waste” within the meaning of  
2 RCRA. *See, e.g.*, Compl. ¶¶ 3, 28-29.

3 Although “RCRA itself does not define the term ‘discarded material,’” the Ninth  
4 Circuit has stated “that the verb ‘discard’ is defined by dictionary and usage as to ‘cast  
5 aside; reject; abandon; give up.’” *Safe Air for Everyone*, 373 F.3d at 1041 (quoting The  
6 New Shorter Oxford English Dictionary 684 (4th ed. 1993)). It defies ordinary usage to  
7 say that hunters “discard,” “cast aside,” “reject,” “abandon,” or “give up” their  
8 ammunition when firing a rifle at a deer. Rather, they *use* the ammunition for its intended  
9 purpose. *See Ecological Rights*, 713 F.3d at 515 (material “being put to its intended use”  
10 is not solid waste); *No Spray Coal., Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir.  
11 2001) (“[M]aterial is not discarded until after it has served its intended purpose.”).

12 Clearly, when a hunter shoots a rifle at a game animal, the ammunition is being  
13 used for its intended purpose. Plaintiffs apparently argue, however, once the round hits its  
14 target, it has served its intended purpose and becomes “solid waste.” At that point, the  
15 round may be lost in a wounded animal that was shot and never retrieved or, if the animal  
16 was field dressed, left behind in a “gut pile.” In these circumstances, Plaintiffs contend  
17 that the round has been “discarded” and therefore is “solid waste” under RCRA.

18 This argument is erroneous. In the Ninth Circuit, materials entering the  
19 environment as an expected consequence of their intended use do not “automatically”  
20 constitute “solid waste.” *Ecological Rights*, 713 F.3d at 518. Lead ammunition  
21 discharged in the course of hunting does not become discarded material under RCRA.  
22 Moreover, cases addressing whether spent lead ammunition constitutes “solid waste” in  
23 the context of shooting ranges establish that spent ammunition only becomes solid waste  
24 when it accumulates over time, not when the ammunition was discharged initially at its  
25 intended target. *See, e.g., Water Keeper*, 152 F. Supp. 2d at 168. In this case, Plaintiffs  
26 do not allege that lead ammunition has accumulated in the Kaibab NF. Therefore, their

1 claim fails as a matter of law.

2 **1. Lead ammunition is not “discarded material” when it is**  
3 **fired for the purpose of hunting game.**

4 Material “released into the environment as a natural, expected consequence of its  
5 intended use . . . is not automatically ‘solid waste’ under RCRA’s definition of that term.”  
6 *Ecological Rights*, 713 F.3d at 518. In *Ecological Rights Foundation*, the Ninth Circuit  
7 decided whether a wood preservative containing the toxin pentachlorophenol (“PCP”)  
8 constituted “solid waste.” The defendant utility companies applied the preservative to  
9 their utility poles, and, over time, the preservative seeped from the poles. The plaintiff  
10 contended that this practice violated RCRA. The court rejected this argument, holding  
11 that the preservative was not a RCRA “solid waste.” The court reasoned that, while on  
12 the utility poles, the preservative “clearly is being put to its intended use as a general  
13 biocide” and is not “solid waste.” *Id.* at 515. The plaintiff argued, however, that once the  
14 preservative “leaks, spills, or otherwise escapes from the poles,” it is no longer being used  
15 for its intended purpose and becomes “solid waste.” *Id.* The court rejected this argument  
16 as well and concluded that the leaking preservative was not “solid waste” because the  
17 leakage was “an expected consequence of the preservative’s intended use.” *Id.* at 516.

18 Notably, the Ninth Circuit borrowed from the U.S. Environmental Protection  
19 Agency’s (“EPA’s”) position on whether fired military munitions constitute “solid waste”  
20 in reaching its holding. The court observed:

21 EPA disagrees . . . that munitions are a “solid waste” when they hit the  
22 ground because they have no further function . . . . EPA’s interpretation [of  
23 “solid waste”] focuses on whether a product was used as it was intended to  
24 be used, not on whether the purpose of the product is to perform some  
25 function once on the ground. For example, the use of explosives (e.g.,  
26 dynamite) for road clearing, construction, or mining does not trigger RCRA  
regulation, even though any residuals on the ground serve no further  
function.







1 Other courts, addressing spent lead ammunition on shooting ranges, similarly have  
2 held that materials entering the environment as an expected consequence of their intended  
3 use may become solid waste if they accumulate over time. *See, e.g., Conn. Coastal*, 989  
4 F.2d at 1316. In *Connecticut Coastal*, the plaintiff filed a RCRA citizen suit against the  
5 owner of a shooting range. *Id.* at 1309. Over a 70-year period, approximately 2,400 tons  
6 (nearly 5 million pounds) of spent lead ammunition accumulated on and around the  
7 shooting range. *Id.* at 1308. The range owner argued that the lead shot had accumulated  
8 while using the product as intended and thus it was not “solid waste” under RCRA. The  
9 Second Circuit disagreed. “Without deciding how long materials must accumulate before  
10 they become discarded – that is, when the shot is fired or at some later time,” the court  
11 held that the lead shot had “accumulated long enough to be considered solid waste.” *Id.* at  
12 1316; *see also Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1222 (D. Or.  
13 2009) (holding that “[f]ifty-four years of lead accumulation [in a shooting range] is more  
14 than long enough to be considered solid waste”); *Potomac Riverkeeper, Inc. v. Nat'l*  
15 *Capital Skeet & Trap Club, Inc.*, 388 F. Supp. 2d 582, 584, 587 (D. Md. 2005) (holding  
16 that “lead build up in the soil” near a shooting range that operated for almost 50 years  
17 constituted “solid waste”).

18 Although the Second Circuit in *Connecticut Coastal* was careful not to decide the  
19 exact moment at which spent ammunition becomes “solid waste,” other courts have  
20 observed that “the court’s language strongly suggests that munitions must ‘accumulate’  
21 for an unspecified amount of time before they can be considered discarded material and  
22 thus solid waste.” *Water Keeper*, 152 F. Supp. 2d at 167; *see also id.* at 169 (“RCRA  
23 does not support Plaintiffs’ contention that munitions become discarded material  
24 immediately upon being fired.”). The Ninth Circuit has observed that “the length of time  
25 the materials accumulated was important to determining whether the materials were solid  
26 waste.” *Safe Air for Everyone*, 373 F.3d at 1042 n.5; *see also Simsbury-Avon*

1 *Preservation Soc., LLC v. Metacon Gun Club, Inc.*, 2006 WL 2223946, at \*8-9 (D. Conn.  
2 2006) (holding that spent lead ammunition at a shooting range that was periodically  
3 recovered and did not accumulate could not be considered “solid waste” under RCRA);  
4 *Otay Land Co. v. U.E. Ltd., L.P.*, 440 F. Supp. 2d 1152, 1182 (S.D. Cal. 2006), *vacated on*  
5 *other grounds sub nom. Otay Land Co. v. United Enterprises Ltd.*, 338 F. App’x 689 (9th  
6 Cir. 2009) (same).

7 In this case, Plaintiffs have failed to allege an accumulation of spent lead  
8 ammunition. Rather, they assert that hunting occurring across the entire Kaibab NF – an  
9 area containing some 1.6 million acres of land – constitutes “disposal” of a “solid waste.”  
10 Compl. ¶ 33. There are no allegations that lead has accumulated anywhere in the national  
11 forest; only that fragments of lead ammunition are found in individual animal carcasses,  
12 which may be discovered and consumed by condors. Compl. ¶¶ 28, 29.<sup>6</sup>

13 Moreover, the Complaint makes plain that Plaintiffs are not concerned with tons,  
14 pounds, or even ounces of lead in the Kaibab NF, but with “minute amounts” of lead  
15 found in “very small lead fragment[s].” Compl. ¶¶ 30, 31. They make it clear that their  
16 goal is not to force the cleanup of an unsafe accumulation of lead in the national forest,  
17 but “to prevent to the greatest extent possible *any amount*” of lead from entering the  
18 environment. Compl. ¶ 14 (emphasis added). This conflicts with the Ninth Circuit’s  
19

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20 <sup>6</sup> Even if Plaintiffs had alleged measurable accumulations of lead in the 1.6-million-acre  
21 Kaibab NF, they have not alleged a substantial endangerment resulting from such  
22 accumulations. *See Conn. Coastal*, 989 F.2d at 1308 (plaintiff claimed that a 5-million-  
23 pound accumulation of lead in land and water near a shooting range harmed wildlife that  
24 depended on the water); *Benjamin*, 673 F. Supp. 2d at 1211 (plaintiff claimed that lead  
25 build-up was contaminating nearby creek). Plaintiffs’ only allegation of substantial harm  
26 is lead poisoning caused by condors consuming the remains of game hunted with lead  
ammunition. Compl. ¶ 35. There are no allegations of harm with respect to ammunition  
that misses its target and comes to rest in the soil, a tree, or another location in the forest.  
Nor have Plaintiffs alleged that condors find and consume lead ammunition in such  
locations.

1 holding that materials entering the environment as an expected consequence of an  
2 intended use are “not automatically ‘solid waste’ under RCRA’s definition of that term,”  
3 *Ecological Rights*, 713 F.3d at 518, and the clear weight of authority requiring some  
4 degree of accumulation before spent ammunition becomes RCRA “solid waste,” *e.g.*  
5 *Water Keeper Alliance*, 152 F. Supp. 2d at 167-69.

6 Finally, it should be emphasized that the implications of Plaintiffs’ position would  
7 extend well beyond the present appeal. Under their interpretation of RCRA, every time  
8 someone shoots a gun, the bullet – lead or otherwise – becomes “solid waste” because,  
9 once it hits (or misses) its target, it has served its intended purpose. Under this view, all  
10 spent ammunition automatically becomes subject to RCRA. This result is at odds with  
11 *Ecological Rights Foundation*, which held that material entering the environment as an  
12 expected consequence of an intended use is not automatically “solid waste.” It simply  
13 “defies reason to suggest that” every hunter, by shooting a single bullet, “is producing  
14 ‘solid waste’ under RCRA.” *Ecological Rights Found.*, 713 F.3d at 517. The court  
15 should reject such an “untenable result[.]” *Id.*

16 **C. The Condor Rule Precludes an “Imminent and Substantial**  
17 **Endangerment” Finding.**

18 **1. Background.**

19 In order to maintain a claim under the RCRA citizen suit provision, 42 U.S.C.  
20 § 6972(a)(1)(B), Plaintiffs must allege and prove that the endangerment to the  
21 environment alleged in their complaint is both (1) “imminent,” *i.e.*, “threatens to occur  
22 immediately;” and (2) “substantial,” *i.e.*, “serious, and there must be some necessity for  
23 the action.” *City of Fresno v. United States*, 709 F. Supp. 2d 934, 943 (E.D. Cal. 2010)  
24 (quoting *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996), and *Price v. U.S.*  
25 *Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994)); *see also, e.g., Cordiano v. Metacon Gun Club*,  
26 575 F.3d 199, 209-11 (2nd Cir. 2009) (discussing the imminent and substantial

1 endangerment standard).

2 In this case, Plaintiffs' substantial endangerment claim is based on its allegation  
3 that hunting with lead ammunition in the Kaibab NF has resulted in the poisoning of  
4 California condors. See Compl. ¶¶ 35–42. However, condors found in northern Arizona,  
5 including the Kaibab NF, have been introduced by the FWS as a nonessential  
6 experimental population under Section 10(j) of the ESA, 16 U.S.C. § 1539(j). See  
7 *generally* Condor Rule.

8 When Congress amended the ESA in 1982 to allow the release of experimental  
9 populations, it intended to address landowner concerns and to reduce controversy about  
10 the impact of such releases on existing land and resource uses. See, e.g., H.R. Conf. Rep.  
11 No. 97-835, at 33-35 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2874-76; *Wyo. Farm*  
12 *Bur. Fed'n v. Babbitt*, 199 F.3d 1224, 1231-32 (10th Cir. 2000) (discussing legislative  
13 history of Section 10(j)). Consequently, Congress required the FWS to adopt special rules  
14 to identify and manage experimental populations, including mechanisms to control the  
15 population and reduce resource conflicts, such as the capture and removal of animals. See  
16 *Wyo. Farm Bur.*, 199 F.3d at 1232. FWS must consider “[t]he extent to which the  
17 introduced population may be affected by existing or anticipated Federal or State actions  
18 or private activities within or adjacent to the experimental population area.” 50 C.F.R.  
19 § 17.81(b)(4).

20 As a consequence, when it issued the Condor Rule and authorized condors to be  
21 released in northern Arizona, the FWS specifically evaluated the impact of lead  
22 ammunition on condors and found that this threat was acceptable and that no restrictions  
23 needed to be placed on hunting. See Condor Rule, 61 Fed. Reg. at 54,050/3, 54,052/3,  
24 54,054/3-55/1. Because the federal agency charged with managing the condor population  
25 has concluded that the impact of hunting with lead ammunition is acceptable and no  
26 restrictions on hunting are necessary, Plaintiffs cannot establish substantial endangerment

1 under RCRA Section 7002(a)(1)(B). Consequently, their claim fails as a matter of law.

2           **2. The FWS specifically evaluated the impact of hunting with**  
3           **lead ammunition in approving introduction of the condor**  
4           **population and concluded that need not be restricted.**

5           As stated, the introduction of condors in northern Arizona was authorized by a  
6 special rule adopted by the FWS in 1996. In that rulemaking, the FWS explained that  
7 Section 10(j) is designed to allow the experimental population to be managed “in a  
8 manner that will ensure that current and future land, water or air uses and activities should  
9 not be restricted.” Condor Rule, 61 Fed. Reg. at 54,049/1; *see also id.* at 54,050/2. Prior  
10 to releasing any condors, the FWS evaluated the existing management programs for the  
11 federal and tribal land in the experimental population area, including the Kaibab NF, and  
12 determined that these programs are “consistent with the reintroduction of condors in the  
13 area.” *Id.* at 54,050/2; *see also id.* at 54,053/2-3 (“existing land management is  
14 compatible with condors”). The agency specifically identified a variety of “land, water, or  
15 air uses,” including sport hunting, that “should not be restricted due to the designation of  
16 the nonessential experimental population of California condors.” *Id.* at 54,050/2-3; *see*  
17 *also id.* at 54,053/3 (“[C]ondors released into the experimental population area should be  
18 able to co-exist with the current and anticipated land, water, or air uses in the area in a  
19 compatible manner without conflict.”).

20           Furthermore, the FWS specifically considered hunting with lead ammunition in its  
21 experimental population rule, and determined that while some condors would be poisoned  
22 by consuming animal remains containing lead fragments, this threat was acceptable and  
23 did not require restrictions on hunting. *Id.* at 54,052/3 (discussing “Issue 5: How will the  
24 operation of the California condor reintroduction project at the Vermillion Cliffs affect  
25 hunting in the area?”), 54,054/3-55/1 (discussing “Issue 11: Lead poisoning could be a  
26 problem once young condors learn to find carrion on their own.”). The FWS specifically  
recognized that “the Kaibab Plateau is heavily hunted and represents a threat to condors

1 once they disperse from the release site and learn to locate food on their own,” and stated  
2 that while condor deaths are expected, it “does not intend to request modifications or  
3 restrictions to the current hunting regulations anywhere in the vicinity of the Vermilion  
4 Cliffs release site or in the experimental population area.” *Id.* at 54,055/1. The agency  
5 also authorized take of a condor, including killing and injuring, provided that such take is  
6 incidental to a lawful activity such as hunting. 50 C.F.R. § 17.84(j)(2)(i).

7 Finally, the FWS stated that condors will be relocated from an area “to avoid  
8 conflicts with ongoing or proposed activities, or when relocation is requested by an  
9 adversely affected landowner.” Condor Rule, 61 Fed. Reg. at 54,053/3. This requirement  
10 is codified at 50 C.F.R. § 17.84(j)(4)(ii), which provides that condors will be relocated or  
11 removed “to address conflicts with ongoing or proposed activities, or with private  
12 landowners, when removal is necessary to protect the condor, or is requested by an  
13 adversely affected landowner or land manager, or other adversely affected party.” Thus, a  
14 judgment that the Forest Service has violated RCRA by contributing to the disposal of a  
15 solid waste and ordering the agency to “abate the endangerment” – the generalized relief  
16 sought by Plaintiffs – would likely result in the removal of condors from the Kaibab NF,  
17 rather than a ban on lead ammunition.

18 In short, to obtain relief under the RCRA citizen suit provision, Plaintiffs must  
19 allege and prove an imminent and substantial endangerment. They cannot do so because  
20 Plaintiffs’ alleged impact to the environment – the deaths of condors due to lead poisoning  
21 – was evaluated and accepted by the FWS in the Condor Rule. FWS’s findings in the  
22 Condor Rule refute Plaintiffs’ allegation of imminent and substantial endangerment,  
23 thereby undermining their claim.

24 In reality, Plaintiffs are attempting to use RCRA – a statute that regulates the  
25 generation, transportation, and disposal of solid waste – to override the FWS’s findings  
26 and management prescriptions under ESA Section 10(j). This tactic is clearly improper

1 and should be rejected by the Court. If Plaintiffs disagree with the manner in which the  
2 California condor population is being managed, their remedy lies with the FWS, which is  
3 responsible for managing the experimental population, not a lawsuit against the Forest  
4 Service under RCRA.

5 **V. ALTERNATIVELY, THE FAILURE TO JOIN THE STATE OF ARIZONA**  
6 **SUPPORTS DISMISSAL PURSUANT TO RULE 19(b).**

7 NSSF hereby adopts the argument made by the State of Arizona in its amicus brief  
8 and urges dismissal on this alternate ground. In short, the State has primary authority for  
9 the regulating the taking of wildlife, including hunting, and the relief being sought by  
10 Plaintiffs would, if granted, directly interfere with such authority, impairing the State’s  
11 interest in manage hunting and conserving wildlife. The State, therefore, is a required  
12 party under Rule 19(a)(1)(B)(i), but sovereign immunity precludes the State’s joinder  
13 under Rule 19(b). Given this action’s unique circumstances, including the State’s critical  
14 role in the management of hunting, the Court should dismiss this action pursuant to Rules  
15 19(b) and 12(b)(7) if it does not grant dismissal on the grounds urged above.

16 **VI. CONCLUSION AND RELIEF REQUESTED.**

17 For the foregoing reasons, NSSF respectfully requests that the Court enter a  
18 judgment dismissing Plaintiffs’ Complaint with prejudice pursuant to Rule 12(c),  
19 Fed.R.Civ.P. or, in the alternative, Rules 19(b) and Rule 12(b)(7), Fed.R.Civ.P.

20 RESPECTFULLY SUBMITTED this 12th day of November, 2019.

21 FENNEMORE CRAIG, P.C.

22  
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24 Norman D. James

25 *Attorneys for National Shooting Sports*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 12, 2019, I electronically transmitted the foregoing National Shooting Sports Foundation, Inc.’ Motion for Judgment on the Pleadings and Supporting Memorandum to the Clerk’s Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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