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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Center for Biological Diversity, et al., Plaintiffs, vs. United States Forest Service, Defendant, and National Rifle Association of America, Inc., et al., Intervenor Defendants.	Case No: 3:12-cv-08176-SMM **PLAINTIFFS' CONSOLIDATED RESPONSE TO MOTIONS TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS AND AMICUS BRIEF** **(ORAL ARGUMENT REQUESTED)**

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INTRODUCTION

Spent lead ammunition is poisoning wildlife, including critically imperiled California condors, on the Kaibab National Forest ("Kaibab"). Defendant United States Forest Service moves to dismiss Plaintiffs' (the Center for Biological Diversity, Sierra Club, and Grand Canyon Wildlands Council (collectively, "the Center")) claim in this case. The Forest Service advances the sole argument that it is not "contributing to" the endangerment of condors and other wildlife. *See* Dkt. 157. But this Court and the Ninth Circuit have already ruled, and the Forest Service has openly admitted, that the Forest Service has the authority to prohibit the use of lead ammunition on the Kaibab. Because the Forest Service has unquestionable authority over what happens on its land, it has a "measure of control" over the spent lead ammunition, as required by the Ninth Circuit to state a claim under the Resource Conservation and Recovery Act ("RCRA").

Intervenor Defendants National Shooting Sports Foundation ("NSSF"), National Rifle Association of America ("NRA"), and Safari Club International ("SCI") also move to dismiss the Center's claim. *See* Dkt. 160; Dkt. 161. Intervenors' arguments are unavailing because the Center has adequately alleged all elements of a RCRA claim, and because the Endangered Species Act ("ESA") special status of California condors is irrelevant to the Forest Service's liability under RCRA.

Finally, the State of Arizona, through an amicus brief joined by Intervenors, also argues in favor of dismissal because Arizona contends it is a required party under Rule 19 that cannot be joined due to sovereign immunity. *See* Dkt. 159. Arizona, however, has failed to establish the elements of Rule 19. And even if this Court determines that Arizona is a required party, this case can continue in its absence under the "public rights" exception to traditional joinder rules. Finally, and in the alternative, if this Court disagrees with the Center's Rule 19 arguments, this Court should not dismiss this case; rather it should grant

the Center leave to amend its complaint to add claims against the Director of the Arizona Game and Fish Department under the *Ex parte Young* doctrine.

For all of these reasons, and because the Ninth Circuit has already ruled on many of the underlying issues advanced here, this Court should deny the motions to dismiss.

FACTUAL BACKGROUND

Every year, wildlife species that call the Kaibab home, or otherwise rely on it as important habitat, are needlessly poisoned and killed from exposure to spent lead ammunition. *See* Dkt. 1 at ¶¶ 25–29, 35. Wildlife species are exposed to spent lead ammunition when they consume animals that have been shot with lead ammunition. *See id.* at ¶¶ 27–29, 35. When lead-core rifle bullets strike an animal they often fragment into hundreds of small pieces of lead that can be found several inches from the site of the wound in large game animals. *See id.* at ¶ 30. A small lead fragment is enough to severely poison or kill a bird, even one as large as a California condor. *See id.* Wildlife that ingest spent lead ammunition, even in minute amounts, experience many adverse health effects, including death. *See id.* at ¶ 31. In turn, wildlife experiencing these effects are far more susceptible to other forms of mortality. *See id.*

Nowhere is the threat of spent lead ammunition in Arizona more apparent than on the Kaibab, an approximately 1.6 million-acre parcel of federal property in northern Arizona owned and managed by the Forest Service. *See id.* at ¶¶ 8, 33. Lead ingestion and poisoning from ammunition has been documented in many avian predators and scavengers that inhabit the Kaibab, including bald and golden eagles, northern goshawks, ferruginous hawks, turkey vultures, and ravens. *See id.* at ¶ 27.

But there is no better evidence of the regular exposure to spent lead ammunition and its harmful effects on wildlife than what scientists, including federal government researchers, have documented regarding lead poisoning in California condors. *See id.* at

¶¶ 36–42. Lead poisoning from exposure to spent lead ammunition is the leading cause of condor mortality in Arizona, and the primary obstacle to achieving a self-sustaining population of condors there. *See id.* at ¶¶ 37–39. As this Court previously recognized, "'[b]ut for' Defendant's decision to allow toxic lead ammunition to be disposed of in the [Kaibab], there would be no lead waste that could be consumed, and local animal species would not suffer from lead poisoning[.]" Dkt. 81, at 5–6.

LEGAL FRAMEWORK

In enacting RCRA, Congress recognized that "disposal of solid waste . . . in or on the land without careful planning and management can present a danger to human health and the environment" and that "inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health." 42 U.S.C. §§ 6901(b)(2)–(3). Congress authorized citizens to bring suit in federal district court to address risks to the environment posed by improperly controlled and managed wastes, including spent lead ammunition. Specifically, RCRA authorizes any person to bring a civil action against anyone "*including the United States*" who has contributed or who is contributing to the disposal of solid waste that may present an imminent and substantial endangerment to the environment. *Id.* § 6972(a)(1)(B) (emphasis added). And Congress vested district courts with tremendous power to remedy a potential endangerment. RCRA provides that the district court "shall have jurisdiction . . . *to restrain any person* who has contributed or who is contributing to the past or present . . . 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* . . . ." *Id.* § 6972(a) (emphasis added). Courts have noted that the "expansive language of this provision was intended to confer 'overriding authority to respond to situations involving a substantial endangerment to health or the environment.'" *United States v. Price*, 688 F.2d

204, 213 (3d Cir. 1982)[1] (citing H.R. Comm. Print No. 96-IFC 31, at 32) (1979). Such a broad, jurisdictional grant furthers Congress's primary goal behind RCRA endangerment citizen suits, "namely the prompt abatement of imminent and substantial endangerments." H.R. Rep. No. 98-198, pt. 1, at 53 (1984).

ARGUMENT

I. The Forest Service Is a Contributor Under RCRA.

The Forest Service moves to dismiss the Center's claim on the ground that the Forest Service is not a "contributor," as that term applies to RCRA's imminent and substantial endangerment provision. Dkt. 157 at 8. But the statute is clear:

> [A]ny person may commence a civil action on his own behalf [] against any person, *including the United States and any other governmental instrumentality or agency* . . . who has contributed or is contributing to the past or present . . . disposal of any solid … waste which may present an imminent and substantial endangerment to . . . the environment[.]

42 U.S.C. § 6972(a)(1)(B) (emphasis added). The Center's theory of liability tracks this language: the Forest Service, a federal agency, has contributed and is contributing to the past and present disposal of solid waste, in the form of spent lead ammunition, that may present an imminent and substantial endangerment to wildlife on the Kaibab. Dkt. 1 at ¶¶ 3, 44–46. The Center alleges that the Forest Service is a "contributor" due to its ownership and management of the Kaibab, which provides it with control over waste disposal activities on the Kaibab. *See, e.g.*, *id.* at ¶¶ 8, 13, 21–24, 33–34, 44–46.

The governing case in the Ninth Circuit on the meaning of "contributing" establishes two separate bases for liability as a contributor: either a party (1) "ha[s] a

[1] The *Price* decision was discussing 42 U.S.C. § 6973 (RCRA § 7003), which sets forth the U.S. Environmental Protection Agency's ("EPA") analogous power to bring suit to restrain anyone contributing to an imminent and substantial endangerment. RCRA sections 7002(a)(1)(B) and 7003 use the same standard of liability and are thus "similarly interpreted." *Cox v. City of Dallas*, 256 F.3d 281, 294 n. 22 (5th Cir. 2001).

measure of control over the waste at the time of its disposal" or (2) "[is] otherwise actively involved in the waste disposal process." *Hinds Invs., L.P. v. Angioli*, 654 F.3d 846, 852 (9th Cir. 2011); *see also Ingalls v. AMG Demolition & Envtl. Servs.*, No. 17-cv-2013-AJB-MDD, 2018 WL 2086155, at *3 (S.D. Cal. May 4, 2018) (holding that to be a contributor under RCRA, a "defendant [must] be actively involved in *or* have some degree of control over the waste disposal process.") (emphasis added).

The Center has adequately alleged that the Forest Service meets the *Hinds* test for contributing. First, the Center has alleged facts sufficient to establish that the Forest Service has a "measure of control" over waste disposal on the Kaibab based on its regulatory authority and landowner status. Dkt. 1 at ¶¶ 13–20, 22, 25. Second, the Center has alleged facts adequate to establish that the Forest Service is actively involved in waste disposal on the Kaibab because it issues Special Use Permits that facilitate hunting that causes endangerment. *Id.* at ¶¶ 16, 21–35, 46.

A. The Forest Service Has a Sufficient Measure of Control over Waste Disposal Activities on the Kaibab.

The Center adequately alleged that the Forest Service has the requisite "measure of control" over waste disposal activities on the Kaibab. In *Hinds*, the Ninth Circuit recognized that a defendant may be liable where it "'had authority to control . . . any waste disposal.'" *Hinds*, 654 F.3d at 851–52 (quoting *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989)).

1. The Forest Service's Authority to Control Activities on the Kaibab Renders it a "Contributor" Under RCRA.

Congress has vested the Forest Service with broad authority and responsibility to regulate activities on, and occupancy of, the National Forests. Dkt. 1 at ¶ 22. The Forest Service has interpreted its broad authorities to include the ability to issue orders and

regulations that prohibit and restrict activities for the purpose of, *inter alia*, protecting "threatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish." 36 C.F.R. § 261.70(a)(4); *see also* Dkt. 1 at ¶ 23. The regulations provide that each Forest Supervisor has the authority to restrict the manner in which the public uses the particular Forest Service lands over which the supervisor has jurisdiction. *See* 36 C.F.R. § 261.50(a); *see also* Dkt. 1 at ¶¶ 21–24. And as the Ninth Circuit already recognized in this case, "the Forest Service has the authority to control certain conduct of [] third-party hunters." *Ctr. for Biological Diversity v. U.S. Forest Serv*., 640 Fed. Appx. 617, 619 (9th Cir. 2016). The Forest Service cannot, and does not, deny its ultimate authority over activities on the Kaibab, including its authority over hunting and waste disposal.

The Forest Service, however, claims that this authority is too far removed for it to be a "contributor" under RCRA because (1) individual hunters, and not the Forest Service, decide what type of ammunition to use and whether and how to dispose of shot wildlife; (2) it chooses to defer to the state on hunting issues; (3) its potential authority to regulate is not sufficient because there must be active involvement or control at the time the waste is disposed; and (4) it would have to engage in legal process to exercise its authority to control the disposal of spent lead ammunition on the Kaibab. Dkt. 157 at 9, 12. These arguments miss the point and ignore clear statutory language and controlling case law.

First, while individual hunters may choose which type of ammunition to use, it is irrelevant to liability. As the Ninth Circuit recognized, "the Forest Service has the authority to control certain conduct of the third-party hunters." *Ctr. For Biological Diversity*, 640 Fed. Appx. at 619. If the Forest Service properly exercised its authority over the Kaibab, individual hunters would not be legally permitted to hunt in a manner that would result in the disposal of spent lead ammunition on the Kaibab.

Second, as this Court previously explained, the fact that the Forest Service has

chosen to defer to states on the issue of hunting does not deprive the Forest Service of its ultimate authority over and responsibility for activities, including waste disposal and hunting, on its own property. Dkt. 81 at 5. Moreover, by definition, the *Hinds* "measure of control" test does not require that an entity have ultimate control over waste disposal to be liable under RCRA—"some degree of control" suffices. *See Hinds*, 654 F.3d at 851; *see also United States v. Valentine*, 885 F. Supp. 1506, 1512 (D. Wyo. 1995) (denying summary judgment on the basis that "it is not necessary that a party have control over the ultimate decisions concerning waste disposal . . . to be found to be a contributor within the purview of RCRA"). Indeed, the Fifth Circuit affirmed a district court opinion denying summary judgment to the defendant City of Dallas on the issue of RCRA contributor liability, where the City's subcontractor illegally disposed of waste into a landfill, the City knew that such disposal was occurring, and the City continued to work with the subcontractor and took no steps to stop the disposal. *See Cox v. City of Dallas*, 256 F.3d 281, 297 (5th Cir. 2001) (holding that "[t]he district court did not clearly err in finding that this 'lax oversight' of its contractors and their disposal of City waste is evidence of the City's 'contributing to' liability").[2]

Third, the Forest Service argues that its authority to regulate is not sufficient because there must be active involvement or control at the time the waste is disposed. Dkt. 157 at 10. However, the cases the Forest Service relies upon, including *Aceto* and *El Paso Natural Gas Co., LLC v. United States*, are supportive of the Center's claims or distinguishable. The Forest Service here has, if anything, more direct control over waste disposal activities

[2] The Forest Service contends that *Cox* is inapposite because the City of Dallas both generated waste and contracted for its disposal, and the Center alleged no similar facts. Dkt. 157 at 14 n.3. This argument fails because the *Cox* court held that "[n]egligent oversight of [waste] disposal is actionable under the RCRA." 256 F.3d at 296. Although the Forest Service did not generate the waste in question, the Forest Service oversaw the disposal in its capacity as manager and owner of the Kaibab.

on the Kaibab than the defendants did in *Aceto*, a case on which the *Hinds* court heavily relied. In *Aceto*, the plaintiffs alleged that the defendants owned the relevant pesticides and supplied specifications for the formulation of pesticides, but did not own or manage the facility where their pesticides were formulated or where the wastes were disposed. *Aceto*, 872 F.2d at 1378, 1383. The *Aceto* court found that it was reasonable to infer from the allegations that the defendants "had [the] authority to control the way in which the pesticides were formulated, as well as any waste disposal," and that the defendants could be contributors under RCRA. *Id.* at 1383–84. This attenuated control in *Aceto* is a far cry from the unequivocal, direct, and acknowledged control that the Forest Service has over activities, and waste generated from those activities, through its role as landowner and manager of the Kaibab.

The Forest Service also relies on *El Paso Nat. Gas Co., LLC v. United States*, 390 F. Supp. 3d 1025 (D. Ariz. 2019), a Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601–9675, case decided after *Hinds*, to support its argument that passive involvement is insufficient to impose RCRA liability. Dkt. 157 at 11. Of course, this case arises under RCRA, not CERCLA. And while CERCLA cases can provide a "useful analogue" for RCRA cases in some instances, *see Valentine*, 885 F. Supp. at 1514, n.3, here, the Forest Service's reliance on *El Paso* is misplaced. As that case discussed, the Supreme Court has specified what the CERCLA statutory terms "operator" and "arranger" mean. *See El Paso*, 390 F. Supp. 3d at 1041–49. But those are not the relevant statutory terms under RCRA. The only applicable statutory term is "contribute," and *El Paso* does not discuss what "contribute" means or how the controlling *Hinds* case is even relevant to the court's opinion in that case.

Moreover, if anything, the *El Paso* case supports the Center's theory of liability. That is because, although the court did not find the United States to be an "operator" or

"arranger," it did find the United States liable as a *landowner*. *Id*. at 1041. This is the very point the Center has been making from day one of this litigation. Here, the Forest Service is a landowner of the Kaibab and has the authority to control activities in the forest. This level of management is sufficient to subject it to RCRA liability, and the *El Paso* case is not to the contrary.

Lastly, the Forest Service argues that, even if the Center is correct that the Forest Service has the authority to control hunting on the Kaibab, this authority does not satisfy the *Hinds* "measure of control" test because the Forest Service's exercise of this authority "would involve significant legal process, opportunities for public participation, and a lengthy series of steps" by the Forest Service. Dkt. 157 at 12. But the question for the Court here is whether the Center has adequately alleged that the Forest Service has a "measure of control" over waste disposal on the Kaibab; the fact that exercising this control might involve additional process is beside the point. Almost all agency actions involve some amount of legal process; the mere fact that the landowner here also happens to be a regulatory agency that must follow procedure does not shield the agency from liability. Indeed, necessary procedures were no hurdle to the federal government when it long ago passed regulations to prohibit the use of lead ammunition for waterfowl hunting. *See* 51 Fed. Reg. 42,103 (Nov. 21, 1986).

At bottom, the Forest Service is asking this Court to find that it deserves special treatment as a federal regulatory agency. Such special treatment is not warranted. To the contrary, Congress expressly stated that federal agencies are subject to RCRA's imminent and substantial endangerment provision. 42 U.S.C. § 6972(a)(1)(B). And several cases discuss government liability in terms of its ability to control waste disposal practices. *See, e.g.*, *Holy Cross Neighborhood Ass'n v. U.S. Army Corps of Eng'rs*, No. Civ.A. 03–370, 2003 WL 22533671, at *8 (E.D. La. Nov. 3, 2003) (finding plaintiffs satisfied the

requirements of Federal Rule of Civil Procedure 8(a) by putting the "[U.S. Army Corps of Engineers] on notice that the RCRA [section 7002(a)(1)(B)] claim rests on the management of and plan to dredge the Industrial Canal"); *Foster v. United States*, 922 F. Supp. 642, 660 (D.D.C. 1996) (finding it could not "be said that the United States lacked actual control over the disposal of wastes from the neighboring military reservation or the Canal itself"). In sum, there is no RCRA liability exception for the Forest Service simply because it is a government agency.

2. As the Landowner and Manager of the Kaibab, the Forest Service Has a Measure of Control.

In *Hinds*, the owner of two shopping centers sued the manufacturers of dry cleaning equipment used at dry cleaners operating in the shopping centers. *Hinds*, 654 F.3d at 849. The district court dismissed the RCRA claims "because they did not allege active involvement by [the manufacturers] in handling or disposing of waste, as required for RCRA liability." *Id*. The Ninth Circuit affirmed, declining to expand the definition of "contribute" to include defendants who "assist in creating waste but do not actually generate or produce it."

In its most recent opinion in this case, the Ninth Circuit made it clear that *Hinds* is at least distinguishable from the facts presented here. *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, 925 F.3d 1041, 1053 (9th Cir. 2019) (noting that the *Hinds* court "had no cause to consider the question presented here: whether owning or managing land on which disposal of solid waste by third parties is ongoing, known, and unabated can be a sufficiently active role to permit contributor liability"). The Center is not suing gun or lead ammunition manufacturers for contributing to an endangerment on the Kaibab.[3] Rather,

[3] If there is any parallel to be made between this case and *Hinds*, it is between the Forest Service, owner of the Kaibab, and the owner of the shopping centers at issue in *Hinds*, who was *the plaintiff* seeking to recover cleanup and remediation costs from other

the Center's theory is based on the well-established common law principle of current landowner liability for ongoing solid waste disposal that may present an imminent and substantial endangerment to the environment. *See United States v. Waste Indus., Inc.*, 734 F.2d 159, 167 (4th Cir. 1984) ("'[Section] 7003 is essentially a codification of the common law public nuisance'" and "'[s]ome terms and concepts, such as persons 'contributing to' disposal . . . are meant to be more liberal than their common law counterparts.'") (quoting H.R. Comm. Print. No. 96-IFC 31, at 31 (1979)). These common law principles include, for example, the principle that landowners can be liable for nuisances caused by abatable artificial conditions on their property. Restatement (Second) of Torts § 839 (Am. Law Inst. 1979); *see also New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050–52 (2d Cir. 1985) (discussing generally the common law of public nuisance).

Courts have found that RCRA's imminent and substantial endangerment provision must be construed broadly. *See, e.g.*, *Waste Indus*, 734 F.2d at 167 ("Section 7003 is a congressional mandate that the former common law of nuisance, as applied to situations in which a risk of harm from solid or hazardous waste exists, shall include new terms and concepts which shall be developed in a liberal, not a restrictive, manner."); *Aceto*, 872 F.2d at 1383 (discussing legislative history and noting that "an explicit allegation of control" is not required to establish liability) (internal quotation omitted). Consistent with this broad interpretation, numerous courts have found landowners liable for contributing to imminent and substantial endangerments on their property. *See Waste Indus.*, 734 F.2d at 161, 168 (reversing district court's granting of defendants' motion to dismiss RCRA imminent and substantial endangerment claim, where defendants included owners of property who leased land to other defendant to operate landfill); *Zands v. Nelson*, 797 F. Supp. 805, 810 (S.D. Cal. 1992) (finding persons who owned/operated gas station "contributors" under RCRA,

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potentially responsible entities. *See Hinds,* 654 F.3d at 849.

where contamination due to leakage of underground storage tanks was "the direct result of activities related to the operation of a gas station" and commenting that "this interpretation does no more than hold defendants responsible for gasoline that would not have been brought onto the property but for the presence of a gas station"); *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1230 (E.D. Wash. 2015) (finding that owners/operators of dairy had some "measure of control" over dairy operations causing imminent and substantial endangerment); *Conn. Coastal Fisherman's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1309, 1316 (2d Cir. 1993) (finding gun club owner and operator contributed to imminent and substantial endangerment for allowing lead shot disposal in contravention of RCRA); *Potomac Riverkeeper, Inc. v. Nat'l Capital Skeet & Trap Club, Inc.*, 388 F. Supp. 2d 582, 588–89 (D. Md. 2005) (denying motion for summary judgment against state official in his official capacity where gun club operations were allegedly causing endangerment on state owned property); *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1222 (D. Or. 2009) (in case against owner/operator of gun club, reasoning that liability under RCRA can be established by allowing lead shot to accumulate on land).

RCRA section 7002(a)(1)(B) itself underscores that "contributors" may include landowners by expressly referencing any "past or present owner" of waste treatment, storage or disposal facilities as being among those who may be deemed to be "contributing to" disposal under that section. 42 U.S.C. § 6972(a)(1)(B). The specific inclusion of "owner[s]" among the classes of potential "contribut[ors]" supports the unsurprising conclusion that the Forest Service bears responsibility here. Moreover, this interpretation of the statutory language is entirely consistent with the Ninth Circuit's "measure of control" test, since property owners clearly have control over the activities on their property of which they are aware.

Although the statute and case law is clear, further support for the Center's interpretation of the term "contribution" under RCRA is found in cases analyzing liability under CERCLA. RCRA's liability scheme is most notably similar to CERCLA section 107(a), which provides that owners of facilities shall be liable for costs and damages associated with cleaning up contaminated sites. 42 U.S.C. § 9607(a)(1). The district court in *United States v. Valentine*, when considering RCRA's imminent and substantial endangerment provision, noted that "[w]e rely on authority discussing CERCLA . . . as it provides a useful analogue. Here, and in many other instances, CERCLA and RCRA are not significantly different." 885 F. Supp. at 1514, n.3. In evaluating CERCLA liability, numerous courts have found landowners liable for contamination caused by other persons. *See, e.g.*, *Shore Realty Corp.*, 759 F.2d at 1044 (finding current landowner liable for contamination "without regard to causation"); *United States v. Northernaire Plating Co.*, 670 F. Supp. 742, 747–49 (W.D. Mich. 1987) (finding landowner liable for contamination caused by lessee), *aff'd United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989). *See also supra* at 8–9 (discussing *El Paso*, 390 F. Supp. 3d at 1041–49).

The Forest Service relies on *City of Imperial Beach v. Int'l Boundary & Water Comm'n*, 356 F. Supp. 3d 1006 (S.D. Cal. 2018), to argue that mere ownership of contaminated land is insufficient to establish RCRA liability. Dkt. 157 at 14 and n.4. But in reaching that conclusion, the *City of Imperial Beach* court relied on *First San Diego Properties v. Exxon Co.*, 859 F. Supp. 1313 (S.D. Cal. 1994), in which the district court found that "contributing" infers "some sort of causal link between the contamination and the [land]owner." *City of Imperial Beach*, 356 F. Supp. at 1023; *First San Diego*, 859 F. Supp. at 1316. In *First San Diego,* the plaintiff was unaware of the contamination when it purchased the property, and since purchasing it there was no further contamination, the plaintiff was not liable. 859 F. Supp. at 1316.

Here, the disposal of spent lead ammuntion has been ongoing throughout the Forest Service's ownership and management of the Kaibab, causing an imminent and substantial endangerment to the environment. The *City of Imperial Beach* court held the defendant liable because it found the defendant's actions created a "more favorable environment[] for [pollution] vectors" by changing the quality and character of the waste. *City of Imperial Beach*, 356 F. Supp. 3d at 1024–25. The same can be said of the Forest Service. The Forest Service permits the use of lead ammunition on the Kaibab. When lead ammunition hits a target it fragments into numerous pieces, changing its character. If the desired target, an animal, is hit, the ammunition and its many fragments enter the animal. This animal, or at a minimum its gut pile,[4] is then left in the Kaibab, creating an exposure pathway, or vector, to the poisonous lead fragments to condors and other scavenger animals will forage upon the animal and/or gut piles.

Further, consistent with Congressional intent, EPA, the agency charged with administering RCRA, has concluded that the phrase "has contributed to or is contributing to" should be "broadly construed[,]" and agreed with the *Aceto* court's definition of "contributing to" as meaning "to have a share in any act or effect." *See* OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. EPA, GUIDANCE ON THE USE OF SECTION 7003, 17 (1997) ("Section 7003 Guidance").[5] In its guidance, EPA listed as examples of a contributor, "an owner who fails to abate an existing hazardous condition of which he or she is aware" and "a person who *owned the land* on which the facility was located *during the time that solid waste was leaked* from the facility." *Id.* at 17–18

[4] Hunters regularly "field dress" an animal, removing the internal organs, as soon as possible to prevent the meat from spoiling. The gut piles are often left at the site of the kill, as opposed to being carried out alongside the animal carcass.

[5] *Available at* https://www.epa.gov/sites/production/files/2013-10/documents/use-sec7003-mem.pdf (last visited Dec. 20, 2019).

(emphasis added). The Forest Service fits squarely into both of these examples: it has been aware of the harm posed by spent lead ammunition on the Kaibab for at least 20 years but has failed to abate the endangerment, and it is indisputably the owner and manager of the land where the disposal continues to occur.

Moreover, the Forest Service has control over activities that occur on the Kaibab beyond its status as a landowner. *See* U.S. CONST. art. IV, § 3, cl. 2 (the Property Clause of the U.S. Constitution, giving Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). The Supreme Court has recognized Congress's "complete power" over public lands, including "the power to regulate and protect the wildlife living there." *Kleppe v. New Mexico*, 426 U.S. 529, 540–41 (1976). The Supreme Court has held, specifically regarding hunting on the Kaibab, that state law does not supersede the federal government's power over public lands. *Hunt v. United States*, 278 U.S. 96, 99–100 (1928) (affirming Forest Service's authority to manage National Forests and holding that "the power of the United States to . . . protect its lands and property does not admit of doubt, the game laws or any other statute of the state to the contrary notwithstanding") (citations omitted).

Pursuant to this power, Congress has enacted numerous statutes conferring the Forest Service with authority over public lands and resources. *See, e.g.,* 43 U.S.C. § 1732(b) (provision in the Federal Land Policy Management Act allowing the Forest Service to "designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or *compliance with provisions of applicable law*") (emphasis added); 16 U.S.C. § 551 (provision in the Organic Administration Act of 1897, granting the Forest Service the authority to regulate the use of public lands to improve and protect those areas); 16 U.S.C. §§ 528–531 (the Multiple-Use Sustained-Yield Act of 1960,

permitting the Forest Service to balance different uses on public lands, including for outdoor recreation and wildlife purposes). Indeed, in addressing the Forest Service's first motion to dismiss, this Court stated:

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

Dkt. 81 at 5.

The Forest Service does not, and cannot, dispute this authority. During oral argument before the Ninth Circuit on the Center's first appeal in this case, the Forest Service admitted that it had the authority to prohibit the use of lead ammunition on the Kaibab, if it chose to do so:

> Judge Parker: Could the Forest Service, if it was so inclined, ban the use of lead ammunition in the Forest, in the Kaibab Forest?
>
> . . .
>
> Mr. Brabender (for Forest Service): The Forest Service does have that authority.[6]

See also Dkt. 157 at 3 ("[T]he Secretary has authority to *prohibit* hunting in certain limited circumstances.").[7]

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[6] *See* United States Courts for the Ninth Circuit, Official Recording of Oral Argument in Ctr. for Biological Diversity v. USFS, No. 13–16684 (Nov. 18, 2015) at 18:18, *available at* https://www.ca9.uscourts.gov/media/view.php?pk_id= 0000015094 (last visited Dec. 19, 2019).

[7] By emphasizing the word "prohibit" the Forest Service may be suggesting that its authority is limited to prohibiting hunting in certain circumstances, but not regulating the type of ammunition used. To the extent this is what the Forest Service is arguing here, this position is contradicted by the overwhelming authority discussed above and by the Forest Service's own admission during the Ninth Circuit oral argument.

B. The Forest Service's Regulation of Commercial Hunting also Meets the *Hinds* Test.

The allegations in the Center's complaint regarding the Forest Service's regulation of commercial hunting are also sufficient to establish that the Forest Service meets the *Hinds* test. "One of the ways the Forest Service exercises its authority over the use of Forest Service land is by prohibiting commercial uses of national forest land unless the user first obtains a Special Use Permit." Dkt. 1 at ¶ 24. Commercial guiding and outfitting for hunting trips are included within this regulatory regime. *See* 36 C.F.R. §§ 251.50–65 (deeming commercial uses not explicitly provided for by Forest Service regulations "special uses" and providing rules for the management of these special uses). Each Special Use Permit must contain terms and conditions that "[m]inimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." *Id.* § 251.56(a)(1)(i)(B).

Consistent with these regulations, the Forest Service issues Special Use Permits to hunting guides and outfitters to take clients hunting on the Kaibab. Dkt. 1 at ¶¶ 24, 34. The Forest Service could include, as a condition of the Special Use Permits, a requirement that persons hunt in a manner that does not result in the disposal of spent lead ammunition on the Kaibab. Yet, the Special Use Permits do not include such a condition. *Id.* at ¶ 34. By issuing Special Use Permits without such a condition, the Forest Service is actively involved in the disposal of spent lead ammunition on the Kaibab. At a minimum, the Forest Service's issuance of the Special Use Permits is another example of the Forest Service's "measure of control" over hunting and the disposal of spent lead ammunition from hunting on the Kaibab.

II. Intervenors' Arguments Are Meritless and this Court Should Reject Them.

This Court should summarily dispose of the arguments raised in Intervenors'

motions because the Center has adequately pleaded all elements of a RCRA claim, and the condors' ESA 10(j) status is irrelevant.

A. Spent Lead Ammunition Disposed of on the Kaibab Is a "Solid Waste" Under RCRA.

1. Spent Lead Ammunition Is a Discarded Material.

Intervenors argue spent lead ammunition is not a "solid waste" under RCRA because it is not discarded material when used for hunting purposes. As the Ninth Circuit has recognized, however, "[t]he plain meaning of 'discard' is to cast aside; reject; abandon; give up." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013) ("*ERF*") (internal citations omitted). Using Intervenors' cramped logic, the fragments of lead bullets left behind in gut piles on the Kaibab are not discarded, abandoned, or given up by hunters. This not only contradicts plain language and defies common sense, but it is also at odds with EPA guidance and case law conclusively establishing spent lead ammunition as solid waste under RCRA—particularly in the context of the statute's imminent and substantial endangerment provision.

In urging this conclusion, Intervenors rely heavily on the Ninth Circuit's holding in *ERF*. *See* Dkt. 161 at 5–6; Dkt. 160 at 8–10, 13. However, *ERF* is distinguishable on multiple grounds, and, in fact, supports the Center's interpretation. First, in *ERF*, the Court explained "[t]he key to whether a manufactured product is a 'solid waste' . . . is whether that product 'ha[s] served [its] intended purpose [] and [is] no longer wanted by the consumer.'" *ERF*, 713 F.3d at 515 (quoting H.R. Rep. No. 94-1491(I), at 2 (1976)). The Court then found that the escaped wood preservative at issue was still serving its intended use and was still wanted by the consumer because it "inhibit[ed] the growth of vegetation, fungi, and other organisms" at the base of the utility poles. *See id.* at 516. Accordingly, it did not qualify as solid waste under RCRA. *Id.* at 518.

In contrast, the lead bullets here were discharged, struck their intended target, fragmented into hundreds of pieces, and left behind in gut piles or in shot-but-not-retrieved animals on the Kaibab causing endangerment. The intended purpose of the lead ammunition is to kill game; thus, it "has served its intended purpose" and "is no longer wanted by the consumer." *See ERF*, 713 F.3d at 515. The endangerment alleged by the Center arises specifically because hunters purposefully leave the spent lead ammunition in gut piles or shot-but-not-retrieved animals. *See* Dkt. 1 at ¶ 29 (identifying the "remains of large game animals *left behind*" as the one source of the lead contamination) (emphasis added); *id.* at ¶ 35 (listing "discarded 'gut piles' and [] carcasses of shot *but not retrieved* animals" as exposure pathways for condors to ingest lead ammunition) (emphasis added).

Second, the Ninth Circuit in *ERF* explicitly limited its holding to finding that wood preservatives escaping from utility poles are "not *automatically* 'solid waste' under RCRA[.]" *ERF*, 713 F.3d at 518 (emphasis added). Notably, it reached this conclusion "[a]bsent contrary EPA guidance to which [it] might defer." *Id.* However, such guidance regarding spent lead ammunition "in the environment" exists here.[8] More fundamentally,

[8] *See* U.S. Envtl. Prot. Agency, Best Management Practices for Lead at Outdoor Shooting Ranges, EPA-902-B-01-001 (2005), available at https://www.epa.gov/sites/production/files/documents/ epa_bmp.pdf (last visited Dec. 2, 2019) (hereinafter "Lead Ammunition BMP" or "BMP"). This guidance was developed with the help of Intervenors NSSF and the NRA. While the purpose of the guidance is to assist operators of shooting ranges, EPA's legal interpretations of RCRA contained therein are not limited to that category. EPA's full statement from the Lead Ammunition BMP is as follows: "Lead shot is not considered a hazardous waste subject to RCRA *at the time it is discharged from a firearm* because it is used for its intended purpose. As such, shooting lead shot (or bullets) is not regulated nor is a RCRA permit required to operate a shooting range. However, spent lead shot (or bullets), left in the environment, is subject to the broader definition of solid waste written by Congress *and used in sections 7002 and 7003 of the RCRA statute.*" Lead Ammunition BMP at I-8 (emphasis added). If spent lead ammunition "left in the environment" at shooting ranges is solid waste under RCRA, it logically follows that spent lead ammunition discarded outside of shooting ranges also qualifies.

the Ninth Circuit clarified that its holding "turn[ed] on the particular allegations in ERF's complaint," specifically, ERF did "not allege that dangerous accumulations" of chemicals resulted from the "discharge of wood preservative from the defendants' utility poles . . . ." *Id.* at 515 n.8, 518. Here, the Center clearly alleged dangerous amounts of spent lead ammunition resulted from the abandoned lead-contaminated gut piles and the shot-but-not-retrieved animals. *See* Dkt. 1 at ¶¶ 31–32, 35. The *ERF* Court, thus, explicitly left open the possibility that, even for wood preservatives seeping off utility poles there could be circumstances in which a dangerous amount in the environment "becomes a RCRA 'solid waste.'" *ERF*, 713 F.3d at 518. Those are the exact circumstances present in this case.[9]

The NRA refers to EPA's Military Munitions Rule ("MMR") in its discussion of *ERF* and other cases, to further argue spent ammunition is not "discarded material" when used for its intended purpose. Dkt. 161 at 5–6. However, the NRA fails to account for the part of the MMR clearly providing that "a used or fired military munition is a solid waste, and, therefore, is potentially subject to RCRA corrective action authorities . . . or imminent and substantial endangerment authorities . . . if the munition lands off-range and is not promptly rendered safe and/or retrieved." 40 C.F.R. § 266.202(d). Here, spent lead abandoned by hunters on the Kaibab is analogous to military munitions landing "off-range," and constitutes a solid waste under RCRA when "not promptly rendered safe and/or

[9] NSSF's focus on the *ERF* court's use of the term "accumulate" is a red herring. Accumulation is not an element of an imminent and substantial endangerment claim under the RCRA citizen suit provision; nor does the statutory definition of "solid waste" require discarded material to "accumulate." Unlike escaped wood preservative, it is not necessary for lead ammunition to accumulate to pose an imminent and substantial endangerment. As the Center pleaded in its Complaint, one small lead fragment in a carcass or gut pile is enough to severely injure or kill a large bird. Dkt. 1 at ¶ 30. Lead ammunition in animal carcasses is therefore also unlike shooting ranges, where ammunition must accumulate in the ground or water to become dangerous to the environment. In the case of condors and other wildlife feeding on lead-contaminated gut piles, the exposure pathway is much more direct and imminent.

retrieved." Also, the MMR "only defines 'when military munitions become hazardous waste'" for purposes of RCRA's regulatory provisions. *Water Keeper All. v. U.S. Dept. of Defense*, 152 F. Supp. 2d 163, 167–68 (D.P.R. 2001) (citing *Military Toxics Project v. E.P.A.*, 146 F.3d 948, 951 (D.C. Cir. 1998)). The regulatory definition of solid waste is narrower than the statutory definition that applies to RCRA citizen suits. *See Connecticut Coastal Fishermen's Ass'n*., 989 F.2d at 1314.

Here, the Center has alleged a historical and ongoing endangerment to the environment caused by disposed spent lead ammunition on the Kaibab. Dkt. 1 at ¶ 40 (noting "hundreds of instances of lead exposure in condors since the Southwest condor population was reintroduced" over 20 years ago). Spent lead ammunition abandoned in the environment no longer serves its intended purpose and is discarded material under RCRA.

2. Hunting Is an Activity Covered by the Definition of "Solid Waste" and Is a "Community Activity" Under RCRA.

The NRA argues that only discarded material resulting from "industrial, commercial, mining, and agricultural operations, and from community activities" or other large-scale, coordinated, group activities qualify as "solid waste" under RCRA and as such, spent lead ammunition does not qualify. Dkt. 161 at 12–13. However, the plain language of the statute invalidates this argument. "Solid waste" is "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, *including* solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . . ." 42 U.S.C. § 6903(27) (emphasis added). The word "including" modifies "other discarded material" and the entire sentence before it. Thus, the language after "including" provides a *nonexclusive* list of examples of where solid wastes can originate. *U.S. v. Wyatt*, 408 F.3d 1257, 1261 (9th Cir. 2005) (finding that the word

"includes" suggests a non-exhaustive list). Thus, spent lead ammunition from hunting is a solid waste under RCRA.

Moreover, hunting is clearly a community activity. The NRA is wrong that "community activities" are necessarily synonymous with group activities. There is nothing inherent in those terms defining the size of the activity, or whether the activity involves a group or a single individual. And the NRA's own intervention papers belie its argument. *See, e.g.*, Declaration of Todd Geiler, Dkt. 98, at ¶ 4 (describing his "longstanding family tradition" of hunting in Arizona and on the Kaibab); Declaration of Michael John Rusing, Dkt. 102, at ¶ 7 ("I started hunting about 54 years ago with friends and family while I was growing up in Prescott, Arizona."); Declaration of Chris W. Cox, Dkt. 97, at ¶ 7 (NRA officer describing other NRA employees' work as "promoting the interests of the hunting community in wildlife management"). Thus, hunting is a community activity or is otherwise covered by the broad statutory language at issue.

B. California Condors' Status as an ESA Section 10(j) Population Does Not Affect the Forest Service's Liability Under RCRA or Preclude the Center's RCRA Suit.

As an initial matter, even if Intervenors were correct—and they are not— that the Center cannot plead an imminent and substantial endangerment to condors due to condors' status as an ESA section 10(j) population, the Center's case would still go forward because this case is about more than just condors. The Center plainly pleaded an imminent and substantial endangerment to numerous scavengers other than condors, including bald and golden eagles, northern goshawks, ferruginous hawks, turkey vultures, and common ravens. Dkt. 1 at ¶¶ 27, 14–15. These other species are not subject to ESA section 10(j). Condors are discussed at length in the Complaint because they are an extensively monitored and studied endangered species. That discussion, however, merely illustrates the

alleged imminent and substantial endangerment to all scavengers on the Kaibab, including but not limited to condors. For this reason alone, this Court should disregard Intervenors' ESA section 10(j) arguments. If the Court does consider Intervenors' ESA section 10(j) arguments, it should reject them because RCRA and ESA section 10(j) do not conflict, the condor rule itself does not prevent an imminent and substantial endangerment finding, and condors are obviously part of the "environment."

1. RCRA and ESA Section 10(j) Do Not Conflict.

The NRA argues RCRA and ESA section 10(j) conflict because "[the Center's] RCRA claim is grounded in an alleged endangerment resulting from hunters' use of lead-based ammunition, an activity that was expressly authorized within the parameters of [the Condor Rule]," which established the ESA section 10(j) population of condors at issue here. Dkt. 161 at 6. However, such a conflict does not exist.

Intervenors attempt to expand ESA section 10(j) into a sweeping abrogation of the applicability of other federal environmental laws, including RCRA, to experimental populations. *Id.* at 6–9; Dkt. 160 at 13–17. However, this is an incorrect interpretation of the plain language of the Condor Rule. ESA section 9 prohibits "takings" and subjects persons who "take" protected species to civil and criminal liability. 16 U.S.C. § 1538(a)(1)(B); *id.* §§ 1540(a)–(b). ESA section 10 creates an exception to section 9 "takings" by allowing the United States Fish and Wildlife Service ("USFWS") to permit any act "otherwise prohibited by section [9]" that is "necessary for the establishment and maintenance of" ESA section 10(j) populations, or any taking "*otherwise prohibited by section [9]* if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *Id.* §§ 1539(a)(1)(A)–(B) (emphasis added). Thus, USFWS's power under section 10 extends *only* to acts or takings prohibited by section 9. NRA's interpretation of ESA section 10 would render the statutory phrase "otherwise prohibited

by Section 9" meaningless. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (noting courts should give effect to every word in a statute).

Furthermore, no conflict exists between RCRA and the Condor Rule because the Condor Rule does not authorize the use of lead ammunition on the Kaibab. 50 C.F.R. § 17.84(j). ESA section 10(j) functions with, and operates alongside, RCRA's imminent and substantial endangerment provision to minimize threats from waste disposal activities to re-introduced species. Even if there were a conflict between RCRA and the Condor Rule, RCRA would control. *United States v. Doe*, 701 F.2d 819, 823 (9th Cir. 1983) ("Where an administrative regulation conflicts with a statute, the statute controls.").

2. The Condor Rule Does Not Preclude an Imminent and Substantial Endangerment Finding.

NSSF argues that because USFWS reintroduced California condors pursuant to ESA section 10(j), despite the risks of spent lead ammunition, the Center cannot allege that spent lead ammunition poses an imminent and substantial endangerment to condors. Dkt. 160 at 15–17. However, USFWS's anticipation that re-introduced condors might suffer from lead poisoning has no bearing on whether the Center can bring a RCRA suit. USFWS's statements in the Condor Rule regarding spent lead ammunition's effect on condors actually support a finding that spent lead ammunition disposed on the Kaibab poses an imminent and substantial endangerment to condors and other scavengers. *See* 61 Fed. Reg. 54,044, 54,054 (Oct. 16, 1996) (discussing the threat of lead poisoning to condors and commenting, "the Kaibab Plateau is heavily hunted and represents a threat to condors . . ."). The question of whether spent lead ammunition poses an imminent and substantial endangerment is a factual inquiry not appropriate for resolution on a motion to dismiss.

Further, the fact that condors in Arizona are an ESA section 10(j) population does not render their poisoning "insubstantial." As the Fifth Circuit explained, "an

endangerment is 'substantial' if it is 'serious.'" *Cox*, 256 F.3d at 300. Here, the Center alleged sufficient facts to establish that the poisoning of wildlife, including condors, due to consumption of spent lead ammunition, is serious because it can lead to significant adverse health effects or death. Dkt. 1 at ¶ 25–32, 35–42; *see also, e.g., United States v. Valentine*, 856 F. Supp. 621, 626–27 (D. Wyo. 1994) (finding evidence of wildlife mortalities was significant in determining whether an imminent and substantial endangerment existed). There are only approximately 88 California condors in the Southwest condor population, and lead poisoning has been and continues to be the leading cause of condor death in Arizona and the primary obstacle to achieving a self-sustaining population of condors there. Dkt. 1 at ¶ 37. Stating that endangerment to this small condor population cannot be "substantial" as a matter of law because the population was reintroduced pursuant to ESA section 10(j) is unsupported by law and contradictory to both common sense and the ESA's conservation goals. *See* 50 C.F.R. § 17.84(j)(1) (Condor Rule stating the release of condors pursuant to ESA section 10(j) "will further the conservation of the species").

3. ESA Section 10(j) Populations Are Part of the "Environment" and Thus the Center Sufficiently Pleads Imminent and Substantial Endangerment.

The NRA argues that the relevant population of condors is not part of the "environment" for purposes of RCRA's imminent and substantial endangerment provision because it is "experimental" and thus akin to a "laboratory" in the Kaibab. Dkt. 161 at 3–5. While RCRA does not define "environment," the Oxford English Dictionary defines it as "[t]he natural world or physical surroundings in general, either as a whole or within a particular geographical area, esp. as affected by human activity." Environment, Oxford English Dictionary (3d. ed. 2011). This broad definition is consistent with Congress's intent that RCRA be liberally construed. *See Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*,

399 F.3d 248, 259 (3d Cir. 2005) ("[G]iven RCRA's language and purpose, Congress must have intended that 'if an error is to be made in applying the endangerment standard, the error must be made in favor of protecting . . . the environment.'"); *see also* 50 C.F.R. § 17.84(j)(2) (prohibiting persons from taking California condors "*in the wild* in the experimental population area except as provided by" the Condor Rule) (emphasis added). A broad, common sense interpretation of the term "environment" encompasses all wildlife, regardless of its ESA status. This Court should reject the NRA's strained argument.

III. This Case Should Not Be Dismissed Under Rule 19.

The State of Arizona, joined by Intervenors, argues that this Court should dismiss the Center's case for failing to join Arizona as a necessary party. *See generally*, Dkt. 159; Dkt. 161 at 13–14; Dkt. 160 at 17. The moving parties bear the burden of establishing that dismissal is appropriate. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). Motions to dismiss for failure to join a party are disfavored. *See Owens-Illinois, Inc. v. Meade*, 186 F.3d 435, 440–41 (4th Cir. 1999) ("Courts are loath to dismiss cases based on nonjoinder of a party, so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will certainly result."); *Jaser v. New York Prop. Ins. Underwriting Assoc.*, 815 F.2d 240, 242 (2d Cir. 1987) ("As an alternative to dismissal, a court should take a flexible approach when deciding what parties need to be present for a just resolution of the suit."). The inquiry is "a practical one and fact specific," and "is designed to avoid the harsh results of rigid application." *Makah Indian Tribe*, 910 F.2d at 558 (citation omitted).

This Court should reject Intervenors' and Arizona's expansive reading of Rule 19, as their position would undermine citizens' ability to bring an enforcement action under RCRA or potentially any other environmental citizen suit provision, for that matter. Further, Arizona and Intervenors have failed to carry their burden to show that the elements

of Rule 19 have been met. Rule 19 establishes a three-part test. First, Arizona and Intervenors must prove that Arizona is a "required party." Fed. R. Civ. P. 19(a)(1). Second, if Arizona is a required party, Arizona and Intervenors must show that joinder is not feasible. *Id.* at 19(b). Third, if joinder is not feasible, then the Court must consider whether, in "equity and good conscience," it should dismiss the case. *Id.* Because Arizona and Intervenors have not met this test, the Court should reject their Rule 19 arguments. Alternatively, rather than dismissing this suit, the Court should grant the Center leave to amend its complaint to add an Arizona official pursuant to the *Ex parte Young* doctrine.

A. This Court Should Reject Intervenors' and Arizona's Rule 19 Arguments as Inconsistent with RCRA.

As an overarching matter, this Court should reject Arizona's and Intervenors' Rule 19 arguments because they fundamentally conflict with, and frustrate the purpose of, the citizen suit provision of RCRA, which plainly allows citizens to bring imminent and substantial endangerment suits against the United States and its agencies. 42 U.S.C. § 6972(a)(1)(B). By the very nature of the defendant being the United States, such a suit could result in a rulemaking or other federal action that might incidentally affect state interests. A holding that states are necessary parties to RCRA endangerment suits against the United States when their interests might be incidentally affected would significantly limit citizens' ability to bring such suits against the federal government. Such a limitation is clearly contrary to Congressional intent.

Notably, in this very case the Ninth Circuit has already considered, and rejected, the argument that because the Forest Service might engage in rulemaking to comply with a court order, this court lacks jurisdiction. *See Ctr. for Biological Diversity*, 925 F.3d at 1046–47. Similarly, in dismissing the Center's case for seeking an advisory opinion, this Court found that it could not order the Forest Service to "abate the endangerment" on the

Kaibab because, in complying with such an order, various statutes and regulations would require the Forest Service to cooperate with other federal and state agencies, including Arizona. *See* Dkt. 137 at 8 & n. 3; *Ctr. for Biological Diversity*, 925 F.3d at 1049. In reversing this Court's decision, the Ninth Circuit found that "[n]one of those statutes allow [the Forest Service] to disregard a judicial directive specifically authorized by RCRA if the requisite liability findings are made." *Ctr. for Biological Diversity*, 925 F.3d at 1049.

This is similar to the dynamic in other enforcement cases, such as citizen suits under the Clean Water Act. In the Ninth Circuit, it is a "general rule" that "federal and state agencies administering federal environmental laws are not necessary parties in citizen suits to enforce the federal environmental laws." *Assoc. to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1014 (9th Cir. 2002). In adopting this rule in *Hammersley,* the Ninth Circuit looked to the plain language of the Clean Water Act, commenting that the language "has created opportunity for citizen suit when government agencies do not act." *Id.*

Just like the language of the Clean Water Act, the plain language of RCRA allows citizens to step in as private attorneys general to enforce the law when government agencies do not do so. *See* 42 U.S.C. § 6972(a). That is all that the Center is seeking to do here. And while Arizona does not administer RCRA, the same principle underlying the rule adopted in *Hammersley* applies here because Arizona does generally regulate hunting, the activity which generates the waste that the Center alleges creates an imminent and substantial endangerment to scavengers. In *Hammersley*, the Ninth Circuit affirmed a district court's decision that a state agency was not a necessary party to a Clean Water Act citizen suit despite the fact that an order from the court might affect an agency determination. 299 F.3d at 1013–15. This Court should follow suit here.

B. Arizona Is Not a Required Party to the Center's RCRA Enforcement Case.

To establish Arizona's "required party" status, Intervenors and Arizona must demonstrate that at least one of the following requirements is met: (1) the Court cannot accord complete relief among the existing parties; (2) Arizona claims an interest relating to the subject of this action and is so situated that disposing of the action in its absence may as a practical matter impair or impede its ability to protect that interest; or (3) Arizona claims an interest relating to the subject of this action and is so situated that disposing of the action in its absence may leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. *See* Fed. R. Civ. P. 19(a)(1).

Here, there can be no doubt that the Court can afford "complete relief among the existing parties" without the participation of Arizona, and neither Arizona nor Intervenors argues otherwise. If the Center prevails in its lawsuit, no relief would need to come from Arizona. Indeed, the Ninth Circuit has already held that a court order would redress the Center's injuries, *Ctr. for Biological Diversity*, 640 Fed. Appx. at 619, and that this Court can issue an order resolving the Center's case. *Ctr. for Biological Diversity*, 925 F.3d at 1047–50. The Court reached both of these decisions despite the absence of Arizona. Similarly, neither Arizona nor Intervenors argues that an existing party might be subject to a substantial risk of double, multiple, or otherwise inconsistent obligations because of an interest held by non-party Arizona. Thus, Arizona's only possible argument is under the second part of the test.

Here, Arizona cannot satisfy the second part of this test because it does not have a legally protected interest. As such, there is no interest that could be impaired or impeded. Additionally, to the extent that the Court finds that Arizona has a legally protected interest,

the Forest Service will adequately represent that interest.

1. Arizona Has Not Claimed a Legally Protected Interest Related to the Subject of this Action that Could Be Impaired or Impeded if this Case Continues in its Absence.

Arizona claims to have two legally protected interests related to the subject of this case: its "sovereign authority to adopt and enforce its own statutes and regulations concerning the manner and methods for taking wildlife" and its "sovereign interest in preserving its voluntary non-lead program as a measure to conserve the condor population." Dkt. 159 at 5. Those interests are not legally protected for two reasons: (1) the federal government, not Arizona, as owner of the Kaibab, has sovereign control over activities on the forest; and (2) pursuant to the Supremacy Clause of the U.S. Constitution, to the extent this case may result in a federal regulation that conflicts with or requires changes to Arizona law, Arizona law must give way.

The Center does not dispute that Arizona has primary responsibility for regulating hunting and wildlife within its borders, and that Congress has extended this responsibility to federal lands within Arizona. But this is beside the point because, at bottom, the Forest Service, as an arm of the federal government, is the ultimate sovereign on the Kaibab and retains the authority to regulate hunting on national forest land. *See supra* at 15–16 (discussing the Forest Service's ultimate authority).

Here, RCRA without question applies to the Forest Service and it applies on National Forest land. As such, this Court can issue an order requiring the Forest Service to come into compliance with RCRA by abating its contribution to an imminent and substantial endangerment on the Kaibab. Such an order, in and of itself, would not implicate Arizona law. Arizona claims that such an order could interfere with its sovereign interests in adopting and enforcing its laws concerning the methods for taking and

conserving wildlife by, for example, forcing an outcome in which the Forest Service adopts regulations conflicting with, or requiring changes to, Arizona law. But Arizona has never had, and hence cannot claim, an interest in adopting and enforcing rules or regulations on federal land that conflict with federal law. *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause of U.S. Constitution). The only interests that the State of Arizona has in regulating or controlling activities on federal land are the interests *delegated to Arizona* by the federal government. Thus, Arizona's claimed interests are not legally protected and are thus not sufficient to render it a "necessary" party under Rule 19.

For similar reasons, this case will not impair or impede Arizona's claimed interests. The question of whether an interest has been impaired or impeded presupposes a legally protectable interest in the first place; as explained above, Arizona does not have such an interest. And the fact that different regulations might apply on federal land, as opposed to state land in Arizona, does not mean that an order from this Court would impair or impede Arizona's sovereign interests within its own borders. Regardless of the outcome of this case, Arizona's interests in adopting and enforcing laws regarding the taking of wildlife and conservation will remain unaffected: it can exercise those interests consistent with its sovereign authority, which does not extend to the Kaibab.

2. The Forest Service Will Adequately Protect Arizona's Interests.

To the extent that Arizona has claimed legally protected interests, its ability to protect those interests will also not be impaired or impeded because the Forest Service will adequately represent Arizona's interests. "As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit." *Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013). A non-party is adequately represented by existing parties if: (1) the interests of the existing parties are such that they would undoubtedly make all of the non-

party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect. *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153–1154 (9th Cir. 1998).

Arizona argues that the existing parties will not adequately represent its interests "because the parties have no duty to protect or defend Arizona's sovereign interests to manage and conserve wildlife resources or to regulate hunting." Dkt. 159 at 10. But the fact that the existing parties might not have a *duty* to protect or defend Arizona's interests does not mean that they will not or cannot do so, and the two cases cited by Arizona do not hold otherwise. *See id.* (citing *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996) and *Natural Res. Def. Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977)).[10]

Contrary to Arizona's assertions, Dkt. 159 at 9–10, the Forest Service will adequately represent any legal interest that Arizona may have. In *Southwest Center*, the Ninth Circuit found that "the United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe." 150 F.3d at 1153–1154 (finding adequate representation where the government and the tribe share a "strong interest in defeating" the suit on the merits and ensuring that the tribe's interest is protected); *see also Washington v. Daley*, 173 F.3d 1158, 1167–69 (9th Cir. 1999) (finding adequate representation where "the government and the Tribes do not disagree on the issues at hand . . . and . . . the Tribes are *co-managers with the federal government* of the resources within those regions." *Id.* at 1168 (emphasis added).

[10] Notably, in both of these cases the courts were considering adequate representation for purposes of intervention under Rule 24, and not whether an absent party was a necessary party under Rule 19. As noted above, in general there is a high burden to establish dismissal under Rule 19. But for Rule 24 intervention, the burden to establish inadequate representation is "minimal." *Costle*, 561 F.2d at 911.

Here, there is no conflict of interest between the Forest Service and Arizona. Both share a strong interest in defeating the suit on the merits and maintaining Arizona's delegated responsibility of regulating hunting on the Kaibab. The Forest Service supports the continued operation of the Kaibab "in accordance with the requirements of state laws," Dkt. 157 at 4, the continued consultation with fish and game departments before exercising its statutory authorities, *id.* at 3, and the continuation of the hunter education and voluntary lead reduction programs that have guided the Southwest Condor Working Group, *id.* at 5–6. The Forest Service is capable of, willing, and intends to vigorously defend this lawsuit and, in doing so, protect Arizona's claimed interests.

C. Even if this Court Determines that Arizona Is a Required Party that Cannot Be Joined, This Case Can Still Proceed "in Equity and Good Conscience."

If the Court determines that Arizona is not a necessary party to this lawsuit, then its Rule 19 inquiry can end there. However, because Arizona itself may be immune from RCRA citizen suits[11], if the Court determines that Arizona is a required party, the Court must then decide "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). The Court considers the following factors when conducting this inquiry:

> (1) The extent to which a judgment rendered in the [party's] absence might prejudice that [party] or existing parties
> (2) The extent to which any prejudice could be lessened or avoided by:
> (A) protective measures in the judgment;
> (B) shaping the relief; or
> (C) other measures;
> (3) whether a judgment rendered in the [party's] absence would be adequate; and

[11] The Center assumes without conceding that the State of Arizona is immune from this suit. *But see*, *infra* at 40 (the Center's alternative request to sue a state official under the *Ex parte Young* doctrine).

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id. These factors "are nonexclusive." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 862 (2008).

This case should not be dismissed because it presents only minimal prejudice, if any, to Arizona's interests, and judgment rendered in Arizona's absence would be adequate to satisfy the Center's request for relief. The importance of the issues in this case, combined with the adequacy of a judgment without Arizona, should lead the Court to proceed without Arizona as a party. Moreover, this case can continue in Arizona's absence under the "public rights" exception to traditional joinder rules.

1. Arizona Would only Suffer Minimal, if any, Prejudice from a Judgment Rendered in its Absence.

The first and second factors in the Rule 19(b) inquiry consider the prejudice to the parties if a judgment is rendered in the required party's absence, and whether that prejudice can be lessened or avoided. The question as to whether the absent party will suffer prejudice overlaps significantly with the question as to whether the absent party's interests will be impaired or impeded by the suit. *See American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) (explaining that the prejudice inquiry "largely duplicates the consideration that made a party necessary under Rule 19(a): a protectable interest that will be impaired or impeded by the party's absence").

Here, to the extent Arizona might suffer any prejudice, that prejudice would be minimal for the same reasons that Arizona's interests would not be impaired or impeded. An order requiring the Forest Service to abate the endangerment on the Kaibab would not, in and of itself, affect Arizona law or the state's sovereign interests. Even assuming, as Arizona does, that the Forest Service might ban the use of lead ammunition on the Kaibab

or require hunters to carry out or bury animals shot with lead ammunition, these decisions would not *contravene* Arizona law. That is because Arizona does not *require* hunters to use lead ammunition or *require* the Forest Service to allow hunters to use lead ammunition on the Kaibab. *See* Ariz. Admin. Code R12-4-303 (Unlawful Devices, Methods, and Ammunition); Ariz. Admin. Code R12-4-304 (Lawful Methods for Taking Wild Mammals, Birds, and Reptiles). A decision from the Forest Service to regulate in this area therefore violates no explicit terms of the Arizona Administrative Code.

Similarly, a ban on lead ammunition would not significantly impact Arizona's voluntary lead reduction and education program. This suit does not seek to prevent Arizona from distributing non-lead ammunition to hunters or from educating hunters as to the harmful effects of lead. To the contrary: the Center is in favor of these practices. But they are simply not enough to prevent the poisoning of condors and other wildlife. Thus through this suit, the Center seeks to prevent endangerment caused by the disposal of spent lead ammunition on federal government land within a discrete portion of Arizona.

Moreover, any prejudice to Arizona could be lessened or avoided via protective provisions, shaping the relief, or other measures. This Court may shape the relief it sees fit in order to avoid implicating Arizona's interests while still requiring the Forest Service to abate the endangerment on the Kaibab. Indeed, the Forest Service must consult with Arizona before passing regulations regarding hunting on the Kaibab. *See* 43 US.C. § 1732(b); 16 U.S.C. § 7913(b)(1). Thus, Arizona will not be prejudiced.

2. A Judgment Rendered in Arizona's Absence Would Be Adequate.

"[I]f an adequate remedy, even if not complete, can be awarded without the absent party, the suit may go forward." *Makah Indian Tribe*, 910 F.2d at 560 (citation omitted). Congress has established the adequate remedy to RCRA citizen suits like this one, and this Court can plainly order such a remedy in the absence of Arizona. *See* 42 U.S.C. § 6972(a).

Arizona does not explicitly argue that a judgment rendered in its absence would be inadequate. Dkt. 159 at 13. Instead, Arizona speculates that public confusion may result if the Forest Service prohibits lead on the Kaibab while Arizona regulations continue to permit lead elsewhere in the state. Arizona cites no case law for the idea that the risk of "public confusion" would render a judgment inadequate within the meaning of Rule 19. And in any event, the Center fails to see how "public confusion" would actually ensue: hunters are already tasked with understanding many regulations that impact their ability to hunt. *See, e.g.,* Dkt. 157 at 5 (discussing an array of Arizona hunting regulations). There is no reason that they could not also understand any limitations that were placed upon hunting in the Kaibab.

3. If the Court Dismisses This Case for Nonjoinder of Arizona, the Center Would Not Have Another Adequate Remedy.

The fourth and final factor considers whether there is an alternative forum in which to bring the claims. "[I]f no alternative forum is available to the plaintiff, the court should be 'extra cautious' before dismissing the suit." *Makah Indian Tribe*, 910 F.2d at 560 (citation omitted). There is no alternative forum in which the Center could seek an adequate remedy to redress the harm alleged in this suit. The Center has sued the owner and manager of the land at issue, in federal court, as RCRA requires. Arizona suggests that the Center could petition either the Forest Service or the Arizona Game and Fish Commission to ban the use of lead ammunition on the Kaibab. Dkt. 159 at 14. But such out-of-court avenues have already been tried, and have been unsuccessful.[12]

[12] Along with many other organizations, the Center has submitted two petitions to the Environmental Protection Agency (one in 2010 and the other in 2012) asking for regulations that would limit or ban the use of lead ammunition under the Toxic Substances Control Act. EPA denied both petitions. *See* EPA, Assessing and Managing Chemicals under TSCA: TSCA Section 21 Petition Requesting EPA to Regulate Lead in Shot and Bullets, *available at* https://www.epa.gov/assessing-and-managing-chemicals-

4. Even if Arizona Is a Required Party, this Case Can Continue in its Absence Under the "Public Rights" Exception to Traditional Joinder Rules.

Even if this Court determines that Arizona is a required party, this case can continue in its absence under the "public rights" exception to traditional joinder rules. Under that exception, absent parties who might be adversely affected by the suit will not be considered indispensable if the suit seeks vindication of a public right. *See Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940) ("In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights."). There are two requirements for the exception to apply: (1) the litigation must transcend the private interests of the litigants and seek to vindicate a public right; and (2) although it may adversely affect them, the litigation must not destroy the absent party's legal rights. *White v. University of California*, 765 F.3d 1010, 1028 (9th Cir. 2014).

Arizona's argument that the public rights exception does not apply focuses entirely on the second factor and ignores the first factor. Dkt. 159 at 15. Presumably this is because the Center's RCRA citizen enforcement suit clearly transcends *private* interests and seeks to vindicate a *public* right. Courts have routinely found that enforcing compliance with environmental laws on federal lands falls under the umbrella of "public rights" litigation. *See, e.g.*, *Conner v. Burford*, 848 F.2d 1441, 1460 (9th Cir. 1988) (where oil and gas lessees moved to intervene in case challenging BLM's sale of leases in two national forests, finding that the litigation did not purport to adjudicate the rights of the current lessees, but rather

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under-tsca/tsca-section-21-petition-requesting-epa-regulate-lead (last visited Dec. 19, 2019). Similarly, all three plaintiffs sent a letter to the Arizona Game and Fish Commission requesting that the Commission amend state hunting regulations to require the use of non-lead ammunition for the taking of big game, small game, and non-game birds and mammals, as well as for all depredation shooting. The Commission did not respond to the letter.

sought to enforce the public right to compliance with the environmental protection standards of NEPA and the ESA); *Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 276–77 (D.D.C. 1985), *aff'd* 835 F.2d 305 (D.C. Cir. 1987) (in case challenging decision to lift protective restrictions on federal lands, finding public rights exception applied because the cause of action was "grounded in the assertion of public rather than private rights," even where disposing of the case without necessary parties could harm the absent parties' interests); *Nat. Res. Def. Council v. Berklund*, 458 F. Supp. 925, 928 (D.D.C. 1978), *aff'd* 609 F.2d 553 (D.C. Cir. 1979) (finding public rights exception applied in NEPA challenge to coal lease sales).

With regard to the second factor, Arizona argues that proceeding without the state "threatens to destroy Arizona's sovereign interest and legal entitlement to adopt and enforce its own laws concerning the manner and methods for taking wildlife." Dkt. 159 at 15. But as discussed above, Arizona's sovereign interest and legal entitlement to adopt and enforce laws on the Kaibab is limited to that allowed by federal law. The federal government, not Arizona, is the ultimate sovereign on the Kaibab.

The three cases cited by Arizona are inapposite. In *Dine Citizens*, the Ninth Circuit found that threatening to completely revoke the operability of the absent tribe's mine and abrogating the tribe's sovereign immunity would have destroyed the tribe's interest in the mine. *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 860–61 (9th Cir. 2019). In *Shermoen v. United States*, the legal entitlement and sovereign interest being litigated was a tribe's wholesale entrustment of, and ability to govern, a reservation to which it had a claim. 982 F.2d 1312, 1316 (9th Cir. 1992). In both of these cases, the litigation *threatened to destroy* the absent tribe's legally protected interests in the land and sovereignty. In contrast, this case will not destroy Arizona's claimed interests. If the Center prevails, Arizona will still be able to regulate hunting as it sees fit throughout

the state; and even on the Kaibab, Arizona will still regulate hunting—it will just have to do so consistent with the approach the Forest Service takes to abate the endangerment.

In *Kescoli v. Babbit*, the Ninth Circuit affirmed the district court's decision that the Navajo Nation and Hopi Tribe were required but indispensable parties to the litigation, finding the plaintiff's action was "essentially private in nature, limited to a disagreement over the appropriate direction the Navajo Nation and the Hopi Tribe should take in relation to the mining." 101 F.3d 1304, 1307, 1311 (9th Cir. 1996). But here, there is nothing "essentially private" about enforcing RCRA in order to protect wildlife from lead poisoning on public land.

This case is much more similar to *Connor v. Burford*, in which the Ninth Circuit held that the litigation did not destroy the absent parties' contracts but rather merely enjoined the permitting of surface-disturbing activities until they fully complied with federal law. 848 F.2d at 1461. Likewise, this case would not destroy Arizona's sovereign rights or legal entitlements to pass laws regarding the take and conservation of wildlife, but instead would merely require the Forest Service to comply with federal law.

Ultimately, this litigation will not destroy Arizona's ability to adopt and enforce laws within its sovereign territory regarding the take and conservation of wildlife species The threat to Arizona's interests, if present at all, is remote, minor, and incidental to the lawsuit's purpose of vindicating the public right to enforce compliance with RCRA and protect scavengers from an imminent and substantial endangerment on the Kaibab. *See American Greyhound Racing, Inc.*, 305 F.3d at 1026 (emphasis in original) (in rejecting public rights exception, distinguishing situation where the litigation was "*aimed* at" absent parties and their interests, from situations where the litigation "*incidentally* affect[ed]" absent parties in the course of enforcing some public right). Because this case falls squarely within the public rights exception, this Court should not dismiss the case under Rule 19.

IV. In the Alternative, the Center Seeks Leave to Amend its Complaint to Add a Claim Against the Director of the Arizona Game and Fish Department as a Defendant.

The Center has sued the one party that matters—the owner and manager of the land at issue—and as such, Arizona is not a required party. But even if this Court determines Arizona is a required party, the remedy is not to dismiss the suit. As noted above, dismissal under rule 19 is highly disfavored. *See*, *e.g.*, *Owens-Illinois,* 186 F.3d at 440–41 ("Courts are loath to dismiss cases based on nonjoinder of a party[.]"). Rather, this Court should allow the Center to amend its complaint to add the Director of the Arizona Game and Fish Department as a defendant. "[U]nder . . . *Ex parte Young*, 209 U.S. 123 (1908), private individuals may sue state officials in federal court for *prospective* relief from ongoing violations of federal law . . . without running afoul of the doctrine of sovereign immunity." *Koala v. Khosla*, 931 F.3d 887, 894–95 (9th Cir. 2019) (emphasis in original); *see also City of San Juan Capistrano v. Cal. Pub. Utilities Comm'n*, 937 F.3d 1278, 1281 (9th Cir. 2019) (finding that a plaintiff "should generally be allowed leave to amend its complaint to add an individual official as a party, assuming claims otherwise satisfy *Ex parte Young*'s requirements."). As a precautionary measure, the Center intends to send the pre-requisite letter(s) notifying the Director of the Center's intent to sue.

CONCLUSION

For the foregoing reasons, the Center respectfully requests that the Court deny the pending motions.

Respectfully submitted,

Dated: December 20, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing, which will send notification of such filing to the following:

Michael C. Augustini, United States Department of Justice, Attorney for Defendant United States Forest Service.

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