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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Center for Biological Diversity, et al., Plaintiffs, v. United States Forest Service, Defendant.	No. CV-12-8176-PCT-SMM **DEFENDANT UNITED STATES FOREST SERVICE'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

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I. INTRODUCTION

Plaintiffs have not pled sufficient facts to state a legally cognizable claim against the Forest Service under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B). Hunting in the Kaibab National Forest must be conducted in accordance with the requirements established by the State of Arizona. *See* ECF 157 at 9-11. Members of the public may hunt in the Kaibab without a permit from the Forest Service. *Id.* Although the Complaint's focus is spent lead ammunition, Plaintiffs do not allege that the Service itself uses lead ammunition or supplies it to hunters. Nor is the Service alleged to perform the specific acts that may expose wildlife to spent lead ammunition (*i.e.*, hunters discarding field-dressed carcasses on the ground).

Given that the Forest Service does not generate or dispose of the alleged waste, Plaintiffs are left arguing that RCRA obligates the Service to use its regulatory powers to ban lead ammunition or dictate hunting practices in the Kaibab to the public. However, Plaintiffs have identified no legal precedent for this unfounded theory of RCRA liability. Under Ninth Circuit law, § 6972(a)(1)(B) requires active involvement or a measure of control over the waste at the time of disposal. *See Hinds Invs., L.P. v. Angioli*, 654 F.3d 846, 850 (9th Cir. 2011) (affirming the dismissal of a RCRA claim); *Ingalls v. AMG Demolition & Envtl. Servs.*, No. 17-cv-2013-AJB-MDD, 2018 WL 2086155, at *3 (S.D. Cal. May 4, 2018) (the Ninth Circuit "could not have been clearer" that a contributor must have an active role with a more direct connection to waste). The Service's unexercised discretionary authority to regulate does not constitute active involvement or control over the disposals allegedly performed by individual hunters in the Kaibab, and cannot be transformed into a finding of RCRA "contributor" liability against the Service.

II. RCRA REQUIRES MORE THAN MERE PASSIVE OWNERSHIP.

Plaintiffs contend that the RCRA analysis should begin and end with their allegation that the Forest Service is a "landowner" and therefore *ipso facto* liable. At the outset, this theory fails because the Service does not "own" the Kaibab. The United States as sovereign – not the Service – owns the land that constitutes the Kaibab. *See* 16

U.S.C. § 1609(a). Plaintiffs' discussion of the Constitution and federal statutes, as well as their cited cases (*see* ECF 167 at 24-25), highlight *Congress'* authority over federal lands. The Service has only been delegated certain authority by Congress to administer the Kaibab. *See, e.g.*, ECF 157 at 8-10. Congress has not authorized the Service to exercise all rights that come with private property ownership, *i.e.*, the full bundle of sticks. The Service, for example, cannot profit by selling Kaibab lands for housing development. Congress also has mandated public access to the Kaibab for recreation and generally has deferred to the State to regulate hunting and manage wildlife. *Id.* Plaintiffs thus ignore the unique legal context applicable to National Forest System lands.

Plaintiffs compound their erroneous premise by arguing, as a matter of statutory construction, that land ownership alone is sufficient to subject the Forest Service to RCRA liability under § 6972(a)(1)(B). *See* ECF 167 at 21. Landowners are mentioned in the statute and certainly can be liable under RCRA if they take affirmative steps that contribute to waste disposals on their land. But something more than legal title to the land must be necessary or Congress would not have selected the term "contributor" to define the scope of liability under § 6972(a)(1)(B). A plain reading of RCRA's text thus belies Plaintiffs' argument that only ownership is required. *See Ctr. for Cmty. Action and Envtl. Justice v. BNSF Ry. Co.*, 764 F.3d 1019, 1024 (9th Cir. 2014) (holding in a RCRA case that courts cannot "rearrange the wording of [a] statute" to suit a party's preferred interpretation); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996) (courts should avoid making any statutory term surplusage).

Plaintiffs have not brought a claim under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), but nevertheless rely heavily on decisions finding landowners liable under that statute. ECF 167 at 17-18, 22. In CERCLA, unlike in RCRA, Congress created a specific category of liability that requires nothing more than owning a site where hazardous substances are located. *See* 42 U.S.C. § 9607(a)(1). By its plain terms, CERCLA § 9607(a)(1) does not require that a landowner also "has contributed" or "is contributing" to the disposal of waste, as does

RCRA § 6972(a)(1)(B).[1] This key difference between CERCLA and RCRA liability illustrates the fallacy of Plaintiffs' passive landowner theory. When Congress includes particular language in one section of a statute but omits it from another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *See BNSF*, 764 F.3d at 1024. Accordingly, it is clear for RCRA purposes that merely owning land is not the equivalent of "contributing" to waste disposal.

The Ninth Circuit's legal analysis in *Hinds*, 654 F.3d at 850-52, points to the same conclusion. In *Hinds*, the court expressly relied on decisions rejecting the view that mere landownership, even with knowledge or indifference to the presence of waste, met the threshold for RCRA § 6972(a)(1)(B) liability. *Id.*; *see Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 844 n.7, 846 (D.N.J. 2003) (explaining that a property owner's passive indifference to contamination is insufficient), *aff'd*, 399 F.3d 248 (3d Cir. 2005); *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 854 (7th Cir. 2008) (holding that RCRA § 6972(a)(1)(B) requires "affirmative action rather than merely passive conduct"). Accordingly, under *Hinds*, government landownership does not alone render the Service liable under RCRA for the alleged acts committed by others.

Plaintiffs acknowledge that at least one district court has interpreted *Hinds* to foreclose RCRA liability for merely owning land on which disposals occur. *See* ECF 167 at 22 (discussing *City of Imperial Beach v. Int'l Boundary & Water Comm'n*, 356 F. Supp. 3d 1006, 1022-23 (S.D. Cal. 2018) (the "mere ownership of contaminated land [is] insufficient"). In *Imperial Beach*, there was no question that the defendant federal agency owned the flood control conveyances and structures through which the

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[1] Plaintiffs cite the CERCLA "owner" liability finding in *El Paso Nat. Gas Co., LLC. v. United States*, 390 F. Supp. 3d 1025, 1041-42, 1048-49 (D. Ariz. 2019), which is inapposite given the textual differences noted above. They overlook *El Paso*'s reasoning that the mere authority to control mining activity on federal land, without active involvement and affirmative control, was insufficient to impose CERCLA "operator" and "arranger" liability on the United States. In that respect, *El Paso* is analogous to *Hinds*' holding on the measure of control at the time of disposal required by RCRA.

wastewater at issue was flowing, and the agency also was aware that the contamination ultimately was reaching the Tijuana River in the United States. The court in *Imperial Beach* nevertheless ruled – based on *Hinds* – that some affirmative act was needed to prove that the agency had "contributed" to the alleged disposals under § 6972(a)(1)(B). *Imperial Beach* is not less significant, as Plaintiffs' suggest (ECF 167 at 22), because it cited an earlier case that reached the same conclusion when the owner had purchased the land after the contamination occurred. *Imperial Beach* analyzed and applied *Hinds*, the governing law in the Ninth Circuit, and held that ownership alone was insufficient.

Plaintiffs try to recast *Imperial Beach* as favorable to their claim, but that is misleading. ECF 167 at 23. First, as already noted, *Imperial Beach* rejected RCRA liability based merely on passive landownership. Second, although one narrow aspect of the *Imperial Beach* claim survived Rule 12(b)(6), that dubious ruling has no applicability here. Specifically, the court found there was active involvement to the extent that the agency's infrastructure materially changed the waste's quality and character (*i.e.*, increased the concentration of contaminants in the wastewater). 356 F. Supp. 3d at 1025. In that respect, *Imperial Beach* presented a completely different scenario because there is no agency involvement of any kind in the alleged acts of disposal here.

One might get the impression from Plaintiffs that RCRA is violated as soon as the Service allows a hunter to set foot in the Kaibab, but that is obviously untrue.[2] To be clear, no RCRA disposal occurs when a hunter *uses* lead ammunition for its intended purpose and a bullet hits an animal and fragments as Plaintiffs describe. *See* ECF 167 at 23, 27-28 n.8 (Plaintiffs noting that lead shot is not considered "waste" at the time it is

[2] Plaintiffs' counsel acknowledged several times during the Ninth Circuit oral argument that using lead ammunition to hunt and kill game is not itself a RCRA disposal. *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 17-15790 (9th Cir. Sept. 7, 2018), *available at* https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014229, at 4:55 to 7:07 (hereafter "Ninth Circuit Argument").

discharged from a firearm). It is only when a hunter field dresses an animal and leaves a gut pile with bullet fragments in the carcass for some period of time, so as to discard it, that the alleged RCRA disposal may occur. Understanding that the shooting of game is not a disposal reveals a fatal flaw in Plaintiffs' RCRA theory: the Forest Service does nothing to alter the quality and character of gut piles after a hunter chooses to leave them exposed on the ground. Unlike *Imperial Beach*, Plaintiffs point to ownership alone and there is no allegation of affirmative conduct by the Service at the time of disposal that could justify imposing RCRA "contributor" liability under § 6972(a)(1)(B).

Plaintiffs' reliance on a 1997 EPA memorandum addressing liability under another provision of RCRA, 42 U.S.C. § 6973, is also misplaced. *See* ECF 167 at 23-24. That internal guidance does not discuss the specific circumstances in which a federal agency could be responsible for disposals *by others* or endorse Plaintiffs' unexercised regulatory authority theory of RCRA liability. Moreover, RCRA case law has evolved substantially since 1997, as reflected by the line of cases leading to the Ninth Circuit's decision in *Hinds*. By way of illustration, the case cited in the EPA memorandum for the assertion that RCRA applies when an owner fails to abate an existing hazardous condition, *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), was later called in question. *See Honeywell*, 263 F. Supp. 2d at 844-45 & n.7 (concluding that *Price* was "not in accordance with the plain language of RCRA, controlling Third Circuit precedent, and all other post-*Price* federal court decisions that have addressed the liability of land owners under RCRA."). The Ninth Circuit cited *Honeywell* with approval in *Hinds*, further undermining Plaintiffs' passive landowner theory. In the end, it is the *Hinds* decision's legal analysis – not the examples in the guidance memorandum – that controls here, and under *Hinds* the Forest Service has not "contributed" to any disposal of waste.

Finally, the snippets from RCRA's legislative history that mention common law nuisance provide no reason to depart from *Hinds*. *See* ECF 167 at 20 (citing *United States v. Waste Indus., Inc.*, 734 F.2d 159 (4th Cir. 1984), which dealt with entirely different legal issues). *Waste Industries*, in particular, did not address whether land

ownership alone is sufficient to impose RCRA liability, but allowed a RCRA case to proceed against those who affirmatively operated a landfill or affirmatively leased their land for the express purpose of hosting a landfill. Notably, Plaintiffs have cited no authority holding that the United States can be deemed liable without active federal involvement in disposals by others. As our initial brief addressed, *Hinds* is consistent with the principle that a public nuisance claim will not lie against a person who did not actively create it. *See* ECF 157 at 21. RCRA's legislative history therefore does not warrant lowering the standard required to state a claim under *Hinds*.

III. UNEXERCISED REGULATORY AUTHORITY DOES NOT CONSTITUTE "CONTROL" OVER THE ALLEGED DISPOSALS.

In a variant of its passive landowner argument, Plaintiffs assert that the *potential* exercise of regulatory authority in the future, not active or direct participation in hunting activities at the time of the alleged disposals in the Kaibab, renders the Forest Service liable. *See* ECF 167 at 14-15. But mislabeling unexercised regulatory authority as "control" does not satisfy *Hinds*. 654 F.3d at 851 (RCRA's terms contemplate "active functions with a direct connection to the waste itself"); *see generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (more than labels and legal conclusions are necessary to state a cause of action). The manufacturers in *Hinds* arguably had some ability to control the waste generated by their machines and did not take steps to eliminate foreseeable disposals. For example, they could have adopted machinery designs to contain waste or issued specific instructions to users that prevented, rather than encouraged, the disposal of solvents into sewer drains. But *Hinds* rejected such an expansive view of "control" and declined to impose RCRA liability merely for assisting in creating waste. The Ninth Circuit was clear that "substantial affirmative action," rather than mere knowledge that a disposal is occurring, is required whether the alleged "contributing" is done through active involvement or control. *Hinds*, 654 F.3d at 850-52 (holding that a defendant must have a "measure of control over the waste at the time of

its disposal or was *otherwise actively involved* in the waste disposal process") (emphasis added).[3] Plaintiffs' unexercised "control" arguments therefore fall short under *Hinds*.

While Plaintiffs focus on what the Service *could do* if it exercised its regulatory authority with respect to National Forest System lands, theoretical possibilities are not germane under *Hinds*.[4] In accordance with historical practice and Congressional intent, the State of Arizona regulates hunting in the Kaibab, determining who receives licenses to hunt, the dates of the hunting season, and what type of ammunition can or cannot be used. *See* ECF 157 at 8-11; 16 U.S.C. § 528 (establishing multiple purposes for which national forests shall be administered and preserving State jurisdiction over wildlife). By contrast, the Service issues no licenses to hunt in the Kaibab, *Ctr. for Biological Diversity v. U.S. Forest Service*, 925 F.3d 1041, 1045 (9th Cir. 2019) (citing 36 C.F.R. § 251.50(c)), and performs no affirmative steps to exercise "control" over the carcasses that may be discarded as a result of lawful hunting activity by others. As Plaintiffs' counsel candidly admitted in the Ninth Circuit, Plaintiffs "can't cite [the court] a case where the United States has been on the hook in a situation like this." Ninth Circuit Argument at 16:20-30. The complete absence of any RCRA precedent on this point may explain why the Ninth Circuit seemingly was unpersuaded that the mere potential to exercise regulatory authority answered *Hinds'* call for active contribution. *See Ctr. for Biological Diversity*, 925 F.3d at 1052-53 (suggesting, without deciding, that the Service may be correct that Plaintiffs' unexercised authority claim is foreclosed by *Hinds*).

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[3] Consistent with the tenor of the *Hinds* decision, the Circuit panel in 2018 suggested that the word "otherwise" in this quote from *Hinds* is further indication that "control" must be actively exercised for RCRA purposes. *See* Ninth Circuit Argument at 9:34-10:19.

[4] Plaintiffs' reliance on language in earlier Article III standing decisions is unavailing. As the Ninth Circuit recognized, Article III standing and RCRA "contributor" liability are different issues. *See Ctr. for Biological Diversity v. USFS*, 640 Fed. Appx. 617, 619 (9th Cir. 2016). If the Ninth Circuit already had concluded that the Service's regulatory authority over the Kaibab were sufficient to prove a RCRA violation, the panel would not have remanded to this Court for a Rule 12(b)(6) determination.

Despite being given another opportunity, Plaintiffs again failed to cite any legal authority that would support a RCRA claim against the Service in the circumstances here.

Plaintiffs also attempt to minimize the key facts in *Aceto*, *Cox*, and *Valentine*, which informed the Ninth Circuit's ruling that substantial affirmative involvement is required under § 6972(a)(1)(B). *Hinds*, 654 F.3d at 851-52; *see also* ECF 157 at 17 (U.S. brief discussing these cases). Contrary to Plaintiffs' arguments (ECF 167 at 16-17), the defendants in *United States v. Aceto Agricultural Chemical Corporation*, 872 F.2d 1373, 1384 (8th Cir. 1989), had direct involvement and exercised at least some control over the disposals, unlike the Forest Service here. The *Aceto* defendants owned and supplied technical grade pesticides, provided the specifications for formulating them into commercial grade pesticides, owned the materials in process, and waste generation was inherent in the formulation process they contracted to be performed at the site. Here, however, the Plaintiffs do not allege that the Service owns or supplies lead ammunition to hunters or dictates individuals' hunting practices in the Kaibab. And in *Cox v. City of Dallas*, 256 F.3d 281, 296-97 (5th Cir. 2011), there was "lax oversight" by the City over contractors the City hired to dispose of the City's own waste. The circuit court noted that the City was aware the contractors were illegally dumping waste at one of the sites and continued to award disposal contracts to them. *Id.* Similarly, the defendant in *United States v. Valentine*, 885 F. Supp. 1506, 1512 (D. Wyo. 1995) – Jim's Water Service – was directly involved in the disposals. Jim's was in the business of collecting and transporting liquid petroleum and oil processing wastes and trucked wastes to the contaminated site. Plaintiffs' allegation that the Service is not exercising its discretionary authority to regulate hunting cannot compare to the defendants' direct and substantial involvement in or connection to the actual waste disposals in *Aceto*, *Cox*, and *Valentine*.

The other owner/operator cases Plaintiffs cite do not support their unexercised authority theory either. *See* ECF 167 at 21. In *Conn. Coastal Fisherman's Association v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1308 (2d Cir. 1993), and *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1211 (D. Or. 2009), the defendants were not

only the owners but also the active operators of private shooting ranges. Neither case involved government entities. Moreover, *Douglas Ridge* did not involve contributor liability or allegations of an imminent and substantial endangerment; rather, plaintiffs pled that the operator lacked a permit and was allowing lead waste to accumulate on its property. 673 F. Supp. 2d at 1221. Plaintiffs here have not pled such a claim against the Service. Nor is the Service an operator of any hunting-related business in the Kaibab. *Cf. Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Tr.*, 32 F.3d 1364, 1367 (9th Cir. 1994) (holding that under CERCLA "a party must do more than stand by and fail to prevent the contamination" to be an operator); *see also supra* n.1.

Potomac Riverkeeper Inc. v. National Capital Skeet and Trap Club, 388 F. Supp. 2d 582 (D. Md. 2005), similarly does not support Plaintiffs' theory. There, a private group owned and operated a skeet and trap range on lands owned by a state agency. *Id.* at 584. Plaintiffs brought claims under both RCRA Sections 6972(a)(1)(A) and (B). *See id.* at 586-89. The decision contains no analysis of "contributor" liability or the relevance of state ownership of the land. *See id.* The court denied cross-motions for summary judgment because there was a genuine dispute of material fact as to whether an imminent and substantial endangerment existed. *Id.* at 589. The court's denial of the range operator's motion to dismiss similarly did not address land ownership. *Id.* at 587 & n.7.

Plaintiffs cite two additional cases that they contend "discuss government liability in terms of its ability to control waste disposal practices." ECF 167 at 18-19. But neither case remotely supports the RCRA claim here. *Foster v. United States*, 922 F. Supp. 642, 660 (D.D.C. 1996), contains a passing reference to "control" but involved CERCLA – not RCRA – liability. Moreover, the site was associated with a military arsenal and an adjacent canal used by the government for disposals; there was no issue as to CERCLA liability for actions by third parties. *Id.* at 647-48. *Foster* is thus entirely irrelevant here.[5]

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[5] *El Paso*'s holding that mere authority to control is insufficient to establish CERCLA "arranger" liability under Ninth Circuit law is a more useful guidepost. *See supra* n.1;

Footnote continued…

In *Holy Cross Neighborhood Association v. U.S. Army Corps of Engineers*, No. Civ. A. 03-370, 2003 WL 22533671, at *1-2 (E.D. La. Nov. 3, 2003), plaintiff's claim was that the Corps' dredging of a canal would stir up contaminated sediment. *Id.* at *8 (finding merely that notice pleading standards were satisfied). Significantly, the Corps did not just own a site, but was actively planning, directing, and overseeing the actual dredging that allegedly released contaminants. *Id.* Thus, the contrast between *Holy Cross* and this case could not be clearer. Whereas the Corps had direct participation by implementing its own dredging project, the Service here does not use lead ammunition in the Kaibab or directly participate in the public's hunting activities. In sum, Plaintiffs' cases do not support a RCRA "contributor" claim against the Forest Service, which does not take a direct or active role in disposing spent lead ammunition in the Kaibab. *Cf. Nat'l Exch. Bank & Tr. v. Petro-Chem. Sys. Inc.*, No. 11-cv-134, 2012 WL 6020023, *3 (E.D. Wis. Dec. 3, 2012) (finding that Congress did not intend the term "contributed" to be an "invitation to string together an expansive causal chain of tangential defendants").

IV. THE SPECIAL USE PERMIT ALLEGATIONS ALSO FAIL.

Our initial brief addressed why Plaintiffs' allegation that the Service issues special use permits to commercial outfitters and guides adds nothing to its unexercised authority argument, which cannot establish liability under § 6972(a)(1)(B). *See* ECF 157 at 21-23. Plaintiffs' opposition failed to show otherwise. As an initial matter, special use permits from the Service are *not required* to hunt in the Kaibab. 36 C.F.R. § 251.50(c).[6] The Service's regulations do not specifically address hunting practices or dictate the types of

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see also E. Bay Mun. Util. Distr. v. United States, 142 F.3d 479, 485-86 (D.C. Cir. 1998) (regulatory authority is not sufficient under CERCLA).

[6] When asked why they had not sued commercial guides, Plaintiffs' counsel stated in the Ninth Circuit that most hunting in the Kaibab is done by individuals without guides. *See* Ninth Circuit Argument at 45:20-50. Regardless, the State of Arizona – not the Service – issues the hunting license necessary for any individual to hunt in the Kaibab.

ammunition hunters may use in the Kaibab. 36 C.F.R. §§ 251.50, 251.51. These matters are governed by the State of Arizona's hunting regulations. While Plaintiffs theorize that the Service "could include" conditions in special use permits, ECF 167 at 26:17-18, there is virtually no limit to the potential regulatory options that any government might then be required to consider under this theory to address actions by others. The mere possibility of imposing additional hunting restrictions over and above Arizona's requirements in the Kaibab does not constitute active and direct involvement by the Service in the alleged acts or conduct of individual hunters in the field. *See Hinds*, 654 F.3d at 851 (RCRA requires active functions with a "direct connection" to the waste itself).

IV. CONCLUSION

Plaintiffs' theories of RCRA liability are incompatible with the Ninth Circuit's decision in *Hinds* and the Complaint provides no basis for finding that the Service actively contributed to the alleged disposals in the Kaibab.[7] Accordingly, the Court should dismiss the Complaint against the Forest Service with prejudice.

Respectfully submitted,

Dated: January 16, 2020

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[7] This motion addresses the "contribution" issue, but the Service does not concede that any other RCRA elements are met. While it is unnecessary to reach the matters intervenors raise, the Service is willing to brief those issues upon the Court's request.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2020, I caused the attached Defendant United States Forest Service's reply in support of motion to its dismiss to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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