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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PRESCOTT DIVISION

Center for Biological Diversity, et al.,

Plaintiffs,

vs.

United States Forest Service,

Defendant, and

National Rifle Association of America and Safari Club International, and National Shooting Sports Foundation, Inc.,

Defendants-Intervenors.

CASE NO. 3:12-cv-08176-PCT-SMM

DEFENDANTS-INTERVENORS NATIONAL RIFLE ASSOCIATION OF AMERICA AND SAFARI CLUB INTERNATIONAL'S REPLY IN SUPPORT OF MOTION TO DISMISS

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I. Hunters' Spent Ammunition Is Not a "Solid Waste" Under RCRA.

Plaintiffs materially misinterpret *Ecological Rights Foundation v. Pacific Gas and Electric Co.*, 713 F.3d 502, 515 (9th Cir. 2013) ("*ERF*") and misunderstand the import of 40 C.F.R. § 266.202, the Military Munitions Rule ("MMR"). Plfs.' Resp. at 18-21. Plaintiffs contend the *ERF* "Court . . . 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 . . . organisms' at the base of the utility poles." Plfs.' Resp. at 18 (emphasis added). Accordingly, Plaintiffs assert the escaped wood preservative in *ERF*—*unlike* the spent ammunition at issue herein—was still serving its intended purpose and thus "did not qualify as solid waste under RCRA." *Id.* However, the relevant passage in *ERF* states only that "preservative that falls to the base of a utility pole still serves its intended purpose by inhibiting the growth . . . of . . . organisms[.]" 713 F.3d at 516. Plaintiffs interpretation—that the escaped preservative was still in use and thus was not "solid waste"—does not hold water. Plfs.' Resp. at 18.

The correct interpretation of the salient passage is that preservative having *previously* served its intended purpose did not become "solid waste" when it escaped and "no longer served its intended use." 713 F.3d at 516. Several facts support this view. First, *ERF* recognizes that escaped preservative—e.g., the preservative "at the base of the utility poles" (*id.*)—"is no longer serving its intended use," akin to "airborne pesticide that drifts beyond its intended target after killing insects." 713 F.3d at 516 (discussing *No Spray Coal., Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) ("*No Spray*")). *ERF* recognizes neither "escaped" material is a "solid waste." *Id.* Second, *ERF* does not, contrary to Plaintiffs' assertion (Plfs.' Resp. at 18), include a finding that the defendant therein "still wanted" the escaped preservative. 713 F.3d at 516. Thus, *ERF* cannot be distinguished on the unsupportable interpretation Plaintiffs offer.

Even assuming, as Plaintiffs argue, that ammunition "has served its intended purpose" once used to harvest an animal, that is irrelevant under *ERF* and *No Spray*. Under those cases, unintended and attenuated repercussions of a material's intended use

do not transform the material into a "solid waste." *See., e.g.*, *ERF*, 713 F.3d at 516-17 (indicating that "lead paint that naturally chips away from houses" is not "solid waste"). This is true even where the unintended repercussion is expected. *See Id.* (finding "wood preservative . . . released into the environment as a natural, expected consequence of its intended use . . . is not automatically 'solid waste'").[1]

Similarly, Plaintiffs ignore that their interpretation of the MMR (Plfs.' Resp. at 19-20) conflicts with the EPA's position (as cited in *ERF*) regarding spent ammunition left on-range, which reinforces the position of NRA/SCI: "munitions that are fired are products used for their intended purpose, *even when they hit the ground since hitting the ground is a normal expectation for their use*." *ERF*, 713 F.3d at 516 (emphasis added). Plaintiffs err in their attempt to contort the MMR to support their cause. The MMR's directives regarding ammunition that lands off range has no parallel here. "Off range" in that context is an exception to the intended use. Plaintiffs' entire case is premised on hunters' spent ammunition being present *on* (and not off) land controlled by the federal government. Plfs.' Resp. at 30. The presence of spent ammunition in harvested game "is a normal expectation for" hunters' use of ammunition on forest land, whereas munitions landing off-range is not. Because the complained-of result is a normal, expected result of hunters' use of ammunition, Plaintiffs fail to show the spent ammunition at issue is "solid waste" when viewed through the lens of *ERF* and the authorities relied on therein.

[1] *ERF* expressly notes it is limited to addressing a dispute where the plaintiff therein—just like the Plaintiffs here—did *not* plead that "dangerous accumulations" of a material constituted a "solid waste." *Compare ERF*, 713 F.3d at 518, *with* Compl. ¶¶ 35, 45-46). Plaintiffs attempt to paint this action as one where a "dangerous accumulation" *was* pleaded (thus putting this case outside *ERF*'s precedential influence) by claiming they "clearly alleged dangerous amounts of spent lead ammunition resulted" from hunting. Plfs.' Resp. at 20. But because allegations of "dangerous amounts" cannot reasonably be stretched, post hoc, into allegations of "dangerous accumulations," Plaintiff fail again in attempting to distinguish *ERF*.

II. Hunters' Spent Ammunition Is Not "Solid Waste" Because Hunting Is Not a "Community Activity."

As stated in NRA/SCI's motion, RCRA only creates liability for disposal of solid waste from certain defined sources. Recreational hunting is *not* one of them. Dkt. 161 at 12-13. Plaintiffs argue that hunting is a community activity under 42 U.S.C. § 6903(27). Dkt. 167 at 21-22. That is wrong; hunting is not a "community activity" under RCRA.

Although Section 6903(27) of RCRA uses the word "including" to define possible sources of solid waste, it does not create an unlimited list of potential sources, as Plaintiffs claim. Dkt. 167 at 21-22. To the contrary, the listed items *limit* the scope of potential sources. "[T]he term 'including' is not one of all-embracing definition, but connotes simply *an illustrative application of the general principle*." *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (emphasis added). Under the associated-words canon, "words grouped in a list should be given related meaning," *Third Nat'l Bank in Nashville v. Impac Ltd., Inc.*, 432 U.S. 312, 322 (1977), and this applies in conjunction with the word "including." *Samantar v. Yousuf*, 560 U.S. 305, 317 (2010).

In *Samantar*, the Supreme Court had to determine the scope of a "foreign state" under relevant law, which "include[d]" several enumerated items. *Id*. The Court ultimately held that a foreign official was not a "foreign state" because the statute listed different types of entities—not people. *Id*. In short, the Court held that the defined term covered a particular, alike class. Here, any other sources of discarded material must be like the sources Congress listed in § 6903(27)—large-scale, coordinated, group activities. Hunting does not take place in large groups because large groups of people scare away wildlife, and large groups of hunters in a concentrated area would pose serious safety issues. Thus, hunting cannot be a "community activity" under RCRA.

Plaintiffs mischaracterize NRA/SCI's intervention papers and declarations in a failed attempt to demonstrate that hunting is a community activity. Dkt. 167 at 22. The fact that two individual NRA/SCI members hunted with family and friends does not

make the activity communal. Read in full, those declarations explain only that the hunters began to hunt as part of a family tradition. Moreover, a family hunting trip is not a "community activity" under RCRA because it goes against the "ordinary or natural meaning" of the phrase "community activity": a community is comprised of many families, not just one. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (citation omitted).

In addition, Mr. Cox's declaration concerned NRA's advocacy activities for all hunters. It had nothing to do with individuals hunting in a particular area or a reflection on whether hunting is a community activity. Cox Decl., Dkt, 97 ¶ 7. Although hunters may compose a discrete "community" of people with a common interest, the act of hunting—which allegedly creates the solid waste—is normally done alone or in a small group, not by many or an entire community all at once. The phrase "community activity" would be rendered meaningless if every activity that involved more than one person over time was considered "communal." *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (noting that courts should give effect to every word in a statute).

Courts have rejected broad claims like the ones being made here that render the source of the waste meaningless under other environmental statutes. For example, the Clean Water Act generally prohibits "the discharge of any pollutant by any person" into the waters of the United States. 33 U.S.C. § 1311(a). But Congress limited that prohibition by requiring that the discharge come from a "point source." *Id.* § 1362(12), (14). The Second Circuit held that the owner of a blood-testing facility who personally disposed of hepatitis-B infected blood samples in the Hudson River could not be criminally liable under the Clean Water Act because he was not a "point source." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643 (2d Cir. 1993). The court rejected arguments that mirror the arguments Plaintiffs make here. First, although the enumerated items in the statutory definition of a "point source" were nonexclusive, human beings did not resemble any of the listed items. *Id.* at 646. And second, if Congress wanted to include any human-caused disposal under the Clean Water Act, then Congress's "lengthy definition of 'point source' would have been unnecessary." *Id.*

The same is true here. Congress carefully defined "solid waste" to limit RCRA's reach. Recreational hunting and hunter-spent ammunition is beyond that reach. Plaintiffs' argument should be rejected, and their complaint should be dismissed.

III. Plaintiffs' RCRA Claim Fails Under ESA Section 10(j).

Plaintiffs try to sideline NRA/SCI's ESA Section 10(j) argument by referring to several non-endangered species and contending that "this case is about more than just condors." Plfs.' Resp. at 22. If Plaintiffs truly sought relief as to all the species mentioned in the paragraph 27 of the Complaint (e.g., turkey vultures and crows), they would not have limited their case to harms allegedly occurring in the Kaibab National Forest ("KNF"). Compl, *passim*. The geographic bounds of the KNF are irrelevant to whether crows and turkey vultures are being impacted by hunters' use of lead ammunition. Rather, Plaintiffs sought to bring a case about a specific condor population that spends much of its time in the KNF. *Id.* ¶ 36. Plaintiffs' allegations focus almost exclusively on this population (Compl. ¶¶ 35-42), and what is little more than a passing reference in Plaintiffs' complaint (Compl. ¶ 27) should not be used to expand the scope of this case.

Plaintiffs also contend that the incidental take provision in Section 10(j) of the ESA only provides relief from liability for conduct that would otherwise be an illegal "taking" under Section 9 and does not protect against RCRA liability. Plfs.' Resp. at 23-24. This violates the well-established cannon that statutes should not be interpreted to produce "absurd results" where "alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). The legislative purpose of Section 10(j) was to alleviate fears of lawsuits—just like the one now before the Court. As the Tenth Circuit has held, Section 10(j) aimed to reduce public concerns about liability where populations were introduced and experimental: "Congress hoped the provisions of Section 10(j) would mitigate industry's fear that experimental populations would halt development projects, and, with the clarification of the legal responsibilities incumbent with the experimental populations, actually encourage private parties to host such populations on their lands." *Wyo. Farm Bureau*

Fed'n v. Babbitt, 199 F.3d 1224, 1231-32 (10th Cir. 2000).

Plaintiffs similarly ignore the facts in claiming "the Condor Rule [50 C.F.R. § 17.84(j)] does not authorize the use of lead ammunition on the Kaibab." Plfs.' Resp. at 24. The presence of hunting with lead ammunition was expressly recognized as an element of the experiment from the beginning. 61 Fed. Reg. 54044, 54055 (Oct. 16, 1996). Although the Condor Rule (a federal regulation) cannot itself overrule RCRA, Section 10(j) of the ESA (a law), as applied through the Condor Rule, can and does. In the same way, Plaintiffs' argument that "if there were a conflict between RCRA and the Condor Rule, RCRA would control," conjures a straw man. Plfs.' Resp. at 24. The rule can only allow for the take of condors *because* Section 10(j) says it can. Section 10(j), by its plain terms, cannot be put into effect without a regulation. 16 U.S.C. § 1539(j)(2)(A) ("The Secretary may authorize . . . ."). Any conflict with the incidental take aspect of the Condor Rule is necessarily a conflict with Section 10(j) of the ESA.

IV. The Case Should Be Dismissed Because It Lacks a Required Party.

Plaintiffs arguments that the Court should not dismiss the Complaint for failure to join the State of Arizona as a party pursuant to Federal Rule of Civil Procedure 19 (Plfs.' Resp. at 26-40) fail. Arizona has claimed legally protected interests in this litigation, proceeding in Arizona's absence may impair or impede Arizona's ability to protect its interests, and existing parties will not adequately represent Arizona's claimed interests. For these reasons, the Complaint should be dismissed.

A. Arizona Has Legally Protected Interests in the Subject Matter of this Case.

As an initial matter, "an absent party need merely '*claim*' a legally protected interest in the suit because '[j]ust adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party.'" *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1155 n.5 (9th Cir. 2002) (citing *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). The term "legally

protected interest" excludes "only those *claimed* interests that are 'patently frivolous.'" *Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999) (citing *Shermoen*, 982 F.2d at 1318). Arizona's claimed interests in its sovereign authority to manage wildlife within the state, including on federally-owned lands, and in maintaining its voluntary non-lead ammunition program, are not patently frivolous.

Arizona claims an interest in enforcing its statues and regulations concerning the manner and methods for taking wildlife. Dkt. 159 at 4-9. A state's interest—and authority—in wildlife and hunting management, including on federally-owned lands, has been confirmed by numerous courts. "Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions. … It has also long been recognized that a state has a legitimate interest in providing enjoyment to its own people." *Conservation Force v. Manning*, 301 F.3d 985, 996 (9th Cir. 2002) (internal quotation and citations omitted). "While Congress might enact legislation respecting national forests, the 'clear and manifest purpose' of which is to preempt [the State's] traditional trustee and police powers as a sovereign to manage wildlife within its borders, it has not done so." *Utah Native Plant Soc'y v. U.S. Forest Serv.*, 923 F.3d 860, 867 (10th Cir. 2019) (citation omitted); s*ee also Wyoming v. United States*, 279 F.3d 1214, 1226 (10th Cir. 2002); *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976).

Plaintiffs do not allege that Arizona's claimed interests are patently frivolous, nor do they dispute that Arizona has "primary responsibility" for managing wildlife in the state, including on KNF. Plfs.' Resp. at 30. Nevertheless, Plaintiffs argue that Arizona's interests are not "legally protected" because, if its interests in wildlife management conflict with federal law, the Supremacy Clause of the U.S. Constitution dictates that the federal law would preempt application of Arizona law. *Id.* at 30-31. Plaintiffs are wrong.

NRA/SCI agree that federal law would preempt state law, if Congress was to enact legislation that clearly and manifestly intrudes on Arizona's broad authority over wildlife management on national forests. But as *Utah Native Plant Society* explains, Congress has

not done so. 23 F.3d at 866-69.[2] Plaintiffs cite no authority to support any contention that Arizona's traditional wildlife management authority has been superseded on KNF. Arizona maintains its legally protected interests in wildlife management on KNF, including interests in regulating hunting and the application of its voluntary non-lead ammunition program. *Id.* at 867.

Without an explicit law preempting Arizona's management authority, Plaintiffs must rely on the assertion that if this Court holds in their favor, the resulting federal regulation of lead ammunition through RCRA *would* preempt Arizona's interests. Plfs.' Resp. at 30-31. But courts have rejected such circular arguments. In *Davis v. United States*, the Tenth Circuit found that the plaintiffs' similarly "narrow interpretation of the term 'legally protected interest' inappropriately presupposes [p]laintiffs' success on the merits. Under the interpretation advanced by [p]laintiffs, the [absent party] would have no legally protected interest … only if [p]laintiffs prevail on the merits." 192 F.3d at 958. The Court held that "[s]uch an approach is untenable because it would render the Rule 19 analysis an adjudication on the merits." *Id.* In *American Greyhound Racing, Inc. v. Hull*, the Ninth Circuit rejected arguments like the one advanced by Plaintiffs. 305 F.3d 1015, 1024 (9th Cir. 2002) ("We have rejected this kind of circularity in determining whether a party is necessary. It is the party's *claim* of a protectable interest that makes its presence necessary.") (citing *Shermoen*, 382 F.2d at 1317); *see also Maricopa Cty. v. Motor Coach Indus.*, No. CV-10-00713, 2011 WL 13301644, *2 (D. Ariz. Feb. 2, 2011) (rejecting argument that absent party was not necessary because he was unlikely to prevail). This Court should reject Plaintiffs' argument, at it would require the Court to decide the merits of the RCRA claims and ultimately determine that RCRA requires the Forest Service to restrict the use of lead ammunition on KNF. This is untenable as it requires the Court to

[2] Although the opinion in *Utah Native Plant Society* is not binding on this Court, the 10th Circuit gave a useful overview of how Congress has historically left wildlife management on national forests to the states, including discussion of multiple federal laws, all of which leave to the states the authority to manage wildlife on national forests.

decide the merits of Plaintiffs' claims before deciding the Rule 19 issues and ruling on NRA/SCI's motion to dismiss.[3]

B. The Litigation May Impair or Impede Arizona's Ability to Protect Its Interests.

Relying on their erroneous conclusion that Arizona has no legally protected interest, Plaintiffs summarily assert that this case will not impair or impede Arizona's claimed interests. Plfs.' Resp. at 31. Of course, if Arizona makes no claims to legally protected interests, the inquiry stops there. But if Arizona does make a claim to legally protected interests—as properly analyzed under Rule 19—the Court must determine whether proceeding in this litigation without Arizona may impair or impede Arizona's ability to protect those interests. *Dawavendewa*, 276 F.3d at 1156.

Just as Plaintiffs' argument regarding Arizona's legally protected interests fails, so too would any assertion that Arizona's ability to protect those interests could not be impaired or impeded by this litigation. Plaintiffs seek a ruling that may force the Forest Service to preempt Arizona's wildlife management authority and restrict the use of lead ammunition on KNF. Comp. ¶ 47. As demonstrated by its amicus brief, Arizona (unsurprisingly) has input and evidence relevant to this finding. *E.g.*, Dkt. 159-1, Exh. B. The Court should find that Arizona's ability to protect its interests may be impaired or impeded by this litigation.

C. Existing Parties Will Not Adequately Represent Arizona's Claimed Interests.

As an alternative argument, Plaintiffs incorrectly assert that Arizona is not a required party because the Forest Service will adequately represent Arizona's interests.[4] Plfs.' Resp. at 31-33. Plaintiffs cite two cases in which the Ninth Circuit has held that the United States can adequately represent Native American tribal interests. *Id.* (citing *Sw.*

[3] Further, Plaintiffs do not explain why compliance with RCRA would necessarily result in preemption of Arizona's authority related to wildlife management.

[4] Plaintiffs did not argue that Defendant-Intervenors NRA/SCI or NSSF would adequately represent Arizona's interests. Indeed, they would not be capable of doing so.

Ctr. for Biological Diversity v. Babbitt, 150 F.3d 1152 (9th Cir. 1998); *Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999)). But the Court should not follow those inapplicable decisions for several reasons.

First, the United States has a trust responsibility for tribes that it does not have for states. *See Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995) (noting, "with great frequency, that the federal government is the trustee of the Indian tribes' rights, including fishing rights"). Both cases cited by Plaintiffs recognize this trust obligation as at least a factor in determining whether the United States could adequately represent the relevant tribal interests. *Sw. Ctr. for Biological Diversity*, 150 F.3d at 1154; *Washington*, 173 F.3d at 1168. And, despite this trust responsibility, the Ninth Circuit has "observed that there is a 'wall of circuit authority' in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity…." *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 857 (9th Cir. 2019) (citation omitted).

Second, the Forest Service and Arizona's interests may not remain aligned. In *White v. University of California*, the Ninth Circuit held that an absent party was not adequately represented by existing parties even though the absent party and the defendant had aligned interests at the time. 765 F.3d 1010, 1027 (9th Cir. 2014). The Circuit Court opined that if it were to hold against the defendant on the merits, the absent party and the defendant may then pursue different courses of action in response to such a ruling. *Id.* That potential split in interests—even after the Court rules on the merits—led the Court to conclude that the absent party's interests were not adequately represented by the existing defendant. *Id.*; *see also Dine Citizens*, 932 F.3d at 854 (summarizing *White*).

In this case, even if the Forest Service and Arizona's interests are currently aligned, a conflict of interest may arise in the future if the Court holds in favor of Plaintiffs and the Forest Service decides to prohibit the use of lead ammunition to abate environmental harm. Arizona's interest is to avoid such an outcome to preserve its legally protected interests. Thus, the Forest Service and Arizona's interests are not perfectly aligned, and they could split if the Forest Service determines that a ban on the use of lead

ammunition is an appropriate action.

Third, contrary to Plaintiffs' assertions, the Forest Service has not indicated that it is "capable of, willing, [or] intends to vigorously defend this lawsuit and, in doing so, protect Arizona's claimed interests." Plfs.' Resp. at 33. For support, Plaintiffs erroneously cite the introductory sections of the Forest Service's motion to dismiss in which the Forest Service simply explains the existing regulatory background related to wildlife management in KNF. *Id.* Nothing in those sections or the rest of the Forest Service's pleadings suggest it will "undoubtedly make all" the same arguments that Arizona would make if it were a party. *Shermoen*, 382 F.2d at 1318. Furthermore, considering its position of wildlife manager within the national forest, Arizona would likely offer necessary elements to the proceedings, including unique legal arguments and scientific information or data that could assist the Court in deciding the merits of Plaintiffs' claims. *Id.*

In total, the Forest Service will not adequately represent the interests of Arizona.

D. Plaintiffs' Remaining Arguments Also Fail.

The remainder of Plaintiffs' arguments as to why the Court should not dismiss the case for failure to join Arizona as a required party are equally unconvincing. As explained in Arizona's amicus curiae brief, the case should not proceed in equity and good conscience and the public rights exception does not apply. Dkt. 159 at 12-15. Thus, the Court should dismiss this case because it lacks a required party.

CONCLUSION

For the foregoing reasons and as explained in NRA/SCI's motion to dismiss, the Forest Service's motion to dismiss, and NSSF's motion for judgment on the pleadings, NRA/SCI respectfully request that this Court dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted this 28th day of January, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2020, I electronically transmitted the foregoing Reply in Support of NRA/SCI's Motion to Dismiss 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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