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7
8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ARIZONA**

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

12 Plaintiffs,

13 v.

14 United States Forest Service,

15 Defendant,

16 and

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

19 Intervenor-Defendants.
20

No. CV-3:12-08176-SMM

**NATIONAL SHOOTING SPORTS
FOUNDATION'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR JUDGMENT ON THE
PLEADINGS (Doc. 160)**

(Oral Argument Requested)

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AGFD	Arizona Game and Fish Department
BMP for Shooting Ranges	EPA, “Best Management Practices for Lead at Outdoor Shooting Ranges,” EPA-902-B-01-001 (2005)
Condor Report	U.S. Fish and Wildlife Service, <i>A Review of the Third Five Years of the California Condor Reintroduction Program in the Southwest</i> (2012)
Condor Rule	U.S. Fish and Wildlife Service, <i>Establishment of a Nonessential Experimental Population of California Condors in Northern Arizona</i> ; Final Rule, 61 Fed. Reg. 54,044 (Oct. 16, 1996)
EPA	Environmental Protection Agency
ESA	Endangered Species Act, 16 U.S.C. §§ 1531 to 1544
FWS	U.S. Fish and Wildlife Service
Kaibab NF	Kaibab National Forest
MM Rule	EPA, <i>Military Munitions Rule</i> , 62 Fed. Reg. 6,622 (Feb. 12, 1997)
NRA	National Rifle Association of America
NSSF	National Shooting Sports Foundation
RCRA	Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 to 6992k
SCI	Safari Club International

1 Intervenor-Defendant National Shooting Sports Foundation, Inc. (“NSSF”) hereby
2 submits its reply in support of its motion for judgment on the pleadings pursuant to Rule
3 12(c), Fed.R.Civ.P.

4 **I. INTRODUCTION.**

5 Plaintiffs are suing the U.S. Forest Service under Section 7002(a)(1)(B) of the
6 Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(B). They
7 allege that recreational hunters using lead ammunition to hunt game within the Kaibab
8 National Forest (“Kaibab NF”) are disposing of solid waste, which presents “an imminent
9 and substantial endangerment to health or the environment” in violation of RCRA. In
10 short, Plaintiffs maintain that whenever a hunter fires his rifle at an animal and fails to
11 retrieve the spent round, he is disposing of solid waste and is subject to RCRA. *See Plfs.’*
12 *Resp.* at 18-19.

13 As explained in NSSF’s motion, there is no legitimate basis for Plaintiffs’ claim.
14 Lead ammunition is not discarded when it is fired at a game animal – it enters and remains
15 in the environment as an expected consequence of its intended use. Because lead
16 ammunition is used for its intended purpose, it is not discarded by the hunter and is not
17 subject to the RCRA citizen suit provision. *See Ecological Rights Found. v. Pac. Gas &*
18 *Elec. Co.*, 713 F.3d 502, 515-18 (9th Cir. 2013) (rejecting claim that wood preservative
19 that leaches from utility poles becomes a RCRA “solid waste”).

20 Moreover, the alleged “imminent and substantial endangerment to human health or
21 the environment” consists of adverse impacts to an experimental population of California
22 condors. This experimental population is not part of the natural environment. It instead
23 was introduced by another federal agency, the U.S. Fish and Wildlife Service (“FWS”),
24 under a special rule that considered the impacts of hunting with lead ammunition and
25 found those impacts acceptable. *Establishment of a Nonessential Experimental*
26 *Population of California Condors in Northern Arizona*, 61 Fed. Reg. 54,044, 54,050/2-3,

1 54,052/3, 54,054/3-54,055/1 (Oct. 16, 1996) (codified at 50 C.F.R. § 17.84(j)) (“Condor
2 Rule”).¹ Therefore, Plaintiffs have not alleged substantial endangerment under RCRA
3 Section 7002(a)(1)(B) and their claim fails.

4 **II. ARGUMENT.**

5 **A. Spent Ammunition Is Not Discarded Material and Does Not** 6 **Become a Solid Waste Following Its Use to Kill Game.**

7 Plaintiffs contend that the small fragments of lead that remain in an animal struck
8 with a lead bullet constitute “solid waste” under RCRA, and that the Forest Service is
9 contributing to the disposal of these small fragments by failing to prohibit the use of lead
10 ammunition in the Kaibab NF. *See* Compl. ¶¶ 30-31, 45-46. Plaintiffs’ position would
11 transform RCRA into a sweeping hunting regulation. Under Plaintiffs’ argument, every
12 stray bullet fragment (lead or otherwise) would be solid waste subject to RCRA.
13 Plaintiffs’ position finds no support in RCRA’s statutory text or the case law interpreting
14 it, and the Court should reject Plaintiffs’ erroneous attempt to stretch RCRA well beyond
15 the intent of Congress.

16 The Ninth Circuit has made it clear that solid waste does not encompass materials
17 entering the environment as an expected consequence of their intended use. *Ecological*
18 *Rights*, 713 F.3d at 518. The facts at issue in *Ecological Rights* are directly analogous to
19 Plaintiffs’ claim. The plaintiffs in *Ecological Rights* argued that wood preservative
20 leaking, spilling, dripping, and entering the air from treated utility poles constituted solid
21 waste under RCRA. *Id.* at 514. The court held that preservative entered the environment
22 as “an expected consequence of the preservative’s intended use,” and was therefore not
23 solid waste under RCRA. *Id.* at 516. In reaching this conclusion, the Ninth Circuit

24 ¹ A complete copy of the Condor Rule is attached to NSSR’s Motion (Doc. 160).
25 Citations to the Federal Register notice for the Condor Rule include the column(s) of the
26 notice by adding after the page citation “/column number.”

1 expressly analogized the wood preservative to spent military munitions, which the
2 Environmental Protection Agency (“EPA”) concluded were not solid waste under RCRA
3 even after they hit the ground, “since hitting the ground is a normal expectation for their
4 intended use.” *Id.* (citation omitted).

5 Plaintiffs attempt to distinguish *Ecological Rights*, suggesting that the wood
6 preservative entering the environment was still serving its intended purpose, while spent
7 ammunition serves no further purpose after hitting its target. Plfs. Resp. at 18. Plaintiffs
8 misstate the Ninth Circuit’s holding. While the court noted that preservative falling to the
9 base of utility poles still served its intended purpose by inhibiting the growth of vegetation
10 and fungi at the base of the pole, *Ecological Rights*, 713 F.3d at 516, the plaintiffs in that
11 case did not limit their allegations to preservative falling to the base of the pole. Rather,
12 the plaintiffs complained that the preservative was leaking from the treated poles,
13 contaminating stormwater, and blowing into the air during dry seasons. *Id.* at 506-07,
14 508-09, 514. The court determined broadly that “wood preservative that is washed or
15 blown away from utility poles by natural means, as an expected consequence of the
16 preservative’s intended use,” was not solid waste. *Id.* at 516. As support for its
17 conclusion, the court relied on EPA guidance stating that the proper focus is “on whether
18 a product was used as it was intended to be used, not on whether the purpose of the
19 product is to perform some function once it is on the ground.” *Id.* (citation omitted).
20 Plaintiffs grossly mischaracterize *Ecological Rights* by suggesting that the case hinged on
21 whether the escaped wood preservative was still serving its intended purpose.

22 Plaintiffs also attempt to distinguish *Ecological Rights* by noting that the plaintiffs
23 in that case did not allege that there were “dangerous *accumulations*” of wood
24 preservative, while Plaintiffs here “clearly alleged dangerous *amounts* of spent lead
25 ammunition.” Plfs. Resp. at 20 (emphasis added). *Ecological Rights* held that material
26 released into the environment as a natural, expected consequence of its intended use is not

1 “automatically” solid waste under RCRA, leaving open the possibility that “wood
2 preservative, or another material [may] become[] a RCRA ‘solid waste’ when it
3 accumulates in the environment.” 713 F.3d at 518. Plaintiffs do not allege that there are
4 accumulations of lead ammunition in the Kaibab NF, but maintain that the small lead
5 fragments that disperse when a bullet makes contact with its target pose a threat to
6 California condors. The plaintiffs in *Ecological Rights* similarly alleged that the wood
7 preservative at issue in that case contained toxic chemicals posing an imminent and
8 substantial endangerment to health or the environment. *Id.* at 507. Under *Ecological*
9 *Rights*, it is not enough for Plaintiffs to argue that the spent ammunition poses a threat to
10 wildlife. They must allege an accumulation of lead ammunition, which they have failed to
11 do. *See id.* at 518; *see also Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1042 n.5 (9th
12 Cir. 2004); *Simsbury-Avon Preservation Soc., LLC v. Metacon Gun Club, Inc.*, 2006 WL
13 2223946, at *8-9 (D. Conn. 2006); *Otay Land Co. v. U.E. Ltd., L.P.*, 440 F. Supp. 2d
14 1152, 1182 (S.D. Cal. 2006), *vacated on other grounds sub nom. Otay Land Co. v. United*
15 *Enterprises Ltd.*, 338 F. App’x 689 (9th Cir. 2009).

16 Plaintiffs cite to the EPA’s “Best Management Practices for Lead at Outdoor
17 Shooting Ranges,” EPA-902-B-01-001 (2005) (“BMP for Shooting Ranges”), claiming
18 that it supports their argument that small lead fragments left in animal carcasses are solid
19 waste under RCRA. Plfs. Resp. at 19 n.8. The BMP for Shooting Ranges states that
20 “[l]ead shot is not considered a hazardous waste subject to RCRA at the time it is
21 discharged from a firearm because it is used for its intended purpose. *As such, shooting*
22 *lead shot (or bullets) is not regulated nor is a RCRA permit required to operate a shooting*
23 *range.”* BMP for Shooting Ranges at I-8 (emphasis added). Plaintiffs focus on language
24 in the BMP for Shooting Ranges stating that “spent lead shot (or bullets), left in the
25 environment, is subject to the broader definition of solid waste written by Congress and
26 used in sections 7002 and 7003 of the RCRA statute.” *Id.* The Ninth Circuit in

1 *Ecological Rights* correctly quoted this exact language for the proposition that a material
2 may become actionable under RCRA “when it accumulates in the environment.” 713
3 F.3d at 518. The language occurs in the context of “how RCRA may apply to outdoor
4 shooting ranges,” and follows a discussion of *Connecticut Coastal Fishermen’s Ass’n v.*
5 *Remington Arms Co.*, 989 F.2d 1305 (2d Cir. 1993), in which the Second Circuit held that
6 a 2,400-ton, decades-long accumulation of spent lead ammunition was actionable under
7 RCRA. BMP for Shooting Ranges at I-7 to I-8. The EPA properly observed that shooting
8 ranges are at risk of legal action under RCRA if they allow lead to accumulate and “do not
9 take steps to minimize lead release or migration.” *Id.* at I-7. The BMP for Shooting
10 Ranges does not, as Plaintiffs posit, suggest that a stray bullet entering the environment is
11 actionable solid waste under RCRA.

12 Plaintiffs also cite the EPA’s *Military Munitions Rule: Hazardous Waste*
13 *Identification and Management; Explosives Emergencies; Manifest Exemption for*
14 *Transport of Hazardous Waste on Right-of-Ways on Contiguous Properties*, 62 Fed. Reg.
15 6,622 (Feb. 12, 1997) (codified at 40 C.F.R. § 266.202) (“MM Rule”). Many courts,
16 including *Ecological Rights*, have relied on the MM Rule for the proposition that fired
17 military munitions are not solid waste under RCRA because they are used for their
18 intended purposes. *See Ecological Rights*, 713 F.3d at 516; 62 Fed. Reg. at 6,630 (“[EPA]
19 is maintaining its position that munitions that are fired are products used for their intended
20 purpose, even when they hit the ground since hitting the ground is a normal expectation of
21 their use.”). Plaintiffs cite 40 C.F.R. § 266.202(d), which provides that “a used or fired
22 military munition is a solid waste, and, therefore, is potentially subject to RCRA
23 corrective action . . . if the munition lands off-range and is not promptly rendered safe
24 and/or retrieved.” Plaintiffs contend that “spent lead abandoned by hunters on the Kaibab
25 NF is analogous to military munitions landing ‘off-range.’” Plfs. Resp. at 20-21.

26 The MM Rule explains why the EPA distinguishes between fired munitions

1 landing on and off an active range:

2 Several commenters expressed concern over the relative merits of not
3 addressing munitions on an active range while addressing munitions that
4 land off a range. [EPA] views these as distinctly different situations. As
5 discussed previously, [EPA] views the firing of munitions that land on
6 active ranges as product use. On the other hand, munitions that land off
7 range that are not promptly rendered safe and/or retrieved, are more like a
8 spill that is not promptly remediated. . . . A munition on an active range is
9 where it is intended and expected to be, and it is in a controlled
10 environment. As such, it is more effectively controlled or managed than a
11 munition that has landed off-range where it normally wouldn't be expected
12 to be.

13 62 Fed. Reg. at 6,632-33. EPA further explained that “a failure to render safe and retrieve
14 a munition that lands off range would be evidence of an intent to discard the munition,
15 just as the failure to respond to a spill of a hazardous material could be evidence of an
16 intent to discard.” *Id.* at 6,632.²

17 The EPA's distinction between munitions landing on and off of an active range
18 illustrates why Plaintiffs' reliance on 40 C.F.R. § 266.202(d) is misplaced. The spent
19 ammunition at issue in this case simply is not analogous to a military munition landing off
20 of a military range. A fired munition that lands off of an active range is not where it is
21 expected to be. While the military's failure to respond to a hazard created by one of its
22 munitions inadvertently landing off-range may suggest an intent to discard that munition,
23 the presence of spent ammunition at issue in this case is a natural, expected consequence
24 of hunting game in a national forest. Nothing in the MM Rule suggests that EPA was
25 referring to the type of small bullet fragments at issue here. In fact, EPA explained that
26 the use of explosives, such as dynamite, for construction or mining does not trigger RCRA

² In this regard, the definition of “military munitions” is extremely broad, and includes, for example, “bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, [and] artillery ammunition.” 40 C.F.R. § 260.10.

1 even though residual materials are left behind on the ground. 62 Fed. Reg. at 6,630.

2 The controlled nature of an active military range also makes monitoring and
3 tracking munitions falling outside the range more feasible, such as rockets and mortar
4 shells. Hunters, on the other hand, are not expected to track down the bullets they shoot at
5 a deer or other game. Rather, spent ammunition is an expected consequence of hunting,
6 and therefore is not “solid waste” under RCRA. *Ecological Rights*, 713 F.3d at 518.

7 It therefore “defies reason” to suggest that every hunter that fires a lead bullet is
8 discarding “solid waste” under RCRA. *See Ecological Rights*, 713 F.3d at 517. If
9 Plaintiffs’ position is correct, every bullet fired – and every bullet *fragment* – “would be
10 ‘solid waste,’ and thus potentially actionable under 42 U.S.C. § 6972(a)(1)(B).” *Id.* The
11 “more tenable reading of RCRA” (and the reading best support by the statutory text, case
12 law, and agency guidance) is that lead ammunition released into the environment as a
13 natural, expected consequence of its intended use is not “solid waste” under RCRA absent
14 accumulation, which Plaintiffs have not alleged. *See id.*

15 **B. The Findings Made in the Condor Rule Preclude an “Imminent
16 and Substantial Endangerment” Finding.**

17 To be entitled to relief, Plaintiffs must allege and prove that the disposal of solid
18 waste “may present an imminent and substantial endangerment to health or the
19 environment.” 42 U.S.C. § 6972(a)(1)(B). The alleged basis for endangerment is the
20 alleged lead poisoning of members of the “Southwest condor population” caused by
21 hunting with lead ammunition in the Kaibab NF. *See Compl.* ¶¶ 25-40.

22 The California condor population is an experimental population that was
23 introduced into northern Arizona and southern Utah pursuant to Section 10(j) of the ESA,
24 16 U.S.C. § 1639(j). As explained in NSSF’s Motion at pages 14-16, before introducing
25 this population of California condors, the FWS specifically considered hunting with lead
26 ammunition, and determined that while some condors would be poisoned by consuming

1 “gut piles” containing lead fragments, this threat was acceptable and did not require any
2 modifications or restrictions to be imposed on hunting to protect the introduced condor
3 population. *See* Condor Rule at 54,052/3, 54,054/3-54,055/1. The FWS recognized that
4 “the Kaibab Plateau is heavily hunted and represents a threat to condors once they
5 disperse from the release site and learn to locate food on their own,” *id.* at 54054/3-
6 54,055/1, but found that “sport hunting . . . should not be restricted due to the designation
7 of nonessential experimental population of California condors.” *Id.* at 54,050/3.

8 In short, as the Condor Rule shows, the impact of sports hunting with lead
9 ammunition was evaluated before the condors’ release into the wild and was considered
10 an acceptable by the FWS – the agency responsible for managing the experimental
11 population. Therefore, as a matter of law, Plaintiffs have failed to allege facts supporting
12 an imminent and substantial endangerment to health or the environment.

13 **1. The Alleged Endangerment Pertains Solely to Condors.**

14 In their Response, Plaintiffs initially argue that they have pled a substantial
15 endangerment to “numerous other scavengers” besides the condor population. Plfs. Resp.
16 at 22 (citing Compl. ¶¶ 14-15, 27). The Complaint fails to support that argument.
17 Paragraphs 14 and 15 of the Complaint contain bare-bones Article III standing allegations.
18 Paragraph 14 merely alleges that Plaintiffs and their members are concerned about lead
19 contamination in the Kaibab NF. No other facts are alleged. Paragraph 15 alleges that
20 Plaintiffs’ members have read “many” (unidentified) studies and reports about the threat
21 posed by spent lead ammunition in the environment generally, and about harm to
22 California condors and “other wildlife.” The Kaibab NF is not mentioned. Finally,
23 paragraph 27 refers to various bird species “that inhabit Forest Service land in Arizona.”
24 Again, it does not refer to the Kaibab NF.³

25 _____
26 ³ NSSR asks that the Court take judicial notice of the established facts that Arizona
(footnote continued on next page)

1 The balance of the Complaint likewise concerns the experimental population of
2 condors. Paragraphs 28 through 32 of the Complaint specifically mention only one
3 species – the California condor. Otherwise these paragraphs contain general allegations
4 that refer vaguely to “bird species” (¶ 28), “avian scavengers” (¶ 29), “a bird” (¶ 30),
5 “wildlife” (¶ 31), and “waterfowl” (¶ 32), and, moreover, fail to mention the Kaibab NF,
6 the alleged location of the endangerment. Further, paragraphs 33 through 42 mention
7 only condors, with the sole exception of paragraph 35, which refers vaguely to “wildlife
8 species.” Thus, this case is about the impact of hunting with lead ammunition in the
9 Kaibab NF on the experimental California condor population, and not about other wildlife
10 species in other locations.

11 2. Plaintiffs Misapprehend the Import of the Condor Rule.

12 As they have done throughout this litigation, Plaintiffs misapprehend the import of
13 the Condor Rule, creating irrelevant straw man arguments. First, Plaintiffs accuse
14 Intervenors of “expand[ing] ESA Section 10(j) into a sweeping abrogation of other federal
15 environmental laws.” Plfs. Resp. at 23. This is nonsense. Intervenors contend that FWS,
16 the federal agency responsible for introducing and managing the experimental condor
17 population, was required to consider “[t]he extent to which the introduced population may
18 be affected by existing or anticipated Federal or State actions or private activities within
19 or adjacent to the experimental population area.” 50 C.F.R. § 17.81(b)(4). The FWS did
20 so, identifying hunting with lead ammunition as existing activity that may impact the
21 experimental population, and determining that condor deaths resulting from lead

22 _____
(footnote continued from previous page)

23
24 contains six national forests with over 11 million acres of land, and that the Kaibab NF
25 contains a small fraction of that land. See USDA Forest Service, Region 3, National
26 Forests and Grasslands, https://www.fs.usda.gov/detail/r3/about-region/overview/?cid=fsbdev3_021966, available at (last viewed January 16, 2020).

1 poisoning are an acceptable impact. Condor Rule at 54,050/2-3, 54,052/3, 54,054/3-
2 54,055/1. Plaintiffs may not second-guess the FWS's findings or ask this Court to declare
3 that hunting with lead ammunition presents substantial and imminent endangerment to the
4 experimental condor population when the FWS has found otherwise in its rulemaking.

5 Plaintiffs also argue that the Court should disregard the unique nature of the
6 experimental condor population and the FWS's decision-making authority in determining
7 whether recreational hunting is a threat to condors. Plfs. Resp. 24-25. As explained in
8 NSSR's Motion, Section 10(j) was enacted to minimize conflicts between the release of
9 experimental populations and existing or anticipated land and resources uses. *See* NSSF
10 Mot. at 14. Experimental populations may be introduced only after the FWS evaluates the
11 extent to which the population may be impacted by existing or anticipated activities
12 within the experimental population area. 50 C.F.R. § 17.81(b)(4). The goal, as the FWS
13 explained, is "to ensure to the maximum extent practicable that current and future land,
14 water, or air uses within the experimental population area are not affected as a
15 consequence of the release of California condors . . .," including "sport hunting." Condor
16 Rule at 54,050/2-3.

17 In short, the FWS determined that the release of condors as an experimental
18 population would further the conservation of species, even though some condors may be
19 incidentally poisoned by consuming carrion containing fragments of spent lead bullets.
20 The FWS specifically found that the introduction of condors "does not conflict with
21 existing or anticipated Federal or State agency actions or current or future land, water, or
22 air uses on public or private lands." Condor Rule at 54,044/1. These findings by the
23 agency responsible for introducing and managing the experimental population are not in
24 dispute and are controlling.

25 Finally, Plaintiffs mischaracterize the argument of Intervenor NRA/SCI regarding
26 the meaning of the term "environment" in the phrase "imminent and substantial

1 endangerment to health or the environment” in 42 U.S.C. § 6972(a)(1)(B). *See* Plfs. Resp.
2 at 25-26. For the reasons explained in their motion to dismiss (Doc. 161), and again in
3 NSSF’s court papers, experimental populations of animals, introduced pursuant to Section
4 10(j), are different from other animal populations. Plaintiffs’ RCRA claim disregards the
5 unique nature of the experimental condor population and its special management
6 requirements, and improperly uses RCRA to override the Condor Rule and impose
7 restrictions on recreational hunting.

8 **C. The State is a Required Party.**

9 Plaintiffs devote much of their response to opposing the State of Arizona’s
10 contention that it is a required party that must be joined to properly render relief. Plfs.
11 Resp. at 27-40. On this issue, NSSF simply notes the State of Arizona, through the Game
12 and Fish Commission, asserts ownership of and is responsible for managing wildlife,
13 including hunting. *See, e.g.*, A.R.S. §§ 17-102 (stating that wildlife “are property of the
14 state and may be taken at such times, in such places, in such manner and with such
15 devices as provided by law or rule of the commission”), 17-231 (setting forth the
16 Commission’s authority over wildlife, including hunting). Given the State’s relationship
17 to the subject matter of this suit, Plaintiffs’ argument that the State lacks a legitimate
18 interest that may be impaired by the relief sought is far-fetched. Indeed, the State
19 apparently would be violating RCRA if the Plaintiffs’ theory of the case is correct.

20 **III. CONCLUSION AND RELIEF REQUESTED.**

21 For the foregoing reasons, Plaintiffs’ Complaint should be dismissed with
22 prejudice pursuant to Rule 12(c) or, alternatively, Rule 12(b)(7), Fed.R.Civ.P.

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RESPECTFULLY SUBMITTED this 28th day of January, 2020.

FENNEMORE CRAIG, P.C.

By s/ Norman D. James
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*Attorneys for National Shooting Sports
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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2020, I electronically transmitted the foregoing National Shooting Sports Foundation, Inc.'s Reply Memorandum in Support of Motion For Judgment on the Pleadings to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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