IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No. 21-15907

CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB; GRAND CANYON WILDLANDS COUNCIL,

Plaintiffs – Appellants,

v.

UNITED STATES FOREST SERVICE, a United States Government Agency,

Defendant – Appellee,

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.; SAFARI CLUB INTERNATIONAL; NATIONAL SHOOTING SPORTS FOUNDATION, INC.,

Intervenor – Defendants – Appellees.

APPELLANTS CENTER FOR BIOLOGICAL DIVERSITY, *et al.*'s OPENING BRIEF

APPEAL FROM MARCH 31, 2021 ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1, Appellants Center for Biological Diversity, Sierra Club, and Grand Canyon Wildlands Council submit the following Corporate Disclosure Statements.

Appellant Center for Biological Diversity is not publicly traded and has no parent corporation. There is no publicly held corporation that owns 10 percent or more of its stock.

Appellant Sierra Club is not publicly traded and has no parent corporation. There is no publicly held corporation that owns 10 percent or more of its stock.

Appellant Grand Canyon Wildlands Council is not publicly traded and has no parent corporation. There is no publicly held corporation that owns 10 percent or more of its stock.

Dated this 11th day of July, 2022.

s/ *Alexander Houston*
Alexander Houston (OSB 214066)
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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Center for Biological Diversity, Sierra Club, and Grand Canyon Wildlands Council (collectively "the Center") appeal the district court's decision in *Ctr. for Biological Diversity v. U.S. Forest Serv.,* 532 F. Supp. 3d 846 (D. Ariz. 2021), dismissing the Center's Resource Conservation and Recovery Act ("RCRA") citizen suit for failure to allege facts establishing the Forest Service as a "contributor" and denying the Center's motion for leave to amend its complaint to add Arizona Game and Fish Officials to the RCRA claims.

The Center alleged imminent and substantial endangerment to California condors and other wildlife caused by exposure to spent lead ammunition. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 42 U.S.C. § 6972(a), which requires RCRA citizen enforcement suits to be brought in the district court for the district in which the endangerment may occur. The alleged imminent and substantial endangerment has occurred and is occurring on the Kaibab National Forest ("the Kaibab"), which is located entirely within the State of Arizona.

On March 31, 2021, the district court issued its Order dismissing the Center's case. ER-5–16.[1] That Order is a final appealable order. *Arpin v. Santa*

[1] Documents provided in the Excerpts of Record are cited as "ER-[page number]." All ER page numbers are located in the lower right corner of each page (ranging from 1 to 292).

Clara Valley Transp. Agency, 261 F.3d 912, 923 (9th Cir. 2001). On April 1, 2022, the district court docketed its Judgment in the cased based on its Order of the previous day. ER-4. This Court has jurisdiction over the Center's appeal from that final Order and Judgment pursuant to 28 U.S.C. § 1291. On May 24, 2021, the Center timely filed its Notice of Appeal from the final decisions disposing of all parties' claims. FED. R. APP. P. 4(a)(1)(B); *see also* ER-270–72.

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying the Center's motion for leave to amend its complaint where the Arizona Game and Fish Officials fall under the *Ex Parte Young* exception to sovereign immunity.

2. Whether the district court erred in finding that the Center had not adequately alleged that the Forest Service is a "contributor," as that term is used in the context of RCRA's imminent and substantial endangerment provision.

3. Whether a new district judge should be reassigned to any remand of the case issued by this Court.

STATEMENT REGARDING ADDENDUM

Pursuant to CIR. R. 28-2.7, an addendum following this brief includes the statutory provisions necessary for the determination of the issues presented.

STATEMENT OF THE CASE

In this citizen enforcement suit—which is now before this Court for the third time—the Center seeks declaratory and injunctive relief under RCRA, arising from the Forest Service's and Arizona Officials' contribution to an ongoing endangerment to the environment in northern Arizona. On September 5, 2012, the

Center initiated this suit alleging the Forest Service, through its authority and control over the Kaibab National Forest and the activities that occur there, has contributed and is contributing to the past and present disposal of solid waste, which may present an imminent and substantial endangerment to the environment. ER-256. The Forest Service is contributing to this endangerment by issuing special use permits for guiding and outfitting activities that allow the use and disposal of lead ammunition within the Kaibab, and by otherwise acceding to the regular disposal of lead in the form of spent ammunition within the Kaibab by other users.

On July 2, 2013, the district court granted the Forest Service's motion to dismiss for lack of Article III standing. ER-247–54. Because the district court concluded that it lacked jurisdiction over the suit, it did not rule on the Forest Service's alternative motion to dismiss for failure to state a claim. ER-248, 253.

The Center appealed, and on January 12, 2016, this Court issued an Order reversing the district court's dismissal of the Center's case, finding that the Center has Article III standing. *Ctr. for Biological Diversity v. U.S. Forest Serv. (CBD I)*, 640 Fed.Appx. 617, 618–20 (9th Cir. 2016).

On remand, the Forest Service again moved to dismiss the Center's case for failing to plead sufficient facts to state a claim for relief, arguing that the Center failed to adequately allege that the Forest Service was a "contributor" under RCRA. ER-223, 235–39. Intervenors likewise filed a motion to dismiss and a

motion for judgment on the pleadings, raising additional arguments for why the court should dismiss the Center's case. *See* ER-179–201, 202–22. On March 15, 2017, the district court dismissed the Center's case, but on grounds not raised in the motions. ER-169, 178. Rather the district court, *sua sponte*, dismissed the case for improperly seeking an advisory opinion. ER-171–78. The district court did not reach the arguments raised in the Forest Service's and Intervenors' motions. ER-178.

The Center again appealed, and on May 30, 2019, this Court issued an order reversing the district court's dismissal of the Center's case, finding that the Center was not seeking an advisory opinion from the court. *Ctr. for Biological Diversity v. U.S. Forest Serv.* (*CBD II*), 925 F.3d 1041, 1050 (9th Cir. 2019). The Ninth Circuit again remanded the case to the district court to resolve the question of whether the Forest Service is a contributor under RCRA. *Id.* at 1053.

On remand the Forest Service again moved to dismiss the Center's case ER-96–119. Defendant-Intervenor National Shootings Sports Foundation filed a Motion for Judgment on the Pleadings (ER-71–95) and Defendants-Intervenors National Rifle Association of America and Safari Club International jointly filed a Motion to Dismiss. ER-50–70. Additionally, in response to the Forest Service's insistence that Arizona Officials are primarily responsible for regulating the use of lead shot, the Center filed a motion for leave to amend its complaint (ER-37–49)

seeking to add a RCRA contributor claim against the Director of the Arizona Game and Fish Department, in their official capacity, and the Commissioners of the Arizona Game and First Commission, in their official capacities (collectively, "Arizona Officials"). *See* ER-17–19, 38.

On March 31, 2021, the district court granted the Forest Service's Motion to Dismiss for failure to state a claim, finding that the Center failed to adequately allege that the Forest Service is a contributor under RCRA. ER-9–14, 16. The district court did not address Defendant-Intervenors' motion to dismiss for failure to state a claim and motion for judgment on the pleadings. ER-16. Finally, the district court denied the Center's motion for leave to amend its complaint, finding that the Arizona Officials did not fall under the *Ex parte Young* exception to sovereign immunity. ER-14–16. On these grounds, the district court issued its Order and Judgment, once again disposing of the Center's case (ER-4, 5–16), which the Center now appeals.

STATEMENT OF FACTS

I. Spent Lead Ammunition on the Kaibab National Forest

Every year, wildlife species that call the Kaibab National Forest home are needlessly poisoned and killed from exposure to spent lead ammunition. ER-263–64. The Forest Service and Arizona Officials' authorization—both explicit and implicit—of disposal of spent lead ammunition on the Kaibab is causing and

contributing to this preventable death and suffering. ER-265. Lead is a potent, potentially deadly toxin, which can cause animals to suffer numerous and severe adverse health effects, including death. ER-263. It also is the primary material in many forms of ammunition, including bullets used for big game hunting. *Id*. Scavenger species are exposed to spent lead ammunition when they consume animals that have been shot but not retrieved or when they feed on the remains of field-dressed animals (also known as "gut piles") that have been killed with lead ammunition. ER-263–64

The risk of poisoning and mortality posed to many species of wildlife by spent lead ammunition is well established. ER-264. Lead poisoning of waterfowl and bald eagles prompted the federal government, in 1976, to institute a nationwide prohibition on the use of lead ammunition for hunting waterfowl. *See* 51 Fed. Reg. 42,103 (Nov. 21, 1986) (final rule fully implementing establishment of nontoxic shot zones beginning in 1976 and culminating in 1991 with a nationwide ban); *see also* ER-264. The federal government has issued additional regulations prohibiting the use of lead ammunition in other hunting contexts, such as depredation. *See, e.g.*, 75 Fed. Reg. 75,153 (Dec. 2, 2010) (requiring non-lead ammunition for the take of migratory birds under a depredation order to prevent toxicity hazards to other wildlife); *see also* ER-264–65. More recently, the Biden Administration has proposed regulations that would open certain National Wildlife

Reserves to hunting while prohibiting the use of lead ammunition on those lands specifically due to its impacts on wildlife and humans. *See* 2022–2023 Station-Specific Hunting and Sport Fishing Regulations, 87 Fed. Reg. 35,136 (proposed June 9, 2022) (to be codified at 50 C.F.R. § 32) ("the best available science, analyzed as part of this proposed rulemaking, indicates that lead ammunition and tackle may have negative impacts on both wildlife and human health, and that those impacts are more acute for some species"). The federal government has been aware of the significant environmental harm caused by the disposal of spent lead ammunition in the environment for more than 30 years and continues to exercise its authority over hunting on federal lands in order to alleviate the threat.

When lead-core rifle bullets strike large game animals they often fragment into hundreds of small pieces of lead that can be found several inches from the site of the wound. ER-264. A very small lead fragment is enough to severely poison or kill a bird, even one as large as a California condor, North America's largest flying bird. *Id*. Wildlife that ingest spent lead ammunition experience many adverse behavioral, physiological, and biochemical health effects, including seizures, lethargy, progressive weakness, reluctance to fly or inability to sustain flight, weight loss leading to emaciation, and death. *Id*. Wildlife experiencing these adverse health effects are far more susceptible to other forms of mortality, such as predation. *Id.*

Nowhere is the threat of spent lead ammunition in Arizona more apparent than on the Kaibab National Forest, an approximately 1.6 million-acre parcel of federal property in northern Arizona managed by the Forest Service and bordering both the north and south rims of the Grand Canyon. ER-257–58, 265. Lead ingestion and poisoning from ammunition is well-documented in many avian predators and scavengers that inhabit the Kaibab, including California condors, bald and golden eagles, northern goshawks, ferruginous hawks, turkey vultures, and ravens. ER-263.

The best evidence of the regular exposure to spent lead ammunition and its harmful impacts on wildlife comes from data on lead poisoning in California condors. After dwindling to the brink of extinction in the early 1980's, California condors have rebounded due to a captive breeding program administered primarily by the U.S. Fish and Wildlife Service ("FWS"). In 1996, FWS reintroduced California condors into the species' historic habitat in northern Arizona pursuant to ESA section 10(j). 61 Fed. Reg. 54,044 (Oct. 16, 1996). There are approximately only 111 free-flying condors in northern Arizona and southern Utah ("Southwest condor population").[2]

[2] Arizona Game & Fish Department, California Condor Recovery, Dec. 2021 https://www.azgfd.com/wildlife/speciesofgreatestconservneed/raptor-management/california-condor-recovery/ (last visited July 6, 2022).

As part of the reintroduction effort, FWS created the Southwest Condor Recovery Team ("SCRT") to study and monitor condors' health and progress toward self-sustainability. Condors use the North Kaibab Ranger District year-round, including for breeding and nesting. ER-266.

The SCRT has focused on the issue of lead poisoning from spent ammunition, has repeatedly confirmed the existence of this substantial and ongoing risk posed by spent lead ammunition, and has stressed the critical importance to the species' survival of reducing exposures to lead. *Id.* ("Lead poisoning has been and continues to be the leading cause of condor mortality in Arizona, and the primary obstacle to achieving a self-sustaining population of condors there").

In light of the well-established risk, scientists regularly monitor lead levels in condors' blood and have documented hundreds of instances of lead exposure in condors since the Southwest condor population was reintroduced in 1996. ER-266–67. Annually, 45 to 95 percent of the condor population tests positive for lead exposure. ER-267. Veterinary intervention is often required to save lead-poisoned condors. *Id*. In many cases, chelation, an expensive and invasive blood treatment, has been required to reverse dangerously high blood lead levels. *Id.*

Since their reintroduction to northern Arizona, condors have foraged on the Kaibab Plateau in the Kaibab National Forest. ER-266–67. Condors rely on large-mammal carrion for a major percentage of their food source. ER-265. The SCRT

has documented increases in blood lead levels in condors during and after hunting seasons. ER-267 (noting that the "abrupt increase of [condor] blood lead levels corresponded with increased [condor] use of deer hunting areas on the Kaibab Plateau in 2002 and thereafter"). Condors are particularly susceptible because they are social animals that often feed in groups, resulting in several poisoned condors from one contaminated carcass in the course of one feeding event. *Id*.

In short, lead poisoning from spent lead ammunition has been and continues to be the leading cause of condor mortality in Arizona, and the primary obstacle to achieving a self-sustaining population. ER-266. Because condors are tracked and monitored more extensively than other species, they serve as a strong indicator of lead exposure for other scavengers on the Kaibab. As the district court correctly observed in its first order dismissing the Center's case, "[b]ut for Defendant's decision to allow toxic lead ammunition to be disposed of in the [Kaibab National Forest], there would be no lead waste that could be consumed, and local animal species would not suffer from lead poisoning." ER-250–51.

II. Forest Service Control Over the Kaibab National Forest

The Property Clause of the United States Constitution gives Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. The "'complete power' that Congress has over public lands necessarily

includes the power to regulate and protect the wildlife living there." *Kleppe v. New Mexico*, 426 U.S. 529, 540–41 (1976). National Forests are public lands owned by the United States and administered by the Forest Service. ER-262; *see also* 16 U.S.C. § 1609(a). The Kaibab is a National Forest. ER-265.

Congress vested the Forest Service with broad authority and responsibility to regulate activities on, and occupancy of, the National Forests. ER-262. The Forest Service has interpreted its broad statutory authorities to include the ability to issue orders and regulations that prohibit and restrict activities in areas and regions 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* ER-262. 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* ER-262–63. One of the ways the Forest Service exercises its authority by prohibiting commercial uses of National Forest lands unless the user first obtains a special use permit; commercial guiding and outfitting for hunting trips are included within this regulatory regime. *See generally*, 36 C.F.R. §§ 251.50–251.65; ER-263. As the Ninth Circuit has recognized, "the Forest Service has the authority to control certain conduct of [] third-party hunters." *CBD I*, 640 Fed.Appx. at 619.

The Kaibab Plateau is a popular big-game hunting destination, resulting in the disposal of spent lead ammunition in the environment left in the carcasses of animals shot with lead bullets. ER-265. Despite the availability of non-lead ammunition alternatives, wildlife mortality due to lead exposure continues to occur on the Kaibab, as discussed above. ER-264–65. The Forest Service has been aware of this problem on the Kaibab for at least 30 years, *see* ER-267, yet it has continued to issue special use permits which allow for the use and disposal of lead on its land, and has otherwise acceded to the practice by non-commercial hunters despite the ongoing endangerment suffered by condors and other scavenger species.

III. Arizona Game and Fish Department's Regulation of Hunting

Although the Forest Service, as an arm of the federal government, has ultimate authority over activities on the Kaibab, including the disposal of waste, the agency works cooperatively with the Arizona Officials to manage fish and wildlife populations in Arizona, including on the Kaibab. ER-23, 27–28, 262–63. The Arizona Officials administer the State's hunting permitting and licensing system. ER-27–28. Among other things, the Arizona Fish and Game Commission enacts rules and orders to regulate and control hunting in Arizona. *See generally* A.R.S. § 17-231 (Arizona statute relating to powers and duties of the Commission). The rules and orders direct hunters' actions, including, when, where,

and how they may take wildlife including rules controlling what types of ammunition hunters can use and what hunters can do with carcasses of animals they kill. *See generally* A.R.S. § 17-201 *et seq.* (Arizona statutes governing the AZGFD and Commission); 12 A.A.C. R12-4-101 *et seq.* (Arizona regulations relating to the AZGFD and Commission).

The Arizona Game and Fish Department as the administrative agent of the Commission is responsible for administering and enforcing Commission rules, including Arizona's hunting laws and regulations. *See generally* A.R.S. §§ 17-201, 17-211 (Arizona statutes relating to powers and duties of AZGFD and Director). A primary way through which the Director administers and enforces Arizona's hunting laws is through the issuance of hunting licenses. *See* A.R.S. §§ 17-331 *et seq.* (Arizona statutes governing licenses for taking and handling wildlife).

The Arizona Officials, in their official capacities, are aware of (1) the overwhelming scientific evidence documenting the threat to condors and other wildlife posed by spent lead ammunition in the environment; (2) actual harm to condors and other wildlife attributed to lead poisoning from spent lead ammunition; and (3) the regulatory actions taken to address it by various arms of the federal government and many states. ER-32–33.

Despite this knowledge, the Arizona Officials have permitted and continue to permit the use and disposal of lead ammunition on the Kaibab, though they have

the authority to regulate this use and/or disposal through the issuance of hunting permits. ER-33. The Arizona Officials' actions with respect to the use of lead ammunition on federal land in Arizona contribute to the disposal of spent lead ammunition on the Kaibab that may present an imminent and substantial endangerment to the environment. ER-34–35.

IV. RCRA's Imminent and Substantial Endangerment Provision

Despite both the Forest Service's and the Arizona Officials' authority to address the use of and disposal of lead ammunition, both continue to contribute to the endangerment rather than stop it. For scenarios precisely like this, Congress created a provision in RCRA to empower citizens to sue to ensure that action is taken to abate ongoing endangerment. In enacting RCRA, Congress found 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 solid and hazardous wastes, including spent lead ammunition. Specifically, RCRA authorizes any person to commence a civil action:

> against any person, *including the United States and any other governmental instrumentality or agency*, to the extent permitted by the eleventh amendment to the Constitution . . . who has contributed or who is contributing to the past or present . . . disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B) (emphasis added). Congress recognized the important roles citizens would play in the statutory scheme: "[c]itizen suits to abate imminent hazards can expand the national effort to minimize these very real threats to our well-being." 130 Cong. Rec. S9151 (July 25, 1984) (statement of Sen. Mitchell). Congress also 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 . . . .*" 42 U.S.C. § 6972(a) (emphasis added). Under the statute, "person" is defined broadly and includes any:

> individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, *State, municipality, commission, political subdivision of a State,* or any interstate body and shall include each department, agency, and instrumentality of the United States.

42 U.S.C. § 6903(15) (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) (quoting H.R. Committee Print No. 96-IFC 31, at 32 (1979)).[3] Such a broad jurisdictional grant furthers Congress' 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).

LEGAL STANDARDS

I. Motion to Amend Complaint

The Ninth Circuit reviews the denial of leave to amend under the abuse of discretion standard. *Zivkovic v. S. Cal. Edison Co.,* 302 F.3d 1080, 1087 (9th Cir. 2002). However, whether such a denial rests on an inaccurate view of the law and is therefore an abuse of discretion requires the court to review the underlying legal determination *de novo. See Southwest Voter Registration Educ. Project v.*

[3] The *Price* decision was discussing 42 U.S.C. § 6973, which sets forth the Environmental Protection Agency's ("EPA") power to bring suit to restrain anyone who is contributing to an imminent and substantial endangerment or issue administrative orders as necessary to protect public health and the environment. But *Price* applies with equal force in the citizen suit context. In amending RCRA in 1984 to add the citizen suit provision, Congress gave citizens the full extent of the power to abate endangerments it had already given EPA. *See* S. Rep. No. 98-284 (1983); *see also Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 287 (1st Cir. 2006) ("The 1984 amendments introduced a new provision, RCRA § 7002(a)(1)(B), into the statutory scheme . . . . [T]his new provision extended to citizens the right to sue a polluter who may be causing an imminent and substantial endangerment to public health or the environment. The Senate Report that accompanied the 1984 amendments approvingly cited and quoted *Price* on several occasions, specifically endorsing that court's conclusion that section 7003 is intended to give courts the tools to 'eliminate any risks posed by toxic waste.'") (citations omitted).

Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam); *Smith v. Pacific Properties and Development Corp.,* 358 F.3d 1097, 1100 (9th Cir. 2004).

Federal Rule of Civil Procedure ("FRCP") 21 provides that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." FED. R. CIV. P. 21. "Courts consider requests to add or drop a party pursuant to Rule 21 under the same standard that applies to requests to amend a complaint under Rule 15." 1 Federal Rules of Civil Procedure, Rules and Commentary Rule 21 (Feb. 2020); *see also Rodriguez v. City of Phoenix*, No. CV-11-01992-PHX-JAT, 2014 WL 1053602, at *6 (D. Ariz. Mar. 19, 2014) (explaining that "when deciding whether to permit the addition of defendants, courts apply the same standard of liberality afforded to motions to amend pleadings under Rule 15") (internal citation and quotations omitted).

FRCP 15(a)(2) provides that a court should "freely give leave" to a plaintiff to amend its complaint "when justice so requires." FED. R. CIV. P. 15(a)(2). *See also Plumeau v. School Dist. No. 40 Cnty. of Yamhill*, 130 F.3d 432, 439 (9th Cir. 1997) (referring to the "strong policy permitting amendment"). Where there is a lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion." *Howey v. United States*, 481 F.2d 1187, 1191–92 (9th Cir. 1973). Parties opposing amendment bear the burden of proving that the court

should deny the amendment. *Supermarket Energy Technologies, LLC v. Supermarket Energy Solutions, Inc.,* CV-10-2288-PHX-SMM, 2015 WL 12538890, at *1 (D. Ariz. Jan. 29, 2014).

II. Motion to Dismiss for Failure to State a Claim

To defeat a motion to dismiss for failure to state a claim, a complaint need not contain "detailed factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The Ninth Circuit reviews *de novo* a district court's grant of a motion to dismiss for failure to state a claim. *Nat. Res. Def. Council v. S. Coast Air Quality Mgmt. Dist.*, 651 F.3d 1066, 1070 (9th Cir. 2011). The Ninth Circuit also applies *de novo* review to motions for judgments on the pleadings. *Fajardo v. Cnty. of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999).

When ruling on motions to dismiss for failure to state a claim, "reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Moreover, a court must draw all reasonable inferences in favor of the nonmoving party. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1066 (9th Cir.

2013). Courts apply a "substantially identical" analysis to motions for judgment on the pleadings. *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012).

SUMMARY OF THE ARGUMENT

In this RCRA citizen enforcement suit, the Center is seeking to hold accountable both the Forest Service and Arizona Officials for their contributions to the imminent and substantial endangerment occurring on the Kaibab National Forest as a result of the disposal of lead in the environment. The Forest Service has admitted its authority to control the disposal of lead on the Kaibab. Nonetheless, throughout this lawsuit the Forest Service has pointed its finger at the State of Arizona as the 'real' accountable party. The Center's motion for leave to amend its complaint puts an end to this finger-pointing by ensuring that *both* responsible parties are before the court as *both* the Forest Service and Arizona Officials meet the Ninth Circuit's *Hinds* test for contributor liability. *Hinds Invs., L.P. v. Angioli*, 654 F.3d 846 (9th Cir. 2011).

Despite the permissive nature and liberal standard in favor of allowing amendment, the district court denied the Center's motion solely on the ground that naming Arizona Officials in the suit would violate the Eleventh Amendment's grant of sovereign immunity to state officials. ER-15–16. This is plain legal error subject to *de novo* review and warranting reversal. The district court ignored that Arizona Officials squarely fall under the exception to sovereign immunity found in

Ex parte Young, 209 U.S. 123 (1908) because the Center alleges an ongoing violation of federal law by Arizona Officials and is seeking solely prospective relief. Therefore, the district court's denial of the Center's Motion based solely on this faulty legal conclusion was an abuse of discretion.

Similarly, the district court erred in granting the Forest Service's Motion to Dismiss for failure to state a claim, incorrectly concluding that the Center had failed to plausibly allege that the Forest Service is a contributor under RCRA. ER-10–14, 16. The district court found that under the Ninth Circuit's *Hinds* test for contributor liability, the Center had alleged neither active involvement nor a measure of control over the disposal of lead on the Kaibab by the Forest Service. ER-10–11. However, the district court's conclusion does not align with what is actually required by *Hinds*, nor does it accurately portray what the Center alleges as the crux of the Service's liability.

Under the plain text of *Hinds,* a person is liable as a contributor if that person is "actively involved" or has a "measure of control" over the disposal, with either element being enough to trigger liability. 654 F.3d at 851. Therefore, the district court's position that active involvement is *per se* required for liability is in error. ER-13. From the outset of this litigation the Center has alleged not only Forest Service control over the disposal *but also* active involvement in the disposal process via the issuance of special use permits to outfitters and guides that allow

for the use and disposal of lead waste on the Kaibab. ER-259, 263, 265, 268. Given that at the motion to dismiss stage a "reviewing court[] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party" (*Seldin*, 422 U.S. at 501), the district court's minimization of the active role played by the Forest Service in issuing special use permits was in error. Consequently, the Center has stated a plausible claim against the Forest Service as a contributor under RCRA, as *both* active involvement and control are alleged as outlined in *Hinds*. The district court's conclusion to the contrary warrants reversal.

Finally, the Center is requesting that this case be reassigned to a new district judge on remand. The Center does not make this request lightly, but the unusual circumstances, timeline, and history of this case make it appropriate for reassignment under the standards articulated by this Court. The Center filed this case in 2012, and after a decade of litigation, the dispute remains in the pretrial stage. Such substantial delay is a product of the district court's three erroneous rulings against the Center, two of which were appealed and summarily overturned by the this Court, with the third appeal now before this panel. This Court previously recognized that "adamancy in erroneous" rulings constitutes the kind of "unusual circumstances" where reassignment on remand is appropriate. Given the need to conserve judicial resources and time, the likelihood that the district court

judge will yet again find erroneous grounds to rule against the Center, and the deadly impacts such delays are having on wildlife in the Kaibab, including the critically endangered California condor, this Court should reassign the case to a new district judge.

ARGUMENT

I. The district court erred in denying the Center's motion for leave to amend its complaint because Arizona Officials are not immune from suit under *Ex parte Young*.

This Court should reverse the district court's decision that the Center cannot amend its complaint to join the Director of the Arizona Game and Fish Department and the Commissioners of the Arizona Game and Fish Commission in their official capacities (collectively "Arizona Officials") under the *Ex parte Young* exception to sovereign immunity. Because the district court's singular basis for denying the Center's motion was that the Arizona Officials were immune from suit as a matter of law (ER-14–15), this Court reviews that purely legal determination *de novo*. *Shelley,* 344 F.3d at 918. Given that the Arizona Officials plainly meet the well-established exception to sovereign immunity found in *Ex parte Young,* the district court's denial of the Center's motion was based on a legal error and hence constitutes an abuse of discretion requiring reversal in light of FRCP 15(a)(2)'s liberal standard for freely allowing amendment.

Where *Ex parte Young* applies, the Eleventh Amendment will not bar suit against a state official acting in violation of federal law. *Nat. Res. Def. Council v. California Dep't of Transp.*, 96 F.3d 420, 422 (9th Cir. 1996) (citing *Ex parte Young*, 209 U.S. at 159–60). Under the doctrine of *Young,* state officials can be sued when the "complaint alleges an *ongoing violation of federal law* and *seeks relief properly characterized as prospective*." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (emphasis added) (citations omitted).[4] Where *Young* is satisfied, a plaintiff "should generally be allowed leave to amend its complaint[.]" *City of San Juan Capistrano v. Cal. Pub. Utilities Comm'n*, 937 F.3d 1278, 1281 (9th Cir. 2019). This conclusion comports with Congress' structuring of RCRA to include in its definition of person, any "State, municipality, commission, political subdivision of a State" (42 U.S.C. § 6903(15)), and allowing for citizen suits against any person "to the extent permitted by the eleventh amendment" (42 U.S.C. § 6972(a)(1)(B)), contemplating the application of *Ex parte Young* to state officials in the context of RCRA citizen suits. In fact, other courts have allowed similar RCRA suits against state officials to proceed over

[4] "The doctrine of . . . *Young* is premised on the notion that a state cannot authorize a state officer to violate the Constitution and laws of the United States." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). "Thus, an action by a state officer that violates federal law is not considered an action of the state and, therefore, is not shielded from suit by the state's sovereign immunity." *Id.* The inquiry into whether the *Young* doctrine applies "does not include an analysis of the merits of the claim." *Verizon*, 535 U.S. at 646.

sovereign immunity objections where the officials were alleged to be contributing to endangerment caused by lead disposal. *Potomac Riverkeeper, Inc. v. Nat'l Capital Skeet & Trap Club, Inc.*, 388 F. Supp. 2d 582, 589 (D. Md. 2005) (finding that *Ex parte Young* applied as the endangerment caused by lead disposal was ongoing, and plaintiffs requested solely prospective relief from Maryland state officials).

Because the Center's amended complaint alleges that Arizona Officials are contributing to an *ongoing* violation of RCRA and requests solely *prospective* relief, (ER-35–36), the district court wrongly dismissed the Center's motion for leave to amend its complaint as barred by sovereign immunity under the Eleventh Amendment. ER-14–15.

A. The Arizona Officials' continued failure to prevent lead disposal on the Kaibab is an ongoing violation of RCRA.

Ex parte Young requires the state officer to "have some connection with the enforcement of the act." 209 U.S. at 157. Here, the Arizona Officials work cooperatively with the Forest Service to manage fish and wildlife in Arizona, including on the Kaibab where the state officials control the regulation and administration of hunting regulations and permits. The Commission enacts rules and orders to regulate and control hunting. *See generally* A.R.S. § 17-231. These rules and orders direct hunters' action, including when, where, and how they may legally take wildlife. *Id.* This includes rules governing what types of ammunition

hunters may use as well as what can be done with carcasses and parts of hunted animals. *See generally* A.R.S. § 17-201 *et seq.*; 12 A.A.C. R12-4-101 *et seq.* The Director of the Arizona Game and Fish Department is responsible for administering and enforcing the Commission's rules, including through the issuance of hunting licenses. *See* A.R.S. §§ 17-201, 17-211; 17-331.

The Center therefore, has adequately alleged an ongoing violation of RCRA by Arizona Officials given their issuance of hunting permits allowing the use of lead bullets, with full awareness that this authorization results in the disposal of lead by hunters on the Kaibab causing the imminent and substantial endangerment to condors and other scavengers. As discussed in detail below, under this Court's *Hinds* test, a party may be a contributor under RCRA if they have a "measure of control" over the disposal of the waste, or are "actively involved" in the disposal. 654 F.3d at 852. Here, Arizona Officials are responsible for crafting, issuing, and enforcing the rules, regulations, and permits governing hunters' behavior and thus are both "actively involved" in the disposal and have a "measure of control" over the actions. The Forest Service agrees with the Center on this point, emphasizing during the previous appeal the importance of Arizona's regulations in governing hunting on the Kaibab. ER-141 (noting that the agency "generally defers to Arizona's regulation of hunting in the Forest, including the types and forms of

ammunition"). Thus, the Center has adequately pleaded an ongoing violation of federal law by state officials necessary to meet the conditions of *Ex parte Young*.

B. The Center seeks prospective relief against the Arizona Officials.

In its proposed amended complaint, the Center requests declaratory relief and injunctive relief. ER-33–36. This relief is prospective and does not involve a liability that "must be paid from public funds in the state treasury" and as such is allowed under *Young*. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Injunctive relief is permitted because it is prospective, even where it results in compliance costs. *Hutto v. Finney*, 437 U.S. 678, 690 (1978). ("The cost of compliance is 'ancillary' to the prospective order enforcing federal law").[5] As such, the Center meets *Young's* requirement that the relief sought be only prospective in nature.

C. RCRA does not contain a remedial scheme that would prevent a court from permitting suit against Arizona.

The Supreme Court has explained "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 74 (1996). In other

[5] The Center is also seeking recovery of its attorneys' fees and costs. Attorneys' fees are allowed under *Young*. *Id.* at 695. ("[Attorney's fees] have traditionally been awarded without regard for the States' Eleventh Amendment immunity . . . [t]he Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants.")

words, where Congress specifically contemplates allowing officials to be sued under a statute, courts will accede to legislative intent. In *Seminole Tribe*, the Court identified the Clean Water Act's citizen suit provision's use of "any person" as implicitly authorizing suit against officials under *Young*. *Id.* at 75 n.17. The Fifth Circuit has since found RCRA's citizen suit language to be nearly identical to the Clean Water Act's citizen suit provision, and therefore, "clearly indicates that Congress specifically intended to permit suits against states within the bounds of the [Eleventh] Amendment." *Cox v. City of Dallas, Tex.*, 256 F.3d 281, 294 n.22, 309 (5th Cir. 2001).

Although the Ninth Circuit has not addressed how *Young* applies to RCRA, this Court held that the identical language found in the Clean Water Act fell under the *Young* exception, and thus subjected state officials to citizen suit.[6] *Sofamor Danek Grp., Inc. v. Brown*, 124 F.3d 1179, 1185 (9th Cir. 1997). In the context of RCRA, the same reasoning applies: Congress specifically included states and state officials in the definition of "person" under the statute and allowed for citizens to bring suit against any person to the extent permitted by the Eleventh Amendment.

[6] *Compare* Clean Water Act's citizen suit provision that authorizes suit "against any person including [ ] the United States, and [ ] any other governmental instrumentality or agency to the extent permitted by the eleventh amendment. . ." 33 U.S.C. § 1365(a)(1), *with* RCRA's citizen suit provision that authorizes suit "against any person, including the United States and any governmental instrumentality or agency, to the extent permitted by the eleventh amendment . . ." 42 U.S.C. § 6972(1)(B).

See 42 U.S.C. § 6903(15); 42 U.S.C. § 6972(a)(1)(B). Consequently, this Court should join the Fifth Circuit in finding that RCRA's citizen suit provision authorizes suit against state officials in their official capacities under *Young*, and reverse the district court's denial of the Center's motion for leave to amend its complaint.

II. The District Court erred in granting the Forest Service's Motion to Dismiss for failure to state a claim because the Center adequately alleged that the Forest Service is a contributor under RCRA's citizen suit provision.

The district court incorrectly dismissed the Center's claim against the Forest Service on the ground that the Center failed to allege facts establishing that the Service is a "contributor" under RCRA. 532 F. Supp. 3d at 854. However, the Service's actions fall squarely within the statute's requirements for RCRA contributor liability. 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 who is contributing to the past or present … disposal of any solid … waste which may present an imminent and substantial endangerment to health or 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. ER-256, 267–68. The Center alleges that the Forest Service is contributing to the disposal of lead through its issuance of commercial special use permits to hunting guides, as well as through its role as the manager and landowner of the Kaibab, collectively giving the agency both control over and an active role in the waste disposal on the Kaibab. ER-267–68.

At the notice pleading stage, the Center need only plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Here, the Center's theory of liability alleged against the Forest Service meets this liberal standard required to survive a motion to dismiss for failure to state a claim as a reviewing court "must construe the complaint in favor of the complaining party." *Seldin*, 422 U.S. at 501.

A. The Forest Service meets the *Hinds* test for RCRA contributor liability.

In the Ninth Circuit, the primary test for assessing contributor liability under RCRA is found in *Hinds*. *See* 654 F.3d at 846. Under this test, a party may be liable as a contributor either where it has a "measure of control over the waste at the time of its disposal or is otherwise actively involved in the waste disposal process." 654 F.3d at 852.[7]

[7] This Court's recent case addressing the requirements for RCRA contributor liability in the context of waste "transporters" does not disturb the test for disposal liability under *Hinds*. *See California River Watch v. City of Vacaville,* 2022 WL

Here, the Center has adequately alleged that the Forest Service satisfies this test for three reasons. First, its issuance of the special use permits for commercial hunting guides constitutes *both* a measure control over the waste's disposal as well as active involvement. ER-259, 263–65, 268. Second, the Forest Service's role as the manager of the Kaibab National Forest and its regulatory authority over waste disposal on the land gives the agency a measure of control over the disposal of lead. ER-256–63, 265, 268. Finally, as the landowner of the Kaibab, the Forest Service has control over waste disposal on the property by third parties, and is therefore contributing to the endangerment by knowingly allowing the disposal to continue. When taken together, the Service's role in explicitly permitting the disposal, as well as its authority to regulate and manage its land where the disposal of lead waste occurs satisfies the *Hinds* test for contributor liability. As such, the Center has alleged a plausible claim under RCRA and the district court's decision should be reversed.

B. The Forest Service contributes to the endangerment by issuing special use permits for commercial hunting on the Kaibab that allow the disposal of lead.

The allegations in the Center's complaint are sufficient to establish that the Forest Service meets the *Hinds* test by allowing the disposal of lead in its special use permits for commercial hunting on the Kaibab. Pursuant to 36 C.F.R. § 251.50,

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2381056 at *7 (9th Cir. July 1, 2022) (reiterating that "active involvement" or "control" over the waste disposal process is necessary for liability).

individuals or entities seeking to commercially operate on Forest Service lands "must obtain a special use authorization" prior to partaking in the special use activity.[8] The district court recognized this point, noting that commercial outfitting and guiding on the Kaibab requires a special use permit. ER-11, 13–14.

However, the district court then disregarded how this element of the Center's allegations helps establish the Service's contributor status, instead concluding that because noncommercial hunters are not required to obtain a special use permit, the Forest Service does not have control over their actions or their disposal. ER-13–14. While the district court is correct that not all hunters on the Kaibab will be subject to the terms of special use permits, that does not make the Service's control over and active role in issuing the permits meaningless. As this Court already recognized, "the Forest Service has the authority to control certain conduct of [] third-party hunters." *CBD I,* 640 Fed. Appx. at 619.

The district court's analysis contradicts itself. The opinion first states that defendants must either take affirmative steps in the disposal of the waste *or* control the actor causing the pollutants to enter the system (ER-12), and that mere ownership of contaminated land "absent some evidence of an active function connected to the waste" is insufficient for contribution under RCRA. *Id.* (citing

[8] *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).

Greenup v. Est. of Richard, No. 219CV07936SVWAGR, 2019 WL 8643875, at *2 (C.D. Cal. Dec. 13, 2019)). Yet, just one page later in the opinion, when presented with evidence illustrating exactly how the Forest Service not only has direct control over commercial hunters and their waste disposal but also actively exercises that control via the issuance of special use permits, the district court disregards these facts as insignificant, despite explicitly calling out their significance earlier in its analysis ER-13–14.

Commercial guides and their clients are a subset of hunters on the Kaibab. ER-265. The Forest Service directly and actively controls the conditions of their use of the land via the issuance of special use permits and the crafting of the permit terms. ER-263. 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." 36 C.F.R. § 251.56(a)(1)(i)(B). Consistent with these regulations, the Forest Service issues special use permits to guides and outfitters to take clients hunting on the Kaibab. ER-263, 265. 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. ER-265. 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, a fact the

district court incorrectly dismissed in its opinion as insignificant because it did not apply to all users of the Kaibab. ER-14–16.

C. The Forest Service contributes to the endangerment through its management of the Kaibab and its regulatory role.

Beyond the Forest Service's issuance of special use permits for commercial guides, the agency has an even greater degree of control over disposal of waste writ large on its lands, and it cannot, and does not, deny its ultimate authority over such activities on the Kaibab, including the disposal of spent lead ammunition. The Forest Service has acknowledged in this case that it has the authority to control the disposal of lead on the Kaibab.[9]

The Forest Service's authority includes the ability to issue orders and regulations that prohibit and restrict activities for the purpose of protecting "threatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish." 36 C.F.R. § 261.70(a)(4); *see also* ER-262. 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* ER-262–63. The Service's plenary authority therefore plainly meets the "measure of control" element of the *Hinds*

[9] *See* United States Courts for the Ninth Circuit, Official Recording of Oral Argument in *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 13–16684 (Nov. 18, 2015) at 18:18, available at https://www.ca9.uscourts.gov/media/video/?20151118/13-16684/ (last visited July 8, 2022).

contributor test. Given the agency's ability to regulate the disposal of waste on its property, including when the material is spent ammunition, the Center has adequately alleged contributor liability of the Forest Service.

On this point, the district court's analysis is again misguided, relying on the fact that the Forest Service defers to the State of Arizona for the regulation of hunting as dispositive of the federal government's lack of control over the disposal. ER-11–12. The Center is not disputing that Congress reserved the states' traditional powers to manage wildlife and hunting on federal lands, including the Kaibab.[10] *See Kleppe v. New Mexico*, 426 U.S. 529, 545–46 (1976). As the district court correctly pointed out, each national forest is required to cooperate with state wildlife agencies to allow hunting in "accordance with the requirements of State laws." *See* 36 C.F.R. § 241.2; ER-11. The district court's analysis actually illustrates why, as discussed above, the Center requested and should be granted leave to amend its complaint to include Arizona Officials responsible for regulating hunting. However, it does not support the conclusion that the Forest Service cannot *also* be a RCRA contributor due to Arizona's role in regulating

[10] To be clear, the Center is not seeking to force the Forest Service to directly regulate hunting in ways typically reserved to Arizona state control, such as hunting seasons, wildlife species that may be hunted, the number that may be taken, or where they may be hunted. Rather, the Center is enforcing the RCRA provisions that prohibit contributing to an imminent and substantial endangerment caused by the disposal of solid waste, in this case, spent lead ammunition, which is a consequence of hunting.

hunting. Both Arizona and the Forest Service can be and are contributors here, given that both, as alleged, have taken affirmative steps to authorize hunting activities that entail the use of lead ammunition, and both have broad authority over the disposal practices causing harm to Forest Service lands and the wildlife that depends on them.[11]

While Arizona has some regulatory authority over lead ammunition disposal as a consequence of hunting in the state, the Forest Service ultimately holds complete control over the disposal of materials on forest lands including the Kaibab. *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"). 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

[11] RCRA imposes joint and several liability. *See, e.g., Waste, Inc. Cost Recovery Group v. Allis Chalmers Corp.,* 51 F. Supp. 2d 936, 941 (N.D. Ind.1999)*; Aurora Nat'l Bank v. Tri Star Mktg., Inc.,* 990 F. Supp. 1020, 1034 (N.D. Ill.1998)*; United States v. Valentine,* 856 F. Supp. 627, 633–34 (D. Wyo.1994); *United States v. Conservation Chem. Co.,* 619 F. Supp. 162, 199 (W.D. Mo.1985) (discussing in detail RCRA's underlying roots as a codification of common law nuisance and the presence of joint and several liability in those cases).

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].

ER-251.

The Forest Service does not, and cannot dispute this authority. The agency has numerous regulations specifically addressing the disposal of wastes on Forest Service lands. *See* 36 C.F.R. § 261.11(a)–(e) (prohibiting the dumping of refuse on forest service lands outside of designated containers); 36 C.F.R. § 228.8(c) (requiring that all mineral resource operators on forest service lands "shall comply with applicable Federal and State standards for the disposal and treatment of solid

wastes. All garbage, refuse, or waste, shall either be removed from National Forest lands or disposed of or treated so as to minimize, so far as is practicable, its impact on the environment and the forest surface resources"). Given the agency's authority to control the disposal of waste on forest lands and its obligations to safeguard those lands and wildlife for present and future uses, including by non-hunters, the Service is empowered to safeguard Forest Service lands either by prohibiting the use of lead ammunition on the Kaibab, or alternatively, at the very least, conditioning such use on the retrieval and removal of animal carcasses and gut piles shot with lead, which constitute solid waste once left in the field by hunters. Again, the Forest Service has admitted this authority:

> 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.[12]

Moreover, by definition, a 'measure of control' under *Hinds,* 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

[12] *See* United States Courts for the Ninth Circuit, Official Recording of Oral Argument in *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 13–16684 (Nov. 18, 2015) at 18:18, available at https://www.ca9.uscourts.gov/media/video/?20151118/13-16684/ (last visited July 8, 2022).

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, Tex.*, 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").[13]

Finally, one of the district court cases cited repeatedly in the district judge's order in support of his conclusion that the Forest Service has neither the control nor active role required to be a contributor actually *supports* the Center's position. In that case, *Greenup v. Est. of Richard*, the court defines contributors as "those who control the actor who directly causes the pollutants to enter into the system[.]" 2019 WL 8643875, at *2 (internal quotes omitted). Analogized to this scenario, the Forest Service would qualify as a contributor as it controls what may and may not

[13] 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 of the Kaibab.

be disposed of on forestlands, thus exercising control over the actors who are directly placing the waste into the environment. *Greenup* went so far as to specify that "[a]n actor who has no control over whether pollutants are actually released into the []system is not a contributor." *Id.* (internal quotes omitted). Here the Forest Service has openly admitted it has exactly that authority and can control what wastes may or may not be disposed of on its lands. *See supra* notes 9, 12. Critically, the *Greenup* court actually references the previous appeal in this case, *CBD II*, and distinguishes its facts from the ones at issue here. 2019 WL 8643875, at *2–3. *Greenup* notes that in *CBD II*, the contamination was "ongoing, known, and unabated[,]" which made contributor liability more likely as opposed to the scenario before that court, where plaintiffs had not pleaded any facts to indicate defendants knew of the contamination. *Id.* (quoting *CBD II,* 925 F.3d at 1053).

The Forest Service's legal authority over the use of lead ammunition or its disposal on the Kaibab is uncontested. Therefore, the district court's reliance on Arizona's authority to regulate individual hunters as the basis for concluding that the Forest Service did not have a measure of control over the disposal was in error.

D. The Forest Service's ownership of land on which disposal of solid waste by third parties is ongoing, known, and unabated is sufficient for contributor liability under *Hinds.*

Persons who knowingly allow the ongoing and unabated disposal of solid waste on their land by third parties have the requisite level of control over the

disposal to meet the 'measure of control' element described in *Hinds*. This conclusion finds support in RCRA's common law roots and relevant case law. As such, the district court incorrectly concluded that "more active involvement" is necessary to establish that the Forest Service contributed to the disposal of lead ammunition on the Kaibab.[14] ER-9–10.

In *Hinds*, the Ninth Circuit recognized that a defendant may be liable where it "'had authority to control . . . any waste disposal.'" 654 F.3d at 851–52 (quoting *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989)). There, this Court refused to extend RCRA contributor liability to manufacturers of dry cleaning equipment under plaintiffs' theory that the manufacturers were contributing to the disposal by their design of the machines that generated the waste. 654 F.3d at 848. The Ninth Circuit concluded that the manufacturers were neither actively involved, nor did they have a measure of control over the handling, storing, treating, transporting, or disposal of the waste. *Id.* at 851–52. Critically, the *Hinds* court explicitly considered and rejected the theory that active involvement is *always* required for contributor liability, noting that in certain instances, RCRA claims could proceed where plaintiffs alleged that the defendants played a role in

[14] As stated above, the Center does allege "more active involvement" by the Forest Service in the form of its setting the terms of the special use permits and subsequently issuing them to hunters. Accordingly, in this case, the Court need not address whether a measure of control standing alone would be sufficient for liability. In any event, because *Hinds* specifically allows for contributor liability via solely a measure of control alone, the Service is liable in either scenario.

environmental contamination "by virtue of their control over the practices that caused the contamination. *Id.* (citing *Marathon Oil Co. v. Texas City Terminal Ry. Co.,* 164 F. Supp. 2d 914, 920–21 (S.D. Tex. 2001); *see also Valentine,* 885 F. Supp. at 1512 (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" (emphasis added)).

Here, as distinguishable from the *Hinds* defendants, the Center is not suing gun or lead ammunition manufacturers for contributing to an endangerment on the Kaibab. Rather, 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, or are meant to be more liberal than their common law counterparts.'") (quoting S. Rep. No. 96-172 (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 State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050–52 (2d Cir. 1985) (discussing generally the common law of public nuisance).

In recognition of RCRA's common law roots, 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."). This ensures that problems that Congress could not have anticipated when passing RCRA will be dealt with in a way that minimizes the risk of harm to the environment and the public. *Id.*; *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).

Further, consistent with Congressional intent, the U.S. Environmental Protection Agency ("EPA"), the expert 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 ("Section 7003 Guidance"), at 17 (1997).[15] In its guidance, EPA listed as an example of a contributor, "an owner who fails to abate an existing

[15] *Available at* epa.gov/sites/default/files/2013-10/documents/use-sec7003-mem.pdf (last visited July 10, 2022).

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

Consistent with this broad interpretation, numerous courts have found landowners liable for contributing to imminent and substantial endangerments on their property. *See, e.g., Waste Indus.*, 734 F.2d at 160, 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 and operated gas station "contributors" under RCRA, 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 and operators of dairy had some "measure of control" over

dairy operations causing imminent and substantial endangerment); *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 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,* 388 F. Supp. at 589 (denying motion to dismiss 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 and operator of gun club, reasoning that liability under RCRA can be established by allowing lead shot to accumulate on land).

The Forest Service here has, if anything, more direct control over waste disposal activities 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 on its property, and waste generated from those activities, through its role as landowner and manager of the Kaibab.

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—especially the federal government—clearly have control over the activities on their property of which they are aware.

In ruling that defendants must "have some active function" in creating, handling, or disposing of the waste to be a contributor, the district court not only misreads *Hinds'* straightforward holding allowing for active involvement or a measure of control, but also disregards the analysis the Ninth Circuit undertook in *Hinds* to specifically consider cases and examples where control is sufficient for contributor status, including the example of an owner who does not actively participate in the disposal yet has control over the practices at the site. 654 F.3d at

851–52 (citing *Marathon Oil Co.,* 164 F. Supp. 2d at 920). Finally, the district court's conclusion disregards the common law principles at the core of RCRA contributor liability regarding how and why landowners are liable for the contamination of their property where the third party disposal is known, ongoing, and unabated. Because the Forest Service meets each of these requirements it is liable not only for its active role and measure of control as described above, but also its landowner status.

III. The Court should remand this case to a different district judge.

In light of the district court's errors, multiple previous reversals on appeal, and a decade-long delay in moving this case past the motion to dismiss stage, the Center respectfully requests that the Court remand this case to a different district judge. The Center does not make this request lightly, but believes it is appropriate under the unusual circumstances of this case.

This Court has both the inherent authority and the specific statutory authority under 28 U.S.C. § 2106 to reassign this case. *See Wyler Summit P'ship v. Turner Broad. Sys., Inc*., 235 F.3d 1184, 1196 (9th Cir. 2000). Panels have broad discretion to reassign cases on remand when they feel justice or its appearance requires it. *See United States. v. Quach,* 302 F.3d 1096, 1103–04 (9th Cir. 2002).

Absent proof of personal bias on the part of the district judge,[16] remand to a different judge is proper if "unusual circumstances" exist. *United States. v. Reyes,* 313 F.3d 1152, 1159 (9th Cir. 2002). Specifically, courts consider three factors to determine if reassignment is warranted by unusual circumstances:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Id. (quoting *United States v. Alverson,* 666 F.2d 341, 349 (9th Cir.1982)). The first two factors are considered to be of equal importance, and a finding of either one supports remand to a different judge. *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1165 (9th Cir. 2007).

Under the first factor, the Ninth Circuit previously has held that "adamancy in erroneous rulings may justify remand to a different judge." *Reyes*, 313 F.3d at 1160 (citing *United States v. Sears, Roebuck & Co., Inc*., 785 F.2d 777, 780 (9th Cir. 1986)). The rationale for this rule is straightforward:

> This holding reflects the sound reasoning that judges who have insisted on erroneous rulings, even when their errors are obvious and have been highlighted for the court, might not appear to the disfavored parties to be likely to decide in accord with the law in the future.

[16] The Center makes no such suggestion of personal bias on the part of District Judge McNamee, and thus requests reassignment only based on unusual circumstances.

> When a district court errs in this way, especially when the court gives no plausible justification for its decision, parties and observers may justifiably doubt whether the future disposition of their matter in the continuing proceedings will be based on proper considerations of law and equity.

Disability Rights Montana, Inc. v. Batista, 930 F.3d 1090, 1100–01 (9th Cir. 2019) (emphasis added).

The Ninth Circuit has repeatedly found reassignment appropriate for erroneous rulings where the district judge refuses to follow Circuit precedent. *See Reyes,* 313 F.3d at 1159–60 (reassigning the remand to a different judge where the district court was adamant in its refusal to follow established law of the circuit concerning FRCP Rule 11(e)(1)(C) plea agreements); *Neurovision Medical Products Inc. v. NuVasive, Inc.,* 494 Fed.Appx. 749, 752 (9th Cir. 2012) (finding reassignment warranted on remand because the district court ignored precedent, cut off or excluded testimony, and repeatedly instructed the jury incorrectly); *Bonlender v. American Honda Motor Co., Inc.,* 286 Fed.Appx. 414, 415 (9th Cir. 2008) (reassigning the case as a result of the district judge's certifying a nationwide class without making any findings regarding FRCP Rule 23's requirements for class certification). Here, the district judge has ignored Ninth Circuit precedent in all three of its decisions, leading this Court to reverse the district court twice on appeal and now must consider these persistent errors for a third time.

In the first appeal, this Court summarily reversed the district judge, finding his Rule 12(b)(1) dismissal for lack of standing relied on inapplicable APA cases that were not relevant to the standing analysis given RCRA's citizen-suit provision. *CBD I*, 640 Fed.Appx. at 618–19. In the second appeal, the district judge ruled that the Center was seeking an advisory opinion from the court and thus did not have jurisdiction to resolve the dispute. ER-171–75. Not a single party defended this analysis on appeal, and this Court rightly struck it down as "irreconcilable" with the separation of powers principles, the terms of the statute, and the precedent of this Circuit. *CBD II,* 925 F.3d at 1050. Similarly, in its third decision, the district court ignored the well-established case law in this Circuit governing when state officials may be sued under the *Ex Parte Young* doctrine. ER-15–16. Given the district judge's repeated willingness to issue rulings that ignore settled law of the Circuit, reassignment upon remand is appropriate.

This Court also has required reassignment where district judges issue multiple erroneous decisions leading to repeated appeals. For example, the Ninth Circuit ordered reassignment in a case on its fourth pretrial appeal from the district court, reasoning that the "case ha[d] consumed a tremendous amount of this court's judicial resources and time. This court's orderly administration of its own docket is threatened by the exertion of effort and expenditure of time on repeated pretrial appeals in one case." *Sears*, 785 F.2d at 781. Conversely, this Court has recently

found that a case on its second appeal from the district judge's rulings did not rise to the level of "adamance" necessary to reassign the judge. *Miller v. Sawant,* 18 F.4th 328, 344 (9th Cir. 2021). This case falls in between the above examples as it is on its third pretrial appeal to the Ninth Circuit; however, the underlying consideration of conserving judicial resources and time makes it far more comparable to *Sears* and thus appropriate for reassignment. The Center filed this lawsuit in 2012, and has now been engaged in the litigation for a decade. Yet, the case remains in the pretrial stage as a result of the district judge's three rulings against the Center, two of which were previously appealed and reversed by this Court. The ten years of delay here far exceed the delay in *Sears,* where the case was in its sixth year when this Court concluded it had been delayed enough by erroneous rulings that reassignment was necessary. 785 F.2d at 781. Conversely, in *Miller,* the case was only in its second year when reassignment was denied (18 F.4th at 344); a short delay compared to the decade long timeline in this case. Given the need to conserve judicial resources and time, and the likelihood that the district court judge will yet again find erroneous threshold grounds to rule against the Center if this case is returned to him, the standard for unusual circumstances is satisfied and the case should be reassigned to a new district judge.

Finally, because this case remains at the pre-trial stage, "any duplication of judicial efforts will be minimal," and the benefits of reassigning will far outweigh the costs. *Manley v. Rowley*, 847 F.3d 705, 713 (9th Cir. 2017).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court in its entirety, allowing the Center to add the Arizona Officials to this case, and allowing the case to go forward against both the Forest Service and the Arizona Officials. The Court also should reassign the case to a different district court judge.

Respectfully submitted on this 11th day of July, 2022.

s/ *Alexander Houston*
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Attorneys for Appellants

STATEMENT REGARDING RELATED CASES

The undersigned, counsel of record for Appellants the Center for Biological Diversity, the Sierra Club, and Grand Canyon Wildlands Council, are aware of no pending related cases.

Dated this 11th day of July, 2022.

s/ *Alexander Houston*
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Earthrise Law Center
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 12,698 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

Dated this 11th day of July, 2022.

s/ *Alexander Houston*
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Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 11, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 11th day of July, 2022.

s/ *Alexander Houston*
Alexander Houston (OSB 214066)
Earthrise Law Center
Attorney for Appellants

ADDENDUM

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42 U.S.C. § 6972
§ 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)
...

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

...

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or 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, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.