No. 21-15907

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Plaintiffs/Appellants,

v.

UNITED STATES FOREST SERVICE, et al.,
Defendants/Appellees,

&

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., SAFARI CLUB INTERNATIONAL, NATIONAL SHOOTING SPORTS FOUNDATION, INC.,
Intervenor Defendants/Appellees.

Appeal from the United States District Court for the District of Arizona
No. CV-12-8176-PCT-SMM (Hon. Stephen M. McNamee)

FEDERAL APPELLEES' ANSWERING BRIEF

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INTRODUCTION

The Center for Biological Diversity (the Center) alleges that the use of lead ammunition by hunters in the Kaibab National Forest in northern Arizona is harming the California condor and other wildlife species that its members have an interest in viewing while recreating in the Kaibab. The Center brought a citizen suit under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(1)(B), against the United States Forest Service, alleging that the agency is contributing to an imminent and substantial endangerment to the environment by failing to stop hunters from disposing waste (in the form of spent lead ammunition) in the Kaibab. The Center seeks to compel the Forest Service to regulate hunting in the Kaibab in a way that stops spent lead ammunition from harming wildlife.

While the Forest Service administers the National Forest System lands in the Kaibab, the agency does not currently regulate hunting in the Kaibab. Rather, the Forest Service has acquiesced in Arizona's regulation of hunting, consistent with governing law and longstanding federal policy. Moreover, as a result of Arizona's lead-reduction program for the condor, the vast majority of big-game hunters within the condor's range in northern Arizona now use non-lead ammunition during the fall hunting season or take other measures to avoid introducing lead into the environment.[1] Arizona's efforts have dramatically reduced the amount of lead

[1] The Center's Complaint (ER-255-69) and the exhibit attached thereto repeatedly rely on the document at SER-3-95, which was filed in district court as Exhibit B to

that might harm wildlife in northern Arizona. Ultimately and in any event, however, because the Center's Complaint failed to allege sufficient facts establishing that the Forest Service had a measure of control over the alleged waste at the time of its disposal or was otherwise actively involved in the waste disposal process of individual hunters, as required by RCRA, the district court granted the Forest Service's motion to dismiss. The Center appeals.

STATEMENT OF JURISDICTION

(a) The district court had jurisdiction under 28 U.S.C. § 1331 because the Center's claims arise under federal law, namely, RCRA, 42 U.S.C. § 6972(a)(1)(B). Excerpts of Record (ER)-257.

(b) The judgment appealed from is final because it dismissed all the Center's claims against all defendants. ER-5-16. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court's judgment was entered on April 1, 2021. ER-4. The Center filed a notice of appeal on May 24, 2021. ER-270-72. The appeal is timely under Fed. R. App. P. 4(a)(1)(B)(ii), which provides 60 days for any party to appeal a judgment in a case where one of the parties is a federal agency.

ECF No. 22-2. The Center refers to this document as the "SCRT 2012 Report." ER-266. In reviewing a motion to dismiss under Rule 12(b)(6), a court may consider "documents incorporated into the complaint by reference." *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007).

STATEMENT OF THE ISSUES

I. To state a claim under RCRA's citizen-suit provision, a complaint must allege that the defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process. Should the Center's complaint against the Forest Service be dismissed with prejudice for failure to state a claim under RCRA because it alleges only non-active conduct by the Forest Service in the forms of unexercised regulatory authority and passive land management?

If the Court answers Question I in the negative and remands the proceedings back to the district court, the following issues are presented:

II. The district court did not conclusively resolve the issue of whether the Eleventh Amendment prevents the Center from amending its complaint to add a RCRA claim against the State of Arizona. Should this Court, consistent with its ordinary practice, give the district court the first opportunity to address the merits of the Eleventh Amendment question, particularly where the State of Arizona is not a party to this appeal?

III. This Court takes the rare step of reassigning a case to a different district judge in "unusual circumstances." Should this case be reassigned to a different district judge where the Center admits the district judge has shown no personal bias against it and the district judge has followed this Court's mandates on remand?

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. Resource Conservation and Recovery Act

RCRA, 42 U.S.C. §§ 6901-6992k, establishes a "cradle-to-grave" regulatory regime that governs the handling, storage, treatment, transportation, and disposal of solid or hazardous wastes. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); *Hinds Investments, LP v. Angioli*, 654 F.3d 846, 850 (9th Cir. 2011).

RCRA includes a citizen-suit provision that authorizes any person who has provided notice of intent to sue to commence a civil action

> against any person, including the United States . . . 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.

42 U.S.C. § 6972(a)(1)(B). The citizen-suit provision further provides:

> The district court shall have jurisdiction, . . . 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.

Id. § 6972(a).

2. Relevant Federal Land Management Statutes and Regulations

"The common law has always regarded the power to regulate the taking of animals *ferae naturae* to be vested in the states to the extent their exercise of that power may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution." *Fund for Animals v. Thomas*, 932 F. Supp. 368, 369-70 (D. D.C. 1996) (citation omitted), *aff'd* 127 F.3d 80 (D.C. Cir. 1997). The states thus traditionally have managed wildlife on federal lands, except to the extent such management is incompatible with, or restrained by, the rights conveyed to the federal government by the Constitution. *See Kleppe v. New Mexico*, 426 U.S. 529, 545-46 (1976). Federal deference to the states in the fields

of wildlife management and hunting is embodied in multiple statutes that govern the management of the National Forest System. *See Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1248-50 (D.C. Cir. 1980).

For example, in the John D. Dingell, Jr. Conservation, Management, and Recreation Act of 2019, Congress declared that it is national policy to expand and enhance "hunting, fishing, and recreational shooting opportunities" on federal land in consultation with state wildlife agencies and others. 16 U.S.C. § 7901(a)(1); *see also id.* § 7912(a) (declaring that federal land generally "shall be open" to hunting, fishing, and recreational shooting in accordance with applicable law); § 7913(b) (declaring that any closure of federal land to hunting for public safety, administration, or compliance with applicable laws must be for "the smallest area for the least amount of time"). This congressional statement of national policy stands alongside the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1787, which recognized the traditional allocation of responsibilities for the management of hunting and fishing on National Forest System lands. Congress declared that

> nothing in this Act shall be construed as authorizing the Secretary [of Agriculture] to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife.

43 U.S.C. § 1732(b). Likewise, the Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531, in mandating that the National Forest System lands be managed for multiple uses, including outdoor recreation, states that "[n]othing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests." *Id.* § 528.[2]

Congress thus has enacted numerous statutes recognizing state jurisdiction and authority over hunting and fishing on federal land. Congress did, however, recognize the need to "designate areas of . . . lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted." 43 U.S.C. § 1732(b). But this authority may be exercised only "for reasons of public safety, administration, or compliance with provisions of applicable law," and only after consulting with the appropriate state fish and game departments. *Id*.

Consistent with this authority, the Forest Service prohibits hunting on National Forest System lands in very limited circumstances, including to address public safety. For example, the Forest Service has promulgated a regulation prohibiting shooting near areas of human occupancy like buildings and campgrounds. *See* 36 C.F.R. § 261.10(d). The Forest Service does not, however,

[2] Similar deference to states may be found in environmental statutes like the National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd(c); the Wild and Scenic Rivers Act, 16 U.S.C. § 1284(a); and the Federal Lands Recreation Enhancement Act, 16 U.S.C. § 6813(a).

regulate the type of ammunition used by state-licensed hunters—the Forest Service has never promulgated a regulation addressing ammunition.

In fact, since at least 2015, through annual appropriations statutes, Congress has prohibited the Forest Service and other federal agencies from spending funds to regulate the lead content of ammunition under RCRA or otherwise. The most recent statute provides that "[n]one of the funds made available by this or any other Act may be used to regulate the lead content of ammunition, ammunition components, or fishing tackle under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.) or any other law." *See* Consolidated Appropriations Act of 2022, Pub. L. No. 117-103 § 438, 136 Stat. 421.[3]

The Forest Service also has the discretion to promulgate regulations protecting, among other things, "threatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish, or special biological communities." 36 C.F.R. § 261.70(a)(4). And each forest supervisor has authority to "issue orders which close or restrict the use of described areas within the area over which he has

[3] *See also* Consolidated Appropriations Act of 2021, Pub. L. 116-260 § 438, 134 Stat. 1546; Consolidated Appropriations Act of 2020, Pub. L. 116-94 § 439, 133 Stat. 2751; Consolidated Appropriations Act of 2019, Pub. L. 116-6 § 418, 133 Stat. 262; Consolidated Appropriations Act of 2018, Pub. L. No. 115-141 § 418, 132 Stat. 691; Consolidated Appropriations Act of 2017, Pub. L. No. 115-31 § 420, 131 Stat. 135, 499; Consolidated Appropriations Act of 2016, Pub. L. No. 114-113 § 420, 129 Stat. 2242, 2579; Consolidated Appropriations Act of 2015, Pub. L. No. 113-235 § 425, 128 Stat. 2130, 2450.

jurisdiction." 36 C.F.R. § 261.50(a). While these authorities theoretically could be used by the Forest Service to regulate hunting or the lead content of ammunition in the Kaibab (if Congress allowed the agency to spend funds on such matters, *see* p.7), the Forest Service rarely exercises these authorities to preempt hunting and fishing practices allowed by states. Instead, the Forest Service cooperates with state wildlife authorities to allow hunting and fishing in "accordance with the requirements of State laws." 36 C.F.R. § 241.2.

Although the Forest Service generally defers to the states' regulation of hunting on National Forest System lands, the agency does require those who engage in commercial activities to obtain a special use authorization. *Id.* § 251.50(a). This category includes entities like hunting outfitters and guides who provide commercial services to the public. *See id.* § 251.51 (defining certain terms, including "guiding" and "outfitting," but not "hunting"). But special use authorizations do not authorize or regulate hunting or apply to the act of hunting or shooting and therefore do not have any effect on a hunter's choice of ammunition. *See* 36 C.F.R. § 251.50(c) ("A special use authorization is not required for noncommercial recreational activities, such as . . . hunting . . . ."). No Forest Service permit of any kind is required for recreational hunting on National Forest System lands.

3. Arizona Hunting Regulations

Similar to other states, the State of Arizona, through the Arizona Game and Fish Commission ("State Commission"), regulates all aspects of hunting in the state, including on federal lands. Among the State Commission's powers and duties is the authority to establish hunting, trapping, and fishing rules and to prescribe the manner and methods for taking wildlife. *See* Ariz. Rev. Stat. § 17-231(A)(2), (3). Hunting is authorized on National Forest System lands in Arizona by State Commission order. *See* Ariz. Rev. Stat. § 17-234 (State Commission shall by order open, close, or alter seasons statewide or any portion of the State); ER-106 ("Hunters must obtain the proper hunting licenses from the state of Arizona and follow Arizona Game and Fish hunting regulations while hunting on national forest land."). By order, the State Commission establishes bag and possession limits, Ariz. Rev. Stat. § 17-234, and by rule prescribes lawful methods for taking wildlife, Ariz. Admin. Code R12-4-304.

The State Commission also has adopted rules specifying the types of weapons and ammunition that are authorized in taking wildlife throughout the state, including on National Forest System lands. *See, e.g.*, Ariz. Admin. Code R12-4-303(A). Ammunition prohibited statewide includes tracer, armor-piercing, and full-jacketed ammunition designed for military use. *See* Ariz. Admin. Code R12-4-303(A)(2). The State Commission also prohibits statewide the use or

possession of lead shot for taking waterfowl. *See* Ariz. Admin. Code R12-4-304(C)(3)(e)(i).

The State Commission's rules allow any individual, organization or agency to petition it to make, amend, or repeal any of its rules, including the manner and methods of taking game. *See* Ariz. Admin. Code R12-4-601.

B. Factual background

While the Center's Complaint references other wildlife (ER-263), it is primarily focused on impacts to the California condor (ER-264-67). California condors are opportunistic scavengers, feeding only on carcasses. *See* 61 Fed. Reg. 54,044-01, 54,045 (Oct. 16, 1996). California condors are among the largest flying birds in the world. *Id.* at 54,044. They are also one of the world's rarest and most imperiled vertebrate species, and they were listed as endangered in 1967 under a precursor to the Endangered Species Act. *Id*. (citing 32 Fed. Reg. 4,001 (Mar. 11, 1967)). Thousands of years ago condors occupied much of the southern United States, including lands in what is now the State of Arizona. *Id.* at 54,045. But by the time Europeans arrived, the condor's range was limited to a narrow Pacific coastal strip in western North America between southern Canada and northern Mexico. *Id.* By 1987, the condor's range was further reduced to only six counties in southern California and all remaining 27 individual condors lived in captivity. *Id.* at 54,045-46.

The U.S. Fish and Wildlife Service (FWS), in cooperation with its public and private partners, is working to recover the species. In the early 1990s, FWS began releasing captive-reared and trained condors in the condor's recent historical range in southern California. *Id.* at 54,046-47. In 1996, FWS released the California Condor Recovery Plan (Recovery Plan) under which the primary objective is to reclassify the condor from endangered to threatened status. *Id.* at 54,046. The minimum criterion for reclassification to threatened status is the maintenance of at least two spatially disjunct, non-captive populations (each with certain minimum demographic characteristics) and one captive population. *Id.*

To satisfy the Recovery Plan's objective of establishing a second non-captive population in an area "spatially disjunct" from the subpopulation in California, in 1996, FWS introduced in northern Arizona a nonessential experimental population of condors under § 10(j) of the Endangered Species Act (ESA), 16 U.S.C. § 1539(j). *Id.* at 54,047; 50 C.F.R. § 17.84(j). Section 10(j) is designed to increase FWS's flexibility to manage an experimental population by treating it as a threatened species regardless of its designation in other parts of its range. 61 Fed. Reg. at 54,049.[4] This is because ESA § 4(d), 16 U.S.C. § 1533(d),

[4] An experimental population can be designated as either essential or nonessential. In the case of a "nonessential" experimental population such as northern Arizona condors, the species is treated (with certain exceptions) as being "proposed" for listing as threatened as opposed to being listed as threatened. *Id.* at 54,049. A species proposed for listing is not protected under ESA § 7(a)(2), which requires

gives FWS greater flexibility in the development and implementation of regulations to manage threatened species than it does for endangered species. *Id.* This flexibility allows FWS to manage the experimental population for recovery in a manner that allows economic and recreational activities to continue, which lessens public resistance to the species' introduction in the area. *Id.* at 54,050.

Before the condor's release in northern Arizona, FWS engaged in extensive public outreach by holding numerous meetings and public hearings and soliciting and receiving hundreds of public comments. *Id.* at 54,051-52. That outreach resulted in FWS identifying multiple issues of public concern, including the effect that the condors' release might have on hunting and the issue of lead poisoning stemming from the use of lead ammunition by hunters. *Id.* at 54,052, 54,054-55.

In responding to public comments, FWS calmed hunters' concerns by stating that the condor reintroduction program will have "no impact" on hunting. *Id.* at 54,052. FWS recognized that the use of lead ammunition by hunters will introduce sources of lead into the environment in the form of unrecovered carcasses and field-dressed "gut piles" of big-game animals shot with lead ammunition, which condors and other scavengers will consume and digest. *Id.* at 54,054. FWS expected that some condor deaths from lead poisoning will inevitably result. *Id.* at

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federal agencies to consult with FWS to ensure that activities that the agency proposes to authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or adversely modify its designated critical habitat. *See* 16 U.S.C. § 1536(a)(2).

54,054-55. But FWS predicted that condor deaths by lead poisoning and other sources of mortality will "be more than compensated by natural and captive reproduction." *Id.* at 54,055. FWS reassured the hunting community that it "does not intend to request modifications or restrictions to the current hunting regulations . . . in the experimental population area" due to the issue of lead poisoning. *Id.*

At the same time, FWS stated it would work with the recovery-effort cooperators to address the threat of lead poisoning through educational programs that instruct hunters on the danger of lead to condors and suggest ways to help reduce or eliminate the threat by burying gut piles or voluntarily using non-lead ammunition. *Id.* at 54,054-55. For the southwest condor reintroduction program, FWS's primary cooperators in the recovery effort include the Arizona Game and Fish Department and the U.S. Bureau of Land Management. *Id.* at 54,050. Other cooperators include the State of Utah, the Forest Service and other federal agencies, Indian tribes, zoos, and The Peregrine Fund. *Id.* Together, these cooperators are known as the "Southwest Condor Working Group." *Id.*

As part of the Southwest Condor Working Group, the Arizona Game and Fish Department has developed and implemented a lead reduction program that seeks to reduce the amount of lead entering the environment without banning the use of lead ammunition outright. As mentioned, condors and other scavengers are exposed to lead by consuming the "gut piles" of field-dressed big-game animals

that are shot by hunters using lead ammunition. ER-264-65. As recommended by the Southwest Condor Working Group, Arizona's lead reduction program educates hunters on the effects of lead ammunition on wildlife, encourages hunters to use non-lead ammunition, provides free non-lead ammunition during the big-game hunting seasons, and operates a gut pile raffle to encourage the removal of gut piles containing lead shot from the wild by burying the piles or packing them out. SER-19-23. The Southwest Condor Working Group does not recommend banning lead ammunition because the effectiveness of bans is inconclusive and because the bans create tension between the condor recovery program and the communities whose support is critical to the program. SER-26, 45-46.

As a result of Arizona's "carefully researched . . . and targeted outreach and incentive-based implementation plan," SER-20, some 90% of hunters within the condor range in northern Arizona voluntarily use non-lead ammunition or pack out or bury their gut piles. SER-23, 56. These voluntary lead reduction efforts have significantly reduced the amount of lead available to condors in Arizona. SER-25.

Despite the Arizona program's success, however, the southwest condor reintroduction program had yet (at the time of the Complaint's filing in 2012)[5] to

[5] The background discussion in the brief is limited to facts alleged in the Complaint or in documents referenced in the Complaint. But the on-the-ground facts have changed since 2012. For instance, citing a document from 2021, the Center notes that the Southwest condor population consists of approximately 111 individuals.

observe a corresponding reduction in condor lead exposure rates. SER-25. This result is attributable to the condor's wide range and the lack of successful lead reduction efforts in states like Utah where condors frequently travel and forage. *Id.* While the vast majority of hunters in northern Arizona participate in lead reduction efforts, very few hunters participate in such programs in Utah and elsewhere. *Id.*

C. Procedural background

In September 2012, the Center initiated suit under RCRA, 42 U.S.C. § 6972(a)(1)(B), alleging that "[t]he Forest Service, by and through its authority and control over the Kaibab National Forest and the activities that occur there, has contributed and is contributing to the past or present disposal of solid or hazardous waste, which may present an imminent and substantial endangerment to health or the environment." ER-268 ¶ 45. The Center alleged that California condors and other wildlife in the Kaibab are exposed to lead by eating deer or elk carcasses or their gut piles after the animals are shot by hunters using lead ammunition. ER-263-67 ¶¶ 25-42. The Center did not bring any claims against the hunters who discard spent lead ammunition in the Kaibab. Rather, the Center alleged that the Forest Service was contributing to the alleged disposal (1) "by failing to use its broad authority to stop the disposal of lead in the form of spent ammunition," and (2) "by issuing Special Use permits for guiding and outfitting activities that do not

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Br. 8. The Complaint, however, alleges the population was 73 in 2012. ER-266 ¶ 36. The condor population thus has *increased* 52% since the filing of this suit.

prohibit the use of lead ammunition." ER-268 ¶¶ 45-46. The Center sought declaratory and injunctive relief. ER-268-69 ¶ 47.

The Forest Service moved to dismiss the Complaint because the Center lacked standing and failed state a claim under RCRA. The district court granted the motion to dismiss for a lack of standing. *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 12-8176, 2013 WL 3335234, at *1 (D. Ariz. July 2, 2013). The court construed the Center's request for declaratory and injunctive relief as seeking an order requiring the Forest Service to promulgate a rule under the APA banning lead ammunition in the Kaibab. *Id.* at *4-*5. The court noted that the only potential source of rulemaking that the Center identified was discretionary and, under *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (*SUWA*), the court could not require the agency to exercise its discretionary authority in a particular manner. *Id.* The district court concluded that because a discretionary rulemaking would require several procedural steps that made the outcome of that process uncertain, the redressability of the Center's alleged harm was too speculative to confer standing. *Id.*

The Center appealed, arguing that the district court misconstrued the relief that it sought. The Center argued that it did not seek an order requiring the Forest Service to promulgate a regulation banning lead ammunition in the Kaibab, but instead sought an open-ended order requiring the Forest Service to comply with

RCRA. *See Brief*, Ninth Cir. No. 13-16684, ECF at 11-1 at 37. In light of the Center's concession that it did not seek an order requiring the agency to initiate a discretionary rulemaking, the Forest Service acknowledged that *SUWA* did not apply. *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, 640 Fed. Appx. 617, 619 (9th Cir. 2016) (*CBD I*). A panel of this Court (Judge McKeown, Judge Rawlinson, and visiting Judge Parker (2d Cir.)) thus held that the Center adequately alleged standing because the Center alleged that the Forest Service was a partial cause of its injuries and that the lawsuit may partially redress them. *Id.* at 619. But the panel stated that the agency could revive its standing challenge later in the case. *Id.* And the panel further emphasized that the Forest Service could reassert its motion to dismiss for failure to state a claim "because the question of whether there is a valid claim under RCRA is fairly debatable." *Id.* at 620.

As this Court contemplated, the Forest Service renewed its motion to dismiss for failure to state a claim under RCRA upon remand. *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 12-08176, 2017 WL 5957911, at *1 (D. Ariz. Mar. 15, 2017). The district court did not directly rule on the central legal issue. The court instead concluded that the open-ended order sought by the Center was akin to seeking an advisory opinion and granting such relief here would interfere with the policy choices of the other branches of the federal government, which have chosen to defer the regulation of hunting on federal lands to the states.

Id. at *4-*6. The district court thus dismissed the Center's claims and entered judgment for the Forest Service.

The Center appealed for the second time, challenging the district court's rationale and additionally asking this Court to rule on the propriety of the Forest Service's motion to dismiss for failure to state a RCRA claim.[6] A second panel of this Court (Judge Berzon, Judge Friedland, and visiting Judge Cardone (W.D. Tex.)) held that the Center's action was justiciable and did not request a prohibited advisory opinion. *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 925 F.3d 1041, 1047-50 (9th Cir. 2019) (*CBD II*). The second panel also rejected the Forest Service's argument that what the district court intended was to decline to exercise jurisdiction, holding that the district court had no such intention and did not have the discretion to decline jurisdiction in any event. *Id.* at 1050-52.

This Court declined the Center's invitation to rule on the merits of the motion to dismiss because the district court did not rule on the substantive questions presented. *Id.* at 1052-53. The second panel (like the previous panel) expressed uncertainty about the merits of the RCRA claim pleaded in the Complaint. *See, e.g., id.* at 1052-53 ("USFS may be correct that the Center's first

[6] While it is common for an appellee to ask the court of appeals to rule on a matter passed by a district court as an alternative basis for affirming a judgment, the Center's request as an *appellant* for the court of appeals to decide for the first time a motion to dismiss still pending before a district court was highly unusual.

argument based on USFS's unexercised authority is foreclosed by *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846 (9th Cir. 2011)"). The second panel also advised the Center to consider amending its Complaint "so as to more fully spell out the bases for USFS's contributor liability." *Id.* at 1053; *see also id.* at 1053 n.3 (noting that the Complaint "does not allege that USFS has contributed to the 'storage' of those bullets.").

On remand for the second time, the Center opted to stand on the very same allegations against the Forest Service that it had made in 2012 and did not amend its RCRA claim. Accordingly, the Forest Service again renewed its motion to dismiss for failure to state a claim under RCRA. ER-96-119. The intervenors also raised a host of additional issues in their respective briefs. ER-50-95. Only months later—after the briefing was complete and the Forest Service's motion had been submitted to the district court for decision—did the Center seek to amend its complaint to add a similar RCRA claim against the Arizona State Commissioners. ER-37-49.

This time, when acting on the various motions before it, the district court squarely addressed the legal deficiencies in the RCRA claim raised by the Forest Service. The Court noted that, under controlling Ninth Circuit precedent, the Complaint must allege facts establishing that the Forest Service has "some degree of control over or be actively involved in the waste disposal process." *Ctr. for*

Biological Diversity v. U.S. Forest Serv., 532 F. Supp. 3d 846, 852 (D. Ariz. 2021) (citing *Hinds*, 654 F.3d at 851) (ER-10). The district court concluded that the Complaint failed to satisfy this standard because the Center's allegations of unexercised regulatory authority and passive land management do not rise to actual control over, or active involvement in, the disposal of waste, which is necessary to make the agency a contributor under RCRA. *Id.* at 852-54 (ER-10-14).

With regard to the Center's belated attempt to add a claim against the State Commissioners, the district court observed that the proposed amendment added nothing to the allegations against the Forest Service. Therefore, the Center's proposed amendment had no bearing on the propriety of dismissing the RCRA claim against the Forest Service. In addition, the district court did not permit the Center to add a RCRA claim against the State Commissioners because the Center's proposed amended complaint failed to provide sufficient information addressing the Eleventh Amendment's prohibition against suing state governments in federal courts without their consent. ER-15-16. Accordingly, the district court denied the Center's motion to amend "without prejudice." ER-16.

SUMMARY OF ARGUMENT

I. This Court should affirm the dismissal of the Complaint. The Center has not alleged sufficient facts to state a legally cognizable claim against the Forest Service under RCRA. Hunting in the Kaibab must be conducted in accordance

with the requirements established by the State of Arizona. Members of the public may hunt in the Kaibab without a permit from the Forest Service. Although the Complaint's focus is spent lead ammunition, the Center does not allege that the Forest Service itself uses lead ammunition or directs its disposal. Nor does the Center allege that the Forest Service performs the specific acts that may expose wildlife to spent lead ammunition (*i.e.*, discarding field-dressed carcasses).

Given that the Forest Service does not generate or dispose of the alleged waste, the Center is arguing that RCRA obligates the Service to use its regulatory powers to ban lead ammunition or dictate hunting practices in the Kaibab to the public. But the Center has identified no legal precedent for this unfounded theory of RCRA liability. Under Ninth Circuit law, RCRA requires active involvement or an actual measure of control over the waste at the time of disposal. The Forest Service's unexercised authority to regulate or passive landownership with respect to hunting does not constitute active involvement or actual control over the disposals allegedly performed by individual hunters in the Kaibab, and cannot be transformed into a finding of RCRA "contributor" liability against the agency.

II. This Court should not decide whether the narrow *Ex Parte Young* exception to a state's Eleventh Amendment immunity from suit applies to the Center's attempted RCRA claim against the State Commissioners. The Center mischaracterizes the district court's ruling. The district court did not make any

substantive determination about the applicability of the *Ex Parte Young* exception to the Center's potential suit against the State Commissioners. The district court merely stated that the Center had failed to provide the court with sufficient information to allow it to make that substantive determination, denying the Center's motion to amend the complaint without prejudice. Because the district court did not decide the substance of the Eleventh Amendment issue, neither should this Court. Indeed, the State Commissioners are not even parties to this appeal, and it would be inequitable to litigate that issue without them. In any event, the Eleventh Amendment issue does not impact the RCRA claim against the Forest Service, which should be dismissed regardless.

III. While the judgment in favor of the Forest Service should be affirmed, this Court should deny the Center's request to reassign this case to a different district judge in the event of a remand. There are no unusual circumstances in this case that would warrant such extraordinary relief. There is no reason to question the district judge's impartiality here, especially where two previous Ninth Circuit panels expressed uncertainty about the merits of the Center's RCRA claim and concluded that the district judge should be provided the first opportunity to address the substantive issues.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's decision to grant a motion to dismiss for failure to state a claim. *See Hinds*, 654 F.3d at 849-50. While a court reviewing a motion to dismiss under Rule 12(b)(6) should accept all factual allegations in a complaint as true, the court must dismiss the complaint if the document fails to: (1) plead a cognizable legal theory, or (2) allege facts sufficient to state a claim for which relief can be granted. *Id*.

ARGUMENT

I. The district court correctly dismissed the Complaint for failure to plead a cognizable RCRA claim against the Forest Service.

The Center has failed to state a claim under RCRA's citizen-suit provision. To state a claim, the Center must plead sufficient facts to allege that the Forest Service (1) "has contributed or . . . is contributing to" (2) "the past or present handling, storage, treatment, transportation, or disposal" (3) "of any solid or hazardous waste," (4) "which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). This brief addresses only the first two elements but does not concede the last two, which the district court's opinion did not address. *See Andersen v. Cumming*, 827 F.2d 1303, 1305 (9th Cir. 1987) ("Ordinarily we will not decide an issue that was not addressed by the district court.").

This Court in *Hinds* considered the meaning of "contributed" or "is contributing to" and rejected an "expansive reading" of the statute that would have imposed RCRA liability merely for assisting in creating waste without generating it or having active involvement in or actual control over the disposal process. 654 F.3d at 850-51. This Court specifically ruled that "contributor" liability did not extend to defendants who designed and manufactured dry-cleaning machines that generated wastewater that was disposed by users into drains and sewer systems in a manner consistent with defendants' instruction manuals. *Id.* at 848-49; *see also California River Watch v. City of Vacaville*, 39 F.4th 624, 633 (9th Cir. 2022) (discussing *Hinds*). The Court held that to state a claim under RCRA's citizen suit provision, a plaintiff must allege that the defendant "had a measure of control over the waste at the time of its disposal or was *otherwise actively* involved in the waste disposal process." *Hinds*, 654 F.3d at 852 (emphasis added). Alleging passivity with regard to someone's else waste disposal, without more, is insufficient to state a claim under 42 U.S.C. § 6972(a)(1)(B). *Id.* at 851.

The Center contends that it has adequately pleaded a claim under *Hinds*' standard by alleging that the Forest Service (1) has failed to exercise its authority to regulate lead ammunition, including by its failure to regulate lead ammunition in the special use authorizations it issues to commercial outfitters and guides; and (2) owns the land on which individual hunters use lead ammunition. Br. 28-46. As

explained below, however, neither of these allegations shows that the Forest Service satisfies the definition of a RCRA "contributor" as interpreted by *Hinds* because each contention alleges only passive conduct.

A. The mere existence of unexercised regulatory authority does not render the Service a "contributor" under *Hinds*.

The Center first argues (Br. 23-39) that the Forest Service is a contributor under RCRA because the agency has broad discretionary authority to stop the disposal of lead in the form of spent ammunition but has failed to exercise it. *See* ER-268 ¶ 45; *see also* ER-262-63 (citing 36 C.F.R. § 261.50(a) (authority to issue orders); *id.* § 261.70(a)(4) (authority to issue regulations)). But while the Forest Service does not dispute its general authority under the identified regulations, the agency is prohibited by law from spending appropriated funds "to regulate the lead content of ammunition [or] ammunition components." *See supra* p. 7. The Center's brief never mentions this point. The Forest Service thus has significantly less authority to regulate lead ammunition than the Center's citations portray.

Regardless, no matter how much discretion the agency has, the Center's allegation fails because the mere existence of unexercised regulatory authority is insufficient to impose RCRA contributor liability. The relevant RCRA provision makes the United States liable only as a "person." 42 U.S.C. § 6972(a)(1)(B). The nature or extent of its potential liability therefore is no different from that of a private citizen. In the over 40 years since RCRA's passage, the Center has

identified no court that ever has held that regulatory agencies—even ones that exercise authority over land, actions, or products that may accumulate, become, or produce waste—are subject to RCRA liability for waste disposals performed by others. *See, e.g., Stewards of Mokelumne River v. California Department of Transp.*, No. 2:20-cv-01542-TLN-AC, 2021 WL 2983302, at *4-5 (E.D. Cal. July 15, 2021) (rejecting a RCRA claim against a state agency for failing to police or regulate the activities of transients disposing of waste on state property, noting that "Plaintiff identifies no controlling or persuasive authority that supports its definition of 'contribute' or the contention that no affirmative action is needed."). And the Forest Service here is even further removed from the disposal of the alleged waste because—consistent with longstanding principles of federal governance—it is not the agency that regulates hunting or ammunition usage in the Kaibab. Rather, those matters are regulated by the Arizona State Commission.

Even if regulatory agencies in some circumstances could be deemed to take affirmative actions to dispose of waste that go beyond their status as regulators, the Forest Service's alleged passivity as a regulator here is insufficient to make it a contributor under RCRA. *See Hinds*, 654 F.3d at 851 (RCRA "require[s] affirmative action rather than merely passive conduct") (quoting *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 854 (7th Cir. 2008)); *see also Goldfarb v. Baltimore*, 791 F.3d 500, 516 (4th Cir. 2015) (RCRA "requires a

defendant's active conduct on—rather than passive connection to—the property in order to be deemed a contributor"). "'Contributing' requires a more active role with a more direct connection to the waste, such as by handling it, storing it, treating it, transporting it, or disposing of it." *Hinds*, 654 F.3d at 851. These statutory terms "are all active functions with a direct connection to waste itself." *Id*. In *Hinds*, therefore, this Court recognized that RCRA requires active involvement with the waste or an actual measure of control contributing to its handling, storage, treatment, transportation, or disposal. *Id.* (citing *Sycamore*, 546 F.3d at 854; *Interfaith Community Org. v. Honeywell Int'l*, 263 F. Supp. 2d 796, 844 (D.N.J. 2003), *aff'd*, 399 F.3d 248 (3d Cir. 2005)). But as the district court correctly concluded, the Center has failed to allege any facts showing the Forest Service has any active involvement or actual measure of control over the handling, storage, treatment, transportation, or disposal of a waste.

To the extent the Center is arguing that a theoretical (instead of an actual) measure of control is sufficient for RCRA contributor liability, the Center ignores that *Hinds* held that "a plaintiff must allege that the defendant had a measure of control over the waste at the time of its disposal or was *otherwise actively* involved in the waste disposal process." 654 F.3d at 852 (emphasis added). The qualifying phrase "otherwise actively" signifies that an actual measure of control is necessary.

Instead of identifying an actual measure of control by the Forest Service, the Center expends considerable effort establishing that the Forest Service has *potential* authority to regulate lead ammunition in the Kaibab. Br. 33-39. This is a fruitless effort because the Forest Service's potential regulatory authority—absent a ban on spending any appropriated funds to exercise such authority, *see supra* p. 7—is not at issue. But merely because the Forest Service has the unexercised *potential* to regulate lead ammunition in the *future* is not sufficient to state a RCRA contribution claim regarding past or present actions because there must be active involvement or an actual measure of control over the waste "at the time of its disposal." *Hinds*, 654 F.3d at 852. The Center has failed to plead any facts showing that the Forest Service affirmatively has exercised actual control over any of the spent lead ammunition in the past or at the present.

Notably, this same contention of potential regulatory authority could be leveled against any federal, state, or local agency in innumerable situations, which could result in broad RCRA liability for these agencies. *See Stewards of Mokelumne River*, 2021 WL 2983302, at *4-5 (applying *Hinds* and concluding that a state agency was not liable as a "contributor" under RCRA for failing to prevent the alleged disposals by transients on state land). This broad liability is contrary to *Hinds*, which in rejecting an expansive reading of the term "contributor," held that

liability under RCRA requires a defendant to be "actively involved in the waste disposal process." 654 F.3d at 851-52.

Merely continuing a longstanding federal policy of deferring to state hunting regulations is not active involvement. It is the textbook definition of merely passive involvement. Presumably, that is why the Center has cited no case allowing such an expansive RCRA claim against a federal or other governmental agency and two previous Ninth Circuit panels in this case expressed uncertainty regarding the legal viability of the Center's unexercised regulatory authority claim against the Forest Service. *See CBD II*, 925 F.3d at 1052-53 (stating that the Forest Service "may be correct that the Center's first argument based on USFS's unexercised authority is foreclosed" by *Hinds*); *CBD I*, 640 Fed. Appx. at 620 ("the question of whether there is a valid claim under RCRA is fairly debatable").

Indeed, the Center's allegations are too far removed from what *Hinds* held to be necessary to state a claim under RCRA. The Forest Service is just as removed from the waste as were the equipment manufacturers in *Hinds*. The manufacturers did not control how businesses, which purchased their equipment, disposed of waste produced later by that equipment, and thus the manufacturers were not RCRA "contributors." *Hinds*, 654 F.3d at 852. Similarly, the Forest Service does not control individual hunters' choice of ammunition or alleged disposal of lead ammunition when hunting in the Kaibab. It is the hunters themselves who make

those determinations and perform the actions. And those hunters are regulated by the State Commission and not the Forest Service (although simply being a regulatory agency with authority over the subject matter is insufficient to establish the requisite control under RCRA).

The Center argues that this Court has "recognized that a defendant may be liable where it 'had authority to control . . . any waste disposal.'" Br. at 40 (quoting *Hinds*, 654 F.3d at 851-52). But the Center reads too much into this statement. *Hinds* did not suggest that mere unexercised "authority to control" is sufficient to impose RCRA liability. This Court declared that some active role typically is required: "'a straightforward reading of RCRA compels a finding that only *active* human involvement with the waste is subject to liability under RCRA.'" *Id.* at 851 (quoting *Interfaith Cmty.*, 263 F. Supp. 2d at 844). The Court noted further that even "courts that have not explicitly held that RCRA liability requires active involvement by defendants have nonetheless suggested that *substantial affirmative action* is required and have permitted RCRA claims to survive only with some allegation of *continuing control* over waste disposal." *Id.* at 851 (emphasis added).

Here, the Forest Service has not taken any affirmative action regarding spent lead ammunition or its disposal. The Forest Service logically cannot exercise "continuing control" over spent lead ammunition or its disposal when it has never

affirmatively taken control over such ammunition in the first place. *Hinds* thus provides no support for the Center's argument that the mere existence of unexercised regulatory authority is sufficient to impose RCRA liability.

Hinds' statement regarding the exercise of control must be understood in the context of the cases it examined. *See Hinds*, 654 F.3d at 851-52 (examining *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1384 (8th Cir. 1989); *Marathon Oil Co. v. Texas City Terminal Ry. Co.*, 164 F. Supp. 2d 914, 920-21 (S.D. Tex. 2001); *United States v. Valentine*, 885 F. Supp. 1506, 1512 (D. Wyo. 1995)). Each of these cases involved defendants who were alleged to have taken substantial affirmative action resulting in continuing control over waste disposal. In *Aceto,* the defendants contracted with a business to manufacture pesticides, maintained ongoing ownership of the pesticide, and dictated the terms of manufacturing, which inherently generated waste. 872 F.2d at 1375-76, 1378, 1384. In *Marathon Oil Co.*, the railway company transported hazardous waste on its tank cars and controlled the loading, unloading, and cleaning practices which resulted in the waste being leaked, dumped, or spilled into the environment. 164 F. Supp. 2d at 920-21. Similarly, in *Valentine*, the defendant physically possessed and transported hazardous waste and thus maintained continuing control over the

waste until it reached the disposal facility. 885 F. Supp. at 1509, 1512.[7] After examining these cases in depth, *Hinds* concluded that passivity is insufficient to impose RCRA contributor liability and that active involvement or substantial affirmative action resulting in control over the waste at the time of its disposal (in the past or the present) is necessary. 654 F.3d at 851-52.

The Center fails to distinguish *Hinds*. The Center merely notes that *Hinds* recognized that "some degree of control" suffices for RCRA liability. Br. at 37 (quoting 654 F.3d at 851). But the Forest Service has not acted affirmatively to regulate lead ammunition and exercises *no control* over the disposal of spent lead ammunition. The alleged disposal of spent lead ammunition results solely from the actions of individual hunters, who are regulated by the State Commission.

The Forest Service's lack of any regulatory control over the disposal of spent lead ammunition is due not only to the spending prohibition on lead-ammunition regulations and federal policy of acquiescing to state hunting regulation, but also to the mandatory legal procedures that the agency must follow to regulate hunting in the Kaibab. These procedures are significant here because

[7] *See also Cox v. City of Dallas*, 256 F.3d 281 (5th Cir. 2011). There, the City generated the waste being disposed of, and affirmatively contracted for its disposal while maintaining continuing oversight over the disposal process. *Id*. at 286, 296-97.

the Forest Service cannot be deemed to have "some" control over lead ammunition disposal in the Kaibab at least until these procedures have been followed.

Specifically, the Forest Service may not regulate the disposal of spent lead ammunition under 36 C.F.R. § 261.70(a)(4) without consulting with the State Commission; issuing a proposed rule; taking public comment on the proposed rule; and promulgating a final rule, which would be reviewable by a federal court with jurisdiction. *See* 43 U.S.C. § 1732(b); 16 U.S.C. § 1612(a); 36 C.F.R. § 261.50(a) and § 261.70(a)(4), (c). Similarly, before issuing an order relating to lead ammunition under 36 C.F.R. § 261.50(a), the Forest Service again would have to consult with the State Commission; comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. and other laws; and solicit public comment under 16 U.S.C. § 7913. Accordingly, while it is theoretically possible for the Forest Service to regulate the disposal of lead ammunition by following these mandates (as FWS did when prohibiting the use of lead ammunition for waterfowl hunting, *see* 51 Fed. Reg. 42,103 (Nov. 21, 1986)),[8] the Forest Service has not done so. It thus currently has no affirmative control (regulatory or otherwise) over spent lead ammunition in the Kaibab.

[8] As noted, *supra* p. 7, since at least 2015, Congress has prohibited federal agencies from spending appropriated funds to regulate the lead content of ammunition.

In sum, *Hinds* rejected an "expansive" theory of RCRA liability and cannot be read to support an even more extreme argument that the mere existence of unexercised regulatory authority is sufficient to impose liability on the Forest Service.[9] The Center's unprecedented theory would effectively eliminate all meaningful boundaries on RCRA liability in this context. If the failure to regulate a particular subject matter alone were sufficient to impose RCRA "contributor" liability on a government agency, countless governmental agencies could be targeted in RCRA actions because plaintiffs could always allege that an agency could have promulgated regulations, issued orders, or otherwise done more to prevent the disposal of waste by others. This would be flatly inconsistent with common sense and the plain language of RCRA as interpreted by *Hinds*, and thus this Court should reject the Center's expansive unexercised authority theory here.

B. Issuing special use permits to commercial outfitters and guides does not make the Forest Service responsible for the disposal of spent lead ammunition by others.

The Center makes only one allegation that arguably accuses the Forest Service of taking an affirmative action, albeit indirectly, with respect to ammunition use in the Kaibab: that the Forest Service issues special use permits to

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[9] The Center notes (Br. 42) that some courts have said that RCRA contributor liability is "broad." But broad does not mean unbounded. RCRA liability is broad in the sense that neither negligence nor other fault is a requirement, provided the defendant has active involvement or an actual measure of control over waste at the time of its disposal. *See Hinds*, 654 F.3d at 850-51.

commercial outfitters and guides without restricting the use of lead ammunition. Br. 30-33. But this argument adds nothing new because, at best, the issuance of a special use permit without banning lead ammunition is just another example of unexercised authority, which is insufficient to establish liability under RCRA § 6972(a)(1)(B).

As explained, the Forest Service does not regulate noncommercial recreational activities like hunting in the Kaibab. But Forest Service regulations do require persons or entities to obtain a permit before engaging in *commercial* activities. *See* 36 C.F.R. § 251.50(a). Commercial outfitters and guides thus must obtain a special use permit to guide or outfit paying clients on trips on National Forest System lands, regardless of whether the trip's purpose is hunting or backpacking or rock climbing. *See also id*. § 251.51 (defining certain terms, including "guiding" and "outfitting," but not "hunting"). The Forest Service uses the same form, approved by the Office of Management and Budget, for all outfitting and guiding permits, regardless of the outfitted or guided activity's purpose. In requiring a special use permit for the outfitting and guiding of individual hunters, the Forest Service is regulating the *commercial* activities of outfitters and guides, not the recreational hunting activities of their paying clients. *See* 36 C.F.R. § 251.50.

Special use permits are not required to hunt in the National Forest System. *See* 36 C.F.R. § 251.50(c) ("A special use authorization is not required for noncommercial recreational activities, such as . . . hunting"). The special use regulations and permit provisions for commercial outfitting and guiding on National Forest System lands do not regulate hunting or supplant Arizona's hunting regulations. Those generic provisions do not constitute active and direct involvement in how hunters conduct themselves in the field. *See Hinds*, 654 F.3d at 851 (RCRA requires active functions with a "direct connection" to the waste itself); *Nat'l Exch. Bank and Tr. v. Petro-Chem. Sys. Inc.*, 2012 WL 6020023, *3 (E.D. Wis. Dec. 3, 2012) (finding that Congress did not intend the term "contributed" to be an "invitation to string together an expansive causal chain of tangential defendants"). No Forest Service permit of any kind is required for recreational hunting on National Forest System lands.

The Center responds by claiming that the Forest Service *could* through the issuance of special use permits exercise some control over lead ammunition or hunting practices in the future. Br. 32. But that hypothetical fails because the Forest Service cannot include any provision seen to be regulating the lead content of ammunition because Congress has prohibited the use of any appropriated funds for that purpose. *See supra* p. 7. In any event, as discussed in the previous section, the theoretical ability to exercise future control is insufficient under

RCRA. As *Hinds* recognizes, RCRA applies only to a person "who has contributed or who is contributing to the past or present" disposal of waste. *See Hinds*, 654 F.3d at 850 (quoting 42 U.S.C. § 6972(a)(1)(B)). The Center identifies no past or present action taken by the Forest Service in connection with regulating outfitting and guiding that has actively contributed to the disposal of spent lead ammunition in the Kaibab.

Thus, the issuance of special use permits to commercial outfitters and guides in accordance with existing federal regulations does not legally equate to the Forest Service being actively involved in the disposal of spent lead ammunition. By alleging that the Forest Service does not condition special use permits on outfitters and guides prohibiting their clients from using lead ammunition, the Center's allegation at best places the Forest Service in an indirect, passive role as a federal agency that is not exercising regulatory authority in the manner the Center prefers. This allegation is indistinguishable from the unexercised authority claim previously discussed at pages 23-34. The Center does not (and cannot) allege that special use permits authorize the disposal of spent lead ammunition on National Forest System lands. The allegation is legally deficient because the Forest Service does not play an active role in or have a direct connection to the disposal of spent lead ammunition in the Kaibab merely by issuing a special use permit for commercial activities on National Forest System lands.

C. The Center's Complaint does not allege that the Forest Service owns the Kaibab and, regardless, mere landownership is insufficient to state a RCRA contributor claim against the Forest Service.

The Center next claims the Forest Service is liable as contributor because it is a "landowner." Br. 39-51. But the Complaint does not allege landownership as a basis for contributor liability. ER-267-68 ¶¶ 43-46. In fact, the Center alleges that the "National forests are public lands owned by the United States," not by the Forest Service, which only administers the federal land. ER-262 (citing 16 U.S.C. § 1609(a), which provides that "Congress declares that the National Forest System consists of units of federally owned forest . . . which are administered by the Forest Service"). Because the Center's landowner theory lacks supporting allegations in the Complaint, it is deficient for that reason alone. *See Harrell v. United States*, 13 F.3d 232, 236 (7th Cir. 1993) (stating that a "plaintiff cannot cure the deficiency [in a complaint] by inserting the missing allegations in a document that is not either a complaint or an amendment to a complaint").[10]

Even assuming the Forest Service could be deemed a "landowner" as opposed to an "administrator" of National Forest System lands, the Center's un-pleaded theory fails because there is no meaningful distinction for purposes of RCRA § 6972(a)(1)(B) between the Forest Service's role as a federal administrator

[10] This Court invited the Center to amend its Complaint to clarify its allegations against the Forest Service. *See CBD II*, 925 F.3d at 1053. The Center declined.

of National Forest System lands and its alleged status as a landowner. The source of the agency's legal authority over National Forest System lands is the same regardless. Unlike a private landowner, the Forest Service (as administrator of the National Forest System) does not exercise the full bundle of sticks of property ownership. The Forest Service's authority to enact and enforce rules governing National Forest System lands is limited to the powers delegated to the agency by Congress, the entity with constitutional authority over federal lands under the Property Clause, U.S. Const. Art. 4, § 3, cl. 2. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). Thus, attributing "landowner" status to the Forest Service does not convert unexercised regulatory authority into the required active involvement.

1. Case law confirms that mere landownership, without more, is insufficient under RCRA.

Moreover, even assuming the Forest Service "owns" the Kaibab in a manner divorced from its regulatory authority, the Center overlooks that *Hinds* specifically relied on cases that repudiated the notion that mere landownership confers RCRA "contributor" liability. *See id.* at 851 (citing *Honeywell*, 263 F. Supp. 2d at 844). *Hinds* approvingly cited *Honeywell*, which concluded that "the plain language of RCRA makes clear that liability should only be imposed on those who actively manage or dispose solid or hazardous waste," and held that there was "no basis for

imposing liability" on the current owners of the site at issue, who allegedly displayed indifference to the spread of contamination after purchasing the property. 263 F. Supp. 2d at 831, 846.[11] Similarly, *Hinds* followed the Seventh Circuit's RCRA decision in *Sycamore Industries*, holding that an owner who sold a building with an abandoned heating system containing asbestos insulation was not liable for leaving the asbestos in place, which was "merely passive conduct." *See Hinds*, 654 F.3d at 851 (discussing *Sycamore Indust.*, 546 F.3d at 854).

Recent cases interpreting *Hinds* confirm that "mere ownership of contaminated land" is insufficient to establish "contributor" liability under RCRA. *Greenup v. Est. of Richard*, No. 2:19-CV-07936-SB-AGR, 2021 WL 3265009, at *4-5 (C.D. Cal. Apr. 5, 2021) (rejecting argument that a landowner's or land manager's "passive inaction or studied indifference" was sufficient under *Hinds* to make the land manager a contributor under RCRA); *Stewards of Mokelumne River,* 2021 WL 2983302, at *5 (rejecting the contention that "mere ownership and control over the property on which the disposal is occurring is sufficient" under

[11] The same district court previously had concluded that one of the property's current owners who acquired the property with preexisting contamination could be held liable under RCRA's citizen-suit provision "based solely on its alleged 'passive indifference' as a property owner." *Honeywell*, 263 F. Supp. 2d at 844-45 & n.7. The district court later corrected itself in the opinion cited in *Hinds*, concluding that its earlier ruling was "not in accordance with the plain language of RCRA, controlling Third Circuit precedent, and all other [recent] federal court decisions that have addressed the liability of land owners under RCRA." *Id*.

Hinds); *City of Imperial Beach v. Int'l Boundary & Water Comm'n*, 356 F. Supp. 3d 1006, 1022-23 (S.D. Cal. 2018) (emphasizing the necessity for active involvement to satisfy RCRA § 6972(a)(1)(B) and stating that a defendant "must have a sufficiently direct connection to the waste disposal process."). Although the Center urges this Court to rule otherwise, the Center has not identified a single decision that has endorsed its passive "landowner" theory.

None of the cases on which the Center relies supports its argument that mere landownership results in contributor liability under RCRA. Br. 43-45. The Center's cases do not address landowner liability; instead, they find potential liability based on affirmative actions taken as active operators of the business or site. *See Aceto*, 872 F.2d at 1375-76, 1378, 1384 (not addressing landowner liability, but concluding that the complaint had sufficiently alleged facts establishing that the defendants had *actual* control (*i.e.*, not theoretical or potential) over the waste disposal process because the defendants contracted with a business to manufacture pesticides, maintained ongoing ownership of the pesticide, and dictated the terms of manufacturing, which inherently generated waste); *United States v. Waste Indus.*, 734 F.2d 159, 168 (4th Cir. 1984) (not addressing whether landownership is sufficient to impose RCRA liability, but allowing RCRA case to proceed against those who *affirmatively operated* a landfill); *Zands v. Nelson*, 797 F. Supp. 805, 810 (S.D. Cal. 1992) (finding a gas station owner and *operator* to be

a potential contributor under RCRA); *Community Ass'n for Restoration of the Env't v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1229 (E.D. Wash. 2015) (piercing veil of corporate-farm landowners who affirmatively exercised active control over farm activities); *Conn. Coastal Fisherman's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1316 (2d Cir. 1993) (finding a shooting range owner who also actively operated the range to be a potential contributor under RCRA); *Potomac Riverkeeper v. Nat'l Capital Skeet and Trap Club*, 388 F. Supp. 2d 582, 586-87 (D. Md. 2005) (denying a state official's Eleventh Amendment defense, but not addressing the state's contributor liability or the relevance of state landownership); *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1221 (D. Or. 2009) (allowing claim to proceed against shooting range operator for allowing lead waste to accumulate, but not addressing contributor liability or allegations of an imminent and substantial endangerment). Thus, to the extent they are relevant at all, these cases are consistent with the principle that contributor liability under RCRA requires more than mere landownership. *See Hinds*, 654 F.3d at 851.

Instead, the Center relies on pre-*Hinds* cases cited in a memorandum from the United States Environmental Protection Agency (EPA) addressing liability under a different RCRA provision, 42 U.S.C. § 6973. Br. 42-43. But that pre-*Hinds* memorandum notably does not address the issue of whether unexercised regulatory authority gives rise to RCRA contributor liability. Nor do the examples

in the memorandum involve a federal agency's liability for waste disposals by others. The memorandum thus is of no relevance here.

In any event, the examples in the memorandum identified by the Center merely restate RCRA case law as it existed in 1997. The case law has evolved substantially since 1997, particularly as a result of this Court's decision in *Hinds*.

Specifically, the case cited by the EPA memorandum for the notion that an owner "who fails to abate an existing hazardous condition on which he or she is aware" is liable under RCRA as a contributor, *United States v. Price*, 523 F. Supp. 1055 (D. N.J. 1981), has been called into question, as recognized by the *Honeywell* decision cited by this Court in *Hinds*. *See Honeywell*, 263 F. Supp. 2d at 844-45 & n.7. And the case cited for the notion that RCRA contributor liability extends to "a person who owned the land on which the facility was located during the time that solid waste leaked from the facility" is easily distinguishable because it involves, at least in part, a gas station owner who actively operated the station from which the waste leaked. *See Zands v. Nelson*, 779 F. Supp. 1254 (S.D. Cal. 1991).

In any event, it is this Court's *Hinds* decision—and not the cases cited in the pre-*Hinds* memorandum addressing a different RCRA provision—that controls. Under *Hinds*, as the recent district court decisions applying that precedent have recognized, the Forest Service cannot be said to have "contributed to" any alleged disposal of waste as a mere passive "landowner."

2. Cases interpreting public nuisance law cannot override *Hinds* and do not assist the Center.

Lacking support for its theory in RCRA jurisprudence, the Center turns to notions of common law public nuisance, which also do not assist the Center. Br. 41. The Complaint alleges no public nuisance or other tort claim against the United States. And the Center's allusions to common law nuisance cannot alter this Court's definitive interpretation of the statute's plain text in *Hinds* as well as this Court's application of that interpretation, both of which precludes a RCRA claim against the Forest Service here. *See Hinds*, 654 F.3d at 850 (endorsing the plain and ordinary meaning of the word "contribute").

Nothing in RCRA's plain text suggests that a public nuisance claim would lie against the United States when acting in its sovereign capacity as a federal regulator. Congress also provided no indication that RCRA liability would arise when the United States gives the public access to federal lands in accordance with federal law to conduct lawful recreational activities authorized by state hunting permits. The Center's reliance on legislative history is unavailing because that legislative history is at best inconclusive, and even clear legislative history cannot override a statute's plain text. *See Am. Rivers v. FERC*, 201 F.3d 1186, 1204 (9th Cir. 1999) (legislative history cannot override plain statutory text).

Regardless, the nuisance law principle most applicable here is that a person is liable for a public nuisance only when that person *actively* created or assisted in

creating it. *See Redevelopment Agency of City of Stockton v. BNSF Ry. Co*., 643 F.3d 668, 673-74 (9th Cir. 2011). Thus, like RCRA contributor liability, "nuisance liability requires more than a passive or attenuated causal connection to contamination." *Id*. at 674. "A public nuisance cause of action [must be] premised . . . on affirmative conduct that assisted in the creation of a hazardous condition." *Id*. at 674 n.2 (quoting *County of Santa Clara v. Atlantic Richfield Co*., 137 Cal. App. 4th 292, 309-10 (2006)). Likewise, active involvement or an affirmative act leading to an actual measure of control over the waste at the time of disposal is also necessary for RCRA contributor liability. *See Hinds*, 654 F.3d at 851.

3. Knowledge or awareness of the disposal of spent lead ammunition is not determinative.

The Center claims that the Forest Service's awareness or knowledge of the disposal of spent lead ammunition on National Forest System lands makes the agency liable as a contributor. Br. 39, 43. Not so. Knowledge or awareness of a disposal is not determinative. RCRA contributor liability is based on strict liability—there is no culpability requirement. *See Aceto*, 872 F.2d at 1377 ("Section 7003 has been interpreted to impose strict liability") (citing, *inter alia*, *United States v. Northeastern Pharmaceutical & Chemical Co*., 810 F.2d 726, 737-42 (8th Cir. 1986). Instead of imposing liability based on culpability (or *mens rea*), RCRA imposes liability based on an *actus rea*—the act of "contributing to" the past or present handling, storage, treatment, transportation, or disposal of any

solid or hazardous waste. 42 U.S.C. § 6972(a)(1)(B).[12] Liability is based on the act of disposal, not knowledge of someone else's disposal. Interpreting the phrase "contributing to" in this context according to its plain meaning, *Hinds* stated that even "courts that have not explicitly held that RCRA liability requires active involvement by defendants have nonetheless suggested that *substantial affirmative action* is required and have permitted RCRA claims to survive only with some allegation of *continuing control* over waste disposal." 654 F.3d at 851 (emphasis added).

To emphasize again, the Forest Service has not taken any affirmative action regarding spent lead ammunition or its disposal. The Forest Service logically cannot exercise "continuing control" over spent lead ammunition or its disposal when it has never affirmatively taken control over such ammunition in the first place. The Forest Service exercises no control over the disposal of spent lead ammunition. The alleged disposal of spent lead ammunition results from the actions of individual hunters, who are regulated by the State Commission.

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[12] When Congress wanted a RCRA provision to contain a *mens rea* requirement, it said as much. For example, § 6928 makes it a crime to "knowingly transport[ ] or cause[ ] to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit[.]" 42 U.S.C. § 6928(d)(1); *see also id.* § 6928(d)(5) (making it illegal to "knowingly transport[ ]" or "cause[ ] to be transported" hazardous waste without a manifest where one is required by the regulations). The RCRA citizen-suit provision contains no such element.

Accordingly, the Forest Service's alleged knowledge or awareness of those actions does not make it a contributor under RCRA's citizen-suit provision.

4. CERCLA demonstrates that Congress did not intend mere landownership to result in RCRA liability.

Finally, the Center contends that mere landownership is sufficient because RCRA references "past and current owners" as being among those who *may* be deemed to be "contributing to" a disposal as *potential* contributors. Br. 45 (citing 42 U.S.C. § 6972(a)(1)(B). No one disputes that an owner potentially may be a contributor—if the owner had a measure of control over the waste at the time of its disposal or was *otherwise actively* involved in the waste disposal process. *See Hinds*, 654 F.3d at 852. But the mere potential does not make it so in every case.

A comparison to CERCLA further undercuts the Center's contention that mere landownership can result in contributor liability under RCRA. Like RCRA, CERCLA identifies an "owner" among classes of those potentially subject to the statute. *See* 42 U.S.C. § 9607(a)(1). But unlike RCRA, CERCLA expressly identifies facility owners as potentially responsible parties (PRPs) and therefore liable under CERCLA solely by virtue of their ownership status. *Id.*; *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 609 (2009) ("Once an entity is identified as a PRP, it may be compelled to clean up a contaminated area or reimburse the Government for its past and future response costs."). In contrast, under RCRA, facility owners may be potentially responsible only if they are

"contributing to" the handling, storage, treatment, transportation, or disposal of waste. *See* 42 U.S.C. § 6972(a)(1)(B). The different standards Congress used in the two statutes shows that Congress did not intend mere ownership to be sufficient for liability under RCRA. Owners, as well as the other categories listed in § 6972(a)(1)(B), are liable under RCRA only to the extent they become actively involved in the disposal. *See Hinds*, 654 F.3d at 852. The distinction between CERCLA and RCRA demonstrates that the Center's unpleaded passive landowner allegation fails to state a claim against the Forest Service under RCRA.

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Since the reintroduction of the experimental California condor population to northern Arizona more than 20 years ago, the Forest Service has played a positive role in increasing the species' prospects for survival and has continued to manage the Kaibab in accordance with federal law. With the State of Arizona and other stakeholders, the Forest Service has supported a host of measures that have substantially reduced the condors' and other wildlife's exposure to spent lead ammunition. The allegations in the Center's now 10-year old Complaint remain insufficient to establish that the Forest Service is legally responsible under RCRA for the disposal of lead ammunition by individual hunters in the Kaibab. The Forest Service's unexercised regulatory authority or alleged passive landownership cannot serve as a legal basis for imposing RCRA "contributor" liability under clear

Ninth Circuit law. The district court correctly dismissed the Center's Complaint for failure to state a valid claim. This Court should affirm.

II. This Court should not address the Eleventh Amendment issue, which is irrelevant to the claim against the Forest Service.

In a prior appeal the Center took the highly unusual step of asking this Court to rule on the propriety of the Forest Service's motion to dismiss that remained pending unaddressed before the district court. This Court appropriately denied that unusual request, allowing the district court to first address that motion by the normal adjudicative process. *CBD II*, 925 F.3d at 1053.

The Center here again asks this Court to rule on an issue unaddressed by the district court, namely, the issue of whether the Eleventh Amendment bars a suit against the Arizona State Commissioners. The Eleventh Amendment issue does not impact the RCRA claim against the Forest Service. As discussed above, the sole RCRA claim should be dismissed against the Forest Service regardless of the Eleventh Amendment issue. As for the Eleventh Amendment issue, this Court should decline to decide it and instead give the district court the opportunity to address the substance of the Center's Eleventh Amendment arguments in the first instance.[13] *See Andersen*, 827 F.2d at 1305 ("Ordinarily we will not decide an

[13] We take no position at this time on whether a dismissal of the RCRA claim against the Forest Service requires the Center to file a new suit in the district court under a new case number or whether the Center may continue to pursue its claim against the State Commissioners under this case number.

issue that was not addressed by the district court."); *Daniel v. Ford Motor Co*., 806 F.3d 1217, 1227 (9th Cir. 2015) ("Because the district court did not address [various issues], we decline to do so on appeal.").

In asking for this Court's authoritative ruling on the issue ahead of any substantive decision of the district court, the Center mischaracterizes the district court's decision as to the State Commissioners. The district court did not—as the Center incorrectly states—"dismiss[] the Center's motion for leave to amend its complaint as barred by sovereign immunity under the Eleventh Amendment." Br. 24. Rather, the district court merely determined that the Center had failed to establish that its suit fell within the limited *Ex Parte Young* exception to state sovereign immunity. ER-16. Tellingly, the district court denied the motion to amend without prejudice. *Id*. In other words, the district court made no substantive ruling on whether the Eleventh Amendment bars the Center's suit. It merely observed that the Center had failed to allege sufficient facts and information for the court to determine whether the limited exception to Arizona's sovereign immunity applied here.

Therefore, should this matter proceed, the Center may propose another amendment in an attempt to add a claim against the State Commissioners. In so doing, the Center should allege the necessary facts and provide the same substantive arguments to the district court that it is making on appeal but failed to

make before the district court. Allowing the appropriate judicial process to play out would also allow the entity with the most at stake to weigh in because, at this juncture, the State of Arizona is not a party to this appeal. Because it is Arizona's immunity to suit that is at issue, Arizona should be given the opportunity to address the Eleventh Amendment issue before it is conclusively determined.

Moreover, the Forest Service opposed the motion in the district court on other grounds. ECF No. 177. For example, the motion is untimely because the Center knew all the facts necessary to assert a claim against Arizona at least by 2012 and has failed to satisfactorily explain why it waited eight years before seeking to amend its complaint. Indeed, the Center did not seek to amend its complaint until after the parties had completed summary judgment briefing during the second remand. The district court did not address the timeliness or other issues because it denied the motion on an alternate ground. In the event of a remand, the district court should be given the opportunity to address these issues in the first instance because "the grant or denial of an opportunity to amend is within the discretion of the District Court."[14] *Parker v. Joe Lujan Enterprises, Inc.*, 848 F.2d

[14] Alternatively, if this Court finds that the district court ruled substantively on the *Ex Parte Young* issue and erred, then the untimeliness of the Center's motion to amend provides this Court with an alternate ground to affirm the district court's ruling. *See Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998) ("In reviewing decisions of the district court, we may affirm on any ground finding support in the record. If the decision below is correct, it must be affirmed, even if the district court relied on the wrong grounds or wrong reasoning.") (internal quotations and citation omitted).

118, 120-21 (9th Cir. 1988). For these reasons, the Court should decline to decide the Eleventh Amendment issue in this appeal.

III. In the event of a remand, there are no "unusual circumstances" justifying reassignment of this cases to a different district judge.

The Center's request to assign this matter to a different judge in the event of a remand should be denied. Br. 46-51. The Center concedes there is no evidence that the district judge has a personal bias against it. Br. 47 n.16. *Accord Liteky v. United States*, 510 U.S. 540, 555 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"). This Court therefore will take the extraordinary step of reassigning this case to a different judge only in "unusual circumstances." *Myers v. United States*, 652 F.3d 1021, 1037 (9th Cir. 2011). There is nothing so unusual in this case that would justify this Court taking the rare step of reassigning the case to a different judge.

The Center erroneously claims that reassignment is appropriate because the district court supposedly has repeatedly ignored Circuit precedent throughout the 10-year proceedings in this case. But an objective view of the proceedings demonstrates that the district court has faithfully applied case law based on its understandings of the allegations and the law, even if the Center or this Court disagrees with the district court's conclusions. While there have been multiple appeals in this case, that fact alone does not demonstrate that the district judge has

inflexibly adhered to erroneous legal rulings or that he would be unable to fairly apply the law in the event of a remand.

In the first appeal concerning standing, the district court concluded that the Center had properly alleged an injury-in-fact and causation but concluded the court could not grant the relief it thought the Center was seeking based on the proceedings up to that point in time—an order requiring the agency to exercise its discretion to promulgate a regulation banning lead ammunition. An order requiring the agency to exercise its discretion in a particular manner, the district court correctly concluded, would be barred by the Supreme Court's decision in *SUWA*. 542 U.S. at 64 (when "the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be"). While the Center clarified on appeal that it ultimately did not seek such prohibited relief (but rather an open-ended order requiring the agency to cease the alleged endangerment, leaving the manner to the agency's discretion), the Center cannot fairly equate a ruling based on a lack of clarity in its own pleadings with a failure of the court to follow precedent.

In the second appeal, the district court mistakenly ruled that it lacked jurisdiction in part because the court thought the requested open-ended order from the judicial branch would improperly interfere with the choices of the other branches of the federal government, which have chosen a policy of acquiescence to

state hunting regulation. But the district court's view that such relief was prohibited was impacted by the Center's inability to articulate what precise relief it was seeking and its failure to provide a clear legal rationale for its claim. Moreover, the Center cannot contend that the district court failed to follow this Court's remand instructions or refused to exercise its jurisdiction thereafter.

As discussed, the Center does not seek, as in the case of a valid RCRA citizen-suit claim, to enjoin a party from taking affirmative action. Rather, the Center seeks to compel a passive federal regulatory agency to regulate in an area in which the agency has acquiesced to state regulation, consistent with governing law and long-standing federal policy. While the Forest Service took the position then (and now) that the better approach was to terminate the case for failure to state a valid RCRA claim, courts have an obligation to address their own jurisdiction. *See Hoffmann v. Pulido*, 928 F.3d 1147, 1151 (9th Cir. 2019) ("Because federal courts are tribunals of limited jurisdiction, they have both the inherent authority and the responsibility to consider their own jurisdiction."). As it is apparent that the district court was grappling with the problems at the core of the Center's unprecedented claim, it would be wrong to grant the Center's removal request based on past rulings that are no longer at issue. *See Myers*, 652 F.3d at 1037 ("[T]here is no real reason to question the impartiality of the trial judge,

notwithstanding what we have found were numerous errors in his disposition of the case.").

In ruling that is subject to this third appeal, the district court correctly ruled that RCRA, as interpreted by *Hinds*, forecloses this suit. But even if this panel should disagree, the district court reasonably applied *Hinds*. Indeed, the two previous Ninth Circuit panels expressed doubts about the merits of the Center's claim in light of *Hinds*, *see supra* p. 29, and several other district courts recently have reached similar conclusions when applying *Hinds*' active-involvement language, *id.* p. 40-41. Moreover, contrary to the Center's contention otherwise (Br. 49), the district court did not ignore *Ex Parte Young* when denying the Center leave to amend its complaint to add the State Commissioners as defendants. As explained above, the Center mischaracterizes the district court's ruling on this issue. *See supra* p. 50. Accordingly, the Center's argument that the district court willfully has ignored established precedent is unsupported by the case's history.

At bottom, this matter falls easily within the heartland of cases this Court regularly sees on appeal. The length of time that has passed since the filing of the Complaint is attributable to the Center's litigation strategy (including the belated effort to add a claim against the State months after the main briefing was completed), the unusual nature of the RCRA claim being pursued, the multiple rounds of briefing, and the busy dockets of both the district court and this Court. It

is not unheard of for litigation to proceed for more than a decade, particularly when the appellate process often takes years to navigate. There is therefore nothing so highly unusual about this case that justifies the rare and extraordinary step of reassigning this case to another judge in the event of a remand.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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