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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB; GRAND CANYON WILDLANDS COUNCIL,</p> <p style="text-align: center;">Plaintiffs - Appellants,</p> <p style="text-align: center;">v.</p> <p>UNITED STATES FOREST SERVICE,</p> <p style="text-align: center;">Defendant - Appellee.</p>
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No. 13-16684

D.C. No. 3:12-cv-08176-SMM

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
Stephen M. McNamee, Senior District Judge, Presiding

Argued and Submitted November 18, 2015  
San Francisco, California

Before: McKEOWN, RAWLINSON, and PARKER,\*\* Circuit Judges.

The Center for Biological Diversity, Sierra Club, and Grand Canyon  
Wildlands Council (collectively the “Center”) appeal the district court’s dismissal

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The Honorable Barrington D. Parker, Jr., Senior Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

of their complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction on Article III standing grounds. The complaint was brought under the citizen-suit provision of the Resource Conservation and Recovery Act (“RCRA”). 42 U.S.C. § 6972(a)(1)(B). The Center alleged that the Forest Service failed to regulate the disposal of spent lead ammunition in the Kaibab National Forest, thus making the Forest Service liable as a “contributor” to an “imminent and substantial endangerment to health or the environment” by permitting the poisoning of California condors and other wildlife. We conclude the Center has Article III standing. Because the district court did not have occasion to decide the Forest Service’s Rule 12(b)(6) motion to dismiss for failure to state a claim, we reverse and remand.

At the motion to dismiss stage, the Center bears the burden of pleading sufficient facts to show there is an injury in fact, that the injury is fairly traceable to defendant’s conduct, and that a favorable decision would likely redress the alleged injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Questions of constitutional standing are reviewed de novo on appeal. *Hayes v. County of San Diego*, 736 F.3d 1223, 1228 (9th Cir. 2013).

The Center established injury in fact through declarations of intent to continue visiting the Kaibab National Forest and the allegations that the Forest

Service's tacit permission for hunters to use lead ammunition endangers wildlife. The complaint also sufficiently established causation by drawing a connection between the Forest Service's refusal to exercise its authority to regulate the use of lead, the continuing use of lead ammunition by hunters, and the poisoning of condors and other wildlife that scavenge remains contaminated by the lead. *See Covington v. Jefferson County*, 358 F.3d 626, 639 (9th Cir. 2004) ("If [the government entity] declined to take any . . . regulatory actions, such inaction, which is correctable by court order or sanction, meets the causation and redressability elements of standing."). The fact that hunters, not the Forest Service itself, actually dispose of the lead, does not make the causal connection too attenuated because the Forest Service has the authority to control certain conduct of the third-party hunters. Finally, the order sought by the Center is likely to redress at least partially the alleged injuries. The complaint alleged that spent lead ammunition is the leading cause of condors' lead exposure, and thus condors (and other, less-migratory, wildlife) would likely benefit from agency action to curb the use of lead ammunition. We conclude that the complaint was adequate to establish Article III standing.

The district court held that redressability could not be established, in large part because of the Supreme Court's decision in *Norton v. S. Utah Wilderness*

*Alliance*. *Norton* held that a suit brought under section 706(1) of the Administrative Procedure Act to “compel agency action unlawfully withheld” could not proceed where there was an absence of a “discrete agency action that it is required to take.” 542 U.S. 55, 64 (2004) (citing 5 U.S.C. § 706(1)). However, *Norton* addressed suits brought under 5 U.S.C. § 706(1) and is inapplicable to the citizen-suit provision here, which provides a cause of action that by its own terms is not limited to compelling non-discretionary action unlawfully withheld. Rather, the citizen-suit provision grants courts the power to “restrain any person who has contributed to” disposal of a solid or hazardous waste that presents an imminent and substantial danger, and to “order such person to take such other action *as may be necessary*.” 42 U.S.C. § 6972(a) (emphasis added). At oral argument, the government conceded that an open-ended order to the Forest Service to abate a contribution under 42 U.S.C. § 6972(a)(1)(B) would not implicate *Norton*.

In connection with its Rule 12(b)(6) motion to dismiss, the government argued that the Forest Service could not be a “contributor” under 42 U.S.C. § 6972(a)(1)(B) on the facts alleged. The district court did not address the Forest Service’s motion and we do not do so here. Notably, the government did not raise the “contributor” argument in its briefing on appeal with respect to the standing question, and thus it is waived as to that issue. This waiver does not

affect the government's ability to address the merits of this argument on remand.

At this stage, we simply resolve that the claim is not “wholly insubstantial and frivolous,” such that it defeats standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946) (internal quotation marks omitted)).

Whether there is a valid cause of action sufficient to survive the Forest Service's motion to dismiss under Rule 12(b)(6) is a question left to the district court on remand. At this stage, however, the plausibility of the legal basis for the claim does not factor into the Rule 12(b)(1) motion to dismiss for lack of constitutional standing, because the question of whether there is a valid claim under RCRA is fairly debatable.

**REVERSED AND REMANDED.**

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

Form fields for case name, v., and 9th Cir. No.

The Clerk is requested to tax the following costs against:

Table with columns for Cost Taxable, REQUESTED (No. of Docs, Pages per Doc, Cost per Page, TOTAL COST), and ALLOWED (No. of Docs, Pages per Doc, Cost per Page, TOTAL COST). Rows include Excerpt of Record, Opening Brief, Answering Brief, Reply Brief, Other, and a TOTAL row.

\* Costs per page: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

\*\* Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees cannot be requested on this form.

Continue to next page

**Form 10. Bill of Costs - Continued**

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

*(To Be Completed by the Clerk)*

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk