

D. Resource Conservation and Recovery Act

1. Center for Biological Diversity v. U.S. Forest Service, 925 F.3d 1041 (9th Cir. 2019)

The Center for Biological Diversity, along with other conservation organizations (collectively, the Center),¹ filed a claim against the United States Forest Service (USFS) seeking declaratory and injunctive relief under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA).² The Center seeks to require the administrator of Arizona's Kaibab National Forest (the Kaibab) to address the use of lead ammunition by hunters in the Kaibab, alleging that the USFS is liable under the RCRA for "contributing to the past or present . . . disposal" of solid waste.³ This case previously reached the Ninth Circuit on appeal from the district court's dismissal for lack of standing, which the Ninth Circuit reversed.⁴ Then, the District Court for the District of Arizona dismissed the case a second time, holding that the Center was improperly seeking an advisory opinion, and therefore, the court lacked subject matter jurisdiction on justiciability grounds.⁵ On appeal, the Ninth Circuit reversed and remanded, finding the Center has put forth a justiciable claim.

The Kaibab is home to a variety of wildlife species and is a popular site for big-game hunting. Some hunters use lead ammunition and leave behind the remains of their kill, which can contain fragments of spent ammunition and can later be consumed by other animals. The Center alleged that this spent lead ammunition significantly impacts the endangered California condor because the condors rely on animal carcasses as a primary food source, and lead poisoning is a leading cause of condor mortality in Arizona. While the USFS does have the authority to regulate hunting in the Kaibab,⁶ it has largely deferred to Arizona's hunting regulations, which allow lead ammunition except when hunting waterfowl.⁷ The USFS requires commercial hunting outfitters to obtain a "special use" permit, but the permits do not regulate the hunting itself. Arizona has implemented a voluntary lead-reduction program, offering free non-lead ammunition to hunters, but the Center alleged that lead poisoning is still a significant problem in the Kaibab.

After reversing the district court dismissal for lack of standing, the Ninth Circuit remanded the case, leaving for the district court the question of whether the suit should be dismissed under Federal Rule 12(b)(6).⁸ The district court, instead, dismissed for lack of jurisdiction, finding the Center was merely seeking an advisory opinion. The district court reasoned that any judicial directive would be nothing more than a recommendation to the USFS, rather than binding, and therefore an improper intrusion by the courts into the Agency's domain. On appeal, the Ninth Circuit found the district court decision "largely ignor[ed] our previous disposition,"⁹ and relied on a misperception of the effects of a favorable ruling for the Center.

First, the Ninth Circuit quickly dispensed of the justiciability issue. The advisory opinion prohibition ensures that "[f]ederal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."¹⁰ A case satisfies justiciability requirements by satisfying two prongs: one, there must be "an honest and actual antagonistic assertion of rights by one

¹ Plaintiffs include the Sierra Club and Grand Canyon Wildlands Council.

² Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2012) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

³ *Id.* § 6972(a)(1)(B).

⁴ *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 640 F. App'x 617, 620 (9th Cir. 2016).

⁵ *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. CV-12-08176-PCT-SMM, 2017 WL 5957911, at *6 (D. Ariz. Mar. 15, 2017).

⁶ USFS recognized at oral argument that it could remove the lead bullets from the Kaibab, require hunters to do so, or prohibit the use of lead ammunition.

⁷ See ARIZ. ADMIN. CODE § R12-4-304; "Ten gauge or smaller, except that lead shot shall not be used or possessed while taking ducks, geese, swans, mergansers, common moorhens, or coots." *Id.* at § R12-4-304(C)(3)(e).

⁸ FED. R. CIV. P. 12(b)(6).

⁹ *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 925 F.3d 1041, 1048 (9th Cir. 2019).

¹⁰ *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

[party] against another”;¹¹ and two, the decision from the court must serve as more than an advisement or recommendation. The Ninth Circuit stated that its previous determination that the Center satisfied standing requirements also satisfies justiciability requirements. By satisfying the injury and causation prongs of the standing analysis, the Center presented a genuine adversarial issue, satisfying the first requirement of justiciability, and a favorable ruling would require the USFS to address the problem of lead ammunition in *some* manner, satisfying the second requirement.

The Ninth Circuit then addressed the district court’s three misperceptions. First, the district court concluded that the USFS had the discretion to disregard an order requiring it to address lead ammunition, however, the Ninth Circuit stated that the RCRA specifically provides otherwise.¹² Whatever discretion the USFS may have over hunting in the Kaibab, the Agency would be required to comply with a court order regarding the disposal of lead ammunition. Second, the district court improperly relied on *Chicago & Southern Air Lines v. Waterman S.S. Corp.*,¹³ which involved an act providing both presidential and judicial review of an administrative order.¹⁴ The Supreme Court found this dual review unconstitutional as it would either entail impermissible judicial review of an order that embodies presidential discretion,¹⁵ or a court decision subject to presidential approval, in other words, an advisory opinion.¹⁶ The Ninth Circuit distinguished *Waterman* as a case concerning separation of powers over a matter for which the President had unreviewable discretion, while USFS does not have such unreviewable discretion. Rather, the RCRA itself expressly grants authority for judicial review.¹⁷ The USFS cannot disregard a court order if the RCRA liability is found, though it may have discretion in how to implement the order. Finally, the district court maintained that an order to address lead ammunition would be “an improper intrusion into the domain of the USFS”¹⁸ because the agency has expertise on the matter to which the court should give deference. The Ninth Circuit, however, responded:

To the extent the exercise of that authority “intrudes”—to use the district court’s term—on the exercise of USFS’s discretion, it does so because that discretion is subject to the limits enunciated by Congress, and because Congress has sanctioned judicial “intrusion” if those limits are exceeded. Typically, we call that “intrusion” judicial review.¹⁹

The Ninth Circuit then addressed the USFS’s argument, which did not defend the district court’s advisory opinion ruling, but rather, construed the decision as declining jurisdiction on equitable grounds, arguing that the court had discretion to decline jurisdiction because the Center was seeking injunctive relief. The Ninth Circuit first made clear that the district court’s analysis relied on a lack of jurisdiction, not discretion to decline jurisdiction should it be found. The Ninth Circuit also explained that Federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.”²⁰ The RCRA citizen suit provision expressly authorizes judicial injunctive relief, and nothing in the provision confers discretion to decline jurisdiction. Not only did the district court not purport to decline jurisdiction, but the court also could not have properly done so.

¹¹ U.S. Nat’l Bank v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993) (quoting *Muskraut v. United States*, 219 U.S. 346, 359 (1911)).

¹² RCRA specifies, “the district court shall have jurisdiction . . . to restrain any person who has contributed or who is contributing to [a substantial endangerment to health or the environment], to order such person to take such other action as may be necessary, or both.” 42 U.S.C. § 6972(a) (2012). And “person” includes “the United States and any other governmental instrumentality or agency.” *Id.* § 6972(a)(1)(A). “Under a plain meaning . . . a private citizen . . . could seek a mandatory injunction, *i.e.*, one that orders a responsible party to ‘take action’ by attending to the cleanup . . . or a prohibitory injunction, *i.e.*, one that ‘restrains’ a responsible party from further violating RCRA.” *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996).

¹³ 333 U.S. 103 (1948).

¹⁴ *Id.* at 104–05.

¹⁵ *Id.* at 114.

¹⁶ *Id.* at 113.

¹⁷ 42 U.S.C. § 6972(a).

¹⁸ *Center*, No. CV-12-08176-PCT-SMM, 2017 WL 5957911 at *6 (D. Ariz. Mar. 15, 2017).

¹⁹ *Center*, 925 F.3d 1041, 1050 (9th Cir. 2019).

²⁰ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Finding the case to be justiciable, the Ninth Circuit reversed the district court ruling and remanded the case to the district court to determine whether the Center had stated a claim.²¹

²¹ A party bringing a citizen suit claim under RCRA must establish that the defendant “has contributed . . . or is contributing to the past or present . . . disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B) (2012). The Center’s claim alleged USFS as a contributor “both because it possesses unused regulatory authority over the hunters and because Section 7003’s liability standards are analogous to those imposed on private landowners at common law.” *Center*, 925 F.3d at 1052. The court noted that *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846 (9th Cir. 2011), may foreclose the Center’s first argument, but that *Hinds* did not address the question presented here. On the Center’s second argument, the court noted that there is tension among the circuits and district courts. The court remanded to allow the parties to better present the issues as they have evolved.