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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

The United States of America, )  
 Plaintiff, )  
 vs. )  
 Red frame parasail, Buckeye )  
 Model Eagle 503 (serial )  
 number 4159); )  
 White metal frame parasail )  
 (serial number 4462); )  
 White Toyota Tacoma pickup )  
 truck )  
 (VIN # 4TAWN72NXWZ151263), )  
 Defendants. )

No. CIV 00-1567 PHX RCB

O R D E R

On August 15, 2000, the United States initiated forfeiture proceedings under 16 U.S.C. § 742j-1(e). The statute authorizes forfeiture of items used in violation of the Airborne Hunting Act ("AHA"), 17 U.S.C. § 742j-1.

Currently pending before the court are two motions dismiss  
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1 submitted by Claimant Steven Stayner.<sup>1</sup> Stayner questions whether  
2 his conduct falls under the AHA and whether the statute can  
3 constitutionally be applied to his activities. Having carefully  
4 considered the arguments raised, the court now denies those  
5 motions.

6 **I. STATUTORY FRAMEWORK**

7 Subsection (a) of 16 U.S.C. § 742j-1, the Airborne Hunting Act  
8 ("AHA"), sets penalties for any person who:

- 9 1. while airborne in an aircraft shoots or attempts to shoot  
10 for the purpose of capturing or killing any bird, fish,  
or other animal; or
- 11 2. uses an aircraft to harass any bird, fish, or other  
12 animal; or
- 13 3. knowingly participates in using an aircraft for any  
purpose referred to in paragraph (1) or (2).

14 16 U.S.C. § 742j-1(a). The statute expressly provides for  
15 forfeiture of equipment used to violate these provisions. 16  
16 U.S.C. § 742j-1(e).

17 The AHA defines "aircraft" to include "any contrivance used  
18 for flight in air." 16 U.S.C. § 742j-1(c); see also 50 C.F.R. §  
19 10.12. Regulations implemented by the Secretary of the Interior  
20 define "harass" as "to disturb, worry, molest, rally, concentrate,  
21 harry, chase, drive, herd or torment." 50 C.F.R. § 19.4.

22 . . .

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26 <sup>1</sup> Stayner filed a verified claim of ownership to the white  
27 metal frame parasail and the white Toyota Tacoma pickup truck. No  
28 party claimed the red frame parasail. Upon Plaintiff's motion, the  
court awarded default judgment against the red frame parasail on  
April 12, 2001.

1 II. BACKGROUND<sup>2</sup>

2 Claimant Steven Stayner is a big game guide from Mesa,  
3 Arizona. Since 1998, the United States Fish and Wildlife Service  
4 ("Service") has been investigating Stayner for violations of the  
5 AHA.

6 In October 1998, California Fish & Game Warden Lieutenant Joe  
7 Brana reported Stayner's boasts of using a powered parachute<sup>3</sup> to  
8 scout "trophy antelope" in the area northwest of Seligman,  
9 Arizona.<sup>4</sup> Stayner also showed Brana photographs of a large buck,  
10 which appeared to have been taken directly above the deer.

11 Also in October 1998, Service investigators received  
12 information from a concerned private citizen who observed a powered  
13 parachute "chase" a herd of antelope in Cataract Canyon, Arizona.  
14 The citizen reported that a Toyota pickup truck appeared to follow  
15 the powered parachute. When the citizen later saw a similar truck,  
16 he approached the driver and reported what he had seen. The driver  
17 indicated that Steve "Steiner," a phonetic spelling that the  
18 Service understands as Stayner, piloted the parachute. The driver  
19 further stated that Stayner was guiding hunters the next day and  
20 was trying to locate elk with his aircraft.

21 Service Special Agent Leo Suazo initiated undercover contact  
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23 <sup>2</sup> Claimant Stayner did not include a factual statement in  
24 either motion to dismiss. The following description derives  
25 exclusively from Plaintiff's complaint, although the government  
26 raised additional allegations in its response brief.

27 <sup>3</sup> The complaint utilizes the term "parasail." Plaintiff  
28 clarifies that "parasail" and "powered parachute" are commercial  
terms. Resp. at 5 n.1. Both parties use the term "powered  
parachute" for purposes of this motion.

<sup>4</sup> Stayner did not know Brana's occupation.

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1 with Stayner in March 1999. In telephone conversations, Stayner  
2 told Suazo that he used his powered parachute to view deer and to  
3 select specific animals for hunt. The two organized a guided hunt  
4 in October 1999.

5 On October 20, 1999, Stayner met Suazo at Phoenix Sky Harbor  
6 Airport. The two then drove in Stayner's Toyota pickup truck  
7 (Defendant 3) to retrieve Stayner's white metal frame powered  
8 parachute (Defendant 2). With the powered parachute in tow, they  
9 headed north to an area near the Grand Canyon. The next day, Suazo  
10 and a surveillance helicopter observed Stayner in his powered  
11 parachute. The helicopter tracked Stayner flying back and forth in  
12 a grid-like motion, at a very low altitude, and in a pattern  
13 consistent with a search for wildlife. The pilots also watched the  
14 powered parachute chase a deer, causing it to run at a high rate of  
15 speed. Upon returning to land, Stayner told Suazo that "he jumped  
16 the big buck" near their camp.

17 On October 22, 1999, Stayner again used his powered parachute  
18 to locate game. After conducting a low-level search, Stayner  
19 returned to ground and reported "jumping" another large trophy  
20 buck. He told Suazo that he would have two deer to choose from in  
21 hunting.

### 22 **III. NOTICE OF SUPPLEMENTAL AUTHORITY**

23 Before discussing the motions to dismiss, the court addresses  
24 the parties' dispute over Plaintiff's Notice of Supplemental  
25 Authority. On May 9, 2001, Plaintiff filed, "for informational  
26 purposes," an interim decision rendered by Judge Teilborg in CR-00-  
27 1185-PHX-JAT. That criminal suit involves A. Paul Stewart,  
28 Claimant in the parallel civil suit CIV-00-1569-PHX-RCB. In the

1 relevant order, Judge Teilborg considered several of the same  
2 issues presented in Stayner's motions to dismiss.

3 Stayner challenges Plaintiff's notice. He argues that the  
4 ruling is based, in part, on oral arguments held before Judge  
5 Teilborg. Accordingly, he asks the court to supplement the record  
6 with the transcripts from those arguments, or, in the alternative,  
7 to strike Plaintiff's supplemental authority.

8 It is unnecessary to either order transcripts from the hearing  
9 before Judge Teilborg or to strike the supplemental authority. The  
10 court is entirely capable of considering the order while noting its  
11 non-binding and non-precedential value. Having answered this  
12 dispute, the court will now consider the merits of Claimant's  
13 motions.

#### 14 **IV. MOTIONS TO DISMISS**

15 Stayner submitted two motions to dismiss the forfeiture  
16 complaint. The first focuses on the meaning of the AHA and whether  
17 it applies to Claimant's conduct. The second questions whether the  
18 statute can be constitutionally applied to Stayner's activities.

##### 19 **A. Understanding the AHA**

20 Stayner challenges whether his conduct warrants penalty under  
21 the AHA. He contends that the statute prohibits airborne  
22 activities only when a hunter<sup>5</sup> is present on board the aircraft or  
23 on the ground and hunting in conjunction with the person in the  
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25 <sup>5</sup> Claimant provides his own definition of "hunter:" a person  
26 who is armed and actively pursuing wildlife with the intent to  
27 "take" it as defined in 50 C.F.R. § 10.12: to pursue, hunt, shoot,  
28 wound, kill, trap, capture, or collect, or attempt to pursue, hunt,  
wound, kill, trap, capture, or collect. Mot. at 3 n.1.  
Plaintiff challenges this definition, noting the lay definition of  
"hunt" does not require the "armed" element.

1 aircraft. Mot. at 21-27. Alternatively, he argues that Congress  
2 intended to reach only airborne activities coordinated with an  
3 onboard or on-the-ground hunter. S. Mot. at 2-5.<sup>6</sup>

4 The plain meaning rule is a cornerstone of statutory  
5 interpretation. It provides that:

6 Where the language is plain and admits of no more than one  
7 meaning the duty of interpretation does not arise and the  
8 rules which are to aid doubtful meanings need no discussion.

9 Caminetti v. United States, 242 U.S. 470, 485 (1917). Here, the  
10 statute is plain and unambiguous. Each subsection of 16 U.S.C. §  
11 742j-1(a) is separated by "or," not "and." The statute penalizes  
12 any person who:

- 13 1. while airborne in an aircraft shoots or attempts to shoot  
14 for the purpose of capturing or killing any bird, fish,  
15 or other animal; or
- 16 2. uses an aircraft to harass any bird, fish, or other  
17 animal;

18 16 U.S.C. § 742j-1(a) (emphasis supplied). The prohibited conduct  
19 is therefore disjunctive, creating liability for aerial harassment,  
20 independent of shooting or attempting to shoot. See Reiter v.  
21 Sonotone Corp., 442 U.S. 330, 339 (1979) (terms used in the  
22 disjunctive should "be given separate meanings, unless the context  
23 dictates otherwise"); United States v. Tucor Int'l, Inc. 238 F.3d  
24 1171 (9th Cir. 2000) (noting plain meaning of "or" in Hyde  
25 Amendment indicates a disjunctive test).

26 Although the statute is unambiguous, for completeness the  
27 court will examine to the legislative history to see if the plain

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28 <sup>6</sup> The court will use "S. Mot." when referencing Stayner's  
"separately filed motion to dismiss the government's complaint for  
forfeiture in rem on the grounds that 16 U.S.C. § 742j-1 is  
unconstitutionally vague as applied to the claimant."

1 meaning of the words is at variance with the policy of the statute  
2 as a whole or if there is clearly expressed legislative intention  
3 contrary to the language. See Escobar Ruiz v. I.N.S., 838 F.2d  
4 1020, 1023 (9th Cir. 1988) (overruling on other grounds recognized  
5 by Castillo-Villagra v. I.N.S., 972 F.2d 1017 (9th Cir. 1992)).  
6 Claimant challenges that forfeiture based solely on subsection  
7 (a)(2) would conflict with legislative intent.

8 Congress enacted the AHA primarily in response to public  
9 outcry over a 1969 NBC film depicting the slaughter of wolves, shot  
10 from aircraft. See Claimant's Ex. 6 at 3-4; Claimant's Ex. 7 and  
11 3. As Representative Obey, co-sponsor of the AHA, commented:  
12 "killing animals from an airplane is hardly a legitimate sport."  
13 Claimant's Ex. 8 at 16. Co-sponsor and Representative Saylor  
14 exhorted:

15 There are certain individuals, who are, in my opinion, about  
16 as low as a human could possibly get, when with all of the  
17 modern devices that it is possible to place at the command of  
18 an individual, they are unwilling to walk, they are unwilling  
19 to tramp, they are unwilling to do anything else, but they  
would like to hire somebody to fly them around in an airplane  
and harass game and birds so that they may walk home and hang  
some animal's head from their walls in their den.

20 See Claimant's Ex. 5 at 8.

21 Claimant seizes upon these statements to support his  
22 understanding that the AHA intended only to reach airborne conduct  
23 coordinated with an onboard or on-the-ground hunter. The court  
24 finds a much broader theme in these statements: "unsportsmanlike  
25 behavior." Questioning before the House emphasized this point:

26 Mr Anderson: Your bill is basically aimed at "sportsman?"  
27 Mr Saylor: Well, sportsman, so-called.  
28 Mr. Anderson: Yes, that is why I put the quotes around the  
word "sportsman," in this instance.

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1 Claimant's Ex. 5 at 14. The extension beyond mere shooting from an  
2 aircraft to target harassment of wildlife is consistent with a  
3 congressional desire to eliminate "unsportsmanlike behavior"  
4 similar to that which Stayner allegedly undertook: using a powered  
5 parachute to scout, uncover, scare, and herd a particularly worthy  
6 buck. The plain meaning of the statute presents no conflict with  
7 this intent. See Claimant's Ex. 5 at 1 ("these bills would make it  
8 unlawful for anyone while airborne in an aircraft to shoot at or  
9 harass [wildlife]...").

10 This conclusion is supported by United States v. One Bell Jet  
11 Ranger II Helicopter, 943 F.2d 1121 (9th Cir. 1991). As here, One  
12 Bell involved AHA forfeiture proceedings solely on the basis of 16  
13 U.S.C. § 742j-1(a)(2). The claimants had used a helicopter to  
14 harass bighorn sheep; no "hunter," as defined by Stayner, was  
15 present. Although ultimately finding that government misconduct  
16 weighed against forfeiture, the Ninth Circuit held these facts  
17 formed a sufficient basis for forfeiture. 942 F.2d at 1124-27.

18 Claimant argues that even if 16 U.S.C. § 742j-1(a)(2)  
19 penalties are proper, the court should employ the "rule of lenity"  
20 to deny forfeiture. The rule of lenity states that "where there is  
21 ambiguity in a criminal statute, doubts are resolved in favor of  
22 the Defendant." United States v. Bass, 404 U.S. 336, 347-50  
23 (1971). The rule is inapplicable; the AHA is unambiguous.

24 The court concludes that the plain language of 16 U.S.C. §  
25 742j-1(a)(2) controls. The United States properly sought  
26 forfeiture under that provision.

27 **B. The AHA and Powered Parachutes**

28 Stayner raises another challenge to the AHA. He argues that

1 the statute's prohibition against using "aircraft" to harass  
2 wildlife does not or was not intended to implicate powered  
3 parachutes. Mot. at 27-28.

4 The AHA defines "aircraft" to include "any contrivance used  
5 for flight in air." 16 U.S.C. § 742j-1(c). The applicable  
6 regulations echo the statutory language. 50 C.F.R. § 10.12 (" . . .  
7 any contrivance used for flight in air"). See also 49 U.S.C. §  
8 40102(6) (setting general definition for "aircraft," applicable to  
9 transportation statutes under Air Commerce and Safety, as ". . .any  
10 contrivance invented, used, or designed to navigate, or fly in, the  
11 air"). This broad definition clearly and unambiguously includes  
12 Claimant's powered parachute.

13 Stayner nevertheless asks the court to look beyond the  
14 statute's plain language to find that it conflicts with  
15 congressional intent. In support, Claimant notes that Congress  
16 focused exclusively on helicopters and general aviation aircraft  
17 when discussing the statute. Mot. at 27. He also highlights that  
18 one AHA penalty is revocation of the violator's airman certificate-  
19 -an item not required for pilots of powered parachutes.

20 Stayner's argument defies common sense. Congress was clearly  
21 concerned with "shooting or harassing of wildlife from any  
22 aircraft." 50 C.F.R. § 19.1 (emphasis added). The Senate  
23 specifically noted that ". . . harassing and chasing wildlife at  
24 low altitudes would certainly produce a safety hazzard."  
25 Claimant's Ex. 7 at 5. As powered parachutes fly at low altitudes,  
26 the purpose of the AHA would not be best met by limiting the  
27 statute to airplanes and helicopters.

28 The court concludes that the plain language of the AHA must

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1 control. The statute is applicable to all aircraft, including  
2 powered parachutes. This holding in no way conflicts with the  
3 congressional intent underlying the AHA.

4 **C. Congressional Regulation of Powered Parachutes**

5 Stayner next argues that the AHA cannot apply to powered  
6 parachutes. He first contends that Congress has opted out of  
7 regulating ultralight aircraft, rendering 16 U.S.C. § 742j-1  
8 inapplicable to powered parachutes. Mot. at 28-31. His second  
9 argument centers on Congress' power to regulate activities in "non-  
10 navigable" airspace. Mot. at 31-34. This argument dovetails with  
11 his final contention that the AHA, as applied to powered  
12 parachutes, exceeds Congress' power under the commerce clause.  
13 Mot. at 35-36.

14 **1. Current Regulations**

15 Federal rules govern the operation of ultralight vehicles,  
16 including powered parachutes. 14 C.F.R. § 103. Qualified vehicles  
17 are exempt from the airworthiness standards, registration  
18 requirements, and pilot certification standards necessary for other  
19 aircraft. 14 C.F.R. § 103.7. The exemptions, however, do not  
20 indicate that "Congress has essentially opted out of the federal  
21 regulation of ultralights, their pilots and their use." Mot. at  
22 31. To the contrary, 14 C.F.R. § 103 sets standards for ultralight  
23 vehicles as well as operating instructions for the aircraft. There  
24 is no indication that the AHA would therefore not apply to powered  
25 parachutes.

26 Alternatively, 14 C.F.R. § 103.1 mandates that ultralight  
27 vehicles be "used for recreation or sport purposes only." Failure  
28 to comply with this proscription triggers "all aircraft

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1 certification, pilot certification, equipment requirements, and  
2 aircraft operating rules applicable to the particular operation."  
3 Pl. Ex. 2 (Advisory Circular 103-7) at 3. Accordingly, even if the  
4 court accepts Stayner's argument that powered parachutes are  
5 unregulated and not subject to the AHA, his use of a powered  
6 parachute in the context of a commercial enterprise would render  
7 him subject to general aviation regulations, including the AHA.

8 2. The Commerce Clause

9 Stayner challenges that the AHA cannot be constitutionally  
10 applied to powered parachutes as they do not fly in "navigable  
11 airspace." Plaintiff contests this position.

12 Courts have twice found the AHA valid under the commerce  
13 clause. See United States v. Helsley, 615 F.2d 784 (9th Cir.  
14 1979); United States v. Bair, 488 F. Supp. 22 (D.C. Neb. 1979).  
15 Each focused on Congress' intent to regulate the safety of the  
16 national air space. Helsley, 615 F.2d at 786; Bair, 488 F. Supp.  
17 at 26. However, neither Helsley nor Bair addressed the specific  
18 issue of powered parachutes. Accordingly, the court must conduct  
19 its own analysis to determine if the AHA can be constitutionally  
20 applied to these machines.

21 Congress does not have unlimited authority to regulate under  
22 the commerce clause. See United States v. Lopez, 514 U.S. 549  
23 (1995). The Supreme Court has set forth three broad areas of  
24 permissible regulation: (1) the use of the channels of interstate  
25 commerce; (2) protection of the instrumentalities of interstate  
26 commerce, or persons or things in interstate commerce, even though  
27 the threat may come only from intrastate activities; and (3)  
28 activities having a substantial relation to interstate commerce.

1 Lopez, 514 U.S. at 558-59.

2 a. *Channels of Interstate Commerce*

3 Congress has declared exclusive sovereignty of the airspace  
4 over the United States, granting a "public right of transit through  
5 the navigable airspace." 49 U.S.C. § 40103(a)(1) & (2). The  
6 extent of Congress' avigational power over is analogous to, stems  
7 from, and is subject to the same constitutional limitations as  
8 Congress' regulatory power over the "navigable waters" of the  
9 United States. See Helsley, 615 F.2d at 786. Accordingly,  
10 Congress has defined "navigable airspace" to include "airspace  
11 above the minimum altitudes of flight prescribed by regulations  
12 under this subpart and subpart III of this part, including airspace  
13 needed to ensure safety in the takeoff and landing of aircraft."  
14 49 U.S.C. § 40102(a)(30). That definition is complemented by the  
15 regulations found at 14 C.F.R. § 91.119, which designate the  
16 minimum altitudes of flight over non-congested areas as 500 feet  
17 above the surface and, over open water and sparsely populated  
18 areas, 500 above any person, vessel, vehicle, or structure.

19 Federal regulations further delineate airspace into six  
20 classes: A, B, C, D, E, & G. 14 C.F.R. § 91.119. Stayner contends  
21 that powered parachutes fly only in class G airspace. He further  
22 characterizes the class as "non-navigable" and therefore  
23 constitutionally exempt from federal regulation. These arguments  
24 fail.

25 Powered parachutes are not restricted to class G airspace.  
26 With prior authorization, they may fly in other classes of  
27 airspace. 14 C.F.R. §§ 103.17, 103.23. The vehicles also have the  
28 mechanical ability to fly in other classes of airspace; the

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1 manufacturer indicates that Stayner's vehicle could reach an  
2 altitude of 10,500 feet. Claimant's Ex. 2. Thus, Stayner's  
3 argument that powered parachutes are limited to class G airspace  
4 fails.<sup>7</sup>

5 It is also clear that Congress both can regulate and has  
6 regulated class G airspace. Commercial aircraft both land and  
7 takeoff in class G airspace; these are controlled activities.  
8 Furthermore, federal regulations set the operating rules for  
9 ultralight vehicles. 14 C.F.R. § 103 Subpart B. The FAA  
10 promulgated the regulations to address the increase in ultralight  
11 activity and correlative increase in the "potential hazard to other  
12 aircraft and operators, as well as to the ultralight operators  
13 themselves." Pl. Ex. 2 at 2. The FAA found that "operations of  
14 these vehicles are now a significant factor in aviation safety."  
15 Id. Accordingly, the court rejects Stayner's argument that powered  
16 parachutes fly only in "non-navigable" airspace.

17 In conclusion, the court finds that the AHA, as applied to  
18 powered parachutes, validly regulates the use of a channel of  
19 interstate commerce: navigable airspace. Lopez, 514 U.S. at 558.  
20 There is no additional requirement that the regulated activity  
21 substantially effect interstate commerce. See United States v.  
22 Ripinsky, 109 F.3d 1436, 1444 (9th Cir. 1997). Thus, it is  
23 constitutional under the Commerce Clause. This holding would be  
24 sufficient to dispose of Stayner's commerce clause challenge.

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26 <sup>7</sup> Furthermore, it appears that the federal regulations  
27 governing ultralight craft define class G space as 1,200 feet or  
28 less above the surface. 14 C.F.R. § 103.23. This would bring  
ultralights within the very definition of navigable airspace (500  
feet or more in non-congested areas). 14 C.F.R. 91.119.

1 Nevertheless, in an abundance of caution, the court examines  
2 whether the AHA meets the other Lopez standards.

3 b. *Instrumentalities of Interstate Commerce*

4 Congress enacted the AHA to protect wildlife as well as  
5 aircraft and airborne passengers. The Subcommittee on Fisheries  
6 and Wildlife heard testimony about mass slaughter of wildlife,  
7 property damage, and at least one death resulting from a mid-air  
8 collision where two pilots engaged in airborne hunting. Helsley,  
9 615 F.3d at 787; Claimant's Ex. 6 at 4; Claimant's Ex. 5 at 19.  
10 This testimony and Congress' clearly articulated safety concerns  
11 indicate that the AHA comes within the ambit of the second Lopez  
12 category: regulation of the instrumentalities of interstate  
13 commerce and protection of persons and things in interstate  
14 commerce.

15 Stayner challenges that the AHA, as applied to powered  
16 parachutes, is distinguishable because powered parachutes are used  
17 solely for intrastate recreational purposes. Despite Stayner's  
18 position, powered parachutes are not limited to intrastate use  
19 either by federal regulations, 14 C.F.R. § 103, or the  
20 manufacturer's operating instructions, Claimant's Ex. 2. However,  
21 even assuming that use of powered parachutes is strictly an  
22 intrastate activity, the statute would still be constitutional;  
23 for, Lopez reaches persons or things in interstate commerce, even  
24 though the threat may come only from intrastate activities. Lopez,  
25 514 U.S. at 558; Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d  
26 1041, 1046 (D.C. Cir. 1997) (upholding prohibition of "taking"  
27 endangered animals, applied to a species of fly found solely within  
28 one state). The FAA has specifically noted the threat ultralight

1 vehicles pose to other aircraft and operators, stating that  
2 "operations of these vehicles are now a significant factor in  
3 aviation safety." Pl. Ex. 2 at 2.

4 The court therefore finds that the AHA, as applied to powered  
5 parachutes, meets the second Lopez standard. There is no  
6 additional requirement that the regulated activity substantially  
7 effect interstate commerce. See United States v. Ripinsky, 109  
8 F.3d 1436, 1444 (9th Cir. 1997). Again, this conclusion would be  
9 sufficient to uphold the statute; the court will nevertheless  
10 examine whether the statute meets the third Lopez category.

11 c. *Substantially Effects*

12 The final Lopez category authorizes congressional regulation  
13 of activities that substantially effect interstate commerce.  
14 Lopez, 514 U.S. at 558-59. The Supreme Court utilized this  
15 standard to evaluate the contested statute in Lopez, which made it  
16 a federal crime to knowingly possess a firearm in a school zone.  
17 The Court concluded that the statute exceeded Congress' authority  
18 under the commerce clause. This holding rested in large part on  
19 the non-economic and criminal nature of the statute. See also  
20 United States v. Morrison, 529 U.S. 598, 610 (2000) (analyzing  
21 Lopez to conclude that the civil remedy provision of the Violence  
22 Against Women Act exceeded congressional regulatory power under the  
23 commerce clause).

24 The AHA contrasts with the federal statutes at issue in both  
25 Lopez and Morrison. It directly addresses economic activity:  
26 hunting. Congress was well aware of the economic character of  
27 hunting, and particularly airborne hunting, when it enacted the  
28 AHA. See Claimant's Ex. 5 at 8 (there are certain individuals who

1 call themselves sportsman. . . they are unwilling to walk, they are  
2 unwilling to tramp. . . but they would like to hire somebody to fly  
3 them around in an airplane and harass game and birds) (emphasis  
4 supplied). The statute directly targets the practice of hiring a  
5 pilot to assist in the scouting and killing of quarry.

6 The AHA regulates not only commercial activity, but interstate  
7 commercial activity. Hunters travel interstate as do the animals  
8 they hunt. The AHA therefore serves as a national program with  
9 direct and substantial effects on interstate commerce. See Palila  
10 v. Hawaii Dep't of Land and Natural Resources, 471 F. Supp. 985,  
11 994-95 (D. Haw. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981) ("a  
12 national program to protect and improve the natural habitats of  
13 endangered species preserves the possibilities of interstate  
14 commerce in these species and of interstate movement of persons,  
15 such as amateur students of nature or professional scientists who  
16 come to a state to observe and study these species, that would  
17 otherwise be lost by state inaction.").

18 Stayner finally asserts that his activities occurred solely  
19 within the state of Arizona and therefore did not substantially  
20 affect interstate commerce. Even construing Stayner's activities  
21 as solely intrastate in character would not invalidate the statute.  
22 "Where a general regulatory statute bears a substantial relation to  
23 commerce, the de minimis character of individual instances arising  
24 under that statute is of no consequence." Lopez, 514 U.S. at 557  
25 citing Wickard v. Filburn, 317 U.S. 111, 197 n.27 (1942).

26 The court concludes that the AHA, as applied to powered  
27 parachutes, meets this third Lopez standard. All of Stayner's  
28 commerce clause arguments fail.

1 D. Vagueness of the Term "Harass"

2 Subsection (a) (2) of 16 U.S.C. § 742j-1 prohibits use of an  
3 aircraft to "harass any bird, fish, or other animal." Regulations  
4 promulgated by the Secretary of Interior define "harass" as "to  
5 disturb, worry, molest, rally, concentrate, harry, chase, drive,  
6 herd or torment." 50 C.F.R. § 19.4. Stayner argues that the  
7 definition is unconstitutionally vague.

8 A criminal statute may be "void for vagueness" under the Due  
9 Process Clause if (1) the law does not provide minimally adequate  
10 notice to individuals who might be prosecuted, or (2) it grants too  
11 much discretion to law enforcement authorities without standards to  
12 avoid arbitrary and discriminatory enforcement. See Kolender v.  
13 Lawson, 461 U.S. 352, 357 (1983). Statutes that do not regulate  
14 fundamental constitutional rights must be examined in light of the  
15 facts of the case. See Chapman v. United States, 500 U.S. 453, 467  
16 (1991). Thus, Stayner cannot suggest activities where the term  
17 "harass" might be found vague; he must show that the statute did  
18 not give notice that his activities would be prohibited.<sup>8</sup> Id.

19 Here, Plaintiff charges Stayner with flying at low altitudes  
20 in order to chase and herd wild animals as part of a plan to scout  
21 "trophy" animals for himself and others to hunt. A plain reading  
22 of the definition of "harass" would encompass these activities.  
23 This holding is supported by United States v. One Bell Jet Ranger  
24 II Helicopter, 943 F.2d 1121 (9th Cir. 1991). In One Bell, the

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25  
26 <sup>8</sup> Accordingly, Stayner's reliance on Chicago v. Morales, 527  
27 U.S. 41 (1999) is misplaced. That case, evaluating a state law  
28 penalizing "criminal street gang members" from "loitering" in  
public places, implicated constitutionally protected rights. Id.  
at 54.

7

1 Ninth Circuit found that the Service's definition of harass ". . .  
2 clearly advances the purposes of the statute." Id. at 1124.  
3 Similar to Stayner, the claimants attempted to locate animals with  
4 a helicopter in order to identify the best trophy animal. Id. at  
5 1125. The court found this activity satisfied the statute,  
6 including any intent requirement that might be read into it. Id.  
7 at 1126.<sup>9</sup>

8 The court concludes that "harass" is not unconstitutionally  
9 vague. Stayner's motion to dismiss on this basis is denied.

10 **V. CONCLUSION**

11 The court denies both of Stayner's motions to dismiss. The  
12 AHA properly applies and can constitutionally be applied to  
13 Stayner's conduct. Accordingly,

14 IT IS ORDERED denying Claimant's motion to dismiss (doc. 6);  
15 and

16 IT IS FURTHER ORDERED denying Claimant's separately filed  
17 motion to dismiss (doc. 8).

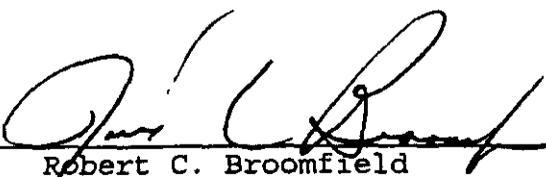
18 DATED this 22 day of July, 2001.

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Robert C. Broomfield  
Senior United States District Judge

23 copies to counsel of record

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25

26 <sup>9</sup> "The legality of using aircraft to scout or locate wildlife,  
27 when done at an appropriate distance" was not before the court in  
28 One Bell. 943 F.3d 1125 n.3. This does not affect the court's  
analysis. Stayner must show that the statute did not give notice  
that his activities would be prohibited. He has not made this  
showing.