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**IN THE UNITED STATES DISTRICT COURT, DISTRICT OF WYOMING**

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STATE OF WYOMING,

Petitioner,

Case No. 14-CV-248-R

v.

**MOTION TO INTERVENE**  
**(Fed. R. Civ. P. 24)**

UNITED STATES DEPARTMENT OF  
INTERIOR, et al.,

Respondent,

and

FRIENDS OF ANIMALS, a non-profit  
organization and PROTECT MUSTANGS, a  
non-profit organization,

Proposed Respondent-  
Intervenors.

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## I. INTRODUCTION

Friends of Animals (“FoA”) and Protect Mustangs (collectively, “Applicants”) respectfully move to intervene in the above captioned case pursuant to Federal Rule of Civil Procedure 24(a). Petitioner, the State of Wyoming, has filed suit in this Court alleging that the Federal Respondents, the United States Department of Interior and the United States Bureau of Land Management (collectively, “BLM”), have failed to take action on the state’s request to remove “excess” wild horses from in Wyoming. Applicants, both non-profit animal advocacy organizations, and their members, have long-standing involvement in conserving wild horses in the western United States generally, and have specific conservation, academic, educational and recreational interests in wild horses in Wyoming. *See* Declaration of Craig C. Downer in Support of Friends of Animals and Protect Mustangs’ Motion to Intervene (hereinafter, “Downer Decl.”) ¶¶ 8-21; Declaration of Nicole Rivard in Support of Friends of Animals and Protect Mustangs’ Motion to Intervene (hereinafter, “Rivard Decl.”) ¶¶ 3-5; Declaration of Anne Novak in Support of Friends of Animals and Protect Mustangs’ Motion to Intervene (hereinafter, “Novak Decl.”) ¶¶ 2-14.

Applicants satisfy all four elements for intervention as of right under Federal Rule of Civil Procedure 24(a). First, this Motion is timely filed as there has not been any substantive activity in this case since the Petition for Review of Agency Action was filed on December 8, 2014. Second, Applicants and their members advocate for the protection of wild horses and frequently visit areas inhabited by wild horses in Wyoming to watch, admire, study, and photograph these animals. Third, resolution of this lawsuit in favor of the Petitioner, including the potential round-up and removal of wild horses, would impair Applicants’ interests as a majority of all Wyoming horses might be lost, or at the very least, only remnant herds will remain. Finally, BLM does not adequately represent Applicants’ interests in this litigation. As the Tenth Circuit has made clear, as a general rule the government’s broad public interest in defending a case like this cannot be said to protect the specific interests of private organizations and their members. Indeed, this has recently been shown to be true regarding the conservation of

the wild horses in Wyoming. Just this past year BLM settled a similar case to the detriment of the interests of Applicants. *See Rock Springs Grazing Assoc. v. Salazar, et al.*, No. 11-CV-263 (D. Wyo. Apr. 3, 2013).

In the alternative, Applicants request permissive intervention pursuant to Federal Rule of Civil Procedure 24(b) because they have claims and defenses that share with the main action common questions of law and fact with those of BLM. *See Fed. R. Civ. P. 24(b)*.

Applicants conferred with counsel for Petitioner, the State of Wyoming, who indicated that it does not oppose this Motion. Applicants have not conferred with BLM, as no counsel has entered an appearance for BLM at this time.

## **II. STATEMENT OF FACTS**

### **A. Status of Wild Horses in America.**

Wild horse populations are quickly disappearing from America. Currently, there is roughly only 40,000 horses on America's public lands, compared to the two to seven million that roamed across the country in the 1900's. In the state of Wyoming, there are less than 4,000 wild horses remaining. *See* Petition, Attach. 1 at 50, 149. Even before making the request underlying this action – that BLM remove additional wild horses – nearly six million acres of Herd Areas on BLM lands had been “zeroed out,” meaning there are **no** wild horses in these areas despite the fact that they were supposed to receive protection under the Free-Roaming Wild Horses and Burros Act (“WHA”). Downer Decl. ¶ 11. Small herds, restricted habitats, and round-ups threaten the continued survival of wild horses on America's public lands. Downer Decl. ¶ 9.

### **B. Background of Proposed-Intervenor Organizations.**

Friends of Animals (“FoA”) is a non-profit, international animal advocacy organization, incorporated in the state of New York since 1957. Rivard Decl. ¶ 3. FoA works to cultivate a respectful view of nonhuman animals, free-living and domestic. *Id.* FoA's goal is to free animals from cruelty and institutionalized exploitation around the world. *Id.* FoA informs its members

about animal advocacy issues and its progress in addressing them through its magazine, ActionLine, its website, and other public reports. *Id.* at ¶ 4.

FoA is a leading organization advocating for the preservation of wild horses on public lands. *Id.* at ¶ 5. On June 10, 2014, FoA filed a petition to list wild horses on federal public lands as a threatened or endangered species under the Endangered Species Act. *Id.* FoA has also published articles on wild horses. *Id.* at ¶ 8. Members of FoA regularly visit herd management areas to view, appreciate, study, and photograph wild horses. *Id.* at ¶ 13. FoA has also organized several events to educate the public about wild horses and the cruel impacts of the round-ups that Petitioner seeks here. *Id.* at ¶¶ 5, 8.

Protect Mustangs is a non-profit organization founded in 2011 to educate, protect and preserve native and wild horses. Novak Decl. ¶ 2. Protect Mustangs actively reaches out to its members and the public to educate them about native wild horses, and to advocate for the right of wild horses to live freely. *Id.* at ¶ 4. Protect Mustangs has a diverse membership base with some members living in Wyoming, some who visit Wyoming to view, study, and photograph wild horses, and many who want to go to Wyoming to see wild horses. *Id.* at ¶ 3.

Applicants and their members have a significant interests in the continued conservation and survival of wild horses in Wyoming. For example, Protect Mustangs member, Craig Downer, is a wildlife biologist specializing in the study of wild horses and their habitats. Downer Decl. ¶ 7. Mr. Downer has written several articles and books about wild horses, and has long evaluated the ramifications of the federal government's implementation of the WHA on wild horse populations in the west. *Id.* at ¶¶ 8-10. Mr. Downer has actively worked to protect wild horses in Wyoming. *Id.* at ¶¶ 11-12. He often travels to Wyoming to observe wild horses. *Id.* at ¶ 13. These trips assist him in his professional work as a wildlife biologist, and also help him contribute to the mission of Protect Mustangs. *Id.* at ¶¶ 13-16.

Likewise, FoA member, Ms. Rivard, is a horse lover and professional correspondent that has traveled to Wyoming as part of her work to bring attention to these highly intelligent, social

animals, and to inform other members and the public about the plight they now face. Rivard Decl. ¶ 8. Ms. Rivard would be devastated if any wild horses were removed from Wyoming, and would enjoy her trips to Wyoming far less if she was not able to observe and photograph wild horses while she was there. *Id.* at ¶ 22.

Finally, Ms. Novak, the Executive Director of Protect Mustangs, studies wild horse herds in Wyoming and is writing a book based on her observations. Novak Decl. ¶ 13. Ms. Novak also plans to visit Wyoming in 2015. During this upcoming trip, she hopes to: (1) view the unique wild horse herds found here; (2) photograph and film native wild horses for her documentary; and (3) study wild horses' natural behavior, their grazing patterns, and their niche in the ecosystem. *Id.* at ¶ 14. Ms. Novak would be personally distressed and professionally harmed if she could no longer observe and document Wyoming's wild horses in their natural free-roaming state. *Id.* at ¶ 13.

### **III. LEGAL BACKGROUND**

#### **A. Motions to Intervene under Federal Rule of Civil Procedure 24.**

##### *1. Elements of Intervention as of Right.*

Federal Rule of Civil Procedure Rule 24(a)(2) entitles a movant to intervene as of right if: (1) the movant's request to intervene is timely; (2) the movant claims an interest relating to the property or transaction that is the subject of the action; (3) the disposition of the litigation may, as a practical matter, impair or impede the movant's interest; and (4) the existing parties do not adequately represent the movant's interest. The Tenth Circuit has indicated on numerous occasions in recent years that it follows "a somewhat liberal line in allowing intervention." *See, e.g., WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010). Indeed, the Tenth Circuit has said that the factors of Rule 24(a)(2) are intended to "capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation," and, thus, are not "rigid, technical requirements." *San Juan Cnty. v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (*en banc*).

2. *Elements of Permissive Intervention.*

In those cases where a movant is not entitled to intervene as a matter of right, a court may grant permissive intervention under Federal Rule of Civil Procedure 24(b). Like intervention of right, permissive intervention is granted liberally. *See* 7C Wright & Miller, Federal Practice and Procedure § 1904 (3d ed. 1986). A movant must show: (1) a timely application and (2) that the movant’s claim or defense has a question of fact or law in common with the suit. *United States v. City of Las Cruces*, 289 F.3d 1170, 1189 (10th Cir. 2002).

**B. The Wild Free-Roaming Horses and Burros Act.**

The Wild Free-Roaming Horses and Burros Act of 1971 (“WHA”), 16 U.S.C. §§ 1331 et seq., was adopted to **protect**, not destroy, the remaining wild horses on federal public lands in the United States. *See* 16 U.S.C. § 1331 (“[W]ild free-roaming horses and burros shall be protected from capture, branding, harassment, or death, and to accomplish this they are to be considered in the area where presently found as an integral part of the natural system of public lands.”). Congress passed the WHA because it found that “wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West; that they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene.” *Id.* The WHA requires BLM to “protect and manage wild free-roaming horses and burros as components of the public lands. . . in a manner that is designed to achieve and maintain a thriving, natural ecological balance on the public lands.” 16 U.S.C. § 1333(a). Additionally, under the Act, wild horse ranges are to be **devoted principally** to horse welfare in keeping with the multiple-use management concept for the public lands. 16 USCS § 1332 (emphasis added).

In carrying out the WHA, BLM is authorized to make a determinations that for a particular herd management area, the presence of “excess” horses requires removal of certain animals from the range. *See Colorado Wild Horse & Burro Coal., Inc. v. Salazar*, 639 F. Supp. 2d 87 (D.D.C. 2009). The WHA defines the term “excess” as animals that “must be removed

from an area in order to preserve and maintain a thriving ecological balance and multiple-use relationship in that area.” 16 U.S.C. § 1332(f). Courts have long recognized that the making of an “excess” determination is largely left to the discretion of BLM. *See Cloud Found., Inc. v. Salazar*, 999 F. Supp. 2d 117, 125 (D.D.C. 2013) (finding that “BLM officials receive significant discretion to choose the wild horse and burro populations the range can support”).

#### IV. ARGUMENT

##### A. Applicants are Entitled to Intervene as a Matter of Right.

###### 1. *This Motion is Timely.*

Courts evaluate the following factors to determine whether an intervention motion is timely: “the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.” *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001). In this case, the Motion is timely. Petitioner filed a Petition for Review of Final Agency Inaction on December 8, 2014. The government has not filed an answer or any dispositive motion. Because this litigation is at such an early stage, intervention will not prejudice any party, and is “timely” within the meaning of Rule 24. *Id.* at 1250-51.

###### 2. *Applicants have the Requisite Cognizable Interest in this Action.*

The Tenth Circuit has stated that an applicant’s “claimed interest [under Rule 24] is measured in terms of its relationship to the property or transaction that is the subject of the action, not in terms of the particular issue before the district court.” *WildEarth Guardians v. Nat’l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010). This Circuit has further declared it “indisputable that a prospective intervenor’s environmental concern is a legally protectable interest.” *Id.* Over the years, the Tenth Circuit has identified numerous environmental-based interests sufficient to meet the interest prong of Rule 24(a), including the desire of an environmental organization and its members to: (1) observe a species in the wild (whether for aesthetic or recreation purposes); (2) defend a government rule where a Plaintiff’s challenge of

the rule could lead to environmental damage; (3) advance conservation goals; and (4) protect and conserve wildlife and its habitat. *See id.* at 1198-99 (citations omitted).

Here, Applicants have a significant interests in the continued conservation and survival of wild horses in Wyoming. Applicants' members regularly observe, photograph, and study the wild horses that are the subject of this action. *See Supra* at § II (B), Background of Proposed-Intervenor Organizations. For example, Mr. Downer has visited, viewed, and studied wild horses in Wyoming on many occasions and is very concerned that if the state is successful in forcing BLM to remove even more wild horses from federal public lands in Wyoming, he “would no longer be able to study and observe these magnificent animals in Wyoming except as a few showcase, overly reduced and dysfunctional, remnant herds.” Downer Decl. at ¶ 19. Applicants and their members also work to advance conservation of wild horses in Wyoming. Novak Decl. ¶¶ 4, 6-9; Rivard Decl. ¶ 5.

### 3. *Wyoming's Legal Challenge May Impair Applicants' Interests.*

The Tenth Circuit has stated that the third element – impairment – presents “a minimal burden.” *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010). Indeed, a “would-be intervenor must show only that impairment of its substantial legal interest is **possible** if intervention is denied.” *WildEarth Guardians v. United States Forest Service*, 573 F.3d. 992, 995 (10th Cir. 2009) (emphasis added). A court “may consider any significant legal effect in the applicant's interest and it is not restricted to a rigid *res judicata* test.” *Natural Resources Defense Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978). In considering the Tenth Circuit's direction on this element, district courts have previously found that a sufficient likelihood of “impairment” exists to the interests of wild horse advocates in actions brought against BLM over the removal of wild horses. *See, e.g., Western Rangeland Conservation Assoc. v. Jewell, et al.*, Civ. No. 14-cv-00327 (D. Utah Sept. 5, 2014).

Petitioner's requested relief, if granted, will undoubtedly impair Applicants' interest in viewing, studying, and preserving wild horses in Wyoming. Petitioner's requested relief – a court



order compelling respondents to remove wild horses from Wyoming (Petition ¶ 5) – poses a direct threat to Applicants’ interest in conserving these wild horses in their current habitat. As explained above, if wild horses are removed from their ranges in Wyoming, Applicants and their members’ scientific, artistic, and recreational interests in wild horses would be placed in jeopardy, if not lost altogether. *See Utahns for Better Transp. v. United States DOT*, 295 F.3d 1111, 1116 (10th Cir. 2002) (examining plaintiff’s complaint and requested relief to determine whether applicant intervenors’ interests will be impaired by case’s disposition). Indeed, the Petitioner’s requested relief, if granted, would not only impair these interests but would also preclude Applicants from advocating that the same horses Petitioner seeks to have removed should be preserved on the range. *See Clinton*, 255 F.3d at 1253-54 (citations omitted). Thus, Applicants fulfill the “minimal burden” of showing the possibility that disposition of this lawsuit could harm their ability to protect their interests. *See WildEarth Guardians v. Nat’l Park Serv.*, 604 F.3d at 1199 (citations omitted).

4. *Applicants’ Interests are Not Adequately Represented by Existing Parties.*

According to the Tenth Circuit, this final element of Rule 24(a)(2) also presents “a minimal burden.” *WildEarth Guardians*, 604 F.3d at 1199. The applicant must show only the possibility that representation **may be inadequate**. *Id.* Moreover, the Tenth Circuit has “repeatedly recognized that it is ‘on its face impossible’ for a government agency to carry the task of protecting the public’s interest and the private interest of the prospective intervenor.” *Id.* (citations omitted.)

Here, Applicants and the other parties’ interests diverge for three reasons. First, as noted above, BLM has shown a willingness to settle actions seeking to force the removal of wild horses in Wyoming. *See Rock Springs Grazing Assoc. v. Salazar, et al.*, No. 11-CV-263 (D. Wyo. Apr. 3, 2013). In *Salazar*, BLM did not advocate for wild horse conservation or any of the interests of Applicants. *Id.* Instead, BLM entered a consent decree with the plaintiffs in which BLM agreed to remove all wild horses from a checkerboard area of private and public land in

southwestern Wyoming. *Id.* Subsequently, BLM proceeded to remove 1,263 wild horses from the range, which reduced wild horse populations in the affected areas to below their Appropriate Management Levels (“AMLs”). *See* Pet., Att. 3. *See also* Consent Decree, *Wyoming v. U.S. Dept. of Interior*, Civ. No. 2:03-00169 (D. Wyo. Aug. 29, 2003). Second, BLM has already stated that it will consider removal of more wild horses in Wyoming in 2015. *See e.g.* Pet., Attach. 3. Finally, BLM might choose to defend this action in a manner that seeks to balance the interests of both those advocating for removal of wild horses (like Wyoming and various grazing associations) and those advocating for greater wild horse protection (like the Applicants). This could result in the removal of some or most, but not all wild horses in Wyoming. Applicants and their members, however, oppose all removals of these animals and believe that the AMLs set for the Herd Management Areas in Wyoming are too low, outdated, and do not accurately reflect the number of wild horses that will create a thriving ecological balance in the state. *See* Rivard Decl. ¶¶ 8-10, 18; Downer Decl. ¶ 11. At very least, Applicants’ scientific, artistic, and recreational interests would be impaired if Petitioner was to prevail either outright in this case or through some type of settlement with the federal government. *See* Rivard Decl. ¶¶ 9, 22.

Furthermore, Applicants are uniquely situated to defend their members’ interests in a way the government is not. Applicants will contribute necessary factual and legal elements to this case that the existing parties may very well neglect or avoid. FoA and Protect Mustangs represent a diverse set of individuals whose professional, aesthetic, recreational, educational, economic, and other interests depend on the protection and preservation of free-roaming wild horses. Novack Decl. ¶ 3; Rivard Decl. ¶¶ 3-5. They will bring their distinct perspectives to this litigation, as well as their vast expertise and first-hand experience concerning wild horse protection, and BLM’s management practices. *See, e.g.*, Downer Decl. ¶¶ 6-13, 17-18; Rivard Decl. ¶¶ 8, 18 -20.

In short, because not all interests implicated by the issues raised by the Complaint will be presented by the existing parties, Applicants meet the final prong for intervention as of right under Rule 24(a), and should be allowed to intervene as a matter of right.

**B. In the Alternative, Friends Should be Granted Permissive Intervention Status.**

If the Court finds Applicants are not entitled to intervention as of right, the Court should allow their alternative motion for permissive intervention under Fed. R. Civ. P. 24(b). As discussed above, this motion is timely and is not prejudicial. Applicants' interests relate to the same issues that are subject of Petitioner's lawsuit, and Applicants participation would bring important information to this action. Because Applicants interests are significantly affected by this litigation and adverse to the existing parties, allowing intervention will help to avoid additional and potentially inconsistent litigation results. Therefore, Applicants respectfully request that the Court grant intervention as of right pursuant to Rule 24, or alternatively grant leave for permissive intervention under Rule 24(b).

**V. CONCLUSION**

For the reasons discussed above, Applicants respectfully request the Court grant this Motion for Leave to Intervene.

Respectfully submitted this 17th day of December, 2014.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 17, 2014, I served a copy of the foregoing Motion to Intervene upon all counsel of record via the Court's CM/ECF system.

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