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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF ANIMALS *Plaintiff*, v. UNITED STATES BUREAU OF LAND MANAGEMENT, *Defendant*, and STATE OF UTAH, *Proposed Defendant-Intervenor*.	**PROPOSED INTERVENOR-DEFENDANT STATE OF UTAH'S STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF RENEWED MOTION TO INTERVENE** Case No. 1:18-cv-02029-RDM

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The Proposed Intervenor-Defendant, State of Utah (the "State") submits this Statement of Points and Authorities in Support of Renewed Motion to Intervene in this action as a matter of right pursuant to Federal Rule of Civil Procedure 24(a) or, in the alternative, permissively under Rule 24(b).

Pursuant to U.S. District Court for the District of Columbia Local Rule 7(m), counsel for the State has conferred with counsel for Plaintiff, Friends of Animals, and Federal Defendant, the Bureau of Land Management ("BLM"). Friends of Animals has indicated that it will oppose the State's Motion and BLM has indicated that it will take no position on the Motion at this time, pending review of the Motion and Memorandum in Support thereof.

I. INTRODUCTION

Under the Wild Free-Roaming Horses and Burros Act of 1971 ("WH&B Act"), BLM is required to "manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance." 16 U.S.C. § 1333(a). To ensure proper management, federal regulations also establish Herd Management Areas ("HMAs") for "the maintenance of wild horse and burro herds." 43 C.F.R. § 4710.3-1. For each HMA, these regulations set an Appropriate Management Level ("AML"), which is a target population range for the wild horses and burros ("WH&B") intended to allow the HMA to maintain the required "thriving natural ecological balance" management standard. When AML is exceeded, WH&Bs become known as "excess animals" "which must be removed…in order to preserve and maintain a thriving natural ecological balance." 16 U.S.C. § 1332(f)(2).

Based on the amount of food (grasses) and water available on public lands, "in 2018 the [BLM] and the U.S. Forest Service determined a suitable number of [WH&Bs] was 26,690

animals on the 29.4 million acres designated HMAs on public land across 10 western states." See Dr. Nicki Frey, *U.S. Knowledge and Opinions of Free-Roaming Horses*, Utah State University Extension, https://www.usuhumanwildlifeinteractions.com/freeroamhorsesurvey.html. However, the current population is much higher than the AML. In fact, "as of 1 March 2019, the [BLM] estimated that there were 88,090 wild horses and burros inhabiting designated HMAs, surrounding herd areas, and other private and public lands." *Id.* It is estimated that "without more active management to reduce growth rates on public rangelands the free-roaming horse population could exceed 160,000 by 2025." *Id.* With this type of overpopulation and level of excess animals, "scientists and managers expect more free-roaming horses and burros will die from dehydration and starvation, due to lack of available resources on the landscape. Furthermore, without more active management, the negative impacts of free-roaming horses and burros to native wildlife and rangeland habitat will become irreversible." *Id.*

In addition to establishing HMAs and AML, Federal regulations also require BLM to develop Herd Management Area Plans ("HMAP") which "establish short- and long-term management and monitoring objectives for a specific WH&B herd and its habitat." *See* BLM Wild Horses and Burros Management Handbook, BLM Handbook H-4700-1, pp. 11, *available at*: https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_H-4700-1.pdf (2010); citing 43 C.F.R. § 4710.3-1. Each HMAP is "prepared with public involvement through a site-specific environmental analysis and decision process (NEPA). During the NEPA process, the environmental impacts associated with a range of alternative management strategies for the WH&B herd and its habitat is analyzed." *Id.* at 36; *see also* National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*.

In 2018 BLM finalized the NEPA process for two of several HMAs in the State of Utah: the Muddy Creek HMA in Emery County (283,400 acres) and the Onaqui Mountain HMA in Tooele County (205,394 acres). *See* July 30, 2018, Decision Record ("DR") and Finding of No Significant Impact ("FONSI") for the Muddy Creek Wild Horse Herd Management Area Gather Plan and Environmental Assessment, DOI-BLM-UT-G020-2017-0032-EA ("Muddy Creek Ten-Year Plan"); December 14, 2018, Decision Record and Finding of No Significant Impact for the Onaqui Mountain Herd Management Area Population Control and Environmental Assessment, DOI-BLM-UT-W010-2017-0009-EA ("Onaqui Mountain Ten-Year Plan"). Both the Muddy Creek Ten-Year HMA Plan and the Onaqui Mountain Ten-Year HMA Plan authorized BLM to conduct gathers of excess animals as necessary over a ten-year period to achieve and maintain AML on each HMA. *Id.*

Operating under the Onaqui Mountain DR and FONSI, BLM conducted a gather on the Onaqui Mountain HMA to remove excess animals in mid-July 2021. The Environmental Assessment ("EA") for the Onaqui Mountain HMA completed by BLM found that the AML for the Onaqui Herd is 121 horses. *See* Onaqui Mountain DR, *supra*. To meet this AML and return ecological balance to the range, BLM gathered 435 horses, with 109 of those gathered released back onto the range. *See* BLM Update 2021, https://www.blm.gov/programs/whb/utah/ 2021-onaqui-wild-horse#:~:text=Adoption,The%20Onaqui%20Mountain%20wild%20horses%20will%20be%20available%20for%20adoption,awarded%20and%20scheduled%20for%20pickup.

II. COURSE OF PROCEEDINGS

The original Complaint in this action was filed on August 29, 2018 (Dkt.1) and claimed that BLM had violated the WH&B Act and NEPA in its adoption of two Ten-Year HMAPs (Pine

Nut and Muddy Creek). The Complaint asked the court to enjoin BLM actions authorized by these plans. On September 13, 2018, an Amended Complaint (Dkt. 5) was filed adding two more HMAPs (Prior Mountain and Eagle Complex) again alleging violations of the WH&B Act and NEPA and still seeking the same injunctive relief. On February 7, 2019, Plaintiff filed a Second Amended Complaint (Dkt. 17) which added a fifth HMAP (Onaqui Mountain), again alleging violations of WH&B Act and NEPA and seeking injunctive relief.

Not until August 20, 2021, did Plaintiff file its third and operative Amended Complaint ("Third Amended Complaint") (Dkt. 77). This Third Amended Complaint was ostensibly filed in response to the July 2021 Onaqui gather. See Memorandum of Points and Authorities in Support of Plaintiff's Motion for Leave to File Third Amended and Supplemental Compliant (Dkt. 75) at p. 1 ("Friends of Animals seek leave to amend and supplement its complaint to clarify the relief sought in this case and to cover the recent roundup of 435 wild horses from the Onaqui Mountain Herd Management Area"). In addition to the WH&B Act and NEPA claims attacking the HMAP's and injunctions enjoining them, Plaintiff now seeks to specifically enjoin further Onaqui roundups as well as an order requiring BLM to return July gathered horses to the Onaqui HMA.

The State filed its original Motion to Intervene on October 4, 2021, citing identified economic harms as protectable interest bases for both standing and intervention as of right. At the January 18, 2022, hearing on the State's motion, the Court denied the motion without prejudice, thereby allowing the State to refile its motion.

This Renewed Motion to Intervene is premised for purposes of both standing and intervention upon the State's protectable sovereign and quasi–sovereign interests in the preservation, conservation, and management of wildlife on the Onaqui and Muddy Creek HMAs.

III. ARGUMENT

The State has Article III standing to bring this motion and the right to intervene as a full participant in this litigation. It has a protectable interest in the protection, propagation, management, conservation, and distribution of wildlife located on or near the Muddy Creek and Onaqui Mountain HMAs that will be further injured if BLM is prevented from future gathers of WH&Bs on these HMAs or is required to return excess horses to the Onaqui Mountain HMA. The resultant harm or injury to wildlife is imminent and ongoing and can be remedied only if Friends of Animals' claims are defeated.

The State meets the requirements to intervene as a matter of right in this case. The State's motion is timely. It has protectable interests in the protection, propagation, management, conservation, and distribution of wildlife located in the State of Utah on or near the Muddy Creek HMA and the Onaqui Mountain HMA. These interests will be further injured if BLM is prevented from conducting gathers of WH&B on these HMAs. Moreover, BLM cannot adequately represent the legally protectable interests of the State because BLM's interests differ from those of the State, and BLM cannot make all the arguments specific and important to wildlife protection, propagation, and management. These narrower interests differ from BLM's mission and interests in wild horse management. Consequently, BLM is not capable of adequately representing the unique interests of the State.

A. The State Has Article III Standing.

The D.C. Circuit Court requires all prospective intervenors to establish Article III standing: injury-in-fact, causation, and redressability. *Old Dominion Elec. Coop. v. Fed. Energy Regulatory Comm'n*, 892 F.3d 1223 (D.C. Cir. 2018): *Crossroads Grassroots Policy Strategy v. Federal Election Comm'n*, 788 F.3d 312 (D.C. Cir. 2015). The inquiry as to whether a proposed intervenor has standing turns on whether there is an invasion of a legally protected interest that is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical; (c) which would be traceable to the plaintiff's challenge; and (d) which would be prevented by defeating the plaintiff's challenge. *Crossroads*, 788 F.3d at 316-17 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)) (quotations omitted).

1. The State Has Protectable Interests in Its Sovereign and Quasi-Sovereign Rights and Duties to Regulate Wildlife on Federal Lands.

a. Courts Have Long Recognized State Public Trust and Police Power Authority Over Wildlife.

Courts in this country have long recognized the states' authority over wildlife, including wildlife on federal lands. *See Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) ("Unquestionably the States have broad trustee and police powers over wild animals within their jurisdiction."); *Defenders of Wildlife v. Andrus*, 627 F. 2d 1236 (D.C. Cir. 1980). As noted in *Kleppe*, this authority is derived from two separate and independent sources, *i.e.*, public trust and police powers. The evolution of these sources as they apply to the regulation of wildlife, as well as their relationship to the Constitution, is traced through a series of Supreme Court cases.

Geer v. Connecticut, 161 U.S. 519 (1896), involved a conviction under a Connecticut statute making it unlawful to transport certain game birds out of state. The defendant challenged

the statute as violating the Commerce Clause. In affirming the conviction, the Court ruled that based upon the common law, the state had the authority to regulate wildlife within its borders, and that this authority was held "as a trust the benefit of the people." *Id.* at 529. Tracing the history of this authority over wildlife back through Roman law and the English common law, the Court ruled that:

> The wild game within a state belongs to the people in their collective sovereign capacity. It is not subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good. (citation omitted).

Id. In finding that the statute in question did not violate the Commerce Clause, the Court concluded:

> We take it to be the correct doctrine in this that the ownership of wild animals so far as they are capable of ownership, is in the state, as the representative and not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common. (citation omitted).

Id. While not the basis for its ruling, the Court identified another source of state authority over wildlife: the police power. "Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the state to preserve for its people a valuable food supply." (citation omitted) *Id.* at 534.

Over subsequent years, the Court explored the constitutional limits of the state's authority over wildlife. *See*, *e.g.*, *Missouri v. Holland*, 252 U.S. 416 (1920) (holding that the 1916 Migratory Bird Treaty Act invalidated a conflicting state law under the Supremacy Clause);[1] *Lacoste v. Louisiana*, 263 U.S. 545 (1924) (State severance tax on wildlife did not interfere with

[1] The Court referenced both the sovereign (police power) and quasi-sovereign (public trust) as the sources of the asserted state authority.

interstate commerce and was not "repugnant" to the Commerce Clause.);[2] *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (In distinguishing Geer, the Court held that a Louisiana statute restricting exploration of shrimp violated the Commerce Clause);[3] *Toomer v. Witell*, 334 U.S. 385 (1948) (South Carolina statute imposing non-resident fees on shrimping boats violated the Commerce Clause and the Privileges and Immunities Clause);[4] *Kleppe v. New Mexico*, 426 U.S. 529 (Held that the state statute authorizing the capture and sale of wild burros violated the federal Wild Horses and Burros Act which Congress properly enacted pursuant to the Property Clause);[5] *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978) (Held that Montana non-resident elk hunting license fees did not violate Privileges and Immunities Clause or the Equal Protection Clause).[6]

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[2] The Court found that "[t]he legislation is a valid exertion of the police power of the state to conserve and protect wildlife for the common benefit. *Id*. at 550.

[3] The authority of the state to regulate and control the common property in game is well established. These and many other cases show that the state owns or has power to control the game and fish with its borders not absolutely or as proprietor or for its own use or benefit but in its sovereign capacity as representative of the people. (citations omitted). *Id*. at 4.

[4] "It does not follow from the existence of power to regulate, that such power need not be exercised with the confines of generally applicable Constitutional limitations. In the view we take, the heart of this case is whether South Carolina's admitted power has been so exercised." *Id*. at 394.

[5] "Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions. (citation omitted). But, as *Geer v Connecticut* cautions, those powers exist only "in so far as [their] exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution." Ibid. "No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of (wildlife), but it does not follow that its authority is exclusive of paramount powers". *Id*. at 545.

[6] "Appellants contend that the doctrine on which *Corfield*, *McCready* and *Geer* all relied has no remaining vitality. We do not agree. Only last Term, in referring to the "ownership" or title language of those cases and characterizing it "as no more than a 19th-century legal fiction," the Court pointed out that language nevertheless expressed 'the importance to its people that a State have power to preserve and regulate the exploration of an important resource.'" *Id*. at 386.

The most recent case in which the Supreme Court has addressed state authority over wildlife is *Hughes v. Oklahoma*, 441 U.S. 322 (1979). Here the Court was faced with a case that was factually very similar to Geer. The state statute forbade the transportation of natural minnows out of state for sale. In ruling that the statute was "repugnant to the Commerce Clause," the Court expressly overruled Geer, citing the evolution of the law discussed above. ("*Geer v. Connecticut* was decided relatively early in that evolutionary process. We hold that time has revealed the error of the early resolution reached in that case, and accordingly *Geer* is today overruled.) *Id.* at 326.

The Court went on, however, to make clear that the state nonetheless holds regulatory authority over wildlife within its borders so long as that regulation does not conflict with federal law:

> The overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within the borders. Today's decision makes clear, however, that States may promote this legitimate purpose only in ways consistent with the basic principle that "our economic unit is the Nation," (citation omitted) and that when a wild animal "becomes an article of commerce… its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." (citation omitted) *Id.* at 338, 339.

b. Federal Statutory Law Recognizes the State's Protectable Interests in Wildlife

Not only do federal courts recognize states' regulatory authority over wildlife within its borders, federal statutory and regulatory laws do as well. And such recognition extends to the federal public lands.

In *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980), the court was asked to require the Secretary of Interior to prepare an environmental impact statement ("EIS") under NEPA before allowing the State of Alaska to kill wolves on federal lands in furtherance of state

wildlife management. The court denied the requested relief on the basis that there was no "major federal action" involved and that Secretary inaction did not trigger NEPA. In the course of its analysis, the court addressed appellant's contention that the Federal Land Policy and Management Act ("FLPMA") required an EIS when state wildlife programs carried out on federal land have significant environmental consequences. Rejecting this argument, the court first noted state authority over wildlife. ("It is unquestioned that the States have broad trustee and police powers over wild animals within their jurisdiction.") (citing to *Kleppe*) *Id.* at 1249. The court then referenced several federal laws and regulations that recognize state wildlife authority on federal lands, including FLPMA.[7]

Regarding FLPMA, which governs BLM lands, the court quoted, in part, Section 302 (b), 43 U.S.C. § 1732 (b):

> . . . Provided further, that nothing in this act shall be construed as authorizing the secretary concerned 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.

By these federal laws, Congress has expressly recognized that which the federal courts have long articulated: the State has regulatory authority for wildlife within its borders, including on federal lands, unless Congress has expressly stated otherwise.

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[7] In addition to FLPMA, the court references: (1) the Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. § 528. ("Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife on the national forests."); (2) the National Wildlife Refuge Systems Administration Act, 16 U.S.C.§ 528. ("The Provisions of this act shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System."); (3) The Wild and Scenic Rivers Act, 16 U.S.C. § 1284 (a) ("nothing in this chapter shall affect the jurisdiction or responsibilities of the States with respect to fish and Wildlife.")

Recognizing the primacy of state authority regarding wildlife on federal lands, in 1970 the Secretary of the Interior developed a "policy statement" to govern state-federal cooperation. 43 C.F.R. § 24 (Department of the Interior Fish and Wildlife Policy: State-Federal Relationships). This policy is premised upon state authority over wildlife on federal lands:

> . . . This policy is intended to reaffirm the basic role of the States in fish and resident wildlife management, especially where States have primary authority and responsibility, and to foster improved conversation of fish and wildlife.
>
> 43 C.F.R. § 24.2 (Purpose).[8]

Reflecting the pronouncement in *Kleppe v. New Mexico*, *supra*, of the two sources of state authority over wildlife, 43 C.F.R. § 24.3 (General Jurisdictional Principles) provides:

> In general, the States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State.

In terms of the respective roles of state and federal government in wildlife management, 43 C.F.R. § 24.4(i) provides:

> (i) Federal agencies of the Department of the Interior shall:…
> (2) Within their statutory authority and subject to the management priorities and strategies of such agencies, institute fish and wildlife habitat management practices in cooperation with the States to assist the States in accomplishing their fish and wildlife resource plans.

[8] The policy makes specific reference to the Congressional enactment, *e.g.* WH&B Act, expressly giving federal responsibility over certain species, but makes clear that this authority is limited. Since development of the policy, a number of Congressional enactments and court decisions have addressed State and Federal responsibilities for fish and wildlife with the general effect of expanding Federal jurisdiction over certain species and uses of fish and wildlife traditionally managed by the States. In some cases, this expansion of jurisdiction has established overlapping authorities, clouded agency jurisdictions, and, due to differing agency interpretations and accountabilities, has contributed to confusion and delays in the implementation of management programs. Nevertheless, Federal authority exists for specified purposes while State authority regarding fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific, overriding Federal law. 43 C.F.R. § 24.1.

The circumstances before the Court in this action provide an example of this state-federal cooperative relationship. Pursuant to the WH&B Act, BLM has sole management authority over wild horses and burros on federal lands. However, this management must be coordinated with concomitant state management authority over the other wildlife that shares the habitat. The State has a protectable interest in making sure that a proper balance between the two is maintained.

c. The State By Statute Has Assumed the Responsibility for the Protection, Propagation, Management, Conservation, and Distribution of Wildlife Within Its Borders.

In the exercise of its police powers, and in furtherance of its public trust responsibilities, the State through its Legislature has statutorily assumed regulatory authority over wildlife. The "Wildlife Resources Code of Utah," UTAH CODE ANN. § 23-13-1, *et. seq.*, and Section 23-14-1, *et. seq.*, ("Wildlife Code") sets forth the policies of the State regarding wildlife within its borders as well as the framework within which the management of wildlife is administered.

Like some forty-seven other states,[9] the State of Utah has declared that all wildlife within Utah is the property of the State as a sovereign.[10] The Wildlife Code defines "wildlife" to include "all vertebrate animals living in nature, except feral animals." UTAH CODE ANN. § 23-13-2 (54)(c). The Wildlife Code creates the Division of Wildlife Resources ("DWR"). UTAH CODE ANN. § 23-14-1(1)(a) as the wildlife authority in the State which is appointed trustee and custodian of protected wildlife[11] in Utah. (Shirley Dec., ¶ 5). DWR is charged with the "powers,

[9] Blumm and Paulsen, *The Public Trust in Wildlife*, 2013 Utah L. Rev. 143, 148.
[10] All wildlife existing within the state, not held by private ownership and legally acquired, is the property of the state. UTAH CODE ANN. § 23-13-1 (1953).
[11] "Protected wildlife" is defined to include all vertebrate animals living in nature. UTAH CODE ANN. § 23-13-2(38)(a). *See also* Declaration of Justin Shirley, Director of the Utah Division of Wildlife Resources ("Shirley Dec.") (Attached as Attachment 1) ¶ 3.

duties, rights and responsibilities provided in the Wildlife Code. UTAH CODE ANN. § 23-14-1(1)(b). DWR is mandated with the duty to "protect, propagate, manage, conserve, and distribute protected wildlife" throughout Utah. UTAH CODE ANN. § 23-14-1(2)(a).

DWR has an interest in wild horses and burros inasmuch as they have an impact on wildlife. (Shirley Dec., ¶ 6). Greater sage grouse, pronghorn, bighorn sheep, and mule deer are a few of the wildlife species for which DWR is responsible that use the same habitats as wild horses and burros in Utah. *Id.* at ¶ 7. Wild horses can affect or alter the way that wildlife is able to access and use critical habitat. They can damage water sources and actively displace wildlife from water sources and riparian corridors which are critically important to wildlife in Utah's arid environments. *Id.* at ¶¶ 8-10.

Excessive use by wild horses has reduced habitat quality for some greater sage grouse populations in Utah. It also reduces forage available for Utah's struggling deer herds. *Id.* ¶ 12.

In short, the State of Utah through its DWR has the statutory responsibility and duty to protect, propagate, conserve, and maintain the vulnerable wildlife in the State's arid and ecosystem and wildlife habitat. Wild horses in excess numbers threaten this wildlife and distort the ecological balance that the WH&B Act expressly requires. The injuries to wildlife caused by this imbalance are concrete and ongoing. The State has a protectable interest in making sure that the appropriate balance between wild horses and other wildlife under DWR's custodial care is restored. Plaintiff, however, seeks to upend BLMs efforts to restore balance through its program of periodic gathers such as the recent Onaqui gather. A rejection of Plaintiff's challenges will allow gathers to go forward, thereby enabling the State to better the wildlife under its care.

2. The State's Protectable Interests In and Duties To Wildlife Have Been Injured-In-Fact and Will Continue to be Injured if Friends of Animals is Successful In Blocking or Reversing BLM's Excess Wild Horse Gathers.

Friends of Animals' Third Amended Complaint asks the Court to declare that BLM's long-term HMAPs, and any gathers of excess wild horses performed in accordance with these plans, violate the APA and NEPA and are, therefore, invalid. In addition, the Third Amended Complaint seeks an injunction blocking any further gathers of excess wild horses unless and until BLM conducts additional NEPA reviews. Further, the Third Amened Complaint seeks an order requiring BLM to return to the HMAs any wild horses that have been gathered. All of these claims and prayers for relief are directed toward the two Utah-based HMAs: Muddy Creek and Onaqui Mountain. Were these actions to be granted, the State's protectable interests in the protection, conservation, and management of wildlife on or near these HMAs would continue to be injured.

Both the Onaqui Mountain Herd Management Area Environmental Assessment ("Onaqui EA")[12] and the Muddy Creek Wild Horse Herd Management Area Gather Plan Draft Environmental Assessment ("Muddy Creek DEA")[13] indicate the presence of State-managed wildlife on the HMAs. Also, both the Onaqui EA and the Muddy Creek DEA conclude that, under the no action alternatives in which no gathers would occur, there would be adverse impacts on wildlife as food and water sources would be depleted.[14]

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[12] Joint Appendix Volume 3: Onaqui (Dkt. 45-2).
[13] Joint Appendix Volume 2: Muddy Creek (Dkt. 46-1).
[14] Wild horse populations would be expected to eventually crash at some ecological threshold; however wild horses, livestock, and wildlife all experience suffering and possible death of individual animals as rangeland resources continued to degrade. Onaqui EA, p. 63.

Cumulative Impacts related to the No Action Alternative would be as stated above, as numbers of horses increase it would adversely affect vegetive resources, which horses, livestock

In substantiation of these conclusions, the State submits the attached declarations from two experts: Terry Messmer (Attachment 2) and Brock McMillan (Attachment 3). Professor Messmer's work and declaration focus on the impact that excess feral (wild) horses have on greater sage grouse. Professor McMillan's work and declaration focus on the effect that excess feral horses have on native ungulates such as pronghorn and mule deer.

According to Professor Messmer, recent scientific literature confirms that feral and wild horse populations that exceed AML set by BLM on designated HMAs affect shrubland structure and composition by consuming limited resources, trampling vegetation and soils, and add vectors of invasive species. (Messmer Dec., ¶ 7). There is a growing body of evidence that native ungulates such as pronghorn and mule deer change their behavior in arid systems, particularly during times of drought. *Id.* ¶ 8.

Several recent studies have specifically evaluated the effects of wild horses and burros on sage grouse habitat and the habitat of other wildlife that compete in the same habitat for limited food, water, and shelter. One such study conducted by the U.S. Geological Survey ("USGS"), found that free-roaming horse populations have continued to grow and have exceeded AML settings across most herd management areas. *Id.* ¶¶ 10-11. Additionally, the USGS Study found, on average, for every fifty percent (50%) increase in horse abundance over the AMLs set by BLM, there was an annual decline in sage-grouse abundance by 2.6%. *Id.* ¶ 12.

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and wildlife compete for, as well as an increased competition for water resources and impact the springs and streams. This would result in a reduced carrying capacity of the area, as well as an increased erosion and reduced functioning condition of the riparian and upland areas. The animals could very well eat themselves out of house and home, which would eventually be reflected in reductions to the grazing permits, as well as possible catastrophic die off of the wild horses and other wildlife in the area, from either drought or a harsh winter. Muddy Creek DEA, p. 40, 41.

According to the same study, horse abundance at or below AML coincided with sage-grouse estimates that were consistent with trends at non-horse areas elsewhere in the study region. Moreover, the USGS study found, that, if horse herd sizes could be maintained at AML, there is potential for rebound where sage-grouse populations have previously declined. *Id.* ¶¶ 12-13. Additionally, although the study showed support for current AMLs, it recognized that well-designed local monitoring programs of other ecological responses such as the functionality of riparian systems, or the abundance and trends of plants or other key wildlife indicators, would help ensure proper management decisions. The USGS study concluded that, if feral horse populations continue to grow current rates unabated, model projections indicate sage-grouse populations will be reduced within horse-occupied areas by more than seventy percent (>70%) by 2034 (15-year projection), on average compared to 21.2% estimated for control sites. *Id.* ¶¶ 14-15.

Another study came to similar conclusions after evaluating the effect of wild horse grazing in the Benmore Pastures and Government Creek areas of Northern Utah, where the Onaqui herd at issue in the instant litigation roam. Mikiah R. Carver, *Understanding the Interaction Between Habitat Use of Feral Horses and the Abundance of Greater Sage-Grouse in the Great Basin*, BYU SCHOLARS ARCHIVE, 2021 ("Carver Study"), *Id.* ¶ 16. The Carver Study focused more specifically on the effect of ungulate grazing on sage-grouse brood-rearing habitat. It concluded that intense ungulate and the combined utilization of late-brood rearing habitat by feral horses and livestock decreased habitat suitability for sage-grouse hens rearing their young. *Id.* ¶¶ 17-18.

Based on these recent studies, and similar studies evaluating sage grouse habitat range wide, it is Professor Messner's scientific opinion that wild horse populations have a negative effect on sage grouse populations and may also have a negative effect on native ungulate populations. This effect is prevalent in areas of Utah where wild and feral horses roam, particularly in the area where the Onaqui herd resides. *Id.* ¶¶ 19-20.

Professor Messmer has spent considerable time working on sage grouse conservation in the area where the Onaqui hoses roam, also known as the Sheeprocks Sage Grouse Management Area, and is aware that the State has spent in excess of $1,000,000 to restore sage grouse habitat and translocate additional birds to augment and stabilize declining local populations. *Id.* ¶ 21. The continues to have a significant interest in ensuring that wild hose populations are managed appropriately in HMAs containing sage grouse habitat. *Id.* ¶ 22.

In addition to the above research and as part of the 2019 Utah Sage Grouse Plan, Professor Messmer also works collaboratively with the State to develop and coordinate the State's Community-Based Conservation Program ("CBCP") for sage grouse. The CBCP employs local working groups, located throughout the State, to address localized threats to sage-grouse and sagebrush obligate species that inhabit Utah. Each of those local working groups created unique management plans, designed to address local threats to the range, including damage caused by wild horse and burros. Using adaptive management techniques outlined in those local plans, the State has mitigated, and continues to mitigate, regional and statewide conservation threats to sage-grouse and other sagebrush obligate species. *Id.* ¶¶ 22-26.

In the area of specific impacts of wild horses on native ungulates, Professor McMillan has authored several recent studies. (McMillan Dec., ¶ 3). He, along with his colleagues, have

evaluated the extent of competition between feral horses and burros and other native ungulates, e.g., deer, elk, and pronghorn, and potential management implications associated with such competition. *Id.* ¶ 4. In the first of those studies, they studied the influence of feral horses on the use of water by native species in a semi-arid environment where availability of water is limited. *Id.* ¶ 5. Specifically, they used remote cameras to monitor water sources in the Great Basin Desert where horses had drinking access and where horses were excluded (with fencing) to compare (1) composition of native communities and (2) water usage by native species. Of the 67,205 images of mammals, 79% contained horses. Horses were associated with decreased richness and diversity of native wildlife species at water sources. Additionally, native wildlife species held fewer visits and spent less time at water sources frequented by horses. These results indicated that horses displaced other wildlife species at water sources, thereby providing evidence of a negative influence on how communities of native wildlife access a limited resource in an arid environment. *Id.* ¶¶ 6-10.

In a subsequent study, Professor McMillan and his colleagues sought to gain a better understanding of the broader spatial and temporal implications of horse-induced competition on access to water by native ungulates to enable better conservation and management of native wildlife species. *Id.* ¶ 11. Specifically, their objective was to determine whether pronghorn and mule deer spatially or temporally altered their use of water to minimize interactions with horses. *Id.* ¶¶ 12, 13. The researchers found that native coagulates used water sources less often where horse activity was high, indicating that spatial avoidance occurred. Further, they observed significant differences in peak arrival time for pronghorn, but not mule deer, at horse-occupied sites versus sites where horses were absent or uncommon, indicating that temporal avoidance

may be more important for pronghorn than mule deer. *Id.* ¶ 14. They also found strong support for the interactive negative effect of elevated temperature and subsequent increased activity of horses at water sources on drinking patterns of pronghorn and mule deer. *Id.* ¶ 15. These findings indicated that feral horses further constrain access to an already limited resource for native species in a semi-arid environment. *Id.* ¶ 16.

Finally, Professor McMillan and his team specifically investigated interference competition between pronghorn and feral horses at water sources within the Great Basin. *Id.* ¶ 17. They observed horses and pronghorn at high-use water sources and recorded all occurrences and outcomes of pronghorn/horse interactions. They then assessed differences in pronghorn behavior in the presence of versus the absence of horses. Pronghorn invested more time on vigilance behavior and less time foraging or drinking in the presence of horses than in their absence. *Id.* ¶¶ 18-20. Nearly half of pronghorn/horse interactions resulted in pronghorn exclusion from water. Based on this research, they concluded that, as feral horse numbers increase competition for water will subsequently increase. This is consistent with other recent research regarding the effects of feral horses on native ungulate species. *Id.* ¶¶ 21-23.

According to Professor McMillan most of the HMAs in Utah have both mule deer and pronghorn populations. *Id.* ¶ 24.

The Onaqui Mountain and Muddy Creek HMAs are large, arid, and ecologically fragile. Wild horses compete directly with other wildlife for food, water, and shelter. Any increase in wild horse number (or, conversely, any failure to decrease the excess number of wild horses), will have an immediate and life-threatening effect upon wildlife. The State has both a right and a duty to protect, propagate, and preserve this wildlife. These interests are placed in significant

jeopardy should the ecological imbalance that would result from the action pursued by Friends of Animals be continued.

3. The Injury To The State's Protectable Interest in Wildlife is Mitigated by BLM's Gathers of Excess Wild Horses and the Continuation of the Programs Authorized by the HMAPs Will Further Enhance the State's Wildlife Efforts.

The third prong of the standing requirement is that the injury be redressable by means of the relief sought. *Friends for Animals v. Norton*, 322 F. 3d 728 (D.C. Cir. 2003); *Lujan V. Defenders of Wildlife*, 504 U.S. 555. In this case, the redressability of the injury to the State's interest in the preservation and propagation of wildlife on the subject HMAs is in the upholding of BLM's HMPAs and any gathers of excess wild horses thereby authorized. The recognized adverse impacts of excess wild horses on wildlife have been, and will continue to be, mitigated if BLM's actions to gather excess wild horses are allowed to continue. Even though the State's protectable interests in wildlife are not the direct object of Friends of Animals' Third Amended Complaint, an adverse decision by the Court invalidating gathers will directly and adversely impact the State's interests. In other words, the State's interests, though not the target complaint, are "among the injured" if the requested relief is granted. *See Lujan v. Defenders of Wildlife*, *supra*. at 563 ("But the injury in fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured"). The injuries to State's interest in wildlife protection, propagation, and management will be redressed if BLM's actions are upheld and allowed to continue.

B. The State is Entitled to Intervene as a Right.

Intervention as of right under Rule 24(a) is subject to a four-part test: (1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction

which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect the interest; and (4) whether the applicant's interest is adequately represented existing parties. *Crossroads Grassroot Policy Strategies v. Federal Election Comm'n*, 788 F. 3d 312 (D.C. Cir. 2015); *Fund for Animals, Inc. v. Norton*, 322 F. 3d 728.

1. The State's Motion to Intervene is Timely

The timeliness requirement under Rule 24(a) is not a rigid test. The circumstances that should be considered include the "time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980). "[T]he requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014).

It is true that this case has been pending for more than three years. (Dkt. 84 at p. 13). Even so, the State's Motion to Intervene is still timely because the timeliness of a motion to intervene is "to be judged in consideration of all the circumstances." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001). While the 'time elapsed since the inception of the suit' is relevant…measuring the length of time passed 'is not in itself the determinative test'…because we do not require timeliness for its own sake. *Roane*, 741 F.3d at 151. Thus, while the overall duration of this case is a factor, it is not the determinative test. Instead, "the most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." *Id.* at 151. Accordingly,

"even where a would-be intervenor could have intervened sooner, in assessing timeliness a court must weigh whether any delay in seeking intervention 'unfairly disadvantage[d] the original parties.'" *Id.*; citing *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 908 (D.C. Cir. 1977).

Here, the State's intervention would not prejudice either of the existing parties. First, the State filed its Motion to Intervene on October 4, 2021, Dkt. 81, not long after the Plaintiff filed its Third Amended Complaint on August 20, Dkt. 77, and shortly after BLM filed the Supplemental Administrative Record on September 30, 2021. Friends of Animals and BLM are still wrestling with the Administrative Record. Only after those issues are resolved will the Court set a briefing schedule. Dkt. 82. As such, where the State has filed its Motion to Intervene within two months of the filing of the operative Third Amended Complaint and before BLM has filed its answer, the State's motion is timely and non-prejudicial. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (finding that motion to intervene filed less than two months after complaint was filed and before the Service filed an answer was timely). The State's intervention will not delay these proceedings. The State does not intend to challenge the Administrative Record and it will adhere to the schedule established by the Court for the briefing of cross-motions for summary judgment.

2. The State's Interests More than Meet the Requirements for Intervention as of Right and the State Will Suffer a Practical Impairment of Its Interests if the Court Rules in Plaintiff's Favor.

The D.C. Circuit Court of Appeals has held that a finding that the State has Article III standing alone is sufficient to establish that it has interest relating to the property or transaction that is the subject of the action. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735; *Crossroads Grassroots Policy Strategies v. Federal Election Comm'n*, 788 F.3d 312, 320 (D.C. Cir. 2015)

("And since Crossroads has constitutional standing, it *a fortiori* has an interest relating to the property…"). The discussion of the State's protectable interest in wildlife previously addressed in Part A(1)-(3) *supra* demonstrates the State's Article III standing and, therefore, its interest relating to the property for purposed of Rule 24 (a) intervention.

An applicant for intervention as of right must also demonstrate that the litigation "may as a practical matter impair or impede the movant's ability to protect its interests." Fed. R. Civ. P. 24(a)(2). However, the impairment standard presents a minimal burden. *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010). An intervenor must only show that impairment of its substantial legal interest is **possible** if intervention is denied." (emphasis added). *Id.*

Where, as here, the intervenor has benefited from agency action and that action is challenged, an unfavorable decision would remove the benefit, the intervenor's interest in protecting its interests is impeded. *See Crossroads*, 788 F.3d at 386. ("Our cases have generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit.").

If Friends of Animals is successful in this case, it is predictable that forage and water available for wildlife would be decreased within the affected HMAs, thereby diminishing wildlife habitat, and thereby impeding the State's ability to protect and propagate wildlife. Under *WildEarth Guardians*, *supra* at 604 F.3d 1192, 1199, it is only necessary for the State to show that this impairment is "possible." Here the impairment is certain.

3. The State's Interests Cannot Be Adequately Represented by BLM.

The burden of showing other parties cannot adequately represent an intervenor's interests is "minimal" and a movant need only show representation of its interest "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Here, the State's interests in regulating wildlife differ from BLM's interest in defending its NEPA analysis or, for that matter, complying with the WH&B Act. Furthermore, the "federal defendants have an obligation to represent the interests of the entire country," whereas the State is more narrowly concerned with the interests of Utahns. *Atl. Sea Island Grp. LLC v. Connaughton*, 592 F. Supp. 2d 1, 7 (D.D.C. 2008) (citation omitted) (finding federal defendants inadequately represented state interests).

As found in *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 997 (10th Cir. 2009), a non-federal actor should not be required to rely on a federal agency to protect its interests, in part because the agency could shift its policy positions during litigation. Therefore, even where "there may be a partial congruence of interests, that does not guarantee the adequacy of representation." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736-37 (D.C. Cir. 2003) (granting intervention). It is not unforeseeable that such a shift could occur.

Where *Connaughton* found that federal defendants inadequately represented state interests, and where *Trbovich* states that the burden on the would-be intervenor is "minimal" and a movant need only show representation of its interest "may be" inadequate, the State clearly meets this minimal standard of showing that the current parties may not adequately represent the State's own unique and sovereign interests.

4. The Litigation Will Practically Impair the State's Ability to Protect Its Interests.

An applicant for intervention as of right must also demonstrate that the litigation "may as a practical matter impair or impede the movant's ability to protect its interests." Fed. R. Civ. P. 24(a)(2). In the D.C. Circuit, courts look to the "practical consequences" of denying intervention. *Nat. Res. Def. Council v. Costle*, 561 F.2d at 909. This factor is satisfied where a judicial decision in the plaintiff's favor would make "the task of reestablishing the status quo . . . difficult and burdensome." *Fund for Animals*, 322 F.3d at 735. "It is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Costle*, 561 F.2d at 910. The same is true where the plaintiffs seek relief that would require would-be intervenors to advocate for their interests via burdensome administrative proceedings.

In *County of San Miguel v. MacDonald*, 244 F.R.D. 36, 47 (D.D.C. 2007), the court found the interests of trade organization intervenor-applicants to be sufficiently "impaired" by the plaintiff's lawsuit seeking to set aside the Service's "listing not warranted" finding under the Endangered Species Act for the Gunnison sage-grouse. Rejecting the plaintiff's arguments that the intervenor-applicants would not be impaired because their lawsuit would not result in an order compelling the defendants to actually list the species, the *San Miguel* court found that if plaintiffs were to succeed in their lawsuit, the time and resources the organizations would spend participating in the administrative process that "they would [have otherwise] ordinarily devote[d] to their businesses" was enough to find that their interests would be impaired. *Id.*

Here, the "practical consequences" of the Court's denial of the Intervenors' motion would be the impairment the States' ability to protect its interests in wildlife protection, propagation, and management on the Muddy Creek HMA.

Accordingly, the State has met its burden of showing that disposition of this matter in Plaintiff's favor (*i.e.*, invalidation of the Muddy Creek Ten-Year Plan, Onaqui Mountain Ten-Year Plan and the 2021 Onaqui Roundup) would cause a practical impairment of the State's interests and impair its ability to protect its interests.

C. If the Court Does Not Allow the State to Intervene as a Matter of Right, It Should Use Its Discretion to Grant Permissive Intervention.

As extensively analyzed above, the State has an interest in this litigation sufficient to establish standing. In the event this Court does not grant intervention as of right, the Court should permit the State to intervene permissively in this matter pursuant to Federal Rule of Civil Procedure 24(b)(1)(B), which states: "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Subsection (b)(3) provides: "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." District courts have "wide latitude" in deciding whether to grant permissive intervention. *See Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

As set forth above, the State's motion is timely and will not unduly delay these proceedings or prejudice adjudication of Friends of Animals' or BLM's rights.

Further, the defenses of the Intervenor share common questions of law and fact with the main action. This requirement is satisfied when "[t]he facts necessary to assert [the intervenor's] claim are essential[ly] the same facts as those necessary to establish [an existing party's] claim." *Butte Cty., CA v. Hogen*, No. CIV.A.08-519 HHK AK, 2008 WL 2410407, at *2 (D.D.C. June 16, 2008); citing *MeWuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, 246 F.R.D. 315,

320 (D.D.C. 2007). In the *Butte County* case, the court held that because "the Tribe's defense of Defendants' actions would raise the same factual and legal issues that Defendants will likely raise in support of their decisions…...the Tribe's claims share common questions of law and fact with the main action such that permissive intervention is proper." *Id.*

Here, as in *Butte County*, it is likely that the facts necessary to assert the State's, or intervenor's, claims and defenses are essentially the same facts as those necessary to establish BLM's claims and defenses. BLM will likely assert that BLM's approval of the Muddy Creek Ten-Year Plan, the Onaqui Mountain Ten-Year Plan, and the 2021 Onaqui Gather complied with all applicable legal requirements, is supported by substantial evidence in the Administrative Record, and is not arbitrary and capricious. *See generally* Dkt. 64 at 21-31. The facts necessary for BLM to support its decisions are essentially the same set of facts necessary for the State to assert its position that failure to manage WH&B populations will detrimentally affect the State's wildlife interests. Here, like in *Butte County*, the State's "claims share common questions of law and fact with the main action such that permissive intervention is proper."

Accordingly, if the Court does not allow the State to intervene as a matter of right, it should allow the State to intervene permissively.

IV. CONCLUSION

The State's voice and unique perspective needs to be heard in this matter. The State has a significant and protectable interest in its wildlife that is jeopardized by this action. Excess wild horse populations compete adversely with natural wildlife for food, water, and shelter. The State is charged with the protection, propagation, management, and conservation of wildlife other than wild horses. The past and future gathers that Friends of Animals challenges are presently the

only means by which an ecological balance in which wildlife can endure is achievable. The State has standing to participate as a party in this litigation, and it meets all of the tests for intervention as of right. In the alternative, the State should be granted permissive intervention.

*/s/Anthony Rampton*_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February 2022, the undersigned electronically transmitted the foregoing **MOTION TO INTERVENE OF THE STATE OF UTAH and PROPOSED INTERVENOR-DEFENDANT STATE OF UTAH'S STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE** to the Clerk's Office using the CM/ECF system which will send notification of this filing to all counsel of record.

/s/Anthony Rampton
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