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9
10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**

12 International Society for the Protection of)
13 Mustangs and Burros,)
14)
15 Plaintiff,)

16 vs.

17 United States Department of Agriculture,)
18 *et al.*,)
19 Defendants,)
20 _____)

21 No. 22-cv-08114-PCT-SPL
22) **CENTER FOR BIOLOGICAL**
23) **DIVERSITY AND MARICOPA**
24) **AUDUBON SOCIETY’S MOTION**
25) **FOR LEAVE TO FILE AN**
26) **AMICUS CURIAE BRIEF**
27) **CONCERNING PLAINTIFF’S**
28) **APPLICATION FOR**
) **TEMPORARY RESTRAINING**
) **ORDER AND PRELIMINARY**
) **INJUNCTION**

29 The Center for Biological Diversity and Maricopa Audubon Society (collectively
30 "the Center") respectfully move for leave to file an amicus curiae brief concerning
31 Plaintiff’s application for a temporary restraining order and preliminary injunction.

32 While the Center does not take a position as to the pending sale of the horses at issue, the
33 Center seeks to provide additional context and information as to why these feral horses
34 needed to be removed from critically important riparian habitat on the Apache-Sitgreaves
35 National Forest, and cannot be allowed to return to this habitat. A highly endangered
36 species depends on this riparian habitat for its survival, and the feral horses' continued
37 habitat destruction is leading to a local extinction from this national forest.
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1 The Center contacted counsel for the Plaintiff, who opposes this motion; and
2 counsel for Defendants, who do not oppose this motion. A copy of the Center’s amicus
3 brief is attached as Exhibit A.
4

5 **INTRODUCTION**

6 Plaintiff’s application for emergency relief does not divulge that there are
7 competing interests in this case between the feral horses and the endangered species on
8 the Apache-Sitgreaves National Forest that depend on untrammeled riparian habitat.
9 More specifically, feral horses and trespass cows have caused significant degradation of
10 the critical habitat for the endangered New Mexico meadow jumping mouse. The feral
11 horses and cows initially invaded the jumping mouse’s critical habitat en masse after the
12 2011 Wallow Fire destroyed the boundary fence between the White Mountain Apache
13 Reservation and the Apache-Sitgreaves National Forest. After providing notice in 2019,
14 the Center filed a citizen suit in 2020 against the U.S. Fish and Wildlife Service (“FWS”)
15 and U.S. Forest Service under the Endangered Species Act (“ESA”). This resulted in a
16 court-approved settlement agreement in 2021, in which the Forest Service agreed to
17 inspect and repair riparian fencing and enclosures, and to remove any discovered feral
18 horses and cows from this riparian habitat. Exhibits B, C. The Forest Service removed
19 the trespass cows in 2019, but unfortunately the horses were not removed, have continued
20 to multiply, and are causing increasing damage to the riparian habitat.
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26 The Center for Biological Diversity is a conservation organization headquartered
27 in Tucson, and has been working for over 30 years to protect and recover endangered
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1 species. Maricopa Audubon Society is a conservation organization based in Phoenix,
2 dedicated to the study and enjoyment of birds and other wildlife, and to the protection
3 and restoration of habitat in the Southwest. Both organizations are a party to the earlier
4 settlement agreement that could be impacted by this case.
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6 The Center believes it's amicus brief would assist the Court in understanding that
7 this case is more complex, and implicates more interests, than presented by Plaintiff's
8 complaint and pending motion. Due to the Center's significant interests in this case, it
9 also intends to move to intervene as a defendant once the pending preliminary injunctive
10 relief motion is resolved. However, given the impending hearing and its potential to bear
11 heavily on the future course of the litigation, the Center seeks to submit an amicus brief
12 to ensure that the Court is apprised of the entire relevant legal and factual context.
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15 **STANDARD OF REVIEW**

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17 "There appears to be no statute or rule which provides standards as to when a
18 party should be granted leave to appear as *amicus curiae* at the district court level."
19 *Dible v. City of Chandler*, 2004 U.S. Dist. LEXIS 33792, *1-2 (D. Ariz., Dec. 23, 2004).
20 Because of the lack of standards, this court has looked to the Federal Rules of Appellate
21 Procedure for guidance on whether leave should be granted. *Id.*, *2. Under Rule 29(a), a
22 party may file an amicus brief by leave of court or if all parties have consented to its
23 filing. *Id.* The motion must be accompanied by the proposed brief, and must state "the
24 movant's interest" and "the reason why an amicus brief is desirable and why the matters
25 asserted are relevant to the disposition of the case." *Id.*, quoting Fed. R. App. P. 29.
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1 The decision whether to permit an amicus brief is a matter within the court’s
2 discretion. *Id.*, citing *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903). The
3 “classic role of *amici* is threefold: (1) to assist in a case of general public interest; (2) to
4 supplement the efforts of counsel; and (3) to draw the court’s attention to law that has
5 escaped consideration.” *Id.*, citing *Miller-Wohl Co. v. Comm’r of Labor & Indus., State*
6 *of Montana*, 694 F.2d 203, 204 (9th Cir. 1982). There is no rule that the *amici* must be
7 totally disinterested. *Id.*, citing *Funbus Systems, Inc. v. State of Cal. Pub. Utils. Comm’n*,
8 801 F.2d 1120, 1125 (9th Cir. 1986).

9 Amicus briefs are frequently accepted concerning legal and factual issues that
10 have potential ramifications beyond the parties directly involved, or if the amicus has
11 unique information or perspective that can help the court. *Earth Island Inst. v. Nash*,
12 2019 U.S. Dist. LEXIS 214578, *5 (E.D. Cal., Dec. 11, 2019). Courts have also held that
13 it is preferable to err on the side of permitting an amicus brief, for if a brief with pertinent
14 information is rejected, the court will be deprived of a resource that might have been of
15 assistance. *Id.*, *6.

21 **THE CENTER’S INTERESTS**

22 The Center unquestionably has significant interests at stake in this case. Most
23 directly, the Center filed an ESA lawsuit in this court in 2020 against FWS and the Forest
24 Service in order to compel essential protections for the endangered New Mexico meadow
25 jumping mouse on the Apache-Sitgreaves National Forest from feral horses and cows that
26 were denuding the mouse’s critical habitat. *Center for Biological Diversity, et al. v.*

1 *David Bernhardt, et al.*, No. 20-cv-00075-TUC-SHR. This case resulted in a settlement
2 agreement which requires the Forest Service to inspect riparian fencing and enclosures
3 within the jumping mouse’s critical habitat in the Black River watershed on the Apache-
4 Sitgreaves National Forest. Exhibit B, p. 4. The Forest Service further agreed:

6 When horses or cattle are found within the existing enclosures, the Forest Service
7 will work to remove the horses or cattle from the enclosures within 14 days and
8 make any needed repairs as soon as staffing, funding, and resources are available.

9 *Id.* This agreement was approved by the court, and remains in effect. Exhibit C (stating
10 that “the Court approves . . . the ‘Stipulated Settlement Agreement’”).

11 Prior to filing the lawsuit in 2020, the Center spent considerable time on the
12 ground on the Apache-Sitgreaves National Forest, methodically documenting the
13 presence of feral horses and cows within protected riparian habitat, and the resulting
14 adverse impacts to the jumping mouse’s critical habitat. These site visits in May and
15 June of 2019 resulted in an over 50-page notice letter that the Center provided to the
16 federal agencies prior to filing suit, including numerous photographs and descriptions of
17 the discovered habitat conditions. Exhibit D. Following the settlement agreement, the
18 Center has remained actively involved in reviewing the inspection reports required by the
19 agreement, and checking on the status of fencing and livestock removal efforts. At this
20 time, the jumping mouse’s habitat continues to be degraded by the feral horses because
21 the Forest Service has not finished fencing off all of the essential riparian habitat.

22 The Center also intervened in a separate lawsuit in order to help defend the final
23 rule designating critical habitat for the New Mexico meadow jumping mouse, including
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1 the critical habitat designated on the Apache-Sitgreaves National Forest. *N. N.M.*
2 *Stockman’s Ass’n v. United States Fish & Wildlife Serv.*, 30 F.4th 1210 (10th Cir. 2022).
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4 More broadly, the Center for Biological Diversity’s primary focus and mission
5 since its founding in 1989 has been to protect and recover threatened and endangered
6 species, including protecting the listed species’ habitat from harmful activities such as
7 livestock grazing within riparian habitats. The Center believes that “because diversity
8 has intrinsic value, and because its loss impoverishes society, we work to secure a future
9 for all species, great and small, hovering on the brink of extinction.”¹ The Center has
10 worked to protect imperiled species and their habitats through science, media, and
11 litigation for over 30 years. The Center’s petitioning, advocacy, and litigation efforts
12 have led to the listing of more than 700 species as threatened or endangered under the
13 ESA, and the protection of hundreds of millions of acres of critical habitat.²
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17 **THE REASONS THE CENTER’S AMICUS BRIEF IS DESIRABLE**

18 Plaintiff’s motion for a temporary restraining order and preliminary injunction is
19 focused on preventing Defendants from holding the sale of horses that have already been
20 captured and impounded from the Apache National Forest. This specific request does not
21 involve the Center or directly impact the Center’s interests, and therefore, particularly
22 given the limited time before the scheduled hearing, the Center is not seeking to intervene
23 for purposes of this impending motion and hearing. Indeed, the Center fully supports the
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27 ¹ <https://www.biologicaldiversity.org/about/>

28 ² <https://www.biologicaldiversity.org/programs/biodiversity/>

1 humane treatment and disposition of these horses.

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3 Plaintiff's motion, however, will indirectly and significantly harm the Center's
4 interests if the Court's ruling on the motion could result in more feral horses remaining
5 on the Apache-Sitgreaves National Forest that will continue to access and degrade
6 protected riparian habitat. In that regard, Plaintiff's motion greatly oversimplifies the
7 underlying issues, making no mention of the competing interests of the endangered
8 species that depend on this riparian habitat, or the Forest Service's responsibilities under
9 the ESA concerning these endangered species and their designated critical habitat.
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12 The Center's amicus curiae brief seeks to provide important information for the
13 Court on three issues. First, the Center's brief provides background information on
14 threatened and endangered species on the Apache-Sitgreaves National Forest, including
15 the New Mexico meadow jumping mouse. The brief further explains how the designated
16 critical habitat in riparian areas has been degraded by feral horses and cows, leading the
17 Center to file an ESA lawsuit and obtain a favorable settlement agreement in this court.
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20 Second, the Center's brief provides an overview of the ESA, including the
21 Center's view of the Forest Service's responsibilities under the Act as they bear on the
22 agency actions at issue in this case.

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24 Third, the Center's brief further explains how the presence of and adverse impacts
25 to endangered species from the feral horses on the Apache-Sitgreaves National Forest
26 may impact the balance of equities and public interest factors of the four-part test for
27 injunctive relief. As it stands, the Plaintiff's assessment of these two factors does not
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1 consider or address this vitally important competing and recognized interest.

2
3 **CONCLUSION**

4 For the above stated reasons, the Center respectfully requests that the Court grant
5 this motion, and accept and consider the Center's amicus curiae brief for purposes of the
6 pending injunctive relief motion. The proposed amicus brief is provided herewith as
7 Exhibit A.
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9 Dated: July 18, 2022.

Respectfully submitted,

10 */s/ Marc D. Fink*

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