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7
8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ARIZONA**

10 Douglas A. Ducey, Governor of Arizona,)
11 in his official capacity,)

12 Plaintiff,)

13 vs.)

14 Randy Moore, Chief of the United States)
15 Forest Service, in his official capacity, *et*)
16 *al.*,)

17 Defendants,)

18 and)

19 Center for Biological Diversity,)

20 Proposed Defendant-Intervenor.)
21 _____)

No. 22-cv-01814-DMF

) **CENTER FOR BIOLOGICAL**
) **DIVERSITY’S MOTION TO**
) **INTERVENE**

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MOTION

The Center for Biological Diversity (“the Center”) respectfully moves for leave to intervene as a defendant in this case. The Center’s motion is supported by the supporting memorandum and the Declarations of Dr. Robin Silver and Russ McSpadden, filed herewith. The Center has also lodged its proposed Answer to Plaintiff’s Complaint. Counsel for the Center contacted counsel for Plaintiff and Defendants requesting their positions on the Center’s motion. Plaintiff opposes the motion, and the Defendants are reserving their position on the motion until they see the filings.

MEMORANDUM

Plaintiff Governor Ducey of Arizona, through the State’s agencies, is installing thousands of shipping crates to create a border barrier on miles of federal land without permission from the federal government and in violation of federal law. In doing so, the Governor is eliminating the last remaining wildlife corridors between Arizona and Mexico, causing significant harm to endangered species such as the jaguar and ocelot that depend on connectivity habitat with Mexico for their long-term survival and recovery.



1 McSpadden Declaration, ¶ 17. The Governor is also undertaking this major action
2 without any compliance with federal environmental laws including the National
3 Environmental Protection Act (“NEPA”), the Endangered Species Act (“ESA”), and the
4 National Forest Management Act (“NFMA”), which require procedural and substantive
5 protections for the public and the environment. The Governor has brazenly ignored clear
6 direction from the federal agencies to stop these damaging activities.

7 The Center has a long-standing interest in the protection and recovery of
8 endangered wildlife that use the areas affected by the Governor’s activities, including the
9 jaguar and ocelot, and in the environmentally responsible management of the border
10 region between Arizona and Mexico. For instance, the Center has engaged in
11 administrative processes and court cases for decades to ensure that the jaguar receives the
12 protections mandated by the ESA, and the Center has challenged multiple decisions of
13 the federal government concerning its border related activities. The Governor’s lawsuit
14 threatens to directly and significantly impair the Center’s and its members’ interests in
15 these endangered species and in the environment along the southern border.

16 Through this lawsuit, the Governor is explicitly attempting to circumvent federal
17 environmental review for his activities at the border. Doc. 1 (Complaint), ¶ 62 (seeking
18 to avoid “the web of environmental reviews”). More fundamentally, the Governor seeks
19 to remove federal jurisdiction and control over the state’s activities at the border, which
20 would thereby eliminate all federal environmental laws and protections. *Id.*, ¶ 73
21 (seeking “an injunction barring any federal governmental actors, including the Forest
22 Service and [Bureau of Reclamation], from attempting to exercise jurisdiction over the
23 Roosevelt Reservation in the State.”); *id.*, p. 19, ¶ G (seeking to “[p]ermanently enjoin
24 any federal governmental actors, including the Forest Service and [Bureau of
25 Reclamation], from attempting to exercise exclusive jurisdiction over the Roosevelt
26 Reservation in the State and allow the State to take appropriate actions, separately and in
27 coordination with federal partners, to protect its citizens and their property.”).

1 The Center satisfies the four-part test for intervention as of right under Federal
2 Rule of Civil Procedure 24(a)(2). First, the Center’s motion to intervene is timely, as the
3 Governor’s Complaint was filed on October 21, 2022, and the Defendants have yet to file
4 a responsive pleading. Second, the Center has a demonstrable interest in the protection
5 and recovery of endangered wildlife species that migrate between Arizona and Mexico at
6 the southern border, as well as in the environment of the border region more generally.
7 Third, a decision in the Governor’s favor enjoining Defendants from exercising
8 jurisdiction and authority over the federal lands at the border, and allowing the Governor
9 to continue closing off the remaining wildlife corridors at the border, would significantly
10 impair the Center’s ability to protect its interests in the wildlife species that depend on
11 connectivity habitat with Mexico, and in the federal public lands along the border.
12 Fourth, Defendants do not adequately represent the Center’s interests in this case, as the
13 Center has previously challenged multiple actions by the federal government at the
14 border concerning related issues, and has also repeatedly challenged prior actions by
15 Defendants concerning the endangered jaguar and its critical habitat. Defendants will
16 also likely focus primarily on the major constitutional and jurisdictional issues in this
17 case, while the Center will focus on the potential for the Governor’s activities and his
18 requested relief to severely harm endangered species and the environment.

19 Accordingly, the Court should grant the Center’s motion for leave to intervene as a
20 matter of right. In the alternative, the Center also satisfies the requirements for
21 permissive intervention under Federal Rule of Civil Procedure 24(b).

22 **BACKGROUND**

23 The Governor is currently installing a border barrier on miles of federal land along
24 the Arizona-Mexico border, using shipping crates. Doc. 1 (Complaint), Exhibit 6.¹ This
25 is despite a clear explanation and direction from the United States Forest Service (“Forest
26 Service”) that the Governor must obtain federal regulatory approval prior to undertaking
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28 ¹ See also Silver Declaration, ¶ 10, Exhibit A; McSpadden Declaration, ¶ 17.

1 these activities on National Forest land. Doc. 1, Exhibit 5. As explained by the Forest
2 Service, the Governor must first apply for and obtain a federal permit, as required by 36
3 C.F.R. § 251.54. *Id.* Moreover, prior to the permit being issued, the Forest Service must
4 analyze the Governor’s request to ensure that the requested action complies with federal
5 environmental laws such as NEPA. *Id.* The Forest Service explicitly directed the
6 Governor to refrain from any further activity associated with the shipping containers on
7 federal Forest Service lands, “until such time as proper authorization is secured.” *Id.*

8 The United States Bureau of Reclamation (“Bureau”) similarly notified the
9 Governor that “[t]he unauthorized placement of these containers constitutes a violation of
10 federal law and is a trespass against the United States.” Silver Declaration, Exhibit A.
11 According to the Bureau, “[t]hat trespass is harming federal lands and resources
12 impeding Reclamation’s ability to perform its mission.” *Id.* The Governor, however, has
13 willfully ignored these instructions and warnings from the federal agencies, and is
14 proceeding without a federal permit, without any compliance with NEPA or other federal
15 environmental laws, and is presently trespassing on and degrading the border lands.

16 The Center, headquartered in Tucson, Arizona, is the preeminent conservation
17 organization in the United States that is focused on the survival and recovery of
18 endangered species. The Center works to secure a future for all species, great and small,
19 hovering on the brink of extinction. Silver Declaration, ¶ 6. The southern border lands
20 where the Governor is unlawfully installing shipping containers, and where he seeks
21 through this lawsuit to continue installing and maintaining shipping containers without
22 any federal review or oversight, are located within established, critical movement
23 corridors between occupied habitat in the United States and Mexico for the jaguar and
24 ocelot, both of which are designated and protected under the ESA, and both of which
25 have been sighted and documented in the area. *See* Silver Declaration, ¶ 11, Exhibit B.

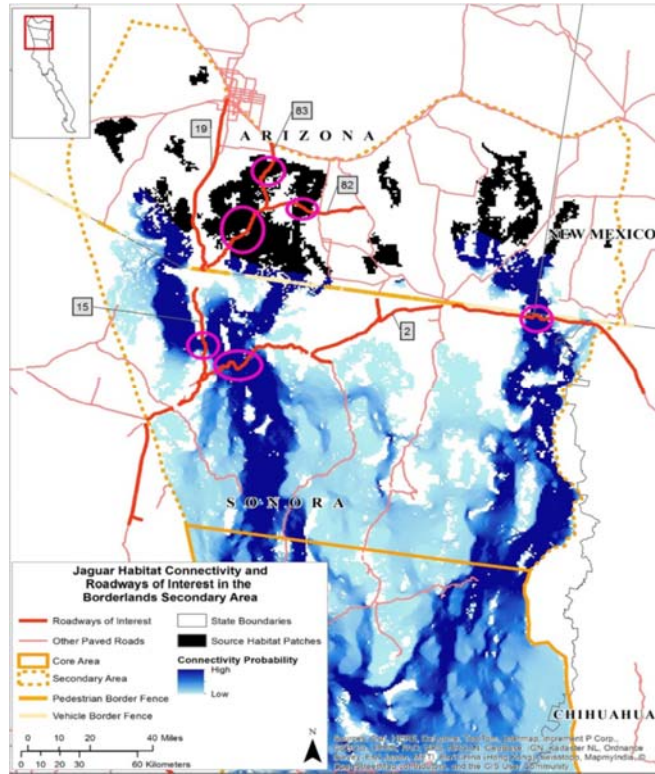
26 The ESA requires the United States Fish and Wildlife Service (“FWS”) to list
27 species that it determines are threatened or endangered with extinction. 16 U.S.C.
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1 1533(a). FWS originally designated the jaguar as an endangered foreign species in 1972.
2 *Ctr. for Biological Diversity v. Kempthorne*, 607 F. Supp. 2d 1078, 1082 (D. Ariz. 2009).
3 The jaguar’s range stretches from southern Arizona and New Mexico south through
4 South America. *Id.* at 1080. In 1996, the Center filed suit to compel FWS to make a
5 final listing decision for the jaguar, which resulted in FWS listing the jaguar as an
6 endangered species in the United States in 1997. *Id.* at 1082. In its listing decision,
7 “FWS placed particular emphasis on the maintenance of cross-border wildlife corridors
8 along the U.S.-Mexico border as a critical element in ensuring the species’ recovery
9 within the U.S.” *Id.*

10 The ESA also requires FWS, concurrently with listing a species as threatened or
11 endangered, to designate “critical habitat” for the species. *Ctr. for Biological Diversity*,
12 607 F. Supp. 2d at 1086, citing 16 U.S.C. § 1533(a)(3). “The designation of critical
13 habitat is ‘the principal means for conserving an endangered species, by protecting not
14 simply the species, but also the ecosystem upon which the species depends.’” *Id.*,
15 quoting *Ctr. for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1101 (D. Ariz.
16 2003). For the jaguar, however, FWS determined in 1997 that the designation of critical
17 habitat would “not be prudent,” and then in 2006 that it would “not be beneficial.” *Id.* at
18 1088. The Center judicially challenged and reversed this determination (*id.* at 1094-95),
19 resulting in FWS finally designating critical habitat for the jaguar in 2014. *Ctr. for*
20 *Biological Diversity v. U.S. Fish & Wildlife Serv.*, 441 F. Supp. 3d 843, 871 (D. Ariz.
21 2020). This critical habitat designation again recognized the importance of connectivity
22 between Arizona and Mexico for the jaguar’s conservation, as the lands designated in
23 Arizona are used to connect jaguars to breeding populations in Mexico. *Id.* at 874.
24 These “[c]onnection corridors are essential, but often under-protected.” *Id.*

25 The ESA further requires FWS to develop and implement “recovery plans” for
26 threatened and endangered species. 16 U.S.C. § 1533(f)(1). The Center also had to file
27 suit against FWS in order to compel the statutorily required recovery plan for the jaguar.
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1 *Ctr. for Biological Diversity*, 607 F. Supp. 2d at 1092-94. FWS finally completed the
 2 Jaguar Recovery Plan in 2018, and a map from the Recovery Plan identifies the habitat
 3 connectivity and corridors for the jaguar between Arizona and Mexico:



17 Silver Declaration, Exhibit C, p. 3. As described by FWS, “[a] visual examination of this
 18 connectivity model . . . reveals three corridors that extend across the U.S.-Mexico
 19 border.” *Id.*

20 If the Governor had complied with federal law prior to undertaking the ongoing
 21 activities at the border, the Forest Service would have been required to ensure that the
 22 Governor’s proposal was consistent with the laws, regulations and policies that govern
 23 the National Forest System, including the land and resource management plan for the
 24 Coronado National Forest, prior to issuing the required permit. 36 C.F.R. § 251.54(e)(1).
 25 The Forest Service would have also had to involve the public and consider the potential
 26 environmental consequences of the Governor’s proposal, along with less damaging
 27 alternatives to that proposal, prior to issuing a permit, as required by NEPA. 42 U.S.C. §
 28 4332(2)(C). And the Forest Service would have been required to consult with FWS on

1 the Governor’s proposal, pursuant to Section 7 of the ESA, to ensure that the proposal
2 was not likely to jeopardize any threatened or endangered species, or result in the
3 destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). The
4 Governor’s lawsuit seeks to insulate the past, ongoing, and future installation and
5 maintenance of his border barrier from compliance with these federal mandates.

6 LEGAL STANDARD

7 Federal Rule of Civil Procedure 24(a)(2) provides:

8 On a timely motion, the court must permit anyone to intervene who . . . claims an
9 interest relating to the property or transaction that is the subject of the action, and
10 is so situated that disposing of the action may as a practical matter impair or
11 impede the movant’s ability to protect its interest, unless existing parties
adequately represent that interest.

12 Fed. R. Civ. P. 24(a)(2). Thus, to be granted intervention of right, the applicant must
13 show that four requirements are met: (1) the motion is timely; (2) the applicant has a
14 significant protectable interest relating to the property or transaction that is the subject of
15 the action; (3) that without intervention, the disposition of the action may, as a practical
16 matter, impair or impede the applicant’s ability to protect that interest; and (4) the
17 existing parties may not adequately represent the applicant’s interests. *Citizens for*
18 *Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011). These four
19 requirements “are broadly interpreted in favor of intervention.” *Id.*; see also *State ex rel.*
20 *Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006) (stating that the Ninth Circuit
21 “construe[s] Rule 24(a) liberally in favor of potential intervenors.”). To determine
22 whether intervention is appropriate, “courts are guided primarily by practical and
23 equitable considerations,” and “are required to accept as true the non-conclusory
24 allegations made in support of intervention.” *RHN Inc. v. CNA Nat’l Warranty Corp.*,
25 2020 U.S. Dist. LEXIS 243525, *4 (D. Ariz., Dec. 29, 2020), citing *Sw. Ctr. for*
26 *Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001); see also Fed. R. Civ. P.
27 24(a)(2) (advisory committee note, stating that “[i]f an [applicant] would be substantially
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1 affected in a practical sense by the determination made in an action, [the applicant]
2 should, as a general rule, be entitled to intervene . . .”).

3 Rule 24(b) also provides that the court may permit anyone to intervene who
4 submits a timely motion and has a claim or defense that shares with the main action a
5 common question of law or fact. Fed. R. Civ. P. 24(b)(1)(B). “The decision is
6 discretionary and ‘subject to considerations of equity and judicial economy.’” *Harris v.*
7 *Ariz. Indep. Redistricting Comm’n*, 2012 U.S. Dist. LEXIS 164882, *20 (D. Ariz., Nov.
8 16, 2012), quoting *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990).

9 ARGUMENT

10 The Center satisfies each of the four elements of the Rule 24(a) test and qualifies
11 for intervention as of right. Alternatively, the Court should allow the Center to intervene
12 under Rule 24(b).

13 **I. The Center satisfies the test for intervention as of right.**

14 There is no question that the Center’s motion to intervene is timely. The Center
15 has a longstanding interest relating to the subject matter of the Governor’s Complaint,
16 and the lawsuit represents a potential, severe impairment of the Center’s ability to protect
17 its interests in endangered species such as the jaguar and ocelot that depend on
18 connectivity habitat between Arizona and Mexico for their survival and recovery. It is
19 also likely that Defendants will not adequately represent the Center’s interests in this
20 case. The Court should therefore grant the Center’s request to intervene as of right.²

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22 ² The Center also has standing to participate as a party in this case. To establish standing,
23 the Center “must demonstrate that it has suffered a concrete and particularized injury that
24 is either actual or imminent, that the injury is fairly traceable to the [plaintiff], and that it
25 is likely that a favorable decision will redress that injury.” *Massachusetts v. EPA*, 549
26 U.S. 497, 517 (2007). The Center has submitted declarations demonstrating its members’
27 use and enjoyment of the border lands adversely affected by the Governor’s installation
28 of shipping containers along the border. McSpadden Dec., ¶¶ 3-9; Silver Dec., ¶¶ 14, 24.
The declarations explain how the members’ use of these lands are being adversely
affected. McSpadden Dec., ¶¶ 17-21; Silver Dec., ¶¶ 25-27. These injuries are caused by
the Governor’s unauthorized actions, and will be redressed if the Center is granted

1 **A. The Center’s Motion to Intervene is Timely.**

2 Whether a motion to intervene is timely is based on the stage of the proceeding,
3 prejudice to the other parties, and the reason for and length of the delay. *United States v.*
4 *Oregon*, 913 F.2d 576, 588 (9th Cir. 1990). The Center’s motion is timely, as it is filed
5 less than two weeks after the Governor filed his Complaint, and well before Defendants
6 are due to file their responsible pleading, and there is no prejudice to any party.

7 **B. The Center has a significant, protectable interest in endangered species**
8 **that migrate between Arizona and Mexico, and in the condition of the**
9 **environment at the southern border.**

10 An applicant for intervention must claim “an interest relating to the property or
11 transaction which is the subject of the action” and be “so situated that the disposition of
12 the action may as a practical matter impair or impede the applicant’s ability to protect
13 that interest.” Fed. R. Civ. P. 24(a)(2). Whether an applicant demonstrates sufficient
14 interest in a case is a practical, threshold inquiry, and the applicant does not have to
15 establish a specific legal or equitable interest. *Citizens for Balanced Use*, 647 F.3d at
16 897. The applicant “must establish that the interest is protectable under some law and
17 that there is a relationship between the legally protected interest and the claims at issue.”
18 *Id.*; see also *Cnty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (the “interest”
19 test is primarily a practical guide to disposing of lawsuits by involving as many
20 apparently concerned persons as is compatible with efficiency and due process.”). “By
21 allowing a party with a practical interest to intervene, courts prevent or simplify future
22 litigation that otherwise might occur.” *Ctr. for Biological Diversity v. United States*
23 *Forest Serv.*, 2016 U.S. Dist. LEXIS 90163, *5 (D. Ariz., June 10, 2016).

24 The Center has significant interests at stake in this case, which are protected by the
25 ESA, NEPA, and other federal laws, and which are at risk due to the Governor’s claims
26 and requested relief. First, the Center has been engaged in litigation for decades to

27 _____ intervention and the Governor’s actions are found to be unlawful, and the containers are
28 removed and the border region is restored. McSpadden Dec., ¶ 22; Silver Dec., ¶ 28.

1 compel protections for the jaguar as required by the ESA, including the designation of
2 critical habitat at the southern border in Arizona. The Center filed suit in 1996 “to
3 compel [FWS] to make a final listing decision for the jaguar.” *Ctr. for Biological*
4 *Diversity*, 607 F. Supp. 2d at 1082. In the resulting 1997 Final Listing Rule, FWS
5 determined that critical habitat for the jaguar was “not prudent,” which the Center
6 challenged in 2003. *Id.* This resulted in a settlement agreement, and in 2006 FWS again
7 declined to designate critical habitat for the jaguar, which the Center again challenged as
8 unlawful under the ESA. *Id.* at 1088. This court again ruled for the Center in 2009 (*id.* at
9 1091, 1094-95), resulting in FWS finally designating critical habitat for the jaguar in
10 2014. 79 Fed. Reg. 12572 (March 5, 2014). The Center also successfully challenged
11 FWS’ failure to prepare a recovery plan for the jaguar, as required by the ESA. *Ctr. for*
12 *Biological Diversity*, 607 F. Supp. 2d at 1094-95.

13 The Center subsequently intervened in two lawsuits to help FWS defend its 2014
14 final rule designating jaguar critical habitat from challenges in both New Mexico and
15 Arizona. *N.M. Farm & Livestock Bureau v. U.S. Dept. of Interior*, 952 F.3d 1216 (10th
16 Cir. 2020) (reversing the decision of the district court which had upheld the designation
17 of critical habitat for the jaguar in New Mexico); *Ctr. for Biological Diversity v. United*
18 *States Fish & Wildlife Serv.*, 441 F. Supp. 3d 843, 874-75 (D. Ariz. 2020) (denying
19 Rosemont’s cross claims challenging the jaguar critical habitat designation in parts of
20 Arizona). The case concerning the jaguar’s critical habitat in Arizona remains active, as
21 the parties await a decision by the United Court of Appeals for the Ninth Circuit.

22 Second, the Center has long been involved in efforts to obtain the necessary and
23 required protections for the endangered ocelot, which also relies on the border region to
24 travel between southern Arizona and Mexico. For example, in 2010, the Center
25 submitted comments on a draft Recovery Plan for the ocelot. Silver Declaration, Exhibit
26 F. And in 2016, the Center filed suit against the Animal and Plant Health Inspection
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1 Service concerning the impacts of its wildlife damage management program on ocelots,
2 which led to a favorable settlement agreement in 2017. *Id.*, Exhibit G.

3 Third, the Center also has a longstanding interest in the health and condition of the
4 environment at the southern border, and has filed numerous legal challenges to federal
5 agency decisions and activities at the border to protect these interests. In *Center for*
6 *Biological Diversity v. Mayorkas*, 2021 U.S. Dist. LEXIS 159034, *15, 28-29 (D. Ariz.,
7 Aug. 23, 2021), this court held that the Department of Homeland Security had violated
8 NEPA by failing to supplement a programmatic NEPA analysis for its activities along the
9 southern border. In *Center for Biological Diversity et. al., v. Austin et al.*, No. 19-CV-
10 408 and *Center for Biological Diversity et. al., v. Austin et al.*, Case No. 20-CV-1230,
11 both filed in the United States District Court for the District of Columbia, the Center
12 challenged the construction of border barriers on the southern border using United States
13 Department of Defense funds. These cases resulted in a settlement agreement on March
14 24, 2022. Silver Declaration, Exhibit H. In bringing these cases and in implementing the
15 Center’s broader campaign concerning the southern border wall, the Center devoted
16 considerable staff time and effort over a period of years to tracking and documenting the
17 significant environmental impacts of border wall construction and activities. *Id.*, ¶ 15.

18 The courts have found similar interests in endangered wildlife and federal public
19 lands to be protectable and sufficient in considering motions to intervene from
20 conservation organizations. *Citizens for Balanced Use*, 647 F.3d at 897 (recognizing
21 applicant’s interest in preserving the wilderness character of portions of a national forest);
22 *United States v. Carpenter*, 526 F.3d 1237, 1240 (9th Cir. 2008) (recognizing applicant’s
23 interest in federal wilderness area); *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392,
24 1398 (9th Cir. 1995) (recognizing applicant’s interest in an endangered species and its
25 habitat); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)
26 (recognizing the applicant’s interest “in the preservation of birds and their habitats.”).
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1 **C. The Center’s interest in endangered species, and in the environment at**
2 **the southern border lands, are threatened by the Governor’s complaint**
3 **and requested relief.**

4 “Generally, after finding that a proposed intervenor has a significant protectable
5 interest, courts have little difficulty concluding that the disposition of the case may affect
6 it.” *Ctr. for Biological Diversity*, 2016 U.S. Dist. LEXIS 90163, at *8, citing *Lockyer v.*
7 *United States*, 450 F.3d 436, 442 (9th Cir. 2006). The same holds true in this case.

8 The Governor’s claims and request for relief present a significant risk to the
9 Center’s long-standing interests in endangered species including the jaguar and ocelot,
10 and the environment more generally at the southern border. The Governor seeks to
11 eliminate his obligations under federal law to obtain approval from the federal
12 government and to comply with federal environmental laws prior to taking action on the
13 federal lands at the southern border. As the Forest Service explained to the State:

14 As we discussed previously, the process for obtaining a permit is outlined in 36
15 C.F.R. 251.54. . . Upon receipt of the required information, the Forest Service will
16 assess the information provided against initial screening criteria outlined in the
17 regulations. If the proposal passes the applicable screening criteria, it will also
18 have to be analyzed for effects on the environment in compliance with the
19 National Environmental Protection Act and other federal law.

20 Meanwhile, please refrain from any further activities associated with the
21 containers on NFS lands, including the use of any equipment, until such time as
22 proper authorization is secured.

23 Doc. 1, Exhibit 5. The Bureau of Reclamation similarly notified the State:

24 The unauthorized placement of those containers constitutes a violation of federal
25 law and is a trespass against the United States (43 C.F.R. Part 423; 43 C.F.R. Part
26 429). That trespass is harming federal lands and resources and impeding
27 Reclamation’s ability to perform its mission.

28 Silver Declaration, Exhibit A.

 The Governor’s complaint seeks to abolish federal oversight, authority and
approval over whatever actions he wishes to take at the southern border, and to thereby

1 eliminate all federal laws, regulations, and protections for endangered species and the
2 environment. More specifically, the Governor explicitly seeks to avoid federal
3 environmental review for his border activities. Doc. 1, ¶ 62. The Governor seeks an
4 injunction “barring any federal government actors” from attempting to exercise
5 jurisdiction over the border lands in Arizona. *Id.*, ¶ 73. And the Governor requests that
6 the federal government be permanently enjoined from exercising jurisdiction over the
7 border lands, and that the State be allowed to take any actions “to protect its citizens and
8 their property.” *Id.*, p. 19, ¶ G.

9 In fact, the Governor is already taking major action at the southern border, through
10 the installation of thousands of shipping containers, without any approvals from the
11 federal government, and without any attempted compliance with the applicable federal
12 environmental laws. Silver Declaration, ¶ 10, Exhibit A; McSpadden Declaration, ¶ 17.
13 The Governor is therefore already significantly harming the Center’s interests in the
14 endangered species that rely on the border as a wildlife corridor, and in the environment
15 more generally at the border. Through this lawsuit, the Governor seeks to provide legal
16 cover for his unauthorized, ongoing border barrier activities at the southern border.

17 The Ninth Circuit has long determined that conservation organizations such as the
18 Center are entitled to intervene as of right where, as here, the litigation threatens harm to
19 wildlife and other natural resource values that are important to the organization’s mission
20 and where the organizations have worked to protect those values. *See Idaho Farm*
21 *Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995) (affirming the granting of
22 intervention where the case could impair the conservation organizations’ ability to protect
23 their interest in an endangered species and its habitat); *Sagebrush Rebellion, Inc. v. Watt*,
24 713 F.2d 525, 528 (9th Cir. 1983) (affirming the granting of intervention to the National
25 Audubon Society, and finding “no serious dispute” where an adverse decision “would
26 impair the society’s interest in the preservation of birds and their habitats.”).

1 **D. The Center’s interests are not adequately represented by existing**
2 **parties.**

3 Intervention shall be granted to any timely applicant with a significant protectable
4 interest that may be impaired if intervention is denied “unless existing parties adequately
5 represent that interest.” Fed. R. Civ. P. 24(a)(2); *Berger v. N.C. State Conf. of the*
6 *NAACP*, 142 S. Ct. 2191, 2203 (2022). “The burden of showing inadequacy of
7 representation is ‘minimal’ and satisfied if the applicant can demonstrate that
8 representation of its interests ‘may be’ inadequate.” *Citizens for Balanced Use*, 647 F.3d
9 at 898, quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). In evaluating
10 the adequacy of representation, the Ninth Circuit considers: (1) whether the interest of a
11 present party is such that it will undoubtedly make all of a proposed intervenor’s
12 arguments, (2) whether the present party is capable and willing to make such arguments,
13 and (3) whether a proposed intervenor would offer any necessary elements to the
14 proceedings that other parties would neglect. *Citizens for Balanced Use*, 647 F.3d at 898.
15 The most important factor is how the applicant’s interests compare with the interests of
16 existing parties. *Id.*

17 Here, it is clear from the Governor’s Complaint that his focus will be on human
18 migrants and migration across the border and the resulting impacts on Arizona and its
19 citizens, and not at all on the potential negative impacts to endangered wildlife and the
20 environment from the State’s ongoing activities at the border. Doc. 1, ¶ 1. Due the
21 precedent-setting nature of the Governor’s constitutional challenges, Defendants are
22 likely to be primarily focused on those legal issues, and the related ownership,
23 jurisdiction, and authority over the southern border lands. The Center’s intervention
24 would provide a unique and unrepresented perspective concerning the endangered
25 wildlife, critical habitat, and general environment of the border lands, which may be
26 entirely neglected by the other parties.
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1 Although the Ninth Circuit has stated that there is an assumption of adequacy
2 when the government is acting on behalf of a constituency that it represents, *Citizens for*
3 *Balanced Use*, 647 F.3d at 898, the Supreme Court has recently cast doubt on any such
4 presumption, stressing instead that this factor generally presents proposed intervenors
5 “with only a minimal challenge.” *Berger*, 142 S. Ct. at 2203. In *Berger*, the Court
6 discussed its earlier decision involving a request to intervene by a private party who
7 asserted a related interest to that of an existing government party. *Berger*, 142 S. Ct. at
8 2203, citing *Trbovich v. Mine Workers*, 404 U.S. 528 (1972). While the Court in
9 *Trbovich* had recognized the interests were related, and aligned “at a high level of
10 abstraction,” the interests were not identical. *Id.* at 2203-04. Thus, “[r]ather than endorse
11 a presumption of adequacy,” the Court stressed that its holding in *Trbovich* was that the
12 movant’s burden should be “treated as minimal.” *Id.* at 2204, quoting *Trbovich*, 404 U.S.
13 at 538, n. 10. The Center easily satisfies this “minimal” burden here.

14 As in *Berger* and *Trbovich*, the interests of the Center and the Defendants in this
15 case are not “identical” and do not “overlap fully.” *Berger*, 142 S. Ct. at 2204. In fact,
16 “[t]he Ninth Circuit has acknowledged that a federal agency, such as the Forest Service,
17 ‘is required to represent a broader view than the more, narrow, parochial interests’ of a
18 proposed [intervenor].” *Ctr. for Biological Diversity v. Zinke*, 2018 U.S. Dist. LEXIS
19 121402, *10-11 (D. Ariz., July 20, 2018), quoting *Forest Conservation Council v. United*
20 *States Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), abrogated on other grounds by
21 *Wilderness Soc’y v. United States Forest Serv.*, 630 F.3d 1173 (9th Cir. 1995); see also
22 *Ctr. for Biological Diversity*, 2016 U.S. Dist. LE XIS 90163, at *9 (same).

23 In responding to the Governor’s claims and request for relief, the Defendants will
24 likely be balancing the important interests in national security, immigration policy, and
25 cordial relations with the State of Arizona, as well as environmental protections. This
26 apparent balancing of interests is indicated by Defendants full knowledge that the
27 Governor has been and is presently acting illegally by installing shipping containers at
28 the southern border, and yet Defendants have not taken any action to stop these

1 unauthorized activities or to even enter an appearance yet in this case. The Center, on the
2 other hand, will be narrowly and aggressively focused on compelling the full
3 enforcement of and compliance with all federal environmental laws and protections at the
4 southern border, and in particular the conservation mandate and requirements of the ESA.
5 As the Ninth Circuit recognized in *Citizens for Balanced Use*, the Defendants
6 “representation of the public interest may not be ‘identical to the individual parochial
7 interest’ of a particular group just because ‘both entities occupy the same posture in the
8 litigation.’” 647 F.3d at 899, quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573
9 F.3d 992, 996 (10th Cir. 2009).

10 Further, the Ninth Circuit has recognized that an important factor in finding
11 inadequacy of representation is where there is a history of adversarial proceedings
12 between the proposed intervenor and the party upon which the proposed intervenor must
13 rely. *See Idaho Farm Bureau Fed’n*, 58 F.3d at 1398 (finding federal agency would not
14 adequately represent environmental group where the challenged agency decision was
15 compelled by that group’s prior litigation); *Cnty. of Fresno v. Andrus*, 622 F.2d 436, 439
16 (9th Cir. 1980) (finding “further reason to doubt” that the Department of Interior would
17 fully protect intervenor’s interest in a rulemaking because “the Department began its
18 rulemaking only reluctantly after [the proposed intervenor] brought a law suit against it”).
19 Again, here, the Center had to repeatedly file lawsuits against FWS over a couple of
20 decades to finally secure the protections required by the ESA for the endangered jaguar
21 and its habitat. And the Center recently sued the federal government multiple times
22 under the prior Administration over the federal government’s own destructive border wall
23 related activities at the southern border.

24 In sum, the Center “will bring a unique perspective to this lawsuit and add to the
25 dialogue in a meaningful manner.” *Ctr. for Biological Diversity*, 2016 U.S. Dist. LEXIS
26 90163, at *10. “On whole, the practical considerations of allowing [the Center] to
27 participate in this lawsuit far outweigh any potential downsides,” and the Center “has
28

1 satisfied all four requirements to intervene as of right.” *Id.*

2 **II. Alternatively, the Center should be granted permissive intervention.**

3 On timely motion, the court may permit anyone to intervene who “has a claim or
4 defense that shares with the main action a common question of law or fact.” Fed. R. Civ.
5 P. 24(b)(1)(B); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110 (9th Cir.
6 2002). “In exercising its discretion, the court must consider whether the intervention will
7 unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P.
8 24(b)(3). Given that the Center has an important perspective to impart on this
9 controversy, and that it is moving to intervene shortly after the case was filed, the
10 standards for permissive intervention are satisfied. The Center has also been extensively
11 involved in prior and ongoing litigation concerning the jaguar and its critical habitat, and
12 in multiple challenges to federal decisions concerning border wall construction. *See*
13 *Silver Declaration*, Exhibit H. Additionally, as explained above, the granting of the
14 motion will not delay this case or prejudice either the Plaintiff or the Defendants.

15 **CONCLUSION**

16 For the foregoing reasons, the Center has a right to intervene under Federal Rule
17 of Civil Procedure 24(a) as a defendant in this case. In the alternative, the Court should
18 permit the Center to intervene as a defendant pursuant to Rule 24(b).

19 Dated November 2, 2022.

Respectfully submitted,

20
21 /s/ Marc D. Fink

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