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Coalition Of Arizona/  
New Mexico Counties  
For Stable Economic  
Growth

*"Working together for responsible  
management."*

**INVOICE**

**DATE:** November 13, 2014

Gila County Board of Supervisors  
Attention: Tommie Martin  
1400 East Ash Street  
Globe, AZ 85501

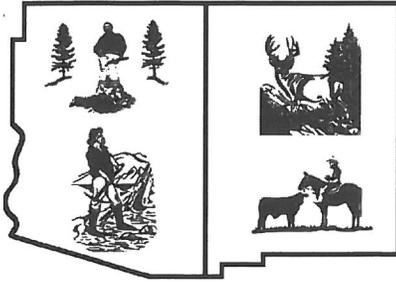
**RE: Coalition Legal Fund**

**Contribution Requested: \$5,000.00**

Please make check payable to:  
Return by mail to

**Coalition of AZ/NM Counties Legal Fund**  
P.O. Box 40  
Glenwood NM 88039

**THANK YOU!**



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Coalition Of Arizona/  
New Mexico Counties  
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Growth

"Working together for responsible  
management."

MEMO

TO: County Members  
FROM: Howard Hutchinson, Executive Director  
DATE: November 13, 2014  
RE: Request For Litigation Funding

In May the Coalition's Board requested that member counties consider including in their 2014/15 budget a contribution to the legal fund.

The legal fund was set up pursuant to the action of the board at the April 19, 2008 meeting in Payson, Arizona. A contribution was to be requested from time to time in order to build and maintain the fund. **This is a voluntary contribution and not a dues increase.** This fund is used to address a number of suits and other potential litigation that will have significant impacts on the member counties of the Coalition. If your county is unable to contribute the full \$5,000, please consider a lesser amount.

The litigation fund has contributed to:

- 2009 - \$61.54 Pacific Legal Foundation intervention in the Spikedace/Loach minnow critical habitat challenge. **Outcome: Over ours and litigation partner's objections the environmental litigants entered into a settlement with the Fish and Wildlife Service (Service) to conduct another review of the designation.;**
- 2009 - \$5,000.00 Contribution to the intervention with New Mexico Cattle Growers in the WildEarth Guardian's suit on the use of categorical exclusions for grazing permit renewals on Forest Service lands and a suit challenging Forest Service grazing permits without considering the impacts on the reintroduction of the Mexican Wolf. **Outcome: The Coalition and litigation partners were successful in preventing a wholesale victory by the litigants with a win at the Federal District Court level. (See appeal note below.);**
- 2010 - \$2,000.00 for the Coalition's participation with the New Mexico Cattle Growers intervention in the Mexican Wolf suits in the Arizona Courts. **Outcome: The Coalition and litigation partners were able to raise important issues before the court. However, we were thwarted in gaining a favorable outcome due to the settlement the Service negotiated with the litigants. However, the settlement did provide us with the opportunity to be participating on a high level with current proposed revisions to the 10(j) rule.;**
- 2011 - \$2,000.00 to Dennis Parker for development of comments on Spikedace/Loach minnow and Chiracahua Leopard Frog critical habitats in partnership with Arizona Cattle Growers, City of Sierra Vista and Cochise County. **Outcome: The comments resulted in a standing being created to bring litigation against the Service. However the Board and other participants felt that a court challenge under the current ESA statute and regulations may have resulted in an unwanted precedent. The Service's**

**decision did force the environmental litigants to return to court for expansion of critical habitat. The Coalition and litigation partners are documenting social, cultural and economic impacts on member counties, industries and individuals in preparation for potential litigation;**

- 2011 - \$1,625 to Darling Environmental Services for development of comments on Spikedace/Loach minnow and Chiracahua Leopard Frog critical habitats in partnership with Arizona Cattle Growers, City of Sierra Vista and Cochise County. **Outcome: The Coalition and litigation partners were able to document the errors by the Service on the social, cultural and economic impacts. Those errors have been used to communicate the lack the scientific and analysis accuracy to our respective state's Congressional and State representatives. This effort is bolstering the call for reform of the ESA and State wildlife management laws that gains momentum with each legislative year.;**
- 2011 - \$1,000.00 to the Americans for Preservation of Western Environment Mexican Wolf suit. **Outcome: The litigation was prepared but later abandoned after an initial dismissal by the court on technical/legal issues. The data and information has been retained for possible future action.;**
- 2011 - \$5,088.00 for the 10<sup>th</sup> Circuit appeal of the WildEarth Guardians categorical exclusion suit. **Outcome: The Coalition and litigation partners entered into the appeal with confidence that our lower court ruling would be upheld. However the Forest Service and Justice Department negotiated a settlement with the litigants over our objections that resulted in a few allotments that had to go through NEPA permit review. This outcome has also been used to bolster the arguments for the need of Congressional review of the grazing permit process statutes and regulations.;**
- 2011 - \$1,500 Darling Environmental Services for development of comments on Spikedace/Loach minnow and Chiracahua Leopard Frog critical habitats in partnership with City of Sierra Vista and Cochise County. **Outcome: (See above statement.);**
- 2011 - \$2,000.00 contribution to New Mexico Cattle Growers for the 10<sup>th</sup> Circuit appeal of the WildEarth Guardians categorical exclusion suit. **Outcome: (See above statement.);**
- 2011 - \$500.00 contribution to partnership with Arizona Cattle Growers and others to have Dennis Parker to develop of comments on the Southwestern Willow Flycatcher critical habitat. **Outcome: While this and other comments on the science behind the original listing the current show that listing and designation of critical habitat are unwarranted the ESA and regulations and Federal Court rules, and precedent cases preclude effective challenge to the science used to justify them. This information has been used in testimony and briefings to Congress for the need to reform the ESA.**
- 2012 - \$443.00 Payment to Budd-Falen Law Offices for research concerning the Draft Environmental Impact Statement for the proposed new Lordsburg Border Patrol Forward Operating Base (FOB). **Outcome: Assisted in the development of comments. The Boarder Patrol ultimately decided to locate the FOB 40 miles North of the border over the objection of the county and citizens. There has been increase in illegal boarding crossings, drug cartel activity, property crime and human trafficking.**
- 2012 - \$1,000.00 Contribution to litigation partners through the City of Sierra Vista for the development of comments for the designation of critical habitat for the Spikedace and Loach Minnow. **Outcome: (See above 2011 contribution for outcome.)**
- 2012 - \$5,477.00 Payment to Budd-Falen Law Offices for preparation of Tombstone suit against U.S. Forest Service and Rio Arriba County Northern Stockman vs. U.S. Forest Service.

**Outcome: Tombstone case, City of Tombstone, Arizona v. United States, Supreme Court Docket No. 12-1069; Arizona District Court Docket No. 11-CV-845:**

**This case is whether the Forest Service can stop or unreasonably condition the City of Tombstone from maintaining its valid easements and rights-of-way for their municipal water system. Because**

parts of the water system are now located within Forest boundaries and a designated wilderness, the Forest Service has taken the position that the City must apply for and receive a "special use permit" before any of the maintenance and repairs can take place.

Through a complicated litigation process, the Federal District Court for Arizona and the Ninth Circuit Court of Appeals ruled, as part of a preliminary injunction ruling, that the City had to receive the permission of the Forest Service through a special use permit prior to doing any maintenance or repairs on the City's water system. In 2012, the City requested Certiorari from the U.S. Supreme Court seeking to overturn the Ninth Circuit's holding. There were two basic Constitutional issues before the U.S. Supreme Court. First, on behalf of the Coalition of Counties, we argued that the City had a property interest in its rights-of-way for its ditches and water system that predated the National Forest, thus the City's actions are not superseded by the "property clause" of the U.S. Constitution. In numerous past Supreme Court cases, the Court has upheld the power of the federal government to "own" property such as National forests, wild horses and other types of property, and that such "ownership" also allowed the federal government to "reasonably regulate" that property's use". We argued that because the City's water system pre-dated the creation of the National forest as well as the wilderness, the City's rights to use and maintain the property could not be regulated or inhibited by the Forest Service'. However, despite our arguments, on April 15, 2013, the Writ of Certiorari was denied by the U.S. Supreme Court and the case was not heard on the merits.

This case is now back before the Arizona Federal District Court. Currently the parties are engaging in the discovery process. Dispositive cross-motions are due on March 21, 2014, oppositions are due May 21, 2014, and replies are due June 20, 2014.

**Outcome: Rio Arriba/ Jarita Mesa, Jarita Mesa Livestock Grazing Association et at. v. United States Forest Service, Federal District Court of New Mexico, 12-CV-69:**

Jarita Mesa and Alamosa Grazing Associations' members are Hispanic stockmen in Northern New Mexico who graze cattle on the Jarita Mesa and Alamosa livestock grazing allotments, both of which lie within the El Rito Ranger District of the Carson National Forest. In 2012, these cattlemen, Rio Arriba County and several individual permittees filed suit against the Forest Service based upon years of discrimination which culminated in a Forest Service decision in 2010 cutting their grazing permits by 18%. The Complaint included both an Administrative Procedure Act ("APA") claim that the Forest Service final decision was arbitrary and capricious, as well as a federal civil rights claim (called a "Bivens" claim) against the Forest Service District Ranger for discrimination.

While I (Karen Budd-Falen) interpret the U.S. Constitution as only allowing federal government ownership of limited property interests such as post offices and military bases, the Supreme Court has not adopted this view. The overarching "property ownership" issue of whether the Federal government could own this property at all was not before the Court. Rather, their issue is whether the City can maintain its preexisting property rights.

The other Constitutional issue in this case related to the Tenth Amendment of the Bill of Rights that states that the powers not specifically enumerated in the Constitution to the federal government are reserved to the states and the people. Because of the limited number of pages we were allowed to use before the Supreme Court, we only briefed the "Property Clause" issue.

On May 23, 2012, the Forest Service moved to dismiss the Bivens claim because of the sovereign immunity of the District Ranger. The Federal District Court for New Mexico agreed with the Forest Service that the ranchers could not bring a Bivens claim, although the Court did find that the ranchers had alleged enough facts to bring a discrimination claim. On February 7, 2013, the Forest Service filed a motion for reconsideration related to the discrimination claim as well as a motion to

dismiss the APA claim for failure to exhaust administrative remedies. On July 26, 2013, a hearing will be held before the New Mexico Federal District Court. No decision has been issued from that hearing to date.

**Outcome: New Mexico Trappers Association, Wild Earth Guardians v. Bidegain, Tenth Circuit Docket No. 13-2001:**

This is a case in which the Wild Earth Guardians ("WEG") sued the New Mexico Game Commission and the New Mexico Game and Fish Department for authorizing trapping within Mexican wolf habitat. The complaint alleges that by allowing trapping, the State of New Mexico is violating the Endangered Species Act ("ESA") section 9 because even a lawfully set trap, being authorized by a licensed trapper, may "take" a threatened Mexican wolf. This firm intervened in the litigation on behalf of the New Mexico Trappers Association, the Coalition of Counties and others (collectively "Trappers") to support the State of New Mexico's trapping licensing program.

On December 4, 2012, the Federal District Court for the District of New Mexico ruled in favor of the State and the Trappers, holding that the current New Mexico statute and regulations authorizing the trapping of fur bearing animals did not violate the ESA's prohibition of take of Mexican wolves. The legal precedent, which I believe is the most important part of this case and has the broadest implications, is that the Court determined that the U.S. Fish and Wildlife Service ("FWS") could adopt 10j rules for experimental/nonessential populations ("ENE") of threatened species (like the Mexican wolf) that lessened the drastic prohibition of "take" of a species. The WEG argued that because ENE populations, like the wolf, are technically threatened species under the ESA, the "take" provisions specific to threatened species in the ESA apply. We argued that Congress provided that the FWS could adopt 10j rules for ENE species that limited those threatened species' "take" provisions.

On January 2, 2013, the WEG appealed its loss to the Tenth Circuit Court of Appeals. We filed our brief on behalf of the Trappers on April 17, 2013. WEG filed its reply brief on May 20, 2013. On February 19, 2014, following an oral argument which took place on January 23, 2014, the Tenth Circuit Court dismissed the case and remanded it back to the Federal District Court of New Mexico because the WEG failed to sue the correct parties.

On Wednesday, March 5, 2014, NM's attorneys requested clarification from the 10 Circuit Court of Appeals: Did their decision to vacate WEG's Appeal of WEG vs McClintic include the lower court's decision in WEG vs Lane? Thursday March 6, 2014, the appellate court answered NO; their decision applied only to WEG vs McClintic.

With this clarification, NM and their interveners (us) have won a dismissal, a summary judgment that established case law, prevailed in an appeal thereby establishing that under constitutional law groups like WEG lack legal standing to sue in such issues and now reaffirmed that the case law from district court will remain intact. Furthermore, this latest clarification, which took less than 24 hours to be handed down, opens the door for the state to go forward and seek reimbursement of all legal funds. Should this occur NM has dealt the environmental litigants defeats that may reverse the trend of ESA lawsuits that has cost game departments, private property owners and sportsman across the nation millions of dollars.

- 2012 - \$1,000 New Mexico Trappers Association for Wolf Trapping Suit. **Outcome:** (See above outcome.)
- 2012 - \$500.00 Pima NRCF for contribution to comments on proposed critical habitat for the Jaguar written by Dennis Parker. **Outcome:** The Fish & Wildlife Service has designated critical habitat for the Jaguar. We are now in discussions with Pacific Legal Foundation to initiate litigation challenging

**the designation using the information generated by the comments of Dennis Parker and Mary Darling.**

- 2013 - \$65.35 Budd-Falen Law Offices Research on Forest Service Planning Rule and Rio Arriba/Jarita Mesa Suits. **Outcome: The Forest Service has published the new planning rule we are awaiting possible challenge as the new rule is implemented. See above for Rio Arriba/Jarita Mesa litigation summary.**
- 2013 - \$5000.00 New Mexico Trappers Association for WildEarth Guardians wolf trapping suit. **Outcome: (See above outcome.)**
- 2013 - \$11,186.87 Budd-Falen Law Offices for work on Tombstone water litigation amicus brief for the 9<sup>th</sup> Circuit Court.
- 2013 - \$436.67 Budd-Falen Law Offices for work on Tombstone water litigation amicus brief for the 9<sup>th</sup> Circuit Court.
- 2013 - \$19.00 Budd-Falen Law Offices for work on Tombstone water litigation amicus brief for the 9<sup>th</sup> Circuit Court. **Outcome: (See above outcome.)**
- 2013 - \$500.00 Pima NRC D for contribution to additional comments on proposed critical habitat for the Jaguar written by Dennis Parker. **Outcome: (See above outcome.)**
- 2013 - \$563.00 Budd-Falen Law Offices for Litigation & Regulation update report.
- 2013 - \$500.00 New Mexico Farm & Livestock Bureau for comments on Tri-County BLM Resource Management Plan Comments. **Outcome: BLM has reopened the comment period. We are awaiting final decision with litigation highly likely.**

The Coalition's Board has carefully invested the legal fund in actions that have yielded positive results for the citizens of our member counties. We have partnered with a variety of interests in Arizona and New Mexico to reduce the expenses of research and litigation to our individual members.

In 2014 we face a year with potential litigation expenses for:

- ◆ Appealing the critical habitat designations for the Jaguar;
- ◆ Challenging the BLM Tri-County RMP decision;
- ◆ Potential challenges to the Forest Service over livestock water right infringement;
- ◆ Potential challenges to Lesser Prairie Chicken listing;
- ◆ Potential challenges against the Fish & Wildlife Service over NEPA and other procedural violations concerning the Mexican Wolf proposed 10(j) rule revisions process.