

Peter M. Lacy (“Mac”) (OSB # 01322)
Oregon Natural Desert Association
917 SW Oak Street, Suite 408
Portland, OR 97205
(503) 525-0193
lacy@onda.org

Stephanie M. Parent (OSB # 92590)
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6736
(503) 768-6642 (fax)
parent@lclark.edu

Laurence (“Laird”) J. Lucas (ISB # 4733)
P.O. Box 1342
Boise ID 83701
(208) 424-1466 (phone and fax)
llucas@rmci.net

Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

OREGON NATURAL DESERT ASS’N et al.

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT et al.

Defendants.

Case No. 03-CV-1017-JE

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS’ MOTION TO STRIKE
AMICUS CURIAE MOTION FOR
SUMMARY JUDGMENT AND AMICUS
CURIAE MOTION TO STRIKE
EXHIBITS AND DECLARATIONS**

Plaintiffs respectfully request the Court to strike *Amicus Curiae* Oregon Cattlemen’s Association’s Motion for Summary Judgment (Dkt # 63) and Motion to Strike Exhibits and Declarations Offered in Support of Plaintiffs’ Dispositive Motion (Dkt # 66).

INTRODUCTION

Plaintiffs filed this action on July 29, 2003, seeking declaratory and injunctive relief for

alleged violations of a number of federal environmental laws by the Bureau of Land Management in its adoption of the Southeast Oregon Resource Management Plan. On March 1, 2004, the OCA moved for intervention under Federal Rule of Civil Procedure 24 (Dkt # 27). The court denied that motion on March 19, 2004 (Dkt # 38). In its Order, the court denied the OCA's motion to intervene as a defendant, but granted the OCA permission to file briefs as an *amicus curiae*. See Order at 4. On April 7, 2004, the OCA filed a Motion for Reconsideration Regarding Intervention (Dkt # 39), again asking the court to grant intervention either as of right or permissively under Federal Rule of Civil Procedure 24. Again, the court denied the OCA's request (Dkt # 50), adhering to its earlier ruling and reiterating that the OCA could reapply to intervene if Plaintiffs prevail on liability and remedies are at issue.

ARGUMENT

The Ninth Circuit has held that an *amicus curiae* "is not a party to litigation." Miller-Wohl Co. v. Comm'r of Labor and Indus., 694 F.2d 203, 204 (9th Cir. 1982), citing Clark v. Sandusky, 205 F.2d 915, 917 (7th Cir. 1953). Instead, the "classic role" of an *amicus curiae* is "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." Id. "Courts have rarely given party prerogatives to those not formal parties. A petition to intervene and its express or tacit grant are prerequisites to this treatment." Id. (citing Ex parte Cutting, 94 U.S. 14, 20-21 (1876)). It is well settled that an *amicus curiae* generally "cannot file pleadings or motions on the cause but is restricted to suggestions relative to matters apparent on the record or to matters of practice." 4 Am. Jur. 2d *Amicus Curiae*, § 6. This comports with the express language of Rule 56 in particular, which states, "A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may . . . move [for summary judgment]." Fed. R. Civ. P.

56(a) (emphasis added).

In a leading case on the role of an *amicus curiae* in litigation, the Sixth Circuit has confirmed the distinction between *amici* and parties to the litigation. United States v. Michigan, 940 F.2d 143 (6th Cir. 1991). The district court, after denying a class of inmates the right to intervene in a challenge to prison conditions, permitted them to become “litigating *amicus curiae*,” with “full litigating rights” including “the right to file pleadings.” Id. at 163. The Sixth Circuit, after reviewing the purpose and history of *amicus* status, reversed the district court’s order. The appellate court strongly criticized such designation, characterizing the order as the achievement, “by circumvention, [of] a result that effectively and impermissibly abused all conventional laws and judicial rules of civil practice and procedure for acquiring the status and rights of a named party/real party in interest, including [Fed. R. Civ. P.] 14 and 17 through 25.” Id. at 164. In the present case, the court was clear in its order denying intervention that the “OCA may file briefs as an *amicus curiae*.” Order (Dkt # 38) at 4.¹

In only one instance that Plaintiffs are aware of has the Ninth Circuit permitted an *amicus curiae* to participate more fully in a court proceeding. Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982). In that case, a district court’s order appointing the Department of Justice and a United States Attorney as *amici* in a prison conditions challenge also provided that they were permitted to “participate in the case with the full rights of parties.” Id. at 1260. However, the Ninth Circuit did not discuss the degree of *amicus* participation as a major issue in the case. It simply deferred

¹ The OCA’s motions are otherwise inappropriate in any event. The Motion for Summary Judgment is inappropriate because this case is proceeding on dispositive motions pursuant to the Tenth Circuit model discussed in Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994). See also Dkt # 23 (Order setting initial dispositive motions briefing schedule). Because these motions are not properly before the court due to the OCA’s status as *amicus curiae*, Plaintiffs will not address the merits of the OCA’s Motion to Strike Exhibits and Declarations unless requested to do so by the court.

to the district court's discretion, stating that it could reverse "an order appointing amici only if the district judge has abused his discretion," which had not occurred. Id. In this case, the court has already followed established case law, agreeing that only the BLM is a proper defendant in the case because only the BLM could be held liable for the alleged violations the federal environmental laws at issue. See Order (Dkt # 38) at 3. As such, there is no compelling reason why an *amicus curiae* should be permitted to file motions such as the ones filed by the OCA, particularly where there is every reason to believe the Federal Defendants will vigorously defend their positions in this case.

CONCLUSION

For the above-stated reasons, Plaintiffs therefore respectfully request the court to strike *Amicus Curiae* OCA's Motion for Summary Judgment and Motion to Strike Exhibits and Declarations Offered in Support of Plaintiffs' Dispositive Motion.

DATED this 21st day of September, 2004

Respectfully submitted,

s/ Peter M. Lacy

Peter M. Lacy ("Mac") (OSB # 01322)
Oregon Natural Desert Association

Of Attorneys for Plaintiffs