

Peter M. Lacy (“Mac”) (OSB # 01322)
Kristin F. Ruether (OSB # 05368)
Oregon Natural Desert Association
917 SW Oak Street, Suite 408
Portland, OR 97205
(503) 525-0193
lacy@onda.org
kruether@onda.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASS’N,
et al.,

Case No. 06-523-HO

Plaintiffs,

v.

RESPONSE TO MOTION FOR
AMICUS CURIAE STATUS
AND TO INTERVENE

SHIRLEY GAMMON, Lakeview District
Manager, BLM, *et al.*,

Defendants.

INTRODUCTION

Laird Ranch *et al.* (hereafter “Applicants”) have moved this Court to grant them *amicus curiae* status in the merits phase of this action and intervenor status for the remedial phase. Because of the extreme late filing of their application and the nature of their stated interest as described in the brief in support of Applicants’ motion, Plaintiffs Oregon Natural Desert Association *et al.* (“ONDA”) oppose Applicants’ amicus request. However, ONDA does not oppose Applicants’ request for intervenor status should this case reach a remedial phase following disposition on the merits.

ARGUMENT

I. STANDARD OF REVIEW

There is “no inherent right to file an *amicus curiae* brief with the Court. It is left entirely to the discretion of the Court.” Long v. Coast Resorts, Inc., 49 F.Supp.2d 1177, 1178 (D. Nev. 1999) (citing Fluor Corp. and Affiliates v. United States, 35 Fed. Cl. 284, 285 (1996)).

Traditionally, an *amicus* is a “non-partisan provider of legal perspective or information to the court.” Funbus Sys., Inc. v. Cal. Pub. Util. Comm’n, 801 F.2d 1120, 1124–25 (9th Cir.1986).

The primary purpose of *amicus curiae* is to address questions of law. See Banerjee v. Bd. of Tr. of Smith Coll., 648 F.2d 61, 65 n.9 (1st Cir. 1981); Metcalf v. Daley, 214 F.3d 1135, 1141 n.1 (9th Cir. 2000) (striking evidence submitted by *amicus curiae* as improper given their specific and limited role in the case). According to Chief Judge Posner, of the Seventh Circuit:

The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief. Such *amicus* briefs should not be allowed. They are an abuse. The term “*amicus curia*” means friend of the court, not friend of a party.

Ryan v. Commodity Futures Trading Comm’n, 125 F.3d 1062, 1063 (7th Cir.1997) (also stating, “An *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all”). Finally, as is the case with intervention under Federal Rule of Civil Procedure 24, timeliness is an important factor when a group seeking *amicus* status seeks to participate in a case by filing briefing or otherwise participating in ongoing litigation. Long, 49 F.Supp.2d at 1178 (citing Fluor Corp., 35 Fed. Cl. at 286); see also United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004) (setting out requirements to obtain intervention as of right under Rule 24(a)(2)).

II. THE MOTION TO FILE AN *AMICUS* BRIEF SHOULD BE DENIED.

Applicants' request to file an *amicus* brief on the merits of ONDA's claims should be denied because: (1) their motion is not timely; (2) they do not claim BLM's briefing is inadequate; and (3) their interests in this case are almost exclusively economic and thereby only relevant if and when this case reaches a remedial phase.

A. The Motion is Not Timely.

In judging timeliness in the context of a motion to intervene, the Ninth Circuit considers three factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997) (also quoting United States v. Washington, 86 F.3d 1499, 1503 (9th Cir.1996) (“any substantial lapse of time weighs heavily against intervention”)). Applicants filed their motion on February 9, 2007, more than nine months after this action was initiated in April 2006. Although they include a long, tortured footnote explaining this lengthy delay, Applicants' Br. at 7 n.2, the practical effect of the delay would be to prejudice ONDA's interests in timely and efficient disposition of this action under the timeline and briefing format established by this Court last year. See Dkt # 19 (Order granting Stipulated Motion concerning briefing format and schedule); Dkt # 34 (Nov. 2006 Order setting Mar. 20, 2007 date for oral argument).

Applicants state that they “do not seek to modify any dates presently scheduled by the Court,” Applicants' Br. at 8, but in fact their proposal would significantly impact the briefing schedule. Applicants propose to file an *amicus* brief and then have ONDA file a response to that brief on “the date the Federal Defendant's reply brief is due.” Id. This would unfairly impose an additional brief on ONDA at a very late stage in summary judgment briefing, as well as

imposing two additional briefs on the Court. See also Contratto v. Ethicon, Inc., 227 F.R.D. 304, 309 n.5 (N.D. Cal. 2005) (citing diversity of case law establishing that parties may not raise new arguments, issues, or facts for the first time on reply).

In order for Applicants to have filed an *amicus* brief that would not modify the established briefing format and schedule they would have to have filed their brief at the same time as BLM filed its opening summary judgment brief—that is, on February 1, 2007. This, of course, means they would have to have filed their motion seeking leave to appear as *amicus curiae* in this action well before then. ONDA’s final reply-response brief on cross-motions for summary judgment is due March 1, 2007. Dkt # 59. Thus, because Applicants’ proposal would inject new briefing and further potential delay into a long-established briefing and argument schedule, they cannot claim that there would be “no prejudice” to ONDA.¹

B. Applicants Are Adequately Represented by BLM for Purposes of This Court’s Determination on the Merits of ONDA’s Claims.

Applicants claim an “interest in seeing that the legal issues before the Court are thoroughly briefed” and express a concern that “the Court has a thorough understanding of the legal validity and factual accuracy of points made by ONDA.” Applicants’ Br. at 6. Yet, Applicants never allege that Defendants have not adequately briefed the legal questions at issue. See id. at 6–9 (discussing *amicus curiae* issues), 15–16 (discussing adequacy of representation of interests under intervention formula). This is despite the fact that they filed their motion a week

¹ Applicants state that ONDA did not “file any response” to an *amicus* brief filed in Ore. Natural Desert Ass’n v. Shuford, No. 06-242-AA. This is not true. ONDA responded to all relevant arguments (by parties or *amicus curiae*) at issue in that case in its reply-response brief on cross-motions for summary judgment, under the same staggered briefing format the Court is using in this action. See 06-242-AA, Dkt # 155 (ONDA’s reply-response brief). In addition, the fact that different grazing permit holders have obtained *amicus curiae* status in other lawsuits does not change the fact that *these* permit holders have filed an extraordinarily late application and seek to alter an established schedule in this case. See Applicants’ Br. at 5, 10.

after BLM filed its opening summary judgment brief, and admit they reviewed BLM's brief prior to filing their motion. Instead, Applicants state that they will "join BLM in support of" its defense of the challenged agency decisions, and then loosely assert that they also "will make their own unique arguments about the claims in this case." Id. at 7 (with no further explanation of what those "unique" legal arguments might be).

In the context of intervention, the prospective intervenor bears the burden of demonstrating that the existing parties may not adequately represent its interests. Sagebrush Rebellion v. Watt, 713 F.2d 525, 528 (9th Cir. 1983). It is well-established that there is a presumption of adequate representation when the representative is a governmental body or officer charged by law with representing the interests of the public. Forest Cons. Council v. U.S. Forest Serv., 66 F.3d 1489, 1499 (9th Cir. 1995). Mere "differences in litigation strategy," Arikaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003), or "minor differences in opinion" do not demonstrate inadequacy of representation. Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996).

During the liability phase of this litigation, Applicants have the same interest as BLM and any other member of the public: an interest in assuring that the agency has complied with all applicable federal laws. Glickman, 82 F.3d at 838 ("Where an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises."); Ore. Natural Desert Ass'n v. Shuford, 2006 WL 2601073, at *5 (D. Or. 2006) (holding same); see also Churchill County v. Babbitt, 150 F.3d 1072, 1082 (9th Cir. 1998) ("A private party cannot 'comply' with NEPA, and, therefore, a private party cannot be a defendant in a

NEPA compliance action.”).² Applicants only say that they want to insure briefing “from all perspectives.” Applicants’ Br. at 6. However, the “interest of a putative intervenor [or, in this case, *amicus curiae*] is not inadequately represented by a party to a lawsuit simply because the party to the lawsuit has a motive to litigate that is different from the motive to litigate of the intervenor.” See Ore. Envtl. Council v. Ore. Dept. of Envtl. Quality, 775 F.Supp. 353, 359 (D. Or. 1991). In short, Applicants have not shown that BLM will not adequately defend their common objective of assuring that the agency has complied with requirements under federal law.

C. Applicants’ Factual Arguments are not Appropriate by *Amicus Curiae* on the Merits.

Finally, Applicants’ request to file an *amicus* brief should be denied because they wish to argue facts and because their interests in this case are almost exclusively economic and thereby only relevant if and when this case reaches a remedial phase. Throughout their memorandum, Applicants’ describe additional “perspectives” or “factual issues” they wish to offer to the Court. Applicants’ Br. at 6, 7, 15–16. Again, though, the primary and limited purpose of *amicus curiae* is to address questions of law. It appears Applicants have much more in mind than simply addressing questions of law to the extent such questions have not already been addressed by BLM. See Applicants’ Br. at 6 (proposed briefing would “ensur[e] that the Court has a thorough understanding of the legal validity and factual accuracy of points made by Plaintiffs”), 7 (“. . . and that the Court is completely aware of Plaintiffs’ misapplication of the law and facts”), 7 (noting “significantly different considerations and concerns”), 7 (“Applicants would offer a

² The Ninth Circuit and its district courts, including the District of Oregon, have applied the “none but a federal defendant” rule concerning intervention consistently in cases alleging similar claims against the government under other environmental laws that regulate agency action. See, e.g., ONDA v. Shuford, 2006 WL 2601073, at *3, 6–7 (reviewing same).

perspective that is not offered by the current parties and that will add depth and breadth to the legal analysis and factual issues provided to this Court”).

These proposed arguments suggest an inappropriately broad role for *amicus curiae*, going well beyond the basic boundary of addressing legal issues not adequately briefed by the parties. Furthermore, Applicants’ assertion “that the Court will not have all of the information it should have in order to make a thorough decision[,]” Applicants’ Br. at 7, is inconsistent with the applicable standard of review on the merits in this case. Because ONDA challenges two BLM Records of Decision—“final agency action” for purposes of judicial review under the Administrative Procedure Act—this Court’s review of ONDA’s claims is based on the administrative record purporting to support the challenged decisions. 5 U.S.C. § 706; Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743–44 (1985); Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000) (“When a plaintiff challenges a final agency action, judicial review is normally limited to the administrative record in existence at the time of the agency’s decision.”) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)); Camp v. Pitts, 411 U.S. 138, 143 (1973) (“The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”). Therefore, briefing concerning additional “information,” “factual issues,” or “perspectives” is both unnecessary and irrelevant for deciding the parties’ cross-motions for summary judgment on the merits of ONDA’s claims.³ See, e.g., Ryan, 125 F.3d at 1064 (“We

³ Because Applicants should not be permitted to file an *amicus* brief, there also is no reason for them to provide argument on the merits during the telephone hearing scheduled for Mar. 20, 2007. If the Court wishes to hear from counsel for Applicants during that telephone hearing, ONDA respectfully requests that any such argument, if necessary, be taken out of Defendants’ time in the interest of insuring that Applicants would address only relevant legal questions to the extent such legal issues are not addressed by Defendants.

are not helped by an *amicus curiae*'s expression of a 'strongly held view' about the weight of the evidence.”).

Similarly, Applicants' memorandum makes clear that their interests in this case are almost exclusively economic. See, e.g., Applicants' Br. at 4 (referring to “significant expense” and “financial harm” related to hypothetical relief), 5 (referring to “harm” from a “temporary or permanent injunction against grazing”), 6 (referring to impacts of a decision on “Applicants' businesses and livelihoods”), 7 (referring to economic harm from “liquidat[ing]” herds under hypothetical injunction), 13–14 (referring to possibility of having to “modify their operations” and sell livestock and property, and possibility of “significant economic losses” under hypothetical injunction scenario), 15 (same arguments concerning “businesses and livelihoods”). These types of economic interests are relevant if, and only if, this case reaches a remedial phase where any injunctive relief issued by this Court could impact those interests.⁴ See ONDA v. Shuford, 2006 WL 2601073, at *7 (finding that grazing permit holders' “economic interests based on federally issued grazing permits are not a ‘significant protectable interest’”).

Furthermore, there is no “right” to graze livestock on the public lands, as Applicants erroneously assert. Applicants' Br. at 12. A federal grazing permit is a mere “privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation.” Osborne v. United States, 145 F.2d 892, 896 (9th Cir. 1944); see also 43 U.S.C. § 315b (grazing permits convey no “right, title, or interest, or estate in or to the public lands”).⁵

⁴ References to potential preliminary injunctions in the declarations filed in support of the application are unfounded. See, e.g., Clark Decl. at ¶¶ 6–7 (referring to economic harm from a “temporary” or “permanent” injunction). ONDA has not filed a motion seeking any such temporary or preliminary injunctive relief; nor does it intend to seek such relief prior to this Court's disposition on the merits.

⁵ See also Public Lands Council v. Babbitt, 529 U.S. 728, 735 (2000) (noting that conditions placed on permits reflect the “leasehold nature of grazing privileges”; that Congress has “made

In short, this Court should deny Applicants’ request to file an *amicus* brief because their focus on factual issues, and their inability to point to any distinct legal questions they could address that BLM has not adequately covered, suggests they wish to serve a lobbying role rather than the role of a friend of the court addressing *legal questions* overlooked or not fully briefed by the parties.

III. ONDA DOES NOT OPPOSE APPLICANTS’ REQUEST FOR INTERVENTION DURING THE REMEDIAL PHASE.

Finally, in this case ONDA does not oppose Applicants’ participation as intervenors if and when this action reaches a remedial phase following the Court’s disposition of ONDA’s claims on the merits.

CONCLUSION

For the foregoing reasons, ONDA respectfully requests the Court to deny Applicants’ request to file an amicus brief and present oral argument on the merits, and to allow them to appear as intervenors during the remedial phase of this action should it reach such a phase.

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the grant of grazing privileges discretionary”; and that the federal government “retained the power to modify, fail to renew, or cancel a permit or lease for various reasons”). For these reasons, grazing permit holders’ interests also are not a “significant protectable interest” for purposes of attaining intervention as of right during the merits phase under Rule 24(a)(2). This is analogous to the type of interest the Ninth Circuit has described as “based upon a bare expectation” insufficient to serve as a “significant protectable interest.” See Forest Cons. Council, 66 F.3d at 1494 (citing Sierra Club v. United States EPA, 995 F.2d 1478, 1482 (9th Cir. 1993)). Courts have applied this reasoning specifically in the context of federal grazing permits. See, e.g., Western Watersheds Project v. U.S. Forest Serv., 2005 WL 3244253, *2 (D. Idaho 2005) (limiting grazing permit holders’ intervention to remedies phase only, in case involving NEPA, NFMA, and Sawtooth Organic Act); Southwest Ctr. for Biol. Diversity v. U.S. Forest Serv., 82 F.Supp.2d 1070, 1074 (D. Ariz. 2000) (grazing association intervention limited to remedial phase).

DATED this 23rd day of February, 2007

Respectfully Submitted,

s/ Peter M. Lacy

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

Of Attorneys for Plaintiff