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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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE

Plaintiffs have requested 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). In its response, the OCA in essence attempts to re-apply for intervention, twice having been denied that privilege already in this case. However, the OCA fails to provide any convincing response to Plaintiffs'

arguments and offers a very open-ended interpretation of the case law and the Local and Federal Rules of Civil Procedure that disregards well-established principles with respect to the distinction between *amici* and parties to a case.

ARGUMENT

The OCA admits that *amicus curiae* are not parties to litigation. OCA Resp. at 6. See also 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). Nevertheless, the OCA attempts to engage in the types of activities in which, pursuant to the Federal Rules of Civil Procedure and the Local Rules, only parties to litigation may engage. The OCA's filings completely disregard the body of case law defining the role of *amicus curiae* in litigation. See, e.g., Pl. Memo in Support at 2–4. In essence, the OCA is attempting—for a third time and this time via a back door route—to gain intervention in this case. This is despite the fact the court has spoken clearly on the point on two previous occasions. See Dkt # 38 (denying intervention motion) & Dkt # 50 (denying motion to reconsider order denying intervention).

The OCA states in its response that "the Court should grant the *amicus* permission to file its motions in this case" and should "[e]nhanc[e]" the OCA's "status" in the case. OCA Resp. at 5. If the OCA desires to take actions beyond its role as *amicus curiae*—which certainly would include the types of motions at issue here—it must comply with the Federal and Local rules by filing a motion requesting appropriate relief. The Local Rules are very clear in stating that "[m]otions may not be combined with any response, reply or other pleading." LR 7.1(b). Yet this is what the OCA has done in response to Plaintiffs' motion to strike. In any event, even if the OCA had properly asked the court for permission to file motions in this action, such a role would have been inappropriate at this stage of the proceedings for the reasons already outlined by the

court twice before. See Order (Dkt # 38) at 3 ("In an action seeking compliance with NEPA, federal agencies or officials are the only proper defendants because private parties do not have a significant protectable interest in NEPA compliance actions. . . . The same reasoning applies to plaintiffs' claims under FLPMA and the Taylor Grazing Act.") (internal quotes omitted).

Finally, the OCA argues that "[t]he issues are presently before the Court and will not be delayed by the addition of the [OCA's] Motion for Summary Judgment or Motion to Strike." OCA Resp. at 5. In fact, these OCA motions have already caused more unnecessary work for the parties and for the court because the issues raised in the OCA's motions are not before the court. Federal Defendants have not yet even filed their dispositive cross-motion, response to Plaintiffs' dispositive motion, or opening brief. It therefore is incorrect to state that issues with respect to a cross-dispositive motion or a motion to strike are before the court.

At its core, the OCA's response presents a fundamental misunderstanding of the role of *amicus curiae* in litigation. The OCA recognizes that the "primary role of the *amicus* is to assist the Court in reaching the right decision," OCA Resp. at 4, but mistakenly equates the role to one carrying with it full-party privileges. The OCA cites one case for the proposition that a district court "has the discretion to determine the extent and manner of the participation of an *amicus*." Russell v. The Board of Plumbing Examiners of the County of Westchester, 74 F.Supp.2d 349, 351 (S.D.N.Y. 1999). However, the OCA omits highly relevant language before and after the limited quote contained in the OCA's response:

> The *amicus* cannot raise or implicate new issues that have not been presented by the parties. The *amicus* cannot assume a fully adversarial position, and is precluded from engaging in adversarial activities such as motions to compel. Moore's 3d. § 327.11[2]. Nor may the *amicus* take an appeal. . . . An intervenor, on the other hand, can act in every way like a party. An intervenor can, but an *amicus* cannot, block settlements by refusing to sign, take discovery, make independent motions, or appeal.

Id. (emphasis added). This is consistent with the case law and other authority cited in ONDA's brief in support of its motion to strike the OCA's motions. In short, the primary function of an *amicus curiae* is to aid the court on questions of law—not to raise new issues and make independent motions on a separate track from the current case schedule.

CONCLUSION

For the above-stated reasons, Plaintiffs again 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 14th day of October, 2004

Respectfully submitted,

s/ Peter M. Lacy

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