

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

MONROE COUNTY BOARD OF )  
COMMISSIONERS, *et al.*, )  
 )  
Plaintiff(s), )  
 )  
v. )  
 )  
UNITED STATES FOREST SERVICE, )  
*et al.*, )  
 )  
Defendant(s). )

Cause No. 4:20-cv-00106-TWP-DML

**MOTION OF WILDLIFE AND FORESTRY GROUPS FOR LEAVE TO FILE BRIEF AS  
*AMICI CURIAE* IN SUPPORT OF FEDERAL DEFENDANTS**

A coalition of wildlife and forestry groups respectfully requests leave of Court to file the attached *amicus curiae* brief in support of federal defendants’ United States Forest Service, *et al.*’s Cross-Motion for Summary Judgment (Dkt. 35). Undersigned counsel conferred with counsel for plaintiffs and federal defendants. Plaintiffs do not take any position at this time; once Plaintiffs have had an opportunity to review the motion for leave and the proposed amicus brief, Plaintiffs will file a response. Federal Defendants do not oppose the motion.

This motion is supported by the attached Declaration of Brent A. Rudolph, Ph.D., Chief Conservation & Legislative Officer of the Ruffed Grouse Society and American Woodcock Society, Declaration of Ray H. Moistner, Executive Director, Indiana Hardwood Lumbermen’s Association, and the Proposed Brief for Wildlife and Forestry Groups.

**ARGUMENT**

The Court should accept the attached brief during its evaluation of the case under Fed. R. Civ. P. 56 and S.D. Ind. L.R 56-1 pursuant to its inherent authority and the goal of “just, speedy, and inexpensive determination of every action and proceeding” under Fed. R. Civ. P. 1. Though “the Federal Rules of Civil Procedure do not address participation of *amicus curiae* at the trial

court level,” *McCarthy v. Fuller*, No. 1:08-CV-994-WTL-DML, 2012 WL 1067863, at \*1 (S.D. Ind. Mar. 29, 2012), “federal district courts possess the inherent authority to appoint *amici curiae* and permit the filing of briefs by them.” *In re Application of Fed. Bureau of Investigation for an Order Requiring Prod. of Tangible Things*, No. BR 13-158, 2013 WL 12335411, at \*2 (FISA Ct. Dec. 18, 2013); *In re Xpedior Inc.*, 354 B.R. 210, 240 (Bankr. N.D. Ill. 2006); *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006) (holding “district courts possess the inherent authority to appoint ‘friends of the court’ to assist in their proceedings.”).

A district court, in sum, may grant leave for an *amicus* brief that appears “timely and useful.” *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff’d*, 782 F.2d 1033 (3d Cir. 1986).<sup>1</sup> Briefs, such as the proposed brief here, that are submitted while the parties are “in the midst of briefing cross motions for summary judgment” are generally considered timely. *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 286 (1996); *United States ex rel. Roby v. Boeing Co.*, 73 F. Supp. 2d 897, 900 (S.D. Ohio 1999). On occasion courts have accepted *amicus* submissions even after completion of briefing where no judgment has been entered. *See Andersen v. Leavitt*, No. 03-CV-6115 DRH-ARL, 2007 WL 2343672, at \*6 (E.D.N.Y. Aug. 13, 2007).

For guidance, district courts may also “employ the principles used in evaluating motions brought under Federal Rule of Appellate Procedure 29.” *McCarthy*, 2012 WL 1067863, at \*1. Consistent with Fed. R. App. P. 29, movants are filing this motion shortly after the party supported, and seek to show “the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case.” Fed. R. App. P. 29(a)(3)(B). Allowing an

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<sup>1</sup> Because of the significant discretion afforded to district courts, courts have not applied rigid deadlines, but have found briefs untimely if filed months or years late to the relevant controversy. Movants’ brief is timely under any of these standards. *Cf. Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982) (case had already been through “numerous pretrial proceedings, including certification of a class, intervention by participants in the fund, motions to compel discovery requests, and submission to the court of fully supported cross-motions for summary judgment.”); *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, No. 1:15-CV-1191, 2017 WL 11454764, at \*1 (W.D. Mich. Oct. 30, 2017) (brief was “filed more than one year after the motion to dismiss was filed and almost six months after the hearing on the motion occurred.”); *Bounty Minerals, LLC v. Chesapeake Expl., LLC*, No. 5:17-CV-1695, 2019 WL 7048981, at \*10 (N.D. Ohio Dec. 23, 2019) (leave to file denied where “summary judgment briefs in this matter were fully ripe seven months ago”).

amicus curiae brief at this stage of the litigation would not be prejudicial to any party, as the plaintiffs' reply brief is not due until January 26 and no hearing has yet been scheduled. Thus there is ample time for party responses if desired.<sup>2</sup>

Prospective *amici* are a wide group of stakeholders with interests in continued active management of the Hoosier National Forest to promote forest health, provide wildlife habitat, and support forest products businesses in Indiana and around the nation. The brief is offered in the spirit of attempting to be “true friend[s] of the court,” who “will seek to add value to [the Court’s] evaluation of the issues presented....” *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (Scudder, J., in chambers). One of the ways an *amicus* brief can be helpful is by “[o]ffering a different analytical approach to the legal issues before the court.” *Id.* *Amici* seek to do that here by presenting a third-way approach to forest management and litigation, different than an “either/or” approach might be suggested by the plaintiffs’ and government’s dueling briefs. Forest management is a rare arena in which highly diverse stakeholders can come together for common goals and mutually beneficial, win-win solutions.

Courts in this district have acknowledged the benefit of appropriate *amicus* briefs. *Cf. Tully v. Okeson*, No. 1:20-CV-01271-JPH-DLP, 2020 WL 4926439, at \*8 & n.7 (S.D. Ind. Aug. 21, 2020), *aff’d*, 977 F.3d 608 (7th Cir. 2020) (granting leave to file to Disability Rights Education and Defense Fund and stating “The Court is grateful for the *amicus* brief and its valuable insights into COVID-19’s impact on Hoosier voters with disabilities”); *Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 859 (S.D. Ind. 2020) (*amicus* should “provide the Court with additional helpful theories or insights”); *E.F. Transit, Inc. v. Cook*, No. 1:13-CV-01927-RLY-MJD, 2018 WL 10502418, at \*1 (S.D. Ind. Dec. 12, 2018) (Court “took both *amicus curiae* briefs into consideration when forming its opinion.”).

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<sup>2</sup> To the extent needed, *amici* request the Court extend the time for filing from December 23, 2020 to January 11, 2021, pursuant to Fed. R. App. P. 29(a)(6). The extension is appropriate in light of circumstances including undersigned counsel’s childcare difficulties arising from the Covid-19 pandemic and a recent family medical issue, intervening holidays, and the need for participants to quarantine and recover from Covid-19.

The attached brief seeks to give factual and legal context to explain *amici*'s perspectives. One of the issues it highlights is the recent decision by the State of Indiana to add the ruffed grouse to the state list of endangered species. The decline of ruffed grouse in Indiana is a direct result of the *lack* of active forest management and shrinking early forest habitat in the state. Projects like Houston South will restore missing pieces of the forest ecosystem and with them species such as the ruffed grouse. *Amici* believe these projects can be done in compliance with other environmental laws and without negative effects on listed species such as Indiana bat.

While the Seventh Circuit has historically been relatively inhospitable to *amicus* filings,<sup>3</sup> the opinion in *Prairie Rivers* indicates a greater receptivity to these briefs and outlines ways in which they may be helpful. Specifically, “a true friend of the court will seek to add value to our evaluation of the issues presented....” *Prairie Rivers*, 976 F.3d at 764. The opinion notes “even a friend of the court interested in a particular outcome can contribute in clear and distinct ways,” including the following that are relevant here:

- Offering a different analytical approach to the legal issues before the court;
- Highlighting factual, historical, or legal nuance glossed over by the parties;
- Explaining the broader regulatory or commercial context in which a question comes to the court;
- Providing practical perspectives on the consequences of potential outcomes;
- Conveying instruction on highly technical, scientific, or specialized subjects beyond the ken of most generalist federal judges.

*Id.* In sum, “an amicus curiae brief should be additive—it should strive to offer something different, new, and important.” *Id.* The brief at issue in *Prairie Rivers* met the relevant tests by “lending context to the cases cited by the parties and highlighting the practical results” of the case. *Id.* at 764. Movants seek to do the same here, to move toward a different conversation and set of arguments about forest management. The court granted leave in a similar case involving

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<sup>3</sup> The leading examples are both in-chambers opinions of former Circuit Judge Posner. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062 (7th Cir. 1997) (Posner, J., in chambers); *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542 (7th Cir. 2003) (Posner, J., in chambers). *Ryan*'s restrictive view was rejected by the Third Circuit in *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 130 (3d Cir. 2002), particularly to the extent *Ryan* added factors beyond Rule 29 in requiring the existing parties to be inadequately represented before accepting an *amicus* brief. *Prairie Rivers* indicates the presence, if not prevalence, of a more receptive view in the Seventh Circuit.

“a stakeholder group comprising ‘a highly diverse range of forest stakeholders—recreational interests, local environmental groups, the timber industry, sportsman groups, local politicians, the Tuolumne Band of Me-Wuk, and others who care about the Stanislaus National Forest, Yosemite National Park, and private timberlands of the region.’” *Earth Island Inst. v. Nash*, No. 1:19-CV-01420-DAD-SAB, 2019 WL 6790682, at \*2 (E.D. Cal. Dec. 12, 2019). “This perspective, *Earth Island* held, is distinguishable from that of the non-profit group and government parties.” *Id.* The same is true here, and the proposed *amicus* brief “may assist the court in resolving the issues before it.” *Id.* “Ultimately, if the filed *amicus* brief ‘turns out to be unhelpful,’ the court ‘can then simply disregard’ it.” *Id.* (quoting *State of Cal. v. U.S. Dep’t of Labor*, No. 2:13-CV-02069-KJM-DAD, 2014 WL 12691095, at \*1 (E.D. Cal. Jan. 14, 2014)). “On the other hand, if a good brief is rejected, the [Court] will be deprived of a resource that might have been of assistance.” *Id.*

Finally, *amici* have endeavored to coordinate so that they can avoid a series of individual filings. This further weighs in favor of the *amicus* brief. *Cobell v. Norton*, 246 F. Supp. 2d 59, 64 (D.D.C. 2003).

### CONCLUSION

For the foregoing reasons, the Court should grant leave to file the *amicus* brief in connection with the parties’ motions for summary judgment.

Dated: January 11, 2021

Respectfully submitted,

/s/ Clark C. Johnson

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