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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

SHOSHONE-BANNOCK TRIBES OF )  
THE FORT HALL RESERVATION, )  
 )  
Plaintiff, )

v. )

LAURA DANIEL-DAVIS, Principal )  
Deputy Assistant Secretary for Land and )  
Mineral Management, UNITED STATES )  
DEPARTMENT OF THE INTERIOR )  
and UNITED STATES BUREAU OF )  
LAND MANAGEMENT, )

Defendants, )

and )

J.R. SIMPLOT COMPANY, )  
 )  
Defendant-Intervenor. )

Case No.: 4:20-cv-00553

**AMICI CURIAE’S PROPOSED REPLY TO  
FEDERAL DEFENDANTS’ AND  
DEFENDANT-INTERVENOR J.R.  
SIMPLOT COMPANY’S RESPONSES TO  
AMICI CURIAE BRIEF**

**INTRODUCTION**

In alleging that Amici Curiae have impermissibly sought to expand the administrative record and raised issues not presented in Plaintiff’s motion for summary judgment, Federal Defendants and Defendant-Intervenor fundamentally misconstrue the role of amici curiae and the scope of their participation in federal actions, *see* ECF Nos. 65 & 66. As explained by U.S.

Supreme Court Justice Breyer, amicus curiae briefs “play an important role in educating the judges on potentially relevant technical matters,” helping them become “moderately educated lay persons” in order to “improve the quality of [their] decisions.” Stephen Breyer, *The Interdependence of Science and Law*, 82 *Judicature* 24, 26 (1998). Indeed, “[a]n amicus brief should normally be allowed when, among other considerations, the amicus has unique information or perspective that can help the court beyond the help that lawyers for the parties are able to provide” *Jamul Action Comm. v. Stevens*, No. 2:13-cv-01920-KJM-KJN, 2014 U.S. Dist. LEXIS 107582, at \*14 (E.D. Cal. Aug. 4, 2014) (citing *Cnty. Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999)) (cleaned up); *Pub. Serv. Co. v. Kempthorne*, No. CV-91-035-S-EJL, 2005 U.S. Dist. LEXIS 57994, at \*7 (D. Idaho Apr. 14, 2005) (“The function of an amicus curiae is to call the court's attention to law, facts, or circumstances in a matter then before it that may otherwise escape its consideration and to aid the court on questions of law.”); *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982) (describing “the classic role of amicus curiae [as] assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court’s attention to law that escaped consideration”).

Here, Amici’s brief provided the Court with unique information and perspective about the environmental effects of fertilizer production and its toxic waste, phosphogypsum; the inadequate regulatory landscape regarding the environmental effects of phosphogypsum and process water in general; the publicly available information on the operations of the Don Plant Fertilizer Facility near Pocatello, Idaho, and the Eastern Michaud Flats Superfund site in particular; and the interdependent phosphate mining operations from Simplot’s Smoky Canyon

Phosphate Mine. *See generally*, ECF No. 50. This information is directly relevant to issues raised in Plaintiff's Complaint and Motion for Summary Judgment, ECF Nos. 1 & 37.

**I. In Fulfilling its Role to Educate the Court, Amici May Cite Secondary Legal Sources and Other Relevant Sources Beyond the Administrative Record.**

Federal Defendants and Defendant-Intervenor claim Amici improperly seek to expand the record in providing this Court with an Environmental Law Reporter article,<sup>1</sup> with courtesy footnote citations to scientific studies this secondary legal source cites, and citations to other extra-record sources. *See* ECF No. 66 at 4, ECF No. 65 at 2.

As a preliminary matter, regarding the Environmental Law Reporter article, neither Federal Defendants nor Defendant-Intervenor cite any caselaw that prohibits amici from citing a secondary legal source in their brief. Indeed, the Ninth Circuit regularly relies on secondary legal sources to inform its decisions, as has this Court. *See, e.g., Mont. Wilderness Ass'n v. McAllister*, 666 F.3d 549, 553 n.2 (9th Cir. 2011) (citing an environmental law journal article to describe motor vehicle use in wilderness areas in an Administrative Procedure Act case); *W. Watersheds Project v. United States Fish & Wildlife Serv.*, No. 4:10-CV-229-BLW, 2012 U.S. Dist. LEXIS 13771, at \*43 (D. Idaho Feb. 2, 2012) (citing an environmental law journal article regarding listing deadlines under the Endangered Species Act).

Moreover, consistent with Amici's unique role in this action, Amici properly provided all citations at issue to assist the Court in understanding technical matters relating to the environmental effects of fertilizer production. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, Nos. CV 01-640-RE, CV 05-23-RE, 2005 U.S. Dist. LEXIS 16657, at \*14-15 (D. Or. Apr. 8, 2005) (denying in part a motion to strike extra-record materials cited in an amicus brief where

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<sup>1</sup> Jaclyn Lopez, *EPA's Opportunity to Reverse the Fertilizer Industry's Environmental Injustices*, 52 Environmental Law Reporter 10125 (2022).

“appropriate extra-record materials, whether presented by the parties or amici, serve the purpose of assisting the court” and “appropriate materials specifically are those that help explain complex or technical scientific issues”); *Wagafe v. Biden*, No. 17-CV-00094-LK, 2022 U.S. Dist. LEXIS 27279, at \*8 (W.D. Wash. Feb. 15, 2022) (holding “attacks [on extra-record materials] unnecessarily complicate and restrict the ‘classic role’ of amicus briefing, which is to assist the Court in cases of general public interest, supplement the efforts of counsel, and draw the Court’s attention to law that has evaded its consideration”). As Amici explained in the brief, the disputed citations are also judicially noticeable by the Court. Dkt. 50 at 12, 14–15; *see also Jamul*, No. 2:13-cv-01920-KJM-KJN, 2014 U.S. Dist. LEXIS 107582, at \*18 (observing that “courts in this circuit frequently grant requests for judicial notice by an amicus curiae”).

Here, the Environmental Law Reporter article and internally cited studies help to inform the Court of matters regarding the environmental harms of phosphate mining and fertilizer production, namely the creation and indefinite storage of radioactive, hazardous phosphogypsum, which support policy arguments made by Amici. Other citations at issue, including a press release and factsheet published by J.R. Simplot Company, and an EPA facility report for the Don Plant, also provide information and context for the Court.

## **II. Amici Provide Information and Arguments That Relate to Issues Raised in Plaintiff’s Complaint and Motion for Summary Judgment.**

Contrary to claims by Federal Defendants and Defendant-Intervenor, ECF No. 65 at 2–4; ECF No. 66 at 2–3, Amici’s brief addresses issues that were raised by Plaintiff; namely, that (1) BLM’s exchange of public lands, which enables Simplot’s production and storage of radioactive, hazardous waste, does not serve the public interest within the meaning of the Federal Land Policy and Management Act (FLPMA); and (2) BLM’s failure to analyze the indirect and cumulative effects of fertilizer production and phosphate mining is contrary to National

Environmental Policy Act (NEPA). ECF No. 50 at 5, 12. Plaintiff explicitly raised these issues in the Complaint, ECF No. 1 at 3, 5, 7, 15, 29, 34–37, and Plaintiff’s memorandum in support of its motion for summary judgment, ECF No. 37-1 at 16–20, 22–29, 33–36.

**III. Defendant-Intervenor Misapprehends the Amici Curiae Brief.**

Defendant-Intervenor alleges the Amici Curiae brief makes erroneous claims that the Don Plant has a calciner, that there is uranium recovery at the Don Plant, and that there is ammonia production at the Don Plant. ECF No. 65 at 3 n. 1. Amici respectfully disagree and maintain their Amici characterization of Defendant-Intervenor’s businesses as “a complex of multiple chemical plants generating and processing various chemicals within the fertilizer production supply chain.” ECF No. 50 at 5. The brief provides information about processes and facilities across that supply chain to provide context for the upstream and downstream effects associated with the land-transfer at issue, *id.* at 5, 18–19, and explains that the calciner is at its Smoky Canyon mine an hour away, and that while Simplot previously synthesized ammonia onsite, it now gets its ammonia from its plant at its Rock Springs facility, *id.* at 2 n. 2–3. The brief also highlights that, as a general matter, phosphogypsum and process wastewater produced during fertilizer production can contain high levels of uranium from the fertilizer production process. *Id.* at 7, 9.

**CONCLUSION**

Federal Defendants and Defendant-Intervenor seek to improperly restrict the Amici's role and the scope of their participation. The Court may rely on the information and expertise provided by Amici in their brief.

DATED this 2<sup>nd</sup> day of September, 2022.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2<sup>nd</sup> day of September 2022, I electronically filed the foregoing document with the U.S. District Court. Notice will automatically be electronically mailed to the individuals who are registered with the U.S. District Court EM/ECF System.

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