**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| **STATE OF OKLAHOMA,**<br><br>**Plaintiff,**<br><br>**vs.**<br><br>**TYSON FOODS, INC., et al.,**<br><br>**Defendants.** | **Case No. 4:05-CV-329-GKF(SAJ)** |

**REPLY OF POULTRY PARTNERS, INC, IN FURTHER SUPPORT OF ITS MOTION FOR PERMISSION TO FILE BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO THE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND INTEGRATED BRIEF IN SUPPORT THEREOF**

COMES NOW POULTRY PARTNERS, INC. ("Poultry Partners") and respectfully submits its *Reply in Further Support of its Motion for Permission to File a Brief as Amicus Curiae in Opposition to the Plaintiffs' Motion for Preliminary Injunction and Integrated Brief in Support Thereof* (Dkt No. 1373). This Reply is specifically directed to Plaintiff's *Response to Motion of Poultry Partners, Inc. for Permission to File Brief as Amicus Curiae* (Dkt No. 1421).

In further support of its Motion for Permission to File an *Amicus Curiae* Brief and in reply to Plaintiff's objection, Poultry Partners respectfully suggests to the Court that Poultry Partners' unique perspective, as an organization of the growers who supply and apply poultry litter, makes its input to the Court particularly helpful. Poultry Partners also respectfully suggests that Plaintiff's claim that Poultry Partners is a "friend" with a

party does not preempt this Court's absolute discretion in determining what information the Court may find useful.

**Contrary to Plaintiff's Claim, Poultry Partner's *Amicus Curiae* Brief Would be Useful to the Court and Is Not Barred Because of Any Alleged "Friendship" with a Party.**

Plaintiff correctly states one principle in its Response, i.e. the right to file an *amicus* brief is "... left entirely to the discretion of the Court." *Long v. Coast Resorts, Inc.,* 49 F.Supp.2d 1177, 1178 (D. Nev. 1999). A more complete statement of the principle was set forth in another case cited by Plaintiff: "The extent, if any, to which an *amicus curiae* should be permitted to participate in a pending action is solely within the broad discretion of the district court. A court may grant leave to appear as an *amicus* if the information offered is timely and useful. ... Nevertheless, by the nature of things an *amicus* is not normally impartial.... While the partiality of an *amicus* is a factor to consider in deciding whether to allow participation, there is no rule... that *amici* must be totally disinterested." *Waste Management of Pennsylvania, Inc. v. City of York,* 162 F.R.D. 34, 36 (M.D.Pa. 1995).

Plaintiff cites the cases of *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,* 282 F.Supp.2d at 1177-78, and *Hawksbill Sea Turtle,* 11 F.Supp.2d at 541, as cases justifying denial of Poultry Partners' request to file an *amicus curiae* brief because the information to be provided by Poultry Partners lacks "utility." Poultry Partners suggest that the courts in those cases denied the *amici* requests because the requests were untimely. Plaintiff's cases therefore provide this Court with no guidance.

Much more helpful is the case of *National Organization of Women, Inc. v. Scheidler,* 223 F.3d 615, 617 (7th Cir. 2000), in which the 7th Circuit, addressing the request of an *amicus curiae* to submit a brief in an appellate proceeding, stated that its policy is … "to grant permission to file an *amicus* brief only when … the *amicus* has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do." Recognizing that appellate considerations are not binding upon this Court's determination process for *amicus* briefs, Poultry Partners respectfully suggests that it has a unique perspective and information that can assist this Court beyond what the parties are able to do. No party to this action will be affected in the same day-to-day operations and real world economics fashion that the poultry growers of Northeastern Oklahoma will be should this Court enter the requested ban on application of poultry litter as fertilizer in the Illinois River Watershed.

Plaintiff also suggests that this Court cannot consider balancing of interests and impacts of a governmental plaintiff's request for an injunction. In support of this suggestion, Plaintiff cites the case, among others, of *Illinois v. Milwaukee,* 599 F.2d 151, 166 (7th Cir. 1979), which was admittedly reversed on other grounds. However, the language cited by Plaintiff is mere *dicta* which drew upon language from the case of *Harrison v. Indiana Auto,* 528 F.2d 1107, 1122-23 (7th Cir. 1976). In the *Harrison* case, the 7th Circuit discussed the very balancing that this Court is allowed to make:

> "Of course, where the pollution from a mill or factory creates hazards that imminently and dangerously affect the public health, the appropriate relief is a permanent injunction against the continuation of the polluting activities. … However, a permanent injunction that shuts down a mill or factory without consideration of the extent of the harm that its pollution

> caused would be equally unreasonable. **Pollution nuisance cases present no special features that should exempt them from the equitable requirements for injunctive relief**, including proof of irreparable harm and inadequate remedy at law." (Emphasis added.)

Each of the other cases cited by Plaintiff for its suggestion that this Court cannot balance interests in evaluating Plaintiff's request for an injunction is distinguishable because the governmental plaintiffs in those cases were merely seeking to enforce or require permits. A close reading of Plaintiff's cases discloses that district courts are **not** free to abandon traditional principles of equity jurisprudence in environmental cases. Instead, the consistent theme of those decisions is that clearly demonstrable bad acts are the most significant factors in allowing a court to enter an injunction without making findings of irreparable harm, inadequacy of legal remedy, or the balancing of interests. To the best of Poultry Partners' knowledge, Plaintiff has not submitted **proof of any bad acts by poultry growers** in the application of litter within the Illinois River Watershed. Just the opposite has been made clear through rigorous and invasive discovery by the Plaintiff.

More recently, the Tenth Circuit has made it clear that balancing the harm that a preliminary injunction will cause is appropriate even where a sovereign seeks it and a sovereign opposes it on the basis of public safety and public interest. *See Prairie Band of Potawatomi Indians v. Pierce,* 253 F.3d 1234, 1246 (10th Cir. 2001). If allowed, Poultry Partners will provide information regarding the harm that will occur if the injunction requested by Plaintiff is granted.

In the case before this Court, Plaintiff asks that litter application within the Illinois River Watershed be banned. Unfortunately, it is the poultry growers that supply and apply the vast majority of litter in the Illinois River Watershed. Poultry growers have repeatedly informed the Plaintiff that poultry growers utilize litter as fertilizer, to be used in their own agricultural business activities or to be sold to others for such use. It is the use of this agricultural resource of fertilizer that the Plaintiff asks be permanently enjoined and taken from the poultry growers without substitute or compensation. As a result, it is entirely appropriate that this Court hear from and balance the interests of the poultry growers. Poultry Partners respectfully suggests that an *amicus* brief from Poultry Partners which supports Defendants is desirable because **no party** to the case at bar stands in precisely the same economic position as the members of Poultry Partners.

**Conclusion**

Poultry Partners respectfully asks this Court's permission to submit an *amicus* brief in opposition to Plaintiff's prayer for injunctive relief.

Respectfully submitted,

s/ D. Kenyon Williams, Jr.

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## CERTIFICATE OF SERVICE

I certify that on the 4th day of January, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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