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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASS’N,
CENTER FOR BIOLOGICAL DIVERSITY,
and **WESTERN WATERSHEDS PROJECT**,

Plaintiffs,

v.

ABIGAIL KIMBELL, Chief, U.S. Forest Service, *et al.*,

Defendants,

Case No. 07-1871-KI

REPLY IN SUPPORT OF PLAINTIFFS’ MOTION TO CONSOLIDATE

INTRODUCTION

Plaintiffs Oregon Natural Desert Association, Center for Biological Diversity and Western Watersheds Project ("ONDA") file this reply in support of their motion to consolidate two related cases with this action. The Oregon Cattlemen's Association and Dayville Grazing Association ("OCA-DGA"), intervenor-defendants in the two 2003 cases, have filed a brief (Dkt # 18) opposing ONDA's motion. Federal Defendants have not responded to ONDA's motion.[1] As explained in our opening brief and below, ONDA again respectfully requests this Court to consolidate Oregon Natural Desert Ass'n v. U.S. Forest Serv., No. 03-213-JO (D. Or. filed Feb. 18, 2003) and Oregon Natural Desert Ass'n v. U.S. Forest Serv., No. 03-381-HA (D. Or. filed Mar. 25, 2003) with this case.

ARGUMENT

I. CONSOLIDATION IS TIMELY AND WILL PROMOTE JUDICIAL EFFICIENCY.

OCA-DGA argues that ONDA "asks the court to disregard the [2003] order denying consolidation" of the 03-213 and 03-381 cases, and that an order granting ONDA's motion would "overturn" the 2003 order. OCA-DGA Opp. at 2, 4. Of course, this Court's 2003 order in 03-213 denying the Forest Service's consolidation motion is not binding precedent. See, e.g., FC Inv. Group LC v. Lichtenstein, 441 F.Supp.2d 3, 10 (D.D.C. 2006) ("In any event, 'one district court decision is not binding on another district court.'") (quoting Am. Council of the Blind v. Wash. Metro. Area Transit Auth., 133 F.Supp.2d 66, 74 n.2 (D.D.C. 2001)). Consolidation is a

[1] ONDA respectfully reserves the right to file a separate response if Federal Defendants seek and are granted leave to file an out-of-time response to ONDA's motion to consolidate. Counsel for Federal Defendants initially conferred with ONDA concerning a potential extension of time that would allow him until January 22, 2008 to file any response to this motion. Counsel indicated that defendants had not yet decided whether they would oppose the motion. ONDA indicated it would not oppose a January 22, 2008 extension request, but now that date has passed and Federal Defendants have not filed anything.

highly case-specific inquiry and this Court retains "broad discretion" to determine whether consolidation will ultimately promote efficient resolution of related claims. Investors Research Co. v. U.S. Dist. Court, 877 F.2d 777, 777 (9th Cir. 1989).

OCA-DGA also argues consolidation is not appropriate until the Court rules on the motions to amend the complaints in the 03-213 and 03-381 cases. OCA-DGA Opp. at 2. By minute order dated January 18, 2008, the Court granted ONDA's motion for leave to amend in the 03-213 case. See ONDA v. USFS, 03-213, Dkt ## 248, 249 (order granting motion and Third Amended Complaint).

Next, OCA-DGA argues that the Court should not "permit ONDA to change its position" concerning consolidation. OCA-DGA Opp. at 6; see also id. at 2 (claiming ONDA's motion is "in contravention of its position in 2003"), 5 (arguing ONDA cannot "completely abandon" a prior "position in favor of the opposite position now that ONDA has a different legal strategy"). Yet, the consolidation motion before the Court in 2003 in the 03-213 and 03-381 cases, and the motion currently before this Court, are two completely distinct motions. ONDA is not somehow bound to maintain an unwavering "position" on consolidation in general.[2] As we explained in our opening brief, this Court's disposition of the National Forest Management Act ("NFMA") and Endangered Species Act ("ESA") claims in all three cases will turn quite significantly upon the scope of the Forest Service's legal obligations under the PACFISH and INFISH aquatic conservation strategies. See ONDA Memo in Support of Consolidation (Dkt # 8), at 10 n.7.

[2] Obviously, if this was so, both OCA-DGA and the Federal Defendants would also be barred from changing their "prior position[s,]" which were strongly *in favor* of consolidating the 03-213 and 03-381 cases. See, e.g., ONDA v. USFS, 03-213, Dkt ## 42, 48, 52 (Forest Service and Oregon Cattlemen's Association briefs in support of Forest Service Motion to Consolidate Related Cases).

Finally, OCA-DGA argues that consolidation is inappropriate because the 03-213/03-381 cases "have received significant treatment by this court." OCA-DGA Opp. at 9. Prior procedural history is largely irrelevant to the question of consolidation. If "consolidation may tend to reduce cost and delay," separately filed actions should be consolidated. *The Manual for Complex Litigation*, *Fourth* (2004) at § 20.11. See also Huene v. United States, 743 F.2d 703, 704 (9th Cir. 1984) (in exercising its broad discretion to order consolidation, a district court "weighs the saving of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause").

Here, the procedural posture of the 03-213/03-381 cases is conducive to consolidation with this action. Those cases are on remand from the Ninth Circuit following that court's decision that the district court should review the merits of ONDA's claims in those cases. Ore. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977 (9th Cir. 2006). OCA-DGA claims the Ninth Circuit remanded "with instructions" to this Court. OCA-DGA Opp. at 9. This is not true: the Ninth Circuit ruled that ONDA had properly challenged final agency action in the form of the Forest Service's Annual Operating Instructions. It remanded to this Court to review ONDA's claims on the merits. ONDA v. USFS, 465 F.3d at 990. No proceedings going to the merits of the claims in 03-213 and 03-381 have occurred since this Court dismissed those cases for want of jurisdiction in June 2005. Following the Forest Service's decision to issue new grazing decisions in 2007, and its consultation with NMFS and FWS concerning the impacts of those grazing decisions on steelhead and bull trout, ONDA has amended the complaints in the 03-213 and 03-381 cases and simultaneously has alleged very closely related claims in this case based on the

2007 grazing decisions. Thus, consolidation is the most economical route to proceed with these intertwined NFMA and ESA claims.[3]

II. COLLATERAL ESTOPPEL IS INAPPLICABLE.

OCA-DGA argues collateral estoppel precludes this Court from consolidating these three actions. OCA-DGA Opp. at 5. This argument is without merit. Collateral estoppel, also known as issue preclusion, "prevents relitigation of all 'issues' of fact or law that were actually litigated and necessarily decided' in a prior proceeding." Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988) (quoting Segal v. AT&T, 606 F.2d 842, 845 (9th Cir. 1979)). To apply collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated by the party against whom preclusion is asserted; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action. McQuillion v. Schwarzenegger, 369 F.3d 1091, 1096 (9th Cir. 2004).

Here, none of the three factors is met. The issue at stake is not identical because the consolidation motion currently before the Court is distinct from the government's 03-213/03-381 consolidation motion filed in 2003 and concerning only those two cases. Therefore, the "issue" has not been actually litigated and the court's prior "determination" does not go to the currently pending consolidation motion. Moreover, there has been no final judgment (for which the

[3] OCA-DGA provides no specific support for its claim that consolidation will cause "great confusion and difficulty." OCA-DGA Opp. at 10; see also id. at 9 (consolidation "is bound to result in significant confusion"). In fact, OCA-DGA's chart summarizing the claims, allotments and parties in the three cases, aside from not accounting for the amendments to the 03-213/03-381 complaints, shows that OCA-DGA does not appear to be confused about the legal claims and facts at issue in each of the three actions, and how they related to one another. OCA-DGA Opp. at 6.

determination of the issue was a critical and necessary part) in the "earlier action" because the 03-213 and 03-381 cases remain active before this Court, on remand from the Ninth Circuit.[4]

III. COMMON QUESTIONS OF LAW OR FACT PREDOMINATE.

OCA-DGA argues consolidation is inappropriate because there are "different" questions of law and fact involved in the three cases. See OCA-DGA Opp. at 2–3, 7, 8, 9. Yet, Rule 42 asks simply whether there is "a common question of law or fact" among the actions at issue. Fed. R. Civ. P. 42(a). See also Takeda v. Turbodyne Tech., Inc., 67 F.Supp.2d 1129, 1132 (C.D. Cal. 1999) (Rule 42 does not "demand[] that actions be identical before they may be consolidated"). Assuming there are common questions, this Court then exercises its broad discretion to determine whether consolidation will promote judicial efficiency. See Investors Research Co, 877 F.2d at 777; see also 9 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2382 (2d. ed. 1995) (in general, a common question of law or fact is by itself enough to permit consolidation, even if the claims arise out of independent transactions).

A. Common Questions of Fact.

OCA-DGA argues that because the facts at issue in these three closely related actions are not completely identical, consolidation is not appropriate. See OCA-DGA Opp. at 7–8 (stating

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[4] Even when all of the elements of the doctrine are met, exceptions to the doctrine may preclude its use based on:

> (1) whether the issues presented are in substance the same in the present and prior litigation; (2) whether controlling facts or legal principles have changed significantly since the prior judgment; and (3) whether "other special circumstances warrant an exception to the normal rules of preclusion."

Richey v. U.S. Internal Revenue Serv., 9 F.3d 1407 (9th Cir. 1993) (quoting Montana v. United States, 440 U.S. 147, 155 (1979)). Here again, we are dealing with a new, third case instead of the two original cases at issue in 2003. Also, facts and circumstances have changed since 2003. The Forest Service has issued new 2007 grazing decisions, and this new action challenges consultation documents which cover allotments challenged in the original two cases.

that the "allotments . . . people, ranches, and administrative records" at issue are "different"). As explained in ONDA's opening brief, each of these three actions involves the Malheur National Forest's grazing authorizations, via its 2007 Grazing Permit Modification decisions and accompanying grazing authorization letters, on allotments containing steelhead and bull trout streams. The core issue of concern to ONDA in these cases is the impact livestock grazing is having each year on stream and riparian habitat and native trout populations on the Malheur National Forest. In addition, the NMFS and FWS consultation process challenged in this action—on which the Forest Service relied in its making its 2007 grazing decisions—covered not only the allotments at issue in this case, but also the allotments involved in the two cases which ONDA moves to consolidate with this one. Therefore, the fundamental factual commonality among the cases is the impact the Forest Service's authorized livestock grazing is having on native trout and their habitat. The agency decisions at issue are (1) the Forest Service's 2007 Grazing Permit Modification decisions and accompanying authorization letters, and (2) the NMFS and FWS biological opinion and letters of concurrence concerning those 2007 grazing decisions. These therefore are factually related decisions based on a common agency-authorized activity on the Malheur National Forest.

B. Common Questions of Law.

The legal claims at issue are likewise common in the three cases. As explained in ONDA's opening brief, the central common legal issue concerns the scope of the Forest Service's duty to modify or suspend grazing practices that retard or prevent attainment of Riparian Management Objectives ("RMOs") under PACFISH and INFISH. Each case alleges the Forest Service has, in its 2007 grazing decisions, violated NFMA by authorizing livestock grazing that is inconsistent with PACFISH and INFISH Standard GM-1. The Endangered

Species Act claims in this action are inextricably bound up with these PACFISH and INFISH issues, as the Forest Service, NMFS and FWS rely heavily on the assumption that the Malheur National Forest's grazing program will achieve "near natural rates of recovery" as required by PACFISH and INFISH. See Ore. Natural Desert Ass'n v. Lohn, 485 F.Supp.2d 1190, 1199 (D. Or. 2007) (noting the role of PAC/INFISH in the 2006 ESA consultations).

OCA-DGA argues that although the NFMA claims are identical, "this does not warrant consolidation" and "[c]onsistent rulings are unnecessary." OCA-DGA Opp. at 7. Identical (or simply related) claims are precisely the type of "common question of law or fact" for which Rule 42 is designed. Fed. R. Civ. P. 42(a). Moreover, consistent rulings (or applications of law) promote economy in judicial administration. See, e.g., Sapiro v. Sunstone Hotel Investors, L.L.C., 2006 WL 898155 (D. Ariz. 2006) (citing Devlin v. Transp. Communications Int'l Union, 175 F.3d 121, 130 (2d Cir. 1999); Enter. Bank v. Saettele, 21 F.3d 233, 235 (8th Cir. 1994)). This is particularly true in these cases, where the decisions of the three agencies are mutually dependent. For example, a ruling invalidating the NMFS and FWS consultation decisions would undermine the Forest Service's 2007 grazing decisions, which rely upon the biological opinion and letters of concurrence.

Finally, OCA-DGA's chart comparing the claims at issue, OCA-DGA Opp. at 6, compares only the claims at issue in the original complaints in the 03-213 and 03-381 actions. The Court already has granted ONDA's motion for leave to amend the complaint in the former case. As explained in ONDA's opening brief, these amendments streamline the claims in those two cases, accounting for the Forest Service's new 2007 grazing decisions and eliminating NEPA claims originally alleged in each case. In the 03-213 Third Amended Complaint (03-213, Dkt # 249), for example, the NMFA claims (Claims Three & Four) are identical to the related

claims (Claims Eight & Nine) in this case, save for the different allotments at issue. The ESA claims in this action envelop the allotments at issue in both the 03-213 and 03-381 cases.

CONCLUSION

For the reasons stated above as well as in our opening brief, ONDA again respectfully requests this Court to consolidate Oregon Natural Desert Ass'n v. U.S. Forest Serv., No. 03-213-JO (D. Or. filed Feb. 18, 2003) and Oregon Natural Desert Ass'n v. U.S. Forest Serv., No. 03-381-HA (D. Or. filed Mar. 25, 2003) with this case.

DATED this 24th day of January, 2008.

Respectfully Submitted,

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