

Peter M. Lacy (“Mac”) (OSB # 01322)
Oregon Natural Desert Association
917 SW Oak Street, Suite 408
Portland, OR 97205
(503) 525-0193
lacy@onda.org

Stephanie M. Parent (OSB # 92590)
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6736
(503) 768-6642 (fax)
parent@lclark.edu

Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

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

Case No. 07-1871-KI

Plaintiffs,

v.

ABIGAIL KIMBELL, Chief, U.S. Forest Service,
GARY L. BENES, Supervisor, Malheur National
Forest, **UNITED STATES FOREST SERV.**,
D. ROBERT LOHN, Regional Administrator,
Nat’l Marine Fisheries Serv., **NAT’L MARINE
FISHERIES SERV.**, **DAVID R. ALLEN**,
Regional Director, U.S. Fish & Wildlife Service,
GARY S. MILLER, Field Supervisor, U.S. Fish
& Wildlife Service, **U.S. FISH & WILDLIFE
SERV.**,

**REPLY TO DEFENDANTS’ RESPONSE
TO PLAINTIFFS’ MOTION TO
CONSOLIDATE**

Defendants,

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 present case involves claims pursuant to the National Forest Management Act (“NFMA”) and the Endangered Species Act (“ESA”). The two related cases involve claims pursuant to NFMA. On February 22, 2008, Federal defendants opposed this motion in part, taking the position that “it would only make sense to consolidate the two 2003 cases, Civil Nos. 03-213 and 03-381,” or that it “may make sense for the Court to consolidate the two NFMA claims in the 2007 case with the 2003 cases, thereby providing for all the NFMA claims across all three actions to be handled by a single judicial officer and all of the ESA claims handled by another such officer.” Fed. Defs’ Resp. at 8. Federal defendants’ opposition ignores that the facts and legal issues underlying the NFMA and ESA claims are inextricably intertwined, which is why consolidation of all three¹ cases would result in judicial efficiency.

ARGUMENT

I. THE THREE CASES HAVE COMMON QUESTIONS OF LAW OR FACT.

Rule 42 does not require identical issues of law and fact; it merely asks whether there is “a common question of law *or* fact” among the actions at issue. Fed. R. Civ. P. 42(a) (emphasis added); see also Takeda v. Turbodyne Tech., Inc., 67 F.Supp.2d 1129, 1132 (C.D. Cal. 1999)

¹ Federal defendants note that grazing permittees, represented by Elizabeth Howard, counsel for intervenors in both of the 2003 cases, filed an action on February 5, 2008, challenging the very same biological opinion that ONDA challenges in the present action. Fed. Defs. Resp. at 4, citing Allen v. Nat’l Marine Fisheries Serv., CV-08-151-SU. Given that this recently filed case is related to the present action, plaintiffs may also seek to consolidate Allen with the present case. This Court may, in its broad discretion, consolidate *sua sponte* if it finds that Allen also presents common issues of law or fact with the cases at issue here. In re Adams Apple, Inc., 829 F.2d 1484, 1487 (9th Cir. 1987) (stating that “trial courts may consolidate cases *sua sponte*, 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2383 at n. 37”).

(Rule 42 does not “demand[] that actions be identical before they may be consolidated”). Here, there are both common questions of law and fact to justify consolidation of these three cases.

A. Common Questions of Law.

As ONDA explained in its opening memo in support of its motion to consolidate, this Court’s disposition of the NFMA and ESA claims in all three cases will turn quite significantly upon the Forest Service’s legal obligations under the PACFISH and INFISH aquatic conservation strategies. See ONDA Memo in Supp. of Consolidation (Dkt # 8) at 10 n.7. The central common legal issue concerns the scope of the Forest Service’s duty, under PACFISH and INFISH, to modify or suspend grazing practices that retard or prevent attainment of Riparian Management Objectives (“RMOs”). Each of the three cases 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 ESA claims in this action are inextricably bound up with these PACFISH and INFISH issues, as the Forest Service, the National Marine Fisheries Service and the Fish & Wildlife Service all rely heavily on the assumption that the Malheur National Forest 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 PACFISH/INFISH in the 2006 ESA consultations).

Federal defendants first state that “[a]rguably, Civil Nos. 03-213 and 03-381-HA are ‘related’ to this action,” but that “such relatedness would not justify consolidation in any event[.]” Fed. Defs’ Resp. at 4. Federal defendants then argue that “there are very few common questions of law as between the 2003 cases and the new 2007 case, at the very least.” Fed. Defs’ Resp. at 5–6. Again, Rule 42 does not require complete identity of questions of law, only that there is a common question of law or fact. Fed. R. Civ. P. 42(a). The NFMA claims in all three

cases involve identical questions of law, albeit applied to various 2007 grazing decisions on various grazing allotments on the Malheur National Forest. As explained above, the ESA claims are wrapped up in the NFMA claims because 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 the letters of concurrence. Federal defendants attempt to show that the present case is predominately about the ESA by parsing out plaintiffs' claims to say there are only two NFMA claims but there are nine ESA claims. Fed. Defs' Resp. at 6. However, the nine ESA claims are different legal theories that all relate to the ESA consultations on the very same 2007 grazing decisions that ONDA alleges also violate the NFMA. Therefore, this case is not predominately about the ESA, it is about whether the Forest Service's 2007 grazing decisions and the consultation decisions in support of those grazing decisions are in accordance with the NFMA and the ESA. These legal questions are sufficiently common to warrant consolidation.

B. Common Questions of Fact.

Federal defendants first argue "there really are no pure questions of fact involved in the Court's resolution" of these cases because they are brought pursuant to the judicial review provisions of the Administrative Procedure Act. Fed. Defs' Resp. at 5. Federal defendants also take pains to point out that this APA review is of "final agency actions," each of which will have its own administrative record. Fed. Defs' Resp. at 3-4 (omitting citation to Ore. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977 (9th Cir. 2006) (overturning the dismissal of the 2003 cases at issue in this motion, holding that Annual Operating Instructions are final agency actions

subject to judicial review under the APA)). While the facts at issue in these cases will primarily be contained in administrative records², there will be significant overlap of facts.

For example, in Civ. No. 03-381, the Forest Service initially submitted two volumes containing administrative record documents. The first volume was comprised of “Policy Documents” that were common to all the agency actions at issue. See ONDA v. USFS, 03-381-HA, Dkt # 39 (administrative record CDs, Policy Documents Vol. 1 of 2) and Dkt # 42 (Administrative Record Index Policy Documents). Then, in addition to the common policy documents, the Forest Service submitted to the Court administrative records for each of the individual agency actions. Id. at Dkt ## 39–41. Even as to these, there were common documents, such as the forest wide “End of Year Report” monitoring the grazing on each of the allotments on the forest. Even the documents that will differ from allotment to allotment, such as the 2007 grazing decisions themselves, follow a template and are remarkably similar in most respects, thereby leading to efficiencies in reviewing the administrative records. Thus, while Federal defendants make much of the manner in which this Court will review the agency decisions, there are common issues of fact that favor consolidation. See 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).

/// /// ///

² The Court is not necessarily limited to reviewing the administrative record in these cases. Although judicial review of an agency action “typically focuses on the administrative record in existence at the time of the decision[.]” Southwest Ctr. for Biol. Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996), the Ninth Circuit has crafted narrow but well-established exceptions to this general rule. Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005) (quoting Southwest Ctr., 100 F.3d at 1450).

II. CONSOLIDATION IS TIMELY AND WILL PROMOTE JUDICIAL EFFICIENCY.

Federal defendants suggest that because the 2003 cases have been pending for five years, Fed. Defs' Resp. at 1, that consolidation is not appropriate. However, the procedural posture of the 2003 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 on those cases. ONDA v. USFS, 465 F.3d 977. No proceedings on the merits of the claims in those two cases 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 moved to amend the complaints in the 2003 cases and has simultaneously 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.

CONCLUSION

For the reasons stated above, ONDA 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 26th day of February, 2008.

Respectfully Submitted,

s/ Peter M. Lacy

Peter M. Lacy (OSB # 01322)
Oregon Natural Desert Association

Of Attorneys for Plaintiffs