

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT ASSOCIATION
and CENTER FOR BIOLOGICAL
DIVERSITY,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,
and ROGER W. WILLIAMS, Malheur
National Forest Supervisor,

Defendants,

and

DAYVILLE GRAZING ASSOCIATION and
OREGON CATTLEMENS ASSOCIATION,
Defendant-Intervenors.

Civil No. 03-381-HA

OPINION AND
O R D E R

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HAGGERTY, Chief Judge:

This case was filed in March 2003 by plaintiffs Oregon Natural Desert Association and the Center for Biological Diversity. At that time plaintiffs sought an order prohibiting the Forest Service from allowing any livestock grazing on the public lands of the Murderers Creek and Blue Mountain Allotments during the 2003 grazing season until plaintiffs' claims could be heard on the merits. The two allotments are located on the Malheur National Forest ("MNF"), which is encompassed within the John Day River Basin.

Plaintiffs filed a Second Amended Complaint in February 2004 and a Motion for Preliminary Injunction in March 2004. This court declined to enjoin grazing for the 2004 season but ordered the parties to confer in hopes of establishing a method and a schedule for addressing and resolving the merits of plaintiffs' claims. The parties filed a proposed schedule in the form of a Joint Status Report to the court on August 5, 2004, and a Scheduling Order was issued in accordance with the parties' proposals.

This Opinion and Order addresses three pending motions in this matter: plaintiffs' Motion for Leave to File an Amended Complaint (Doc. # 97); Defendant-Intervenors' Motion to Strike (Doc. # 120); and Defendant-Intervenors' Motion for Extensions in the Briefing Schedule (Doc. # 122). The federal defendants oppose the Motion for Leave to File an Amended Complaint, and plaintiffs oppose the Motion to Strike and Motion for Extensions. For the following reasons, the Motion for Leave to File an Amended Complaint is granted, a ruling on the Motion to Strike is reserved, and the Motion for Extensions is granted as modified.

1. Motion for Leave to File an Amended Complaint

Plaintiffs have filed a Motion for Leave to File an Amended Complaint (Doc. # 97). Defendant-Intervenors do not object to this motion, but defendant United States Forest Service ("Forest Service") opposes the proposed claims that challenge the Forest Service's alleged pattern, practice or policy of failing to comply with all applicable laws, regulations and Forest Plan standards and requirements when authorizing grazing on the Blue Mountain and Murderers Creek Allotments. The Forest Service argues that these amendments are "futile given that the Court clearly lacks subject matter jurisdiction to entertain such

amorphous, free-floating claims that lack even the pretense of being anchored to final, discrete agency action” Resp. at 4.

Specifically, the Forest Service objects to five of the new claims being asserted in plaintiffs' Proposed Third Amended Complaint: plaintiffs' proposed second, fourth, sixth, eighth and eleventh claims for relief. As already noted, these five claims allege that the Forest Service engages in a pattern, practice or policy of authorizing grazing each year that results in violations of law, regulation and policy.

Grazing allotments on the MNF are governed by a permit system under the Federal Land Policy and Management Act of 1976. A grazing permit is a "document authorizing livestock to use National Forest System or other lands under Forest Service control for the purpose of livestock production" 36 C.F.R. § 222.1(b)(5). Generally, permits are issued for periods of ten years. 36 C.F.R. § 222.3(1). Permits are issued according to a priority system tied to ownership of private "base property" and set limits on allowable numbers of livestock and seasons of use based on an allotment's estimated ability to sustain certain average levels of use. *See* C.F.R. § 222.3(c)(1)(ii); *see also* 43 U.S.C. § 1752.

The Forest Service manages livestock grazing on national forests by using three separate decision-making processes: (1) federally issued grazing permits; (2) allotment management plans ("AMPs"); and (3) annual operating plans, currently referred to as annual operating instructions ("AOIs"). An AMP is an allotment-specific planning document that: (1) prescribes how grazing operations will be conducted in order to meet multiple-use and other goals and objectives; (2) describes any range improvements to meet allotment

objectives; and (3) contains any other grazing management provisions and objectives prescribed by the Forest Service. 36 C.F.R. § 222.1(b)(2).

The Forest Service's regulations require that an AMP be issued for all grazing allotments. An AMP prescribes the extent of grazing on an allotment and must be consistent with the Forest's Land and Resource Management Plan (the "Forest Plan") for a particular region.

An AOI is a signed agreement issued annually by the Forest Service to a permittee that sets final authorized dates of grazing, pasture and grazing system rotations, numbers of livestock permitted for the upcoming season, monitoring and reporting requirements, and maximum limits of forage use by livestock. Each allotment is further divided into pastures or units, which allows the Forest Service to control grazing on each allotment at different times and the levels of use throughout the grazing season. The AOIs must also be consistent with the Forest Plan.

Plaintiffs' new claims assert that the Forest Service has engaged in a pattern, practice or policy of issuing AOIs without sufficient legal or factual basis. Plaintiffs allege that these AOIs will remain legally inadequate until, before preparing them, the Forest Service collects, analyzes and evaluates relevant data and information that comport with the adopted Strategies for Managing Anadromous Fish-Producing Watersheds in Eastern Oregon and Washington, Idaho, and Portions of California, commonly known as PACFISH, and also analyzes potential impacts upon Management Indicator Species ("MIS"). Until the Forest Service collects and analyzes such data, and then prepares adequate AMPs for the two allotments that are bolstered with appropriate analysis under the National Environmental

Policy Act (NEPA), plaintiffs assert that the 2005 AOI decisions, and any subsequent decisions, will be arbitrary, capricious and not in accordance with laws and regulations.

A. STANDARDS FOR AMENDMENTS

Amendment of a Complaint is governed by Fed. R. Civ. P. 15 which provides, in part:

[A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Whether to grant or deny a motion to amend pleadings is a matter of the court's discretion. *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765 (9th Cir. 1986).

Federal policy strongly favors determination of cases on their merits. Therefore, the role of pleadings is limited, and leave to amend should be freely given. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The party seeking leave to amend need only establish to the court why amendment is required.

Various factors that may justify denial of leave to amend are: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) repeated failure to cure deficiencies by previous amendment. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). While Rule 15(a) should be interpreted with "extreme liberality," leave to amend is not to be granted automatically. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). Liberality in granting a plaintiff leave to amend "is subject to the qualification that the amendment not cause undue prejudice to the defendant, is not sought in bad faith, and is not futile." *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999). *See also Thornton v.*

McClatchy Newspapers, Inc., 261 F.3d 789, 799 (9th Cir. 2001) (plaintiff who lost at summary judgment was properly denied leave to amend because plaintiff's motion was filed in bad faith and was unduly delayed). The discretion to deny leave to amend is particularly broad where – as here – the court has granted the plaintiff an opportunity to amend its complaint previously. *Financial Corp. v. Federal Home Loan Bank*, 792 F.2d 1432, 1438 (9th Cir. 1986).

B. ANALYSIS

The Forest Service's opposition to a portion of plaintiffs' proposed amendments is grounded in the assertion that the five new claims at issue would be futile and not justiciable. This opposition is without merit. The court concludes that, with regard to the proposed amendments, including the challenged claims, plaintiffs have established standing, ripeness, and that there is a reasonable expectation that the alleged violations will recur.

Plaintiffs allege that the Forest Service's "continued authorization of environmentally damaging grazing practice" will continue to injure them. Proposed Third Amended Complaint at Paras. 7 and 8. This is sufficient to establish standing.

Ripeness is evaluated in terms of whether the challenged issue is fit for judicial determination, and the degree of hardship to the parties that would be imposed if the court withheld consideration. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). This court concludes that plaintiffs' pattern and practice claims arise from within the parameters of the administrative records for this case, and appear capable of being developed via lay and expert declarations. Therefore, the challenges as presented appear fit for adjudication. Moreover, there is significant potential for hardship to plaintiffs if the claims

are valid and left unresolved. If patterns and practice of improper AOI issuances exist and remain unaddressed, plaintiffs could be left with no alternative but to again seek emergency relief on the eve of grazing. Accordingly, the challenged claims are ripe.

Finally, the nature of the claims at issue reveals that there is a reasonable expectation that the alleged violations will recur. The kind of data collection and analysis plaintiffs allege that the Forest Service must undertake (monitoring MIS populations or habitat and measuring stream conditions for example) are recurring processes. If plaintiffs are correct and establish that the Forest Service is mandated to perform such analyses, such duties would be continual. Therefore, the potential for violating the requirements also would be reasonably subject to recurrence.

The Forest Service's reliance upon the Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. ____, 124 S. Ct. 2373 (June 14, 2004) (hereinafter *SUWA*) is unavailing as grounds for objecting to plaintiffs' proposed amendments. That decision recognized that an environmental plaintiff can sue under the Administrative Procedure Act only if the plaintiff asserts that an agency has failed to take a discrete action that the agency is required to take. *Id.* at 2380. Plaintiffs' amended claims at issue adequately challenge discrete actions – the issuance of AOIs – as arbitrary and capricious and illegal for failing to comply with Forest Plan requirements, the National Forest Management Act of 1976 regulations and NEPA. Plaintiffs also assert that upcoming AOI decisions will continue to violate these laws, regulations and Forest Plan requirements because the Forest Service has a pattern of doing so and has failed to produce the necessary and relevant monitoring information, AMPs, and NEPA analysis. The amendment of

plaintiffs' Complaint with such claims is not precluded by the *SUWA* decision. The proposed claims challenge the Forest Service's decisions – specific agency actions – embodied in AOIs for the Blue Mountain and Murderers Creek Allotments, and seek to remedy alleged violations of law that have occurred and are likely to recur as a result of the Forest Service's alleged continued failure to conduct required monitoring and prepare required AMPs with required NEPA analysis. Accordingly, plaintiffs are granted leave to file their Third Amended Complaint.

2. Motion To Strike

Defendant-Intervenors move to strike three Declarations plaintiffs have submitted in support of their Motion for Summary Judgment. Notwithstanding the movants' request for an expedited ruling on this motion, the court is compelled to reserve a decision until plaintiffs have had a full and fair opportunity to respond to this motion. In so doing, the court notes that the Declarations at issue were filed on November 19, 2004, and defendant-Intervenors elected to file their Motion to Strike over three weeks later, on December 14, 2004. Moreover, plaintiffs indicate that they intend to justify their reliance upon the Declarations by reference to exceptions to the established review of record limitations. Some of these exceptions allow extra-record evidence for purposes of determining whether an agency has considered all relevant factors and adequately explained its decisions. *Inland Empire Public Lands Council v. Glickman*, 88 F.3d 697, 703-04 (9th Cir. 1996) (quotations and other citations omitted). The court believes that a ruling on the propriety of the Declarations is possible only after full briefing is filed on the dispositive motions. The court

acknowledges that the parties will be compelled to brief matters that may be subsequently stricken or rendered moot.

3. Motion for Extensions

Defendant-Intervenors also move to amend the stipulated briefing schedule for the dispositive motions in this matter. Plaintiffs object, expressing doubt that the Forest Service will comply with a modified briefing schedule. Plaintiffs also seek to ensure that they are given a fair opportunity to respond to the Motion to Strike. In its Response the Forest Service expresses concern regarding the present uncertainty in the litigation because of the heretofore pending Motion to Amend and the Motion to Strike. The Forest Service also references the possibility of moving to supplement the Administrative Record to include an end-of-the-year report (and the possibility that this supplement could render the Motion to Strike moot). The Forest Service commits to making any supplement to the Record by January 21, 2005.

The court has considered each party's position. In light of the extenuating circumstances surrounding this portion of the litigation, the court concludes that the fairest, most efficient way to proceed is to modify the briefing schedule as follows:

- Plaintiffs' Response to the Motion to Strike due January 4, 2005;
- Defendant-Intervenors' Reply to the Motion to Strike due January 11, 2005;
- All supplements to the Administrative Record, all Responses to plaintiffs' Motion for Summary Judgment and all Cross-Motions for Summary Judgment due January 21, 2005;

- Plaintiffs' Reply in support of their Motion for Summary Judgment and Responses to Cross-Summary Judgment Motions due February 4, 2005;
- All Replies in support of Cross-Motions for Summary Judgment due February 18, 2005.

A hearing on the dispositive motions will be scheduled for early March, 2005. A ruling on the Motion to Strike will be reserved until after that hearing.

CONCLUSION

For the foregoing reasons, plaintiffs' Motion for Leave to File an Amended Complaint (Doc. # 97) is GRANTED; a ruling on defendant-Intervenors' Motion to Strike (Doc. # 120) is reserved pending full briefing and oral argument; and Defendant-Intervenors' Motion for Extensions in the Briefing Schedule (Doc. # 122) is GRANTED AS MODIFIED in this Opinion.

IT IS SO ORDERED.

Dated this ____ day of December, 2004.

Ancer L. Haggerty
United States District Judge