

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-Appellants

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**OREGON NATURAL DESERT
ASS’N *et al.*,**

Plaintiff-Appellants,

v.

**UNITED STATES FOREST SERV.
et al.,**

Defendant-Appellees,

and

ROBERTSON RANCH *et al.*,

Defendant-Intervenor-Appellees,

and

OREGON CATTLEMEN’S ASS’N,

Defendant-Intervenor-Appellee.

No. 05-35637

D.C. No. CV-03-00213-REJ
District of Oregon, Portland

**MOTION TO CONSOLIDATE
RELATED APPEALS**

CORPORATE DISCLOSURE STATEMENT

Appellants Oregon Natural Desert Association and Center for Biological Diversity are non-profit corporations and have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

INTRODUCTION

Plaintiff-Appellants Oregon Natural Desert Association and Center for Biological Diversity (collectively referred to as “ONDA”) hereby move this court, pursuant to Federal Rule of Appellate Procedure 3(b)(2), to consolidate this appeal, Ore. Natural Desert Ass’n et al. v. U.S. Forest Serv. et al., No. 05-35637 (D.C. No. CV-03-213-JO) (“ONDA I”), with Ore. Natural Desert Ass’n et al. v. U.S. Forest Serv. et al., No. 05-35689 (D.C. No. CV-03-381-HA) (“ONDA II”), including consolidating the two briefing schedules and setting the two appeals for oral argument before the same panel. ONDA believes consolidation is appropriate because the main question presented for review is identical in both appeals, this common question will be reviewed using nearly identical administrative records, and the parties are nearly identical in each appeal.

BACKGROUND

These two appeals arise out of closely similar lawsuits brought against the Forest Service regarding the agency’s management of livestock grazing on public lands on the Malheur National Forest in eastern Oregon. ONDA challenged the agency’s annual authorizations of grazing practices that cause or exacerbate damage to stream and riparian habitat along streams that are home to mid-Columbia River steelhead and bull trout, species listed as threatened under the Endangered Species Act. ONDA contends that the grazing practices the Forest

Service annually authorizes via its “Annual Operating Instructions” have caused, and are causing, ecological damage in violation of the Forest Plan’s “PACFISH” and “INFISH” aquatic conservation strategy grazing standards.¹

Each of the two underlying cases centers around the Forest Service’s duty to satisfy PACFISH/INFISH standard GM-1, which requires that the agency must:

(1) “Modify grazing practices . . . that retard or prevent attainment of Riparian Management Objectives or are likely to adversely affect inland native fish”; and

(2) “Suspend grazing if adjusting practices is not effective in meeting Riparian Management Objectives.” The two cases each raise some similar and some

identical claims under the National Forest Management Act (“NFMA”), 16 U.S.C.

§§ 1600–14 and the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§

4321–61. In addition, this case also raises claims under the National Wild and

Scenic Rivers Act, 16 U.S.C. §§ 1271–87, because the primary streams at issue in

this case lie within designated wild and scenic river corridors.

On June 3, 2005, the district court in this case granted judgment in favor of

¹ In 1995, the Forest Service and other agencies developed the Pacific Anadromous Fish Strategy (“PACFISH”), an aquatic conservation strategy that set management objectives and standards intended to protect anadromous fish habitat in watersheds throughout the range of anadromous fish east of the Cascade Range. The agencies also developed the Inland Native Fish Strategy (“INFISH”), an equivalent plan for twenty-two national forests within the range of (non-anadromous) bull trout habitat. INFISH applies in all such areas beyond the range of PACFISH. The Forest Service in 1995 amended the affected forest plans, including the Malheur National Forest’s Land and Resource Management Plan, to incorporate PACFISH and INFISH into the plans.

the Forest Service and dismissed ONDA's case. The dismissal is based primarily on the court's determination that the Forest Service's Annual Operating Instructions ("AOIs") are not "final agency action" that may be challenged pursuant to 5 U.S.C. § 706(2). See also 5 U.S.C. §§ 702, 704 (providing that "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof," and that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review"). The district court also rejected ONDA's claim that the Forest Service had unreasonably delayed undertaking legally required agency action in the form of adopting allotment management plans and undertaking NEPA analyses on its grazing authorizations.

On June 20, 2005, the district court in ONDA II also granted summary judgment in favor of the Forest Service and dismissed that case. The court explicitly based its reasoning on that of the earlier ONDA I decision, determining that ONDA lacked jurisdiction because the AOIs that allow permittees to conduct grazing constitute "agency actions," but fall short of qualifying as "final" actions subject to judicial review under Section 706(2)(A) of the APA. The ONDA II court also determined that ONDA's NFMA claims were not sufficiently discrete to allow the court to compel specific performance. Finally, as in ONDA I, the court

determined that recent Congressional appropriations bill “riders” targeted at forestalling grazing permit cancellation on grounds that NEPA analysis is lacking foreclosed ONDA’s claims.

ONDA promptly appealed these decisions because, in ONDA’s view, the district court incorrectly decided the question whether the Forest Service’s annual grazing decisions as made in the AOIs are indeed “final agency action” under the APA and whether congressional riders have foreclosed the district courts from granting any relief for plaintiffs.

ARGUMENT

I. CONSOLIDATION IS APPROPRIATE BECAUSE OF THE TIMING OF THE TWO APPEALS, THE NEARLY IDENTICAL ISSUES ON APPEAL, THE VERY SIMILAR ADMINISTRATIVE RECORDS UNDER REVIEW, AND THE ALMOST IDENTICAL PARTIES INVOLVED.

Federal Rule of Appellate Procedure 3(b)(2) allows the court to consolidate appeals. The advisory committee note for Rule 3(b)(2) states that the rule is designed “to encourage consolidation of appeals whenever feasible.” Fed. R. App. P. 3(b)(2), Advisory Comm. Note (West 2005). Similarly, the advisory committee note to Ninth Circuit Rules 34-1 to 34-3 regarding oral argument encourages simultaneous scheduling of oral argument for cases that involve related legal issues, stating specifically that the court may “advance or defer the hearing of an appeal so that related issues can be heard at the same time.” Cir. R. 43-1 to 34-3,

Cir. Advisory Comm. Notes (2005).

The Plaintiff-Appellants are identical in these two appeals, and the appeals were filed only ten days apart (June 20 & 30, 2005, respectively). The case schedules have been set on nearly identical tracks, with briefing currently scheduled to begin in early- to mid-October for both cases. According to the court-ordered briefing schedule for these appeals, briefing is currently scheduled to be completed by November 21, 2005 in this appeal and by November 30, 2005 in case number 05-35689. Thus, because briefing has not yet begun and because oral argument has not yet been scheduled in either appeal, consolidation will not delay or otherwise interrupt either case schedule.

As noted above, the two appeals raise an identical primary legal question: whether the Forest Service's annual grazing decisions as made in the AOIs are "final agency action" thereby providing ONDA with jurisdiction to challenge those decisions under the APA. Under the test for "final agency action" announced by the Supreme Court in Bennett v. Spear, 520 U.S. 154 (1997), for agency action to be "final" the action must: (1) mark the "consummation" of the agency's decision-making process, and (2) be one by which "rights or obligations have been determined" or from which "legal consequences flow[.]" Id. at 177-78. ONDA will argue in both appeals that AOIs are final agency action because the AOI decisions are the only place in which the agency makes decisions with respect to

how to fulfill its PACFISH and INFISH duties. Thus, ONDA in each appeal will seek to refute the district courts' conclusions that AOIs merely implement decision previously made, arguing instead that these agency decisions consummate new decision-making processes, determine rights and obligations vis-à-vis a particular season's grazing practices, and have significant legal consequences.

Therefore, the main question in both cases concerns this key jurisdictional issue.² As a result, the portions of the two administrative records relevant to the questions on appeal will be nearly identical. Moreover, because Federal Defendants are the same in both appeals, and because both appeals involve the same Forest Service administrative unit (the Malheur National Forest), there is a seamless consistency between the two appeals on these issue. Finally, to ensure consistent resolution of this jurisdictional question of first impression, the two appeals should be decided simultaneously. Accordingly, ONDA respectfully submits that consolidation of these two appeals is the most appropriate and efficient way to resolve them.

II. OPPOSING COUNSEL'S POSITION ON THIS MOTION

ONDA contacted counsel for Appellees to attempt to ascertain if Appellees will oppose or consent to this motion. Counsel for Defendant-Intervenor-Appellees Oregon Cattlemen's Association and Dayville Grazing Association indicated those

² Note that the NEPA claims on appeal are exactly identical in each case, as well.

parties do not oppose this motion.³ As of the date of this filing, counsel for Appellants was unable to ascertain Federal Defendants' position or Defendant-Intervenor-Appellee Robertson Ranch's position.

CONCLUSION

For the foregoing reasons, ONDA respectfully requests this court to consolidate this matter, Ore. Natural Desert Ass'n et al. v. U.S. Forest Serv. et al., No. 05-35637, with Ore. Natural Desert Ass'n et al. v. U.S. Forest Serv. et al., No. 05-35689, including consolidating the briefing schedules and scheduling the two cases for oral argument before the same panel.

Dated July 18, 2005

Respectfully submitted,

Peter M. Lacy ("Mac") (OSB # 01322)
Of Attorneys for Plaintiff-Appellants

Oregon Natural Desert Association
917 SW Oak Street, Suite 408
Portland, OR 97205
503-525-0193
lacy@onda.org

³ The Oregon Cattlemen's Association is a Defendant-Intervenor-Appellee in both appeals, while the Dayville Grazing Association is a separate Defendant-Intervenor-Appellee in only the ONDA II case (No. 05-35689). Robertson Ranch, a Defendant-Intervenor-Appellee in this case (No. 05-35637) is represented by separate counsel.

PROOF OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of Appellants' **MOTION TO CONSOLIDATE RELATED APPEALS** was transmitted via U.S. Mail on July 18, 2005 to the following parties:

Stephen J. Odell
Assistant U.S. Attorney
1000 SW Third Avenue, Suite 600
Portland, OR 97204-2902

Paul A. Turcke
Moore Smith Buxton & Turcke, Chartered
Attorneys at Law
225 North 9th Street, Suite 420
Boise, Idaho 83702

Karen Budd-Falen
Budd-Falen Law Offices, L.L.C.
300 East 18th Street
Cheyenne, WY 82001

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

Of Attorneys for Plaintiff-Appellants