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**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON**

**OREGON NATURAL DESERT  
ASSOCIATION, and OREGON NATURAL  
RESOURCES COUNCIL FUND,**

Plaintiffs,

v.

**UNITED STATES FOREST SERVICE,  
UNITED STATES FISH AND WILDLIFE  
SERVICE, and KAREN SHIMAMOTO,**

Defendants.

**Case No.: 04-3096-CO**

**PLAINTIFFS’ MEMORANDUM IN  
SUPPORT OF MOTION FOR  
RECONSIDERATION OF ORDER  
GRANTING DEFENDANTS’  
MOTION TO DISMISS**

**I. INTRODUCTION**

Pursuant to the inherent right of the Court to reconsider and modify interlocutory orders, Plaintiffs respectfully request the Court reconsider on two points its Order, dated January 13,

2006, granting Defendants' Motion to Dismiss. First, the Court has dismissed Plaintiffs' pattern and practice claims as overly broad programmatic challenges; however, in doing so the Court has erroneously dismissed Plaintiffs' claims one through four, which were not plead as pattern and practice claims. Claims one and three identify permits on eleven allotments as specific, final agency action giving rise to these two claims. In contrast, only claims two and four were pled as pattern and practice claims. In its Order, the Court agreed that permits are final agency action and accordingly should not grant Defendants' Motion to Dismiss as to claims one and three.

Second, the Order dismisses claim eight as outside of the statute of limitations. While the claim itself does not set forth that the challenged biological opinions were reauthorized in March 2000, the Complaint in its description of the biological opinions does describe the reauthorization. In providing an Answer to the Complaint, Defendants' acknowledge that the biological opinions were reauthorized within the statute of limitation. Because Defendants were apprised of and acknowledged the reauthorization of the biological opinions, Plaintiffs have satisfied the pleading requirements of Fed. R. Civ. Pro. 8(a)(2) and request that the Court reconsider the dismissal of this claim. In the alternative, Plaintiffs request permission to amend the Complaint to clarify that the claim includes the reauthorization of the biological opinions.

## **II. BACKGROUND**

### **A. PROCEDURAL BACKGROUND**

On November 15, 2004, Plaintiffs filed the original Complaint, in part alleging that identified Annual Operating Instructions ("AOIs") on eleven allotments authorized grazing in violation of the National Forest Management Act ("NFMA"). In response to decisions in similar cases that found that AOIs are not final agency actions, the Plaintiffs amended their complaint to alternatively identify the current term grazing permits and Allotment Management Plans

(“AMPs”) for the specific allotments where violations of grazing standards have occurred without adequate modification as agency action giving rise to Plaintiffs’ claims. Docket No. 36. On August 29, 2005, Defendants filed a motion to dismiss seven of the eight claims alleged in the Amended Complaint. Docket No. 39. Defendants’ Memorandum in Support of its Motion to Dismiss focused on the issue of whether AOIs are final agency action and ignored the additional sources of agency action identified by Plaintiffs in the Amended Complaint. Docket No. 40. Plaintiffs’ response to the Motion to Dismiss identified this shortcoming and in reply Defendant submitted twenty-five (25) new exhibits and argument in support addressing the issue of permits as final agency action. Docket No. 49. Plaintiffs moved to strike these new exhibits and arguments presented for the first time in the Reply, or in the alternative for permission to submit a sur-reply. Docket No. 50. The Court granted Plaintiffs’ alternative request and Plaintiffs filed a sur-reply. Docket No. 58. The Court heard oral argument regarding the Motion to Dismiss on November 30, 2005, and on January 13, 2006, issued an Order granting Defendants’ motion. Docket Nos. 63 and 66.

In the Order, the Court disagreed with Defendants on several important points. Most significantly, the Court found that permits are reviewable final agency actions and that review of grazing permits is not limited to challenges issued during National Environmental Protection Act (“NEPA”) administrative reviews. Order at 19-20. Despite its disagreements with Defendants’ rationale, the Court granted Defendants’ motion with respect to all seven claims challenged by Defendants. Order at 24. Plaintiffs file the present Motion for Reconsideration because Plaintiffs find that pursuant to the Court’s rationale, the Court erred in granting the Defendants’ motion with respect to Claims One and Three. Additionally, Plaintiffs respectfully request the Court reconsider its decision to dismiss Claim Eight as outside of the statute of limitation in light

of the fact that adequate notice of the reauthorization was provided in the Amended Complaint and Defendants acknowledged the reauthorization in their Answer.

## **B. STANDARD FOR RECONSIDERATION**

The Federal Rules of Civil Procedure do not set forth a process for requesting reconsideration of an interlocutory order.<sup>1</sup> However, the Ninth Circuit has determined that as long as a district court retains jurisdiction over a matter, the district court possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient. City of Los Angeles v. Santa Monica BayKeeper, 254 F.3d 882, 885 (9th Cir. 2001) (quoting Melancon v. Texaco, Inc., 659 F.2d 551, 553 (5th Cir. 1981)). See also United States v. Smith, 389 F.3d 944, 948 (9th Cir. 2004); cert. denied, \_\_\_ U.S. \_\_\_, 125 S. Ct. 1721 (2005). The Ninth Circuit finds that the power to reconsider, rescind or modify an interlocutory order derives from the common law and not the Federal Rules of Civil Procedure. City of Los Angeles, 245 F.3d at 886. The district court may proceed in any manner not inconsistent with the limitations set forth in the Federal Rules of Civil Procedure to correct mistakes or manifest errors in the handling of a case. Id. at 887.

The authority to grant reconsideration to correct mistakes or manifest errors is similarly reflected in the standards set forth by the Federal Rules of Civil Procedure for reconsideration of a final judgment or order. Pursuant to Fed. R. Civ. Pro. 59(e), the Ninth Circuit has found that reconsideration is appropriate if the court has committed clear error or the initial decision was manifestly unjust. School Dist. No. 1J, Multnomah County v. Acands, Inc., 5 F.3d 1255, 1263 (9th Cir.1993), cert. denied, 512 U.S. 1236 (1994). See also Zimmerman v. City of Oakland, 255

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<sup>1</sup> FRCP 59(e) sets forth a process for requesting alteration or amendment of a judgment. FRCP 60(b) sets forth a process for requesting relief from a final order or judgment. The present order is an interlocutory order because it does not provide for dismissal or resolution of all claims raised in the Amended Complaint. See Carey v. Greyhound Company, 424 F.2d 485, 486-487 (9th Cir. 1970).

F.3d 734, 740 (9th Cir. 2001). Similarly, Fed. R. Civ. Pro. 60(b) provides for reconsideration upon a showing of mistake, surprise, or excusable neglect. School Dist. No. 1J, 5 F.3d at 1263 (internal citations omitted).

### **III. BASIS FOR RECONSIDERATION**

#### **A. Order Erroneously Grants Defendants’ Motion to Dismiss With Respect to Claims One and Three On the Basis that the Claims Are Overly Broad Pattern and Practice Claims.**

As recognized in the Order, Plaintiffs allege in the first and third claims that the Forest Service has violated NFMA when it authorized grazing on eleven allotments via federal grazing permits, AMPs, and AOPs/AOIs. Order at 3-4; Docket 36 at ¶¶ 84-87, 91-94. Alternatively, in the second and fourth claims, the Plaintiffs address the same grazing violations by alleging that the Forest Service has a pattern, practice, or policy of violating NFMA when it permits and authorizes grazing on the eleven allotments. Order at 4-5; Docket 36 at ¶¶ 88-90, 95-96. Unlike the second and fourth claims, which are alleged as pattern and practice claims and seek to address future violations, the first and third claims allege a closed set of documented grazing violations as authorized by grazing permits and other agency decisions.

The Court in its Order agreed with Plaintiffs that Ninth Circuit case law is clear that grazing permits are final agency actions. Order at 19. Moreover, the Court rejected Defendants’ position that a review of grazing permits must be limited to a challenge at the end of the NEPA process. Order at 20. Accordingly, the Court stated: “Defendants’ motion to dismiss plaintiff’s claims because the permits do not constitute final agency action should be denied.” Id. As a result, Plaintiffs’ first and third claims should survive because Defendants have failed to demonstrate that Plaintiffs can plead no set of facts in support of claims one and three. See Mishler v. Clift, 191 F.3d 998, 1002 (9th Cir. 2001). The Court has found that the permits

identified by Plaintiffs authorizing grazing on the eleven identified allotments are reviewable final agency actions and, as a result, the Court should not dismiss Plaintiffs' first and third claims.<sup>2</sup>

Nonetheless, the Court found that Plaintiffs' first through fourth claims should be dismissed as pattern and practice claims that are overly broad programmatic challenges. Order at 21. Specifically, the Court found that the claims are analogous to those dismissed by the court in Institute for Protection of Wildlife v. Norton, 337 F.Supp.2d 1223 (W.D. Wash. 2004) and the recent decision of Judge Haggerty in Oregon Natural Desert Association v. Forest Service, 03-381-HA (D.Or). As the Order describes, in Institute for Protection of Wildlife the court dismissed pattern and practice claims that were barred by Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). However, this analogy was presented by Defendants only in regards to claims two and four, which are alleged as pattern and practice claims. Order at 8-9; Docket 49 at 6-7. Neither Judge Haggerty nor the court in Institute for Wildlife Protection address claims other than pattern and practice claims, and Defendants do not attempt to assert that the rationale of those decisions are relevant to claims one and three, which are not alleged as pattern and practice claims.

Defendant sought to dismiss claims one and three solely on the basis that Plaintiffs had failed to identify specific final agency actions giving rise to their claims. Docket No. 49 at 3-6.<sup>3</sup> As explained above, the Court found that Plaintiffs have identified specific final agency actions

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<sup>2</sup> While Defendants' argued that Plaintiffs did not identify the decision making points with sufficient clarity, the argument is without merit because there is only one current permit for each permit holder on the allotments at issue. There is no need for Plaintiffs to distinguish the documents further in order to give Defendants notice of the agency actions that this suit challenges. The Defendants attached the relevant permits to their reply, and accordingly, the Defendants cannot argue that they are unable determine which permits the Plaintiffs challenge.

<sup>3</sup> In their reply, Defendants erroneously state that Plaintiffs have pled claims one through four with the terms "continuous and ongoing". Docket No. 49 at 3. The first four claims do not contain these terms.

giving rise to their claims and the Court properly denied Defendants motion to dismiss on these grounds. In their reply in support of the motion to dismiss, Defendants provided additional arguments regarding Plaintiffs' pattern and practice claims: claims two and four. Docket 49 at 6-7. The Defendants did not attempt to apply this additional argument to claims one and three and even went so far as to concede in the reply that if the Court found that permits are final agency actions that some of the identified grazing permits are beyond the statute of limitations. Docket No. 49 at 18-19. The Court did find that permits are final agency actions and denied Defendants' alternative argument that the statute of limitations bars Plaintiffs' claims on some of the allotments because violations of the terms of the grazing permits have taken place within the statute of limitations. Order at 19-20. Accordingly, it is an error to extend Defendants' argument regarding claims two and four to dismiss claims one and three, and Plaintiffs respectfully request the Court reconsider its Order as to these claims.

**B. Order Erroneously Grants Defendants' Motion to Dismiss with Respect to Claim Eight Because the Complaint Establishes that the Challenged Biological Opinions Were Reauthorized within the Statute of Limitations. In the Alternative, Plaintiffs Request Permission to Amend Complaint to Clarify Claim Challenges the Biological Opinions As Reauthorized.**

The Court granted Defendants' motion to dismiss with respect to claim eight on the ground that claim is barred by the six year statute of limitations for civil actions against the federal government. Order at 24. The eighth claim alleges that the Fish and Wildlife Service ("FWS") has violated the Endangered Species Act ("ESA") by failing to include Inland Native Fish Strategy ("INFISH") standards as reasonable and prudent measures in the biological opinions governing the Fremont-Winema grazing program to avoid jeopardy to listed fish species. Order at 24; Docket No. 36 at ¶¶ 114-21.

In dismissing the claim, the Court found that “[t]he complaint does not allege any updates of these BOs.” Order at 24. However, to the contrary, the Amended Complaint at ¶ 79 states in full:

In March 2000, the Forest Service reinitiated consultation for the entire grazing program because of the multiple violations of standards during the 1998 and 1999 grazing seasons. In response to this request, the FWS reexamined the impact of the Fremont-Winema’s grazing program and prepared an update to the previous BiOps. The 2000 letter from the FWS concluded that, despite the violations of the terms of the incidental take statements, the corrective measures taken by the Forest Service were sufficient to avoid jeopardy to listed species.

Docket No. 36 at ¶ 79. The claims as alleged state that the FWS “has not included,” as opposed to “did not include,” INFISH standards as reasonable and prudent elements of the biological opinions despite its acknowledgement that grazing on the Fremont-Winema does not comply with INFISH standards. Docket 36 at ¶ 120. As written the eighth claim does not limit its allegations to the original adoption of the biological opinions and includes the failure of the FWS to incorporate INFISH standards at the time of reauthorization in March 2000.

Moreover, the Defendants in the Answer to the complaint acknowledge that reauthorization of the biological opinions occurred in 2000. Paragraph 80 of the Answer in response to the paragraph of the complaint written above (changed to ¶ 79 in the Amended Complaint) states in full:

Defendants deny the allegations in the first sentence in Paragraph 80, but aver that informal consultation was requested by the Forest Service on the effects of corrective actions, as noted in a letter dated March 2, 2000, which document speaks for itself and constitutes the best evidence of its contents. Defendants deny the allegations of the second sentence, but aver that FWS examined the effects of corrective actions and concluded that the original BiOps would remain intact, as noted in a letter dated March 1, 2000, which document speaks for itself and constitutes the best evidence of its contents. With respect to the third sentence of the paragraph, it purports to describe the contents of a 2000 FWS letter to the Forest Service, which is a document that speaks for itself and constitutes the best evidence of its contents. Defendants deny any allegation that is inconsistent with that documents’ plaint language.

Docket No. 15 at ¶ 80.

Accordingly, because the Amended Complaint does allege that the biological opinions were reauthorized and because Defendants acknowledged the reauthorization, the Amended Complaint provides sufficient notice of its claims as within the statute of limitations as required by Fed. R. Civ. Pro. 8(a)(2) because Plaintiffs have provided Defendants with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957).

Alternatively, if the Court finds that the Amended Complaint as written does not provide sufficient notice to Defendants, Plaintiffs respectfully request permission to amend the Amended Complaint pursuant to Fed. R. Civ. Pro. 15 to clarify that claim eight seeks to include the reauthorization of the biological opinions in March 2000. See Lawson v. City of Santa Barbara, 310 F.3d 1134, 1137 (9th Cir. 2002) (instructing district court to grant permission for plaintiff to amend complaint to clarify that complaint sought to challenge past and future denials of parade permit).

#### **IV. CONCLUSION**

In conclusion, Plaintiffs respectfully request the Court reconsider its Order granting Defendants' Motion to Dismiss with respect to claims one and three because the claims are not pattern and practice allegations subject to the limitations identified by the Court and claim eight because the Complaint has identified that reauthorization of the challenged biological opinions occurred within the statute of limitations. Alternatively, Plaintiffs request permission to amend the complaint to clarify the scope of claim eight.

DATED: January 23, 2006.

Respectfully submitted,

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