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

**OREGON NATURAL DESERT ASS’N,**

Case No. 06-242-AA

Plaintiff,

v.

**REPLY IN SUPPORT OF MOTION TO  
CONSOLIDATE**

**DANA R. SHUFORD**, Burns District Manager,  
BLM, *et al.*,

Defendants.

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**INTRODUCTION**

On May 25, 2006, Plaintiff Oregon Natural Desert Association (“ONDA”) moved this court (Dkt # 51) to consolidate this case with a related case, Ore. Natural Desert Ass’n v. Gammon, No. 06-523-HO (D. Or. filed Apr. 21, 2006). Defendants Dana R. Shuford *et al.* (hereafter “BLM”) have filed a response in opposition (Dkt # 76) to ONDA’s motion. Applicant-Intervenor “Steens Mountain Landowner Group, Inc.” (“SMLG”) also filed a provisional

response in opposition (Dkt # 57). Because neither the BLM nor the SMLG has raised any significant concerns that might overcome ONDA's showing that common questions of law and fact predominate, and that consolidation will promote judicial economy, ONDA again respectfully requests the court to consolidate these cases, as described in ONDA's motion and opening memorandum in support.

### **ARGUMENT**

ONDA has asked the court to maintain separate schedules for lodging of the administrative records and briefing on the merits, but to consolidate into a single hearing oral argument on cross-dispositive motions in both cases. Consolidation of these cases before a single judge will reduce duplicative work by the court and the parties and will increase efficiency by consolidating appropriate segments of the litigation. In response, Defendants and the SMLG dispute that the two cases involve common questions of law or fact, and argue consolidation will not be efficient. BLM Resp. at 1–2; SMLG Resp. at 1–2. Because the core legal questions at issue are identical in these cases, and because a consolidated hearing and coordinated decisions would serve the interests of judicial economy, consolidation as requested in ONDA's motion is appropriate.

#### **I. COMMON QUESTIONS OF LAW AND FACT.**

Both the BLM and the SMLG frame their responses as if Rule 42 requires completely or broadly identical questions of law and fact, as if identifying any legal or factual difference between these two cases is enough to defeat a consolidation request. In fact, the Rule only refers to “actions involving a common question of law or fact.” Fed. R. Civ. P. 42(a). In the end, the court bases its decision on factors of convenience and economy in judicial administration. See Sapiro v. Sunstone Hotel Investors, L.L.C., 2006 WL 898155, at \*1 (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)).

**A. The BLM Admits That the Legal Questions in the Two Cases “Are Similar” or “Identical.”**

Defendants “concede that the NEPA claims in the two cases are similar”; they “concede that the FLPMA claims in the two cases are similar”; and they admit that ONDA’s Taylor Grazing Act claim in each case “is identical.” BLM Resp. at 4, 5, 6. Thus, the BLM points only to a single claim in 06-242 concerning the Steens Act to support the blanket statement that ONDA’s “allegations in ONDA-242 are legally distinct from plaintiffs’ allegations in ONDA-523.” Id. at 2; see also SMLG Resp. at 5–6. Importantly, the BLM simply is wrong when it asserts that ONDA’s Steens Act claim (Claim Six) is “central” to this case. See BLM Resp. at 2–3. That claim is only one of the eight claims at issue in this case, and is already in briefing under ONDA’s motion for partial summary judgment. Unlike all of the other claims in both 06-242 and 06-523, which challenge final agency decisions pursuant to APA § 706(2)(A), ONDA’s Transportation Plan claim in 06-242 is a single claim targeting the BLM’s failure to act in accordance with a statutory mandate tied to a date-certain deadline under the Steens Act—and therefore actionable pursuant to APA § 706(1). This unique claim, although critically important to ONDA and its members, is not “central” to the case as far as consolidation under Rule 42 is concerned. Similarly, the two claims in 06-523 involving the Beaty Butte AMP do not defeat the primarily “predominant” nature of the legal questions at issue in these two cases.

The SMLG argues that judges in the same district interpret the same federal laws in different cases all the time. See SMLG Resp. at 6. While this statement is correct, it misses the point of consolidation under Rule 42. The rule serves as a vehicle to achieve maximum convenience and economy in judicial administration. Sapiro, 2006 WL 898155 at \*1 (citing

Devlin, 175 F.3d at 130; Saettele, 21 F.3d at 235). Consolidation is intended to “avoid unnecessary cost or delay[,]” Manual for Complex Litigation, Third (“Manual”) at § 21.631, so that “the business of the court may be dispatched with expedition and economy while providing justice to the parties.” 9 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure (“Wright & Miller”) § 2381 (2d. ed. 1995). The SMLG argues there is no threat of inconsistent rulings based on factual differences in the plans at issue in these two cases. SMLG Resp. at 6. In this instance, however, ONDA respectfully suggests that consolidated hearings and consideration will provide this court the most sensible foundation upon which to make any principled distinctions between such divergent rulings.<sup>1</sup>

**B. Common Questions of Fact Predominate.**

Neither the BLM nor the SMLG are able to effectively dispute ONDA’s showing that common questions of fact predominate. First, both argue common questions of fact do not predominate because 06-523 involves both a Resource Management Plan as well as an Allotment Management Plan. BLM Resp. at 3–4; SMLG Resp. at 4. The addition of two claims concerning the Beaty Butte AMP in 06-523 in fact will help highlight some of the core legal questions at issue in each case. As explained in ONDA’s memo in support of this motion, one of the main issues in these cases involves the nature of the BLM’s land use planning duties concerning authorized livestock grazing. See ONDA Br. (Dkt # 52), at 4–5. One problem ONDA has identified in the BLM’s land use plans (RMPs) is that the agency has failed to consider a reasonable range of alternatives with respect to land areas and forage levels allocated to livestock

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<sup>1</sup> The SMLG questions why ONDA did not file these cases together initially. SMLG Resp. at 5 n.2. As noted in the 06-523 Complaint, ONDA had only just dismissed its administrative appeal concerning the Beaty Butte AMP at the same time it filed this action. See 06-523, Compl. at ¶¶ 72–75. Thus, because the Lakeview RMP lawsuit includes two claims involving the Beaty Butte AMP, these two actions ripened at different times.

grazing. See 06-242 Compl. at ¶¶ 53–56; 06-523 Compl. at ¶¶ 85–89. ONDA also alleges a similar flaw in the BLM’s decision adopting the Beaty Butte AMP. 06-523 Compl. at ¶¶ 104–107. Thus, in its RMPs, the BLM says it will make grazing allocation decisions at site-specific decision-making points such as AMPs, but in the AMP the agency says those decisions are made at the RMP level. See id. Because of this perceived “shell game,” the court’s rulings in these two cases will be important in terms of determining at what level of BLM decision making certain key types of grazing decisions must be made. Consolidated consideration of these two cases therefore will aid in efficient resolution of this issue because the court will have a broader view of how the agency actually implements its planning efforts.

The SMLG also argues against consolidation based on the fact that some of the individually-named decision makers are different, the lands at issue are different geographically, and the cases involve lands in different Oregon counties. SMLG Resp. at 4. The names of the individuals making these agency decisions are irrelevant because they are sued in their official capacities and because the legal questions at issue are largely identical. See, e.g., 06-242 Compl. at ¶¶ 11–17 (naming agency officials in “official capacity” only). The fact that different counties are involved is irrelevant because all of the lands at issue in both cases are public lands managed by the federal government. Id. at ¶ 18; 06-523 Compl. at ¶ 23.<sup>2</sup> Therefore, none of the BLM’s and SMLG’s arguments overcome ONDA’s showing that common facts predominate in these two actions.

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<sup>2</sup> Both the BLM and the SMLG also suggest that ONDA’s opposition to a government motion to consolidate in a 2003 lawsuit has some significance for the consolidation motion before this court. BLM Resp. at 3, 5, 7; SMLG Resp. at 4 n.1. ONDA’s position on a consolidation motion in a case from several years ago, involving completely different statutes, claims, agencies, and geographic areas, is irrelevant here. Defendants also incorrectly label the court’s decision in that previous case as “[j]udicial precedent.” BLM Resp. at 3. A district court decision is not binding precedent on that court in future cases, and nothing in the prior order announces any new rule of law under Rule 42.

### **C. Common Parties.**

The SMLG also argues consolidation is not appropriate because the parties are different in these two cases. SMLG Resp. at 6. In fact, the actual parties are nearly identical, with BLM and various named officials acting in their official capacities on the defendants' side and either ONDA or ONDA and two co-plaintiff organizations on the plaintiffs' side.<sup>3</sup> In any event, Rule 42(a) says nothing about "common parties" and Wright & Miller suggest that "[a]ctions involving the same parties are apt candidates for consolidation." Wright & Miller § 2384 (same parties "strengthens the case for consolidation under Rule 42(a)").

### **II. AVOIDING UNNECESSARY COST, DELAY, AND CONFUSION.**

Finally, the SMLG asserts that a consolidated hearing and decision-making by a single judge is "extremely complicated" and would "unnecessarily complicate[] already complex cases." SMLG Resp. at 7. But as ONDA explained before, both cases are in their early stages, injunctive relief will not be at issue prior to either merits decision, and the majority of the core legal issues at stake are identical. For these reasons, a consolidated hearing followed by coordinated decisions—which avoids having the court and parties argue identical legal issues twice in front of two different judges and avoids requiring two different judges and their staff to research and review nearly identical legal issues—presents the most efficient and economical way for the court to proceed.

### **CONCLUSION**

ONDA again respectfully requests this court to consolidate this case with Ore. Natural Desert Ass'n v. Gammon, No. 06-523-HO (D. Or. filed Apr. 21, 2006), maintaining separate schedules for lodging of the administrative records and briefing on the merits, but issuing an

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<sup>3</sup> Obviously, co-plaintiffs Oregon Natural Resources Council Fund and Northwest Environmental Defense Center in the 06-523 case, fully support this motion.

order that oral argument on cross-dispositive motions in both cases will be consolidated in a single hearing.

DATED this 11th day of August, 2006.

Respectfully Submitted,

s/ Peter M. Lacy

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Oregon Natural Desert Association

Of Attorneys for Plaintiff