

JEAN E. WILLIAMS
Deputy Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division

J. BRETT GROSKO
Senior Trial Attorney (Md. Bar)
ROBERT M. NORWAY
Trial Attorney
Wildlife and Marine Resources Section
P.O. Box 7369, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0342 | Phone (Grosko)
(202) 305-0444 | Phone (Norway)
(202) 305-0275 | Fax
Brett.Grosko@usdoj.gov
Robert.Norway@usdoj.gov

Attorneys for Federal Defendants

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

CENTER FOR BIOLOGICAL DIVERSITY and)
SIERRA CLUB,)

Plaintiffs,)

v.)

DAVID BERNHARDT, in his official capacity)
as Secretary of the Interior, *et al.*,)

Federal Defendants,)

STATE OF WYOMING,)

Movant-Intervenor,)

and)

UPPER GREEN RIVER CATTLE,)
ASSOCIATION, *et al.*,)

Movant-Intervenors.)

_____)

Case No. 1:20-cv-855

FEDERAL DEFENDANTS' MOTION TO CONSOLIDATE

INTRODUCTION

Last year, the U.S. Forest Service (the “Forest Service”) issued the Record of Decision for the Upper Green River Rangeland Project (the “Project”), which authorized grazing on six allotments on the Bridger Teton National Forest. As part of its decision-making process, the Forest Service sought and obtained a biological opinion and incidental take statement from the U.S. Fish and Wildlife Service (“FWS”) through consultation pursuant to Section 7 of the Endangered Species Act (“ESA”). Before this Court are two lawsuits challenging the Forest Service’s decision to authorize grazing on those allotments in the Project area, and FWS’s biological opinion for the Project and incidental take statement (the “2019 BiOp”): the instant lawsuit, and *Western Watersheds Project, e v. Bernhardt*, No. 1:20-cv-860.¹ Federal Defendants hereby request that the Court consolidate these cases under Local Civil Rule 40.5(d) and Rule 42 of the Federal Rules of Civil Procedure. These cases present challenges to the same decisions, against the same defendants, and present similar legal questions for determination. Consolidation would promote efficiency in the adjudication of these matters for both the parties and the Court.

Counsel for the parties in the subject cases have discussed the instant motion in compliance with Local Civil Rule 7(m). The positions of the parties are as follows:

- (a) The Plaintiffs in the instant case, Center for Biological Diversity and Sierra Club oppose the instant motion.
- (b) Movant-Intervenor, the State of Wyoming, does not oppose the instant motion.

¹ In this motion, Federal Defendants refer to entries in the docket for *Center for Biological Diversity v. Bernhardt*, No. 1:20-cv-855, as “*CBD*, Dkt. No. ____,” and *Western Watersheds Project v. Bernhardt*, No. 1:20-cv-860, as “*WWP*, Dkt. No. ____.”

(c) Movant-Intervenors, the Upper Green River Cattle Association, *et al.*, do not oppose the instant motion.

BACKGROUND

The Forest Service issued the Record of Decision for the Project on October 11, 2019. FS-PAR-11982–FS-PAR-12036 (Forest Service’s Record of Decision for Project); FS-PAR-10326–FS-PAR-11049 (Forest Service’s Environmental Impact Statement for Project). The decision authorized livestock grazing on six allotments under management criteria that will maintain or improve resource conditions. FP-PAR-11983. The 170,643-acre Project area is located near Pinedale, Wyoming, in the Pinedale Ranger District of the Bridger-Teton National Forest. *Id.* There are six allotments in the Upper Green area: Wagon Creek, Noble Pastures, Beaver Twin, Badger Creek, Roaring Fork, and the Upper Green River. *Id.* Eighteen permittees are authorized to graze cattle on the allotments between June 16th and October 15th. *See Fed. Defs. Opp. to Plfs. Mot. for Prelim. Inj., WWP, Dkt. No. 26, at 10.*

Two lawsuits challenging the Forest Service’s decision to authorize grazing and FWS’s 2019 BiOp and incidental take statement are pending before this Court:

1. In the instant case, plaintiffs the Center for Biological Diversity and Sierra Club seek declaratory and injunctive relief concerning the authorization of grazing pursuant to the Forest Service’s Record of Decision and FWS’s 2019 BiOp. *CBD*, Dkt. No. 1 (“*CBD Compl.*”) at 25. The *CBD* Plaintiffs also seek an order setting aside the incidental take statement found in the 2019 BiOp. *Id.* The *CBD* Plaintiffs challenge the 2019 BiOp’s rationale for permitting lethal removals of grizzly bears, specifically the lethal removal of female bears, *id.* ¶¶ 85-86, as well as the alleged reliance on ineffective conservation measures, *id.* ¶¶ 81-94. Plaintiffs allege that their action arises under the ESA and APA. *Id.* ¶¶ 7, 10-11, 88-89, 93-94.

2. In Case No. 20-cv-860, plaintiffs, the Western Watersheds Project, Alliance for the Wild Rockies, and Yellowstone to Uintas Connections seek declaratory and injunctive relief from the authorization of grazing pursuant to the Forest Service's Record of Decision and FWS's 2019 BiOp. *WWP*, Dkt. No. 1 (“*WWP Compl.*”) at 41-42 (Request for Relief section). Additionally, the *WWP* Plaintiffs seek declaratory and injunctive relief pertaining to the Forest Service's authorization of trailing livestock through an enclosure for the Kendall Warm Springs Dace in the Project area. *Id.* at 42. Like the *CBD* Plaintiffs, the *WWP* Plaintiffs contend that FWS erred in issuing the 2019 BiOp, challenging the FWS's rationale permitting lethal removals of grizzly bears, specifically female bears, incidental to the Project, *id.* ¶¶ 133-143, and consideration of conservation measures. *Id.* ¶¶ 155-161. The *WWP* Plaintiffs also allege that their action arises under the ESA and Administrative Procedure Act (“APA”). *Id.* ¶ 9, 11, 13, 151, 159, 164-65. The *WWP* Plaintiffs similarly challenge the FWS's rationale as it relates to FWS's consideration of grizzly bear food sources in the Project area, *id.* ¶¶ 144-151, 163-166, and the Forest Service's alleged failure to consult with FWS concerning the Kendall Warm Springs Dace, a small fish present in an enclosure in the Project, *id.* ¶¶ 169-173.

APPLICABLE STANDARDS

Federal Rule of Civil Procedure 42(a) provides that a district court may consolidate separate actions or discrete proceedings therein as follows:

If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.

“The decision whether to consolidate cases under Rule 42(a) is within the broad discretion of the trial court.” *Stewart v. O'Neill*, 225 F. Supp. 2d 16, 21 (D.D.C. 2002). In exercising that

discretion, “district courts weigh the risk of prejudice and confusion wrought by consolidation against the risk of inconsistent rulings on common factual and legal questions, the burden on the parties and the court, the length of time, and the relative expense of proceeding with separate lawsuits if they are not consolidated.” *Singh v. Carter*, 185 F. Supp. 3d 11, 18 (D.D.C. 2016).

Consolidation of actions under Rule 42(a) is “a valuable and important tool of judicial administration.” *Hanson v. Dist. of Columbia*, 257 F.R.D. 19, 21 (D.D.C. 2009) (quoting *Devlin v. Transp. Commc’ns Int’l Union*, 175 F.3d 121, 130 (2d Cir. 1999)). Consolidation is often appropriate “where, as here, the plaintiffs are different but are asserting identical questions of law against the same defendant[s].” *Nat’l Ass’n of Mortg. Brokers v. Bd. of Governors of Fed. Reserve Sys.*, 770 F. Supp. 2d 283, 286 (D.D.C. 2011) (citations omitted).

ARGUMENT

Here, the application of the above standards weighs heavily in favor of consolidating these two actions. First, there can be no dispute that these actions, which all seek to invalidate the same decisions, “involve a common question of law or fact.” Fed. R. Civ. P. 42(a). The claims in both cases have been brought against the Forest Service, FWS, and officials from those agencies in their official capacities. *CBD Compl.* ¶¶ 22-25; *WWP Compl.* ¶¶ 21-23. Both sets of Plaintiffs challenge the same decisions: the Forest Service’s decision to authorize grazing on the Project, and FWS’ 2019 BiOp and the related incidental take statement. *CBD Compl.* ¶¶ 81-94; *WWP Compl.* ¶¶ 133-166. Both sets of Plaintiffs rely on the same legal theories arising under the same provisions of the ESA and APA: alleging that the 2019 BiOp relied on ineffective conservation measures, *CBD Compl.* ¶¶ 81-94; *WWP Compl.* ¶¶ 154-159, and inadequately considered the effects from the Project on grizzly bears and, more specifically, female grizzly bears, *CBD Compl.* ¶¶ 84-85; *WWP Compl.* ¶¶ 140-143. And both sets of Plaintiffs seek similar declaratory and injunctive relief against the Forest Service and FWS. *CBD Compl.* at 25; *WWP Compl.* at 41. Put simply, Plaintiffs

in both cases seek similar relief against the same Federal Defendants, and challenge the same agency decisions using the same legal theories. The cases therefore clearly qualify for consolidation under Rule 42(a) because they involve more than one common question of law and fact. *See also* Local Rule 40.5(a)(3) (civil cases are “deemed related when . . . they (i) relate to common property, or (ii) involve common issues of fact, or (iii) grow out of the same event or transaction”); *WWP* (Dkt. No. 7) (notice of related case).

Given that the cases have not reached an advanced stage, challenge the same decisions, present nearly identical legal questions, assert claims against the same Federal Defendants, and were filed within hours of each other on the same day, consolidation will not cause confusion or result in a delay of proceedings; nor will consolidation prejudice any of the parties. To the contrary, consolidation would further the convenience of the parties and judicial economy by allowing the parties to coordinate briefing schedules and hearing dates and eliminating the need for the parties to file similar or even duplicate pleadings.

Federal Defendants would not object to a provision allowing the Plaintiffs and intervenors to file separate summary judgment briefs. This may be warranted because, for example, in *WWP*, the Plaintiffs have asserted a claim concerning the Kendall Warm Springs dace and an ESA section 9 claim, while the Plaintiffs in *CBD* have not done so. That said, the Federal Defendants would propose filing one consolidated administrative record in this APA case, one single combined memorandum of law in support of their cross-motion for summary judgment and in response to Plaintiffs’ motions for summary judgment, and one single reply brief in support of their cross-motion for summary judgment. Consolidation would therefore further judicial economy and not prejudice the parties.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court consolidate *Center for Biological Diversity v. Bernhardt*, No. 1:20-cv-855, and *Western Watersheds Project v. Bernhardt*, No. 1:20-cv-860.²

Dated: July 17, 2020.

Respectfully submitted,

JEAN E. WILLIAMS
Deputy Assistant Attorney General

/s/ J. Brett Grosko
J. BRETT GROSKO
Senior Trial Attorney (Md. Bar)
ROBERT M. NORWAY
Trial Attorney (D.C. Bar)
Wildlife and Marine Resources Section
P.O. Box 7369, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0342 | Phone (Grosko)
(202) 305-0344 | Phone (Norway)
(202) 305-0275 | Fax
brett.grosko@usdoj.gov
robert.m.norway@usdoj.gov

Attorneys for Federal Defendants

OF COUNSEL

Heather R. Hinton-Taylor
Britta Beckstead
U.S. Department of Agriculture
Office of General Counsel

Tyson H. Powell
Dana E. Jacobsen
U.S. Department of the Interior
Office of the Solicitor

² Federal Defendants reserve their right to continue to seek other appropriate procedural relief in the consolidated cases, including the relief requested in *CBD* and *WWP* in Federal Defendants' motions to transfer this case to the U.S. District Court for the District of Wyoming, which have been filed in each case and are fully briefed. *See, e.g.*, Dkt. No. 25.

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2020, I caused the foregoing document to be served upon counsel of record, as indicated below, through the Court's electronic service system (ECF/CM):

/s/ J. Brett Grosko
Attorney for Federal Defendants