PRERAK SHAH
Deputy Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

TYLER M. ALEXANDER (CA 313188)
JENNIFER A. NAJJAR (CO 50494)
EMMA L. HAMILTON (CA 325360)
Trial Attorneys
Natural Resources Section
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

NEIGHBORS AGAINST BISON SLAUGHTER, *et al.*,	)	Case No. 1:19-cv-00128-SPW
Plaintiffs;	)	**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE**
v.	)	
THE NATIONAL PARK SERVICE, *et al.*,	)	
Defendants.	)	Administrative Procedure Act Case, 5 U.S.C. §§ 701 *et seq*.

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INTRODUCTION

Plaintiffs Bonnie Lynn and Neighbors Against Bison Slaughter (together, "Neighbors") move to consolidate this case with *Cottonwood Environmental Law Center v. Bernhardt* ("*Cottonwood*"), No. 2:18-cv-12-SEH, a case that has been pending before a different judge for two years and involves different parties, legal claims, and facts. Plaintiffs in both cases challenge aspects of the Interagency Bison Management Plan ("the IBMP")—a cooperative agreement between the State of Montana, various federal agencies, and several American Indian Tribes to coordinate each entity's respective bison management responsibilities in and around Yellowstone National Park. But the mere fact that both cases involve challenges to bison management does not mean that consolidating the two actions in the Billings Division would promote efficiency or judicial economy.

To the contrary, Plaintiffs' motion to consolidate threatens to confuse the distinct hunting-related issues (which do not all arise under NEPA) before the Court in this case with the broader attacks on the sufficiency of the IBMP's environmental analysis in *Cottonwood*. Consolidation would also decrease efficiency by unnecessarily tethering the two cases—currently at different procedural postures—to the same timeline, and would undermine the Ninth Circuit's recent order remanding *Cottonwood* to Judge Haddon for further consideration after the plaintiff requested—and was denied—reassignment to a

different trial judge. The United States opposes this motion because the two cases are at different phases of preparation, they involve different facts and legal issues, and the supposed efficiencies referenced in the motion are illusory.

I. Background

A. *Neighbors Against Bison Slaughter, et al. v. National Park Service, et al. ("Neighbors"),* No. 1:19-cv-00128-SPW

Neighbors brought this suit in the United States District Court for the District of Columbia on October 21, 2019. *See* Compl., ECF No. 1 ("NABS Compl."). The case was then transferred here on Defendants' motion. Neighbors' Complaint centers on purported human health and safety risks stemming from an annual bison hunt in Beattie Gulch near Gardiner, Montana. *Id.* ¶¶ 1-8. Neighbors allege that Defendants—the National Park Service ("Park Service"), the United States Forest Service ("Forest Service"), Secretary of the Interior David Bernhardt, Secretary of Agriculture Sonny Perdue, and Yellowstone Superintendent Cam Sholly—have "authorized" the state- and tribally-regulated hunt through the IBMP's publication of its 2019 Winter Operating Procedures ("2019 Winter Plan"). *Id.* ¶ 4.

Neighbors assert four claims for relief, each related to the annual hunt. *Id.* ¶¶ 5-8, 15-17. In Count One, Neighbors claim that the Park Service has arbitrarily and capriciously implemented the Yellowstone Management Act Amendments by "authoriz[ing]" bison hunting in Beattie Gulch without analyzing safety risks and

impacts. *Id.* ¶¶ 54-59. Count Two similarly alleges that, as a party to the IBMP under which the 2019 Winter Plan issued, the Forest Service has arbitrarily and capriciously implemented various land management statutes. *Id.* ¶¶ 60-63. Count Three alleges that Defendants violated the National Environmental Policy Act ("NEPA") by not adequately analyzing the impacts of bison hunting when they published the 2019 Winter Plan, *id.* ¶¶ 64-68, and Count Four alleges that the agencies failed to supplement the IBMP's NEPA analysis to address hunting. *Id.* ¶¶ 69-71. Neighbors seek declaratory relief and urge the Court to "[h]old unlawful and set aside the 2019 Winter Plan, and any future operating procedures for the Plan." *Id.* ¶ 72(a). Neighbors also ask the Court to "[p]ermanently enjoin the Park Service and the Forest Service from authorizing bison hunting on federal land in Beattie Gulch and within one mile of the private residences there." *Id.* ¶ 72(f).

B. *Cottonwood Environmental Law Center v. Bernhardt,* No. 2:18-cv-12-SEH

Plaintiff Cottonwood Environmental Law Center ("Cottonwood") filed suit in the Butte Division of the U.S. District Court for the District of Montana on February 8, 2018. *See* Compl., *Cottonwood Envtl. Law Ctr. v. Bernhardt*, No. 2:18-cv-12-SEH, ECF No. 1. The third amended complaint[1] reveals that the

[1] Plaintiffs' motion to consolidate references Cottonwood's second amended complaint, but Cottonwood filed its third amended complaint on March 3, 2020. *See* 2:18-cv-12-SEH, ECF No. 91.

claims, alleged facts, and legal issues in *Cottonwood* embrace more than opposition to hunting in Beattie Gulch. *See* 3d Am. Compl., No. 2:18-cv-12-SEH, ECF No. 91 ("Cottonwood Compl."). *Cottonwood* also names additional defendants that are not parties to *Neighbors*: Governor of Montana Steve Bullock, U.S. Forest Service Regional Forester Leanne Marten, and the USDA Animal and Plant Health Inspection Service ("APHIS"). *See id.* at 1. The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the Intertribal Buffalo Council intervened as Defendants.

The *Cottonwood* Complaint repeatedly defines the scope of its bison management challenges to include management activity taking place in "Zone 2," an area north of Yellowstone where the IBMP partners have agreed to maintain certain levels of bison tolerance (or allowable numbers of bison) depending on the season. *See, e.g.*, *id.* ¶¶ 17-19. Cottonwood broadly attacks IBMP management practices prohibiting migrating bison from moving beyond Zone 2, and takes issue with the practice of "hazing" bison back into Zone 2 if they migrate beyond its boundaries. *Id.* ¶¶ 25-35. Cottonwood also identifies a 2017 study on brucellosis transmission by elk as allegedly significant new information requiring supplemental NEPA analysis. *Id.* ¶¶ 20-22.

There are currently three claims for relief alleged in *Cottonwood*, each asserting that the defendants have violated NEPA by failing to supplement their

environmental analysis of the IBMP based on new circumstances and information. Count One alleges that the defendants failed "to supplement the NEPA analysis for the [IBMP] based on the new tribal hunting." *Id.* ¶ 64. Count Two alleges failure to supplement based on new information from the 2017 brucellosis study. *Id.* ¶ 71. Finally, Count Three alleges failure to supplement "given the significant new information and changed circumstances that the population objective could be raised to 7,500 animals." *Id.* ¶ 78. Cottonwood seeks declaratory relief as well as various injunctions preventing Defendants: "from enforcing the Zone 2 drop dead line[, and] . . . from any future hazing, harassing, trapping, or slaughtering any bison in or near Yellowstone Park . . . ." *Id.* at Prayer for Relief ¶¶ C, D.

On February 20, 2019, Judge Haddon granted the *Cottonwood* defendants' renewed motions to dismiss on the ground that Cottonwood had failed to state a claim. *See* Mem. & Order, No. 2:18-cv-12-SEH, ECF No. 81 8-9. On December 23, 2019, the Ninth Circuit Court of Appeals reversed Judge Haddon's decision in part and remanded the case for further proceedings. *See Cottonwood Envtl. Law Ctr. v. Bernhardt*, No. 19-35150, 2019 WL 7163377 (9th Cir. Dec. 23, 2019). In particular, the Ninth Circuit remanded "for a determination whether Cottonwood has alleged facts demonstrating Article III standing to pursue its NEPA claims against the State of Montana." *Id.* at *1. The court also held that Cottonwood had failed to state a plausible claim for relief in counts related to hazing and bison

population objectives, but noted that, "[a]s there could be facts that would support [those counts], we remand to the district court to allow Cottonwood an opportunity to seek leave to amend its complaint." *Id.* at *2. These issues are now pending before Judge Haddon.

II. Legal Standard

Under Federal Rule of Civil Procedure 42(a), a district court has the discretion to consolidate actions "involv[ing] a common question of law or fact." Fed. R. Civ. P. 42(a); *see also Washington v. Daley*, 173 F.3d 1158, 1169 n.13 (9th Cir. 1999) ("consolidation is within the broad discretion of the district court") (quoting *In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir. 1987)); *Or. Nat. Desert Ass'n v. Shuford*, No. CIV 06–242–AA, 2006 WL 2601073, at *10 (D. Or. Sept. 8, 2006) ("District courts have broad discretion in deciding whether to consolidate cases within the same district.") (citing *Inv'rs Research Co. v. U.S. Dist. Court*, 877 F.2d 777 (9th Cir. 1989)). Even where appropriate, however, "consolidation is by no means a necessity." *Wall v. U.S. Dep't of Agric.*, No. CV 16–118–M–DLC, 2016 WL 5816883, at *2 (D. Mont. Oct. 5, 2016) (citing *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848 (9th Cir. 2016)); *see also Sapiro v. Sunstone Hotel Inv'rs, LLC*, Nos. CV 03 1555 PHX SRB, CV 04 1535 PHX JWS, 2006 WL 898155, at *1 (D. Ariz. Apr. 4, 2006) ("the fact that a common question is present does not guarantee consolidation.").

In determining whether to consolidate, "[t]he court weighs 'the saving of time and effort that consolidation under Rule 42(a) would produce against any inconvenience, delay, or expense that it would cause for the litigants and the trial judge.'" *Nelson v. Paulson*, No. C08-1034-JCC, 2008 WL 11347440, at *1 (W.D. Wash. Sept. 25, 2008) (quoting 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2383 (3d ed. 2008)). "Consolidation is inappropriate . . . if it leads to inefficiency, inconvenience, or unfair prejudice to a party." *Glass v. Intel Corp.*, No. CV 06–671–PHX–MHM, 2007 WL 2265663, at *4 (D. Ariz. Aug. 6, 2007). "The party seeking consolidation bears the burden of establishing that the . . . benefits of consolidation outweigh any prejudice." *Single Chip Sys. Corp. v. Intermec IP Corp.*, 495 F. Supp. 2d 1052, 1057 (S.D. Cal. 2007); *see also Sapiro*, 2006 WL 898155, at *2.

III. Analysis

A. The Limited Degree of Overlap Between Claims and Parties Does Not Warrant Consolidation.

There are no doubt parallels between the *Neighbors* and *Cottonwood* cases. Both challenge aspects of the IBMP, both seek relief against the federal government, and both allege that increased state and tribal hunting outside Yellowstone National Park requires the IBMP partners to conduct supplemental NEPA analysis. *See* NABS Compl. ¶¶ 69-71; Cottonwood Compl. ¶ 64. But the cases are also substantially different: each case involves distinct theories not

common to the other; *Cottonwood* includes non-federal defendants that may have defenses, authority, and claims of entitlement not shared by the federal Defendants; and the cases are in different procedural postures. These differences outweigh the similarities and would make consolidation burdensome for the Court and the parties.

i. The Cases Involve Predominantly Distinct Legal Claims and Underlying Facts.

The claims in *Cottonwood* alleging NEPA violations based on new population objectives and brucellosis information are unique to that case. *See* Cottonwood Compl. ¶¶ 65-78. Likewise, the Administrative Procedure Act ("APA") claims in *Neighbors* alleging arbitrary and capricious implementation of various land and resource management statutes do not overlap with any claims in *Cottonwood*. *See* NABS Compl. ¶¶ 54-63.

That the cases both attack the IBMP is not enough to justify consolidation where the legal theories in the cases differ significantly. *Cf. Sidari v. Orleans Cty*, 174 F.R.D. 275, 281 (W.D. N.Y. 1996) ("Consolidation is not warranted merely because two separate plaintiffs allege distinct claims under the same general theory of law or statute."); *Certified/LVI Envtl. Servs., v. PI Constr. Corp.*, No. CIVA.SA01CA1036FBNN, 2003 WL 1798542, at *2 (W.D. Tex. Mar. 3, 2003) (denying motion to consolidate despite the fact that "both cases involve a claim under the Miller Act."). Because the issues that are unique to each case

predominate over the single NEPA claim the two cases have in common, consolidation would not promote the most efficient resolution of the plaintiffs' claims in either case.

ii. The Cases Involve Different Plaintiffs, Defendants, and Intervenors.

Additionally, *Cottonwood* involves defendants who are not parties to the *Neighbors* case, and who have distinct interests and prerogatives from those implicated in *Neighbors*. Though party differences do not necessarily preclude consolidation where it would still serve the interest of judicial economy and convenience, *see* Pls.' Br. in Supp. of Mot. to Consolidate 10-11, ECF No. 68 ("Pls.' Br.") (collecting cases), courts have also held that non-overlapping parties can cut against consolidation. *See, e.g.*, *Certified/LVI Envtl. Servs.*, 2003 WL 1798542, at *3 (denying consolidation where one lawsuit involved parties not present in another); *Sidari*, 174 F.R.D. at 282 (same); *Barrios v. Elmore*, No. 3:18-cv-132-DJH-RSE, 2018 WL 3636576, at *3 (W.D. Ky. July 31, 2018) (same); *Nat'l Sec. Counselors v. Cent. Intelligence Agency*, 322 F.R.D. 41, 44 (D.D.C., 2017) (declining to consolidate cases at the fee petition stage, despite the fact that "the issues raised in the two cases may be efficiently resolved in consolidated opinions[,]" in part because the parties, including federal defendants, were not the same in each case).

Here, consolidation would not materially streamline the Court's consideration of either case. Both cases generally challenge management actions related to the IBMP, but only federal agencies and agency officials are named as defendants in *Neighbors*, and one of the federal IBMP partners—APHIS—is not named at all. *See* NABS Compl. 1. *Cottonwood*, by contrast, names APHIS as a defendant as well as the State of Montana, and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the Intertribal Buffalo Council have intervened as Defendants. *See* Cottonwood Compl. 1. The varying interests of the dissimilar parties in each case will likely result in distinct defenses and legal arguments that the Court will be required to review separately.

iii. The Administrative Records May Differ.

Defendants acknowledge that in both cases the administrative record lodged with the Court (which forms the basis for judicial review under the APA, 5 U.S.C. § 706) will likely include some of the same general documents related to the IBMP. Still, there is no guarantee that the administrative records will be identical because the complaints rely on different categories of information in support of their assertions that NEPA supplementation is required, and three of Neighbors' four claims do not involve NEPA supplementation and instead challenge the implementation of the 2019 Winter Plan.

The content of an administrative record is tied to the decision or action being challenged, *see Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989), and "[u]sually, two suits under the APA challenging distinct agency actions will not involve common questions of law or fact." *Habitat Educ. Ctr., Inc. v. Kimbell*, 250 F.R.D. 390, 394 (E.D. Wis. 2008). It is not clear from the face of the complaints that the two cases challenge the same agency action or alleged failures to act.

The *Neighbors* Defendants are in the process of preparing their administrative record, which will be lodged with this Court on March 25, 2020. *See* Case Management Order 1, ECF No. 62. As discussed above, the *Neighbors* Complaint focuses exclusively on hunting in Beattie Gulch (an area outside the park) and identifies the 2019 Winter Operating Plan as the alleged final agency action Neighbors challenge in Counts One and Two (arbitrary and capricious implementation of land management statutes) and Three (inadequate NEPA analysis of the 2019 Winter Plan). *See* NABS Compl. ¶¶ 4, 59, 63, 68, 72.

Cottonwood, on the other hand, never mentions the 2019 Winter Plan in its complaint, and asserts failure to supplement under NEPA as its sole legal claim. *See* Cottonwood Compl. ¶¶ 56-78. Although it is not clear from the *Cottonwood* Complaint what specific final agency action or inaction it is challenging, Plaintiffs' motion for consolidation suggests that they view the relevant agency action

generally as "decisions not to supplement the IBMP EIS." *See* Pls.' Br. 6. Cottonwood also identifies additional categories of alleged new information or changed circumstances beyond hunting (population objectives and a brucellosis study) to support its claims that the agency failed to act. *See* Cottonwood Compl. ¶¶ 65-78. In doing so, Cottonwood challenges broader aspects of the IBMP present since its inception in 2000—including management tools like hazing to prevent bison from leaving Zone 2 and the IBMP partners' assessments of target bison population objectives. *See id.* Plaintiffs aver that "Cottonwood identifies extra-record documents that require a supplemental EIS beyond what Neighbors ha[ve] identified." *See* Pls.' Br. 10.

The administrative record for alleged "decisions not to supplement" NEPA could differ significantly from the record for an alleged decision to implement the 2019 Winter Plan. And, "only if the administrative records contain identical facts or present the same legal question will different actions share a common question." *Habitat Educ. Ctr., Inc.*, 250 F.R.D. at 395. At bottom, it is too early to presume that the administrative record the federal Defendants will eventually prepare and lodge in *Cottonwood* will address the same agency actions or inactions for which the *Neighbors* Defendants are currently preparing their administrative record. Additionally, APHIS will also likely be involved in preparing the administrative record in *Cottonwood*, but not in *Neighbors*.

Neighbors' authorities are not to the contrary. The out-of-circuit cases Neighbors cite to suggest that potentially overlapping administrative records "compel[] consolidation" are merely examples of trial courts determining that the efficiency gains of consolidating two cases with the same administrative records outweighed any potential downsides. *See id.* at 2-3, 10-11 (citing *Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of Fed. Reserve Sys.*, 770 F. Supp. 2d 283, 287 (D.D.C. 2011); *En Fuego Tobacco Shop LLC v. FDA*, 356 F. Supp. 3d 1 (D.D.C. 2019)). In *En Fuego*, the cases to be consolidated were already before the same trial judge, *see* 356 F. Supp. 3d at 5-7, and in both cases the court explicitly stated that the cases would be decided on "the same administrative record." *Id.* at 10; *Nat'l Ass'n of Mortg. Brokers*, 770 F. Supp. 2d at 287. But that does not obviate the Court's discretion to determine whether consolidation is appropriate here in light of the unique claims and parties in each case. *See En Fuego*, 356 F. Supp. 3d 1 ("[i]n other circumstances, these differences might warrant non-consolidation."); *Nat'l Ass'n of Mortg. Brokers*, 770 F. Supp. at 286 ("[c]onsolidation pursuant to Rule 42(a) is permissive and vests a purely discretionary power in the district court.").

At most, these cases affirm the well-established proposition that determining whether consolidation would result in worthwhile efficiency gains is committed to the sound discretion of the trial court, and the similarities and differences between

administrative records is but one potential factor in that analysis. *See, e.g.*, *Habitat Educ. Ctr., Inc.*, 250 F.R.D. at 395 (declining to consolidate cases against similar federal defendants, even when each case involved an APA challenge to a timber project in the same national forest, because the cases would involve different administrative records and "[d]espite their similarities, the projects are different enough to require independent review."). As alleged in their complaints, Neighbors and Cottonwood seek judicial review of distinct elements of the IBMP and different agency actions or failures to act. Plaintiffs have pointed to no case law that "compels" consolidation of these two cases, and any efficiency gains from doing so would be outweighed by the potential for confusion and delay.

iv. The Cases Are in Different Procedural Postures.

Another factor weighing against consolidation is that *Cottonwood* is currently on a different procedural track than *Neighbors*, and as the case was recently remanded Judge Haddon has not yet issued a scheduling order for lodging the administrative record and merits briefing. Although Plaintiffs suggest that the parties in *Cottonwood* could "easily" adhere to the scheduling order in *Neighbors*, *see* Pls.' Br. 11, the federal Defendants in Cottonwood would likely be unable to produce an administrative record by March 25, 2020, particularly because Cottonwood has so recently filed its third amended complaint.

Because the two cases are not moving in lockstep, consolidation could delay both cases, undermining the interests of judicial economy and efficiency. *See, e.g.*, *Liqui-Box Corp. v. Reid Valve Co., Inc.*, Nos. 85-1549, 87-2098, 1989 WL 431980, at *2 (W.D. Pa. Oct. 11, 1989) (holding that "sound judicial administration" prevented consolidation of cases at "widely separate stages of preparation," (citations omitted)); *Save Our Sonoran, Inc. v. Flowers*, Nos. CV-02-0761-PHX-SRB, CV-05-3924-PHX-SRB, 2006 WL 8440481, at *6 (D. Ariz. Dec. 22, 2006) (declining to consolidate "nearly identical" complaints when they had "diverged procedurally" since filing). "Consolidating the actions before either this Court or Judge [Haddon] would not . . . result in any 'streamlining.' Rather, it would create a hodgepodge of conflicting schedules, deadlines, and rulings." *See United States v. Brace*, No. 1:17-cv-00006 (BR), 2018 WL 9815246, at *2 (W.D. Pa. Nov. 14, 2018).

Defendants recognize, of course, that consolidation would not merge the two cases. *See Hall v. Hall*, 138 S. Ct. 1118, 1127 (2018). Still, the different parties, claims, and procedural postures of the two cases will require the Court to delve into the unique intricacies of *each case*—i.e., standing, hazing, brucellosis transmission, and population objectives in *Cottonwood*, and statutory interpretation, federalism, and jurisdiction over hunting in *Neighbors*. Thus, consolidation before the same judge on the same timeline will not necessarily

make the process any more efficient. Rather, doing so threatens to blur the lines between these distinct legal and factual issues, particularly if Plaintiffs seek consolidated briefing in the two cases.[2]

Whether or not Plaintiffs seek consolidated briefing, if the cases were consolidated the same judge would still be required to review two sets of arguments concurrently and then separately adjudicate the distinct issues in each case. The potential difficulties consolidation would present for the federal Defendants and the Court outweigh any minor efficiencies that might be gained by streamlining the cases here. In fact, "[i]t would be more burdensome and inefficient to combine" the two non-NEPA claims in *Neighbors* with the two unique (non-hunting) NEPA claims in *Cottonwood* merely because one hunting-related NEPA claim overlaps in the two cases. *See Wall*, 2016 WL 5816883 at *3. In sum, consolidation is likely to make case management proceedings unwieldy, which would undercut any efficiencies that might result from consideration by the same court of two very different lawsuits that have in common only a single overlapping claim.

[2] Even after the two conference calls and "dozens of emails" that Plaintiffs describe in their motion, *see* Pls.' Br. 2, counsel for Cottonwood and Neighbors declined to make clear whether they envision consolidated briefing for the two cases or simply seek to have both cases heard before the same judge.

v. Any Risk of Inconsistent Judgments on the Sole Overlapping Claim Can Be Avoided through Case Management Procedures.

Finally, with respect to the common issues raised by Count Four of the *Neighbors* Complaint and Count One of the *Cottonwood* Complaint (the adequacy of the IBMP's NEPA regarding hunting), any risk of inconsistent judgments could be addressed by mechanisms such as a case management order requiring the parties to keep each trial judge apprised of developments in the other case that concern the potentially overlapping claim, or a stay of the common claim in one court. *Cf. Campbell v. PricewaterhouseCoopers*, Nos. CIV. S-06-2376 LKK/GGH, S-08-965 LKK/GGH, S-08-997 LKK/EFB, 2008 WL 3836972, at *3 (E.D. Cal. Aug. 14, 2008) (denying motion to consolidate where "many of the efficiency gains sought to be achieved by consolidation can also be achieved without consolidation" through case management procedures).

B. If the Court Determines Consolidation is Appropriate, the First-to-File Rule Should Apply.

In addition to opposing consolidation generally for the reasons described above, Defendants oppose Plaintiffs' attempt to use Rule 42(a) to transfer *Cottonwood* out of the Butte Division. Defendants agree that *Neighbors* was properly assigned to the Billings Division following Defendants' successful motion to transfer the case to the District of Montana. *See* Pls. Br. 12. Plaintiffs do not effectively explain, however, why *Cottonwood* should be transferred to the Billings

Division after it has been pending before Judge Haddon in the Butte Division for more than two years—and particularly after the Ninth Circuit recently remanded *Cottonwood* for further proceedings before Judge Haddon.[3]

Although *Cottonwood* has not yet reached the merits, the case has generated a lengthy and complex procedural history before Judge Haddon to date.[4] *See* 2:18-cv-12-SEH, ECF Nos. 2-82. It is not clear how transferring the case to a new judge at this stage would be any more efficient than allowing Judge Haddon to conduct further proceedings on remand, as explicitly directed by the Ninth Circuit. *See, e.g.*, *Brace*, 2018 WL 9815246 at *1 ("even if . . . the matters involved sufficient commonalities, given that the actions have been pending before different courts for nearly *two years*, consolidation, at this point, would be inappropriate.").

Defendants also disagree with Plaintiffs' assertion that the first-to-file rule, to the extent it applies by analogy in the context of intra-district consolidation and

[3] Further, the Ninth Circuit explicitly rejected Cottonwood's attempts to have the case transferred to a different judge on remand. *See Cottonwood*, 2019 WL 7163377, at *6 n.2.

[4] This procedural history includes separate hearings on Cottonwood's second motion to amend and defendants' renewed motions to dismiss, as well as briefing and rulings on: Cottonwood's motion for a temporary restraining order; Cottonwood's motion to amend its complaint a second time; the state and federal defendants' separate motions to dismiss; the intervenor-defendants' motion to intervene; and Cottonwood' motion for jurisdictional discovery. *See* No. 2:18-cv-12-SEH, ECF Nos. 2-82.

transfer, should "bend" to provide Cottonwood with a new judicial assignment. *See* Pls.' Br. 14. "[T]hese matters are before different judges as a result of the manner in which the parties elected to proceed." *See Brace*, 2018 WL 9815246, at *2. Cottonwood chose to file its claim in the Butte Division in 2018. Neighbors chose to file more than a year later in the District of Columbia. It is not clear why plaintiffs in both cases believe they should get a second chance to file their lawsuits in the district they now prefer, but it is clear that no true judicial efficiency would result from such a transfer.

Plaintiffs selectively quote case-law to suggest that it would be "reversible error" to apply the first-to-file rule where the parties involved in the two suits are not the same. *See* Pls.' Br. 12 (quoting *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 628 n.13 (9th Cir. 1991)). The case-law does not support their contention. The first-to-file rule is a "generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94–95 (9th Cir. 1982). Accordingly, "[t]he first-to-file rule is successfully invoked primarily when the actions at issue are pending in different district courts." *See Ekin v. Amazon Servs., LLC*, No. C14-0244-JCC, 2014 WL 12028588, at *3 (W.D. Wash. May 28, 2014) (citing *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1156 (9th Cir.

2007)). However, courts have found that "the purpose of the first-to-file rule can [] be served by applying the rule 'where related cases are pending before two judges in the same district,'" even when the parties in the two cases are not identical. *See, e.g.*, *Olin Corp. v. Cont'l Cas. Co.*, No. 2:10–cv–00623–GMN–RRJ, 2011 WL 1337407, at *2 (D. Nev. Apr. 6, 2011) (quoting *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997)).

Here, if the Court finds consolidation appropriate, the policies underlying both consolidation and the first-to-file rule—avoiding duplication, piecemeal resolution of issues, and encroaching on the authority of other courts, *see id.*—would be best served by consolidating the cases before the judge with whom the first case was filed and who has presided over it for more than two years. The parties apparently agree that the first-to-file rule, "is to be applied with a view to the dictates of sound judicial administration[,]" Pls.' Br. 14 (quoting *Pacesetter*, 678 F.2d at 95). But Plaintiffs' motion misses the point. Here, sound judicial administration requires that the cases, if consolidated, should be consolidated before the judge who has already spent two years with the subject matter.

CONCLUSION

The preponderance of the seven claims in these two cases assert different legal theories and involve different questions of law and fact, and the cases involve different plaintiffs, defendants, and defendant-intervenors. Plaintiffs have not met

their burden to show that consolidation would significantly promote judicial economy, efficiency, or convenience such that the cases should be consolidated under Fed. R. Civ. P. 42. *See Single Chip Sys. Corp.*, 495 F. Supp. 2d at 1057.

If the Court should choose to consolidate the actions, however, Defendants respectfully request that the briefing schedules and page limits for the two actions remain separate, given the importance of the issues raised, and further submit that the cases would be most logically and efficiently consolidated before Judge Haddon where *Cottonwood* is pending on remand.

Respectfully submitted this 5th day of March, 2020.

PRERAK SHAH
Deputy Assistant Attorney General
Environment & Natural Resources Division

/s/ Emma L. Hamilton
EMMA L. HAMILTON
Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Tele: (202) 305-0479
Fax: (202) 305-0506
emma.hamilton@usdoj.gov

JENNIFER A. NAJJAR
Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Tele: (202) 305-0476
Fax: (202) 305-0506

jennifer.najjar@usdoj.gov

TYLER M. ALEXANDER
Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Tele: (202) 305-0238
Fax: (202) 305-0506
tyler.alexander@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

In accordance with Local Rules 7.1 and 24.1 of the Rules of Procedure of the United States District Court for the District of Montana, I certify the following concerning the Defendants' Response to Plaintiffs' Motion to Consolidate.

1. The document is double spaced except for footnotes and quoted and indented material;
2. The document is proportionally spaced, using Times New Roman, 14 point font; and
3. The document contains 4728 words as calculated by Microsoft Word.

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of this filing to all counsel of record.

/s/ *Emma L. Hamilton*

EMMA L. HAMILTON
U.S. Department of Justice