

MATTHEW D. THURLOW, D.C. Bar No. 1008014  
Baker & Hostetler LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036  
(202) 861-1681ex  
mthurlow@bakerlaw.com  
(Admitted pro hac vice)

JARED S. PETTINATO, MT Bar No. 7434  
The Pettinato Firm  
3416 13<sup>th</sup> St. NW, #1  
Washington, DC 20010  
(406) 314-3247  
Jared@JaredPettinato.com

*Attorneys for Plaintiffs*

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

NEIGHBORS AGAINST BISON  
SLAUGHTER, *et al.*,

Plaintiffs,

v.

THE NATIONAL PARK SERVICE, *et al.*,

Defendants.

Case No. 1:19-cv-128-SPW

Judge Susan P. Watters

PLAINTIFFS NEIGHBORS  
AGAINST BISON SLAUGHTER  
AND BONNIE LYNN'S BRIEF IN  
SUPPORT OF THEIR MOTION TO  
CONSOLIDATE

## INTRODUCTION

Under Federal Rule of Civil Procedure 42(a), Plaintiffs Neighbors Against Bison Slaughter and Bonnie Lynn (collectively, Neighbors) move the Court to consolidate, here with this case, the case of *Cottonwood Environmental Law Center v. Bernhardt*, No. 2:18-cv-12-SEH (Feb. 8, 2018). The plaintiff in that case is simultaneously filing a motion to consolidate it here.

Both cases arise from the same Interagency Bison Management Program (IBMP), and so they will rely on overlapping administrative records. Compare Compl. ¶¶ 31-53, ECF No. 1, with Second Am. Compl. for Declaratory and Injunctive Relief (2nd Am. Compl.) ¶¶ 10-37, *Cottonwood*, ECF No. 46, Ex. 1. Consolidating these cases would advance judicial economy and would avoid duplicative or contradictory rulings.<sup>1</sup>

Although Cottonwood Environmental Law Center filed first, and the Helena Division has jurisdiction over that case, all of the activities in both cases, within in the District of Montana, occurred in Park County. Therefore, this Court's case-

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<sup>1</sup> Neighbors is making this joint motion now because the United States Court of Appeals for the Ninth Circuit recently overturned a February 2019 order dismissing the *Cottonwood* case. Mem., No. 19-35150 (9th Cir. Dec. 23, 2019), Ex. 2. The Ninth Circuit issued its mandate issued on February 14, 2020. *Cottonwood*, No. 2:18-cv-12-SEH, ECF No. 88. Therefore, the United States District Court for the District of Montana just obtained jurisdiction over that case again. Neighbors referenced the briefs in *Cottonwood* in support of their motion for a temporary restraining order and preliminary injunction. Pls.' P. & A. in Supp. of Their Mot. for a TRO & Prelim. Inj. 10, 19 n.15, ECF No. 4-1. *Neighbors Against Bison Slaughter v. Nat'l Park Serv.*, No. 1:19-cv-128-SPW NEIGHBORS' BR. IN SUPP. OF MOT. TO CONSOLIDATE

assignment order directs both cases to the Billings Division.<sup>2</sup> Moreover, the *Cottonwood* case has not advanced out of the pleadings stage, so few efficiencies would gain from leaving it in the Helena Division.

Over the past month, Neighbors consulted with Federal Defendants and the counsel for the parties in *Cottonwood*. After two conference calls with counsel for all the parties in both cases, dozens of emails, and other calls, they could not reach much agreement. Federal Defendants have informed Neighbors that they will oppose both consolidating and consolidating in the Billings Division. *Cottonwood* defendant Governor Steve Bullock has informed Neighbors that it opposes consolidating the cases in the Billings Division. Neighbors understands that *Cottonwood* defendant-intervenors, the Fort Peck Tribe and the InterTribal Buffalo Council, however, do not oppose this motion.

In other cases, federal defendants commonly seek to consolidate cases when they challenge the same agency action. *See, e.g., 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) (*NAMB*) (consolidating APA cases over the plaintiffs' objections); *En Fuego Tobacco Shop LLC v. FDA*, 356 F. Supp. 3d 1, 11 (D.D.C. 2019) (same). In those cases, the courts consolidated the cases over the plaintiffs' objections—despite

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<sup>2</sup> Standing Order DLC-45 (Aug. 2, 2019), [www.mtd.uscourts.gov/sites/mtd/files/SO%20DLC-45.pdf](http://www.mtd.uscourts.gov/sites/mtd/files/SO%20DLC-45.pdf).  
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non-identical parties and different procedural postures. The courts concluded that, because both cases would rely on the same administrative records, consolidating the cases would save judicial resources. For the same reasons, Federal Rule of Civil Procedure 42(a) compels consolidating these cases.

## **BACKGROUND**

The two lawsuits overlap in the claims, legal bases, defendants, and facts. Both lawsuits arise from the same activities by the same government agencies (the National Park Service and the Forest Service, or the Agencies) and focus on some of the same failures to act. They also overlap in goals because all plaintiffs seek to ensure safe bison hunting in Beattie Gulch and elsewhere.

Cottonwood seeks to obtain that objective by enjoining enforcement of the Zone 2 management area, thereby increasing tribal and nontribal hunting opportunities by allowing bison to freely roam on public land in Montana.

Neighbors also wants to see the dangerous bison slaughter in Beattie Gulch stopped before someone dies or suffers serious injury. They also want to see more wild bison leave Yellowstone to tribal reservations, tribal ownership, and tribal management. Some tribes exercise a sliver of their treaty rights to hunt bison on public land in Beattie Gulch, but the Agencies lack political will to provide any meaningful breadth to those rights. Even as the State of Montana has opened

additional areas for bison to roam, the Agencies have cramped six tribes' hunters into two small areas for exercising those treaty rights.

## I. The Claims

In both cases, the plaintiffs claim that National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 to 4370m-12, requires the Agencies to issue a supplemental EIS. *Compare* Compl. ¶ 71, with 2nd Am. Compl., *Prayer for Relief* ¶¶ A, B, C.

### A. Cottonwood Claims

Plaintiff Cottonwood Environmental Law Center made four claims for a supplemental EIS under NEPA. It based each claim on one of these four circumstances:

1. New Yellowstone bison hunters constitute significant new information or circumstances. 2nd Am. Compl. ¶¶ 53-59.
2. Hazing operations present safety concerns for Cottonwood members and the public. *Id.* ¶¶ 60-65.
3. A study completed by the National Academy of Sciences in 2017 traces the spread of brucellosis to cattle, in the Greater Yellowstone Area, to elk, and not to bison. *Id.* ¶¶ 66-71.
4. In May 2018, the National Park Service proposed the significantly higher number of 4,200 bison as the population objective for Yellowstone. *Id.* ¶¶ 72-76.

### B. Neighbors' Claims

Neighbors makes one claim that NEPA requires the agencies to issue a supplemental EIS because the concentrated, dangerous hunting in Beattie Gulch so

far exceeds the environmental impacts analyzed in the IBMP EIS. *Id.* Compl. ¶¶ 69-71 (count 4).

In addition, Neighbors claims the Agencies arbitrarily and capriciously implemented the 2019 Operation Plan ([2019] Operating Procedures for the IBMP (Dec. 31, 2018), ECF No. 4-12). Specifically, when it made that decision, it violated three statutes:

1. The Forest Service Organic Act of 1897, 16 U.S.C. §§ 472-482, 551;
2. The Yellowstone Management Act Amendments, Act of January 24, Pub. L. No. 67-395, 43 Stat. 1174, 1214 (codified at 16 U.S.C. § 36); and
3. NEPA.

*See, e.g.*, Compl. ¶¶ 4-8, 54-71, ECF No. 1. Based on these arguments, Neighbors asks the Court to set aside 2019 Operation Plan.

## II. The Parties

Cottonwood named as defendants several federal parties and Montana Governor Steve Bullock. 2nd Am. Compl. ¶¶ 26-28, 44, 74.<sup>3</sup> The Fort Peck Tribes and the InterTribal Buffalo Counsel have intervened. Order 24, *Cottonwood* (May 1, 2018) (granting motion to intervene). Neighbors has named only federal defendants that include or oversee the Agencies. *See generally* Compl.

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<sup>3</sup> After Federal Rule of Civil Procedure 25(d) substitutes several parties, Cottonwood will have named the Park Service, the Forest Service, Secretary of the Interior David Bernhardt, Yellowstone Superintendent Cam Sholly, U.S. Forest Service Regional Supervisor Leanne Martin, the federal Animal-Plant Health Inspection Service (APHIS), and Montana Governor Steve Bullock. *Neighbors Against Bison Slaughter v. Nat'l Park Serv.*, No. 1:19-cv-128-SPW NEIGHBORS' BR. IN SUPP. OF MOT. TO CONSOLIDATE

### III. The Statuses

Neither case has yet proceeded to cross-motions for summary judgment. Instead, both cases will likely rely on overlapping sets of administrative record documents.

For this case, the Agencies are compiling the sets of administrative record documents on which they based their decisions not to supplement the IBMP EIS. *See* Order (Jan. 3, 2020), ECF No. 62. Separately, the Agencies are compiling their respective administrative records for the 2019 Operation Plan. *See id.*

#### A. Cottonwood Status

Cottonwood filed its case in February 2018. Compl., *Cottonwood* (Feb. 2, 2018), ECF No. 1. It filed a motion for a temporary restraining order. Mot. for TRO, *Cottonwood*, ECF No. 2. That Court denied that motion the next day. Order, *Cottonwood* (Feb. 5, 2019), ECF No. 5.

Over the next year, Cottonwood amended its complaint twice and moved for jurisdictional discovery, as the federal defendants and Montana moved to dismiss. The defendants argued that Cottonwood lacked Article III standing and that its NEPA claims presented no claim for relief because they would not stop third-party hunters in Beattie Gulch and West Yellowstone. *See, e.g.,* Fed. Defs.' Br. in Supp. of Mot. to Dismiss 2, *Cottonwood*, ECF No. 18-1.

The Parties completed briefing that motion, and Cottonwood amended its complaint in response. Mem. and Order 4-5, *Cottonwood* (Feb. 20, 2019), ECF No. 81. Afterward, the federal defendants and Montana renewed their motions to dismiss. *Id.* at 5. In response, Cottonwood moved to stay briefing for jurisdictional discovery; the Court granted very limited discovery. *Id.* at 5-6.

In February 2019, the District Court dismissed the case on grounds neither the Agencies nor Montana had advanced: that Cottonwood’s amended complaint failed to “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 8 (quotations omitted). The District Court found no ongoing major federal action, so it held that NEPA could not conceivably require the Agencies and Montana to issue any supplemental EIS. *Id.*

On appeal, the Ninth Circuit generally rejected the Agencies’ and Montana’s arguments and the District Court’s conclusion. It overturned the order dismissing the case and remanded the case back to the District Court. *See* Mem., No. 19-35150 (9th Cir. Dec. 23, 2019). For the two claims it recognized did not state sufficient factual matter, the Ninth Circuit specifically allowed Cottonwood to cure the deficiencies by amending its complaint. *Id.* at 5. The Ninth Circuit also directed the District Court to reach the “fact-intensive” question “whether the state and



federal aspects of the [IBMP] are ‘sufficiently interrelated’ to subject the State of Montana to NEPA’s requirements.” *Id.* at 3.<sup>4</sup>

B. Neighbors Status

On October 21, 2019, Neighbors filed its case in the United States District Court for the District of Columbia. Compl. On November 14, 2019, on the Agencies’ motion, that court transferred the case to this District and denied Neighbors’ motion for a temporary restraining order. Order, ECF No. 46. On December 2, 2019, this Court denied Neighbors’ motion for a preliminary injunction. Order (Dec. 2, 2019), ECF No. 57.

This Court issued a case management plan on January 3, 2019. Order, ECF No. 62. Under it, the Agencies filed their answer on February 12, ECF No. 65, and they will file the administrative records in March.

**DISCUSSION**

Consolidating these cases will conserve judicial resources and the Parties’ scarce and valuable resources. The two cases involve largely overlapping facts and similar issues of law, and one court can more efficiently and effectively hear and decide all of the claims.

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<sup>4</sup> Cottonwood had asked the Ninth Circuit to assign the case to a different judge on remand. The Ninth Circuit rejected that request because the situation had not met the criteria. *Id.* at 6 n.2.

**I. Rule 42(a) Compels Consolidating These Cases as the Most Efficient for the Courts and the Parties.**

Rule 42(a) describes a flexible process for consolidating cases, so courts can most effectively handle competing demands and constraints. *See Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018). Under Federal Rule of Civil Procedure 42, a court may consolidate cases “[w]hen actions involving a common question of law or fact are pending before the court.” Fed. R. Civ. P. 42(a).

The Supreme Court recently described the mechanics of consolidating cases under Rule 42(a). It recognized that courts consolidate cases “as a matter of convenience and economy in administration, but [consolidating cases] does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.” *Hall*, 138 S. Ct. at 1127 (quotations omitted). Consolidation “enable[es] more efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them.” *Id.* at 1125. The Supreme Court specifically recognized that “[d]istrict courts enjoy substantial discretion in deciding whether and to what extent to consolidate cases.” *Id.* at 1131. These motivating principles behind Rule 42(a) apply here.

These cases substantially overlap in fact. The IBMP group has consented to all Yellowstone bison management changes and issued annual operations plans together. Only relatively minor facts differentiate the two cases. Cottonwood *Neighbors Against Bison Slaughter v. Nat’l Park Serv.*, No. 1:19-cv-128-SPW NEIGHBORS’ BR. IN SUPP. OF MOT. TO CONSOLIDATE

argues that Montana has subjected itself to jurisdiction here, and will ask for a ruling. *See* Mem. 3, No. 19-35150 (9th Cir. Dec. 23, 2019). Also, Cottonwood identifies extra-record documents that require a supplemental EIS beyond what Neighbors has identified. *See* 2nd Am. Compl. 66-76. In contrast, Neighbors focuses on the 2019 Operation Plan, although Cottonwood’s claims do not challenge that action. The administrative records will overlap substantially, and that compels consolidation. *See En Fuego*, 356 F. Supp. 3d at 10 (“Both cases involve the same administrative record . . . , which will serve as the court’s primary, if not exclusive, source of facts to decide the presented legal issues.”).

These cases also present largely overlapping legal issues. Cottonwood’s claims all arise under NEPA and the APA. Two of Neighbors’ claims arise under NEPA and the APA. Neighbors’ other two claims allege the Agencies violated other laws during the NEPA and APA processes the Agencies undertook.

Because of this substantial overlap of factual and legal claims, a single court could more efficiently evaluate the common legal background and rule on each of the distinct legal claims. Requiring two courts to rule would duplicate that effort at researching and understanding the complex and detailed factual and legal background before ruling.

The different sets of defendants would not preclude or impact consolidation. *See NAMB*, 770 F. Supp. 2d 283, 4 (“Identity of the parties is not a prerequisite.”).

Neither does the single, outstanding jurisdictional issue related to the Montana Governor. *See En Fuego*, 356 F. Supp. 3d at 11 (“notwithstanding their different postures, consolidating [two cases] is appropriate under Rule 42(a), because both involve common questions of law and fact.”). Each “of multiple cases consolidated under the Rule retains its independent character . . . .” *Hall*, 138 S. Ct. at 1125, 1130.

The practicalities here underscore the benefits from consolidating the cases. Under the Court’s scheduling order, summary judgment briefing in this case would not start until June. ECF No. 62. The *Cottonwood* parties could easily brief that issue in plenty of time for the Court to rule before summary judgment briefing would start. In the meantime, as the Agencies compile the administrative records for this case, they could also compile any administrative record documents that could differ for the *Cottonwood* case.

## **II. The Standing Assignment Order Directs These Cases to the Billings Division.**

Although *Cottonwood* filed in the Butte District first, the current assignment order directs cases arising in Park County to the Billings Division.<sup>5</sup> Most Yellowstone bison management activities happen in Yellowstone, which Congress has assigned to the District of Wyoming, so they do not weigh in favor of any

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<sup>5</sup> *See* Compl., *Cottonwood*, ECF No. 1.  
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division in Montana. *See* 28 U.S.C. § 131 (“Wyoming and those portions of Yellowstone National Park situated in Montana and Idaho constitute one judicial district.”). Separate from those activities, both cases arise from non-Yellowstone activities in Park County. Local Rule 1.2(c)(1) assigns cases arising there to the Billings Division.

The *Cottonwood* Complaint arises from activities within Yellowstone and within Zone 2 of the IBMP. *See* 2nd Am. Compl. ¶¶ 16-33. Zone 2 fits completely within Park County. *Compare* 2019 Montana Highway Map I-6, [mdt.mt.gov/travinfo/docs/2019-mt-highway-map.pdf](http://mdt.mt.gov/travinfo/docs/2019-mt-highway-map.pdf), *with* IBMP Record of Decision 29, ECF No. 4-16 (map).

The *Neighbors* case complains of activities in Yellowstone and in Beattie Gulch—also in Park County. *See* Compl. ¶¶ 31-53; *see also* Mont. Fish, Wildlife & Parks, Hunting Season/Quota Change Supporting Info. 2 (Sept. 19, 2018) (map of Beattie Gulch), ECF No. 4-31.

The first-to-file rule does not require consolidating this case in the Butte Division, where Cottonwood filed first, because these cases do not present identical parties or claims. *See Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 628 n.13 (9th Cir. 1991) (“if the issues or parties involved in the two suits were not the same, adherence to the first-to-file rule *would* be reversible error for it would constitute a misapplication of the law.”).

To the extent the first-to-file rule applies by analogy, its flexibility bends to the standing case-assignment order here. Even if it applied, the “‘first to file’ rule is not a rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration.” *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982). The standing assignment order exists to accomplish precisely those case-management goals, and no advantages would arise from consolidating these cases in the Butte Division because that court did not invest time ruling on the merits of that case. *See generally* Mem. and Order, *Cottonwood* (Feb. 20, 2019). Therefore, the current assignment order directs the Court to consolidate these cases in the Billings Division.

### CONCLUSION

Because this situation satisfies Rule 42(a) to allow this Court to consolidate the cases and hear them together, and because consolidating them would materially conserve judicial and party resources without prejudicing any party, Rule 42(a) compels consolidating them.

Neighbors propose that all parties file all new events on this docket. *See Hall*, 138 S. Ct. at 1123 (recognizing this process as routine).

Respectfully submitted, February 19, 2020,

MATTHEW D. THURLOW  
D.C. Bar No. 1008014  
Baker & Hostetler LLP

1050 Connecticut Avenue, NW  
Washington, DC 20036  
(202) 861-1681  
mthurlow@bakerlaw.com  
(*Admitted pro hac vice*)

/s/ Jared s. Pettinato

JARED S. PETTINATO, MT Bar No. 7434  
The Pettinato Firm  
3416 13<sup>th</sup> St. NW, # 1  
Washington, DC 20010  
(406) 314-3247  
Jared@JaredPettinato.com

*Attorneys for Plaintiffs*

**CERTIFICATE OF COMPLIANCE WITH WORD COUNT**

I certify that this reply brief complies with 7.1(d)(2)(B). It includes 2,834 words, which excludes the caption, certificate of compliance, and table of contents.

I relied on Microsoft Word to count the words.

Dated December 2, 2019,

/s/ Jared S. Pettinato  
JARED S. PETTINATO, MT Bar No. 7434