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**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 REPLY
BRIEF IN SUPPORT OF THEIR
MOTION TO CONSOLIDATE

INTRODUCTION

Federal Defendants argued in their briefs that no conveniences arise from consolidating this case with *Cottonwood Environmental. Law Center v. Bernhardt*, No. 2:18-cv-12-SEH (D. Mont. Feb. 8, 2018), but they just missed a deadline because they “mistakenly conflated the response deadline in [this case] with the response deadline [there].”¹ To avoid precisely those kinds of mistakes and difficulties, federal defendants routinely encourage consolidating Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, cases on the same project.² These Federal Defendants never explain why they deviate from that position. Instead of reasoning from the purpose of Rule 42(a) to increase “convenience and economy,” *Hall v. Hall*, 138 S. Ct. 1118, 1127 (2018), their position only makes sense as motivated reasoning based on tactical judge-shopping.

The United States Court of Appeals for the Seventh Circuit has criticized courts for declining to consolidate cases “even though the issues and parties have substantial overlap.” *Smith v. Check-N-Go of Ill., Inc.*, 200 F.3d 511, 513 n. __ (7th Cir. 1999). Plaintiffs Neighbors Against Bison Slaughter and Bonnie Lynn

¹ Compare [Fed.] Defs.’ Opp. to Pls.’ Mot. to Consolidate 8, 14-17 (FD Br.), ECF No. 69, with [Fed. Defs.’] Unopposed Mot. for Leave to File Out of Time a Resp. to Pls.’ Mot. to Consolidate 2, *Cottonwood*, ECF No. 95, Ex. 1.

² See, e.g., *Nat’l Ass’n of Mortg. Brokers v. Bd. of Governors of Fed. Reserve Sys.*, 770 F.Supp.2d 283 (D.D.C. 2011); *En Fuego Tobacco Shop LLC v. FDA*, 356 F. Supp. 3d 1 (D.D.C. 2019).

(Neighbors) seek to consolidate these cases, so the parties can reach the merits expeditiously, and without risking inconsistent or conflicting rulings.

I. The Facts and Legal Claims Significantly Overlap.

Federal Defendants make inconsistent arguments in different courts and use the wrong legal standard. In Neighbors' initial brief, they argued that the administrative records in this case and in *Cottonwood* overlap in "claims, legal bases, defendants, and facts." [Neighbors'] Br. in Supp. of Mot. to Consolidate 3 (Pls.' Br.), ECF No. 68-1. In response, Federal Defendants argue that "distinct legal claims and underlying facts" predominate the two cases. FD Br. 8 (capitalization omitted). That position contradicts the position the United States took two months ago in the United States Court of Federal Claims.

In *L & W Construction v. United States*, No. 19-1628L (Fed. Cl. Oct. 18, 2019), Ms. Lynn and an LLC she owns are seeking just compensation under the Fifth Amendment because every winter since 2013, the concentrated, dangerous bison slaughter in Beattie Gulch has occupied her land and prevented her from renting her cabins as vacation-rental cabins. Compl., Ex. 2. In moving to dismiss that takings case, the United States argued that the takings case was "based on substantially the same operative facts" as this case.³ This APA case, however, will rely on administrative records; in the Court of Federal Claims, the parties will

³ U.S. Mot. to Dismiss 15-17, *L & W Constr.*, ECF No. 8, Ex. 3.

develop facts through discovery under the Rules of Evidence. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). If, as the United States argues, the operative facts in this APA case and that takings case substantially overlap, *a fortiori*, the facts in these two APA cases overlap.

Federal Defendants further argue that this case focuses on “hunting-related issues” while *Cottonwood* makes “broader attacks on the sufficiency of the IBMP’s environmental analysis” FD Br. 1. That argument mischaracterizes the claims.

Both cases are making environmental claims. *Cottonwood* focuses on the science of bison management and bison welfare, while *Neighbors* focus on human health and safety and bison welfare. *Compare* Second Am. Compl. ¶¶ 53-76, *Cottonwood* (*Neighbors*, ECF No. 68-2); *with* Compl. ¶¶ 31-53, ECF No. 1. NEPA applies to both. NEPA requires agencies to analyze the scientific basis for bison management and it also requires them to analyze “public health or safety” impacts. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.27(b)(2); *City of Las Vegas v. FAA*, 570 F.3d 1109, 1115 (9th Cir. 2009).

Federal Defendants argue that “the legal theories in the cases differ significantly.” FD Br. 8. The Supreme Court already rejected that argument. It is “irrelevant” for identifying overlapping claims if “the two suits proceeded on different legal theories.” *United States v. Tohono O’Odham Nation*, 563 U.S. 307, 319 (2011).

Federal Defendants argue that “there is no guarantee that the administrative records will be identical” FD Br. 10. They misstate the legal standard. Federal Rule of Civil Procedure 42(a) empowers courts to consolidate cases not when the cases have identical facts, but when the “actions . . . involve a common question of law or fact.” The facts in the administrative records here will almost completely overlap, and every convenience weighs in favor of consolidating these cases.⁴ *See Smith*, 200 F.3d at 513 n. __.

II. The State of Montana as a Defendant in *Cottonwood* makes no difference.

In their initial brief, Neighbors explained that non-identical parties do not preclude consolidating cases. Pls.’ Br. 10. In response, Federal Defendants rely on meaningless formalism of the different named agencies and agency officers. FD Br. 3-4. No one misunderstands that the defendants in the two cases are the United States and the Governor of Montana. *See APA*, 5 U.S.C. § 703 (“the action for

⁴ Even as Federal Defendants seek to undermine Neighbors’ arguments that rely on out-of-circuit cases, FD Br. 13, Federal Defendants rely on an out-of-circuit case to support their argument that some courts decline to consolidate APA cases. FD. Br. 11-12 (citing *Habitat Educ. Ctr., Inc. v. Kimbell*, 250 F.R.D. 390 (E.D. Wis. 2008)). That case presents vastly different operative facts. There, the plaintiffs sought to consolidate four cases arising from five different projects. *Id.* at 393-94. The court recognized that “the efficient administration of justice is best served by one judge handling all four cases,” and it retained jurisdiction over all four as related, although it declined to consolidate them because they arose over different projects. *Id.* at 394-96. The two cases here, in contrast, arise over a single project: Yellowstone bison management. And just as in *Habitat Education Center*, these two cases would proceed more efficiently if a single judge presided over both.

judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.”). Federal Defendants have failed to demonstrate that consolidating this case, with another case that names the Governor of Montana, makes consolidation impractical or inconvenient.⁵

III. The First-to-File Rule Gives Flexibility to Consolidate Here.

Neighbors proposed that the Courts consolidate *Cottonwood* with this case because the activities in the Montana Judicial District all occur within Park County, and Local Rule 1.2(c)(1) assigns cases that arise there to the Billings Division. Pls.’ Br. 11-13. In response, Federal Defendants repeatedly emphasize the two years that the Helena Division presided over the *Cottonwood* case. FD Br. 1, 17-20. Those two years of proceedings culminated in the United States Court of Appeals for the Ninth Circuit overturning an order dismissing *Cottonwood*, and providing clear, easy directions for remand. ECF No. 68-3.

Federal Defendants’ list of motions and rulings fails to explain how experience before the remand would expedite matters after the remand. FD Br. 18 n.4. Indeed,

⁵ To be complete, while consulting on this motion, the Fort Peck Tribe and the InterTribal Buffalo Council stated that they intended to withdraw as intervenors in *Cottonwood* if Cottonwood Environmental Law Center amended its complaint to remove any implication that it intended to stop Yellowstone National Park from shipping bison to the Fort Peck Reservation. Cottonwood did so. *Compare* Second Am. Compl. for Declaratory and Injunctive Relief, *Cottonwood*, (*Neighbors*, ECF No. 68-2), *with* Third Am. Compl. for Declaratory and Injunctive Relief, *Cottonwood*, ECF No. 91, Ex. 4.

the first-to-file rule functions as a discretionary, default rule—not a mandatory command. *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982). This Court could easily follow the Ninth Circuit’s directions, rule, and keep *Cottonwood* on the same track as this case, consistent with Local Rule 1.2(c)(1).

CONCLUSION

For the foregoing reasons, Neighbors requests the Court to grant the motion to consolidate *Cottonwood* here.

Respectfully submitted, March 12, 2020,

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I certify that this reply brief complies with 7.1(d)(2)(B). It includes 1,327 words, which excludes the caption, certificate of compliance, and table of contents. I relied on Microsoft Word to count the words.

Dated March 12, 2020,

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