

Peter M. Lacy (“Mac”) (OSB # 01322)
Oregon Natural Desert Association
917 SW Oak Street, Suite 408
Portland, OR 97205
(503) 525-0193
lacy@onda.org

Stephanie M. Parent (OSB # 92590)
4685 SW Flower Place
Portland, OR 97221
(503) 320-3235
parentlaw@gmail.com

Kristin F. Ruether (OSB # 05368)
Advocates for the West
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
kruether@advocateswest.org

Attorneys for Plaintiffs

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

OREGON NATURAL DESERT ASS’N *et al.*, Case No. 03-CV-213-JO

Plaintiffs,

v.

UNITED STATES FOREST SERV. *et al.*,

Defendants,

**MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE
THIRD AMENDED COMPLAINT**

and

ROBERTSON RANCH *et al.*,

Intervenor-Defendants,

and

OREGON CATTLEMEN'S ASS'N,

Intervenor-Defendants.

INTRODUCTION

Plaintiffs Oregon Natural Desert Association and Center for Biological Diversity (collectively "ONDA") move the Court for leave to amend the Second Amended Complaint (Dkt # 76) to challenge recent decisions issued by the U.S. Forest Service that authorize grazing for the relevant allotments on the Malheur National Forest at issue in this litigation. See Attachment 1 ([Proposed] Third Amended Complaint). ONDA also proposes to amend the complaint to streamline the litigation by eliminating certain claims for relief. Because ONDA's request to amend is timely, will not prejudice any party, and will further efficient resolution of ONDA's claims due to substantial common questions of fact and law with the original claims, amendment is appropriate.

RELEVANT FACTUAL BACKGROUND

In 2003, ONDA filed the present lawsuit challenging the Forest Service's grazing authorizations on six allotments on the Malheur National Forest. Ore. Natural Desert Ass'n v. U.S. Forest Serv., No. 03-213-JO (D. Or. filed Feb. 18, 2003). This action targets grazing authorizations on the Bluebucket, Dollar Basin/Star Glade, North Fork, Spring Creek, Flag Prairie and Ott allotments.

In 2005, this Court dismissed this action for lack of subject matter jurisdiction, concluding that the Forest Service's "Annual Operating Instructions," the agency decisions plaintiffs had challenged in each case, were not "final agency action" under the Administrative

Procedure Act. Ore. Natural Desert Ass'n v. U.S. Forest Serv., 2005 WL 1334459 (D. Or. June 03, 2005). On September 21, 2006, the Ninth Circuit reversed the district court, ruling that ONDA had properly challenged the agency's annual grazing authorizations and remanding to the district court on the merits. Ore. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977 (9th Cir. 2006).

On remand, this Court held two status conferences, on March 1, 2007 and April 13, 2007, to discuss how to proceed. ONDA and the Forest Service each provided further status reports to the Court in June 2007, informing the Court that the parties were exchanging settlement letters, that the Forest Service was in the process of issuing new grazing decisions (in the form of permit modification decisions), and that ONDA, upon receiving those decisions, would consider whether to seek leave to amend the complaint based on these new decisions. The Forest Service responded to ONDA's April 20, 2007 settlement letter by letter dated September 27, 2007, and the parties thereafter concluded that settlement is not possible at this time. Therefore, ONDA reviewed the Forest Service's most recent grazing decisions and the impacts of the grazing on the ground and now seeks to amend the complaint to challenge the new grazing decisions.

ARGUMENT

I. STANDARD OF REVIEW

Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). While permission to amend is committed to the Court's discretion, the Ninth Circuit has long held that Rule 15's policy favoring amended pleadings is "to be applied with extreme liberality." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (quotation and citations omitted).

Leave to amend should be granted unless the revised pleading would result in undue

prejudice to the opposing party, is the product of bad faith, would cause undue delay in the proceedings, or would be a futile exercise. DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987) (citations omitted). In the Ninth Circuit, it is an abuse of discretion to deny leave to amend in the absence of any of the above reasons. See Keniston v. Roberts, 717 F.2d 1295 (9th Cir. 1983). The Supreme Court also has held that leave to amend should be “freely given” in the absence of these reasons. Foman v. Davis, 371 U.S. 178, 182 (1962) (district court abused its discretion in refusing to permit plaintiff to amend complaint).

In considering these factors, “prejudice to the opposing party . . . carries the greatest weight.” Eminence Capital, LLC, 316 F.3d at 1052. Therefore, “[u]nless undue prejudice to the opposing party will result, a trial judge should ordinarily permit a party to amend its complaint.” Howey v. United States, 481 F.2nd 1187, 1190 (9th Cir. 1973) (denial of leave to file amended complaint, even five years after filing of initial complaint, was an abuse of discretion in the absence of prejudice). See also Sierra Club v. Union Oil Co., 813 F.2d 1480, 1493 (9th Cir. 1987) (mere delay in proffering an amendment to a complaint does not justify denying leave to amend). ONDA’s request to amend its complaint does not implicate any of these factors.

II. ONDA’S PROPOSED THIRD AMENDED COMPLAINT IS TIMELY AND IS NOT MADE IN BAD FAITH.

ONDA proposes to amend its complaint to challenge certain of the Forest Service’s grazing decisions that it has issued since this Court dismissed ONDA’s claims for lack of subject matter jurisdiction. These decisions include the 2007 grazing permit modification decisions and any accompanying grazing authorization letters for grazing on the allotments at issue in this litigation. During the time since the Forest Service issued these decisions, ONDA was discussing settlement with the Forest Service and reviewing grazing impacts that have resulted from the recent decisions during the 2007 grazing season. In these circumstances, ONDA’s motion is

timely. See, e.g., Howey, 481 F.2d at 1190–91 (granting leave to amend even though motion was made five years after initial complaint was filed).

ONDA also does not seek to amend its Complaint in “bad faith.” Adding challenges to the recent grazing decisions is a reasonable and necessary response in consideration of the procedural posture of this case. This Court dismissed ONDA’s challenges, but in September 2006, the Ninth Circuit overturned the dismissal and remanded the case back to this Court. Ore. Natural Desert Ass’n v. U.S. Forest Serv., 465 F.3d 977 (9th Cir. 2006). At that time, new grazing decisions for the upcoming 2007 grazing season were inevitable. Therefore, ONDA engaged in discussions with the Forest Service and awaited the new decisions. Because the new decisions are substantially similar to the previously challenged grazing decisions, and because grazing continues to detrimentally impact the riparian areas, ONDA seeks to challenge the new decisions.

Amendment is not sought in order to destroy diversity jurisdiction, to unreasonably delay judicial proceedings, or for any other impermissible purpose, but instead is sought to bring before the Court the new decisions, which ONDA alleges violate the National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1600–1614. See Nat’l Wildlife Fed’n v. NMFS, No. CV-01-00640, minute order (D. Or. July 16, 2004) (Dkt # 503) (granting plaintiffs leave to supplement complaint to add new defendant and additional claims against new agency decision); compare Sorosky v. Burroughs Corp., 826 F.2d 794, 805 (9th Cir. 1987) (upholding district court’s denial of leave to amend for bad faith where amendment was sought in an admitted attempt to destroy court’s diversity jurisdiction); see also Hip Hop Beverage Corp. v. RIC Representacoes Importacao e Comercio Ltda., 220 F.R.D. 614, 622 (C.D. Cal. 2003) (citing these tactics as evidence of bad faith).

III. ONDA’S PROPOSED THIRD AMENDED COMPLAINT WILL NOT UNDULY PREJUDICE DEFENDANTS.

“The party opposing amendment bears the burden of showing prejudice.” DCD Programs, 833 F.2d at 187. Defendants will not be prejudiced if ONDA is permitted to amend its Complaint. Whether leave to amend is granted or whether ONDA is required to bring a new lawsuit to challenge the new final agency actions concerning grazing, defendants will have to answer ONDA’s claims. Allowing amendment serves judicial economy because the new grazing decisions are similar to the previously challenged grazing decisions; therefore, the proposed amended claims share significant common questions of fact and law with the original claims. Furthermore, the updated administrative records for the proposed amended claims will by necessity be highly similar and contain significant overlap with those already filed. Finally, this case has not been closed.

IV. ONDA’S PROPOSED THIRD AMENDED COMPLAINT IS NOT FUTILE.

The test for “futility” with respect to a motion to amend under Rule 15 is the same as the test for a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. See Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988) (“[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense.”); Wetterman v. Monaco Coach Corp., 141 F.Supp.2d 1263, 1264 (D. Or. 2003) (same). ONDA’s proposed amendment easily satisfies this minimum threshold, given that the Ninth Circuit has ruled in this very case that challenges to similar grazing decisions are justiciable. Ore. Natural Desert Ass’n v. U.S. Forest Serv., 465 F.3d 977 (9th Cir. 2006); see Attachment 1 ([Proposed] Third Amended Complaint). Accordingly, ONDA’s proposed Third Amended Complaint presents more than “colorable” claims for relief—claims that certainly cannot be described as futile. As the Ninth Circuit has

held, “[w]here the underlying facts or circumstances of a case ‘may be a proper subject of relief, [a plaintiff] ought to be afforded an opportunity to test his claim on the merits.’” DCD Programs, 833 F.2d at 188 (quoting Foman, 371 U.S. at 182).

CONCLUSION

For the reasons stated above, ONDA respectfully asks the Court to grant its Motion for Leave to File a Third Amended Complaint.

DATED this 31st day of December, 2007.

Respectfully Submitted,

s/ Peter M. Lacy

Peter M. Lacy (OSB # 01322)
Oregon Natural Desert Association

Of Attorneys for Plaintiffs