

[NAMES AND ADDRESSES OF COUNSEL
APPEAR ON SIGNATURE PAGE]

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

IDAHO RIVERS UNITED and
FRIENDS OF THE CLEARWATER,

Plaintiffs,

v.

NEZ PERCE-CLEARWATER FOREST
SUPERVISOR CHERYL F. PROBERT, *et al.*,

Defendants.

Case No. 3:16-cv-102-CWD

**JOINT MOTION FOR
DISMISSAL**

Plaintiffs and Defendants, by and through their undersigned counsel, hereby jointly move the Court for dismissal of this action under F.R.Civ.P. 41(a)(2), under terms set forth below and in the accompanying Proposed Order:

RELEVANT FACTS

This is an environmental case challenging the U.S. Forest Service's approval, in February 2016, of the Johnson Bar Fire Salvage Project (Project). Plaintiffs filed a complaint on March 11, 2016, seeking declaratory and injunctive relief. ECF No. 1. The complaint alleged seven claims, asserting that in approving the Project, the Forest Service, the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (FWS) violated the National Environmental Policy Act (NEPA), the Wild and Scenic Rivers Act (WSRA), the National

Forest Management Act (NFMA), the Endangered Species Act (ESA), and the Administrative Procedure Act (APA).

On April 6, 2016, Plaintiffs moved for a preliminary injunction on their NEPA, WSRA, and NFMA claims, seeking to halt the Project. ECF No. 14. On May 12, 2015, after briefing and oral argument, the Court entered an order granting the motion for a preliminary injunction and enjoining the Forest Service from proceeding with on-the-ground operations or other activities associated with the Project. ECF No. 49 at 40. The Court found that Plaintiffs were likely to prevail on some of their NEPA and WSRA claims (claims two, four, and five) and deferred full assessment and determination on the remaining claims. *Id.* at 13, 18.

In the interim, on April 26, 2016, Plaintiffs filed an amended complaint asserting an additional claim for relief (claim eight) based on an alleged failure to act or unreasonable delay by the Forest Service in adopting a comprehensive river management plan in violation of the WSRA section 3(d), 16 U.S.C. § 1274(d), and the APA, 5 U.S.C. § 706(1). ECF No. 42 ¶¶ 139-147.

The Project and Project-Specific Claims (Claims One through Seven)

In light of the Court's order enjoining the Project, as the parties previously informed the Court (*see* ECF No. 57), the Forest Service determined to withdraw the Johnson Bar Record of Decision (ROD), suspend the two commercial timber contracts for the Project ("Hot Deck" and "Peterson Point"), and prepare a Supplemental Environmental Impact Statement (SEIS), for which it anticipates issuing a record of decision around March 31, 2017. In addition, the Federal Defendants determined to withdraw the ESA consultation documents for the Project, and reinstate ESA consultation in connection with the SEIS process.

Federal Defendants have now implemented these steps by issuing notices of suspension of the Project's contracts on May 13, 2016; and by issuing a Notice of Withdrawal of the ROD. In addition, the Forest Service notified NMFS and FWS on July 8, 2016 that the Project ROD has been withdrawn; and the Services subsequently withdrew their respective ESA consultation documents for the Project (i.e., NOAA's BiOp and FWS' Letter of Concurrence).

Because the February 2016 ROD and the ESA consultation documents challenged in the Amended Complaint are now withdrawn, and the Forest Service will engage in the SEIS process to conduct further environmental review under NEPA before approving any new ROD, Plaintiffs and Defendants agree that Plaintiffs' Claims One through Seven challenging the Project and consultations are now moot and may be dismissed with prejudice by the Court, as provided in the accompanying Proposed Order.

Plaintiffs expressly reserve the right to challenge the SEIS, new ROD and/or new ESA consultations in the future, as may be appropriate, including by presenting claims that reiterate allegations made in the Amended Complaint if, in Plaintiffs' view, Federal Defendants have not corrected their alleged violations of law.

Claim Eight

The parties disagree about whether the Federal Defendants' actions, as recounted above, may have mooted Plaintiffs' Eighth Claim for Relief, or whether that claim is properly justiciable before the Court in this proceeding. However, in the interests of compromise and to avoid unnecessary litigation before the Court at this stage, the parties agree that Plaintiffs' Eighth Claim for Relief may be dismissed without prejudice to refiling in the future. Again, Plaintiffs expressly reserve the right to present the same or similar legal challenges in a new action as set forth in the Eighth Claim for Relief.

Attorney Fees and Costs

As set forth in the First Amended Complaint, Plaintiffs seek a recovery of reasonable attorney fees and litigation expenses incurred in this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq. The parties agree that nothing in this Joint Motion for Dismissal precludes Plaintiffs from submitting an EAJA motion for recovery of reasonable attorney fees and litigation expenses or precludes Defendants from contesting such a motion; and that the Court retains jurisdiction to resolve such a motion.

WHEREFORE, the parties jointly move the Court to dismiss all claims in the First Amended Complaint as set forth in the accompanying Proposed Order.

DATED: July 20, 2016

Respectfully submitted,
/s/ Laird J. Lucas
Laurence ("Laird") J. Lucas (ISB# 4733)
Marc Shumaker (ISB# 9606)
Advocates for the West
P.O. Box 1612 Boise, ID 83701
208-342-7024 ext. 2009
llucas@advocateswest.org
mshumaker@advocateswest.org

Deborah A. Ferguson (ISB# 5333)
Ferguson Durham, PLCC
223 N. 6th Street, Suite 235
Boise, ID 83702
208-345-5183
daf@fergusondurham.com

Attorneys for Plaintiffs

Respectfully submitted,
JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

/s/ Sean C. Duffy
SEAN C. DUFFY
Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044 7611
(202) 305-0445 (tel)
(202) 305-0506 (fax)
sean.c.duffy@usdoj.gov

SETH M. BARSKY, Section Chief
S. JAY GOVINDAN, Assistant Section Chief
RICKEY D. TURNER, Trial Attorney
Wildlife and Marine Resources Section
999 18th St., South Terrace, Suite 370
Denver, CO 80202
Telephone: (303) 844-1373

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2016, I filed the foregoing Joint Motion to Dismiss and associated Proposed Order electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Deborah A. Ferguson
daf@fergusondurham.com

Laurence J. Lucas
llucas@advocateswest.org

Marc A. Shumaker
mshumaker@advocateswest.org

Sean C. Duffy
sean.c.duffy@usdoj.gov

Rickey Doyle Turner, Jr.
rickey.turner@usdoj.gov

Laird J. Lucas
Laird J. Lucas