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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK, *et al*., Plaintiffs, v. PRESIDENT DONALD J. TRUMP, *et al.*, Defendants.	CV 19-28-GF-BMM **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT**

INTRODUCTION

The claims in this case have been fully briefed, and oral argument was held on the parties' cross-motions for summary judgment this past April. Plaintiffs now seek to supplement their complaint to add new claims challenging the U.S. Bureau of Land Management's ("BLM") decision to authorize a right-of-way for the Keystone XL Pipeline to cross federal public land in Montana. Specifically, Plaintiffs' proposed amended and supplemental complaint would add claims alleging that BLM's decision violated the National Environmental Policy Act ("NEPA"), the Mineral Leasing Act ("MLA"), and the Federal Land Policy and Management Act ("FLPMA"), and that the U.S. Fish and Wildlife Service's ("FWS") consultation process regarding the right-of-way violated the Endangered Species Act ("ESA").

Plaintiffs' motion should be denied for three primary reasons. First, the motion should be denied because the request to supplement the complaint comes far too late and Plaintiffs unduly delayed in developing the new claims. The case has already been submitted on the merits, and the Court should resolve the existing claims rather than delaying resolution of the existing case. Second, allowing the proposed supplement would be prejudicial because it would unfairly expand the scope of this case at this very late stage of the litigation. Third, allowing the proposed amendment would not serve judicial economy because there are two

other existing cases that challenge BLM's right-of-way decision. Rather than allowing Plaintiffs to extend this lawsuit, it would be far more efficient for the Court to permit Plaintiffs to intervene in those pending cases, or to file a new suit raising their new claims, which could then be heard on a schedule similar to one of the existing cases. Accordingly, Plaintiffs' motion should be denied.[1]

LEGAL STANDARD

A party may move for leave to file a supplement complaint "setting out any transaction occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d).[2] A district court has broad discretion in determining whether to grant a motion to supplement. *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988). "The purpose of Rule 15(d) is to promote as complete an adjudication of the dispute between the parties as possible by allowing the addition of claims which arise after the initial pleadings are filed." *Id.* at 473-74 (quoting *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1057

[1] Plaintiffs previously filed a Motion for Leave to File a Second Amended Complaint, ECF No. 108, to add a claim challenging Executive Order 13,867, 84 Fed. Reg. 15,491 (Apr. 10, 2019). That motion, which remains pending, is addressed in Defendants' Opposition to Plaintiffs' Motion for Leave to File Second Amended Complaint, ECF No. 114. Those arguments are incorporated by reference and are not repeated here.

[2] Plaintiffs posture their motion as seeking leave to amend, ECF No. 142-2 at 5-6, but, as explained above, they seek to supplement their complaint. The standard for granting a motion to supplement and leave to amend are similar, and Plaintiffs here fail to make the threshold showing under either standard.

(9th Cir. 1981)). Courts "liberally construe Rule 15(d) absent a showing of prejudice to the defendant." *Keith*, 858 F.2d at 475. But while district courts have broad discretion with respect to supplemental pleadings, they should allow such supplements only "when to do so will promote speedy disposition of the entire controversy, will not cause undue delay, and will not prejudice other parties' rights." *Id.* (citation omitted). Although prejudice to the opposing party is accorded much weight, "undue delay" can also provide grounds to deny the proposed supplement. *Cf. Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991) (undue delay justifies denial of leave to amend). Moreover, "[w]hile leave to permit supplemental pleading is 'favored,' *Keith*, 858 F.2d at 473, it cannot be used to introduce a 'separate, distinct and new cause of action.'" *Planned Parenthood of S. Arizona v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997) (per curiam) (citation omitted).

ARGUMENT

I. Plaintiffs' Proposed Supplemental Claims Are Unjustifiably Belated and Would Unduly Delay the Resolution of the Lawsuit.

Plaintiffs' motion to supplement comes at an inexcusably late date in these proceedings. Plaintiffs initiated this case with the filing of its original complaint, ECF. No. 1, well over one year ago, on April 5, 2019. Since then, Plaintiffs moved for a preliminary injunction on July 10, 2019, ECF No. 27, which the Court denied without prejudice. *See* Dec. 20, 2019 Order, ECF No. 73. Subsequently, the

Plaintiffs renewed their motion for injunctive relief and the parties briefed summary judgment. The Court heard argument on the summary judgment motions on April 16, 2020.

Now, over four months after the existing claims have been submitted to the Court for a final ruling and seven months after BLM's right-of-way decision, Plaintiffs seek to supplement the complaint to add new claims challenging BLM's right-of-way decision. But the proceedings at this point have advanced too far for Plaintiffs to inject new claims. Thus, Plaintiffs' motion is unduly delayed and should be denied on that basis. *Schlacter-Jones v. Gen. Telephone of Cal*., 936 F.2d 435, 443 (9th Cir. 1991) (holding that timing of a motion to amend after summary judgment brief had been fully briefed weighed heavily against allowing leave to amend complaint).

Allowing the proposed supplement would unquestionably delay the resolution of the claims, which are now awaiting a decision from the Court. This delay alone provides grounds for denying Plaintiffs' proposed supplement. *See Keith*, 858 F.2d at 475 (supplementation should not be allowed when it would cause "undue delay"); *see also Schlacter-Jones*, 936 F.2d at 443; *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1389 (9th Cir. 1990) (upholding the denial of a motion to amend based in part on undue delay). Plaintiffs should not be permitted to "circumvent summary judgment" by seeking to supplement the complaint at this

late stage. *Schlacter-Jones*, 936 F.2d at 443; *see also Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994) (upholding the denial of a motion to amend where leave was sought at the summary judgment stage).

Plaintiffs offer no excuse for waiting seven months after BLM's decision to authorize a right-of-way in January to seek relief. They instead glibly contend that their new claims will not inject delay because they present pure questions of law to be resolved on BLM's administrative record. *See* Pls.' Mem. in Suppl. of Mot. for Leave to File Third Am. and Supp. Compl. at 7-8, ECF No. 142-2. But this argument ignores that the administrative records for BLM's right-of-way decision and FWS's consultation process have not yet been prepared. It also ignores the fact that the existing claims in this case presented purely legal issues, and yet it took a year until the claims were fully briefed and argued to the Court on the merits. If the Court permits supplementation, it will unquestionably further delay the resolution of this case, which is otherwise fully submitted and awaiting this Court's final judgment.

In sum, the proposed supplement should be denied because it would unduly delay the resolution of this case.

II. Allowing the Proposed Supplemental Claims Would Unfairly Prejudice the United States.

The motion should also be denied because the requested relief would prejudice the United States. The filing of a motion to supplement at such a late

stage in the proceedings is prejudicial to Defendants. *Hawaiian Navigable Waters Preservation Soc'y v. State of Hawaii*, 823 F. Supp. 766, 776 -777 (D. Haw. 1993). Defendants prepared a defense in this case based on the claims presented in the original complaint, and those claims have now been fully briefed on the merits and are ready for resolution by the Court. It would be prejudicial to Defendants to essentially allow Plaintiffs a do-over by delaying the resolution of those claims until Plaintiffs' new unrelated claims are resolved. *See Kaplan*, 49 F.3d at 1370 (this kind of "[e]xpense, delay, and wear and tear on individuals and companies count toward prejudice") (citation omitted).

Further, allowing the new claims would also be prejudicial because it would require additional briefing on wholly different legal issues. *See Burleigh v. Cnty. of Monterey*, No. C–07–02332 RMW, 2008 WL 3487255, at *3 (N.D. Cal. Aug. 11, 2008) (finding that "proposed amendments [would] significantly prejudice the [defendant] because it was made well past the close of fact discovery, would delay the proceedings, and would necessitate further motion practice"); *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 595 F. Supp. 326, 332 (N.D. Cal. 1983) ("At this point in the litigation, the addition of a cause of action . . . would necessitate further discovery and thus would prejudice the defendants.").

In addition, allowing the proposed supplemental claims would be prejudicial because those claims overlap with claims that have already been filed in two other

cases. As discussed further below, there are two other pending cases challenging BLM's right-of-way decision, and both were filed before Plaintiffs' motion to supplement the complaint to add similar claims. *See generally* Compl., *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. U.S. Dep't of the Interior*, No. 4:20-cv-44-BMM-JTJ, ECF No. 1 (D. Mont. filed May 29, 2020) ("*Fort Peck* Compl."); Compl., *Bold Alliance v. U.S. Dep't of the Interior*, No. 4:20-cv-59-BMM-JTJ, ECF No. 1 (D. Mont. filed July 14, 2020) ("*Bold Alliance* Compl."). Allowing the proposed supplement in this case would be prejudicial because it would force Defendants to litigate claims involving BLM's right-of-way decision in three different cases on potentially different schedules.

Plaintiffs, by contrast, would suffer no prejudice if their motion is denied. The two other cases that challenge BLM's right-of-way decision, one of which (the *Bold Alliance* case) also involves a challenge to FWS's consultation process that Plaintiffs seek to challenge, are in the early stages of litigation. In the *Fort Peck* case, the parties recently submitted a proposed schedule under which BLM's administrative record would be lodged by October 30, 2020 and, depending on whether there is any briefing on record issues, merits briefing could be completed by the end of April 2021. *See* Stipulation and Joint Case Management Plan, *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation*, No. 4:20-cv-44-

BMM-JTJ, ECF No. 41 at 4-5. In the *Bold Alliance* case, the United States has not yet responded to the complaint and no briefing schedule has been set.

The *Fort Peck* case involves claims against BLM's right-of-way decision, as well as actions by the U.S. Army Corps of Engineers, and alleges violations of NEPA, the MLA, and trust obligations owed to the tribes. *See generally Fort Peck* Compl. Thus, the claims Plaintiffs seek to inject in this case significantly overlap with the claims in *Fort Peck*. The claims in the *Bold Alliance* case are even more similar to the ones that Plaintiffs seek to add here. There, the plaintiffs challenge BLM's right-of-way decision and the FWS's consultation. *See generally Bold Alliance* Compl. They allege that BLM's right-of-way decision violated NEPA, the MLA, and FLPMA, and that FWS's consultation process violated the ESA, *see id.* ¶¶ 118-146, just as Plaintiffs seek to do here. *See* Proposed Third Am. and Suppl. Compl. for Declaratory, Injunctive, & Mandamus Relief ("Proposed Suppl. Compl.") ¶¶ 101-176, ECF No. 142-1. Moreover, some of the issues that Plaintiffs seek to litigate are similar to the ones previously alleged by Bold Alliance. For example, both Bold Alliance and the Plaintiffs here allege that the 2019 Supplemental Environmental Impact Statement contains an inadequate analysis of the risk of oil spills, greenhouse gas emissions, and oil prices. *Compare Bold Alliance* Compl. ¶¶ 99-101, 119-121 *with* Proposed Suppl. Compl. ¶¶ 113-146.

Given the overlap between the claims and allegations, it would be far more efficient for Plaintiffs to either seek to intervene in the *Bold Alliance* case or to file a new case that could be consolidated with the *Bold Alliance* case or heard on the same schedule. Handling the proposed new claims in that manner would allow for the timely resolution of the claims along with similar claims in other lawsuits without delaying the final resolution of the original claims in this case.

In sum, Plaintiffs' motion if granted would prejudice the United States, whereas Plaintiffs would not be prejudiced if the motion is denied.

III. Plaintiffs Should Not Be Permitted to Add New Distinct Claims At This Stage of the Lawsuit.

The Court should also deny Plaintiffs' request to supplement the complaint because Plaintiffs seek to add four new distinct causes of action,[3] which is not permitted under Ninth Circuit law. *Planned Parenthood*, 130 F.3d at 402. The *Planned Parenthood* case involved a challenge to an abortion statute which the court found to be unconstitutional. *Id.* at 401-02. Subsequently, the Arizona legislature amended the statute, and the plaintiffs attempted to supplement their complaint to challenge the new law. *Id.* at 402. The court denied the motion to supplement, explaining that the proposed supplemental complaint "involved a new

[3] These new claims are in addition to the claim challenging Executive Order 13,867 that Plaintiffs previously sought to add in their Motion for Leave to File a Second Amended Complaint, ECF No. 108.

and distinct action that should have been the subject of a separate suit." *Id.* The court further explained that although "both the original suit and the supplemental complaint sought to challenge Arizona's parental consent law, the supplemental complaint challenged a different statute than the one that had been successfully challenged in the original suit." *Id.*[4]

Here, Plaintiffs propose to add distinct new claims that, as a legal matter, are wholly distinct from their original claims. The original claims challenged the President's decision to issue a permit for the Keystone XL Pipeline on Constitutional grounds. *See* Compl. ¶¶ 50-66. Plaintiffs' proposed new claims challenge entirely different actions raising entirely different legal theories. They challenge BLM's right-of-way decision, alleging violations of NEPA, the MLA, and FLPMA, and they challenge FWS's consultation process under the ESA.[5] *See*

[4] The Ninth Circuit also noted that the original suit had already proceeded to a final judgment four years previously and that the judgment was not appealed. *Planned Parenthood*, 130 F.3d at 402. But these facts provided only secondary support to the court's holding that new and distinct claims should be brought in a separate lawsuit. *See id.*

[5] To the extent that Plaintiffs also request declaratory and injunctive relief against BLM based on the ESA, *see* Proposed Supp. Compl., Prayer ¶¶ 6, 8, they fail to plead a claim that would entitle them to such a relief. And even if they did propose to add such a claim, any proposed amendment or supplementation would be futile, as Plaintiffs have failed to provide BLM with the jurisdictionally-required 60-day notice of intent to bring an ESA citizen-suit claim against the agency. *See Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998) ("failure to strictly comply with the notice requirement acts as an absolute bar to bringing suit under the ESA"); *Seto v. Thielen*, No. 10-00351 SOM-BMK, 2011 WL 322545, at *2 (D. Haw. Jan. 28, 2011), *aff'd*, 519 F. App'x 966 (9th Cir.

Proposed Suppl. Compl. ¶¶ 101-176. In other words, Plaintiffs are bringing entirely new claims, and at this point in the proceedings, they should be required to file those claims in a new lawsuit. *See Planned Parenthood*, 130 F.3d at 402 (proposed supplemental complaint "involved a new and distinct action that should have been the subject of a separate suit").

CONCLUSION

Accordingly, Plaintiffs' motion for leave to supplement their existing claims to add claims challenging BLM and the FWS should be denied.

Respectfully submitted this 4th day of September, 2020,

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2013) (proposed amendment of ESA citizen-suit claim would be futile since plaintiffs failed to comply with the notice requirement).

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 2,619 words, excluding the tables, caption, signature, certificate of compliance, and certificate of service.

/s/ Marissa Piropato
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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2020, a copy of the foregoing was served on all counsel of record via the Court's CM/ECF system.

/s/ Luther L. Hajek
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