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

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE, Plaintiffs, vs. PRESIDENT DONALD J. TRUMP, UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GENERAL TODD T. SEMONITE, Commanding General and Chief of Engineers; UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency; AURELIA SKIPWITH, in her	Civ. No. CV 19-28-GF-BMM **PLAINTIFFS' REPLY TO TRANSCANADA IN SUPPORT OF MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT UNDER F.R. CIV. PRO. 15** **Hearing:** **Time:** **Judge: Hon. Brian M. Morris**

official capacity as Director of the U.S. Fish and Wildlife Service; UNITED STATES BUREAU OF LAND MANAGEMENT, and DAVID BERNHARDT, in his official capacity as U.S. Secretary of the Interior,

Defendants,

TRANSCANADA KEYSTONE PIPELINE, LP, a Delaware limited partnership, and TC ENERGY CORPORATION, a Canadian Public Company,

Defendant-Intervenors.

I. INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 15(a)(2) and (d), on August 17, 2020 Plaintiffs moved this Court for leave to amend and supplement their First Amended Complaint ("FAC") to challenge the Federal Defendants' implementation in 2020 of Defendant Donald J. Trump's issuance in 2019 of the Presidential Permit challenged in this action. The motion's proposed Third Amended and Supplemental Complaint ("TASC") adds four claims for relief challenging the 2020 implementation approvals but makes no substantive changes to the original three claims for relief which have been fully briefed and argued and remain ripe for this Court's disposition on the parties' pending summary judgment motions.

The new claims are related to the original claims. For this reason, this Court denied the Federal Defendants' earlier motion to dismiss, on ripeness grounds, Plaintiffs' allegations against the Agency Defendants whose subsequent implementation approvals are challenged in the four new claims. Dkt. 73 at 38-39. This Court reasoned, correctly, that their anticipated implementation of the 2019 Permit was a sufficient connection to foreclose their dismissal from this case. *Id*.

The motion is proper under Rule 15(d) because Plaintiffs' proposed TASC "set[s] out . . . event[s] that happened after the date of the pleading to be supplemented" that relate to – and indeed, directly implement – the Presidential Permit this lawsuit seeks to vacate. The motion also properly references Rule 15(a) because the TASC makes minor amendments to the FAC such as the substitution of a replaced official. The motion does not delay this Court's ruling on the parties' pending summary judgment motions as to the first three claims for relief.

Defendant-Intervenors TransCanada Keystone Pipeline, LP et al., (collectively, "TransCanada") raise two arguments in opposition to Plaintiffs' motion. Both are also raised by the Federal Defendants, and both fail for the same reasons. Taking TransCanada's two arguments in reverse order to reflect the actual sequence of events in this case, TransCanada first claims that "the proposed amendment is the result of undue delay." Opp. at 11-12. Not so. The Federal Defendants did not publish notice of their 2020 approvals until January 29, 2020, five days *after* the parties had already commenced their summary judgment

briefing on the original three claims challenging the 2019 Permit. 85 Fed.Reg. 5232 (Jan. 29, 2020). Briefing and argument on those motions is completed. The TASC does not delay this Court's ruling thereon.

Moreover, TransCanada is the party that commenced the summary judgment proceedings that created the bifurcated timing it now complains about. It filed its motion to adjudicate the lawfulness of the 2019 Permit on January 24, 2020, two days after it knew that the first of the Federal Defendants' implementation approvals had been issued. TransCanada knew that doing so would necessarily bifurcate the timing of these proceedings because it knew that those 2020 implementation approvals would be reviewed under the Administrative Procedure Act, a review that could not commence until after the Federal Defendants had spent many months preparing the administrative record for those approvals. That delay precluded adjudication of the implementation approvals concurrently with TransCanada's summary judgment motion. It cannot complain now that the other parties cooperated in the sequencing of this case that TransCanada had chosen.

Second, TransCanada argues that "the proposed amendment would unduly prejudice TC Energy." Opp. 8-11. Not true. Nothing in the TASC affects this Court's ruling on the previously filed motions. If the Court vacates the 2019 Permit, the implementing approvals necessarily fall. If the Court sustains the 2019 Permit, the parties will adjudicate the 2020 approvals. Either way, Plaintiffs' motion prejudices no one.

Accordingly, TransCanada's opposition is without merit.

II. PLAINTIFFS' NEW CLAIMS ARE TIMELY AND CAUSE NO DELAY

TransCanada claims that Plaintiffs' motion "is the result of undue delay." Opp. 11-12. This claim fails because it is refuted by the actual history and current context of this case. As noted, TransCanada is the party that chose to commence the summary judgment proceedings in a way that necessarily separated adjudication of the 2019 Permit from adjudication of the 2020 implementation approvals.

The Federal Defendants did not issue public notice of their 2020 approvals until January 29, 2020. 85 Fed. Reg. 5232. By then, TransCanada had *already* filed its summary judgment motion on January 24, 2020 (Dkt. 77-79), based on the record underlying that 2019 approval. Adjudication of that motion, and the parties' further cross-motions, would be guided by the Court's refinement of the principles of law set forth in its December 20, 2019 Order (Dkt. 73) denying the defendants' motions to dismiss, as further informed by the parties' supplemental briefs requested in that Order. Thus, as directed, on January 24, 2020 Plaintiffs filed their 36-page Brief in Response (Dkt. 80) to that Order.

Concurrently, on January 14, 2020 (Dkt. 75), TransCanada had filed its Amended Status Report announcing its intent to commence construction in February. That submission, in turn, prompted Plaintiffs to renew their still pending preliminary injunction motion on January 31, 2020 (Dkt. 82).

Those motions, and Plaintiffs' related motion to file their SAC, unleashed a flurry of extensive briefing amounting to hundreds of pages of documents over the

next three months. Dkt. 77-125. All of that briefing was directed to the lawfulness of the 2019 Permit, rather than the Federal Defendants' 2020 implementation approvals. After that, this Court held a lengthy hearing on the parties' cross-motions on April 16, 2020. Thereafter, Plaintiffs reasonably awaited the Court's highly anticipated ruling – which, if it vacated the 2019 Permit, would moot the need for further amendments to challenge the 2020 approvals – for three months before commencing preparation of their proposed TASC and motion for leave to file it.

Thus, the parties' pending motions can, and should, be decided based on the record before the Court at the time those motions were filed. Nothing in Plaintiffs' motion to file the TASC alters that fact. All that Plaintiffs' motion does, is provide the Court and the parties with the challenges to the Federal Defendants' 2020 implementation approvals that Plaintiffs will advance in the event this Court does not vacate the 2019 Permit on which those implementation approvals are predicated. If, on the other hand, the Court vacates the 2019 Permit, then the 2020 approvals that implement that unlawful Permit necessarily fall.

III. ALLOWING THE PROPOSED SUPPLEMENTAL CLAIMS DOES NOT PREJUDICE TRANSCANADA

TransCanada asserts that allowing the TASC would prejudice it because the TASC advances four new claims in addition to the three original claims. Opp. 8-11. But none of its arguments withstands scrutiny.

First, it contends that "[c]ourts are less inclined to grant a motion for leave to amend that is filed while a motion for summary judgment is pending," because

"'only in extraordinary cases' should parties be allowed to change legal theories after a motion for summary judgment has been filed." *Id*. at 8, quoting *Rocky Mountain Biologicals, Inc. v. Microbix Biosystems, Inc.*, 986 F.Supp.2d 1187, 1204 (D. Mont. 2013) and *Hulett v. Cont'l Res., Inc.*, No. CV 14-23-GF-BMM-JTL, 2015 WL 12780574, at *1 (D. Mont. Dec. 22, 2015). But TransCanada's argument, and the cases it cites, address an entirely different context in which the movant seeks to change the legal theories it has already advanced in summary judgment briefing. That is not the case here.

Here, Plaintiffs do not change the legal theories on which their existing summary judgment motion is based. Those theories remain exactly the same. As shown above, the TASC would have no effect on the pending summary judgment and preliminary injunction motions. Those motions will be decided based on the record and briefs already submitted. Plaintiffs urge the Court to decide those long-pending motions as soon as possible.

Rather, the purpose of the TASC is to alert the Court and the parties to the facts and legal theories that Plaintiffs intend to raise and litigate *in the future*, should the Court not vacate the 2019 Permit. As noted, should the Court vacate the 2019 Permit approving the Keystone XL Pipeline Project, then the Federal Defendants' 2020 approvals that implement that Permit would necessarily fall, and there would be no need to litigate the lawfulness of the 2020 approvals. But if the Court rules that the 2019 Permit is valid, then the parties will need to litigate, and this Court will need to decide, the lawfulness of the 2020 approvals that

implement the 2019 Permit.

Allowing the TASC now will expedite adjudication of the 2020 approvals in the future, should it become necessary to do so. Rather than cause delay or prejudice, the TASC promotes efficiency by allowing "'the entire controversy between the parties [to] be settled in one action.'" *Planned Parenthood of S. Arizona v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997), quoting 6A Wright, et al., Federal Practice and Procedure: Civil 2D § 1506 (1990).

TransCanada's second contention is that it will suffer prejudice because adjudication of the four new claims would have to be "resolved on an administrative record that would take the United States *a significant amount of time to prepare*." Opp. at 10. But that is precisely why it would have been *impossible* to adjudicate the lawfulness of the 2020 permits last spring, when TransCanada implies it should have been. As the Federal Defendants likewise admit in their opposition, the earliest their administrative record for the implementation approvals will be available is *October 30, 2020*, and the earliest that merits briefing on the lawfulness of the 2020 permits could be completed is *April 2021*. Dkt. 144 at 7.

These admissions completely refute TransCanada's claim that it would suffer prejudice should Plaintiffs' TASC be allowed. The TASC's four new claims will be adjudicated just as soon as the Federal Defendants complete their administrative record underlying their 2020 approvals this fall or winter. Allowing the TASC would not delay that completion at all.

TransCanada's third and final argument is that "litigation of [Plaintiffs' four new claims] will be duplicative of the claims presented in two pending cases before this court." Opp. at 10. But TransCanada makes no attempt to support this claim, and with good reason. Although there are some similarities between the three cases, the detailed claims presented in the TASC are not duplicated in any other litigation, as a casual perusal of the three different lawsuits confirms. And, to avoid duplication of effort and inefficiency, the parties are perfectly capable of coordinating preparation of the Federal Defendants' administrative record and the briefing and hearing schedules in all three cases.

This Court has broad authority to order that related cases be consolidated for record preparation, briefing and hearing. The informed exercise of that authority is the appropriate means of achieving better efficiency in the adjudication of related claims. Allowing the requested supplementation here will allow the parties to then explore consolidation of briefing and hearing of similar claims and to avoid the creation of duplicative agency records.

Denying the amendment, by contrast, would only delay adjudication of the four new claims by forcing Plaintiffs to prepare, file and then serve a new, separate lawsuit. Doing so would waste time and serve no purpose.

In summary, Plaintiffs' motion is fully consistent with Rules 15(a)(2) and (d). Rule 15 is construed with "extreme liberality" in favor of amendment. *Eminence Capital, L.L.C., v. Aspeon, Inc*., 316 F.3d 1048, 1051 (9th Cir. 2003); *see also AmerisourceBergen Corp. v. Dialysis West, Inc.*, 445 F.3d 1132, 1136

(9th Cir. 2006). "Federal policy strongly favors determination of cases on their merits. Therefore . . . leave to amend the pleadings is freely given unless the opposing party makes a showing of undue prejudice, or bad faith or dilatory motive on the part of the moving party." California Practice Guide (The Rutter Group 2020), Federal Civil Procedure Before Trial § 8:1461, *citing Foman v. Davis* (1962) 371 U.S. 178, 182, *Sonoma County Association of Retired Employees v. Sonoma County*, 708 F.3d 1109, 1117 (9th Cir. 2013).

The "standards for granting or denying motion[s] to supplement under Rule 15(d) are [the] same as [the] standards for leave to amend under Rule 15(a)." California Practice Guide, *supra*, § 8:1750. "[S]upplemental pleadings are favored because they enable the court to award complete relief in the same action, avoiding the costs and delays of separate suits. Therefore, absent a clear showing of prejudice to the opposing parties, they are liberally allowed." *Id.* at § 8:1750, *citing Keith v. Volpe,* 858 F2d at 473.

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IV. CONCLUSION

TransCanada has failed to show undue delay or prejudice. Plaintiffs' motion advances the policy of the federal courts to bring all related claims together in a single proceeding, and thereby serve justice, conserve resources, and resolve matters on their merits where possible. Accordingly, Plaintiffs respectfully request that this Court grant them leave to file their Third Amended and Supplemental Complaint.

Respectfully submitted,

Dated: September 11, 2020

LAW OFFICES OF STEPHAN C. VOLKER

s/ *Stephan C. Volker*
STEPHAN C. VOLKER (Pro Hac Vice)

Dated: September 11, 2020

PATTEN, PETERMAN, BEKKEDAHL & GREEN, PLLC

s/ *James A. Patten*
JAMES A. PATTEN

Attorneys for Plaintiffs
INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE

CERTIFICATE OF COMPLIANCE

Pursuant to Montana District Court, Civil Rule 7.1(d)(2)(B), I certify that **PLAINTIFFS' REPLY TO TRANSCANADA IN SUPPORT OF MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT UNDER F.R. CIV. PRO. 15** contains 2127 words, excluding caption and certificate of service, as counted by WordPerfect X7, the word processing software used to prepare this brief.

s/ *Stephan C. Volker*

CERTIFICATE OF SERVICE

I, Stephan C. Volker, am a citizen of the United States. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Stephan C. Volker, 1633 University Avenue, Berkeley, California 94703.

On September 11, 2020 I served the following document by electronic filing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the email addresses registered in the above entitled action:

PLAINTIFFS' REPLY TO TRANSCANADA IN SUPPORT OF MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT UNDER F.R. CIV. PRO. 15

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 11, 2020 s/ *Stephan C. Volker*

STEPHAN C. VOLKER (Pro Hac Vice)