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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KARUK TRIBE, ENVIRONMENTAL PROTECTION INFORMATION CENTER, CENTER FOR BIOLOGICAL DIVERSITY, KLAMATH RIVERKEEPER, and KLAMATH-SISKIYOU WILDLANDS CENTER,	)	Civ. No. 16-01079
Plaintiffs,	)	**MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND SUPPLEMENTAL AND AMENDED COMPLAINT**
v.	)	
WILLIAM STELLE, National Marine Fisheries Service; NATIONAL MARINE FISHERIES	)	**Date: Friday, May 12, 2017** **Time: 9:00 am**

SERVICE; PATRICIA A. GRANTHAM, Klamath National Forest Supervisor; and UNITED STATES FOREST SERVICE,

Defendants,

and

SISKIYOU COUNTY, a political subdivision of the State of California, AMERICAN FOREST RESOURCE COUNCIL, an Oregon nonprofit corporation, GARY RAINEY, and GEORGE HARPER,

Defendant-Intervenors

Without Oral Argument

MOTION

Pursuant to Federal Rules of Civil Procedure 15(a)(2) and 15(d), plaintiffs Karuk Tribe, Environmental Protection Information Center, Center for Biological Diversity, Klamath Riverkeeper, and Klamath-Siskiyou Wildlands Center ("Karuk Tribe") move for leave to file their Second Supplemental and Amended Complaint, a copy of which is attached as an exhibit to this motion as Exhibit A.

Counsel for Karuk Tribe shared a draft of its Proposed Second Supplemental and Amended Complaint with counsel for opposing parties on March 27, 2017 to ascertain their position on this filing. Counsel for federal Defendants indicated that they oppose the addition of Karuk Tribe's National Environmental Policy Act ("NEPA") claim, but do not oppose other changes to the Complaint; counsel for Defendants-Intervenors indicated that they do not oppose this motion.

Karuk Tribe moves this Court for leave to supplement and amend the First Amended Complaint (Dkt. # 14) to supplement and amend its claims and allegations, including by alleging the development of significant new information that has come to light since the First Amended Complaint was filed on March 15, 2016. *See* Exhibit A ([Proposed] Second Supplemental and Amended Complaint). The First Amended Complaint included two federal Defendants (William

Stelle and the National Marine Fisheries Service) and four claims brought pursuant to the Endangered Species Act ("ESA"), in addition to naming two other federal Defendants (Patricia Grantham and the United States Forest Service) and four claims brought pursuant to the National Forest Management Act ("NFMA"). Karuk Tribe's Proposed Second Supplemental and Amended Complaint seeks to: 1) dismiss with prejudice federal Defendants William Stelle and the National Marine Fisheries Service; 2) dismiss with prejudice the four ESA claims; 3) drop a NFMA claim involving bald eagles; 4) add a single NEPA claim alleging that the Forest Service must supplement the environmental analysis for the Westside Fire Recovery Project in response to significant new information that was not available at the time of the filing of the First Amended Complaint; and 5) make minor clarifications and conforming edits to reflect the supplemented and amended claims and parties.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STANDARD OF REVIEW.

The Court "may permit [a] party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Fed. R. Civ. P. 15(d). Motions to supplement a pleading are evaluated under the same standard as motions to amend under Rule 15(a). *Glatt v. Chicago Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996) (standard for supplementing a pleading under Rule 15(d) "is the same" as the standard governing amendments under Rule 15(a)) (citing *Intrepid v. Pollock*, 907 F.2d 1125, 1131 (Fed. Cir. 1990); 6A Charles Alan Wright *et al*., Federal Practice & Procedure § 1504, pp. 185–86 (2d ed. 1990)). Rule 15 provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

While permission to supplement or amend is committed to the Court's discretion, the Ninth Circuit has long held that Rule 15's policy favoring revised 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). Rule 15(d) provides the Court with broad discretion in allowing a supplemental pleading as a tool of judicial economy and convenience, and its use is

therefore favored. *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988). Claims that accrue after the date of the initial complaint are properly analyzed under Rule 15(d) as supplementation of a complaint rather than amendment to a complaint, although as a practical matter the analysis generally yields the same result. *United States v. Reiten*, 313 F.2d 673, 674 (9th Cir. 1963). Allowing supplementation and amendment here is consistent with the "general purpose of the Rules to minimize technical obstacles to a determination of the controversy on its merits." *Id.*

Leave to supplement and 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).

Among 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.2d 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).

II. KARUK TRIBE'S PROPOSED SECOND SUPPLEMENTAL AND AMENDED COMPLAINT WILL NOT UNDULY PREJUDICE DEFENDANTS.

"The party opposing amendment bears the burden of showing prejudice." *DCD Programs*, 833 F.2d at 187. In this case, Defendants-Intervenors do not oppose this filing, so there will be no prejudice to them. Federal Defendants have indicated that they oppose adding the NEPA claim but do not oppose the other changes to Karuk Tribe's complaint; however, federal Defendants have not indicated the grounds upon which their opposition rest. Regardless,

federal Defendants will not be prejudiced by the filing of the Tribe's Second Supplemental and Amended Complaint.

The issue Karuk Tribe intends to address in its NEPA claim – the gravamen of the Forest Service's objection to the filing of the Second Supplemental and Amended Complaint – is whether the lack of sufficient revenue generated from the sale of commercial timber from the Westside Fire Recovery Project ("Westside Project") represents "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). Karuk Tribe intends to argue that because the final environmental impact statement ("FEIS") for the Westside Project was predicated on receiving substantially more revenue – revenue that was required to complete other necessary aspects of the project (including hazardous fuel reduction, replanting, and legacy site treatments) upon which the environmental consequences of the action were based – than was in fact generated from the sale of timber, that the environmental consequences of the Westside Project are likely to be far different than that represented in the FEIS. Indeed, if the Forest Service does not have and is unlikely to receive sufficient funding to fully implement the Westside Project, then the agency's conclusions about the environmental consequences of the project – which was supposed to include hazardous fuel reduction, replanting, and legacy site treatments, actions that will not occur without funding – require supplementation under the law. 40 C.F.R. § 1502.9(c)(1)(ii).

Regardless of Karuk's allegation that supplementation is required, the Forest Service has an ongoing legal obligation to be alert to significant new information requiring supplementation. Agencies are required to prepare supplements to an EIS if "the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c). As the Supreme Court has explained, "It would be incongruous with [NEPA's] approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects,

once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). Given that the Forest Service has an independent legal obligation to be alert to the need to supplement its analysis, and to undertake that supplementation regardless of an external party bringing it to the agency's attention, the Forest Service cannot be prejudiced by conducting an analysis that the law already requires it to undertake.

Moreover, the parties have already briefed aspects of the financial viability of the Westside Project. In the parties' briefing on Karuk's motion for a preliminary injunction (Dkt. ##36, 52-53, 57-58), Karuk raised the concern that the lack of funding for *all* aspects of the Westside Project – particularly the non-commercial or restorative aspects of the project including hazardous fuel reduction, replanting, and legacy site treatments – may result in a more degraded Project area if only the commercial aspects (i.e., salvage logging) of the project were implemented. Therefore, federal Defendants cannot complain of being unaware of this important issue. Now that much of the commercial portions of the Project are complete, however, a full evidentiary record of the revenue received by the Forest Service from salvage logging is available and likely supports Karuk's claim that NEPA requires supplemental environmental analysis of the environmental consequences of the Westside Project. The addition of this legal claim should not delay the resolution of all matters before this Court, and will not result in undue prejudice to the federal Defendants.

III. KARUK TRIBE'S PROPOSED SECOND SUPPLEMENTAL AND AMENDED COMPLAINT IS TIMELY AND IS NOT MADE IN BAD FAITH.

Karuk Tribe proposes to supplement and amend its Complaint for five purposes: 1) dismiss with prejudice federal Defendants William Stelle and the National Marine Fisheries Service; 2) dismiss with prejudice the four ESA claims; 3) drop a NFMA claim involving bald eagles; 4) add a single NEPA claim alleging that the Forest Service must supplement the environmental analysis for the Westside Fire Recovery Project in response to significant new information that was not available at the time of the filing of the First Amended Complaint; and 5) make minor clarifications and conforming edits to reflect the supplemented and amended

claims and parties. In particular, the proposed Second Supplemental and Amended Complaint adds a new claim that federal Defendants Patricia Grantham and the United States Forest Service ("Forest Service") failed to properly supplement their NEPA analysis in response to significant new information, Ex. A ¶¶ 194-204, a claim that arises under the Administrative Procedure Act. 5 U.S.C. § 706.

Karuk's motion is timely. Information to support the Tribe's allegation that NEPA supplementation is required was not available at the time of the filing of Karuk's First Amended Complaint. While some timber sales had been advertised, sold, awarded, and implementation had begun at the time of the filing of the First Amended Complaint, the harvest of most of the commercial timber is just now nearing completion and information about the total receipts from the sale of this timber should be available to the Forest Service. This information should be part of the full administrative record that this Court has ordered filed on or before May 2, 2017, and will be made available to all parties to the litigation at that time. Additionally, the Ninth Circuit has expressly held that a claim that an agency has failed to prepare a supplemental NEPA analysis is "not a challenge to a final agency decision, but rather an action under 5 U.S.C. § 706(1), to 'compel agency action unlawfully withheld or unreasonable delayed'" and, accordingly, "[i]n such cases, review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). That is why Karuk indicated in the case management conference that it may need to propound discovery to prove its claims.

Regardless, Karuk intends to argue that the lack of sufficient funds to implement *all* aspects of the Westside Project – not just the commercial timber harvest elements – necessarily means that the environmental consequences of the action disclosed in the FEIS will be different than discussed in the FEIS, requiring supplementation under NEPA. This timeline certainly does not implicate any undue delay. *See, e.g., Howey v. United States*, 481 F.2d 1187, 1190–914 (9th Cir. 1973) (granting leave to amend even though motion was made five years after initial complaint was filed).

Karuk's motion is not made in bad faith. The Tribe is moving this Court to supplement and amend its complaint within the timeframe stipulated by the parties and set forth by the Court, based on a good faith analysis of the facts and law. Supplementation and amendment of Karuk's complaint will result in a more complete adjudication of the dispute among the parties regarding whether the Forest Service has complied with its obligations under NEPA. Accordingly, supplementation and amendment will promote judicial efficiency, and therefore is "favored." *Volpe*, 858 at 473 (9th Cir. 1988).

Karuk Tribe does not seek to revise its Complaint in bad faith, nor are the revisions sought in order to unreasonably delay judicial proceedings, or for any other impermissible purpose, but rather to accurately reflect factual developments since the date of the First Amended Complaint and to clarify the claims in this case going forward. *See Hip Hop Beverage Corp. v. RIC Representacoes Importacao e Comercio Ltda.*, 220 F.R.D. 614, 622 (C.D. Cal. 2003) (citing evidence of bad faith).

IV. KARUK TRIBE'S PROPOSED SECOND SUPPLEMENTAL AND AMENDED COMPLAINT IS NOT FUTILE.

The test for "futility" with respect to a motion to supplement or 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). The supplemental claims here are justiciable and facts could be proved that would constitute valid claims under NEPA. Accordingly, the proposed Second Supplemental and Amended Complaint presents more than "colorable" claims for relief: claims that 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).

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CONCLUSION

For the reasons stated above, Karuk Tribe respectfully asks the Court to grant its Motion for Leave to File its Second Supplemental and Amended Complaint.

Date: April 3, 2017. Respectfully submitted,

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CERTIFICATE OF SERVICE

Karuk Tribe submits this Certificate of Service of the Motion and Memorandum in Support of Motion for Leave to File Second Supplemental and Amended Complaint, [Proposed] Order Granting Motion for Leave to File Second Supplemental and Amended Complaint, and [Proposed] Second Supplemental and Amended Complaint. The following parties were served through the Court's electronic case filing system:

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I hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct. Executed and respectfully submitted April 3, 2017.

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