

Lauren M. Rule (ISB # 6863)
ADVOCATES FOR THE WEST
PO Box 1612
Boise ID 83701
(208) 342-7024
(208) 342-8286 (fax)
lrule@advocateswest.org

Laurence (“Laird”) J. Lucas (ISB # 4733)
P.O. Box 1342
Boise, ID 83701
(208) 424-1466 (phone and fax)
llucas@lairdlucas.org

Attorneys for Plaintiff Western Watersheds Project

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

WESTERN WATERSHEDS PROJECT;)	
)	CIV. No. 05-189-E-BLW
Plaintiff,)	
)	MOTION FOR LEAVE TO
v.)	REOPEN CASE AND FILE
)	SUPPLEMENTAL COMPLAINT
)	
UNITED STATES FOREST SERVICE,)	
)	
Defendant.)	
_____)	

Plaintiff Western Watersheds Project (“WWP”) respectfully requests that the Court reopen this case to restore it to the active docket and grant WWP leave to file a supplemental complaint pursuant to Federal Rule of Civil Procedure 15(d). WWP raises allegations in its proposed supplemental complaint that are directly related to its prior claims in this action challenging Defendant U.S. Forest Service’s (“Forest Service”) Final Environmental Impact

Statement and Records of Decision for four domestic sheep allotments on the Sawtooth National Forest (collectively referred to as the “North Sheep” allotments).

Pursuant to the Court’s prior Orders in this case, the Forest Service has issued a Supplemental Environmental Impact Statement and Supplemental Records of Decision, which WWP is now challenging as still insufficient to comply with the Forest Service’s duties under the National Forest Management Act (“NFMA”), the Sawtooth National Recreation Area Organic Act (“SNRA Act”) and the National Environmental Policy Act (“NEPA”). Because the claims asserted in the proposed supplemental complaint have a close relationship to the claims set forth in the original complaint, and pursuing these new claims in the same litigation would further the orderly and fair administration of justice, the Court should grant this motion.

FACTUAL BACKGROUND

WWP, along with a second plaintiff Randall Hermann MD, originally filed this lawsuit in May 2005, challenging the Final Environmental Impact Statement (“FEIS”) and Records of Decision (“RODs”) for the North Sheep allotments¹ due to violations of NFMA, the SNRA Act, and NEPA. Specifically, Plaintiffs claimed that the Forest Service violated NFMA by failing to act consistently with standards and guidelines in the Sawtooth Forest Plan as well as the Plan’s assessment of the capability and suitability of forest rangelands to sustain livestock grazing; and also failing to insure viable populations of bighorn sheep. *See Complaint* ¶¶ 62-65. WWP also challenged the 2003 Sawtooth Forest Plan under NFMA for failing to comply with the

¹ The issuance of the FEIS and ROD was in response to this Court’s prior order in *Western Watersheds Project v. Sawtooth National Forest*, CV-01-389-E-BLW (June 13, 2002) in which the Court held the Forest Service had violated NEPA by not completing an EIS according to the Forest Service’s internal schedule, and imposed a deadline for that analysis.

requirement to assess the capability and suitability of rangelands to provide habitat for management indicator species. *Id.*

In addition, the original complaint raised claims under the SNRA Act for violating the Act's prohibition against substantially impairing the primary values of the area; and under NEPA for failing to assess the impacts of grazing non-capable lands, failing to use up-to-date and accurate scientific information, failing to take a hard look at impacts to bighorn sheep, failing to assess all connected and cumulative actions, and failing to take a hard look at potential human health risks from domestic sheep grazing on public lands. *Complaint ¶¶ 66-73.*

WWP filed a motion for summary judgment in November 2005 on all of its claims in the Complaint, and the Forest Service responded to that motion and filed its own cross motion. *Docket Nos. 25, 35.* The Court issued a Memorandum Decision and Order in February 2006, granting in part and denying in part WWP's motion. *Docket No. 47.* In its Order, the Court first granted WWP's motion with regard to the capability and suitability claims. The Court held that the Forest Service had determined which rangelands were capable of sustaining grazing in the Forest Plan, but did not incorporate that analysis or even consider it at the site-specific level in the North Sheep FEIS. *Memorandum Decision and Order at 7-16.* Thus, the Forest Service was violating its duty under NFMA to act consistently with the Forest Plan and its duty under NEPA to take a hard look at and provide the public with all of the relevant information in the North Sheep FEIS. *Id.* The Court also held that the analysis in the Forest Plan concerning capability of rangelands to provide habitat for management indicator species was inadequate with regard to pileated woodpeckers and sage grouse. *Id. at 16-20.*

The Court next held that the Forest Service violated NFMA's consistency requirement by relying heavily on an adaptive management strategy to establish that it would meet all of the

standards and guidelines in the Forest Plan but did not explain this strategy or the monitoring protocols that were the heart of the strategy. *Id. at 20-23*. The Court noted that the Forest Service had documented problems to various resources caused by grazing and had stated that changes to grazing management were necessary. *Id. at 20-21*. Instead of making significant changes to grazing management on three of the four allotments, however, the North Sheep decisions relied primarily on an adaptive management approach to insure improvements, yet failed to fully explain that approach. *Id. at 21-23*. Thus, the Forest Service did not demonstrate it was complying with the Forest Plan. *Id. at 23*. Likewise, it did not demonstrate that grazing would not substantially impair the primary values of the area as required by the SNRA Act. *Id.*

The Court ruled that the Forest Service had adequately assessed impacts to bighorn sheep, considered connected and cumulative actions, and considered human health risks in the North Sheep FEIS. Thus, it denied WWP's motion with regard to these claims. *Id. at 23-25*.

Subsequent to this ruling, the parties briefed the issue of appropriate remedies for the Forest Service's violations of law. *Docket Nos. 52-71*. The Court issued an Order in June 2006 that ordered the Forest Service to conduct supplemental analyses for the North Sheep EIS and Forest Plan to address the violations discussed in its prior Order, and also enjoined grazing along two drainages in the Smiley Creek allotment for the 2006 grazing season. *Docket No. 74*. In an Order clarifying that ruling, the Court adopted the parties' proposal to set March 2008 as the deadline for the supplemental analyses for both the North Sheep EIS and the Forest Plan. *Docket No. 81*.

The parties filed a joint motion to dismiss the action in February 2008 because the Court had ruled on all of WWP's claims and the Forest Service was on track to issue both supplemental analyses on time. *Docket No. 82*. The Court granted that motion and closed the case, but

retained jurisdiction to enforce the terms of its prior Orders as well as the terms of the joint motion to dismiss. *Docket No. 83*. The Forest Service issued the supplemental capability analysis for the Forest Plan with regard to management indicator species in January 2008 and the Supplemental Environmental Impact Statement and Supplemental Records of Decision for the North Sheep allotments in March 2008.

Plaintiffs are now moving to reopen this case and file a supplemental complaint challenging the Supplemental North Sheep EIS and Records of Decision because they do not adequately address the violations of law described by the Court previously in this case. Many of the same flaws are repeated in the supplemental analysis for the North Sheep allotments and thus WWP intends to raise several legal claims under NFMA, the SNRA Act, and NEPA that are the same or similar to its previous claims.

For instance, although the North Sheep SEIS now includes a capability analysis, it still does not adequately assess the impacts of continuing to graze allotments where the vast majority of area is not capable of sustaining livestock grazing. Likewise, the explanation for the adaptive management strategy again fails to demonstrate that it will insure compliance with all Forest Plan objectives and the SNRA Act's prohibition against substantially impairing primary values. WWP is also raising a few additional claims that tie in to the facts established in the prior North Sheep FEIS of which the Court is familiar. In light of the clear relationship between claims in the supplemental complaint and the original complaint, WWP requests that the Court grant its motion to reopen this case and file its proposed supplemental complaint.

ARGUMENT

Rule 15 authorizes the filing of supplemental pleadings "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be

supplemented.” See F.R.Civ.P. 15(d). The Supreme Court has held that Rule 15(d) “plainly permits” supplementing a complaint to cover events happening after the original suit was filed. See *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 226-27 (1964) (allowing supplemental complaint filed 10-years after original action filed, and after judgment entered).

According to the Ninth Circuit, Rule 15(d) should be “liberally construed” to give district courts broad discretion in allowing supplemental pleadings, and its use is “favored” as a tool of judicial economy and convenience as long as there is no undue prejudice to the opposing party. *Keith v. Volpe*, 858 F.2d 467, 473-5 (9th Cir. 1988); see also *LaSalvia v. United Dairymen of Arizona*, 804 F.2d 1113, 1119 (9th Cir. 1986) (reversing denial of motion to supplement complaint). As stated in *Volpe*, all that is required is that there is “some relationship . . . between the newly alleged matters and the subject of the original action, they need not all arise out of the same transaction.” *Volpe*, 858 F.2d at 474.

Courts have regularly allowed plaintiffs to file supplemental complaints to challenge actions that the Court had previously ordered an agency to take. See *Raduga USA Corp. v. U.S. Dept. of State*, 440 F. Supp.2d 1140, 1150-51 (S.D. Cal. 2005) (setting aside judgment and allowing supplemental complaint to challenge denial of visa application after court had ordered agency to make determination on the application); *Tucson Herpetological Society v. Kempthorne*, 2006 WL 2788643, at *6-7 (D. Ariz. 2006) (allowing supplemental complaint to challenge new ESA listing decision issued pursuant to court order); *San Luis & Delta-Mendota Water Authority v. U.S. Dept. of Interior*, 236 F.R.D. 491, 495-502 (E.D. Cal. 2006) (allowing supplemental complaint to challenge subsequent water rights decision under the same statutes); *Center for Biological Diversity v. Kempthorne*, 2008 WL 2468454, at *2 (N.D. Cal. 2008)

(allowing complaint to be amended or supplemented to challenge listing decision after court had ordered agency to make decision).

Here, the supplemental complaint has a strong relationship to the original complaint. The Court previously held the North Sheep FEIS unlawful for several reasons and ordered a supplemental analysis. Now WWP is challenging that supplemental analysis, alleging that it has many of the same legal flaws as the original decision. Thus, this Supplemental Complaint is a reasonable and convenient method to raise these claims. Furthermore, supplementation would serve the interests of judicial economy because the Court is already familiar with the facts of the case as well as many of the legal arguments. This Court has previously allowed WWP to reopen a case and file a supplemental complaint even where matters were not as directly related as here. *See e.g. WWP v. Bennett*, 2008 WL 2003114, at *7 (D. Idaho 2008); *WWP v. Dyer*, Case No. 97-519 (D. Idaho, Dec. 3, 2007) (Memorandum Decision and Order, Docket No. 387).

Allowing supplementation would in no way unduly prejudice the Forest Service. The agency must respond to WWP's allegations whether they arise in a supplemental complaint or a new complaint. Therefore, the Court should use its broad discretion under Rule 15(d) to reopen this case and allow WWP to file its proposed supplemental complaint.

CONCLUSION

For the foregoing reasons, the Court should grant WWP's motion for leave to reopen this case and to file the accompanying Supplemental Complaint.

Dated: January 26, 2009

Respectfully submitted,

s/Lauren M. Rule
Lauren M. Rule
Laurence ("Laird") J. Lucas
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2009, I electronically filed the foregoing MOTION FOR LEAVE TO REOPEN CASE AND FILE SUPPLEMENTAL COMPLAINT with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the counsel of record listed below:

Deborah Ferguson
Assistant U.S. Attorney
Deborah.Ferguson@usdoj.gov

Rachel Dougan
Trial Attorney, U.S. Dept. of Justice
Rachel.Dougan@usdoj.gov

William G. Myers, III
Holland & Hart
wmyers@hollandhart.com

Daniel Steensen
Ringert Clark Chtd.
dvs@ringertclark.com

Bryce Farris
Ringert Clark Chtd.
bryce@ringertclark.com

s/Lauren M. Rule
Lauren M. Rule