IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOLENEX LLC, Plaintiff, v. DAVID L. BERNHARDT, in his official capacity as Secretary, U.S. Department of the Interior, *et al.*, Defendants, and PIKUNI TRADITIONALIST ASSOCIATION, *et al.,* Defendant-Intervenors.	Civil Case No. 13-00993 (RJL) **MOTION FOR LEAVE TO FILE SECOND AMENDED AND SUPPLEMENTAL COMPLAINT**

Pursuant to Federal Rule of Civil Procedure 15(a)(2), Plaintiff Solenex LLC, by and through its undersigned attorneys, hereby respectfully files this Motion for Leave to File its Second Amended and Supplemental Complaint. Through the amendment Solenex seeks leave to add two new and distinct claims addressing separate agency actions, more clearly delineate between the final agency actions challenged and relief sought, and revise the pleading to more clearly and fully reflect the factual background of this case and the new claims.

Amendment is appropriate at this stage of this case in order to add two new claims involving the following separate but related agency actions: (1) the US Forest Service's December 3, 2014 decision that Solenex's well would have adverse effects on the entire 165,000 acre Traditional Cultural District ("TCD"), and (2) the Forest Service's decision that the negative cultural impacts of developing Solenex's Federal Oil and Gas Lease M-53323 ("Lease") could

not be mitigated. Although these new claims could be litigated in a separate action, it is preferable for these claims to be considered here in furtherance of judicial economy and due to their highly interrelated nature to the existing claims. Solenex must bring these claims now in order to avoid a statute of limitations defense. Should the Court rule that the Solenex Lease was properly cancelled, these claims will likely be mooted (not barred by *res judicata*). Should Solenex prevail on having its Lease re-instated, however, these agency actions must be addressed so they do not remain as improper impediments to Solenex's development of its Lease. This proposed amendment also addresses the U.S. Court of Appeals for the District of Columbia Circuit's apparent confusion regarding the relationship between Solenex's Lease and its Application for Permit to Drill ("APD"). Solenex's Lease and APD are separate and independent of one another and, as such, cancellation or denial of the APD need not affect the status of the Lease. No prejudice will arise from the amendment, and the amendment is not made as a dilatory tactic, in bad faith, or for any other inappropriate reason. In such circumstances, Solenex's amendment of its Complaint is proper, and Solenex should be afforded the opportunity to test the merits of its claims as amended.

Pursuant to Local Civil Rule 15.1, Solenex has attached the proposed Complaint as amended. Pursuant to Local Civil Rule 7(m), Solenex's counsel has conferred with Defendants' and Intervenors' counsel. Defendants and Intervenors oppose the motion to amend.[1]

[1] As a result of Defendant's opposition and in order to preserve its new claims against a statute of limitations defense, concurrently with the filing of this motion Solenex has been forced to file its new claims as a separate action. Should the motion to amend be granted here, Solenex will likely dismiss the new action without prejudice. Should the motion to amend be denied, Solenex will move to consolidate the new action with this case.

FACTUAL BACKGROUND

On May 24, 1982, the BLM issued Solenex's Lease to Sidney Longwell. The National Environmental Policy Act ("NEPA") documents underlying the Lease and Lease itself were unchallenged and became final in 1982. The next year, the Lease operator submitted a surface use plan, an APD to drill a well on the Lease, and a cultural resource inventory report that documented the survey for cultural resources performed on the well site and the three proposed access routes. No cultural resources were located during the survey.

The Forest Service and the Bureau of Land Management ("BLM") began reviewing the surface use plan and APD in November 1983 and released a joint 324-page Environmental Assessment ("EA") with respect to the surface use plan and APD in January 1985. The two agencies concluded the proposed project, as limited by the Lease stipulations and the additional conditions of approval imposed by the agencies, could be performed without any adverse environmental effects; the Forest Service therefore approved the surface use plan and the BLM approved the APD.

The BLM's approval of the APD was appealed in part because the Blackfoot Tribe claimed ownership to the land. *Glacier–Two Medicine All.*, 88 IBLA 133, 148–49 (1985). On August 9, 1985, the Interior Board of Land Appeals ("IBLA") rejected most of the appeal issues, but remanded with instructions for the BLM to further consider four issues, none of which concerned validity of the Lease. *Id*. at 150–56.

The term of the Lease was suspended effective October 1, 1985, pending further consideration of the issues identified by the IBLA. Citing a shifting variety of excuses, the Forest Service and BLM then kept the Lease in suspension for over two decades, and eventually at least some of the Forest Service employees began working to thwart development of the

Lease. Solenex originally brought this lawsuit in 2013, as a mandamus action to seek an end to the otherwise interminable suspension of its Lease so that Solenex may renew and continue its development efforts.

In the meanwhile, following multiple reviews, studies, conferrals and the issuance of thousands of pages of NEPA documents, the Forest Service and BLM repeatedly reapproved the APD for the exploratory well on the Lease in 1987, 1990, and 1993. In the last instance, the BLM asked for secretarial-level approval of the APD because of the unreasonable delay that had already occurred. On January 14, 1993, the Assistant Secretary of the Department of the Interior ("DOI"), concurred in the Record of Decision issued by the BLM approving the APD. This was the *fourth time* the APD was approved.

After the 1992 election of President Clinton, at least some Forest Service employees and others started taking action to interfere with the Lease and the planned exploratory well. The Lease suspension was repeatedly continued while politicians from Montana pursued legislative protections for the area. Forest Service employees also latched on to new changes to the National Historic Protection Act, which now allowed for the creation of traditional cultural districts under non-verifiable and amorphous conditions. The Forest Service investigated the possibility of a traditional cultural district in the area around the Lease and by 1997 encouraged the Blackfoot Tribe to concur in the traditional cultural district as a way to increase their control over lands they sought to have returned to them.

Over the course of the next few decades, the Forest Service worked to create then expand a traditional cultural district that would impinge upon development of the Lease. In 1997 and 2000 the Forest Service provided documents to the Keeper of the National Historic Register ("Keeper") to verify that the area was eligible to be considered as a cultural district. In 2002 the

Keeper confirmed that an approximately 89,000-acre Traditional Cultural District was eligible for listing on the National Register of Historic Places. The Forest Service and the Blackfoot Tribe, however, were ultimately unsatisfied with the 89,000 acre TCD because it did not encompass important areas of the Lease or other areas the Blackfoot people had ceded to the United States in 1895 for mineral development and now sought to control. After years of further documentation, in 2012 the Forest Service accomplished expanding the Traditional Cultural District to roughly 165,000 acres.

Eventually, in September 2014, the Forest Service tentatively found that the Solenex proposed well and drilling on the Lease would have adverse effects on the TCD. Solenex objected to this finding, but on or about December 3, 2014, the Forest Service finalized its determination that the proposed well would cause adverse effects to the entire TCD. ECF No. 93-2 at 12. The Blackfoot Tribe then took the position that any drilling in the 165,000 acres was unacceptable and withdrew from further conferrals. On August 17, 2015, Defendants suggested—*for the first time*—that they may initiate a process for cancelling the Lease. ECF No. 53 at 2. On September 21, 2015, the National Historic Advisory Council adopted the Blackfoot position that the effects of a well on the TCD could not be mitigated. Then, going far beyond their mandate and area of agency expertise, the Advisory Council recommended that the previously approved APD be revoked and the Lease be cancelled.

On March 17, 2016, the BLM issued a decision administratively cancelling the Lease and disapproving the approved APD. ECF No. 68-1.

PROCEDURAL BACKGROUND

Solenex filed its initial Complaint in the U.S. District Court for the District of Columbia on June 28, 2013, seeking to compel agency action "unlawfully withheld or unreasonably

delayed" under the Administrative Procedure Act ("APA"), specifically 5 U.S.C. § 706(1). ECF No. 1. Solenex requested either an order compelling Defendants to immediately lift the Lease suspension or an order compelling Defendants to complete any remaining administrative action so the Lease suspension could be lifted within 30 days. *Id.*

On July 27, 2015, after summary judgment briefing, this Court ruled that Defendants' 29-year delay in ending the Lease suspension was unreasonable as a matter of law and granted summary judgment in favor of Solenex. ECF No. 52 at 2–3. In response, on March 17, 2016, Defendants issued a decision cancelling the 33-year-old Lease and disapproving the APD that had been approved for more than 23 years. ECF No. 68-1.

On April 15, 2016, Solenex moved to file an amended and supplemental complaint; the new complaint was essentially a new action, challenging final agency decisions that just been made the prior month and had not been made at the time this lawsuit was first filed. ECF No. 71. This Court granted the motion to amend, and on September 12, 2016, Solenex filed a Motion for Summary Judgment on its new claims. ECF No. 89. The Court again granted summary judgment for Solenex, this time on September 24, 2018. ECF No. 131. Finding that it need not address all arguments as to why cancellation of the Lease violated the APA, the Court held that the cancellation after approximately 30 years was arbitrary and capricious because it failed to account for the reliance interests that had accrued in the meanwhile.

Defendants and Intervenors appealed. ECF No. 133, 135. Oral argument before the D.C. Circuit was held on January 21, 2020, during which the D.C. Circuit expressed a misunderstanding that the Lease and APD operate hand in hand such that the Lease cannot exist without an APD. Transcript of Oral Argument at 5–8, *Solenex LLC v. Bernhardt*, 962 F.3d 520 (D.C. Cir., Jan. 21, 2020). On June 16, 2020, the D.C. Circuit reversed this Court's holding that

agency delay and the Interior's failure to consider Solenex's reliance were, *standing alone*, sufficient to render the cancellation and withdrawal decisions arbitrary and capricious, and remanded the case for further proceedings. *Solenex LLC*, 962 F.3d at 527.

With the time that has elapsed and with this matter again before this Court, Solenex must now challenge not only the cancellation of its Lease and APD, but other final agency actions concerning the proposed well's effects on the TCD, that left unchallenged, would continue as illegal impingements on Solenex's Lease. To bring those claims into this action and to clarify the separate claims and relief concerning the Lease and the APD, Solenex seeks to amend its complaint.

ARGUMENT

Solenex's proposed amendment, adding claims that are clearly not barred by the statute of limitations and seeking to avoid the confusion previously expressed by the D.C. Circuit concerning the interrelationship of the Lease and the APD, serves the interests of justice and is not precluded by other considerations. This amendment adds two new claims involving separate but related agency actions: (1) the Forest Service's December 3, 2014 decision that Solenex's well would have adverse effects on the entire Traditional Cultural District, and (2) the Forest Service's decision that the negative cultural impacts of drilling an exploratory well could not be mitigated. As stated above, Solenex could choose to file a new lawsuit covering these claims but including the new claims in this case is preferable and judicially efficient due to their close relation to the existing claims. This proposed amendment also addresses the D.C. Circuit's uncertainty regarding the relationship between Solenex's Lease and its APD. Solenex's Lease and APD are separate and independent of one another and, as such, cancellation or denial of the APD does not dictate cancellation of the Lease. Solenex must be permitted the right to continue

its Lease for its duration and to seek acceptable ways to develop the Lease during its term. Moreover, the Second Amended Complaint more clearly delineates between the relief requested and restructures the pleading to more clearly and fully reflect the factual background of this case and the new claims.

Amendment under Rule 15 is governed by a generous standard. "Rule 15 makes clear that when the court's leave is sought, that leave should be 'freely give[n] … when justice so requires.'" *United States ex rel. Scott v. Pac. Architects & Engineers, Inc.*, 327 F.R.D. 17, 19 (D.D.C. 2018) (quoting Fed. R. Civ. P. 15(a)(2)). Leave to amend "should be freely given unless there is a good reason … to the contrary," and denial of leave to amend constitutes an abuse of discretion "unless there is sufficient reason." *Id.* (citing *Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1003 (D.C. Cir. 1996); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)). Parties are routinely permitted to amend pleadings well after suit has been filed, including on remand. *Harris v. Secretary, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 345 (D.C. Cir. 1997)*; see also Farouki v. Petra International Banking Corp.*, No. 08-2137, 2013 WL 12309520 at *3 (D.D.C. June 12, 2013) ("An amendment can be proper after remand to the district court even if . . . the claim was presented for the first time on appeal or had not been presented to the district court in a timely fashion.") (citing *City of Columbia, MO. v. Paul N. Howard Co.*, 707 F.2d 228, 341 (8th Cir. 1983)). This is particularly true where the amendment seeks to refine claims specifically related to those issues identified by the appeals court as requiring additional proceedings on remand, and the defendant has no reason to be "surprised by unexpected claims." *Galvan v. Bexar Cnty.*, 785 F.2d 1298, 1304 (5th Cir. 1986). Furthermore, "[u]nlike when a party asks to change a scheduling order, the party seeking to amend its complaint does not have the burden to demonstrate that 'good cause exists' for the amendment."

Shea v. Clinton, 288 F.R.D. 1, 4 (D.D.C. 2012). "Instead, courts generally put the burden on the party opposing the amendment to show that there is a reason to deny leave." *Id.* As such, the standard for amendment under Rule 15 "is to be construed liberally." *Connecticut v. U.S. Dep't of the Interior*, 363 F. Supp. 3d 45, 54 (D.D.C. 2019).

The U.S. Supreme Court explained that an illiberal reading of Rule 15 would be "inconsistent with the spirit of the Federal Rules" because "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 181–82 (1962). Consequently, Rule 15's requirement that leave to amend should be freely given "is to be heeded." *Id.* at 182; *see also Howard v. Fed. Express Corp.*, 280 F. Supp. 3d 26, 29 (D.D.C. 2017). To that end, *Foman* articulated a number of factors to consider the handful of situations where leave to amend should be denied. These include "futility of amendment, undue delay, bad faith, dilatory motive, undue prejudice, or repeated failure to cure deficiencies by previous amendments." *Vasquez v. Whole Foods Mkt., Inc.*, 302 F. Supp. 3d 36, 68 (D.D.C. 2018) (citing *Boyd v. District of Columbia*, 465 F. Supp. 2d 1, 3 (D.D.C. 2006)). As explained in greater detail below, leave to amend should be granted because none of these factors are present here.

First, Solenex's proposed amendment would not be futile. A proposed amendment is considered futile if it cannot withstand a motion to dismiss. *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Solenex seeks to amend its complaint by adding two new claims that did not exist at the time the initial lawsuit was filed in 2013 and that may have been resolved by the parties

without the need for judicial determination had the reinstatement of Solenex's Lease been upheld. Solenex must bring at least one of these claims before December 3, 2020 in order to fall within the statute of limitations and, as mentioned above, Solenex prefers to bring them in this lawsuit in furtherance of judicial economy. Defendant's prior filing admits that the oldest of these decisions was made on approximately December 3, 2014, thus the claims are not time barred. *See Willoughby*, 100 F.3d at 1003 (claim was futile where untimely). Nor are there any other circumstances that would render the new claims futile—they appropriately challenge final agency actions within the purview of the APA. In addition, in response to some of the questions asked and confusion expressed by the D.C. Circuit, Solenex's proposed amended complaint seeks to provide additional details that better illustrate the separation of the decisions concerning the Lease and the APD, the Defendants' wrongdoings, and the harms stemming from those wrongdoings. The initial claims were adequate to state a claim and the additional facts supplement and clarify the claims, in no way detracting from their ability to withstand a motion to dismiss. Simply put, nothing on the face of Solenex's proposed amended complaint suggests that adding to and providing additional detail for its claims would be futile.

Amendment also does not create a risk of undue delay—it avoids greater delay. *See Connecticut*, 363 F. Supp. 3d at 55 (consideration of whether delay is undue should take into account the actions of the parties and the possibility of prejudice). The D.C. Circuit remanded for further proceedings on June 16, 2020. Following remand, new counsel has been put in place for the Defendant and the parties have been in conferral in anticipation of moving this case forward, with the first conferral occurring by telephone on October 27, 2020. Afterwards, in compliance with the Court order of November 1, 2020, counsel for all parties conferred by email from November 2, 2020 to November 25, 2020, and by telephone on November 18, 2020. Solenex is

timely adding its new claims to the case, claims that could have been avoided had this case proceeded differently. Whether through amendment or in a new action, Solenex must bring these claims now or accept the agency action as binding. Bringing the claims through an amendment rather than in a new action will create less delay as the Court and the parties will not have to wait for service of the new action, a motion to consolidate, etc. Moreover, Solenex diligently prosecuted its mandamus claim, diligently prosecuted the cancellation claims when they later arose, and now is compelled to diligently prosecute its new claims. As such, the amendment itself will cause no undue delay. Finally, Solenex could not have amended its complaint while this case was on appeal, nor would it have made sense to amend while its September 2016 Motion for Summary Judgment was pending, thus those time periods should not be considered delays caused by Solenex. *See Farouki,* 2013 WL 12309520 at *4 (noting that time case was on appeal was not delay attributable to either party).

Relatedly, and for the reasons stated above, there is no dilatory motive on behalf of the Solenex; rather, Solenex wants this matter to proceed as quickly as possible so that it can finally be resolved after over 30 years of delay. The two new claims could not have been added at the outset, as they did not exist at the time of the initial lawsuit. Moreover, Solenex hinted at but did not add these claims in 2016 because if the parties had been able to resolve the cancellation decision in a timely manner, they may also have resolved disputes over the other actions now at issue. The cancellation decisions alone involve very complex facts and legal considerations and should it have been feasible, warranted a separate proceeding and briefing; attempting to avoid potentially unnecessary claims was not dilatory.

There is likewise no cognizable argument that the proposed amendment will cause undue prejudice for Defendants. Solenex is not substantially changing its theory of the case, the new

claims it asserts are not remote from the prior claims, and there was no prior discovery that would have to be revisited as a result of Solenex's amendment. *See Scott*, 327 F.R.D. at 20–21. (a complaint may be unduly prejudicial if it "substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation"; it would "put [the opponent] to added expense and the burden of a more complicated and lengthy trial"; or it raises "issues . . . [that] are remote from the other issues in the case) (quoting *Djourabchi v. Self*, 240 F.R.D. 5, 13 (D.D.C. 2006)). Whatever prejudice Defendants may assert affects both parties and stems from the Defendants' various procedural objections, the parties' mutual exploration of settlement, the Defendants' appeal and related remand, and, most recently, work and other slow-downs related to COVID-19 and the holiday season. Further, according to Defendants' arguments, the lands at issue cannot be re-leased or otherwise developed, so Defendants suffer no actual harm from the length of this proceeding. Nor has the passage of time foreclosed any argument or evidence otherwise available to Defendants. *Dooley v. United Technologies Corp.*, 152 F.R.D. 419, 425–26 (D.D.C. 1993).

Finally, there has been no repeated failure to cure deficiencies by previous amendments. Neither of Solenex's earlier complaints were disposed on a motion to dismiss and Solenex has twice been granted summary judgment. The one amendment that has already occurred in this case was filed in direct response to the Cancellation Decision, and was plainly sufficient to allege that Defendants' actions in cancelling the Lease were unlawful. The present amendment is sought, again, not to cure any deficiencies identified by the Court in the First Amended Complaint, but in an attempt to clarify several issues raised by the DC Circuit.

CONCLUSION

For these reasons, Solenex respectfully requests the Court grant it leave to file its revised Second Amended Complaint.

DATED this 2nd day of December 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December 2020, I electronically filed the foregoing using this Court's CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and service will be accomplished by this Court's CM/ECF system.

/s/ Zhonette M. Brown
Zhonette M. Brown