

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, <i>et</i>)	
<i>al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	
TOM VILSACK, Secretary of the U.S.)	Civ. No. 1:13-cv-00639-MCA-RHS
Department of Agriculture, <i>et al.</i> ,)	
)	
Federal Defendants,)	
)	
VALLEY MEAT COMPANY, LLC, <i>et</i>)	
<i>al.</i> ,)	
)	
Defendant-Intervenors.)	

FEDERAL DEFENDANTS’ MOTION FOR LEAVE TO FILE SURREPLY
[EXPEDITED CONSIDERATION REQUESTED]

Pursuant to D.N.M.LR-Civ. 7.4(b), Federal Defendants hereby respectfully request that the Court grant Federal Defendants leave to file a surreply, by 5 p.m. Monday, August 26, 2013, to Plaintiffs’ August 22, 2013 “Reply in Support of Motion to Modify the Temporary Restraining Order and Objection to Magistrate’s Order Requiring Injunction Bond,” ECF No. 126.¹ A surreply is necessary to respond to Plaintiffs’ numerous accusations that Federal Defendants and the United States have acted in bad faith in opposing Plaintiffs’ motion to modify the temporary restraining order and objections to Magistrate Judge Scott’s imposition of

¹ Counsel for the United States has been tied up with an emergency motion for a stay pending appeal in a Ninth Circuit matter and with numerous other pressing matters in another District of New Mexico case (including a motion due today), and has not had an opportunity to prepare the actual surreply.

a bond requirement pursuant to Federal Rule of Civil Procedure 65(c). Plaintiffs' reply brief makes such assertions as:

"Defendants' contradictory arguments (against and in favor of being enjoined) lay bare the fact that the only reason the defendants want to hold onto this crushing bond is to pressure Plaintiffs to drop their case, despite having demonstrated to this Court their likelihood of success." ECF No. 126 at 1.

"The testy responses filed with the Court are telling, and confirm that the defendants are exploiting the Court's order and abusing the bonding provisions to squelch public interest litigation – something every Circuit has repeatedly warned against." ECF No. 126 at 1.

"Even accounting for the substantial financial resources of one of the Plaintiffs here, the roughly \$500,000 a month bond ordered by the Magistrate [sic] will not be sustainable, will divert funds from the important animal rescue and sheltering mission of the Plaintiffs, and will ultimately deter this and other public interest cases challenging federal agency abuses – *exactly the result the federal defendants are hoping for.*" ECF No. 126 at 2.

"It is unclear why, except to deter this and other public interest cases, the federal defendants even responded to this motion. It seeks no relief against them and does not affect them financially, nor does it affect the pending injunction against them. The only available answer – that they are using the bond issue as an opportunity to suppress this and other public interest challenges to federal government conduct – is clear, and troubling." ECF No. 126 at 2 n.2.

"Now the defendants claim the very opposite – that the Court's injunction must, as a matter of law, encompass non-federal parties who were not even sued. This bizarre and opportunistic request – defendants pleading with the Court to enjoin them in a manner they begged the Court not to do earlier this month – is gamesmanship that should not be countenanced by the Court." ECF No. 126 at 2.

"The reason for this sudden change of heart by the defendants is clear – a broad injunction against non-federal parties is necessary to sustain the massive injunction bond, which they hope will price Plaintiffs out of this public interest case." ECF No. 126 at 3.

"The federal defendants' brief also makes clear their efforts to use the injunction bond as a weapon." ECF No. 126 at 4.

"Yet they filed a lengthy opposition brief because they see the \$495,000 bond as an opportunity to cut this case short and deter future public interest litigants from challenging gross federal legal violations." ECF No. 126 at 4.

“The federal defendants’ opportunistic use of the bonding provision will no doubt be coupled with additional attempts to slow this case down, and price Plaintiffs out of litigating this matter entirely.” ECF No. 126 at 4 n.3.

“Thus, it could not be more clear that federal defendants’ sudden protestations in favor of a bond is nothing more than a naked effort to subvert the bond provisions of FRCP 65 and insulate the federal government from judicial review.” ECF No. 126 at 4.

“Thus, contrary to defendants’ claims, this is a case where the \$500,000 bond will ‘impede [Plaintiffs’] access to judicial review,’ preclude a final decision on the merits, and get the federal defendants off the hook for ignoring their NEPA obligations. * * * This is their obvious intent.” ECF No. 126 at 5 (citations omitted).

“The bond ruling here sets a terrible precedent and represents an unmistakable message from the United States Government that it is more than willing to deploy the threat of a bond to deter litigation and deprive public interest litigants of their day in court.” ECF No. 126 at 6.

All of these accusations are unfounded and untrue, and easily refuted. Since the sole focus of Plaintiffs’ reply brief is to make new accusations that attack the motivations and integrity of the United States, Federal Defendants should be afforded an opportunity to set the record straight by filing a surreply. The United States’ interest is in seeking justice and ensuring that the law is properly and consistently applied, including the law governing the proper scope of NEPA injunctions and the requirement for surety bonds in “public interest” cases. There is no agenda to limit access to courts. A surreply would assist the Court in clarifying these matters.

FOR THE FOREGOING REASONS, Federal Defendants respectfully request that the Court grant Federal Defendants leave to file a surreply. In accordance with D.N.M.LR-Civ. 7.1(a), Federal Defendants have contacted Plaintiffs and Plaintiff-Intervenor New Mexico, through counsel of record, to determine whether this motion is opposed and to make a good-faith request for concurrence. Counsel for Plaintiffs and Plaintiff-Intervenor indicated that they oppose this motion.

Respectfully submitted this 23rd day of August, 2013.

ROBERT G. DREHER
Acting Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

/s/ Andrew A. Smith
ANDREW A. SMITH (NM Bar 8341)
Senior Trial Attorney
c/o United States Attorneys Office
201 Third Street, N.W., Suite 900
P.O. Box 607
Albuquerque, New Mexico 87103
Telephone: (505) 224-1468
Facsimile: (505) 346-7205
Andrew.Smith@usdoj.gov

ALISON D. GARNER (DC Bar 983858)
Trial Attorney
P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 514-2855
Facsimile: (202) 305-0506
Alison.Garner@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2013, I filed through the United States District Court ECF System the foregoing document to be served by CM/ECF electronic filing on all counsel of record.

/s/Andrew A. Smith
ANDREW A. SMITH
U.S. Department of Justice