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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

FRONT RANGE EQUINE RESCUE, et al.,

Plaintiffs,

and

STATE OF NEW MEXICO

Plaintiff-Intervenor,

v.

TOM VILSACK, Secretary U.S. Department
of Agriculture, *et al.*,

Federal Defendants,

and

VALLEY MEAT COMPANY, et al.,

Defendant-Intervenors,

and

**INTERNATIONAL EQUINE BUSINESS
ASSOCIATION, et al.**,

Defendant-Intervenors.

No. 1:13-cv-00639-MCA-RHS

**DEFENDANT-INTERVENORS'
JOINT MOTION TO COMPLY
WITH THE COURT'S
SCHEDULING ORDER DATED
AUGUST 29, 2013**

COME NOW Defendant-Intervenors International Equine Business Association et al, Responsible Transportation L.L.C., Confederated Tribes and Bands of the Yakima Nation, Rains National Meats, Chevaline LLC and Valley Meats (collectively “Defendant-Intervenors”) and hereby move to strike (1) those propositions and references in Plaintiffs and Plaintiff-Intervenors Opening Briefs that are outside the Administrative Record filed by the United States Defendants and (2) require both Plaintiffs and Plaintiff-Intervenors to comply with this Court’s Scheduling Order dated August 29, 2013, mandating compliance with the precedent established in Olenhouse v. Commodity Credit Corporation, 42 F.3d 1560, 1580 (10th Cir. 1984), specifically by providing a “Statement of the Issues Presented” as required 10. Cir. R. 28(a)(5). In support of this Motion, Defendant-Intervenors state as follows:

I. THE TENTH CIRCUIT PROHIBITS USE OF EXTRA-RECORD STATEMENTS AND CITATIONS IN THIS CASE.

A. Legal Standard

Judicial review of an agency’s final action is conducted under the Administrative Procedure Act (“APA”), 5 U.S.C. § 703-706, wherein a court may “set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” 5 U.S.C. § 706(2)(A). The Supreme Court has long held a court’s review of a federal agency administrative decision is limited to the agency administrative record. Florida Power and light v. Lorior, 460 U.S. 729, 743-44 (1985). The court’s review entails a searching and careful de novo review of the administrative record to determine whether the decision was based on a consideration of the relevant factors and whether

there has been a clear error of judgment. Downer v. United States, 97 F.3d 999, 1002 (8th Cir. 1995) (quoting Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989)). A court's review is limited to the administrative record before the agency at the time the agency decision was made. 5 U.S.C. § 706. In the Tenth Circuit, the court's review should be processed as an appeal based on the appellate record and with few exceptions, the court cannot rely on evidence outside that record.

Ctr. For Native Ecosystems v. U.S. Fish & Wildlife Serv., 795 F. Supp. 2d 1199, 1201 (D. Colo. 2011). The focus of the Court's narrow review is the administrative record already in existence, not some new record made initially before the court. Camp v. Pitts, 411 U.S. 138, 142 (1973); Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir.1994)¹.

B. Plaintiffs and Plaintiff-Intervenors Opening Briefs Violate this Standard

Despite this Court's Order dated August 13, 2013, ruling that the parties would follow the Olenhouse briefing requirements related to their proffered Opening Briefs, (see Scheduling Order at ¶ 6), both Plaintiffs and Plaintiff-Intervenors September 12, 2013 "Opening Briefs on the Merits," cite extensively to extra record evidence including affidavits, press releases, and other evidence that is not part of the Administrative Record and which was not developed until after

¹ While Movant would note that the Ninth Circuit has offered four limited exceptions to the requirement that a court's review be limited to the administrative record before the agency at the time the decision is made, none of those exceptions have been cited by Plaintiffs and Plaintiff-Intervenors in this case. Rather Plaintiffs and Plaintiff-Intervenors simply include extra record statements and citations with no legal authority for their inclusion at all.

the Administrative Record in this case was completed. Although not an exhaustive list of these violations, Plaintiffs' brief includes:

--Number of citations to declarations/affidavits that are not part of the Administrative Record: 24 (excluding citations in footnote 14 which seem to relate to the standing of the Plaintiffs)

--Number of citations to press releases that are not part of the Administrative Record: 2

--Number of citations to local administrative reviews that are not part of the Administrative Record: 4

Plaintiffs have cited to no authority which would allow this court to consider such extra-record evidence particularly that which was developed or prepared after the Administrative Record was completed, thus these citations and the propositions for which they stand should be stricken.

Plaintiff-Intervenors' Opening Brief fares no better than does Plaintiffs' Opening Brief on the Merits at complying with the Olenhouse prohibition related to considering extra-record evidence. Plaintiff-Intervenors' brief includes:

---Number of citations to declarations/affidavits that are not part of the Administrative Record: 11

--Number of citations to press releases that are not part of the Administrative Record: 7

--Number of citations to local administrative reviews that are not part of the Administrative Record: 1

As with Plaintiffs, Plaintiff-Intervenors have cited no authority which would allow this court to consider extra-record evidence, thus these citations and the propositions for which they stand should be stricken.

II. PLAINTIFFS AND PLAINTIFF-INTERVENOR'S OPENING BRIEFS FAIL TO FOLLOW THE TENTH CIRCUIT RULES BY FAILING TO LIST THE ISSUES PRESENTED AND CERTIFY THE LENGTH OF THEIR BRIEFS.

As the Joint Defendant-Intervenors have noted, the Court's August 29, 2013 Scheduling Order requires compliance with the Olenhouse requirements that Opening Briefs follow the Tenth Circuit Court Appeal rules. These rules require the Appellant's (Opening) brief to include, "a statement of the issues presented for review." 10. Cir. R. 28(a)(5). The purpose of this requirement is to notify the court of the exact issues under review and to assist the Tenth Circuit Court, on appeal, in determining what issues have not been fully and adequately raised before the Court below. See Bronson v. Swensen, 500 F.3d 1099, 1104 (10th Cir.2007) ("[T]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue."); Moore v. Astrue, 491 F. App'x 921, 923 (10th Cir. 2012). The Tenth Circuit Court requires compliance with this requirement in all cases, including those in which the Appellant is proceeding pro se. See e.g., Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir.2005); CitiFinancial Mortgage Co., Inc. v. Frasure, 327 F. App'x 49, 51 (10th Cir. 2009).

In this case, neither Plaintiffs nor Plaintiff-Intervenors have included a section in their brief which outlines the issues presented by their appeal. Without this section, the responding parties and the Court are seriously prejudiced by not knowing the precise legal issue challenged and the breath of that challenge. Additionally, because it is likely that this court's ruling will be

appealed to the Tenth Circuit, Plaintiffs and Plaintiff-Intervenors should be required to present their specific issues to this Court in the correct format to aid the Appellate Court in determining the breath of its judicial review. Thus, Plaintiffs and Plaintiff-Intervenors should be required to present to this Court a “statement of the issues presented for review” as required by the Tenth Circuit Court rules and this Court’s Scheduling order.

Finally, the Tenth Circuit Court rules also place s specific page limitation on opening briefs. The rules specifically state that the length of the Opening Brief is limited to 30 pages or 14,000 words. 10.Cir. R. 32(a)(7). There is no certification from either the Plaintiffs of Plaintiff-Intervenors of compliance with that requirement. Such certification should be provided.

Counsel for Defendant-Intervenors have contracted counsel for Defendants, Plaintiffs and Plaintiff-Intervenors. Counsel for Defendants does not oppose this Motion; counsel for Plaintiffs opposes this Motion; counsel for Plaintiff-Intervenors opposes this Motion.

WHEREFORE, Defendant-Intervenors respectfully request that this Court order that all propositions and citations in Plaintiffs and Plaintiff-Intervenors brief which are outside the Administrative Record be stricken. Additionally, Defendant-Intervenors respectfully request that this Court order Plaintiffs and Plaintiff-Intervenors to provide to the Court and parties a “statement of the issues presented” and a certification that their opening briefs have not exceeded the page limits required by the Tenth Circuit Court rules. Defendant-Intervenors also request an expedited ruling on this Motion.

RESPECTFULLY SUBMITTED this 18th day of September, 2013.

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CERTIFICATE OF SERVICE

I certify that I filed the foregoing document on September 18, 2013, using the ECF System, which will send notification to all parties of record.

/s/Karen Budd-Falen
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