UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, THE HUMANE SOCIETY OF THE UNITED STATES, MARIN HUMANE SOCIETY, HORSES FOR LIFE FOUNDATION, RETURN TO FREEDOM, RAMONA CORDOVA, KRYSTLE SMITH, CASSIE GROSS, DEBORAH TRAHAN, and BARBARA SINK, Plaintiffs, v. TOM VILSACK, Secretary U.S. Department of Agriculture; ELIZABETH A. HAGEN, Under Secretary for Food Safety, U.S. Department of Agriculture; and ALFRED A. ALMANZA, Administrator, Food Safety and Inspection Service, U.S. Department of Agriculture, Defendants.	Civil No. 1:13-CV-00639--MCA-RHS

OPPOSITION TO DEFENDANTS' NOTICE OF RELATED CASES AND MOTION TO TRANSFER

Plaintiffs oppose Defendants' "Notice of Related Cases and Motion to Transfer" [Dkt. No. 39] (the "Transfer Motion"),[1] because any transfer is entirely unnecessary and a waste of the Court's resources. The case Defendants seek to relate this case to is, by Defendants' own admission, entirely moot. Indeed, Defendants have a pending motion to dismiss that case, in which they argue that the court has *no subject matter jurisdiction*; specifically, because

[1] *Valley Meat Company, LLC, v. Tom Vilsack, Secretary, U.S. Department of Agriculture, et al.*, Civil No. 2:12-cv-01083-JCH-CG ("*Valley Meat*"), and *Front Range Equine Rescue, et al. v. Tom Vilsack, Secretary, U.S. Department of Agriculture, et al.*, Civil No. 1:13-cv-00639-MCA-RHS ("*Front Range*"). Plaintiffs are filing this opposition in both Courts, as Defendants filed their Transfer Motion in both Courts.

Defendants answered Valley Meat Company, LLC's ("Valley Meat") application for inspection, "any claim that the agency has failed to respond to the application in timely fashion is rendered moot." *Valley Meat*, Dkt. 27, p. 5. Despite this representation to Judge Herrera, Defendants now claim in this Court that there is some risk of "inconsistent rulings" on the merits between this case and a case in which there is no Article III jurisdiction.

Contrary to Defendants' claims, denying this motion does not present any chance of inconsistent rulings, nor would transfer effect any judicial economy for the Courts. In addition to the fact that there will be no substantive briefing in *Valley Meat* because it has been rendered entirely moot, there are fundamental differences between the cases that counsel against joint disposition. *Valley Meat* concerns a single slaughterhouse owner's action to compel a *decision* on his permit application, which he contends was unreasonably delayed. *Front Range* presents a nationally significant question: whether the United States Department of Agriculture ("USDA") can restart horse slaughter without conducting either an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). With regard to the unreasonable delay claim presented in *Valley Meat*, that claim became moot the moment that Defendants answered Valley Meat's application. *See Franks v. Salazar*, 816 F. Supp. 2d 49, 56 (D.D.C. 2011) (claims challenging agency delay in processing permit applications are moot once the applications have been processed). Since all available relief has already been provided in *Valley Meat*, there is literally zero chance of conflicting merits decisions in these cases, and simply nothing left to litigate as to the merits of the *Valley Meat* case.

Because Plaintiffs in this action have a pending motion for emergency injunctive relief, they respectfully request that Defendants' unauthorized Transfer Motion be denied, so that the parties can focus on the prompt resolution of the pending preliminary injunction motion, rather

than adding administrative burden to the courts and unnecessarily transferring this matter because Defendants feel like it.

DISCUSSION

I. There is No Legal Support for Defendants' Motion.

Defendants filed this Transfer Motion on July 12, 2013, after all parties had consented on July 9 (pursuant to Defendants' motion to dismiss or transfer venue) to voluntarily transfer *Front Range* from the Northern District of California to this Court. In other words, Defendants did not like the first court in which this case was filed, and Plaintiffs consented to transfer the action rather than spend precious time litigating over the motion to transfer. The stipulation signed by the parties underscored that time was of the essence, and the parties requested transfer as soon as possible to address their time-sensitive dispute. *See Front Range*, Dkt. 30, ¶¶ 3-4 ("mutually agreed need for an expedited hearing on the matter," and requesting "that the matter [ ] be transferred as soon as possible").

Having initiated the move of this case from one court to another, Defendants now want to move it again, for reasons that are entirely unclear. Indeed, as Defendants' papers make clear, if a party decides it does not like the judge hearing its case in the District of New Mexico, there is no such thing as a "motion to transfer" to another judge, nor is there any "related case" motion practice. *Front Range*, Dkt. 39, p. 6 (noting that "the District of New Mexico local rules do not include a related cases rule"). Defendants instead point only to local rules from the Northern District of California, a venue which, ironically, Defendants insisted was improper for this very case. In further contravention of this Court's rules, Defendants' Transfer Motion does not cite to any relevant "authority in support of the legal positions advanced," as required by Local Civil

Rule 7.3, and constitutes nothing more than a second attempt to change the sitting judge in this case. It is a request that should not be countenanced by the Court.

II. The *Valley Meat* Case is Moot, There is No Chance of Conflicting Rulings, and There is No Economy in Transfer.

Valley Meat is no longer a live controversy within the meaning of Article III, and the *Front Range* case is not related in the legal sense, as it has a completely different scope and posture from the *Valley Meat* case. *Valley Meat* involves only a single plaintiff suing the USDA, for the USDA's alleged past unreasonable delay in issuing a decision on one facility's application for inspection to begin slaughter. As Defendants note, because the agency has now made its decision, Defendants rightly moved to dismiss the case because it is moot and the initial court has no subject matter jurisdiction over it. *Valley Meat*, Dkt. 27. Thus, according to Defendants' own arguments, the *Valley Meat* court no longer has any ability to make substantive rulings in the case – conflicting or otherwise.

As Defendants admit, the *Front Range* case seeks to ensure that the USDA conducts environmental review under NEPA for nationally significant agency decisions -- not to determine whether an answer to Valley Meat's application for inspection was timely.[2] Whether there was delay in making a decision on one particular application for inspection is not only entirely moot at this point, but it is also irrelevant to the claims presented in *Front Range* that Defendants have violated NEPA.

In contrast to the narrow scope and posture of the *Valley Meat* case, the *Front Range* case challenges Defendants' national program approving horse slaughter, creating a new national equine residue testing program, and causing nationwide environmental and other effects. *Front*

[2] *See* USDA, *Constituent Update on Equine Slaughter Inspection* (Jul. 12, 2013), http://www.fsis.usda.gov/wps/portal/fsis/newsroom/meetings/newsletters/constituent-updates/archive/2013/ConstUpdate071213 ("Constituent Update").

Range, Dkt. 1, ¶¶ 2, 5-10. Defendants' Transfer Motion attempts to cabin the actual scope of the *Front Range* complaint by arguing that the complaint "plainly focus[es] on" Valley Meat's grant of inspection. *Front Range*, Dkt. 39, p. 2, n. 2. But this misses the point of *Front Range* as well as *Valley Meat*. *Front Range* addresses the national program, which was first indicated by the *government's action* in granting inspection. *Valley Meat* was and is only about whether or not the agency unreasonably delayed in providing an answer to one application for inspection. Despite Valley Meat's bizarre threats to seek damages, the case is plainly over, and that Court lacks Article III jurisdiction to do anything but dismiss it.

While Valley Meat happened to be the first plant to receive a grant of inspection, Plaintiffs' claims in *Front Range* focus on the likely increasing number of inspections authorized by Defendants nationwide, as well as the national residue plan, which is mentioned throughout the complaint. *Front Range*, Dkt. 1, ¶¶ 2, 5-10, 143-46, 164-66. The singular question of whether an answer to Valley Meat's application was unreasonably delayed is simply not germane to -- let alone in any way dispositive of -- the merits of Plaintiffs' claims that major federal actions were taken without the required NEPA review. *Front Range* challenges multiple agency actions, of a nationwide scope, that go far beyond the grant of inspection to Valley Meat, and the claims in the two cases are in no way interdependent or legally related.

Given the scope and posture of the two proceedings, there is no risk of inconsistent rulings by separate courts. Defendants falsely frame the potential inconsistency between *Front Range* and *Valley Meat* as one in which Defendants could be required to "simultaneously issue and not issue a grant of inspection." *Front Range*, Dkt. No. 39, p. 6. This contention misses the fact that compelling Defendants to "grant" the Valley Meat application, as opposed to compelling Defendants to "answer" it, was *never* an option for the Court in the *Valley Meat* case.

See, e.g., In re Am. Rivers & Idaho Rivers United, 372 F.3d 413, 419 (D.C. Cir. 2004) (when petitioners claim an agency unreasonably delays answering their petition, courts "are not concerned here with what answer [the agency] might ultimately give the petitioners; rather, [they] are reviewing its failure to give them *any* answer . . ."); *Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 34-36 (D.C. Cir. 1984) (declining to decide, "in the first instance," the merits of a citizen petition that had not been answered for two years, and remanding for a determination of whether the agency had unreasonably delayed in answering). And the current facts are even more dispositive, because the grant of inspection *has already been issued, by Defendants, not the Court* – and so there is no possible factual inconsistency.[3]

The question before the *Front Range* Court – which exists regardless of and independent from the prior case -- is whether environmental review should be undertaken before a national program of horse slaughter starts or continues. At present, a national horse slaughter residue testing plan has been implemented, two plants have been granted inspection, another plant may be approved soon (according to USDA itself)[4], and several other applications for inspection are pending. Only one of these agency actions involves Valley Meat.

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[3] Defendants claim their grant of inspection would be "diametrically [ ] opposed" to a later judicial opinion that NEPA review is required. *Front Range*, Dkt. 39, p. 6. But it is well established that there is no inconsistency in requiring a federal agency to conduct NEPA review, and *then* make its decisions once that review is done. Defendants have presented the Court with an entirely false dichotomy between granting inspection and granting inspection after carrying out their legal duties under NEPA. *See, e.g., Utah Envtl. Cong. v. Richmond*, 483 F.3d 1127, 1140 (10th Cir. 2007) ("As long as the Forest Service complied with the NEPA's procedural requirements, we will not second-guess the wisdom of the ultimate decision.") (internal quotation omitted).

[4] *See* Constituent Update, *supra* n. 2 (Defendants "expect[] to issue a grant soon" to another horse slaughter facility in Gallatin, Missouri); Charles D. Brunt, *Valley Meat Suit Now in N.M. Court*, Albuquerque Journal, July 13, 2013, http://www.abqjournal.com/main/220700/news/valley-meat-suit-now-in-nm-court.html (USDA spokeswoman declines to state which horse slaughter applicant will be granted inspection next).

Nor is this a case where one judge has made a substantive investment in the issues, such that transfer would serve judicial economy. Since *Valley Meat* was filed on October 19, 2012, there have been no substantive rulings or hearings in the *Valley Meat* case. Defendants obtained three extensions of time to respond and, on June 28, 2013, undertook the action that case sought to compel – *i.e.*, an *answer* to the application for inspection – and filed their motion to dismiss for lack of subject matter jurisdiction. *Valley Meat*, Dkt. 27. Therefore, there will be no judicial time or resources savings in transferring the *Front Range* case. Nor will it serve any other purpose, except perhaps Defendants' desire to change judges for a second time.

Finally, since no compelling reason exists to transfer *Front Range* to another courtroom, this Court should exercise its discretion to deny the Transfer Motion as a guard against any appearance of judge shopping. It is beyond question that "[w]here judge shopping has been found to exist, the district court has the authority to act to preserve the integrity and control of its docket." *Steward v. Dow Corning Corp.*, 92-1105-K, 1992 WL 75195, at *1 (D. Kan. Mar. 13, 1992) (citing *Span–Eng Associates v. Weidner,* 771 F.2d 464, 470 (10th Cir. 1985)). Denying the Transfer Motion will not only allow the *Front Range* case to move forward more expeditiously – as is necessary given the impending July 29 commencement of horse slaughter – but it will also discourage parties from seeking a transfer when they lack compelling circumstances for their request.

CONCLUSION

For the reasons and authority set out above, there is no legal or factual justification supporting the Transfer Motion. There is no risk of inconsistent opinions, and no judicial economy will result from transfer. This is a time-sensitive matter, and no efficiency will be served by transferring this action to a judge who has no real duties left in the case except to

dismiss the unrelated *Valley Meat* action as moot. Plaintiffs therefore respectfully request that Defendants' Transfer Motion be denied.

Respectfully submitted this 14th day of July 2013.

/s/ Bruce A. Wagman
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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 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/ Bruce A. Wagman
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