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,

VALLEY MEAT COMPANY, LLC,

Defendant/Intervenor.

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

MEMORANDUM OF LAW IN SUPPORT OF THE STATE OF NEW MEXICO'S MOTION TO INTERVENE

I. INTRODUCTION

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the State of New Mexico ("New Mexico") seeks to intervene in the above-captioned action. New Mexico's interests, which may be impaired by the outcome of this litigation, in combination with the absence of adequate representation by the current parties, provide solid grounds for New Mexico's

intervention as of right. In the alternative, the Court should permit New Mexico to permissively intervene because New Mexico has legal rights and claims that share common questions of fact and law with the main action. New Mexico's entry into this action will not in any way delay or unreasonably multiply the proceedings or unduly increase the Court's burden in adjudicating this matter. Accordingly, the Court should grant New Mexico leave to intervene so it may participate in this action and ensure that its interests are sufficiently protected.

II. PROCEDURAL AND FACTUAL BACKGROUND

Prior to the filing of this action, Defendant/Intervenor Valley Meat Company, LLC operated a cattle-slaughtering plant in Roswell, New Mexico. Dkt. No. 1 (Complaint), ¶¶ 7, 14, 140. During the course of its operations, Valley Meat was found in violation of New Mexico's environmental laws, and fined $86,400.00 by the New Mexico Solid Waste Board in 2012. Dkt. No. 1, ¶ 14.

In an amendment to the 2006 Agricultural Appropriations Act, Congress had withdrawn funding for the inspection of horses intended for slaughter, effectively ending horse slaughter for human consumption in the United States. Dkt. No. 1, ¶ 131. In *Humane Society of the United States v. Johanns*, 520 F. Supp. 2d 8, 13 (D.D.C. 2007), Humane Society of the United States sued USDA, alleging that formal review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, was required before horse slaughter operations could begin anew, based on the significant environmental impacts of those operations. *Id*. at 19-20. The court agreed, and permanently enjoined USDA from inspecting new horse slaughter facilities without first undertaking proper NEPA review. *Id*. at 38; Dkt. No.1, ¶ 133.

In November 2011, Congress reinstated funding for USDA inspections of horse slaughter facilities. Dkt. No. 1, ¶ 134. On March 15, 2013, Valley Meat filed an application with USDA to modify its grant of inspection so that it could begin slaughtering horses for commercial food

production. Dkt. No. 22 (Defendants' Motion to Dismiss or Transfer) at 5. In late June 2013, USDA approved Valley's Meat application. Dkt. No. 22 at 5. USDA failed to prepare an environmental impact statement or environmental assessment, in violation of NEPA, prior to granting inspection to Valley Meat and other horse slaughter plants and prior to adopting and implementing a new residue testing plan applicable to those horse slaughter plants. Dkt. No. 1, ¶¶ 8, 9, 143-53. USDA refused to prepare an environmental impact statement or environmental assessment on the ground that Valley Meat's and other companies' new horse slaughter operations would not have a significant environmental effect. *Id.* ¶¶ 104-06. USDA's inspection of Valley Meat's horse slaughter plant may now occur as early as August 5, 2013. Dkt. No. 44, at 2.

New Mexico now files this motion to intervene as of right, or in the alternative permissively, on the grounds that it has a direct and substantial interest in the outcome of the instant action, as explained below.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 24(a)(2) provides that intervention must be allowed if a proposed intervenor

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Id.

Under Rule 24(a), an applicant may intervene as a matter of right if "(1) the application is timely, (2) the applicant claims an interest relating to the property or transaction which is the subject of the action, (3) the applicant's interest may be impaired or impeded, and (4) the applicant's interest is not adequately represented by existing parties." *Elliot Indus., Ltd. P'ship. v. Am.*

Prod. Co., 407 F.3d 1091, 1103 (10th Cir. 2005)). "The Tenth Circuit generally follows a liberal view in allowing intervention under Rule 24(a)." *Id.*

In the alternative, Federal Rule of Civil Procedure 24(b) provides that a court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of fact or law." *Id.* Thus, to permissively intervene in the case the movant must establish that "(i) the application to intervene is timely; (ii) the applicant's claim or defense and the main action have a question of law or fact in common; and (iii) intervention will not unduly delay or prejudice the adjudication of the original parties' rights." *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 245 (D.N.M. 2008) (citation omitted). New Mexico satisfies the requirements under both subsections of Rule 24.

IV. ARGUMENT

A. NEW MEXICO SHOULD BE PERMITTED TO INTERVENE AS OF RIGHT

1. The Instant Motion is Timely

"The timeliness of a motion to intervene is assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) (quotations omitted).

This action was filed just two-and-a-half weeks ago. *See* Dkt. No. 1. Defendants' and Defendant/Intervenor's responsive pleadings are not yet due. The Court has imposed a scheduling order that specifically contemplates requests by other parties to intervene, *see* Dkt. No. 44 at 2, prior to the completion of briefing and hearing on Plaintiffs' motion for a temporary restraining order and preliminary injunction. As such, New Mexico's motion is timely and there can be no prejudice to existing parties due to the timing of this motion.

2. New Mexico Has Significant Interests at Stake in this Litigation

A party seeking to intervene "must claim . . . an interest relating to the property or transaction which is the subject of the action." *Utah Ass'n of Counties*, 255 F.3d at 1251 (citing Fed. R. Civ. P. 24(a)(2)). "The applicant must have an interest that could be adversely affected by litigation," and "practical judgment must be applied in determining whether the strength of the interest and the potential risk of injury to that interest justify intervention." *San Juan County v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2011). New Mexico has tangible interests in the subject matter at issue in this litigation that will not be adequately protected absent its intervention.

a. New Mexico's Interest in Preventing Environmental and Public Health Harms Associated with Horse Slaughter Waste Disposal and Other Operations

A State's interest in seeing its laws applied constitutes a sufficient interest for purposes of Rule 24(a). *See Sierra Club v. City of San Antonio*, 115 F.3d 311, 315 (5th Cir. 1997) (holding the State of Texas has an "important sovereign interest in protecting the self-governing authority" under its state law).

New Mexico has a legal interest in its sovereign right to regulate land, air and water quality within its borders within the parameters of federal law. The impacts of Valley Meat's proposed horse slaughter operation, particularly its disposal of carcasses and other wastes, on the environment and public health are subject to regulation by the New Mexico Environment Department and the New Mexico Department of Health. Moreover, federal laws, such as the Clean Water Act and the Clean Air Act, allow states to regulate and enforce their own environmental quality programs, so long as such programs are approved by the federal government. *See* 33 U.S.C. § 1313; 42 U.S.C. § 7410. The State has a recognized interest in seeing that commercial operations within its borders are conducted in a safe and environmentally

responsible manner. This is particularly true for an enterprise that has violated environmental regulations in the past. New Mexico also has significant interests at stake in this litigation related to threatened and endangered species living in the vicinity of Valley Meat's contemplated horse slaughter operation. Dkt. No. 1, ¶¶ 154-60. New Mexico's interests are federally recognized as "broad trustee and police powers over wild animals" living within its borders. *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976).

New Mexico's regulation of the environmental and health effects of commercial activities such as Valley Meat's contemplated horse slaughter plant would be affected by an adverse decision in this case. *See, e.g.*, *City of San Antonio*, 115 F.3d at 315; *see also Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (Intervention for State of Texas proper because adverse decision would interfere with State's ability to manage and regulate agricultural water use). Among other consequences, an adverse decision could force New Mexico to devote significant resources to enforcing environmental quality and public health laws with respect to an untested new industry or else face exposure to serious environmental or public health risks.

b. ***New Mexico's Interest in Preventing the Manufacture, Sale or Delivery of Adulterated Food***

The New Mexico Food Act provides that "a food shall be deemed to be adulterated … if it bears or contains any poisonous or deleterious substance which may render it injurious to health…". NMSA 1978, § 25-2-10(A)(1) (1965). Scientific studies and the Food and Drug Administration have concluded that chemicals commonly used to treat horses in the United States are "deleterious" and "injurious to health" within the definition of the Act. Horse meat originating from U.S. horses that have been treated with such chemicals would be deemed "adulterated" under New Mexico law. The New Mexico Food Act further provides that "[t]he following acts and the causing thereof within the state of New Mexico are hereby prohibited: the manufacture, sale or delivery, holding or offering for sale of any food that is adulterated or

misbranded." NMSA 1978, § 25-2-39(A) (1951). The New Mexico Food Act applies by its terms to the "manufacture" of food in New Mexico regardless of where the food is ultimately sold or consumed. Therefore, commercial horse slaughter operations in New Mexico that manufacture horse meat for consumption as "food" by humans or animals are likely unlawful. New Mexico has a unique interest in ensuring that no commercial horse slaughter operations take place within its borders that violate state law.

c. ***New Mexico's Interest in Avoiding Economic Losses Attributable to Horse Slaughter***

"The threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest" to intervene. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002). The prospect that USDA will imminently authorize Valley Meat's horse slaughter operations in New Mexico may expose New Mexico to a variety of injuries, including, for example, substantial additional regulatory costs of ensuring that Valley Meat's operations do not endanger the local water supply or the health of area residents. If Valley Meat becomes the first or one of the first plants in the United States in many years authorized to kill horses for food manufacture, it is also likely that at least some consumers will avoid other meat products from New Mexico. The prospect of USDA permitting the manufacture of adulterated foods within New Mexico's borders thus threatens the market for New Mexico's existing businesses, particularly the beef industry. This concern is not speculative, as shown by recent disruptions to the European market for beef products following the discovery of product adulteration. *See, e.g., Horsemeat Scandal: Supermarkets Battle to Regain Trust*, The Telegraph, Feb. 16, 2013, available at http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9875236/Horse-meat-scandal-Supermarkets-battle-to-regain-trust.html (visited July 19, 2013).

The State should be granted intervention as of right to protect any one or all of these important interests.

3. Disposition Of This Action As A Practical Matter May Impair Or Impede New Mexico's Interests

"To satisfy [the impairment] element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied. This burden is minimal." *Utah Ass'n of Counties*, 255 F.3d at 1253 (emphasis added); *see also Forest Guardians v. Bureau of Land Management*, 188 F.R.D. 389, 395 (D.N.M. 1999) ("Under this element of Rule 24(a) … the court may consider any significant legal effect in the applicant's interest.").

New Mexico easily satisfies this test. First, if Defendants prevail in this action, the interests detailed above – including public health, environmental and economic interests – would be compromised. In addition, whether horse meat that is not sufficiently screened, and likely adulterated, is permitted to enter the food supply will be affected by this litigation. This showing is sufficient to meet the third prong of the test for intervention as of right.

4. Absence of Adequate Representation

Finally, a would-be intervenor must show "the *possibility* that representation may be inadequate." *WildEarth Guardians v. National Park Service*, 604 F.3d 1192, 1198 (10th Cir. 2010) (emphasis added). "The possibility that the interests of the applicant and the parties may diverge need not be great in order to satisfy this minimal burden." *Id.*

New Mexico is not adequately represented by the existing parties in this lawsuit. While New Mexico and Plaintiffs share the same ultimate objective of seeing the required environmental impact statement or environmental assessment performed before USDA grants approval to Valley Meat or any other company to begin commercial horse slaughter, their interests are not identical. Plaintiffs have no particular interest in ensuring that commercial

activities within New Mexico's borders comply with the multiple regulatory schemes of the various states agencies charged with protecting the state's environment and health. While Plaintiffs share New Mexico's concern about the dangers that horsemeat poses to consumers, Plaintiffs do not possess New Mexico's unique regulatory interest in enforcing the New Mexico Food Act's ban on adulterated foods. Plaintiffs likewise have not articulated any specific interest in ensuring that New Mexico avoids economic losses associated with commercial horse slaughter. Conversely, New Mexico lacks Plaintiffs' interest as a petitioner in the USDA rulemaking process regarding horse slaughter. This difference in interest is sufficient to establish the fourth prong of the test for intervention as of right.

B. ALTERNATIVELY, THE COURT SHOULD GRANT NEW MEXICO LEAVE TO PERMISSIVELY INTERVENE

In the alternative, New Mexico seeks permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. If the Court denies New Mexico's motion to intervene as of right, it should grant permissive intervention because (1) New Mexico's motion is timely; (2) New Mexico's interests and other claims present common questions of law and fact with the main action; and (3) its intervention will not prejudice the existing parties. Fed. R. Civ. P. 24(b).

New Mexico's claims also share common questions of law and fact with the existing action. New Mexico supports Plaintiffs' efforts to obtain the required environmental review from USDA prior to that agency's authorization of horse slaughter at Valley Meat's facility in New Mexico, but as outlined above seeks to intervene because the consequences of an adverse ruling will be vastly different for New Mexico than for Plaintiffs.

In addition, as set forth above, New Mexico's proposed intervention is timely. Nothing has occurred in the case except for the filing of the complaint and Plaintiffs' motion for preliminary injunctive relief, transfer of venue to this judicial district, and several other entities' motions to intervene. *See* Fed. R. Civ. P. 24(b)(3); *DeJulius v. New Eng. Health Care Emps.*

Pension Fund, 429 F.3d 935, 943 (10th Cir. 2005) (district courts must consider prejudice or delay in deciding whether to grant permissive intervention). Nor will New Mexico's addition to these proceedings as an intervenor unreasonably complicate the issues to be litigated here, or delay the proceedings, which are in their earliest stages.

V. CONCLUSION

For the above reasons, New Mexico respectfully asks the Court to grant its motion to intervene in this action as a matter of right, or in the alternative, to intervene permissively.

Dated: July 19, 2013

GARY K. KING
NEW MEXICO ATTORNEY GENERAL

By: *Ari Biernoff*
Ari Biernoff
Assistant Attorney General
408 Galisteo Street
Santa Fe, NM 87501
Telephone: (505) 827-6086
Facsimile: (505) 827-6036
abiernoff@nmag.gov

Attorney for Proposed Intervenor State of New Mexico

CERTIFICATE OF SERVICE

I certify that I filed the foregoing documents on July 19, 2013 using the ECF System, which will send notification to all parties of record.

Ari Biernoff
Ari Biernoff