

**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 OF THE STATE OF NEW MEXICO IN SUPPORT OF
PLAINTIFFS' MOTION TO MODIFY THE TEMPORARY RESTRAINING ORDER
AND OBJECTION TO MAGISTRATE'S ORDER REQUIRING INJUNCTION BOND**

I. INTRODUCTION

Plaintiff-Intervenor the State of New Mexico ("New Mexico") files this memorandum of law in support of Plaintiffs' motion to modify the temporary restraining order ("TRO Order," Dkt. No. 94) and objecting to Magistrate Judge Scott's order requiring that Plaintiffs post bonds

in the amount of \$495,000.00 to secure that temporary restraining order (“Bond Order,” Dkt. No. 102). New Mexico supports the arguments that Plaintiffs articulate in their motion/memorandum of law, [see Dkt. No. 112] and will not repeat those arguments here. New Mexico files this brief to raise two additional points germane to Plaintiffs’ request that the Court modify or set aside the Bond Order.

II. ARGUMENT

The Bond Order Runs Counter to the Court’s Determination That Plaintiffs Have Established a Likelihood of Success on the Merits

The grant of a temporary restraining order or preliminary injunction requires a showing by the movant that it has a likelihood of prevailing on the merits of its claim, *see Walmer v. United States Dep’t of Defense*, 52 F.3d 851, 854 (10th Cir. 1995), *cert. denied*, 1995 U.S. Lexis 7725 (Nov. 13, 1995). In granting Plaintiffs’ motion for a temporary restraining order, the Court explicitly determined that at this stage of the proceedings Plaintiffs have demonstrated a likelihood of success on the merits. *See* Transcript of August 2, 2013 Hearing at 149:11-14 (determining that “plaintiffs have established a substantial likelihood of success on the merits of their APA and NEPA claim challenging Directive 6130.1”); at 150:8-11 (determining that “plaintiffs have established a substantial likelihood of success on the merits of their NEPA and APA claim on the challenge to the grants of inspection.”).

The Bond Order turns this judicial determination on its head, effectively concluding that Valley Meat and Responsible Transportation rather than Plaintiffs have shown a likelihood of success on the merits. The Bond Order states Magistrate Judge Scott’s conclusion that “both Responsible Transportation and Valley Meat will suffer harm and injury by virtue of the temporary restraining order and there is nothing further that either Defendant can do to mitigate these damages and loss.” Bond Order at 1-2. When injunction bonds are required, the rationale supporting them is to provide a source of payment for “damages as may be incurred or suffered

by any party who is found to have been *wrongfully* enjoined.” *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1158 (10th Cir. 2001) (emphasis added). The Bond Order, in requiring a bond in the full amount of Defendant-Intervenors’ claimed future lost profits or future lost expenses, has essentially determined that the temporary restraining order will “harm” those businesses. But such harm can only flow if the Court ultimately determines that the temporary restraining order was issued in error, a determination that the Court has not made.

The Bond Order Should be Modified to Specifically Exclude the State of New Mexico from any Bond Obligation

Under a number of New Mexico statutes, the New Mexico Attorney General is exempted from the bond requirement when he brings suit on behalf of the State of New Mexico. For example, the Unfair Practices Act (NMSA 1978), Sec. 57-12-8, provides: “The attorney general acting on behalf of the state of New Mexico shall not be required to post bond when seeking a temporary or permanent injunction” in an action under that Act. New Mexico law applies the same exemption to a wide range of additional injunctive actions, for example, suits filed to prevent the unauthorized practice of law (NMSA 1978, Sec. 36-2-28.2); to put a stop to pyramid schemes (NMSA 1978, Sec. 57-13-4); to ensure that assisted living facilities comply with their legal obligations (NMSA 1978, Sec. 24-17-10), and to protect consumers from abusive mortgage lending practices (NMSA 1978, Sec. 58-21B-21).

Read together, these statutory exceptions show that the bond requirement does not apply where the Attorney General brings suit in the public interest. Even outside of the enumerated causes of action, the exception is consistent with the Attorney General’s role in initiating litigation on behalf of New Mexicans’ health, safety and consumer interests. *See State ex rel. Bingaman v. Valley Savings & Loan Ass’n*, 97 N.M. 8, 10, 636 P.2d 279, 281 (1981) (noting the

AG's discretion under statute to "determin[e] when the public interest requires him to bring a civil action on behalf of the state.").

This suit, which seeks to require USDA to conduct a proper environmental review before granting inspection to horse slaughter plants, is the quintessential action in the public interest. *See Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (identifying strong public interest in federal government's "compliance with the relevant environmental laws," specifically NEPA).

III. CONCLUSION

For the above reasons, New Mexico respectfully asks the Court to grant Plaintiffs' motion to modify the temporary restraining order and to modify or set aside the Bond Order.

Dated: August 21, 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 Plaintiff-Intervenor State of New Mexico

CERTIFICATE OF SERVICE

I certify that I filed the foregoing documents on August 21, 2013 using the ECF System, which will send notification to all parties of record.

Ari Biernoff
Ari Biernoff