

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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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’ SURREPLY

Pursuant to this Court’s order, ECF No. 130, Federal Defendants file this surreply in response 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. Plaintiffs’ Reply is centered on a new argument: that Federal Defendants support continued imposition of the bond security required by Magistrate Judge Scott because posting such a bond will “pressure Plaintiffs to drop their case.” Pls. Rep., ECF No. 126 at 1. Plaintiffs’ new argument finds no support in the law, the record before the Court, or Plaintiffs’ own assertions. Federal Defendants have no improper motivation in defending this action or in responding to Plaintiffs’ motion or objection. Federal Defendants’ only interest in this matter is in seeking justice and ensuring that the law is properly and consistently applied.

A. There Is No Basis To Plaintiffs' Claim That Federal Defendants Are Attempting To Force Plaintiffs To Abandon Their Case

Federal Defendants are not trying to “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.” Pls. Resp. at 5 (quoting *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Serv.*, 657 F. Supp. 2d 1233, 1248 (D. Colo. 2009)). The United States is sensitive to questions of access to the courts and has no designs to use the bond requirements of Federal Rule of Civil Procedure 65(c) to circumvent justice. In that regard, the United States takes no position as to the size of the bond and put on no evidence about what bond might be appropriate. Magistrate Judge Scott heard evidence provided by the Defendant-Intervenors and based his bond order on that evidence. However, unlike *San Luis* and the other cases imposing no bond or a nominal bond, Plaintiffs failed to produce any evidence to show that they cannot post the bond required by Federal Rule of Civil Procedure 65 and ordered by Magistrate Judge Scott. *See San Luis*, 657 F. Supp. 2d at 1248 (declining to impose a bond because “*the declarations establish that the imposition of substantial security would impede Plaintiff’s access to judicial review*”) (emphasis added). Federal Defendants have no basis to determine that Plaintiffs cannot readily satisfy the bond established by Magistrate Judge Scott, because Plaintiffs have provided none.

Even if Plaintiffs had provided *any* evidence of their inability to post the bond set by Magistrate Judge Scott, Plaintiffs’ allegations that Federal Defendants are trying to “price Plaintiffs out of this public interest case,” Pls. Rep. at 3, make no sense. Plaintiffs’ motion and objection attacks the scope of the temporary restraining order and accompanying bond requirement, both of which are expressly based on a term of 30 days. *See* ECF No. 94 at 7; ECF No. 102 at 2. Plaintiffs posted this bond amount without apparent incident, and they assert

(again, without evidentiary support) that Plaintiff Humane Society of the United States (“HSUS”) alone has the ability to satisfy this bond amount for at least “a month or two.” Pls. Rep. at 5. Thus, by Plaintiffs’ own concession, a denial of their present motion and objection would have no effect on Plaintiffs’ ability to pursue their case, because Plaintiffs are fully capable of posting the bond amount required by Magistrate Judge Scott. Federal Defendants have no reason to believe otherwise.

Moreover, Plaintiffs fail to explain how having to post a compensatory bond to protect Defendant-Intervenors’ legitimate business interests as required by Federal Rule of Civil Procedure 65(c) would “cut this case short.” Pls. Rep. at 4. Even if Plaintiffs had been unable to post the required bond, the only result would have been that the temporary restraining order would have been unenforceable, as if it had never issued. Plaintiffs do not claim that their case would become moot in the absence of an emergency injunction, nor could they. Had the temporary restraining order been denied, Federal Defendants would have sent inspectors to the facilities in New Mexico and Iowa, and Defendant-Intervenors would have begun slaughtering horses in accordance with the Federal Meat Inspection Act. Plaintiffs have proffered no evidence or basis for Federal Defendants to believe that Plaintiffs would have given up on this case or would have been any less fervent in pursuing their NEPA claims in an attempt to halt Defendants-Intervenors’ slaughter activities had the temporary restraining order not been in effect.

At bottom, the United States has an undeniable and unique interest in the law governing both the scope of injunctions and attendant bond requirements in NEPA cases which must, by

definition, involve challenges to federal agency actions.¹ Plaintiffs' motion and objection presented arguments that were plainly contrary to the body of well-established case law. Yet Plaintiffs complain because Federal Defendants presented a response brief focused only on Plaintiffs' flawed arguments directly related to the government's unique interest in the law: 1) that this Court erred by including Defendant-Intervenors in the scope of the temporary restraining order and 2) that Magistrate Judge Scott erred by rejecting Plaintiffs' version of the "public interest" exception, when Plaintiffs had failed, and continue to fail, to present any evidence that they could not afford a compensatory bond. Plaintiffs' accusations that Federal Defendants seek to end this case through a correct application of well-established case law ring hollow.

B. Federal Defendants Are Seeking To Expedite This Litigation

Plaintiffs take their accusations so far as to proclaim that "[t]he 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. Federal Defendants have no interest in delaying this case, and have been discussing ways to expedite a final resolution of the merits of this case – which is relatively straightforward from a NEPA merits standpoint – since well before the August 2, 2013 hearing. And, even before Magistrate Judge Scott's August 8, 2013 bond hearing and decision, Federal Defendants began

¹ Oddly, Plaintiffs assert that the United States' failure to seek bonds in cases in which Plaintiff HSUS requested temporary restraining orders and preliminary injunctions were denied somehow shows that the United States is asking opportunistically here. Pls. Rep. at 4-5. In those cases, however, Plaintiffs' requests for emergency injunctive relief were denied, so Federal Rule of Civil Procedure 65(c) would not have applied. *See, e.g., Humane Soc. of U.S. v. Johanns*, 520 F.Supp.2d 8, 14 (D.D.C. 2007) ("On March 14, 2006, the Court issued an [21] Order and [22] Memorandum Opinion denying Plaintiffs' request for a preliminary injunction."). In any event, that the United States considers the circumstances of each particular case before crafting arguments on bond further demonstrates that the United States is not seeking to thwart public interest litigation.

exploring whether it would be make sense to convert the forthcoming preliminary injunction hearing into a hearing on the merits.

Under the thesis of Plaintiffs' reply brief, Magistrate Judge Scott's imposition of a compensatory bond in accordance with Federal Rule of Civil Procedure 65(c) would lead Federal Defendants to seek ways to delay this litigation until Plaintiffs could no longer continue to post a bond for interim injunctive relief and force them to drop their lawsuit.² But even prior to Plaintiffs' accusation, Federal Defendants did just the opposite, putting into motion a formal proposal to expedite the final resolution of this litigation. The culmination of Federal Defendants' is a proposal that is joined by all Defendant-Intervenors and appears to have the support of Plaintiffs and Plaintiff-Intervenor (subject to some additional considerations). *See* ECF Nos. 128, 131. Indeed, under Federal Defendants' proposed schedule, this matter would have been fully briefed and ripe for disposition on the merits by October 3, 2013, within the two-month period that Plaintiffs themselves concede that Plaintiff HSUS alone is able to cover the bond amount set by Magistrate Judge Scott, if it was extended for that long.³ Federal Defendants' interest is in the expeditious resolution on the merits related to implementing this important government program. Delay serves no one's interests, not the Federal Defendants, not the Defendant Intervenors and not the Plaintiffs.

Plaintiffs' arguments that the Court should modify the temporary restraining order or otherwise modify the bond amount set by Magistrate Judge Scott because Federal Defendants are using the bond "as an opportunity to cut this case short and deter future public interest litigants

² As noted in Section A, even if Plaintiffs could no longer post a bond and the temporary restraining order was dissolved, that would have no effect on their ability to continue to litigate this case to conclusion.

³ Federal Defendants and Defendant-Intervenors accommodated a request by Plaintiffs and Plaintiff-Intervenor to extend their time for Reply Briefs on the Merits from one week to requested two weeks, so the schedule has slipped to October 10, 2013.

from challenging gross federal legal violations,” Pls. Resp. at 4, fall flat. This Court’s decision on Plaintiffs’ motion and objection will not change the decades-old body of NEPA case law cited in Federal Defendants’ response brief. In future cases, plaintiffs that can make a showing that they are unable to post a compensatory bond will not be deterred from bringing public interest cases. Nor will plaintiffs who can post such a bond, such as Plaintiffs here, be deterred. Federal Defendants are seeking only to have this Court follow well-established Circuit-level case law that will remain in effect after this litigation is over.

FOR THE FOREGOING REASONS Plaintiffs’ accusations regarding Federal Defendants’ motives and intentions should be rejected, and Federal Defendants respectfully request that that the Court deny Plaintiffs’ August 14, 2013 “Motion to Modify the Temporary Restraining Order and Objection to Magistrate [Judge]’s Order Requiring Injunction Bond,” ECF No. 112.

Respectfully submitted this 26th day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 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