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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 REPLY IN SUPPORT OF 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 file this reply in support of their request that the Court strike those propositions and references in Plaintiffs and Plaintiff-Intervenors Opening Briefs that are outside the Administrative Record filed by the United States Defendants. Plaintiffs have not met their burden of proof on this matter, nor have they followed the appropriate procedures to bring this issue to the Court's attention.[1] Therefore, this Court should find that Plaintiffs cannot unilaterally utilize extra-record evidence, and should strike the proffered evidence, and the propositions for which that evidence is offered in support.

I. PLAINTIFFS AND PLAINTIFF-INTERVENOR CANNOT UNILATERALLY FILE AND ARGUE FROM EXTRA-RECORD EVIDENCE WITHOUT SEEKING LEAVE FROM THE COURT.

Defendant-Intervenors have moved to strike extra-record evidence relied upon by the Plaintiffs and Plaintiff-Intervenors in their Opening Briefs on the Merits in this matter. The evidence was included in the Briefs without conferring with the Federal Defendants or Defendant-Intervenors, and without seeking leave from the Court. See Document No. 155. Plaintiffs do not deny that their claims are subject to judicial review only pursuant to the

[1] Plaintiff-Intervenor State of New Mexico did not file a Response to Defendant-Intervenors' Motion by the September 23, 2013 noon deadline set by the Court. Therefore, Defendant-Intervenors respectfully request that the motion, unchallenged by the Plaintiff-Intervenor, be granted in full with respect to the State of New Mexico. See D.N.M.LR-Civ. 7.1(b) ("The failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion.").

Administrative Procedure Act ("APA"), 5 U.S.C. § 703-706, which limits the scope of judicial review to the Administrative Record relied on by the the agency when it reached the decision at issue. See 5 U.S.C. § 706. The administrative record lodged with this Court on August 29, 2013 is entitled to a presumption of regularity, which Plaintiffs and Plaintiff-Intervenor bear the burden of overcoming before the Court may consider materials that the agency has not designated as a part of the Administrative Record.[2]

Despite their burden of proof, Plaintiffs did not file any motion requesting the Court to find that Plaintiffs' exhibits had been improperly excluded from the Administrative Record. Plaintiffs did not even advise the Defendant-Intervenors, nor the Federal Defendants, that they believed the Administrative Record was missing these documents or excerpts of documents. Instead, Plaintiffs took the bold and inappropriate step of unilaterally referring to the extra-record evidence in their Opening Brief, without permission, and now argue that they should be accepted by this Court because the agency *should have* considered them when making its decisions which are challenged in the case at bar.

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); Am. Min. Cong. v. Thomas, 772 F.2d 617, 626 (10th Cir. 1985) ("[T]he agency's action must be reviewed on the basis articulated by the agency and on the evidence and proceedings before the

[2] Although the burden to overcome the presumption of regularity must be overcome for each extra-record document that the Plaintiffs and Plaintiff-Intervenor proffer in this matter, the remainder of this Reply refers to the Plaintiffs only, since the Plaintiff-Intervenors did not filed a Response to the Defendant-Intervenors' motion. However, all arguments are equally applicable to the Plaintiff-Intervenor, as well.

agency at the time it acted."); Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir.1994). Designation of an administrative record by a federal agency is "entitled to a presumption of administrative regularity," and "[t]he court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." See Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993).

Plaintiffs and Plaintiff-Intervenor's reliance upon extra-record evidence – including declarations created after this litigation began – without leave from the Court, is not only contrary to the APA and established Tenth Circuit precedent, it is also in violation of the Federal Rules of Civil Procedure and the District of New Mexico Local Rules. See Fed. R. Civ. P. 7(b)(1) ("A request for a court order must be made by motion."); see also D.N.M.LR-Civ. 7.1(a) ("A motion must be in writing and state with particularity the grounds and the relief sought."). Unbelieveably, Plaintiffs have STILL not sought leave from the Court for permission to rely on extra-record evidence.

Plaintiffs, in response, mischaracterize basic principles of administrative law, and cite no authority which would allow them to unilaterally designate additional evidence for this Court to consider when determining the merits of this action. Circumstances that warrant consideration of extra-record materials are "extremely limited." See Custer Cnty. Action Ass'n v. Garvey, 256 F.3d 1024, 1028 (10th Cir. 2001). To supplement the AR with omitted materials, the petitioner "must show by clear evidence that the record fails to include documents or materials considered by Respondents in reaching the challenged decision . . . and *clearly set forth in their motion*: (1) when the documents were presented to the agency; (2) to whom; (3) and under what context."

See Water Supply & Storage Co. v. U.S. Dep't of Agric., 2012 WL 5831167 (D. Colo. Nov. 15, 2012).

Not only did Plaintiffs fail to present this Court with a motion requesting leave to supplement the administrative record prior to unilaterally relying on that evidence in their merits briefing, Plaintiffs failed to justify their use of that material under the standard set forth above. Plaintiffs argue that the agency failed to consider the evidence utilized in its merits brief, and that such alleged failure makes its claims meritorious. However, Plaintiffs have not alleged that the referenced documents were presented to the agency prior to the challenged decisions being made, nor could they, as quite a bit of the "evidence" was created for this litigation.[3] Plaintiffs had ample opportunity to put the other documents before the agency during the decision-making process, as is evident by an administrative record that is replete with documents submitted by these Plaintiffs. Plaintiffs have been a part of this process before the agency for some time, yet Plaintiffs chose not to include the referenced documents in its submissions to the agency prior to the decision being made. It is not as if the Plaintiffs came along late in the process and are "stuck" with someone else's administrative record. Therefore, those documents have no place in this Court's review in this case.

Plaintiffs also make the argument that this Court should allow the extra-record evidence simply because it was submitted in support of their Motion for Temporary Restraining

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[3] This Court recently denied a Motion to Supplement an Administrative Record where the documents post-dated the decision that was challenged, and therefore could not have been before the decision-maker. See Los Alamos Study Group v. U.S. Dep't of Energy, Civil No. 11-CV-946 JEC/LFG, "Memorandum Opinion and Order," (March 29, 2013), at 2, attached as Exhibit 1.

Order/Preliminary Injunction, and therefore "has been seen by the Court." This argument was explicitly rejected by this Court as recently as April, 2013. See Village of Logan v. U.S. Dep't of the Interior, Case No. 12-CV-401 WJ/LFG, "Memorandum Opinion and Order Denying Plaintiff's Motion for Supplementation of the Record," at 5-6, attached as Exhibit 2. Partially relying on the fact that the plaintiff in that case could have raised the proffered evidence with the agency prior to its decision, and chose not to, this Court determined that the plaintiff's "motion to supplement the AR with the documents it provided as exhibits in its motion for preliminary injunction" is denied. See id. at 6. Therefore, even in a situation where a plaintiff appropriately sought leave from the Court to supplement the administrative record, that supplementation was denied.

II. CONCLUSION

The extra-record evidence cited by the Plaintiffs and Plaintiff-Intervenor is not properly before this Court. Therefore, Defendant-Intervenors respectfully request that the Court strike the extra-record evidence, and that it strike or disregard Plaintiffs' and Plaintiff-Intervenor's arguments which rely on that evidence.

RESPECTFULLY SUBMITTED this 24th day of September, 2013.

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Attorney for Intervenor Defendants Valley Meat Company, et al.

CERTIFICATE OF SERVICE

I certify that I filed the foregoing document on September 24, 2013, using the ECF System, which will send notification to all parties of record.

/s/ Kathryn Brack Morrow
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