UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 13-2187

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, SANDY SCHAEFER, TANYA LITTLEWOLF, CHIEF DAVID BALD EAGLE, CHIEF ARVOL LOOKING HORSE and ROXANNE TALLTREE-DOUGLAS,
Plaintiffs-Appellants,

and THE STATE OF NEW MEXICO,
Plaintiff-Intervenor-Appellant

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,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DEFENDANT-INTERVENOR/APPELLEES VALLEY MEAT COMPANY, LLC, RAINS NATURAL MEATS, AND CHEVALINE, LLC'S RESPONSE TO APPELLANTS' RULE 8(a) EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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PRELIMINARY STATEMENT

This case is not about National Environmental Policy Act ("NEPA"), not really, not if Appellants were being honest with Court in the real remedy they sought or what their real concern is rather than a staged histrionic tale of the impending environmental doom. Ultimately this case is about a disagreement over a national policy in which one side of the debate having tried and failed to have their philosophy reinstated into control by way of a failed policy in Congress or by manipulations of the Executive Branch, has now turned their focus on using their vast resources to abuse the judicial systems to bully and exhaust the least able to defend themselves, the start-up small businesses looking to engage in a lawful enterprise endorsed by Congress as one of many solutions to address a national problem. Appellants have no avenue to appeal the fact that Congress has not been swayed to their philosophy on the issue of domestic commercial processing of equine animals and will not adopt the law that they believe is best so they have resorted to seizing upon a technical question in another law and using that as an avenue to hopefully exhaust and render insolvent their less advantaged opponents.

But, this case is important and this Court's treatment of this emergency motion may even be more important than the ultimate resolution of the appeal. This case represents a bright line instant showing the Country what it should expect of its

judiciary. The Nation is watching because this case really isn't about NEPA. The gaggle of the media surrounding and circling this case aren't really interested in whether or not a Food Safety Inspection Service (FSIS) Directive is final agency action and whether or not the United States Department of Agriculture (USDA) should have conducted an Environmental Impact Study (EIS) instead of relying on long settled Categorical Exclusion. No this case is about horse slaughter and Appellants have vocally and repeatedly announced to the world that they filed this litigation to block horse slaughter. Their openly stated goal is to prevent the will of Congress, acting in the public interest, from ever again coming to force in the form of lawful regulated industry.

The importance of this case crescendos in this emergency motion. This emergency motion represents the worst kind of attempted misuse of judicial authority and resources by well-funded special interest groups. Though there is no real immediate threat of harm to the environment and though the dangers alleged by Appellants through self-serving self-affirming bald assertions have been accounted for, examined, and regulated by multiple other agencies of both state and federal government actually having the authority to protect against environmental harm, that does not stop Appellants from using their vast resources to seize upon the opportunity misuse the Courts to improperly seek and obtain incorrectly granted

injunctions for the purpose of driving their opposition out of business. This Court should reject this type of misuse of judicial resources and authority. This emergency motion represents an opportunity set a boundary of public policy that special interest groups unsuccessful in their legislative endeavors should not expect to be able to use the their vast resources to misuse the judicial system litigate their opponents out of existence.

Appellee-Intervenors Valley Meat Company, LLC ("VMC"), Rains Natural Meats ("RNM"), and Chevaline, LLC ("CHEVALINE") respond to this emergency motion because they are parties that are the Real Parties in Interest that have suffered and continue to suffer real actual harm as result of the injunctions of the judiciary.(Affidavits of Ricardo De Los Santos, David Rains, and Sue Wallis, ECF Nos. 56-2,56-3,&56-4) Their harm is real, not speculative. Judge Armijo recognized this in the District Court case order for a Temporary Restraining Order when she stated that these business "will suffer significant economic harm if they are prohibited from operating during the pendency of the present litigation" (Amended Order Granting TRO, ECF No. 125) and ultimately ordered a bond be set to cover the substantial losses of the companies. It is important to note that these companies are the ones suffering real harm when they represent an innocent party in the sense that they have not done anything wrong or failed to meet a

regulation or requirement of the law. The only failing alleged is one by the FSIS that they did not conduct an EIS when in the opinion of Appellants they should have. On the other hand, the threat of harm alleged by Appellants is vague and speculative requiring one sided unscientific conclusions as well as ignoring basic facts about other levels of regulations and safeguards to become a real threat.

ARGUMENT

I. APPELLANTS ARE UNLIKELY TO SUCCEED ON APPEAL AND SHOULD NOT BE ALLOWED TO USE NEPA PROCEDURAL LITIGATION TO OBSTRUCT SUBSTANTIVE FEDERAL LAW WITH WHICH THE DISAGREE ON A POLICY LEVEL

Judge Armijo's decision in the lower court case is sound and represents the correct application of the standard of review under the Adminstrative Procedures Act ("APA") and *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994) of USDA FSIS's compliance with NEPA procedural requirements. Judge Armijo's findings that FSIS in complying with Federal Meat Inspection Act by applying its long-standing categorical exclusion to the granting of inspections of equine animals at the direction of Congress was the correct application of substantive federal law and her decision is the correct outcome on the merits of the case. Appellant should not be allowed to continue a fictional dispute over whether or not FSIS has complied with the procedural law of NEPA in order to obstruct a federal

agency from carrying out its duties under the substantive federal law with which they did disagree.

This attempt to have this Court issue an emergency injunction is nothing more than such an obstruction and is not a real challenge on the merits. The United States Supreme Court in both *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), and *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), Court reigned in the Ninth Circuit's propensity to issue injunctions as a matter of course in NEPA cases. The Supreme Court in those case found that injunctions such as are sought in this case interfered with substantive lawful federal activity and improperly elevated procedural requirements to substantive barriers. Further, the Supreme Court held in *Monsanto*, it was not proper "to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances." 130 S. Ct. at 2757. And that NEPA places no "thumb on the scales" for use in blocking substantively lawful decisions. *Id*. Going on in *Winter*, this Court admonished the lower Courts for "significantly understat[ing] the burden the preliminary injunction would impose on the [the Navy] * * *, and the injunction's consequent adverse impact on the public interest in national defense." *Winter*, 129 S. Ct. at 377. Appellants in this case have presented no new argument or any better explanation for why this injunction is proper or as to why they will succeed on the merits where they failed before other than to make bald assertions that they think

Judge Armijo was wrong because she did not agree with their interpretation of NEPA which they arrived at for the sole purpose of attempting to obstruct a different substantive federal law with which they disagree.

II. THERE IS NO REAL THREAT OF HARM TO APPELLANTS AND CERTAINLY NO IRREPERABLE HARM

In in order to continue this manufactured charade, Appellants offer no other evidence of impending environmental other than their own beliefs and self-serving science created the goal of stopping horse processing. For this Court to find that appellant's face a threat of irreparable harm, the court must turn a blind eye to the science that contradicts their assertion that all horses going to processing represent a toxic dangerous source pollution to the environment. Frankly, to find such an assertion to be credible, the court would have to ignore the very manure that issues from these animals which would undoubtedly have to contain the same toxic substances with absolutely no regulation as it enters the natural environment. And going further to find a real threat of irreparable harm to the environment as is claimed by appellants this Court would have to conclude that the only safety valve between the alleged environmental disasters of equine material entering ecosystem is requiring FSIS to conduct an EIS. But, this conclusion requires the court to ignore host of other federal and state agencies, laws, and regulations in place to protect the environment and of which the companies have complied with, just as they will

continue to do. There is no real of irreparable harm to appellants, their alleged threat is speculative and flies in the face of common sense, which is very different from the real, already occurring, harm to these Appellee-Intervenor businesses.

III. THERE IS NOT AN ABSENCE OF HARM TO INNOCENT OPPOSING PARTIES, BUT RATHER REAL AND SUBSTANTIAL HARM TO APPELLEES VMC, RNM, AND CHEVALINE

As noted above, the lower court has already correctly determined that there is a substantial harm visited upon Appellee-Intervenor businesses by injunctions preventing them from going about their lawful business, and by preventing the federal government from supplying the required inspectors in compliance with federal law. That fact is inarguable and the actual the threat of irreparable harm arising out of this continued litigation as well as further injunction from the judiciary may very well serve to irreparably damage these businesses by driving them to insolvency. The actual harm of an injunction, preventing the federal government from complying with the law, has already been weighed and measured by the lower court. In the case of VMC, the lower court found that for every month that passes under injunction VMC suffers a net loss of $435,000 just of lost income (Order Requiring Injunction Bond, ECF No. 102.) RNM on the other hand, using the courts formula for VMC suffers a net loss of $100,000 a month just of lost income. (Affidavit of David Rains, ECF No. 161-1) Those two numbers do not represent the total harm incurred as a result of an injunction preventing them from doing their

lawful business. These losses plus the losses of Appellee-Intervenor Responsible Transportation represent only the direct measurable harm that the injunction sought perpetuates. However, such an evaluation on the merits of an injunction fails to even consider the indirect harm to the public interest, the welfare of horse, and to the horse industry in general that this obstruction of this federal law creates by preventing these lawful businesses.

IV. THE INJUNCTION IS NOT IN THE PUBLIC INTEREST

While appellants may claim in self-appointed fashion be representing the public interest in this matter, in reality, they are only representing their own philosophical interest. The actual public interest in the authorization of this regulated industry by Congress is not served by preventing the industry. In the summer of 2011, the federal government recognized the unintended, but devastating, impact the slaughter ban had on the horse industry and on the welfare of horses in a 2011 GAO Report[1]. Congress responding for welfare of public interest restored funding for inspections in November of 2011 under Consolidated and Further Continuing *Appropriations* Act for *Fiscal Year 2012* ("FY2012 Resolution") (PUBLIC LAW 112–55 - NOV. 18, 2011). This is public interest that will be blocked and harmed by awarding Appellants the injunction they seek.

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[1] U.S. Government Accountability Office, *Horse Welfare: Action Needed to Address Unintended Consequences from Cessation of Domestic Slaughter* (June 2011), *available at* http://www.gao.gov/new.items/d11228.pdf.

V. THE FAILURE TO FOLLOW FED.R.APP. P. 8 AND SEEK RELIEF UNDER F.R.CIV.P. 62 SHOULD BE CONSIDERED FATAL AND IF ANY CONTINUING INJUNCTION IS CONSIDERED BY THIS COURT IT SHOULD BE CONDITIONED ON THE POSTING OF COMMENSURATE BOND FOR THE PROTECTION OF INNOCENT PARTIES

In every motion for relief made to the court of appeals, the movant must show the district court denied or failed to afford the relief requested, and the motion must state the reasons given, or must show an application to the district court would not be practicable. Fed. R. App. P. 8(a)(2)(A). Appellants have clearly failed to make an application to the District Court and other than a superficial statement have failed to explain why such an application is in impracticable. While Appellants might have argued that the analysis of the 10th Circuit in *Homans v. City of Albuquerque*, 264 F.3d 1240 (10th Cir., 2001) allowed for Appellant to skip that step because it would have been useless to try, in contrast, it is apparent that Judge Armijo is not foreclosed to issuing an injunction having done so once already and her extensive knowledge of the case would have well served such an evaluation. It is important to note that the District Court is already well versed in the aspects of this case having weighed the respective harms to the parties once and issued an injunction once with commensurate bonds. It would instead appear that Appellants have skipped around this part of the rule in hopes of avoiding paying for any more security bonds. That type gamesmanship should not be rewarded by this Court. It is appropriate that if in

balancing the harms of this case that this Court does find an injunction should continue that parties harmed by the injunction are awarded the equitable protection provided for in the rules. "Preliminary injunctions, because issued before a full adjudication, often turn out to have been issued in error, and when that happens the costs imposed on the party against whom the injunction ran are costs incurred by an innocent person (at least innocent in the preliminary-injunction phase of the litigation). The innocent may be a private firm or a government agency or a hapless individual (or even another nonprofit), but that doesn't make it or him or her unworthy of the law's protection." *Habitat Educ. Ctr. v. United States Forest Serv.*, 607 F.3d 453,459 (7th Cir.2010) Also a bond would be appropriate in this instance as Justice Stevens explained in *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) "[s]ince a preliminary injunction may be granted on a mere probability of success on the merits, generally the moving party must demonstrate confidence in his legal position by posting bond in an amount sufficient to protect his adversary from loss in the event that future proceedings prove that the injunction issued wrongfully. The bond, in effect, is the moving party's warranty that the law will uphold the issuance of the injunction." *Id.* at 649, 102 S.Ct. 2629 (Stevens, J., concurring in part and concurring in the judgment) (*footnote omitted*).

This Court should reject application for an injunction by Appellants completely, but if the Court choses to continue an injunction that particular matter

should be remanded back to the District Court of the determination of an appropriate bond under F. R. Civ. P. 62.

Dated: November 7, 2013

Respectfully submitted,

By: *- Electronically Signed by –A. Blair Dunn*
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CERTIFICATE OF SERVICE

I certify that I filed the foregoing documents on November 7, 2013 using the ECF System, which will send notification to all parties of record.

Electronically Signed by – A. Blair Dunn
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