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Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE LOS ALAMOS STUDY GROUP,)	Case No. 1:10-CV-0760-JH-ACT
)	
Plaintiff,)	
)	FEDERAL DEFENDANTS' MOTION
v.)	FOR TWO-WEEK EXTENSION OF TIME
)	TO RESPOND TO PLAINTIFF'S
UNITED STATES DEPARTMENT OF)	MOTION FOR PRELIMINARY
ENERGY, et al.)	INJUNCTION, DKT. NO. 13
)	
Defendants.)	
)	

Without prior notice and without conferring with Federal Defendants as required by
D.N.M.LR-Civ. 7.1(a), Plaintiff filed a motion for preliminary injunction at the close of business

Mot. Extension; Case No. 1:10-CV-0760

on Friday, November 12, 2010. Dkt. No. 13.¹ The parties previously agreed to a one-week extension to accommodate the Thanksgiving holiday, see Dkt. No. 14, but as set forth below, a number of significant developments have occurred since the extension was agreed to that make this motion necessary. Pursuant to Federal Rule of Civil Procedure 6(b) and D.N.M.LR-Civ. 7.4(a), Federal Defendants hereby move for a two-week extension for the current due date, to December 20, 2010, to file their response. Federal Defendants have conferred with Plaintiff, through counsel of record, which opposes this motion for an extension of time.

ARGUMENT

Under the Federal Rules of Civil Procedure, “[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires.” Fed. R. Civ. P. 6(b)(1)(A). “Showing good cause is not a particularly demanding requirement.” U.S. v. Board of County Comm’rs of County of Dona Ana, New Mexico, 2010 WL 965607, *3 (D.N.M. Feb. 18, 2010). Under the local rules, an extension of briefing time must be timely and must not interfere with established case management deadlines. D.N.M. LR-Civ. 7.4(a).

Federal Defendants seek a two-week extension to respond to Plaintiff’s motion for a preliminary injunction because of several significant reasons. To respond to Plaintiff’s motion for preliminary injunction, Federal Defendants will rely, in large part, upon a declaration prepared and submitted by Herman LeDoux, the Federal Project Director for the Chemistry and Metallurgy Research Replacement (“CMRR”) Project at the Los Alamos Site Office of Federal

¹ Federal Defendants’ Motion to Dismiss for lack of subject matter jurisdiction is fully briefed and pending. See Dkt. No. 12.

Defendant National Nuclear Security Administration (“NNSA”). The CMRR Project is the subject matter of this litigation, and Mr. LeDoux’s declaration will be a key component of the Federal Defendants’ response. Mr. LeDoux has been unavailable for at least the past week due to a severe family medical emergency that has taken him out of New Mexico. Counsel for Federal Defendants were informed of this development on December 2, 2010.

In addition to the unavailability of a key declarant, Federal Defendants seek a two-week extension because counsel for Plaintiff waited until December 1, 2010, to transmit supporting materials for its motion for preliminary injunction even though paper copies were available and could have been sent contemporaneously with the filing of the motion. See Dkt. No. 18. The Court granted Plaintiff leave to file its supporting materials on compact discs on November 23, 2010, Dkt. No. 17, but Plaintiff waited another eight days to send copies of the two CD-ROMs and, when it did so, sent them by regular U.S. Postal mail. Plaintiff seeks to rely on these materials in support of its motion for preliminary injunction, as well as in support of its opposition to Federal Defendants’ Motion to Dismiss, which is also relevant to the motion for preliminary injunction because the jurisdictional defects in Plaintiff’s claims inform Plaintiff’s likelihood of success on those claims.

There are 108 documents or excerpts of documents in Plaintiff’s list of materials for these CD-ROMs. See Dkt. No. 16-1. Plaintiff has made no attempt to authenticate any of these documents, and has laid no foundation for their admissibility. Undersigned counsel Andrew Smith received the CD-ROMs on December 2, and Attorney John Tustin has yet to receive the CD-ROMs. Neither counsel for Federal Defendants has had an adequate opportunity to review and formulate a response to Plaintiff’s materials. Nor have the CD-ROMs been copied and

provided to the Department of Energy client agencies and counsel, which must review the materials to assist in preparing Federal Defendants' declarations and brief in opposition to the motion for a preliminary injunction.² While some of the materials appear to be DOE documents, many of them are not. In essence, by failing to serve exhibits in support of and referenced in Plaintiff's motion for preliminary injunction until December 1, 2010, the motion was incomplete until that date.³ Pursuant to the local and Federal Rules of Civil Procedure, Federal Defendants' response should not be due until December 20 under these circumstances.

Other considerations merit granting a two-week extension. Both counsel for Federal Defendants have and have had significant obligations that require substantial work efforts in other matters since the filing of Plaintiff's motion for a preliminary injunction, including:

November 16 and 17--alternative dispute resolution for Tonkawa Tribe of Indians of Oklahoma v. Salazar, et al., No. 5:06-cv-1435-F (W.D. Okla.) and Tonkawa Tribe of Indians of Oklahoma v. United States, No. 1:06-cv-938-BAF (Fed. Cl.)

November 17--opening summary judgment papers in The Wilderness Society v. U.S. Forest Service, No. 3:07-CV-00170-RLH-RAM (D. Nev.)

November 23--summary judgment reply papers in Swan View Coalition v. U.S. Forest Service, No. 6:09-cv-00127-M-DWM (D. Mont.)

December 8--motion to dismiss in Americans for the Preservation of the Western Environment v. Tuggle, Civ. No. 10-00788-RB-CG (D.N.M.)

² On December 3, counsel for Plaintiff informed counsel for Federal Defendants that Plaintiff's materials are available on Plaintiff's website. In addition to counsel for Federal Defendants not being aware of this until the business day before the present scheduled due date for the response, it is inappropriate and unreasonable for Federal Defendants' counsel to visit Plaintiff's website to obtain materials that were available and should have been provided contemporaneously with the preliminary injunction motion.

³ See D.N.M.LR-Civ. 7.3(b) ("Movant must submit evidence, in the form of affidavits, deposition excerpts, or other documents, in support of allegations of fact.").

December 9--opening summary judgment papers in Center for Sierra Nevada Conservation v. U.S. Forest Service, No. 2:09-CV-2523-LKK (E.D. Calif.)

appx. December 7--anticipated motion to dissolve injunction in Natural Resources Defense Council v. Department of Energy, No. 3:04-cv-04448 SC (BZ) (N.D. Cal.)

In addition, both counsel have had significant court decisions come down in recent weeks, requiring additional attention internal to the federal government, both counsel were on leave for the Thanksgiving holiday, and counsel Tustin also was ill from November 27-29.

A two-week extension will not interfere with case management deadlines because no such deadlines have been established in this case. The issues surrounding the unavailability of a key declarant, Plaintiff's delay in transmission of supporting documents for its affidavits, and counsels' professional obligations in other matters provide a substantial reason for why the December 6 response deadline should be extended by two weeks to allow Federal Defendants to fully and fairly respond to Plaintiff's motion for preliminary injunction.

Plaintiff cannot claim prejudice from a two-week extension because Plaintiff filed its complaint on August 16, 2010, but waited almost three months to file its motion for a preliminary injunction. See GTE v. Williams, 731 F.2d 676, 678 (10th Cir. 1984) ("Delay . . . undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."). Additionally, a two-week extension will not prejudice Plaintiff because it complains only about ongoing expenditures on planning and design for CMRR. No construction, and thus no environmental effects, would occur until at least June 2011. See October 4, 2010 Declaration of Donald L. Cook, Deputy Administrator for Defense Programs, DOE/NNSA, Dkt. No. 9-1 ¶ 21, 25. Plaintiff did not, and cannot, identify any concrete, irreparable event that will take place within the next several months that would

justify the extraordinary relief of a preliminary injunction. Thus, there is no immediate urgency to Plaintiff's motion, and hence no viable reason for Plaintiff to oppose a modest two-week extension. In contrast, a two-week extension will allow Federal Defendants to prepare a more responsive opposition to Plaintiff's motion, thereby assisting the Court in resolving the issues presented in Plaintiff's motion.

CONCLUSION

For the reasons set forth above, Federal Defendants respectfully request a two-week extension to December 20, 2010 to file their response to Plaintiff's motion for preliminary injunction.

Respectfully submitted on this 3rd day of December, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2010 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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