

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MICHAEL W. COTTER
United States Attorney

ERIC R. WOMACK
Assistant Branch Director

MICHELLE R. BENNETT
Trial Attorney
United States Department of Justice
20 Massachusetts Avenue N.W.
Washington, D.C. 20530
Tel: (202) 305-8902
Fax: (202) 616-8470
Email: michelle.bennett@usdoj.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

RANCHERS-CATTLEMEN
ACTION LEGAL FUND, UNITED
STOCKGROWERS OF AMERICA,

CV 16-00041-BMM-JTJ

Plaintiff,

v.

TOM VILSACK, in his official
capacity as Secretary of Agriculture;
and UNITED STATES
DEPARTMENT OF
AGRICULTURE,

Defendants.

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
AN OPPORTUNITY TO RESPOND
TO PLAINTIFF'S MOTION
FOR A TEMPORARY
RESTRAINING ORDER

INTRODUCTION

On September 12, 2016, plaintiff moved the Court to “immediate[ly]” enter a temporary restraining order (“TRO”) “without providing [defendants] an opportunity to respond” to plaintiff’s motion. Mem. in Supp. of Pl.’s Mot. for TRO (“Pl.’s TRO Mot.”) at 1-2 (ECF No. 28). In particular, plaintiff seeks “the injunction requested in its [Cross-Motion for Summary Judgment or, in the Alternative, a Preliminary Injunction] . . . until the Court can rule on that Motion.” Pl.’s TRO Mot. at 1. Plaintiff’s extraordinary request for an *ex parte* TRO should be denied.

There is nothing new that justifies plaintiff’s urgent request for the extraordinary remedy that it now seeks. The procedure that plaintiff challenges—where Qualified State Beef Councils (“QBSCs”) collect the federal beef assessment, retain up to 50 cents in the absence of an objection by a cattle producer, and forward the remaining amount to the Cattlemen’s Beef Promotion and Research Board (“Beef Board”)—has been in place for *30 years*, since the Beef Promotion and Research Order was first promulgated in 1986. *See* 51 Fed. Reg. 26,132 (1986); *see also Johann v. Livestock Mktg. Ass’n*, 544 U.S. 550, 554 & n.1 (2005). And plaintiff filed its complaint in this case in May, approximately *four months* prior to the beginning of the “fall cattle run”—the purported emergency on which plaintiff bases its TRO Motion. Pl.’s TRO Mot. at 10.

Indeed, the “fall cattle run” did not appear to be an emergency when plaintiff filed its Summary Judgment/Preliminary Injunction Motion nearly three weeks ago, as that Motion does not even mention the “run” in its request for preliminary injunctive relief.

At a minimum, plaintiff’s delay precludes issuance of an *ex parte* TRO. Accordingly, defendants respectfully request that the Court provide defendants with an opportunity to respond to plaintiff’s TRO Motion. In light of the severity of plaintiff’s delay, defendants request until September 28, 2016 to respond to plaintiff’s TRO Motion—the date previously provided by the Court’s September 12, 2016 Order (ECF No. 26) for defendants to respond in unison to all of the outstanding motions in this case. If, however, the Court desires expedited briefing on plaintiff’s TRO Motion, defendants will endeavor to compile as complete a response as possible in the time allowed by the Court.

ARGUMENT

Plaintiff moves for the entry of a TRO under Federal Rule of Civil Procedure 65(b)(1), which, under certain circumstances, permits the entry of a TRO without “notice to the adverse party.” Pl.’s TRO Mot. at 1. Plaintiff specifically requests that the Court enter a TRO without providing defendants an opportunity to respond to plaintiff’s TRO Motion. *Id.* at 1-2, 15.

The Supreme Court has explained that the circumstances justifying the issuance of an *ex parte* TRO are extremely limited:

The stringent restrictions imposed . . . by Rule 65 on the availability of *ex parte* temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. *Ex parte* temporary restraining orders are no doubt necessary in certain circumstances, but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.

Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 438-39 (1974) (internal citation omitted).

Consistent with the overriding concern articulated by the Supreme Court, the Ninth Circuit has made clear that there are “very few” circumstances justifying the issuance of an *ex parte* TRO. *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir.2006). The Ninth Circuit has identified two such circumstances, neither of which is present here. *See id.* (explaining that notice may be excused where it “is impossible either because the identity of the adverse party is unknown or because a known party cannot be located in time for a hearing” and where providing “notice to the defendant would render fruitless the further prosecution of the action” because the adverse party is likely to destroy evidence). Although plaintiff here gave defendants notice of the TRO Motion, plaintiff seeks to prevent defendants from having an opportunity to be heard on the merits of that

motion. *See* Pl.’s TRO Mot. at 1-2, 15. There is no basis for that request in this case.

To the extent any urgency exists that would warrant an *ex parte* TRO in this case, it is entirely of plaintiff’s own creation. Plaintiff claims it needs a TRO before the “fall cattle run,” Pl.’s TRO Mot. at 10, which plaintiff asserts, based on 2015 weekly sales data, runs “between early September and late December,” Declaration of Bill Bullard ¶ 5 (ECF No. 28-1). But plaintiff does not claim that the timing of this year’s fall cattle run is any different than in prior years (indeed, plaintiff relies on 2015 data). Thus, plaintiff was aware of the timing of the fall cattle run when it filed its complaint in May 2016, but plaintiff did not move for a preliminary injunction at that time (although doing so would have been advisable and accommodating to the schedules of the Court and defendants if plaintiff wanted a decision regarding preliminary injunctive relief by early September). Plaintiff instead waited until August 24, 2016 to file its Summary Judgment/Preliminary Injunction Motion. But, even then, plaintiff was silent about its purported need for a ruling by early September. In fact, plaintiff’s Summary Judgment/Preliminary Injunction Motion does not mention the fall cattle run at all.¹

¹ Plaintiff speculates that “[w]ithout the Government’s delay,” (*i.e.*, without defendants’ request for an extension of time to respond to plaintiff’s Summary Judgment/Preliminary Injunction Motion, which the Court granted), “a preliminary injunction could have been entered by mid-October.” Pl.’s TRO Mot. at 11. It is unclear how plaintiff can make this statement without knowing the Court’s

Plaintiff did not mention the fall cattle run to counsel for defendants until September 7 (when conferring on defendants' motion for an extension of time), or to the Court until September 12 (when plaintiff filed its TRO Motion). In both instances, the purported date by which action was needed, *i.e.*, "early September," had already passed. Bullard Decl. ¶ 5. Plaintiff provides no excuse for this delay in filing its TRO Motion, which is itself sufficient reason to reject plaintiff's effort to obtain a TRO without giving defendants an opportunity to respond. *See, e.g., Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) ("By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action."); *Turner v. Cate*, No. C 10-560 SBA (PR), 2010 WL 1028458, at *3 (N.D. Cal. Mar. 18, 2010) (denying *ex parte* TRO based on plaintiff's "suspect" "claim of urgency"; "[p]laintiff waited until the last minute," March 1, 2010, "before applying for a TRO," despite knowing of the purported urgency since January 2010); *Hughes v. Green Point Mortgage Funding, Inc.*, No. CV09-2200-PHX-MHM, 2009 WL 4508513, at *1 (D. Ariz. Dec. 1, 2009) (denying motion for *ex parte* TRO where plaintiff "wait[ed] until the last minute" to seek a TRO, despite being aware of the alleged urgency "for some time").

schedule, particularly when plaintiff did not advise the Court about the fall cattle run in its Summary Judgment/Preliminary Injunction Motion. Also, according to plaintiff's TRO Motion, mid-October is already well into the fall cattle run. *See* Bullard Decl. ¶ 5.

Plaintiff’s newfound urgency is even more suspect considering that the procedure plaintiff challenges—where QBSCs collect the federal assessment, retain up to 50 cents in the absence of an objection by a cattle producer, and forward the remaining amount to the Beef Board—has been in place for 30 years. *See* 51 Fed. Reg. at 26,132; *see also Johann*, 544 U.S. at 554 & n.1. As defendants have previously explained, the procedure came about through a referendum process in the mid-1980s in which a large majority of voting cattle producers approved the Beef Promotion and Research Order. *See Johanns*, 544 U.S. at 554. Upending this longstanding “status quo,” without providing defendants with an opportunity to respond to plaintiff’s TRO Motion, is not relief that is contemplated by the Federal Rules of Civil Procedure. *Granny Goose Foods*, 415 U.S. at 438-39.

Aside from its delay, plaintiff also has failed to provide adequate “reasons why” a TRO should be entered without providing defendants an opportunity to be heard. Fed. R. Civ. P. 65(b)(1)(B). Plaintiff apparently believes that “the Government has had ample opportunity to respond” to the merits of its First Amendment claim. Pl.’s TRO Mot. at 13. But, as this Court recognized in finding good cause to grant defendants’ motion for an extension of time to respond to plaintiff’s Summary Judgment/Preliminary Injunction Motion, defendants previously explained why they needed additional time to prepare their response

and any supporting materials. *See* ECF Nos. 24-26. And nothing in the Federal Rules of Civil Procedure requires defendants to fully brief the merits of a complaint in a motion to dismiss or risk waiving the opportunity to later address the merits should plaintiff file a belated motion for preliminary injunctive relief.² Indeed, the very fact that defendants have not addressed the merits in detail demonstrate why an *ex parte* TRO would be particularly unwarranted.

In light of plaintiff's delay (and plaintiff's failure to explain that delay), there is no justification for an *ex parte* TRO, or even a need to adjust the schedule recently adopted by this Court. Under the current schedule for briefing the parties' pending cross-motions, those motions (including plaintiff's Summary Judgment/Preliminary Injunction Motion) will be fully briefed by October 12, 2016. As defendants explained in their motion for an extension of time, this schedule will provide defendants with sufficient time to fully and appropriately respond to the arguments and evidence plaintiff presented in its Summary

² As defendants explained in their motion to dismiss, they did not fully address the procedure plaintiff now seeks to challenge because plaintiff's complaint was premised on the absence of such a procedure. *See* Compl. ¶ 74 (alleging that defendants do not have "a procedure by which a cattle producer who disagrees with the Montana Beef Council's message can request that the complete amount of his assessments be directed to the Beef Board"); *id.* ¶ 89 (same). Defendants' motion to dismiss argued, in part, that, "[i]f plaintiff wishes to challenge that procedure, plaintiff would need to amend its complaint to do so." Mem. in Supp. of Defs.' Mot. to Dismiss or, in the Alternative, to Stay the Case at 21 & n. 2 (ECF No. 19-1).

Judgment/Preliminary Injunction Motion, including preparing potential declarations in support of that response. *See* ECF No. 25. Interrupting this process to brief (and have the Court resolve) plaintiff's TRO Motion, which raises identical issues, will merely delay meaningful resolution of the case. *See, e.g.*, Fed. R. Civ. P. 65(b)(2) (discussing automatic expiration of a TRO).

If, however, the Court desires expedited briefing on plaintiff's TRO Motion despite the unexplained delay in filing it, then defendants respectfully request that, at a minimum, they be given an opportunity to respond to plaintiff's TRO Motion before the Court issues a decision. Assuming the date set by the Court is before September 28, 2016, defendants will endeavor to compile as complete a response as possible in the time allowed.

Respectfully submitted this 13th day of September, 2016,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MICHAEL W. COTTER
United States Attorney

ERIC R. WOMACK
Assistant Branch Director

/s/ Michelle R. Bennett
MICHELLE R. BENNETT
(CO Bar No. 37050)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W. Room 7310

Washington, D.C. 20530

Tel: (202) 305-8902

Fax: (202) 616-8470

Email: michelle.bennett@usdoj.gov

Attorneys for Defendants.

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 1,898 words, excluding the caption, signature block, and certificates of service and compliance.

Dated this 13th day of September, 2016.

/s/ Michelle R. Bennett
MICHELLE R. BENNETT
Trial Attorney

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Michelle R. Bennett
MICHELLE R. BENNETT
Trial Attorney