IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-3258-CMA

SAVE THE COLORADO, a Colorado nonprofit corporation;
THE ENVIRONMENTAL GROUP, a Colorado nonprofit corporation;
WILDEARTH GUARDIANS, a nonprofit corporation;
LIVING RIVERS, a nonprofit corporation;
WATERKEEPER ALLIANCE, INC., a nonprofit corporation; and
SIERRA CLUB, a nonprofit corporation.

Petitioners,

v.

LIEUTENANT GENERAL TODD T. SEMONITE, in his official capacity as the Chief of the U.S. Army Corps of Engineers;
DAVID BERNHARDT, in his official capacity as Secretary of the Interior; and
AURELIA SKIPWITH, in her official capacity as Director of the U.S. Fish and Wildlife Service.

Respondents.

PETITIONERS' MOTION FOR LEAVE TO FILE A SURREPLY IN RESPONSE TO DENVER WATER'S REPLY (ECF 60)

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INTRODUCTION

Pursuant to D.C.COLO.LCivR 7.1(d), Petitioners respectfully request leave to file a short surreply (of no more than five pages). In its reply in support of its motion to dismiss Petitioners' case, ECF 60, Denver Water made two new arguments that are central to the Court's resolution of the pending motions filed by Denver Water and Federal Respondents. *See* ECF 47; 49. As explained below, these new arguments both satisfy the standard for granting leave to file a surreply and warrant a brief response to ensure that Petitioners have an adequate and equitable opportunity to explain the gravity of these new contentions and their impact on any ruling on the motions to dismiss.[1]

LEGAL STANDARD

As this Court has explained, although "neither the Federal Rules of Civil Procedure nor this Court's local rules of procedure provide for the filing of surreply briefs," a surreply is nevertheless warranted "if the reply brief raises new material that was not included in the original motion." *Pirnie v. Key Energy Servs., LLC*, No. 08-cv-1256-CMA-KMT, 2009 WL 1386997 at *1 (D. Colo. May 15, 2009) (Arguello, J.) (citing *Green v. New Mexico*, 420 F.3d 1189, 1196 (10th Cir. 2005)). "'New material' can include new legal arguments or factual evidence." *Id.* (quoting *Green*, 420 at 1196).

[1] The Court's Civil Practice Standard 7.1A(d)(4) prohibits "surreply or supplemental briefs . . . without permission of the Court." CMA Civ. Practice Standard 7.1A(d)(4). Thus, because Petitioners have properly sought permission of the Court through this motion for leave, Petitioners hereby attach a proposed surreply and respectfully request that the Court formally lodge it as accepted in the ECF system if leave is granted. This appears to be routine practice in this Court. *See, e.g.*, *Zebrowski v. Zebrowski*, No. 10-cv-2582-CMA-KMT, 2010 WL 5094026 at *1, *5 (D. Colo. Dec. 8, 2010) (Arguello, J.) (granting leave to file surreply after noting that the movant had filed its motion for leave "along with [its] Sur-reply").

DISCUSSION

Petitioners easily satisfy the standard for a surreply in this case. In its reply in support of its motion to dismiss, Denver Water made two new legal arguments that have a significant bearing on the central question at issue—i.e., whether this Court or the Tenth Circuit has original jurisdiction over Petitioners' challenge to the U.S. Army Corps of Engineers' Clean Water Act Section 404 permit and underlying analysis (and related actions directly flowing from the Corps' permit).

In its motion to dismiss, Denver Water argued unequivocally that the Federal Power Act ("FPA") "compels ***all*** *challenges related to FERC hydropower licensing actions*—including the actions challenged here—to be filed in the U.S. courts of appeals." ECF 48 at 16 (emphasis added); *see also id.* ("*[A]ll* aspects of a FERC decision, including its coordination with other agencies and reliance on their work product, [must] be reviewed in one action, before one court of appeals"). Now, however, Denver Water makes two new arguments, which are in tension with its original position and which bear significantly on the jurisdictional question before the Court.

First, in contrast to its previous argument, Denver Water now states that it "does not contend it is *always* the case that, when an agency takes an action related to a FERC-licensed project, review lies in the court of appeals," ECF 60 at 1. Thus, in sharp contrast to its prior position, Denver Water now concedes that district courts have jurisdiction over *some* agency actions "related to a FERC-licensed project." This new argument further underscores Petitioners' position that their challenge to the legally independent and factually distinct CWA permitting action by the Corps—in which FERC played no role—must be pursued in district court because it did not involve FERC, was

not triggered by and serves independent utility from FERC's license, and could not have been raised before FERC, which lacks statutory authority to discern or cure CWA violations. Given the significant concession inherent in Denver Water's new legal argument—which expressly contradicts its prior position—Petitioners must be granted an opportunity to respond to this argument as it bears on the pending motions.

Second, Denver Water now argues, for the first time, that "Petitioners might have been able to sue in district court while FERC's proceeding was ongoing," but that FERC's issuance of a license terminated this Court's jurisdiction. *Id.* at 13. This new argument warrants a response for several reasons. To begin with, Denver Water's new proposed approach to jurisdiction—i.e., a district court has jurisdiction over actions related to a FERC-licensed project only until FERC's issuance of a license strips the court of jurisdiction—lacks any basis in statute or common sense. Moreover, it raises serious concerns by making jurisdiction dependent on a third party not before the court. In addition, Denver Water's new approach invites litigants to engage in improper legal maneuvering to delay resolution of a case until FERC acts, as a means of stripping the court of jurisdiction prior to merits resolution. Indeed, as explained in the proposed surreply, Denver Water did just that here, by representing one position to Petitioners' counsel in April 2019 concerning its view of the Court's jurisdiction and thereby shaping the trajectory of this litigation, only to now reverse course in a manner that seriously prejudices Petitioners' interests. Because Denver Water raised this argument for the first time in its reply, Petitioners must be granted an opportunity to respond.

Finally, Petitioners note that although it is Petitioners' lawsuit that Respondents seek to permanently dismiss, Respondents have filed a total of 81 pages of briefing in

support of dismissal compared to only 30 pages of briefing by Petitioners. Thus, by any measure, a brief surreply consisting of no more than five additional pages by Petitioners—especially where warranted to respond to new arguments raised in Denver Water's reply—is appropriate and equitable under the circumstances in light of the disproportionate amount of briefing filed by Respondents.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant leave and formally accept the filing of Petitioners' proposed surreply, which is limited to responding to Denver Water's new arguments set forth in its reply.[2]

Respectfully submitted,

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[2] Pursuant to D.C.COLO.LCivR 7.1(a), Petitioners conferred with Respondents. Federal Respondents and Denver Water oppose the relief requested herein.

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2020, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ William S. Eubanks II
William S. Eubanks II