

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:18-cv-03258-CMA

SAVE THE COLORADO et al.,
Petitioners,

v.

LT. GEN. TODD T. SEMONITE, et al.,
Respondents,

CITY AND COUNTY OF DENVER,
ACTING BY AND THROUGH ITS BOARD
OF WATER COMMISSIONERS,

Respondent-Intervenor.

DENVER WATER’S OPPOSITION TO MOTION FOR LEAVE TO FILE A SURREPLY

Respondent-Intervenor Denver Water respectfully opposes Petitioners’ motion for leave to file a surreply (“Mot”). No surreply is warranted where a reply makes arguments in “direct rebuttal to [a] contention in [a] [r]esponse [b]rief.” *Gates Corp. v. Dorman Prods., Inc.*, No. 09-cv-0258, 2009 WL 4675099, at *2 (D. Colo. Dec. 7, 2009) (Arguello, J.). The points from Denver Water’s reply to which Petitioners seek to respond directly rebut Petitioners’ Opposition, citing no new facts or law. Furthermore, Petitioners’ accusation that Denver Water acted in bad faith is baseless.

First, Petitioners argue (at 2-3) that Denver Water contradicted its motion by recognizing in its reply that not every agency action that could be viewed as somehow related to a FERC-licensed project is subject to review only in a court of appeals. But Denver Water’s motion addressed the specific circumstances of *Petitioners’* claims, explaining how the environmental analyses Petitioners challenged are “integral

elements” or “ingredients” of FERC’s record and decision and therefore inhere in the controversy before FERC. See ECF 48 at 2-3, 23-24. When stating in its initial motion that the FPA’s jurisdictional provision covers all actions inhering in a FERC order, Denver Water plainly was not seeking to apply that provision to the universe of circumstances in which an agency action might bear some relationship to a FERC-licensed project, no matter how tenuous and regardless of the timing. And in its reply, Denver Water was specifically distinguishing Petitioners’ cases, which concerned U.S. Army Corps of Engineers actions that *post-dated* judicial review of FERC’s actions, and wherein the two agencies conducted independent analyses. See ECF 60 at 1, 9-10.

Second, Petitioners (at 3) erroneously assert that Denver Water raised a new argument by citing cases that characterize FERC’s action as extinguishing district court jurisdiction, even though Denver Water cited those same cases in its motion. ECF 48 at 17-18, 26-28. Denver Water cited those cases again in its reply to rebut Petitioners’ argument that a footnote in FERC’s decision instructed them to sue in district court, and to refute their accusation that Denver Water improperly delayed in bringing its motion. Denver Water simply pointed out that, “at most,” the footnote “suggests” that FERC may have believed Petitioners could maintain a district-court suit *before* issuance of its order, and that there was nothing improper about Denver Water filing a jurisdictional motion to dismiss once the issues crystalized through issuance of FERC’s order. ECF 60 at 13 & n.8. Again, these are not new legal arguments warranting a surreply.

Finally, Petitioners’ accusation that Denver Water has acted in bad faith and sought to delay this case is entirely false. Mot. at 3. The mere fact that Denver Water

requested additional pages for a possible motion to dismiss in April 2019 is not evidence of misconduct. To the contrary, that filing shows that Denver Water stated from the outset that it intended to move to dismiss under the FPA.

At no point did Denver Water seek to delay this case or gain any improper tactical advantage that Petitioners might perceive, but rather proceeded in good faith based upon its best assessment of the law. In coordination with federal respondents, and consistent with the Tenth Circuit's decision in *Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 262-64 (10th Cir. 1989), and other case law, Denver Water decided that the issues raised by its *jurisdictional* motion to dismiss—which can be raised at any time—would be clearest once FERC had acted, so that the Court could review the basis for and scope of the order. Denver Water could not know when FERC would act, but Denver Water did transparently convey that it planned to move to dismiss upon issuance of FERC's order—as shown by the Joint Case Management Plan filed earlier this year, in which the parties agreed to defer merits briefing until after FERC's order and Denver Water's subsequent motion to dismiss.¹ While Denver Water had hoped that the reinitiated ESA consultation would end and FERC would act sooner, Denver Water has done everything in its power to bring this case to an expeditious resolution.

CONCLUSION

For these reasons, the Court should deny Petitioners' motion to file a surreply.

¹ See ECF No. 44 at 4 (“Respondent-Intervenor anticipates that FERC will soon issue an order on Respondent-Intervenor's application to amend its hydropower license for the operation of the Gross Reservoir and Dam . . . Respondent-Intervenor contends that, under 16 U.S.C. § 825/(b), FERC's issuance of that order will divest this Court of jurisdiction to review Petitioner's claims . . .”).

DATED this 4th day of November, 2020

Respectfully submitted,

Jessica R. Brody
Daniel J. Arnold
Nicholas A. DiMascio
DENVER WATER
1600 West 12th Avenue
Denver, CO 80204-3412
(303) 628-6460
Nick.dimascio@denverwater.org

/s/ Amanda Shafer Berman
Amanda Shafer Berman
David Y. Chung
Elizabeth Boucher Dawson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500
aberman@crowell.com

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users of the CM/ECF system.

Dated: November 4, 2020

Respectfully submitted,

/s/ Amanda Shafer Berman
Amanda Shafer Berman