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12 **IN THE UNITED STATES DISTRICT COURT**
13 **EASTERN DISTRICT OF CALIFORNIA**
14 **FRESNO DIVISION**

15 UNITED FARM WORKERS and UFW
16 FOUNDATION,

17 Plaintiffs,

18 v.

19 THE UNITED STATES DEPARTMENT OF
20 LABOR and MARTIN J. WALSH, in his
21 official capacity as United States Secretary of
22 Labor,

23 Defendants.

Case No. 1:20-cv-01690-DAD-JLT

**PLAINTIFFS' OPPOSITION TO JOINT
MOTION TO INTERVENE OF
NATIONAL COUNCIL OF
AGRICULTURAL EMPLOYERS AND
WESTERN GROWERS ASSOCIATION**

Hearing On Motion

Date: June 22, 2021

Time: 1:30 p.m.

Before: Judge Dale A. Drozd

1 **INTRODUCTION**

2 The National Council of Agricultural Employers and Western Growers Association (“proposed
3 intervenors”) waited until June 10, 2021 to seek to intervene in this action—more than six months after
4 the complaint was filed, five months after this Court granted a preliminary injunction, and almost five
5 months since the Court ordered the U.S. Department of Labor (“DOL”) to notify employers about the
6 potential for future wage-adjustment payments. Proposed intervenors offer no reasonable justification
7 for their protracted delay. Nor could they. Public statements made by proposed intervenors demonstrate
8 that they not only have been aware of this litigation from its outset, but they have been closely
9 monitoring. Respectfully, to characterize the proposed intervenors’ motion as filed at the eleventh hour
10 would be charitable. Prior to the motion, the Court had already issued a wage-adjustment order, the
11 parties had fully briefed proposed amendments to that order, and this Court had indicated it was fully
12 “prepared to issue a final order addressing the parties’ requests for modification.” ECF No. 66.

13 Therefore, intervention of any kind is inappropriate here because of the proposed intervenors’
14 prolonged and unjustified delay in seeking leave to intervene. Permitting intervention at this juncture
15 would only serve to unduly delay final resolution of the Court’s June 11 order amending its earlier
16 wage-adjustment order. This Court has recognized the need for avoiding delay in implementing its
17 order. Moreover, proposed intervenors have failed to demonstrate that their interests have not been
18 adequately represented by defendants, or that the Court has not taken their interests into consideration
19 throughout this litigation.

20 The motion should be denied.

21 **BACKGROUND**

22 This case—as well as a predecessor lawsuit against the U.S. Department of Agriculture
23 (“USDA”)—concerns the government’s attempt to unlawfully freeze the wages of H-2A workers and
24 U.S. workers in corresponding employment. On October 13, 2020, plaintiffs filed a complaint against
25 the USDA, then-U.S. Secretary of Agriculture Sonny Perdue, and then-Under Secretary of Farm
26 Production and Conservation William Northey that alleged that defendants’ decision to discontinue the
27 Farm Labor Survey and cease publication of the Farm Labor Report violated the Administrative
28

1 Procedure Act because it was arbitrary and capricious and was made without the requisite notice-and-
2 comment rulemaking procedure. *See UFW v. Perdue*, No. 1:20-cv-1452-DADJLT (Oct. 13, 2020), ECF
3 No. 1. Plaintiffs simultaneously filed a Motion for Temporary Restraining Order and Preliminary
4 Injunction to prevent USDA from implementing its decision, *see UFW v. Perdue*, No. 1:20-cv-1452-
5 DADJLT (Oct. 13, 2020), ECF No. 3, and on October 28, 2020, the Court granted plaintiffs' motion, *see*
6 *UFW v. Perdue*, No. 1:20-cv-1452-DADJLT (Oct. 28, 2020), ECF No. 33.

7 On November 30, 2020, plaintiffs filed a complaint and motion for preliminary injunction in the
8 instant action seeking to prevent DOL from implementing its November 5, 2020 Final Rule revising the
9 methodology for calculating Adverse Effect Wage Rates ("AEWRs") for the H-2A program. *See* ECF
10 Nos. 1, 5. On December 7, 2020, defendants filed their opposition to plaintiffs' motion for preliminary
11 injunction. ECF No. 31. On December 9, 2020, the State of California sought leave to appear as
12 Amicus Curiae in support of plaintiffs' motion for preliminary injunction, which the Court granted on
13 December 10. ECF Nos. 32, 33. Plaintiffs filed a reply to defendants' opposition to the motion for
14 preliminary injunction on December 11, 2020. ECF No. 34. On December 14, 2020, the Court held a
15 hearing on the motion for preliminary injunction, ECF No. 36, and on December 23, 2020, the Court
16 granted plaintiffs' motion, ECF No. 37.

17 On January 6, 2021, the parties submitted a joint status report offering competing views of what
18 relief was appropriate in light of the Court's December 23 order. ECF No. 38. The Court issued a
19 supplemental order regarding preliminary injunctive relief on January 12, 2021. ECF No. 39. That
20 order "reserve[ed] the issue of whether any award of backpay is warranted based upon the difference
21 between the 2020 AEWRs and the final 2021 AEWRs." *Id.* at 2. However, the Court directed
22 defendants "to provide notice to all H-2A employers who submit job orders and applications for H-2A
23 labor certification between December 21, 2020 and the publication of the final 2021 AEWRs, informing
24 them of the potential backpay claim." *Id.* at 3. Defendants issued the court-ordered notice on January
25 15, 2021. *See* U.S. Dep't of Labor, *Employment and Training Administration – Announcements* (Jan.
26 15, 2021), <https://www.dol.gov/agencies/eta/foreign-labor/news>.

1 On February 12, 2021, USDA finally complied with the preliminary injunction entered in *UFW*
2 *v. Perdue*, No. 1:20-cv-1452 (E.D. Cal. Oct. 28, 2020), and published the Farm Labor Report originally
3 scheduled for November 2020.¹ The Farm Labor Report confirmed that farmworkers wages have
4 continued to increase significantly; indeed, the Farm Labor Survey determined that the gross wage rate
5 for field and livestock workers during the October 2020 reference week had increased six percent year-
6 over-year.² Moreover, the annual average gross wage for field and livestock workers—the figure that
7 determines the 2021 AEWRs under DOL’s 2010 regulation—rose approximately five percent, to
8 \$14.62.³

9 On February 23, 2021, DOL published the 2021 AEWRs, as required by the Court’s January 12,
10 2021 supplemental order. *See Labor Certification Process for the Temporary Employment of Aliens in*
11 *Agriculture in the United States: 2021 Adverse Effect Wage Rates for Non-Range Occupations*, 86 Fed.
12 Reg. 10,996 (Feb. 23, 2021). On March 11, 2021, plaintiffs filed a motion seeking an extension of the
13 Court’s preliminary injunction in the form of equitable restitution; namely, plaintiffs sought an order
14 directing defendants to notify H-2A employers that they were required to provide wage-adjustment
15 payments to farmworkers who worked during the January 1 to February 23, 2021 period when 2020
16 AEWRs applied instead of the higher 2021 rates. ECF No. 44. Defendants filed an opposition to the
17 motion on March 23, 2020, ECF No. 47, to which plaintiffs replied on March 26, 2021, ECF No. 48.
18 The Court held hearings on the motion on April 6, 2021 and May 11, 2021. *See* ECF Nos. 51, 57. On
19 May 14, 2021, the Court granted plaintiffs’ motion. *See* ECF No. 58.

20 On June 3, 2021, the parties filed a joint submission proposing amendments to the Court’s May
21 14 wage-adjustment order. Plaintiffs proposed eliminating language in Part 2.a of the Court’s order that
22 limits the order’s scope to H-2A employers that submitted job orders and applications for H-2A labor
23 certification between December 21, 2020 and February 23, 2021. *See* ECF No. 64 at 2-3. Defendants
24

25 ¹ *See* USDA Nat’l Agric. Statistics Serv. (NASS), *Farm Labor* (Feb. 11, 2021),
26 <https://release.nass.usda.gov/reports/fmla0221.pdf>.

27 ² *See id.* at 1.

28 ³ *See id.* at 2.

1 opposed plaintiffs' proposed amendment while also proposing amended language for Part 3 of the
2 Court's wage-adjustment order. On June 8, 2021, the Court issued a minute order instructing the parties
3 to submit supplemental briefing to clarify plaintiffs' request to expand the scope of the Court's wage-
4 adjustment order. ECF No. 66. The parties submitted their supplemental briefs on June 10, 2021. ECF
5 Nos. 67, 69. Later that day, proposed intervenors filed a motion to stay the Court's consideration of the
6 parties' request to amend the wage-adjustment order and a motion to intervene. ECF Nos. 69, 70.

7 On June 11, 2021, the Court ruled on the parties' proposed amendments. ECF No. 74. The
8 Court declined to expand the May 14 order's scope to apply to employers that submitted H-2A job
9 orders or applications before December 21, 2020. *See id.* at 3-4. The Court clarified, however, that the
10 May 14 order applied to H-2A employers that submitted either job orders *or* applications between
11 December 21, 2020 and February 23, 2021, not just those employers that submitted both documents
12 during that period. *See id.* at 7.

13 Since October 2020, proposed intervenors have actively been monitoring the ongoing litigation
14 between plaintiffs and USDA and defendants.⁴ Nonetheless, until now, proposed intervenors did not
15 seek to intervene or otherwise make their position known to the Court. Proposed intervenors now seek
16 to intervene as defendants to oppose plaintiffs' proposed (now rejected) amendment to the May 14
17 wage-adjustment order.

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21 ⁴ *See, e.g., Ag Worker Lawsuit Muddies Status of H-2A Adverse Effect Wage Rate*, Fruit Grower News
22 (Oct. 26, 2020), <https://fruitgrowersnews.com/news/ag-worker-lawsuit-muddies-status-of-h-2a-adverse-effect-wage-rate/> (noting that the NCAE communicated to members that the lawsuit against USDA
23 could impact wages under the H-2A program); Tom Karst, *Farmworker Groups File Lawsuit Over H-2A Wages*, The Packer (Dec. 1, 2020), <https://www.thepacker.com/news/industry/farmworker-groups-file-lawsuit-over-h-2a-wages> (NCAE president and CEO commenting on lawsuit); *Farm Workers Union Sues DOL Over New Rule for H-2A Wage Rates*, Western Growers Ass'n (Dec. 1, 2020),
24 <https://www.wga.com/blog/farm-workers-union-sues-dol-over-new-rule-h-2a-wage-rates> (Western
25 Growers Association blog post about the then-recently filed lawsuit), Philip Brasher & Ben Nuelle,
26 *Judge Blocks H-2A Wage Rate Freeze, Reforms*, AgriPulse (Dec. 24, 2020), <https://www.agripulse.com/articles/15060-judge-blocks-h-2a-wage-rate-freeze-reforms> (NCAE president and CEO
27 commenting on lawsuit).
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