IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 08-cv-1624-WJM-NRN

COLORADO ENVIRONMENTAL COALITION,
INFORMATION NETWORK FOR RESPONSIBLE MINING,
CENTER FOR NATIVE ECOSYSTEMS,
CENTER FOR BIOLOGICAL DIVERSITY, and
SHEEP MOUNTAIN ALLIANCE,

Plaintiffs,

v.

OFFICE OF LEGACY MANAGEMENT, and
UNITED STATES DEPARTMENT OF ENERGY,

Defendants.

ORDER GRANTING MOTION TO DISSOLVE INJUNCTION AND DIRECTING ENTRY OF FINAL JUDGMENT

Plaintiffs bring this lawsuit under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq*., the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4231 *et seq*., and the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq*., challenging certain decisions made by the United States Department of Energy's Office of Legacy Management (for purposes of this order, "DOE") concerning a uranium mining program in southwestern Colorado that DOE oversees. That program was known as the Uranium Lease Management Program ("ULMP"). At some point, the program dropped "Management" from its title and now goes by "ULP," but the Court will continue to refer to it as "ULMP" for consistency with prior orders.

In an earlier phase of this lawsuit, the Court enjoined DOE from implementing its

most recent decisions regarding the ULMP. Currently before the Court is DOE's Motion to the Dissolve Injunction ("Motion to Dissolve"). (ECF No. 160.) For the reasons explained below, the Court will grant this motion, dissolve the injunction, and enter final judgment.

I. BACKGROUND

A. Early Stages and Original Injunction

In 2007 and 2008, DOE approved new uranium mining under the ULMP, mostly on lands around Paradox Valley in southwestern Colorado. Plaintiffs sued in July 2008, claiming that DOE had not satisfied its obligations under NEPA, ESA, and associated regulations when making this decision. (ECF No. 1.) Substantive proceedings moved slowly at first due to parallel litigation over collateral matters, and to limited discovery the Court permitted. (ECF No. 41.) The case was transferred to the undersigned upon his appointment in February 2011. (ECF No. 71.)

In October 2011, having finally received full substantive briefing, the Court partially agreed with Plaintiffs' challenges. *See Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193 (D. Colo. 2011) (ECF No. 94) ("*CEC I*"). Consequently, the Court vacated DOE's environmental review documents, stayed all existing ULMP leases, and enjoined DOE from approving additional leases or other ULMP-related activities on the lease tracts. *Id*. at 1224. The Court then invited DOE to "move . . . to dissolve this injunction" after it had "conduct[ed] an environmental analysis on remand that complies with NEPA, ESA, all other governing statutes and regulations, and this Order." *Id*.

B. Previous Motion to Dissolve Injunction

In April 2017, DOE moved to dissolve the injunction. (ECF No. 147.) The Court resolved that motion in February 2018. *See Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 302 F. Supp. 3d 1251 (D. Colo. 2018) (ECF No. 151) ("*CEC II*"). The Court agreed with DOE that it had corrected all previously noted errors, save for one. The ESA requires federal agencies to evaluate whether their actions might jeopardize the habitat of an endangered or threatened species, and this evaluation process may include consultation with the United States Fish & Wildlife Service ("FWS"). *See id*. at 1269–70. In this case, the main question was whether reasonably foreseeable uses and discharges of water in the course of mining and associated activities might ultimately affect four endangered fish species living in the Colorado River. *Id*. at 1270, 1273–74. DOE requested FWS's opinion on the matter (a "Biological Opinion" or "BiOp") by sending to FWS the DOE's Biological Assessment ("BA") that that water usage would have at least *some* adverse effect on the endangered Colorado River fish. *Id*. at 1270. FWS's resulting BiOp concluded that there was no likelihood of jeopardizing or threatening those fishes' habitat. *Id*. at 1270–71.

However, when requesting the BiOp, DOE conveyed to FWS only the forecasted annual water consumption of ULMP mines, and not water consumption for "other mining operations expected to coincide with renewed mining on ULMP lease tracts." *Id*. at 1273. In particular, DOE's water consumption analysis did not address a uranium mill planned for Paradox Valley, to be known as the Piñon Ridge Mill:

> Among the many things DOE says about this mill, DOE predicts "[a] surge in uranium exploration, mining, and permitting . . . if the mill is constructed," referring to mining on BLM land rather than ULMP lease tracts. DOE notes that

> the Piñon Ridge Mill would require water as part of its milling operations. DOE does not, however, estimate the mill's water requirements, nor the water requirements of the non-ULMP uranium mines it predicts will come into existence.

Id. (citations omitted; alterations in original). "Notably," the Court added,

> DOE does not claim that it lacks information from which it can reasonably estimate the amount of water the Piñon Ridge Mill will likely consume, or the amount of water non-ULMP uranium mines will likely consume. The Court is therefore compelled to presume that DOE possesses the necessary information.

Id. at 1274.

With the ability to predict all water consumption associated with renewed mining on the ULMP tracts—whether caused by DOE's decision to resume mining there, or simply coinciding with it and reasonably foreseeable to occur—the Court held that DOE had acted arbitrarily and capriciously by relying on FWS's resulting BiOp, knowing that the BiOp was formulated with materially incomplete information. *Id*.; *see also id*. at 1272 ("An agency acts 'not in accordance with law,' 5 U.S.C. § 706(2)(A), when it fails to convey material information in its possession to FWS, and the agency behaves arbitrar[ily] and capriciously when it relies on a BiOp resulting from a materially defective consultation."). "Fortunately," the Court continued,

> the remedy in this circumstance does not require total vacatur . . . . Instead, the Court will leave the existing injunction in place, for the time being, and order DOE to reinitiate consultation with FWS based on a supplemental BA. The supplemental BA may be limited solely to the question of water depletion based on DOE's estimates of the likely combined annual water usage of ULMP mines, non-ULMP mines likely to become operational, and the Piñon Ridge Mill. Upon receiving FWS's response (presumably an additional or supplemental BiOp), DOE may then issue an updated or supplemental ROD [*i.e.*, record of decision] and move once again to dissolve the injunction. Such a motion

> need only address whether DOE fulfilled its ESA § 7 consultation duties with respect to water depletion that may affect Colorado River endangered fish.

Id. (footnote omitted).

C. Current Motion to Dissolve

By letter dated May 2, 2018, DOE transmitted a supplemental BA to FWS. (ECF No. 160-1.) The supplemental BA reports DOE's efforts to search for all relevant current or reasonably foreseeable uranium mining and related activities in the area, and to estimate annual water usage of all these activities. (*Id*. at 4–7.) The BA also tabulates all of the estimated water usage. (*Id*. at 7–10.)

The most notable development reported in the supplemental BA is that, not long after this Court issued *CEC II*, a Colorado administrative law judge ruled that the Colorado Department of Public Health and Environment ("CDPHE") should not have issued the license under which the Piñon Ridge Mill was to be constructed and operated. (*Id*. at 5–6.) The supplemental BA further reports that CDPHE elected not to appeal the judge's decision, and "therefore the license [was] revoked as of April 26, 2018." (*Id*. at 6.) In this light, the supplemental BA announces that the Piñon Ridge Mill is no longer a reasonably foreseeable action coinciding with renewed ULMP mining, so DOE would not consider its potential water usage. (*Id*.) However, perhaps out of a desire not to appear to be shirking the Court's instructions in *CEC II*, DOE included within the supplemental BA the amount of water the Piñon Ridge Mill had been expected to consume. (*Id*.) DOE also included a parting comment about the changing uranium market and its potential relationship to the defunct Piñon Ridge proposal:

> Finally, in the [previous BA's] discussion regarding cumulative effects from the yet-to-be constructed Piñon

> Ridge Mill, whose licensed was revoked in April 2018, DOE cited the following text from that company's reports for the mill: "A surge in uranium exploration, mining, and permitting is anticipated if the mill is constructed, including permitting and development of uranium/vanadium deposits controlled by Energy Fuels Resources." The cited reports were circa 2009 to 2012. This statement may have been appropriate at that time; however, since then, various world events happened (e.g., Fukushima in 2011) that contributed to continued low uranium ore prices—lower than economically feasible for new mining or a surge in mining.

(*Id*. at 10–11.)

By letter dated June 19, 2018, FWS responded to DOE's supplemental BA. (ECF No. 160-2.) As to Piñon Ridge, FWS agreed that it was no longer the sort of reasonably foreseeable action that must be considered. (*Id*. at 3.) As to all other data reported in the supplemental BA, FWS announced that its previous BiOp was still accurate in predicting no jeopardy to the Colorado River endangered fishes' habitat. (*Id*. at 2–4.)

Having received this information, DOE moved to dissolve the injunction in July 2018. (ECF No. 160.) Plaintiffs remain opposed to dissolving the injunction, except as to ULMP least tracts that will be reclaimed rather than newly mined. (ECF No. 162 at 9–10.)

II. LEGAL STANDARD

In opposing the *first* motion to dissolve, Plaintiffs argued from case law that a party seeking to dissolve an injunction bears a heavy burden to show that circumstances have changed. (*See* ECF No. 148 at 10–11.) The Court rejected this argument: "Plaintiffs' cited case law relates to injunctions that were meant to last indefinitely. Here, however, the Court specifically contemplated lifting its injunction after

DOE completed the necessary environmental review." *CEC II*, 302 F. Supp. 3d at 1255 (citing *CEC I*, 819 F. Supp. 2d at 1224).

In opposing DOE's *current* Motion to Dissolve, Plaintiffs once again argue that DOE bears a heavy burden of showing changed circumstances. (ECF No. 162 at 4.) The Court again rejects this argument, for the reasons just stated. Although DOE bears the burden in this procedural posture, it is simply a burden to show that it has materially complied with the Court's instructions.

III. ANALYSIS

A. Whether a New or Supplemental Administrative Record is Needed

DOE attached its supplemental BA and FWS's response to its Motion to Dissolve (ECF Nos. 160-1, 160-2), but has not submitted any other documents generated during the re-consultation process the Court ordered in *CEC II*. Plaintiffs' primary challenge is that DOE cannot move to dissolve the injunction without first assembling and lodging a new or supplemental administrative record, comprising all documents related to the re-consultation. (ECF No. 162 at 5–6.)

The parties have not cited, nor has the Court located, any authority establishing that a government agency must, in all instances, assemble and disclose a full administrative record before seeking a Court's approval of its administrative action. The case law *assumes* that an administrative record will be assembled, but without discussing it as some sort of categorical or jurisdictional requirement.

Despite the paucity of case law on the topic, judicial review of administrative action will, by nature, nearly always require an administrative record. Under the unique circumstances presented here, however, the Court finds that DOE committed no error,

or, if it did, the error is attributable to Plaintiffs as the equivalent of invited error. These outcomes are evident from the procedures that led up to the Motion to Dissolve.

To repeat, the Court's instructions in *CEC II* were as follows:

> Fortunately, the remedy in this circumstance does not require total vacatur . . . . Instead, the Court will leave the existing injunction in place, for the time being, and order DOE to reinitiate consultation with FWS based on a supplemental BA. The supplemental BA may be limited solely to the question of water depletion based on DOE's estimates of the likely combined annual water usage of ULMP mines, non-ULMP mines likely to become operational, and the Piñon Ridge Mill. Upon receiving FWS's response (presumably an additional or supplemental BiOp), DOE may then issue an updated or supplemental ROD and move once again to dissolve the injunction. Such a motion need only address whether DOE fulfilled its ESA § 7 consultation duties with respect to water depletion that may affect Colorado River endangered fish.

302 F. Supp. 3d at 1274 (footnote omitted). A few months later, DOE submitted a status report announcing that it had transmitted its supplemental BA to FWS and "intend[ed] to file a motion to dissolve the injunction as soon as practicable after receipt of [FWS's] final response to the [BA]." (ECF No. 154 at 1–2.) The Court then ordered the parties to "confer and . . . file a joint status report explaining their views (including their respective views, if they cannot agree) on: (1) what steps remain, if any, before [DOE] may file a motion to dissolve the injunction, and (2) an appropriate briefing schedule for such a motion." (ECF No. 155.) In the joint status report, "[t]he parties agree[d] that the only step remaining before [DOE] may file a motion to dissolve the injunction is for [DOE] and [FWS] to complete their consultation over [the supplemental BA]." (ECF No. 156 at 1.) The parties also presented an agreed-upon briefing schedule, with the motion to dissolve due "30 days after receipt of final response from

FWS to Supplemental BA." (*Id*. at 3.) The Court adopted the proposed briefing schedule, with the first deadline (*i.e.*, filing of the motion to dissolve) set for 30 days after DOE received a final response from FWS regarding the supplemental BA. (ECF No. 157.)

This course of events reveals three things. First, the Court charged DOE with a limited, discrete task—in contrast to a reopening of the entire process that the Court ordered in *CEC I*. Second, the Court expressed its expectation of an updated or supplemental ROD,[1] but the Court said nothing about a new or supplemental administrative record—in contrast to proceedings before the original motion to dissolve (ECF No. 147), where the Court specifically required a new administrative record (*see* ECF No. 132). Third, the Court asked the parties to describe "what steps remain, if any, before [DOE] may file a motion to dissolve the injunction" (ECF No. 155), and Plaintiffs did not at that time raise the need to produce a new or supplemental administrative record.

Accordingly, because the Court did not require a new administrative record, DOE did not err in failing to produce one. Also, the situation is equivalent to "invited error" because Plaintiffs had their opportunity to insist on an administrative record as part of the scheduling order but did not. *See, e.g.*, *United States v. Edward J.*, 224 F.3d 1216, 1222 (10th Cir. 2000).

Finally, assembling an administrative record would take more time and likely more briefing. The Court finds that it would not be in the interest of justice to delay

[1] No party has pointed the Court to an updated or supplemental ROD, unless the supplemental BA (ECF No. 160-1) is deemed to be the same thing. But Plaintiffs do not object on this account, so the Court will not explore the matter further.

resolution of the matter any further. This case is almost eleven years old, and the Court's injunction has been in place for more than seven years.

For all these reasons, the Court holds under the unusual circumstances presented here that DOE need not have assembled and disclosed a full administrative record before seeking review of its limited, Court-ordered re-consultation with FWS.

B. Whether DOE Properly Evaluated the Significance of the Piñon Ridge Mill Developments

Plaintiffs' only other argument against dissolving the injunction is that DOE purportedly did not recognize the true significance of the Piñon Ridge Mill's demise. (ECF No. 162 at 6–8.) Plaintiffs note that the Piñon Ridge Mill was expected to consume a substantial amount of water—substantial enough to exceed a numeric threshold that FWS finds significant, particularly when added to all other estimated water usage. (*Id*. at 7.) Plaintiffs argue that FWS therefore should have considered the Piñon Ridge estimate as a proxy for whatever mill will handle the uranium likely to be mined in the area: "the newly presented fact that [the] Piñon Ridge Mill license is no longer effective *and another mill must be used* does not allow [DOE] to arbitrarily exclude the water depletions needed to mill the oars from the [DOE] uranium lease tracts." (*Id*. (emphasis added).) Plaintiffs' argument fails for at least three reasons.

First, Plaintiffs fail to recognize the significance of the Piñon Ridge Mill in the Court's previous ruling. The Court noted DOE's prediction that the Piñon Ridge Mill would prompt a uranium mining boom in the area, particularly on non-ULMP tracts. *CEC II*, 302 F. Supp. 3d at 1273. The Court thus faulted DOE for failing to "estimate the mill's water requirements, [and] the water requirements of the non-ULMP uranium mines [DOE] predicts will come into existence." *Id*. And that is what the Court tasked

DOE with estimating and then transmitting to FWS. *Id*. at 1274. The Court never faulted DOE's estimates for water usage associated with ULMP lease tracts. Regardless, the supplemental BA plausibly and adequately explains why the Piñon Ridge Mill will likely never be constructed, and why substantial uranium mining is not likely to occur anyway. There is no hint that the mining that likely *will* occur will require anywhere near the fairly large amount of water predicted for the Piñon Ridge Mill.

Second, FWS in fact conveyed the Piñon Ridge Mill estimate to FWS. It did so, of course with a significant caveat, *i.e.*, that it no longer viewed the estimate as relevant and it was not seeking FWS's opinion in light of the estimate. (ECF No. 160-1 at 5–6.) Nonetheless, FWS came to its own conclusion, in agreement with DOE, that the Piñon Ridge estimate was not a matter it needed to consider. (ECF No. 160-2 at 3.) DOE therefore did not fail to convey the relevant information to FWS—and conveying that information is what the Court ordered in *CEC II*.

Third, the only potential location that ULMP-generated uranium ore could be milled is the White Mesa Mill near Blanding, Utah, roughly 100 miles from Paradox Valley. DOE conveyed White Mesa's estimated water requirements to FWS. (ECF No. 160-1 at 7.) Plaintiffs fault DOE for relying on a 1979 figure for that estimate, stating that "[c]urrent data is [*sic*] presumably available." (ECF No. 162 at 8.) But Plaintiffs then go on to note that the previously-filed administrative record shows the White Mesa Mill processes "only alternate feed" (nuclear waste generated through non-natural processes, from which uranium may be extracted), not uranium ore. (*Id*. (internal quotation marks omitted).) This strongly suggests that useful data for White Mesa Mill are *not* available, given that the mill does not presently process what ULMP and other

uranium mines would produce—uranium ore.

For these reasons, the Court finds that DOE did not fail to convey adequate information to FWS during the re-consultation process. Consequently, DOE has remedied the only lingering problem noted in *CEC II*, and is entitled to have the injunction dissolved.

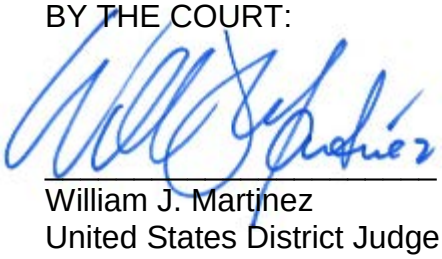
IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Defendants' Motion to Dissolve the Injunction (ECF No. 160) is GRANTED;
2. The Court's injunction entered October 18, 2011 (ECF No. 94, as modified by ECF No. 102) is DISSOLVED;
3. The Clerk shall enter judgment in favor of Defendants and against Plaintiffs, and shall terminate this action; and
4. The parties shall bear their own costs.

Dated this 18th day of March, 2019.

BY THE COURT:



William J. Martínez
United States District Judge