United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff(s),
v.
State of NEVADA; Nevada State Department of Conversation and Natural Resources; et al., Defendant(s).

No. 2:00-CV-0268-RLH-LRL.

Aug. 31, 2007.

Blaine T. Welsh, U.S. Attorney's Office, Las Vegas, NV, Lois J. Schiffer, U.S. DOJ, Tax Division, Stephen G. Bartell, United States Department of Justice, Environment & Natural Resources Division, Washington, DC, for Plaintiff.

Paul G. Taggart, Taggart & Taggart, Ltd., Michael L. Wolz, Nevada Attorney General's Office, Carson City, NV, for Defendants.

(Second Motion for Preliminary Injunction-# 120)

ROGER L. HUNT, United States Chief District Judge.

On July 25, 2007, the Plaintiff, United States of America (hereinafter referred to as the Department of Energy or DOE) filed Plaintiff's Emergency Second Renewed Motion for Preliminary Injunction and Hearing on Shortened Time (# 120). By Plaintiff's using (and misconstruing the intent of) this Court's prior admonition, that if it becomes necessary to file a renewed motion (for a preliminary injunction) the Defendants must file a response within three days and the Court would set the matter for an immediate hearing, the Court immediately set a hearing and ordered Defendants to file their oppositions within the prescribed time. A status hearing was conducted on July 30, 2007, at which the Court set a hearing date on the Plaintiff's motion for August 15, 2007. Defendants were ordered to file their opposition papers the next day, July 31, 2007, which they did (124, 125). The Court further ordered that because it would be out of the district as of August 4, until the hearing on August 15, no further filings would be considered unless filed on or before August 3, 2007.

The Court granted Plaintiff's motion for leave to file excess pages, filed with this motion. That permitted the DOE to file their motion which consisted of 46 pages, notwithstanding the Local Rule limiting motions to 30 pages.

Defendants' Oppositions did not exceed the page limitations of the Local Rules. However, notwithstanding the Local Rules and the Court's order that no additional documents would be filed regarding the motion after August 3, 2007, Plaintiff filed a Reply on August 13, 2007, ten days late. Contemporaneous with the Reply, which was 45 pages long, Plaintiff filed a motion for leave to file excess pages, asking that it be permitted to file a Reply that is as long as the original motion and more than twice the page limitation for replies under the Local Rules. Defendants promptly filed a motion to strike the Reply. Because the Reply was untimely, was in excess of the page limitations, and because there was no good cause shown for a need to exceed the page limitations, other than Plaintiff's counsel's inability to avoid repetition, the Court granted the motion to strike and denied the motion to exceed pages.

The hearing on this motion was held on August 13, 2007. It lasted for four hours. The Court finds that Plaintiff has not met its burden and the motion will be denied.

This case originated out of the efforts of DOE to obtain state water permits in connection with the proposal to establish a nuclear waste depository at Yucca Mountain, Nevada. In August 1992 the Nevada State Engineer granted the DOE temporary water permits for use in site characterization at Yucca Mountain. Those temporary permits expired by their terms on April 9, 2002. On November 29, 2001, DOE requested an extension of the temporary permits. However, before the State Engineer acted on the request, the Secretary of the DOE notified the Governor of Nevada, on February 14, 2002, that he intended to recommend the Yucca Mountain site to the President, thus indicating that the site characterization was complete. Based on those representations, the request for an extension was denied on February 7, 2002.

Meanwhile, In July 1997 the DOE filed applications to permanently appropriate 430 acre-feet of groundwater in anticipation of the site characterization and application for, and the construction and operation of, the repository. Those applications were denied in the infamous Ruling No.

4848, on February 2, 2000. That ruling was appealed in both the state and federal courts. Plaintiff filed its first Complaint on March 2, 2000. This Court attempted to defer to the state court. The Ninth Circuit Court of Appeals, finding a not " insubstantial" claim of federal preemption, reversed this Court and remanded the case for consideration of the federal question. *United States v. Morros*, 268 F.3d 695 (9th Cir.2001). Contrary to the assertions of the DOE, the Circuit Court only found that the claim was not insubstantial, it did not address the merits of the claim, leaving that for this Court.

On March 7, 2002, the DOE filed a First Amended Complaint for Declaratory and Injunctive Relief seeking to include the allegations regarding the State Engineer's February 2002 denial of its request to extend its temporary permits.

In April 2002, pursuant to the Nuclear Waste Policy Act (NWPA) the Governor of Nevada filed his Notice of Disapproval of the proposed Yucca Mountain repository with Congress. Congress passed a joint resolution overriding the Notice of Disapproval and the President signed the Yucca Mountain Development Act (YWDA) on July 23, 2002. With the enactment of YWDA, DOE was required by statute to submit a license application to the Nuclear Regulatory Commission (NRC) within 90 days. That application has yet to be made, despite promises by DOE which now promises to submit the license application in June 2008, six years later. As this Court noted in 2005, and is still the situation to date, there has yet to be a final radiation standard promulgated by the EPA for the Yucca Mountain Project, nor has there been an NRC licensing rule (which must necessarily follow issuance of the final EPA standard) by which DOE can prepare a complete and defensible licensing application.

In December 3, 2002, Plaintiff filed a renewed motion for preliminary injunction, alleging that it needed water for site maintenance, fire protection and various other uses. That was resolved by the filing of a stipulation reached on December 18, 2002, among the parties which allowed for adequate water to meet those needs then described by the DOE. Accordingly, the hearing was cancelled and the Court entered an Order approving the stipulation.

Plaintiff also filed a motion for summary judgment and Defendants filed a motion to stay the proceedings. On March 11, 2003, the Court denied the motion for summary judgment and entered a stay because, in part, of the ongoing litigation in the D.C. Circuit Court of Appeals, and remanded the matter back to the State Engineer for further hearings, directing the State Engineer that it could not use the same bases for a decision as were the bases for the Ruling No. 4848, which was based upon a statute ruled unconstitutional by the Ninth Circuit Court of Appeals. On August 20-21, 2003, the State Engineer conducted a hearing and issued Ruling No. 5307 on November 7, 2003. The applications were again denied on the grounds that they threatened to prove detrimental to the public interest.

In December 2003 Plaintiff filed its motion to amend the complaint a second time to include an appeal of Ruling 5307 and to lift the stay. The Court granted the motion to amend and lifted the stay only for the limited purpose of permitting the filing of the second amended complaint and the answer thereto. April 6, 2005 Order (# 109). In that Order this Court directed " the Defendants to address the requests for the use of water without delay and make reasonable efforts to accommodate all reasonable and appropriate needs." By this time the D.C. Circuit Court had issued it ruling affirming the designation of the Yucca Mountain site, but holding that the radiation standard was inadequate and a new and acceptable radiation standard would have to be implemented in order to qualify for the licensing application to the NRC.

While these legal matters have been occurring, the parties have been addressing the use of water in the interim.

The Stipulation and Order which laid the foundation for interim water use by the DOE was entered December 19, 2002 (# 77). While there is reference to the needs for potable water, and for fire and emergency use, no reference or mention is made of the necessity of bore hole drilling, although the time period for filing the licensing application had commenced six months before. Furthermore, there was no reference to bore hole drilling during the hearing on the motion for a preliminary injunction held six months before (June 11, 2002, transcript submitted by Plaintiff as Exhibit 1).

A year after the hearing, noted in a June 25, 2003, letter, there was a " tentative agreement" for an increase in DOE's use, described a totaling 1,360,000 gallons per year, of which 420,000 gallons per year

were for potable water uses. That letter, from Defendants, notes for the first time discussions about bore hole drilling and the fact that an agreement has not yet been reached for the additional 300,000 gallons DOE asserted it needed for bore hole drilling for seismic investigation, but that a stipulation could be entered as to the terms that had been agreed to. No stipulation was forthcoming.

A month later (July 7, 2003), in a letter from Plaintiff's counsel, the DOE notes the lack of agreement on the 300,000 gallons for bore hole drilling, but that DOE would not exceed the volume agreed upon without further notice. It is represented that the original estimate was based upon the DOE's projection of a need for 8-10 bore holes of 250 feet. It is prudent to note here that bore drilling did not begin for another three years (summer of 2006). There was a letter in April 2004 from DOE noting that because of repairs necessitated from severe storm damage more non-potable water had been needed in the past eight months than originally anticipated.

A year after agreeing not to use more water than agreed, and after admitting there had been no agreement on the additional 300,000 gallons needed for bore hole drilling, and while there yet had not been any bore holes drilled, by letter dated May 20, 2004, DOE announced that it intended to drill 35 bore holes, twenty of which would be at a depth of 150 feet and 15 at a depth of 700 feet and that it would require an additional 2,000,000 gallons of water to do so. Thus, demanding that the total per annum water use be increased from the agreed 1,360,000 gallons per annum, to 3,780,000 gallons per annum.

By letter dated June 30, 2004, the State Attorney General responded to the above request with a number of questions, asking what the purpose, authority, completion date and operational needs of the requested bore holes were. It further questioned whether there had been funding and why the original projection had escalated so dramatically.

Two months later, the DOE's counsel responded in a letter dated August 24, 2004. The letter, which the Court would describe as an arrogant retort that DOE is doing it because it wants to and thinks it has the right to, also states that though it expects to complete the drilling in 2005, it is considering a number of other significant activities and will notify the state of any future additional water needs. It offered to answer any other questions and to discuss the matter, but did not suggest any willingness to negotiate, modify, or limit its desired activities. Any suggestion of a need or willingness to reach an agreement on water usage is conspicuously absent. No discussions were held and no bore drilling was conducted during the rest of 2004 or 2005.

On February 17, 2005, DOE wrote the State Engineer a more conciliatory letter defining a more limited use of water and changing the stated purpose of the anticipated drilling. The letter again describes the 35 bore holes, noting that there will be no water needs for the first 100-200 feet of drilling but that the deepening of 15 of the bore holes would require 1.3 million gallons to complete. However, that estimate included water to be used for road and pad preparation. More significant is the stated purpose of the bore holes. The previous correspondence (June 25, 2003) described them as seismic investigation. Now it is described as needed for the design of foundations for surface facilities, but no legal or Congressional directive for the work is noted, nor is there an explanation for why foundation design was necessary before there was a license to construct the repository.

On the other hand, there was a second drilling need which purportedly was to address a request for additional information from the Nuclear Regulatory Commission to better characterize the number and age of volcanic events in the region. This drilling need was only anticipated to require 330,000 gallons, closer to the figure originally stated by the DOE and for which there had been no followup agreement negotiated.

The next day, February 18, 2005, an overnight letter was delivered which dramatically changed the previously described bore hole depths. Whereas before (May 20, 2004), the DOE stated it intended to drill 35 bore holes, twenty of which would be at a depth of 150 feet and 15 at a depth of 700 feet that it would require additional 2,000,000 gallons of water to do so, now the 15 bore holes are described as " monitoring wells," not bore holes, and were to be drilled to a depth of 700 feet at first and then deeper, not to exceed the 1,300 feet depth of the water table. This was to require an additional quarter of a million gallons of water. The entire project was to be completed in 180 days. There was a request that there be a hiatus, in drilling between levels, of several months. The letter asked for permission to suspend

the drilling without the necessity of capping the holes/wells during that suspension. The State Drilling Supervisor approved the suspensions, but required notification when it happened and that the holes/wells be secured against accidental entry by animals or children.

During the rest of the year, the initial stage of drilling apparently occurred. This did not require the use of water. DOE notified the state of a suspension of its drilling operations at the end of 2005.

By letter of April 25, 2006, the DOE advised the Drilling Supervisor that the previous extension, approved January 12, 2006, was anticipated to end with the resumption of drilling to begin May 15, 2006, and provided an anticipated schedule of work, which showed completion in October 2006.

By letter of December 11, 2006, the DOE gave notice that the water use in 2006 would exceed the 420,000 limit, established by the agreement between the parties, by only 100,000 gallons.

Then, suddenly, in a letter dated February 14, 2007, the DOE announced that it needed *4 million gallons* and now was going to drill *48* (not 35) bore holes. These bore holes included 17 deep bore holes of up to 1,300 feet deep and 31 bore holes of up to 650 feet deep, to obtain geotechnical information below the footprints of the surface facilities planned for the Yucca Mountain Repository. No explanation was offered as to why the sudden need for even more bore holes and twice the amount of water identified just months earlier.

By letter dated February 23, 2007, the DOE describes the 17 holes as not bore holes, but seismic monitoring wells. The drilling was to begin March 12, 2007, not the year before, and the DOE was requesting authority to suspend the drilling for 270 days (rather than the 180 days it requested in 2005). Again, there is no explanation for this dramatic increase in what the DOE wants to do, other than the fact that it wants to do it. The letter " Subject" identifies its purpose as a request for the 270-day suspension. The " suspension" was granted by the state.

On May 7, 2007, Nevada, having become aware that the DOE may have already begun to use the water for the drilling of the 48 proposed holes, without any agreement between the parties, responded by letter. While not precluding further discussions, the DOE was informed that the State Engineer did not agree to nor acquiesce in the use of any water for the proposed drilling of the 48 bore holes. There were several communications between the parties without reaching an agreement. By letter of June 1, 2007, the State Engineer issued a cease and desist order regarding the use of water for the second phase of the borehole drilling described in the February 2007 correspondence. On June 7, 2007, the DOE directed that all Phase II drilling operations stand down and that no " Well workover activities" be conducted which required the use of water.

However, on June 8, 2007, DOE advised the state Attorney General that compliance with the cease and desist order was causing delay and unnecessary expense in the implementation of the Yucca Mountain project, that the DOE had decided that the collection of the information was necessary and reasonable and appropriate, suggesting that it was all authorized and mandated by the approval of the site by Congress and the President and thus state water law was preempted and DOE was not required to submit to or accommodate state water rights or interests, and that it would be used in support of its license application which it was preparing for submission to the NRC on June 30, 2008. The DOE rejected any suggestion that the use of water violates the stipulation/order presently in effect and further suggested that it violates this Court's orders (both propositions are incorrect). The letter notes a telephone conference call that proved fruitless and suggested the parties get together to discuss a resolution.

Accordingly, the State Engineer lifted the cease and desist order while discussions could be held, but informed the DOE that if no agreement could be reached, it would be reinstated. A meeting was held between the parties. This was followed by a letter from the Nevada State Engineer, (who is now Tracy Taylor) to Scott Wade, Acting Director of the Yucca Mountain Project. That letter is too lengthy to quote in full here. It first notes that the projected use violates both the stipulation and the agreement referred to in the letter of June 25, 2003. It then notes that the facts belie DOE's claims that there had been a " misunderstanding," and expresses his opinion that the actions of DOE appear to have been deliberate, and in violation of the protocol established, *i.e.*, that all communications and negotiations would occur between counsel for the parties. (DOE took, and has taken, the position that its letters of notification of

activities, since there had been no formal objection, constitutes agreement, or at least acquiescence on the part of the state to its sudden and voracious appetite for more water.)

The State Engineer expresses concern that the " Phase 2" drilling project is not, despite the express representations made at the meeting on June 12, 2007, the final phase of bore hole drilling, and that DOE has not been forthcoming about its intentions for water use in the future.[FN1] Furthermore, he notes that site characterization was finished in 2002, as represented to Congress and the President, when the site was presented for approval, and that until there is in place an appropriate radiation standard and the license has been approved by the NRC to construct and operate the facility, the basis for the water request, and even for the denied water permits, are premature until the license is approved.

> FN1. In fact, the Fifth Wade Declaration, para. 39, admits that Mr. Wade knew in May 2007 that the actual amount of water needed for the Phase II drilling was " over 8 million gallons," not the disclosed 4 million gallons. Nor did he reveal that there was a Phase III proposed by BECHTEL SAIC in its Seismic Studies prepared for the DOE in September 2006. See Exhibit 4 to Nevada Agency's Memorandum.

Notwithstanding the foregoing observations, and in deference to the cost of the sudden delay and to allow the DOE a reasonable amount of time to wrap up its bore hole drilling program, the State Engineer agreed to water use with certain conditions. I quote the relevant part of the relevant paragraph:
I therefore agree that DOE may make use of water in order to conduct work on " Phase 1" and " Phase 2" (as outlined in the attachment to this letter) of its bore hole drilling program until thirty (30) calendar days from the date of this letter, and I hereby lift the cease and desist order of June 1, 2007, to that extent only. However, the lifting of the cease and desist order is conditional. *No* water may be used for additional phases of the bore hole drilling project, or for any expansions or changes to Phase 1 or Phase 2 (as outlined in the attachment to this letter), or for any other studies or work that were not yet commenced as of June 25, 2003, when our previous stipulation was entered into. The intention of that agreement was to maintain the status quo as of that date, and maintenance of the status quo does not include the commencement of new work or studies that requires the use of additional water. Furthermore, the use of water for any bore hole drilling whatsoever is prohibited after thirty (30) calendars days of the date of this letter.

July 16, 2007, letter to Wade. The letter also demands that the inspectors of the State Engineer's office be permitted to inspect the sites to ensure compliance, and then asks for a response in writing.

On July 20, 2007, Plaintiff's counsel wrote that the limits and conditions were " unacceptable." He further stated that to comply would be a concession of the contested issues in the litigation. Accordingly, the State Engineer reinstated his cease and desist order on the same date.[FN2] Plaintiff filed this motion on July 25, 2007. It also resumed the drilling operations and apparently has refused entry by the State Engineer to enforce the cease and desist order.

> FN2. Notwithstanding Plaintiff's expressed fear that the cease and desist order covered all use of water, the cease and desist order applies only to the Phase II drilling operations. This presumes that there will not be any attempt to do Phase II drilling under the guise of Phase I drilling, and that there be no additional phases implemented without agreement.

I. Is the bore hole drilling mandated or just desired?

Plaintiff expends much time and ink arguing that it is required to conduct the bore hole drilling in question to " meet congressional mandates." The bases for the argument are contradictory. Sometimes Plaintiff argues that it is necessary for the filing of the licensing application with the NRC. Plaintiff's Motion, Page 4. At other times it argues that it " is now required to proceed with development and operation of the national repository at DOE facilities on federal land at Yucca Mountain." Plaintiff's Motion, page 2. Both arguments are without merit. Neither stands up to the scrutiny of the law nor its own documents.

The federal law and regulations which Plaintiff is so fond of citing provides that the project is to be done in phases. See 10 C.F.R. 21 § 63.102(c) The first was the site characterization which involved the years of

studies performed by the DOE and then the recommendation to the President and Congress for approval of the site. Once that was done, NWPA Section 114(b) requires the Secretary to submit an application for construction authorization no later than 90 days after the date the recommendation for the site designation is effective. 42 U.S.C. § 10134(b). The site approval occurred on July 23, 2002, when President Bush signed the YMDA into law. That licensing application has never been filed, although promises to do so have been made. The most recent promise is that it will be filed June 2008, six years after it was required to be submitted. Once the license is issued, then the DOE may construct and operate the repository and, once it is filled, presumably close the facility.

Under the NWPA, all site characterization was to be completed before the site recommendation. 42 U.S.C. § 10134(a)(1)(C). Either that is so, and this is not site characterization, or it would appear that the DOE misled Congress and the President in its application for approval of the site. Doe attempts to deny that this is further site characterization. However, its own documents contradict that argument. In an internal document dated 2/17/05, the DOE's activities are described as " site characterization activities." Litigation-Water Permits Rev. 2.DOC 02/17/05. DOE's efforts to disparage this document were disingenuous at best. Also of significance, the document states that, " denial of the permit applications will not impact current activities" as " the Department could truck in water." *Id.*

The argument that the bore hole drilling is required for or by the NRC is likewise unpersuasive. First there is no evidence or law presented that states that the NRC requires further studies or bore hole drilling in support of the licensing application. There is reference to studies to be made during site characterization, construction and operation, but not in reference to the licensing application. Furthermore, the law required that the license application be submitted within 90 days of the President's signature. That time limitation makes it abundantly clear that these extensive bore hole drilling activities, which have now been spread out over years and even prospectively require many more months, were not anticipated, expected or required to be accomplished within the 90-day window required by the law.

Even the DOE, in the Congressional Hearings in May 2002, regarding site authorization, and in opposition to those who argued that more studies needed to be done before authorization, stated, " the request for yet more preliminary study, even before seeking a license from the NRC, is unsupportable." Hearings before the Senate Committee on Energy and Natural Resources, 107th Congress, 1st Session, on S.J. Res. 34 at 204.

DOE has not even submitted an application for a license to construct and operate the Yucca Mountain Nuclear Repository, much less obtained the license. Thus, it cannot argue that it is just filling its mandate to construct and operate the site. As of now it has no such mandate. It is pure speculation that it will meet its self-imposed deadline of June 2008, or that its application for license will be granted. There still exists the impediment of an unadopted revision to the radiation standards mandated by the D.C. Circuit.

DOE cannot even make up its mind whether it is doing the bore hole drilling for seismic studies or for foundation studies for the facilities it hopes to construct in the unknown future.

Certainly there is no congressional mandate, no legal mandate for bore hole drilling, particularly the drilling of 44 or 84 bore holes and the use of 4 million or 8 million gallons of water to do so. The Court entertains the suspicion that either DOE wants to look busy, or it wants to keep its contractor occupied during its lengthy delays in filing for a license.

II. Is the drilling deadline mandated or self-imposed?

Numerous drilling deadlines have been declared by the DOE and have come and gone. They have been delayed and interrupted, all at the whim of the DOE. There is no reason to believe that the present deadlines are mandated by any congressional mandate or federal law. The deadlines, the extent of the drilling, the number of phases and amount of water necessary are all self-imposed deadlines. In fact, this entire " crisis" is self-imposed and self-created. DOE does not have to do what it is doing. It merely wants to, and demands compliance and subservience by the state and by this Court under the guise of preemption, to its arbitrary actions.

III. What amount of water is necessary? Is there alternative water available?

The arbitrariness of the DOE's actions is underscored by its increasing demand for more water. The initial stipulation was prepared based upon the DOE's own estimate of its water needs based upon its obligation to maintain the status quo until the project could be licensed. If the bore hole drilling was so important, so necessary, and required, why was it not known in December 2002, seven months after the site was approved, when the stipulation was signed? Why was it not known until June 2003, a year after the site was authorized and nine months *after* the license application was due? Why was the initial estimate for water needs established at 300,000 gallons in June 2003 and then not until a year later increased to 2 million gallons? Why now, in early 2007, has the disclosed estimate jumped by 100% to 4 million gallons? And why was the estimate of 8 million gallons, learned in May 2007 not disclosed until this motion? The answer, at least in part, is because these activities are driven exclusively by the DOE's own self-imposed activities and deadlines.

The foregoing also shows that this work either is for further site characterization, which was represented to be finished in 2002, in anticipation of studies necessary for construction, when and if it is ever licensed and authorized, or, in anticipation of potential opposition to problems with the license application. None of this is " mandated" by federal law. It is a creation of the DOE. The arguments about preemption are without merit.

IV. Water availability

DOE argues that it cannot meet its obligations unless the state yields to its every demand for water. That argument pales in light of its own internal document which says the drilling can be accomplished by trucking water from a well for which the DOE does have a permit. Admittedly, this would be inconvenient. Eight miles of the road is unpaved, requiring it to be watered for dust suppression. But that is a short distance, compared to the alternative demand for 8 million gallons of water. Perhaps it would cause some delay. But the DOE has already caused years of delay in the drilling. It will not be irreparably harmed by a little more.

Perhaps it is appropriate to mention here an admission by counsel for the DOE in the hearing. While the motion and accompanying declaration demand the use of water, not just of 8 million gallons, but up to the full amount of the underlying water permit applications, of 430 acre feet, in argument it was admitted that only 10 acre feet was needed to complete the drilling project. That is approximately 3,258,510 gallons, not *4 million* or *8 million* gallons demanded by DOE. This admission, among the many others, demonstrates that the DOE has intentionally multiplied its demands to create a crisis of its own making.

V. Penalties and damages

The DOE admits that the state has stated that its threatened penalties will not go into effect until 2009. The DOE admits that there is only a " threat" of penalties even then. It further admits, contrary to its cries of damages due to delays which the Defendants' actions caused, even to this point, that it has ignored the cease and desist order and continues to use the water, without authority, because it claims it can. The DOE does not deny that it has denied the State Engineer access to the site, requiring him to rely on the accuracy and completeness of DOE's reports, the same DOE that failed to disclose its intention to use 8 million gallons of water, not just 4 million.

As noted elsewhere, the DOE's damages, even had they occurred, were monetary and do not qualify as irreparable under the law.

VI. What efforts were made to reach agreement and who should take the lead?

Both sides accuse the other of doing nothing to reach an agreement on water use. The state is accused of merely repeating the fact there has been agreement reached beyond the stipulation and an increase in the amounts of water necessary for those activities identified in the stipulation and at the time it was entered, but that there was no agreement on the amount of water to be used for drilling bore holes. Thus, the DOE argues, when the DOE said it would be reporting on the water use (which it claims it did, accurately), when the state failed to insist on an agreement it acquiesced in the DOE's increasing demands. Having failed to act when the DOE gave " notice" that it was going to use 300,000 gallons, and then later that the amount jumped to 2,000,000 gallons, the state is now precluded from objecting to the 4 million gallon demand (which is really an 8 million gallon demand).

Nevada responds with the contention that it repeatedly reminded the DOE that there was no

agreement on the amount of water to be used for the bore hole drilling, and that although the DOE said it was going to use the water, it continued to delay without ever using the water. Thus, Nevada could assume that it would not actually be undertaken until an agreement was actually reached.

The Court finds Nevada's position the more reasonable. Further, since it was the DOE's desire to use (more and more) water for the bore drilling project, and there was a stipulation in place which limited the amount of water it would use, the obligation was on the party who wished to change the agreement to initiate discussions in an effort to reach an agreement among the parties.

VII. Does preemption preclude compliance with state water law?

The issues presented in this motion do not involve preemption. There has been no act by Congress which preempts Nevada's state water laws. The underlying case deals only with the issue of whether the State Engineer's actions in denying the water permits was in violation of the state's water laws. This motion deals with an agreement between Nevada and the DOE for use of water during the interim between the site approval and the licensing of the repository and whether the actions of the parties have been reasonable in requesting or providing sufficient water to maintain the status quo.

Since the passage of the Desert Land Act, Congress has repeatedly recognized the supremacy of State law in respect to the acquisition of water for the reclamation of public lands of the United States. See S.Rep. No. 755, 82nd Congress, 1st Session, at 206. " The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). In fact, the DOE has specifically recognized this federal policy in its Yucca Mountain Site Recommendation Environmental Impact Statement at 11-9: " It is the policy of the United States Government to apply for water in accordance with state laws." Doe's argument, at the hearing, that it is not required to, is in complete contradiction to its own policy statement.

The DOE is fond of quoting this Court's prior order requiring Defendants to " cooperate with the United States to ensure adequate water to meet the reasonable needs of Plaintiff." Order # 91 (March 11, 2003), page 12, denying Plaintiff's Motion for Summary Judgment. What Plaintiff fails to do is quote the rest of the sentence, " as described in the Stipulation and as promised by the State." The operable words here are " reasonable needs" and " as described in the Stipulation." That language stressed the need for Nevada to be reasonable in providing the water agreed to in the Stipulation, *i.e.*, to abide by the spirit of the stipulation. There was never any intent by the Court to require Nevada to submit to every DOE demand for water, however unreasonable and however beyond the parameters of the stipulation.

If the DOE knew that it had to do this work as part of its continuing site characterization work, it hid it from the Court and from the state. Furthermore, it now denies that this is part of the site characterization work. In addition, this Court finds that the purported need for bore hole drilling, which initially disclosed as 8-10 holes, then jumps to 35 holes and then to 44 holes, and demands 300,000 gallons, which jumps to 2 million and then to 4 million (with an undisclosed-until this motion-intent to really demand 8 million) to be unreasonable and without any demonstrable, legitimate purpose other than to look busy and keep DOE's contractors busy.[FN3]Or, alternatively, it shows a complete lack of confidence in its ability to obtain a license from the NRC because of weaknesses in its original scientific studies.

> FN3. In BECHTEL SAIC's Seismic Studies, identified elsewhere, the DOE contractor recommends drilling an additional 44 bore holes in a Phase 3, even beyond the Phase 2 project which already demands 4 or 8 million gallons of water. This phased drilling appears to be at the behest of BECHTEL, rather than any congressional of statutory mandate.

None of this presents a conflict between state and federal law or regulation. Years ago the DOE sought the Court's help in maintaining the status quo at Yucca Mountain. It has, since that time, engaged in activities which dramatically alter the status quo. If the DOE had been more forthcoming and more reasonable in its request, and made a good faith effort to demonstrate to Defendants and the Court the justifiable need for and the reasonableness of the need for more water than provided in the stipulation,

we would not find ourselves faced with this conflict or this motion. The Plaintiff wants the Court to preclude the Defendants from interfering with its necessary water uses. It has failed to demonstrate the necessity of its voracious water demands. The issue here is not preemption. The issues here are credibility and good faith.

The motion seeks a preliminary injunction to enjoin the Nevada State Engineer from interfering with DOE's necessary water uses.

An injunction is an extraordinary remedy not to be lightly issued. *Hubbard Business Plaza v. Lincoln Liberty Life Ins. Co.*, 649 F. Supp 1310, 1317 (D.Nev.1896).“ The traditional equitable criteria for granting preliminary injunctive relief are (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).” *Dollar Rent a Car of Wash., Inc. v. Travelers Indem. Co,* 774 f.2d 1371, 1374 (9th Cir.1985).“ The moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor.” *Los Angeles Memorial Coliseum Commission v. National Football League,* 634 F.2d 1197, 1201 (9th Cir.1980). These are not separate tests, but the outer reaches of a single continuum. *Dollar*, 744 F.2d at 1375.

Plaintiff fails the test and the preliminary injunction will not issue.

I. Preemption is not an issue here

Much of the DOE's argument, and apparently motivation, centers on preemption as a basis for the request for the preliminary injunction. Preemption is not the issue here for reasons explained above and below. In truth, it appears to the Court that the DOE is merely trying to accomplish in an end-run what it was not able to do in its motion for summary judgment which the Court has previously denied. To make a premature determination of the preemption argument would be to grant a victory to Plaintiff even beyond the claims of the Second Amended Complaint.

The reason preemption is not an issue is that the real issues are (1) whether the State Engineer acted reasonably in issuing a cease and desist order when there was no agreement for the extensive water use demanded; (2) whether the DOE's sudden demand that it be permitted to escalate its water use without an agreement, or even a reasonable explanation establishing there was a requirement, as opposed to a wish, to engage in the bore hole drilling far beyond the initial requests for that work; (3) whether there was any clear authority or mandate that the drilling and other anticipated activities were required by federal law; and (4) whether DOE's refusal to consider any limitations on its desired activities and to even disclose its ultimate intentions, and out-of-hand rejection of the State Engineer's proposed approval criteria by merely stating it was “ unacceptable,” was reasonable.

DOE's argument in its moving papers discusses, with extensive citations, the proposition that where it is impossible to comply with state statutes and federal statutes, that the state statute is preempted. It argues that cases dealing with this issue have already determined that the Nuclear Waste Policy Act preempts Nevada water law. Those cases hold no such thing. There is no clear declaration by Congress that the Act preempts state water law. Furthermore, in DOE's argument at the hearing, it admitted that there is no conflict between state law and federal law as to state water rights and state water law. There is only an arguable conflict in the implementation of that law by the State Engineer's denial of the water permit applications. That issue addresses the viability, bases, and reasonableness of the decision. That issue is not before the Court in this motion and DOE made no attempt to address the facts which drive the resolution of that issue.

DOE really chaffs under any limitations on its water use and wants to be able to ignore it. However, its actions show clearly that it has recognized and acquiesced to the validity of the state's water laws. First, it filed applications for permits from the state to use the water. If it were not required to because of preemption, why did it even file the permits. Second, when the permits were denied, it filed an appeal of the decision pursuant to the state law procedures. Third, when there arose a dispute over water needed to maintain the status quo at the site while the site approval and licensing process was taking place, it entered into a stipulation, which was memorialized

by an Order of this Court by which it agreed to certain water uses based upon its own projections of what would be needed. Fourth, its own policy is to comply with state water law.

DOE has now not only demanded, but used water in excess of that stipulation, in violation of both the stipulation and the Court's Order, and has the audacity to claim it is not bound by its own agreement, or this Court's Order, because of preemption. It argues that the Nuclear Waste Policy Act is now the " Supreme Law of the Land" and that gives the DOE the right to do anything it pleases, anything it wishes, because it is now required to proceed with development and operation of the repository. It blatantly ignores the fact that it is not authorized to construct and operate the repository unless and until it has a license to do so. Not only has it not obtained such a license, it has not even applied for such a license and does not intend to until June 2008, six years after the statute required it to do so. In the meantime, it has entered into an agreement, which agreement has become an Order of this Court. The issue here is whether it has violated that agreement and Order. Any preemption argument is premature and irrelevant at this stage in the proceedings. There has been no effort to lift the stay which is in effect, or to modify the Order. Those efforts, too, are likely premature given DOE's delay in applying for a license to proceed.

The nature and tenor of the DOE's precipitous actions and its repeated pushing of the envelope by ever increasing demands for water, suggests that the DOE has intentionally created this impasse by forcing the Defendants to finally say they have gone too far.

The Court, in denying this motion for preliminary injunction, wishes to make clear that it is not deciding the merits of the underlying case. It has no intention of prejudicing either parties' rights or claims in the underlying case. And, it specifically does not intend that this order imply how it will ultimately rule on the underlying issues in this case.

II. There is no strong likelihood of success on the merits.

Other than its arguments about preemption, DOE presented no evidence or argument to demonstrate that it would prevail in the underlying case, *i.e.,* to prove that the State Engineer's denial was unreasonable, arbitrary, or incorrect. Furthermore, it has failed to show that it will succeed in any argument on the merits of the motion, which seeks to preclude the State Engineer from exercising the responsible and duty he has to protect the state's water rights and water law.

III. DOE has failed to demonstrate the possibility of irreparable injury to plaintiff if the preliminary relief is not granted.

The injury argued by the DOE is the cost of delay in the drilling operations and the disruption that it would entail, including drilling operators leaving the job and delaying the completion of their work. Any damage caused by delay can be laid at the doorstep of the DOE. It has delayed the application for a license by six years, and the June 2008 is not the first deadline promised. There is no assurance that it will occur even then. Furthermore, these drilling operations have been promised to begin many times, only to be delayed by the DOE. Any period of delay numbered by days or weeks, caused by the cease and desist order, is minuscule compared to the years of delay of DOE's own doing. And the delay complained of in this motion is only delay occasioned by the work projected in the suddenly announced multiplication of drill holes and water needs that occurred just weeks before the cease and desist order, without any explanation beyond the fact that the DOE wanted to do it. The originally announced drilling was to be completed in October 2006. Even the work identified in the dramatic increase was scheduled to be completed by October 2007, just two months later than the limitation the state requested. Rather than negotiate the time to complete, the DOE rejected any limitation on its work-even its own promised limitations-out of hand.

It is generally accepted that allegations of monetary harm are not sufficient to justify a finding of irreparable injury. " Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable injury." *Los Angeles Coliseum Commission v. National Football League,* 634 F.2d 1197, 1202 (9th Cir.1980), *quoting Sampson v. Murray,* 415 U.S. 61, 90 (1974).

The Court can attribute no damages due to delay caused by the cease and desist order, that were not

already the result of the DOE's own actions.

IV. The balance of hardships do not favor the Plaintiff.

As discussed above, any hardship on the Plaintiff has been self-inflicted. The state, on the other hand, faces the unauthorized use of its water, a violation of state water law, a violation of an agreement it entered into in good faith, a violation of this Court's Order authorizing that agreement, and interference with its obligation to its citizens to enforce its laws and preserve its water. State water law, particularly in the arid Southwest, has been held to hold a unique and protected position. While there has been incidences where regulations governing riparian water rights and when and where dams on rivers could be erected and regulated, the validity of western states' groundwater rights and the right to regulate that water in the public interest is not a right to be taken lightly, nor is it a right that can cavalierly be ignored or violated by a federal agency without some Congressional authority and mandate to do so. Here, in this interim period between the site selection and the licensing process, there is no mandate for the drilling the DOE has undertaken, nor the every increasing extent of the drilling. The only argument the DOE makes is that because the site has been approved as a site, that it has the authority to do whatever it wishes to do if it feels it would prepare it for the eventuality of approval, even though approval is not a foregone conclusion, particularly in view of the D.C. Circuit's rejection of the radiation standard used.

The Court does not know if DOE's efforts are motivated by a desire to answer Congressional and media criticisms of its scientific conclusions and reports of falsified scientific reports, or a desire to look busy by this sudden flurry of activity, or some other motivation. Whatever the motivation, the potential hardship upon the state and its rights is far greater that any potential hardship upon the DOE for short term delays or the curtailing of the DOE's activities back to its original projections and promises.

V. Advancement of the public interest

There is great public interest, both locally and nationally, in this case. The nation seeks to find a repository for nuclear waste that it can be assured provides a safe haven that will protect the public far, far into the future. The local populace, strapped for water, is having to go into counties north of the Las Vegas area to obtain water to meet the tremendous growth being experienced there. Whether both interests can or need be accommodated is not the subject of this motion or this order. That question will likely be addressed when, and if, this case is heard on the merits. At present, within the parameters of this motion, the only public interest issue is whether state officials can be precluded from exercising their lawfully mandated duties, or whether a federal agency can run roughshod over a state's rights or interests without specific authority and mandate to do the precise activities it wishes to do. This issue, too, does not weigh in the Plaintiff's favor here.

This case raises serious questions, but those questions will not be resolved in the resolution of this motion. Even if the Court was inclined to do so, no factual basis for doing so has been presented by Plaintiff, only a weak attempt to argue preemption as a justification for the DOE's precipitous, arbitrary and unreasonable violation of its own stipulated agreements and this Court's Order. There is no evidence that the Defendants have acted unreasonably through the course of the last several years. There has been a consistent expression of a willingness to reach an agreement to accommodate DOE's ever increasing demands for water.

DOE attempts to put the onus on the state for failing to initiate discussions to modify the stipulation. But it is the DOE that wishes changes and modifications! Should it not have the obligation to initiate the discussions or negotiations? It is not reasonable conduct, when one is obligated under a stipulation, to sit back and merely announce that it wanted to engage in additional activities and use additional water, and then claim that because the State Engineer did not issue a cease and desist order sooner, it tacitly agreed that the DOE could do whatever it wanted to do.

The DOE asks for an injunction to prevent the state from precluding it from " necessary" water uses. It has failed to demonstrate that the suddenly announced Phase 2, with the concurrent doubling of water use and increase in previously announced drilling needs, is necessary.

Plaintiff has failed to meet any of the criteria necessary to justify a preliminary injunction against

the State of Nevada precluding it from exercising its rights and duties with respect to state water law and state water rights.

IT IS THEREFORE ORDERED that Plaintiff's Emergency Second Renewed Motion for Preliminary Injunction (# 120) is DENIED.