

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DESERT ROCK ENERGY CO., LLC
and DINÉ POWER AUTHORITY,

Plaintiffs,

vs.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY *and* STEPHEN
L. JOHNSON, Administrator, United States
Environmental Protection Agency,

Defendant.

No. 4:08-cv-872

EPA'S UNOPPOSED MOTION TO LODGE CONSENT DECREE

June 5, 2008

EXHIBIT A

PROPOSED CONSENT DECREE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DESERT ROCK ENERGY COMPANY, LLC *and*
THE DINÉ POWER AUTHORITY

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,

Defendants.

Civ. No. 08-872

CONSENT DECREE

WHEREAS, on March 21, 2008, Plaintiffs Desert Rock Energy Company, LLC and Diné Power Authority (collectively, "Plaintiffs") served upon the United States a Complaint in this action pursuant to section 304(a) of the Clean Air Act ("CAA"), 42 U.S.C. § 7604(a), alleging that Defendants United States Environmental Protection Agency and Stephen L. Johnson, as Administrator of the United States Environmental Protection Agency (collectively, "EPA") failed to perform a mandatory duty pursuant to CAA § 165(c), 42 U.S.C. § 7475(c), to take action on Plaintiffs' application for a permit to construct a coal-fired power plant on land held by the United States Government in trust for the benefit of the Navajo Nation (the "Permit Application").

WHEREAS, Plaintiffs and EPA (each, a "Party," and collectively "the Parties") wish to effectuate a settlement of the above-captioned matter without expensive and protracted litigation;

WHEREAS, the Parties consider this Decree to be an adequate and equitable resolution of the claims in the above-captioned matter;

WHEREAS, the Court, by entering this Decree, finds that the Decree is fair, reasonable, in the public interest, and consistent with the CAA, 42 U.S.C. §§ 7401 et seq.;

NOW THEREFORE, before the taking of testimony, without trial or determination of any issue of fact or law, and upon the consent of the Parties, it is hereby ORDERED, ADJUDGED and DECREED that:

1. This Court has subject matter jurisdiction over the claims set forth in the Complaint and to order the relief contained in this Decree. This Court has personal jurisdiction over the parties, and venue is proper in the United States District Court for the Southern District of Texas.
2. On or before July 31, 2008, EPA shall issue a final permit decision on the Permit Application, within the meaning of 40 C.F.R. § 124.15(a).
3. The Parties agree and acknowledge that before this Decree may be finalized and entered by the Court, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to Clean Air Act section 113(g), 42 U.S.C. § 7413(g) ("Section 113(g)"). After the EPA has provided the opportunity for comment on this Decree as required by Section 113(g), the Administrator of EPA and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold his consent to the Decree, in accordance with Section 113(g). If the federal government elects not to withdraw or withhold consent to this Decree pursuant to the criteria set forth in Section 113(g), the Parties shall promptly file a motion that requests the Court to enter this Decree.

4. Any provision of this Decree may be modified by (a) written stipulation of the Parties with notice to the Court, or (b) by the Court following motion of any Party to this Decree, pursuant to the Federal Rules of Civil Procedure, and upon consideration of any response by the non-moving Party.

5. Plaintiffs and EPA shall not challenge the terms of this Decree or this Courts jurisdiction to enter and enforce this Decree. Upon entry, no Party shall challenge the terms of this Decree.

6. Nothing in this Decree shall be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law in granting or denying the Permit Application. EPA's obligation to perform the action specified in Paragraph 2 by the time specified therein does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

7. Nothing in this Decree shall be construed as an admission of any issue of fact or law nor to waive or limit any claim or defense, on any grounds, related to any action EPA may take pursuant to Paragraph 2 above.

8. Nothing in this Decree shall be construed to confer upon the district court jurisdiction to review any action taken by EPA pursuant to this Decree. Nothing in this Decree shall be construed to confer upon the district court jurisdiction to review any issues that are within the exclusive jurisdiction of the United States Courts of Appeals pursuant to CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1). Nothing in the terms of this Decree shall be construed to waive any remedies or defenses the Parties may have under CAA Section 307(b)(1), 42 U.S.C. § 7607(b)(1). Nothing in this Decree shall be construed to limit any person's right to petition the

EPA Environmental Appeals Board to review the Agency's action with respect to the Permit Application under 40 C.F.R. § 124.19.

9. The obligations imposed upon EPA under this Decree can only be undertaken using appropriated funds. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable federal statute.

10. Any notices required or provided for by this Decree shall be made in writing and sent to the following:

For Plaintiffs:

JEFFREY R. HOLMSTEAD
Bracewell & Giuliani LLP
2000 K St. NW, Suite 500
Washington, DC 20006-1782
(202) 828-5852

DOUGLAS C. MacCOURT
Ater Wynne LLP
222 S.W. Columbia St., Suite 1800
Portland, OR 97201-6618
(503) 226-8672

For Defendant:

DAVID GUNTER
United States Department of Justice
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-3785

BRIAN DOSTER
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
(202) 564-1932

11. The deadline for filing a motion for costs of litigation (including attorneys' fees) for activities performed prior to the entry of this Decree shall be 120 days after entry of this Decree by the Court. Prior to the filing of any motion for costs of litigation (including attorneys' fees) pursuant to 42 U.S.C. § 7604(d), the Parties shall seek to resolve informally any such claim. The Court shall retain jurisdiction to resolve any request for costs of litigation (including attorneys' fees), notwithstanding any dismissal pursuant to Paragraph 13 of this Decree.

12. The Court shall retain jurisdiction to determine and effectuate compliance with this Decree, including jurisdiction over any claim for costs of litigation (including attorneys' fees) that Plaintiffs may incur in seeking to enforce the terms of this Decree.

13. When EPA's obligation under Paragraph 2 has been completed, the case shall be dismissed. EPA shall file the appropriate notice with the Court so that the Clerk may close the file. This dismissal shall be with prejudice with respect to the final permit decision described in Paragraph 2. No Plaintiff shall file a complaint alleging that 42 U.S.C. § 7475(c) requires additional action with respect to the Permit Application, including the completion of the procedures described in 40 C.F.R. § 124.19, before 210 days have elapsed from the date this Consent Decree becomes effective. EPA expressly preserves any available defenses to such a claim, including the defense that EPA's performance of the obligation stated in Paragraph 2 of this Consent Decree constitutes full performance of its statutory duty under 42 U.S.C. § 7475(c) with respect to the Permit Application.


14. The undersigned representatives of each Party certify that they are fully authorized by the Party they represent to bind that Party to the terms of this Decree.

SO ORDERED on this ____ day of _____, 2008.

HON. MELINDA HARMON
UNITED STATES DISTRICT JUDGE

SO AGREED:

FOR PLAINTIFFS


JEFFREY E. HOLMSTEAD
Bracewell & Giuliani LLP
2000 K St. NW, Suite 500
Washington, DC 20006-1782
(202) 828-5852

DATED: June 3, 2008

Douglas C. MacCourt

DOUGLAS C. MacCOURT

Ater Wynne LLP

222 S.W. Columbia St., Suite 1800

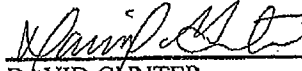
Portland, OR 97201-6618

(503) 226-8672

DATED: *June 3*, 2008

FOR DEFENDANT

RONALD J. TENPAS
Assistant Attorney General
Environment & Natural Resources Division



DAVID GUNTER
United States Department of Justice
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-3785

DATED: June 3, 2008