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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

PERMIAN BASIN PETROLEUM ASSOCIATION	§	
CHAVES COUNTY, NEW MEXICO	§	
ROOSEVELT COUNTY, NEW MEXICO	§	
EDDY COUNTY, NEW MEXICO, and	§	
LEA COUNTY, NEW MEXICO,	§	
Plaintiffs,	§	
	§	**Civil Action No. 7:14-CV-50-RAJ**
v.	§	
	§	
DEPARTMENT OF THE INTERIOR,	§	
U.S. FISH AND WILDLIFE SERVICE,	§	
SALLY JEWEL, and DANIEL M. ASHE,	§	
Defendants.	§	

ORDER DENYING DEFENDANTS' OPPOSED MOTION TO AMEND THE JUDGMENT

Before the Court is Fish and Wildlife Service's ("FWS") Opposed Motion to Amend the Judgment ("Motion to Amend"), filed pursuant to Federal Rule of Civil Procedure 59(e). (Doc. 95). FWS's overarching claims before the Court are:

(1) The Court should amend the Summary Judgment Order by remanding FWS's Final Rule and listing decision without vacatur to correct a clear error of law and to prevent manifest injustice.

(2) Alternatively, the Court should tailor its decision by limiting vacatur to those areas in which Plaintiffs have suffered harm.

BACKGROUND

For an extensive background on the Administrative Procedure of this case and the Endangered Species Act ("ESA"), *see Permian Basin Petrol. Ass'n v. Dep't of the Interior*, No. MO-14-CV-50, 2015 WL 5192526 (W.D. Tex. Sept. 1, 2015).

On April 10, 2014, FWS published a final rule in which it listed the lesser prairie-chicken ("LPC") as a threatened species. LPC Final Rule, 79 Fed. Reg. 19,974 (Apr. 10, 2014). Plaintiffs initiated a lawsuit on June 9, 2014, challenging the listing decision as arbitrary and capricious and requesting the Court to set aside the listing decision. (Doc. 1 at 3). Specifically, Plaintiffs argued that FWS violated its own policy in issuing the Final Rule listing the LPC as a threatened species and failed to provide a rational basis for the listing decision. (*Id.*). Both parties filed competing Motions for Summary Judgment on May 7, 2015 (Docs. 66, 67), as well

as corresponding Responses (Docs. 74, 75) and Replies (Docs. 82, 83). At issue was (1) whether FWS complied with its own rules for evaluating conservation efforts (Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE")), which requires an extensive two-part (15 criteria) analysis; (2) whether FWS explained a rational decision for listing the LPC as a threatened species based on the best scientific evidence available; and (3) whether FWS responded to significant and highly relevant comments raised by Plaintiffs. *Permian Basin Petrol. Ass'n*, 2015 WL 5192526, at *1.

On September 1, 2015, the Court issued its Order Granting Plaintiffs' Motion for Summary Judgment and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment (hereinafter "Summary Judgment Order"). (Doc. 93). The Court ruled in favor of Plaintiffs as to Claim 1, holding that FWS acted arbitrarily and capriciously by failing to properly interpret and conduct the proper PECE analysis to the Range-Wide Plan ("RWP"), thus warranting vacatur. *Permian Basin Petrol. Ass'n*, 2015 WL 5192526, at *19. However, the Court held against Plaintiffs with respect to Claims 2 and 3, reasoning that Plaintiffs had not put forth sufficient evidence to satisfy their burden of proof as to either claim. *Id.* at *20.

In response to the Court's Summary Judgment Order, and pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, FWS filed the instant Motion to Amend the Judgment on September 29, 2015 (Doc. 95), which was followed by Plaintiffs' Response (Doc. 99) and FWS's Reply (Doc. 100). On November 10, 2015, two days before the scheduled hearing on the Motion to Amend, Plaintiffs filed a Notice of Supplemental Information. (Doc. 102). FWS objected to Plaintiffs' filing at the hearing, which was held on November 12, 2015. (Doc. 104 at 15). The Court withheld from ruling on the Motion to Amend at the close of the hearing, instead ordering the parties to mediate the case by January 14, 2016. (*Id.* at 48; Doc. 106). In addition, the Court granted FWS the opportunity to respond to Plaintiffs' Notice of Supplemental Information. (Doc. 104 at 48; Doc. 105). FWS filed its Response to Plaintiffs' Notice of Supplemental Information on December 15, 2015. (Doc. 107). The Response, which comprised of approximately 10 pages of briefing and an estimated 350 pages of exhibits, led Plaintiffs to file a second Notice of Supplemental Information on January 7, 2016. (Doc. 110). That same day, the parties filed a Joint Notice of Mediation Results, stating that a settlement could not be reached. (Doc. 109). On January 13, 2016, in an interest to obtain the most up-to-date information on the status of the species, this Court issued an order informing the parties that they had until January 27, 2016, to file any additional information they wanted the Court to consider before issuing its final ruling on the Motion to Amend. (Doc. 112). Both parties submitted their final filings with the Court on January 27, 2016. (Docs. 114, 115).

MOTION TO ALTER OR AMEND STANDARD OF REVIEW

Federal Rule of Civil Procedure 59(e) allows the Court to alter or amend a judgment upon a movant's showing of "(1) an intervening change in controlling law; (2) new evidence not previously available; or (3) the need to correct a clear legal error or to prevent manifest injustice." *Farquhar v. Steen*, 611 F. App'x 796, 800 (5th Cir. 2015) (per curiam) (citing *In re Benjamin Moore & Co.*, 318 F.3d 626, 629 (5th Cir. 2002)). Rule 59(e) "'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (internal

citation omitted); *Mitchell v. Sikorsky Aircraft*, 533 F. App'x 354, 358–59 (5th Cir. 2013) (per curiam). The Court has broad discretion in granting or denying a motion to alter or amend the judgment under Rule 59(e). *Johnson v. Diversicare Afton Oaks, LLC*, 597 F.3d 673, 677 (5th Cir. 2010). However, courts have held that granting a motion to alter or amend is an extraordinary remedy and should be used sparingly. *See Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004).

DISCUSSION

I. FWS has not satisfied its burden of establishing that amendment of the judgment is necessary to correct a clear error of law or to prevent manifest injustice.

FWS asserts the Court failed to apply the governing legal standard in choosing between remand and vacatur, which, if applied, would require remand as opposed to vacatur. (Doc. 95 at 1). According to FWS, this failure constitutes a clear error of law, warranting amendment to this Court's Summary Judgment Order. (*Id.*). FWS also argues that remand is necessary to prevent manifest injustice. FWS does not contend there has been an intervening change in controlling law or that new evidence has been discovered that was previously unavailable. As such, this Court's analysis in deciding whether to amend the judgment focuses solely on the third prong of the motion to alter or amend standard: whether alteration or amendment of the judgment is necessary to correct a clear error of law or to prevent manifest injustice. *See Farquhar*, 611 F. App'x at 800 (citing *In re Benjamin Moore & Co.*, 318 F.3d at 629).

In ordering vacatur of FWS's Final Rule listing the LPC as a threatened species, the Court relied on *Central & Southwest Services, Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) and *Illinois Public Telecommunications Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997). These cases adopted the standard set out in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 151 (D.C. Cir. 1993) and *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) for determining when vacatur is appropriate. The test establishes that "remand is generally appropriate when 'there is at least a serious possibility that the [agency] will be able to substantiate its decision' given an opportunity to do so, and when vacating would be 'disruptive.'" *Cent. & Sw. Servs., Inc.*, 220 F.3d at 692 (citing *Radio-Television News Dirs. Ass'n*, 184 F.3d at 888 (quoting *Allied-Signal, Inc.*, 988 F.2d at 151)). Both prongs must be satisfied to warrant remand. *Id.* Here, FWS argues there is a serious possibility that its decision to list the LPC could be substantiated on remand and that vacatur is disruptive. For the reasons set forth below, however, the Court disagrees.

A. This case constitutes a rare circumstance warranting vacatur.

In *Illinois Public Telecommunications Ass'n*, the D.C. Circuit Court of Appeals stated, "When this court remands a rule to an agency for further consideration with little or no prospect of the rule's being readopted upon the basis of a more adequate explanation of the agency's reasoning, the practice of the court is ordinarily to vacate the rule." *Ill. Pub. Telecomms. Ass'n*, 123 F.3d at 693. The relevant inquiry is the seriousness of the order's deficiencies. *Allied-Signal, Inc.*, 988 F.2d at 150–51. This concept was further explained in *Radio-Television*, stating "There is a fine line between agency reasoning that is so crippled as to be unlawful and action

that is potentially lawful but insufficiently or inappropriately explained." *Radio-Television News Dirs. Ass'n*, 184 F.3d at 888 (internal quotations omitted).

FWS argues there is a serious possibility it can substantiate its decision to list the LPC on remand. Courts have stated that "[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. U.S. Nuclear Regulatory Comm'n*, 470 U.S. 729, 744 (1985). FWS relies heavily on *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007), to support that only in rare circumstances should a court order vacatur. (Doc. 95 at 1). However, the facts at issue here are distinguishable from *O'Reilly*. In *O'Reilly*, the Fifth Circuit Court of Appeals disagreed with the district court's order enjoining the issuance of a dredge permit after finding the Corps acted arbitrarily and capriciously and held that the district court should have remanded. *O'Reilly*, 477 F.3d at 238–39. This decision was based, in large part, on the conclusory language in the environmental assessment, which the court found resulted in a failure to adequately explain the reasons for finding that the Corps had properly complied with the National Environmental Policy Act of 1969. *Id.* at 227. The Fifth Circuit Court of Appeals reiterated the standard set forth in *Florida Power & Light Co.*, stating that vacatur should only be ordered in rare circumstances. *Id.* at 239.

The Court finds that unlike *O'Reilly*, rare circumstances warranting vacatur exist in the present case. As Plaintiffs have indicated, the majority of the cases that held remand without vacatur was the appropriate remedy were those where the court found that the agency's only error was an inadequate explanation for the basis of its action. *See id.* at 227; *Cent. & Sw. Servs., Inc.*, 220 F.3d at 692; *Radio-Television News Dirs. Ass'n*, 184 F.3d at 888; *Allied-Signal, Inc.*, 988 F.2d at 150. In contrast, FWS's failure here was not merely a failure to adequately explain the basis for its decision to list the LPC as a threatened species under the ESA. As stated in this Court's Summary Judgment Order, FWS's RWP PECE analysis was insufficient and its reasoning was invalid because material information was not considered in reaching the decision to list the LPC. *Permian Basin Petrol. Ass'n*, 2015 WL 5192526, at *9. FWS made improper assumptions affecting the entire RWP PECE evaluation and failed to consider updated enrollment numbers in its possession prior to the publication deadline for the final rule and listing determination. *Id.* at *10–11. As such, this Court finds that the facts of this case constitute a rare circumstance warranting vacatur.

B. FWS has not satisfied its burden of proving that vacatur will have or has had disruptive effects.

Even assuming FWS could substantiate its decision on remand, FWS must also establish that vacatur will have disruptive effects before remand is warranted. *Cent. & Sw. Servs., Inc.*, 220 F.3d at 692. "The decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal, Inc.*, 988 F.2d at 150–51 (quoting *Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)). A court's consideration of the disruptive consequences that may result from an order of vacatur is analogous to the inquiry made in determining whether to

grant a preliminary injunction. *See Int'l Union, United Mine Workers*, 920 F.2d at 967 (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977), *declined to follow on other grounds by Weingarten Realty Investors v. Miller*, 661 F.3d 904, 910 (5th Cir. 2011);[1] *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593–94 (7th Cir. 1986)). The Supreme Court has stated that a court may grant a preliminary injunction only upon a clear showing that the moving party is "*likely* to suffer irreparable harm . . . , that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added). FWS has not met that standard.

FWS argues that vacatur will have, and has already had, disruptive effects. (Doc. 95 at 5). Specifically, FWS asserts that vacatur will disrupt existing conservation efforts because (1) "Federal agencies are no longer required to consult with the Service under ESA Section 7 to minimize or mitigate damage caused by actions" that would threaten the LPC or its habitat; (2) participants who have already enrolled in voluntary conservation agreements may seek to withdraw; and (3) those who have not enrolled may elect not to do so. (*Id.* at 5–6). In support, FWS provided the Court with affidavits alleging that since the listing decision, actions negatively impacting the LPC and its habitat have already been taken. (Doc. 95-1; Doc. 100-1). However, this argument is without merit as FWS cannot prove that irreparable harm is *likely* to occur.

The evidence FWS provided suggesting that actions are being taken that are negatively affecting LPC habitat is unpersuasive. FWS admits to a lack of first-hand knowledge of the information, and evidence has not been presented to substantiate these claims.[2] (Doc. 95-1 at 8; Doc. 100 at 6; Doc. 115-1 at 7). FWS cites several instances where activity has been initiated or may potentially be initiated on LPC habitat. (Doc. 100-1 at 2–4). In one instance, FWS cites a wind-energy development project in New Mexico that will consist of 237 turbines, but FWS states only that 30 of those turbines are "*proposed*" to be placed in LPC habitat. (*Id.* at 2–3) (emphasis added). FWS mentions several other projects—some of which are merely *intended* or *proposed*—that would interfere with LPC habitat, but FWS fails to specify the extent and severity of these projects, merely stating that they are to take place in critical areas of LPC habitat. FWS's most recent filing states, "FWS has been made aware of . . . several *potential* development projects that have a *potential* to harm the species in the absence of the protections of the ESA." (Doc. 115-1 at 7) (emphasis added). However, FWS has failed to provide the Court with any further proof of the probability of these events occurring. Accordingly, FWS has not established that the LPC is *likely* to suffer irreparable harm as a result of these development activities.

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[1] In *Miller*, the Fifth Circuit Court of Appeals declined to adopt the balance of equities test in determining whether a stay from an arbitration order should be granted, reasoning that the four-factor test from *United States v. Baylor University Medical Center*, 711 F.2d 38, 39 (5th Cir. 1983) need be applied. *Miller*, 661 F.3d at 910. The four factors included: "(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest." *Baylor*, 711 F.2d at 39. However, this case is distinguishable from *Miller* in that these facts do not involve a stay from an order compelling arbitration. Rather, this case is concerned with the analogous nature of an inquiry determining whether to grant a preliminary injunction to the inquiry determining whether vacatur will cause disruptive consequences. Alternatively, even if this Court were to apply the four-factor test from *Baylor*, between the instant order and this Court's Summary Judgment Order, FWS has failed to satisfy that test.

[2] The affidavit provided by FWS specifically states "These examples are based only on information provided to the FWS." (Doc. 100-1 at 2).

As an exhibit to their January 7, 2016 filing, Plaintiffs submitted a letter from the Western Association of Fish and Wildlife Agencies[3] ("WAFWA"), which directly contradicts FWS's assertions.[4] WAFWA explained that it spoke with several of the companies mentioned in FWS's filing to determine the current status of the projects and discovered that three of those projects were not imminent.[5] Furthermore, according to WAFWA, the projects cited by FWS "would impact roughly 0.1% of the area in the estimated range of the species. . . . Even if those assumptions underestimate the impact by a hundred times, it is unlikely that these projects would have a demonstrable impact on the probability that the LPC would be placed in danger of extinction." (Doc. 110-1 at 12).

As an exhibit to the most recent court filings, both parties attached letters from two wind-energy companies, responding to FWS's allegations. (Docs. 114-1, 114-2, 115-3, 115-4). The first, from E.ON Climate & Renewables, North America ("E.ON"), in charge of the Vici Project, accuses FWS of providing the Court with factually inaccurate information and notes FWS's failure to contact the company to ascertain the validity of the information prior to providing it to the Court. (Doc. 115-3). According to E.ON, the initial decision to pursue the project was made only after extensive research was conducted to determine the extent of LPC population in the proposed project area, which showed that the project would not likely impact the species. (*Id.* at 4–5). Contrary to FWS's assertions that the project was fast-tracked following vacatur of the listing decision, E.ON explains the decision to pursue the project was "due to a number of commercial factors," and wholly unrelated to the Court's Summary Judgment Order. (*Id.* at 3–4). E.ON also denied FWS's assertion that the project was located in or near key connectivity zones and attached a graph showing that the project area is over ten miles away from the nearest connectivity zone. (*Id.* at 3 & Attachment A). In fact, while the project area juts into the estimated occupied range of LPC habitat, the project itself is several miles outside the occupied range. (*Id.*). Even if, as FWS states, the project area falls within the ten-mile buffer established by WAFWA to account for LPC population and habitat variability (Doc. 115 at 5–6), FWS has failed to show that the project is likely to harm the species.

The second letter, from EDF Renewable Energy, Inc. ("EDF"), in charge of the Roosevelt Wind Farm Project, also accuses FWS of providing the Court with statements based on "speculation and erroneous, unsupported assumptions." (Doc. 115-4 at 2). The letter directly contradicts FWS's allegations that, like E.ON, EDF was using the Court's decision, vacating the listing decision, to its advantage. EDF explains that the project's location and layout were a result of a number of surveys as well as meetings and consultations between EDF, FWS, and a

[3] WAFWA is the agency that administered the RWP. (Doc. 110 at 2).

[4] In the letter, WAFWA expresses concern regarding FWS's understanding of the RWP, stating "WAFWA is disappointed that the FWS continues to demonstrate a poor understanding of the RWP that they helped develop and endorsed in 2013, as well as basic concepts of biology, wildlife management, and the industries they intend to regulate." (Doc. 110-1 at 1). The letter explains that (1) vacatur has not negatively affected enrollments in the RWP, (2) the RWP is working, (3) LPC conservation efforts cannot be compared to those of the greater sage grouse and dunes sagebrush lizard because it "ignores key biological principles," (4) WAFWA is on schedule to meet many of the goals specified in the RWP, and (5) arguments and reports suggesting imminent development in LPC habitat that will threaten the species are "speculative and/or misinformed." (Doc. 110-1).

[5] According to WAFWA, one of the projects was "off the table," a second was "no longer being pursued," both cancelled due to potential LPC impacts, and a third was "so far out on the development calendar that [they] haven't even begun to evaluate its potential to affect LPCs." (Doc. 110-1 at 12).

state agency concerning the potential effect on the LPC. (*Id.* at 2–3). As a result of these meetings, EDF contends it made numerous modifications to minimize the project's effects on the LPC. (*Id.* at 3). FWS faults EDF for locating wind turbines two miles, as opposed to three miles, from the nearest lek[6] site. (Doc. 115 at 7). However, according to EDF, the parties orally agreed that the wind turbines would be placed no less than two miles away from all lek sites observed within the last five years, only to be informed of the suggested three-mile setback by FWS months later, and well after the development plans had been finalized. (Doc. 115-4 at 3–4). EDF also states that contrary to FWS's assertions, development had commenced prior to vacatur of the listing decision. (*Id.* at 3). Finally, EDF disputes FWS's claims that an alleged missing lek site was likely attributable to EDF's project, stating that the company informed FWS that the "missing lek was a mapping artifact and never, in fact existed, a conclusion that was corroborated by [a New Mexico state agency]." (*Id.* at 4 & Attachment B). EDF's willingness to continue consulting with FWS and both E.ON's and EDF's demonstrated efforts to minimize their projects' effects on the LPC seemingly contradict FWS's assertion that vacatur will have disruptive effects because "[f]ederal agencies are no longer required to consult with [FWS] under ESA Section 7 to minimize or mitigate damage caused by actions" that would threaten the LPC or its habitat.

FWS repeatedly argues that oil and gas development is one of the more significant threats to the species. (Doc. 95-1 at 4). However, as WAFWA indicated in its letter to the Court, "[o]il prices have dropped roughly 70% over the last year, rendering most companies' development plans no longer profitable." (Doc. 110-1 at 2–3). In fact, "[a]s of December 23, the number of active rigs across Colorado, Kansas, New Mexico, Oklahoma, and Texas had declined 62% from the previous 12 months." (*Id.* at 3). Thus, while oil and gas development may generally pose a threat to the species, the current threat to the species is minimal given the recent decline in oil prices and the impact it has had on the oil companies. Notwithstanding the toll this decline has had on the oil and gas industry, WAFWA states that "[n]inety-eight percent of the enrollment fees for the RWP have been paid," and none of the companies have requested to withdraw from the program. (*Id.*).

FWS also urges the Court to consider drought conditions. As Plaintiffs explained in their Final Submission to the Court, "2015 was a record-setting year for precipitation in the LPC range." (Doc. 114 at 9, Doc. 114-3, Doc. 114-4) (citing data from the National Weather Service). Furthermore, Plaintiffs provide ample evidence illustrating the National Weather Service's predictions of heavy precipitation in the LPC range in 2016. (Doc. 114-5–Doc. 114-13). FWS acknowledges that "[t]he range of the species is not currently experiencing the severe drought conditions that took place immediately before the listing decision," but argues that climate change projections predict more severe and persistent drought conditions in the long term. However, FWS has not provided this Court with any evidence in support of that assertion. (Doc. 115-1 at 5).

FWS cites to a single instance where an enrollee *inquired* into withdrawing from the Candidate Conservation Agreements with Assurances ("CCAA") as support for its claim that vacatur will deter voluntary enrollment or will lead to current enrollees withdrawing from

[6] "A 'lek' is the area where males of the species gather to perform competitive courtship displays and where breeding occurs." (Doc. 95-1 at 8).

voluntary conservation programs. (Doc. 95-1 at 13). FWS continues by stating that "for other species landowners have maintained their CCAA enrollment even without a listing." (*Id.*). Despite that fact, FWS argues that this single inquiry is indicative of a possible future trend of enrollee withdraws in CCAAs, but fails to provide the Court with additional information for this assertion. Therefore, the Court finds this argument unpersuasive.

The Court, in evaluating the degree of the potential disruption of vacatur finds that FWS has not met its burden of proving that vacatur has had or will have disruptive effects. The evidence provided by FWS is speculative and FWS has not persuaded the Court that those development activities[7] that have already occurred or that may occur are imminent or substantial. In fact, the evidence presented to this Court suggests that the threats to the LPC have been subsiding. The LPC population has been increasing,[8] the severe drought conditions have abated, oil and gas development has slowed significantly due to the decrease in oil prices, and wind development has not and seemingly will not pose a substantial threat to the species. While FWS argues to the contrary, FWS has failed to provide this Court with sufficient evidence to support its position. The absence of vacatur would subject Plaintiffs to strict requirements under the ESA. *See* LPC Final Rule 79 Fed. Reg. at 20,067–,068. Meanwhile, FWS has not put forth sufficient evidence to show that vacatur would have disruptive effects. In light of these considerations and the balancing of equities, the Court finds FWS has not met its burden of proving that vacatur will have, or has had, disruptive effects.

Accordingly, the Court finds FWS has not shown that there is a serious possibility it can substantiate its decision to list the LPC on remand. Alternatively, FWS failed to provide this Court with sufficient evidence to show that vacatur would have disruptive effects. As such, FWS has not met its burden of establishing that remand is the appropriate remedy in this case and Claim One is, therefore, denied.

II. Vacatur should not be limited to those areas in which Plaintiffs have suffered harm.

FWS argues, in the alternative, that vacatur should be limited to only those areas where Plaintiffs have suffered harm, namely Texas and New Mexico. (Doc. 95 at 13). Courts have routinely held that a motion filed pursuant to Fed. R. Civ. P. 59(e) may not be used to relitigate old matters. *Mitchell*, 533 F. App'x at 359. FWS raised this argument in its motion opposing Plaintiffs' motion for summary judgment, filed on June 5, 2015, prior to the Court's Summary Judgment Order. (Doc. 74 at 46–47). Although the Court did not explain its rationale for failing to limit vacatur in the Summary Judgment Order, the Court is not required to address every argument raised by the parties. *Dade v. Wands*, No. 11-CV-00430-WJM-MJW, 2012 WL 1207150 (D. Colo. Apr. 11, 2012) (denying Movant's motion filed pursuant to 59(e), reasoning "[t]here is no requirement for a court to specifically address each and every argument raised by a

[7] This refers to the development activities cited in FWS's filings with the Court, such as the Roosevelt Wind Farm Project and the Vici Project.

[8] "Between 2013 and 2015, [LPC] numbers increased from about 17,000 to over 29,000 birds, a gain of about 70 percent in a few years' time." (Doc. 114 at 8); (LPC RWP PECE analysis_03142014_FinalClean (1).docx, LRI Doc. 167 at L004029).

Citation to documents in the administrative record will note the document title, the Listing Rule Index document number (LRI Doc. #), followed by the citation to the six-digit Listing Rule Bates Number (L######) found at the bottom-right corner of the document (e.g., Document Name, LRI Doc. ## at L######).

party in papers filed with the Court") (citing *United States v. Palomino-Rodriguez*, 301 F. App'x 822, 824 (10th Cir. 2008)); *see also Sw. Bell Tel. Co. v. AT&T Commc'ns of Sw., Inc.*, No. A 97-CA-132 SS, 1998 WL 657717 (W.D. Tex. Aug. 31, 1998) (refusing to address every argument raised by the parties). As such, this Court did not err in failing to specifically address FWS's claim that vacatur should be limited. Instead, this Court implicitly rejected FWS's claim by failing to tailor the requested relief and vacating the listing decision in its entirety. *See Permian Basin Petrol. Ass'n*, 2015 WL 5192526. Therefore, the Court denies this claim as being procedurally barred.

Alternatively, this claim is denied on the merits. FWS cites *Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior*, 344 F. Supp. 2d 108, 136 (D.D.C. 2004) in support of its assertion that vacatur can and should be limited. In that case, the court limited the scope of vacatur to those areas within North Carolina that were at issue in the case. *Id.* However, *Cape Hatteras Access Preservation Alliance* involved critical habitat designation, whereas here, the issue involves the listing decision pertaining to the entire species of the LPC. In making the determination to list the LPC as a threatened species, FWS considered the LPC population throughout the entire range, which includes Texas, New Mexico, Kansas, Colorado, and Oklahoma. LPC Final Rule, 79 Fed. Reg. 19,974 (Apr. 10, 2014). Given that the decision to list the species as threatened was based on the entire population across all five states, the Court declines to limit vacatur to only those states connected to the parties in this case. Furthermore, both parties in *Cape Hatteras Access Preservation Alliance* agreed to limit vacatur to North Carolina, but there was no such agreement between the parties in this case.[9] *Cape Hatteras Access Pres. All.*, 344 F. Supp. 2d at 136.

Finally, FWS argues that this Court's ruling is overbroad in that it will affect parties in other districts and their ability to litigate the issues in this case. (Doc. 95 at 8). Contrary to FWS's assertion, this Court's decision is not binding on other courts. While other courts may, as FWS suggests, look to this Court's reasoning in reaching their own conclusion, this Court's ruling is merely persuasive authority and not precedential. As such, FWS's alternate ground for relief is also denied.

CONCLUSION

For the reasons stated above, FWS has failed to show the Court that it committed a clear error of law in its Summary Judgment Order or that remand would prevent a manifest injustice. Accordingly, the Court denies FWS's Motion to Alter or Amend the Judgment. (Doc. 95).

It is so ordered.

Signed this 29 **day of** February, **2016.**

Robert Junell
Senior United States District Judge

[9] The Court ordered mediation, but the parties were unable to reach an agreement. (Doc. 109).