IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA *ex rel.* GENTNER DRUMMOND, in his capacity as Attorney General of the State of Oklahoma and OKLAHOMA SECRETARY OF ENERGY AND ENVIRONMENT KEN McQUEEN in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiffs,	)	
v.	)	Case No. 05-CV-00329-GKF-SH
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAINE FOODS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., and SIMMONS FOODS, INC.,	)	
Defendants.	)	

ORDER

This matter comes before the court on defendants' Motion to Dismiss [Doc. 3010]. For the reasons set forth below, the motion is denied.

I. Background/Procedural History

This case has a lengthy procedural history, which the court will not fully summarize. Relevant to this motion, the State of Oklahoma brought this case against defendants alleging that defendants have polluted and continue to pollute the waters of the Illinois River Watershed (IRW) with phosphorus and bacteria from the waste generated from defendants' poultry and applied to

lands in the IRW. Although the State initially asserted ten causes of action, the case ultimately proceeded to a non-jury trial regarding the State's right to equitable relief on the following claims: (1) violation of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972; (2) state law public nuisance and state law nuisance *per se*; (3) federal common law nuisance; (4) trespass; and (5) violations of Okla. Stat. tit. 27A, § 2-6-105 and Okla. Stat tit. 2, § 2-18.1.

The parties tried the case to the court for fifty-two days over the course of five months. After the State rested, on defendants' motion, the court granted defendants judgment on partial findings under Federal Rule of Civil Procedure 52(c) as to the state-law nuisance *per se* and RCRA claims, as well as the State's claim of bacterial pollution with the exception of the State's allegations and evidence related to blue-green algae. *Oklahoma v. Tyson Foods, Inc*., No. 05-CV-0329-GKF, 2010 WL 653032 (N.D. Okla. Feb. 17, 2010).

On January 18, 2023, the court entered its Findings of Fact and Conclusions of Law. [Doc. 2979]. Therein, the court found in favor of the State and against defendants on the State's claims of statutory public nuisance, federal common law nuisance, trespass, and violations of Okla. Stat. tit. 27A, § 2-6-105 and Okla. Stat. tit. 2, § 2-18.1. The court specifically found and concluded that "actual and ongoing injury to the waters of the IRW constitutes irreparable harm and warrants injunctive relief." [*Id.* at p. 217]; *see also* [*Id*. at pp. 207, 212-13]. Based on the Findings of Fact and Conclusions of Law, the court directed the parties to meet and attempt to reach an agreement with regard to remedies to be imposed in this action and, on or before March 17, 2023, advise the court whether they had been able to do so. [*Id*. at p. 218].

On March 17, 2023, the court held a Status Conference wherein the parties requested a 90-day extension of the deadline to reach an agreement with regard to remedies. [Doc. 2988]. The court granted the request and directed the parties to file a joint status report by June 9, 2023.

On June 9, 2023, the parties filed a Joint Status Report advising the court that they wished to pursue mediation facilitated by retired Tenth Circuit Judge Deanell Reece Tacha and advised that they would submit a status report within fourteen days of the conclusion of mediation. [Doc. 2997].

On October 26, 2023, plaintiffs and defendants filed separate Status Reports advising the mediation had been unsuccessful. [Doc. 3008; Doc. 3009]. That same day, defendants filed the Motion to Dismiss. [Doc. 3010].

II. Analysis

Defendants argue dismissal is required for two primary reasons. First, defendants contend that the plaintiffs' claims for injunctive relief are moot. Second, defendants assert that proceeding on the current record would violate their due-process rights. The court separately considers mootness and due process.

A. Mootness

"Courts recognize two kinds of mootness: constitutional mootness and prudential mootness." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010). Defendants argue that plaintiffs' claims for injunctive relief are both constitutionally and prudentially moot. The court separately analyzes each form of mootness.

1. Constitutional Mootness

"Article III of the Constitution permits federal courts to decide only 'Cases' or 'Controversies.'" *Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 879 (10th Cir. 2019) (citing U.S. Const. art. III, § 2). The Tenth Circuit has explained:

> Courts employ three jurisdictional doctrines to keep federal courts within their constitutional bounds: standing, mootness, and ripeness. Standing requires the plaintiff to allege a personal interest warranting federal-court jurisdiction by showing three elements: (1) an injury in fact, (2) a causal connection between the

> injury and the conduct complained of, and (3) redressability. Mootness is standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).

Prison Legal News, 944 F.3d at 879 (internal quotations and citations omitted); *see also Rio Grande Silvery Minnow*, 601 F.3d at 1121 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."). Thus, "the constitutional mootness doctrine focuses upon whether 'a definite controversy exists throughout the litigation and whether conclusive relief may still be conferred by the court despite the lapse of time and any change of circumstances that may have occurred since the commencement of the action.'" *Jordan v. Sosa*, 654 F.3d 1012, 1024 (10th Cir. 2011) (quoting *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997)). "The crucial question is whether 'granting a present determination of the issues offered . . . will have some effect in the real world.'" *Citizens of Responsible Gov't State Pol. Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) (quoting *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1266 (10th Cir. 1999)). If a case is moot, the court lacks subject matter jurisdiction. *Smith v. Becerra*, 44 F.4th 1238, 1247 (10th Cir. 2022).

The Tenth Circuit has recognized "the conditions under which a suit will be found constitutionally moot are stringent." *Bldg. & Constr. Dep't v. Rockwell Int'l Corp*., 7 F.3d 1487, 1491 (10th Cir. 1993). The court must apply "a claim-by-claim approach to mootness" and "decide whether a case is moot as to 'each form of relief sought.'" *Smith*, 44 F.4th at 1247 (quoting *Prison Legal News*, 944 F.3d at 880). "The defendant bears the burden of establishing that a 'once-live case has become moot.'" *Smith,* 44 F.4th at 1247 (quoting *West Virginia v. Env't Prot. Agency*, — U.S. —, 142 S. Ct. 2587, 2607 (2022)).

Defendants argue that, given the lapse in time, their past conduct cannot provide the basis for equitable relief and therefore "the Court can no longer grant Oklahoma effectual relief as to its injunctive claims." [Doc. 3010, p. 20].

"An injunctive relief claim becomes moot when the 'plaintiff's continued susceptibility to injury' is no longer 'reasonably certain' or is based on 'speculation and conjecture.'" *Smith,* 44 F.4th at 1247 (quoting *Jordan*, 654 F.3d at 1024). In making the determination, plaintiffs' "susceptibility to *continuing* injury is of particular importance." *Jordan,* 654 F.3d at 1024. Thus, "past exposure to alleged illegal conduct does not establish a present live controversy" only if the past exposure is "*unaccompanied by any continuing present effects*." *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996) (emphasis added); *see also Prison Legal News*, 944 F.3d at 880 (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307-08 (2012)) ("[A]n action is not moot if a plaintiff has 'a concrete interest, however small, in the outcome.'").

Defendants have failed to demonstrate that the State is not susceptible to long-lasting and continuing injury from defendants' trespass and the nuisance created thereby. As previously stated, the court previously found and concluded that defendants' conduct constituted a continuing nuisance and/or trespass, which caused ongoing injury to the waters of the IRW. [Doc. 2979, pp. 200-18]. Defendants now cite a handful of publications for the proposition that conditions in the IRW have improved since trial of this matter. However, the authors of those same publications recognize that "progress [with respect to phosphorus levels] has plateaued," Doug Thompson, *Arkansas, Oklahoma Officials to Host Public Meeting on Illinois River*, NW. ARK. DEMOCRAT GAZETTE (Jan. 14, 2023), https://www.nwaonline.com/news/2023/jan/14/arkansas-oklahoma-nwofficials-to-host-public/, and that portions of the IRW remain impaired by phosphorus, U.S.

ENV'TAL PROT. AGENCY, COOPERATIVE EFFORTS BUILD TRUST WHILE REDUCING POLLUTION 8 (Apr. 2020). Further, defendants only speculate that it is "likely" "some" of the farms that contributed to phosphorus in the IRW no longer raise chickens or support farming operations. [Doc. 3010, p. 19]. Under the circumstances, defendants have not shown the State is not suffering any "continuing present effects" or continuing injury as a result of defendants' past violations resulting in excessive phosphorus loading in the soils of the IRW and the sediments of Lake Tenkiller. *McClendon*, 100 F.3d at 867; *see also Smith,* 44 F.4th at 1247 (it is defendants' burden to establish constitutional mootness).

Defendants rely on the decision of the U.S. Court of Appeals for the Eighth Circuit in *Webb v. Missouri Pacific Railroad Company*, 98 F.3d 1067 (8th Cir. 1996). However, as an Eighth Circuit decision, *Webb* is not binding on this court. *See United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir. 1986). Regardless, *Webb* is distinguishable. *Webb* was an employment discrimination lawsuit originally brought in 1975 against Missouri Pacific Railroad Company. The liability phase of the trial occurred over four years, from November 1985 to December 1989. During trial, in the spring of 1986, Missouri Pacific merged with Union Pacific Railroad Company. *Webb*, 98 F.3d at 1068.

On April 15, 1994, the district court issued an injunction against Union Pacific prohibiting the creation and tolerance of a racially oppressive work environment and enjoining Union Pacific from using discriminatory practices in discipline, promotions, and job assignments. *Id.* However, the court "[r]el[ied] almost exclusively on evidence of discriminatory treatment from before the merger" and, further, the record included an uncontested affidavit detailing Union Pacific's antidiscrimination and affirmative action programs and stating that, "since December of 1989, there have been no [formal or informal] complaints of racial harassment." *Id.*

Stating that "injunctive relief should not be considered unless the record shows 'a real threat of [a] future violation [of the law] or a contemporary violation of a nature likely to continue or recur,'" the court noted that the district court had no recent information about discrimination following the merger. Instead, the court had only an uncontested affidavit documenting Union Pacific's "effective implementation of comprehensive antidiscrimination and affirmative action programs" coupled with no recent reports of discrimination. *Id.* Thus, the court concluded that Union Pacific's *existing* employment practices did not justify the imposition of injunctive relief. *Id.* at 1069.

Here, however, defendants offer no evidence of a change in their practices with respect to poultry waste. Nor is there evidence of an "effective" and "comprehensive" program that has resulted in no recent reports—that is, a complete absence—of continuing injury from either past or present application of poultry waste. Rather, for the reasons previously set forth in the court's Findings of Facts and Conclusions of Law, injunctive relief is warranted.

Based on the foregoing, defendants have failed to satisfy the "stringent" burden of showing that this matter is constitutionally moot. *Building & Constr. Dep't*, 7 F.3d at 1491; *Smith,* 44 F.4th at 1247.

2. Prudential Mootness

The Tenth Circuit has recognized that, "[e]ven if a case is not constitutionally moot, a court may dismiss [a] case under the prudential-mootness doctrine if the case 'is so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the *power* to grant.'" *Jordan*, 654 F.3d at 1024 (quoting *Rio Grande Silvery Minnow*, 601 F.3d at 1121). "Prudential mootness therefore 'addresses not the *power* to grant relief[,] but the court's *discretion* in the exercise of that power.'"

Jordan, 654 F.3d at 1024 (quoting *S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997)). The prudential mootness doctrine "generally applies only to requests for injunctive or declaratory relief." *Rio Grande Silvery Minnow,* 601 F.3d at 1122.

Defendants argue that plaintiffs' claims are prudentially moot "because the record has become too stale to support an injunction" and "[t]he passage of time has . . . created practical problems that would plague crafting relief *on this record*." [Doc. 3010, pp. 21-22 (emphasis added)]. The court need not decide the issue, however, as, based on new evidence, the court shall make additional findings and conclusions as to the specific terms of the injunctive relief and the act or acts to be restrained or required. *See Cohn v. United States*, 259 F.2d 371, 376 (6th Cir. 1958) (prior to entry of judgment the court retains inherent power to make amended findings and additional conclusions).

Insofar as defendants contend that the passage of time alone renders this matter prudentially moot, the court is not convinced. *See* [Doc. 3010, p. 22 (citing *Winzler v. Toyota Motor Sales U.S.A., Inc*., 681 F.3d 1208, 1210 (10th Cir. 2012))]. How best to confront existing and potential future pollution in the IRW remains a topic of debate in Oklahoma. An order and judgment with respect to the proper remedies therefore retains its utility. *Cf. Winzler,* 681 F.3d at 1210 (noting a case may be prudentially moot where "the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits").

B. Due Process

Finally, defendants seek dismissal, arguing that granting injunctive relief on this record would violate due process. However, defendants offer no case law suggesting that dismissal constitutes an appropriate remedy under the circumstances. On the contrary, it appears that the appropriate remedy is expeditious resolution of the remedial issues. *See Harris v. Champion*, 15

F.3d 1538, 1558-59 (10th Cir. 1994) (Circuit required district court to resolve habeas petition within certain timeframe or defendant would be released); *see also* [Doc. 3010, p. 23 (collecting cases regarding mandamus)]. This court shall expeditiously enter a final order and judgment as to injunctive relief in this matter. Accordingly, due process does not warrant dismissal.

III. Conclusion

WHEREFORE, the Motion to Dismiss [Doc. 3010] of defendants Tyson Foods, Inc.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; Cobb-Vantress, Inc.; Cal-Maine Foods, Inc.; Cargill, Inc.; Cargill Turkey Production, LLC; George's, Inc.; George's Farms, Inc.; Peterson Farms, Inc.; and Simmons Foods, Inc. is denied.

IT IS FURTHER ORDERED that this matter is set for Status/Scheduling Conference on Tuesday, July 23, 2024 at 1:30 p.m.

IT IS SO ORDERED this 26th day of June, 2024.

GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE