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7 and the Nevada State Engineer

8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE DISTRICT OF NEVADA**

10 UNITED STATES OF AMERICA,  
11  
12 Plaintiff,

13 v.

14 STATE OF NEVADA; NEVADA STATE  
DEPARTMENT OF CONSERVATION  
AND NATURAL RESOURCES; R.  
15 MICHAEL TURNIPSEED, P.E., in his official  
capacity as Director, Department of  
16 Conservation and Natural Resources; and  
HUGH RICCI, P.E., in his official capacity  
17 as State Engineer for the State of Nevada,  
18 Defendants.

Case No. 2:00-cv-00268-RLH-LRL

**NEVADA STATE ENGINEER'S  
MOTION TO COMPEL COMPLIANCE  
WITH STATE ENGINEER'S ORDERS  
OF JUNE 1 AND JULY 16, 2007, AND  
REQUEST FOR ORDER**

19 Defendants, the State of Nevada; Allen Biaggi, Director, Nevada Department of  
20 Conservation and Natural Resources; and Tracy Taylor, P.E., Nevada State Engineer (State  
21 Engineer), by and through their counsel of record, Catherine Cortez Masto, Attorney General  
22 for the State of Nevada, and Michael L. Wolz, Senior Deputy Attorney General, hereby asks  
23 this Court for an order compelling DOE to immediately cease its use of water for all bore hole  
24 drilling. The State Engineer specifically requests that this Court instruct the parties in regard  
25 to completion of DOE's "Phase 1" drilling program in light of the fact that the State Engineer  
26 intended that DOE cease and desist the use of water for all bore hole drilling and not merely  
27 "Phase 2."

28 ////

1 The State Engineer also requests, pursuant to LR 6-1 and the Court's Order of  
2 June 11, 2002, that this Court shorten the time in which DOE may respond to this motion so  
3 that this issue will not be rendered moot as the result of DOE's ongoing drilling activities while  
4 this motion is pending.<sup>1</sup>

5 This motion is supported by the attached documents and on all pleadings and papers  
6 on file herein.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 This Court in its Order of August 31, 2007, denied DOE's Emergency Second Renewed  
9 Motion for Preliminary Injunction and Hearing on Shortened Time, holding DOE had failed to  
10 meet any of the criteria necessary to justify a preliminary injunction against the State of  
11 Nevada. By letter dated September 5, 2007, the State Engineer asked DOE to immediately  
12 confirm that it had stopped its use of water for bore hole drilling pursuant to his June 1, 2007,  
13 Cease and Desist Order. A copy of this letter is attached hereto as Exhibit A. On September  
14 6, 2007, DOE informed the State Engineer by letter that it has discontinued using water for  
15 drilling and boring activities associated with the Phase II bore hole drilling program.<sup>2</sup> DOE  
16 stated, however: "[p]lease note that Phase I drilling, which is not affected by the cease and  
17 desist order, is anticipated to conclude by the end of September 2007. . . ." Letter of  
18 September 6, 2007, from James W. Hollrith, Acting Director, Yucca Mountain Site Operations  
19 Office, to Tracy Taylor, Nevada State Engineer. A copy of that letter is attached hereto as  
20 Exhibit B. Although no support is cited for this position, it is assumed that DOE relies on this  
21 Court's statement in the August 31, 2007, Order: "[n]otwithstanding Plaintiff's expressed fear  
22 that the cease and desist order covered all use of water, the cease and desist order applies  
23 only to the Phase II drilling operations." Order of August 31, 2007, at 10 n.2.

24 \_\_\_\_\_  
25 <sup>1</sup> Because DOE has represented that it will be completed with Phase I of its drilling program by the end  
26 of September, the State Engineer does not feel that there is adequate time to engage in the normal negotiating  
27 process prior to seeking relief from this Court. The State Engineer will send, contemporaneously with the motion,  
a letter asking DOE to voluntarily cease using water as part of its Phase I drilling activities. Should DOE agree to  
permanently stop using water for those purposes this motion will be rendered moot and will be withdrawn by the  
State Engineer.

28 <sup>2</sup> DOE also states that it intends to conduct certain activities in the wind up of its Phase II drilling  
program such as plugging 16 existing wells. The State Engineer does not object to DOE's use of water for those  
purposes.

1 It should be noted that DOE's own letter seems to suggest that it is still within DOE's  
2 prerogatives to use water for bore hole drilling despite this Court's clear finding that such  
3 activity is not authorized by law. DOE states: "[i]n the event DOE determines to resume using  
4 water for Phase II borehole drilling in the future (based, for example, on an appeal or other  
5 changed circumstances), DOE will notify you before doing so." [Emphasis added.] Clearly,  
6 DOE may not "determine" to resume this use of Nevada water without a permit from the  
7 Nevada State Engineer, an order of this Court, or an agreement with both Nevada parties.

8 In ordering DOE to cease and desist the use of water, the State Engineer intended that  
9 DOE cease the use of water in all bore hole drilling, not merely Phase II. As the State  
10 Engineer stated in his letter of July 16, 2007: "[i]f the conditions are not acceptable, the cease  
11 and desist order of June 1, 2007, is hereby reinstated and the stay of that order entered  
12 June 12, 2007, is lifted, and *no water may be used for any bore hole drilling projects currently  
13 underway.*" Letter of July 16, 2007 (emphasis added). A copy of that letter is attached hereto  
14 as Exhibit C. As is clear from that language, the State Engineer intended that no water be  
15 used for either Phase I or Phase II of the drilling program. Although the State Engineer's  
16 Cease and Desist Order of June 1, 2007, made specific mention of Phase II, the State  
17 Engineer did so under the belief that Phase I was nearly complete. Letter of June 1, 2007, at  
18 2. A copy of that letter is attached hereto as Exhibit D. Additionally, this statement was made  
19 before the meeting with DOE and any description of Phase I had been provided the State  
20 Engineer. Letter of July 16, 2007, Exhibit C, at 5. The State Engineer did not intend to imply  
21 in the June 1, 2007, Cease and Desist Order that he agreed to the continuing use of water on  
22 the Phase I drilling program. He believed, based on DOE's representations, that the Phase I  
23 drilling program was all but complete and that the use of water for that program was,  
24 therefore, moot.

25 There are no factual or legal justifications for treating the Phase I or Phase II bore hole  
26 drilling programs differently under this Court's August 31, 2007, Order. All of the reasons  
27 given by this Court showing that DOE's use of water is improper under Nevada law are as  
28 readily applicable to Phase I of the drilling program as they are to Phase II. Likewise, DOE

1 cannot identify any legal authority for prosecuting the Phase I drilling work any more than it  
2 can for Phase II. There is no legal justification for treating either phase of the drilling program  
3 differently from the other under this Court's Order of August 31, 2007.

4 The State Engineer, therefore, requests this Court instruct the parties regarding the  
5 manner in which the Order of August 31, 2007, should be implemented and specifically ask  
6 that this Court direct DOE to cease the use of water for all bore hole drilling.

7 DATED this 10th day of September, 2007.

8 CATHERINE CORTEZ MASTO  
9 Attorney General

10 By: /s/ Michael L. Wolz  
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20 the Nevada State Engineer

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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 10th day of September, 2007, I electronically filed the foregoing **NEVADA STATE ENGINEER'S MOTION TO COMPEL COMPLIANCE WITH STATE ENGINEER'S ORDERS OF JUNE 1 AND JULY 16, 2007, AND REQUEST FOR ORDER** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their e-mail addresses:

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