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7

8 **IN THE UNITED STATES DISTRICT COURT**

9 **FOR THE DISTRICT OF NEVADA**

10 UNITED STATES OF AMERICA,)

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

11 Plaintiff,)

12 v.)

**STATE OF NEVADA AGENCY FOR
NUCLEAR PROJECTS' MOTION TO
COMPEL COMPLIANCE WITH
REQUIREMENT FOR A THREE-WAY
AGREEMENT FOR WATER USAGE AND
REQUEST FOR SHORTENING TIME**

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

17 Defendants.)
18

19 Defendant, State of Nevada, Nevada Agency for Nuclear Projects, through Robert
20 Loux, its Executive Director (Nevada Agency), by and through its counsel, Catherine Cortez
21 Masto, Nevada Attorney General, and Marta Adams, Senior Deputy Attorney General, hereby
22 asks this Court for an order compelling the United States Department of Energy (DOE) to
23 immediately cease its use of water for all bore hole drilling irrespective of "phase" and instruct
24 DOE to comply with the prerequisite to reach a three-way agreement among the parties to
25 allow for all appropriate use of water by DOE during the current interim period. Nevada
26 Agency specifically requests that this Court instruct DOE to comply with the requirement that a
27 three-way agreement be reached concerning any and all use of water by DOE during the
28 current interim period.

1 Pursuant to LR 6-1 and the Court's Order of June 11, 2002, Nevada Agency requests
2 that this Court shorten the time for DOE to respond to this motion so that the issue of DOE's
3 use of water for Phase I bore hole drilling will not be rendered moot during the pendency of
4 this motion. This motion is supported by the attached documents and on all pleadings and
5 papers on file herein.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 This Court in its Order of August 31, 2007, denied DOE's Emergency Second Renewed
8 Motion for Preliminary Injunction and Hearing on Shortened Time, holding that DOE failed to
9 meet its burden justifying the issuance of a preliminary injunction. In a letter dated
10 September 5, 2007, the State Engineer asked that DOE immediately confirm that it had
11 stopped its use of water for bore hole drilling pursuant to his June 1, 2007, Cease and Desist
12 Order. A copy of that letter is attached hereto as Exhibit A. On September 6, 2007, DOE sent
13 a letter to the State Engineer informing him that it has discontinued using water for drilling and
14 boring activities associated with the Phase II bore hole drilling program.¹ DOE stated,
15 however, that: "[p]lease note that Phase I drilling, which is not affected by the cease and
16 desist order, is anticipated to conclude by the end of September 2007. . . ." Letter of
17 September 6, 2007, from James W. Hollrith, Yucca Mountain Site Operations Office, to Tracy
18 Taylor, Nevada State Engineer. A copy of that letter is attached hereto as Exhibit B.

19 DOE cites to no authority for its position, but it is believed that DOE is basing its
20 continuation of water use for drilling on this Court's statement in its August 31, 2007, Order:
21 "[n]otwithstanding Plaintiff's expressed fear that the cease and desist order covered all use of
22 water, the cease and desist order applies only to the Phase II drilling operations." Order of
23 August 31, 2007 (Order) at 10 n.2.

24 It should be noted that DOE's letter seems to suggest that it is still within DOE's
25 prerogatives to use water for bore hole drilling even though this Court unequivocally
26 determined that DOE's use of water for bore hole activity is not authorized by law and has not
27

28 ¹ In addition, DOE states that it intends to conduct certain activities incident to curtailing its Phase II
drilling activities including plugging and casing its Phase II wells.. Nevada Agency does not object to DOE's use
of water for those purposes.

1 been agreed to by the parties. Unquestionably, this Court found that all site characterization
2 activities were to be completed by DOE before DOE made its Yucca Mountain site
3 recommendation to Congress in February 2002. Order at 11. Further, the Court determined
4 that bore hole drilling is not required by the U.S. Nuclear Regulatory Commission (NRC) and
5 that such bore hole activity was found by a congressional committee to be unsupportable at
6 the current stage of the Yucca Mountain project. Order at 12. The Court summarized its
7 finding in this regard:

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

14 *Id.* at 13.

15 In DOE’s September 6, 2007, letter, it expressly states: “*In the event DOE determines*
16 *to resume using water for Phase II borehole drilling in the future (based, for example, on an*
17 *appeal or other changed circumstances), DOE will notify you before doing so.”* Here, once
18 again, DOE demonstrates its unmitigated audacity by suggesting that it will “determine” to
19 resume this particular use of Nevada water without an agreement with both Nevada parties.

20 This Court recognized that there was no agreement among the parties concerning use
21 of water for bore hole drilling. The Court noted that:

22 A year after the hearing, noted in a June 25, 2003, letter, there was
23 a “tentative agreement” for an increase in DOE’s use, described as
24 a “[sic] totaling 1,360,000 gallons per year, of which 420,000 gallons
25 per year were for potable water uses. That letter, from Defendants,
26 notes for the first time discussions about bore hole drilling and the
27 fact that *an agreement has not yet been reached* for the additional
28 300,000 gallons DOE asserted it needed for bore hole drilling for
29 seismic investigation, but that a stipulation could be entered as to
30 the terms that had been agreed to. *No stipulation was forthcoming.*

31 August 31, 2007, Order at 5 (emphasis added).

32 As a party to the existing stipulation intended to address DOE’s interim water use,
33 Nevada Agency has never agreed to DOE’s use of water for bore hole drilling. A three-way
34 agreement concerning DOE’s interim water use is a necessary prerequisite before DOE can

1 undertake such water use. That a three-way agreement is required before DOE uses water
2 for its interim needs is emphasized by this Court's Order:

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

12 *Id.* at 23.

13 There are no factual or legal reasons for differentiating between Phase I or Phase II
14 bore hole drilling nor are any recognized by this Court's August 31, 2007, Order. DOE's use
15 of water for bore hole drilling was never agreed to by the parties and such an agreement is
16 clearly necessary particularly in light of DOE's propensity for changing the so-called "phase" it
17 is operating under and its ever-changing schedule.

18 The Nevada Agency therefore requests that the Court order DOE to cease its use of
19 water for all bore hole drilling regardless of "phase" and instruct DOE to comply with the
20 prerequisite that it reach a three-way agreement with the parties before it makes use of water
21 during the current interim period.

22 DATED this 10th day of September, 2007.

23 CATHERINE CORTEZ MASTO
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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 **STATE OF NEVADA AGENCY FOR NUCLEAR PROJECTS' MOTION TO COMPEL COMPLIANCE WITH REQUIREMENT FOR A THREE-WAY AGREEMENT FOR WATER USAGE AND REQUEST FOR SHORTENING TIME** 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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