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21 **IN THE UNITED STATES DISTRICT COURT**
22 **FOR THE DISTRICT OF NEVADA**

23 STATE OF NEVADA,
24 Plaintiff,
25 vs.
26 UNITED STATES; *et al.*,
27 Defendants.
28

Case No. 3:18-cv-00569-MMD-CBC

**PLAINTIFF'S
STATUS REPORT**

1 Plaintiff, the State of Nevada, by and through legal counsel, hereby files its Status
2 Report as directed by the Court in its January 30, 2019, Minute Order. This Status
3 Report is based upon all pleadings on file, the exhibits attached thereto, and the
4 arguments and testimony set forth in the January 17, 2019, Evidentiary Hearing on
5 Plaintiff's Motion for a Preliminary Injunction.

6 On January 30, 2019, the U.S. Defendants submitted a Notice of New Information
7 ("Notice") which provided a sworn declaration asserting that shipment of one-half metric
8 ton of plutonium to Nevada under the plan proposed in the Supplement Analysis ("SA")
9 (ECF No. 1-1), has been completed. The Notice claims that the shipment was completed
10 prior to November of 2018, the month in which Nevada filed this lawsuit. The
11 U.S. Defendants title their Notice as "new information," yet this information is only new
12 to Plaintiff and this Court. The Notice makes clear that the U.S. Defendants have
13 repeatedly misled Nevada and this Court.

14 When Nevada brought this suit, and at all times until DOE filed its "Notice of New
15 Information" Nevada believed, based on what it thought were good faith discussions with
16 DOE officials and DOE counsel (Mr. Negri), that (1) no shipments pursuant to the
17 Supplement Analysis had taken place and that (2) no shipments would take place until
18 February 1, 2019, at the earliest. Nevada had engaged in good faith discussions with DOE
19 regarding potential plutonium shipments starting in April of 2018. *See* the Affidavit of
20 Pam Robinson (ECF No. 4) at ¶ 2. On various occasions, the U.S. Defendants even
21 provided written commitments to Nevada that it would forbear from commencing
22 shipments. The first written commitment came when the U.S. Defendants' counsel
23 pleaded with Plaintiff for more time to respond to Plaintiff's Motion for Preliminary
24 Injunction, and then used the written commitment as an incentive to get that extension.
25 *See* the Affidavit of Marta Adams (ECF No. 21-1) at ¶ 5. Next, after the Court's
26 January 17, 2019 Hearing, Plaintiff informed the U.S. Defendants that it would filing a
27 temporary restraining order to prevent DOE from commencing shipments until the Court
28 reached its decision. DOE persuaded Plaintiff not to file its temporary restraining order

1 by providing a written assurance that it would not commence shipping until after
2 January 31, 2019. The U.S. Defendants provided these false and misleading assurances
3 with knowledge that shipments not only commenced but were also apparently completed.

4 The extent to which DOE misled Nevada in bad faith is made clear in the
5 Declaration of William Harris Walker that was included in DOE's Response to Nevada's
6 Motion for Preliminary Injunction. *See* the Declaration of William Harris Walker
7 (ECF No. 27-1). In his declaration, Mr. Walker states that in a meeting on October 30,
8 2018, DOE "further detailed its plans for shipping plutonium to the State [of Nevada]."
9 *Id.* at ¶ 8. Yet, U.S. Defendants now contends that many shipments were already almost
10 certainly completed by that time. *See* the Declaration of Bruce M. Diamond
11 (ECF No. 56-1) at ¶ 4 ("it can be stated that [the shipment] was done before
12 November 2018"). Thus, DOE was being disingenuous in its October 30, 2018 call to
13 Nevada to discuss the "plan" when the shipments had already began.

14 The Court's January 30, 2019, Minute Order directs each party to state whether
15 DOE's "new information" makes Nevada's Motion for a Preliminary Injunction moot. It
16 does not. The U.S. Defendants' declaration and conduct of this case, if anything,
17 demonstrate the imperative need for preliminary injunctive relief. Such relief is needed
18 for at least two reasons, even if a half ton of plutonium already is in the State. First, the
19 ambiguity of the U.S.'s statement creates the palpable suspicion that additional material
20 could be sent. Paragraph three of the General Counsel Diamond's statement conflates an
21 original determination regarding a shipment "campaign" with a change of mind and
22 designation of a "separate campaign." Following this, paragraph four of the declaration
23 references a half-ton of plutonium and the completion of all shipment to Nevada pursuant
24 to U.S. "efforts" to comply with the S.C. District Court's order. On the other hand, the SA
25 states that "up to one metric ton of plutonium would be transported from SRS to
26 [Nevada]." *See* the SA (ECF No. 1-1) at 13. Nevada has no confidence that another one-
27 half metric ton of plutonium from SRS might be transported here.

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1 Furthermore, there may even be a prospect for shipment of additional tonnage to
2 Nevada. Both statute, 50 U.S.C. 2566, and court order require more to be shipped from
3 South Carolina by 2022. In its complaint, Nevada argues that the cumulative impacts
4 from such reasonably foreseeable future shipments should be considered in NEPA
5 documentation. Now, with the U.S.'s perfidious conduct clear on the record in this case,
6 there is a fair suspicion that shipment of this material, too, might be impending.

7 Additionally, the SA provides that "shipments between Pantex and NNSS may
8 occur if needed in the implementation of this proposed action." See the SA (ECF No. 1-1)
9 at 1. Therefore, the possibility remains that DOE could subsequently ship additional
10 amounts of plutonium from Pantex to NNSS under this proposal. Thus, DOE may
11 attempt to use Pantex as a "pit-stop" to complete shipments to NNSS. Such a scenario is
12 not covered by DOE's Notice of New Information and must be precluded by granting
13 Plaintiff's requested injunction.

14 Ultimately, Plaintiff's Motion for Preliminary Injunction is not moot. Even under
15 the Notice of New Information: (1) It remains possible under the SA that another one-half
16 metric ton of plutonium could be transported to NNSS and; (2) The SA still proposes to
17 make shipments in between NNSS and Pantex, an issue in no way addressed by the

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1 Notice of New Information. The U.S. *must* respectfully, be compelled to perform the
2 requisite environmental analysis required both by NEPA, and by the very same statute
3 and court order that require shipment out of South Carolina. And it *must* be enjoined
4 from any further shipments, overt or covert, before the analysis is done

5 DATED this 30th day of January, 2019.

6 AARON D. FORD
7 Attorney General

8 By: /s/ C. Wayne Howle
9 C. WAYNE HOWLE (Bar No. 3443)
10 Chief Deputy Attorney General
11 DANIEL P. NUBEL (Bar No. 13553)
12 Deputy Attorney General

13 By: /s/ Marta Adams
14 MARTA ADAMS (Bar No. 1564)
15 Special Deputy Attorney General

16 EGAN, FITZPATRICK, MALSCH &
17 LAWRENCE, PLLC

18 By: /s/ Martin G. Malsch
19 MARTIN G. MALSCH
20 Special Deputy Attorney General

21 **CERTIFICATE OF SERVICE**

22 I certify that I am an employee of the State of Nevada, Office of the Attorney
23 General, and that on this 30th day of January, 2019, I served a true and correct copy of
24 the foregoing PLAINTIFF'S STATUS REPORT, by U.S. District Court CM/ECF electronic
25 service, which will send notification of such filing to the email addresses that are
26 registered for this case:

27 /s/ Dorene A. Wright
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