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20
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 OPPOSITION TO
DEFENDANTS' MOTION FOR
A STAY OF UNITED STATES'
RESPONSE TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION IN LIGHT OF
LAPSE OF APPROPRIATIONS

1 Plaintiff, the State of Nevada, by and through legal counsel, hereby files its
2 Opposition to Defendants' Motion for a Stay. This Opposition is based on the attached
3 points and authorities and all pleadings on file, and the exhibits attached thereto.

4 MEMORANDUM OF POINTS AND AUTHORITIES

5 I. Factual and Procedural History

6 Defendants, the United States Department of Energy, Rick Perry, Secretary of
7 Energy in his official capacity, the National Nuclear Security Administration, and Lisa E.
8 Gordon in her official capacity as Administrator of the National Nuclear Security
9 Administration (collectively "DOE" or "Defendants"), propose to ship one metric ton of
10 plutonium from DOE's Savannah River Site in the State of South Carolina, to DOE's
11 Nevada National Security Site ("NNS"), located approximately 90 miles northwest of the
12 City of Las Vegas, Nevada. See Complaint (ECF No. 1) at ¶ 2. The mode of
13 transportation would be by trucks travelling in accordance with DOE's Secure Asset
14 Transportation Program. *Id.* Plutonium-239, the subject of the shipments at issue here,
15 is a fissile material that can fission and release large amounts of energy. *Id.* at ¶ 4.
16 Plaintiff contends that DOE's proposed action will result in increased radiation doses to
17 Nevada citizens and would, in some circumstances, lead to contamination of the lands
18 and the groundwater of Nevada with radioactive materials. *Id.* at ¶ 16.

19 On November 30, 2018, Plaintiff filed its Complaint against Defendants, which
20 alleges that: (1) Defendants violated the National Environmental Policy Act; (2)
21 Defendants violated the Council on Environmental Quality Regulations; and (3)
22 Defendants violated their own regulations. Concurrent with the filing of its Complaint,
23 Plaintiff also filed a Motion for Preliminary Injunction. In its Motion for Preliminary
24 Injunction, Plaintiff repeatedly emphasizes the urgency of this matter. See Plaintiff's
25 Motion for Preliminary Injunction (ECF 1-20) at 9:16-17 ("lacking any assurance against
26 this imminent risk, Nevada (and this Court) must assume that the shipments could reach
27 Nevada any day now").

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1 Subsequent to Plaintiff's filings, Trial Attorney for the United States Department
2 of Justice, David L. Negri, Esq., counsel for Defendants, communicated with Special
3 Deputy Attorney General Marta Adams, counsel for Plaintiff, to request an extension of
4 time to respond to Plaintiff's Request for Preliminary Injunction. See the Affidavit of
5 Marta Adams attached as **Exhibit 1**. Ms. Adams informed Mr. Negri that Plaintiff could
6 not stipulate to the requested extension without first obtaining an assurance that DOE
7 would not begin its plutonium shipments to the NNSS before the Court decided upon
8 Plaintiff's Motion for Preliminary Injunction. *Id.* In an email transmitted on December
9 17, 2018, as part of discussions concerning the proposed stipulation extending the briefing
10 schedule, Mr. Negri provided assurances as follows:

11 Counsel for the U.S. Defendants represents that transportation
12 of plutonium or defense plutonium materials between DOE's
13 Savannah River Site and DOE's Nevada National Security Site
14 to comply with the order of the United States District Court for
15 South Carolina will not occur during the thirty (30) days
following December 21, 2018, the current due date of the U.S.
response to the State of Nevada's Motion for Preliminary
Injunction.

16 See the December 17, 2018, email attached as **Exhibit 2**. The parties were unable to
17 reach a stipulation without a definite hearing date and Defendants would not provide any
18 assurance that it would not begin shipments beyond this thirty day window following
19 December 21, 2018. See the Affidavit of Marta Adams attached as Exhibit 1. Ms. Adams
20 informed Mr. Negri that Plaintiff could not agree to the time extension without
21 confirmation from the Court that a hearing on this matter would occur prior to the end of
22 Defendants' thirty day no-shipment assurance. On December 20, 2018, Defendants filed
23 their Motion for Enlargement of Time for the United States' Response to Plaintiff's
24 Motion for Preliminary Injunction (ECF No. 18). On that same day, the Court issued a
25 Minute Order granting the Defendants' Motion for Enlargement of Time despite the
26 Plaintiff's objection. See December 20, 2018, Minute Order in Chambers (ECF No. 19).
27 The Court did provide, however, that a hearing on Plaintiff's Motion for Preliminary
28 Injunction would be held on January 17, 2019. This date was mutually agreeable to the

1 parties because it ensured a hearing prior to the expiration of Defendants' thirty day
2 shipping assurance contained in Mr. Negri's December 17, 2018 email.

3 Despite the Court's Minute Order setting a hearing date for January 17, 2019, the
4 Defendants now submit the present Motion for a Stay. Defendants contend that this
5 matter must be stayed due to the recent lapse of funds to the Department of Justice.
6 Plaintiff informed Defendants that it would not oppose the Motion for Stay if the
7 Defendants could agree not to commence plutonium shipments until after the Motion for
8 Preliminary Injunction is heard by the Court. *See* the Affidavit of Marta Adams attached
9 as Exhibit 1. Defendants refused to provide any such assurance.

10 II. LEGAL ANALYSIS

11 In their Motion for a Stay, Defendants rely on 31 U.S.C. § 1342 to support their
12 request. That statute provides that "an officer or employee of the United States
13 Government or of the District of Columbia government may not accept voluntary services
14 for either government or employ personal services exceeding that authorized by law
15 except for emergencies involving the safety of human life or the protection of property."
16 31 U.S.C. § 1342. Defendants reliance on 31 U.S.C. § 1342 is misplaced given the sense of
17 urgency and need for prompt resolution of Plaintiff's Motion for Preliminary Injunction
18 and because 31 U.S.C. § 1342 does not apply to emergency matters, such as exists in the
19 present case, which involve the safety of human life or the protection of property.

20 A stay of litigation based on a lapse of appropriations to the United States
21 Department of Justice is not appropriate in cases of significance to both parties in which
22 the prompt resolution of a matter, including a pending request for injunction relief, is
23 necessary. *United States v. US Airways Grp., Inc.*, 979 F. Supp. 2d 33 (D.D.C. 2013). For
24 example, in *US Airways Grp.*, the United States requested a stay due to the lapse of
25 appropriations to the Department of Justice. *Id.* at 34. The United States argued that
26 "Department of Justice attorneys and employees are generally prohibited from working,
27 except in limited circumstances, including 'emergencies involving the safety of human life
28 or the protection of property.'" *Id.* Despite the lack of appropriations to the Department of

1 Justice, the court found that a stay would be inappropriate for a number of reasons. *Id.*
2 First, the United States own affirmative actions had already led to delay in the case. *Id.*
3 Second, a number of persons and entities had “a vested interest in the adjudication of this
4 case without delay.” *Id.* at 35. Ultimately the court held that a stay would “delay the
5 necessary speedy disposition of this matter.” *Id.* For that reason, the court held that “it
6 is essential that the Department of Justice attorneys continue to litigate this case.” *Id.*
7 *See also Priests For Life v. U.S. Dep't of Health & Human Servs.*, 2013 WL 5572730, at *1
8 (D.D.C. Oct. 2, 2013) (Department of Justice requested a stay after lapse of
9 appropriations, but the court declined because “in light of the irreparable harm alleged,
10 the impending time sensitive mandate, and *defendants' refusal to delay* enforcement
11 of the mandate as to the plaintiffs in this case, the Court finds that an
12 indefinite stay would be incompatible with the fair administration of justice”) (emphasis
13 added); *see also Native Songbird Care & Conservation v. Foxx*, 2013 WL 5609320, at *3
14 (N.D. Cal. Oct. 11, 2013) (“Given the fact that time is of the essence in this case, and the
15 fact that an indefinite stay could potentially prejudice Plaintiffs, the Court will
16 not stay this case because of the lapse of appropriations”); *see also F.T.C. v. Johnson*, 2013
17 WL 6577026, at *1 (D. Nev. Oct. 3, 2013) (in denying a motion for a stay resulting from a
18 lapse in appropriations, the court noted that “moreover, the [federal agency] cannot
19 demonstrate that denial of a stay would be prejudicial . . . and denial of its stay request
20 will not present any adverse effect since the [federal agency] is legally obligated to
21 continue to prosecute this action”). If a court orders the Department of Justice to
22 continue working on a civil case, despite a lapse in appropriations, the Department of
23 Justice will permit the attorneys to do so.¹

24 Here, similar to *US Airways Grp.*, a stay would greatly harm the Plaintiff's vested
25 interest in adjudication of this case without delay. Plaintiff's Complaint alleges the
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27 ¹ See UNITED STATES DEPARTMENT OF JUSTICE, U.S. DEPARTMENT OF JUSTICE FY 2019 CONTINGENCY
28 PLAN at 3 (2018) (available at <https://www.justice.gov/jmd/page/file/1015676/download>) (“If a court denies such a request [for a stay] and orders a case to continue, the Government will comply with the court's order, which would constitute express legal authorization for the activity to continue”).

1 significant harm the State may suffer if Defendants proceed with their proposed actions.
2 A stay in this case would necessarily delay the proposed hearing date, meaning that the
3 Defendants could begin shipping plutonium prior to a hearing on the Plaintiff's Motion for
4 Preliminary Injunction. Further, Plaintiff communicated to Defendant that it would not
5 oppose this Motion if Defendants agreed to delay shipment of the plutonium until after a
6 hearing on the Plaintiff's Motion for Preliminary Injunction. *See* the Affidavit of Marta
7 Adams attached as Exhibit 1. Defendants refused to make such a commitment. *Id.*
8 Additionally, the Defendants affirmative actions have already led to the delay of this case.
9 The Defendants' Motion for Enlargement of Time, which this Court granted, has already
10 pushed out the Defendants' time to respond by two weeks. For these reasons, similar to
11 *US Airways Grp.*, Plaintiffs asks this Court to find that the Department of Justice must
12 continue to litigate this case.

13 Additionally, a stay is not appropriate in the present matter because 31 U.S.C.
14 § 1342 does not apply to "emergencies involving the safety of human life or the protection
15 of property." *See* 31 U.S.C. § 1342. The present case represents such an emergency. As
16 detailed in Plaintiff's Complaint and Motion for Preliminary Injunction, DOE's proposed
17 action could potentially result in a serious harm to the citizens of Nevada, as well as the
18 property of the State. *See* Complaint (ECF 1) at ¶ 16 ("the proposed action will result in
19 increased radiation doses to Nevada citizens and would, in some circumstances, lead to
20 contamination of the lands and the groundwater of Nevada with radioactive materials").
21 One example of this can be seen in DOE's refusal to ensure "that the shipments will be
22 made with the same safety and security protections that apply generally to other
23 shipments of weapons-grade plutonium." *Id.* at ¶ 15. Further, "DOE officials have refused
24 to assure Nevada that the shipments will be made in certified 'Type B' packages, which
25 are packages designed to withstand severe accidents in transit." *See* Plaintiff's Motion for
26 Preliminary Injunction (ECF 1-20) at 10:10-12. Given these facts, a pending "emergency
27 involving the safety of human life or the protection of property" exists so as to preclude
28 application of 31 U.S.C. § 1342.

CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 28th day of December, 2018, I served a true and correct copy of the foregoing PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR A STAY OF UNITED STATES RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION IN LIGHT OF LAPSE OF APPROPRIATIONS, by U.S. District Court CM/ECF electronic service to:

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United States Attorney, District of Nevada
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Assistant United States Attorney
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Jean E. Williams
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/s/ Sherrie A. Connell
Sherrie A. Connell

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