IN THE NINTH CIRCUIT COURT OF APPEALS

WINNEMUCCA INDIAN COLONY; SHARON WASSON; THOMAS WASSON; JUDY ROJO; ELVERINE CASTRO; PETER LITSER; STEPHEN ERICKSON; KIM TOWNSEND; VIRGINIA SANCHEZ; JACK MALOTTE; ARVILLA MASCARENAS; PATRICIA AXELROD;

Plaintiffs - Appellants,

v.

UNITES STATES OF AMERICA; ROBERT M. GATES, Secretary of the United States Department of Defense; LINTON BROOKS, Director of the National Nuclear Security Administration; JAMES TEGNELIA, Director of the Defense Thread Reduction Agency,

Defendants - Appellees,

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No. 09-15176
D.C. No. 2:06-cv-00497- LDG-PAL
District of Nevada, Las Vegas

APPELLANT'S REPLY BRIEF

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FEDERAL CASES

I.

The District Court's Orders

constituted a judicially sanctioned change

in the legal relationship of the parties

This case turns on whether or not the Court's actions constituted a "judicially sanctioned change in the legal relationship of the parties."[1] The Plaintiffs have argued that the Court's order to give the Court and the Plaintiffs thirty days notice prior to rescheduling the detonation of the Divine Strake and the Court's order to maintain the status quo until a hearing, granted the relief requested and made a material change in the legal relationship of the parties, certainly one that had not existed prior to this litigation and prior to the District Court's orders.

The Defendant, the Threat Reduction Agency, hid its improvident actions behind the rationale that the detonation of Divine Strake was necessary for the defense of this country and, thus, the Agency believed it owed no one an explanation of its decisions and had scheduled the detonation without consulting with the public at all. The delay that was judicially sanctioned by requiring the Agency to give the Plaintiffs and the District Court thirty days notice of any further

[1] ***Buckhannon and Care Home, Inc. V. West Virginia Dep't. Of Health and Human Resources,*** 532 U.S. 598 (2001)

scheduling of a detonation and the Court's order imposing the status quo granted the Plaintiffs exactly what was necessary, time to respond to the environmental documentation in a meaningful and effective way

On April 11, 2004, the Court made the following order: "4/11/2007 MINUTES OF PROCEEDINGS - Status Conference held on 4/11/2007 before Judge Lloyd D. George. Crtrm Administrator: Judy Harris; Pla Counsel: Robert R. Hager; Randall Edwards; Terry Lodge; Def Counsel: Caroline Blanco; Sharon Hejazi; Paul Detwiller; Court Reporter/FTR #: Aaron Blazevich, ECRO; Time of Hearing: 10:37 a.m.. The Court heard the representations of counsel and for the reasons stated in open Court IT IS ORDERED the Status/Motion Hearing currently scheduled for April 30, 2007 has been VACATED and a new hearing has been scheduled for JUNE 27, 2007 at 8:30 a.m. in LV courtroom 6B before Judge Lloyd D. George. The Court has reserved the entire day for this hearing which shall conatain the motion to dismiss and the motions for attorneys fees. The parties have to and including until 4:00 p.m. on April 24, 2007 in which to file opening briefs. Due 15 days thereafter are responses and 11 days thereafter any replies shall be due. IT IS ORDERED that until the next hearing on Wednesday, June 27, 2007 ***STATUS QUO WILL PREVAIL PER THE COURTS ORDERS***. Motion Hearing set for 6/27/2007 08:30 AM in LV Courtroom 6B before Judge Lloyd D. George,

the parties are to be completely prepared to go forward. IT IS FURTHER ORDERED that courtesy copies of all filings with this Court shall be served upon the chambers of Judge Lloyd D. George. (no image attached) (JJH) (Entered: 04/11/2007)" (Docket 57) (Emphasis added)

Imposition of a status quo by the Court changed the legal relationship of the parties by judicial sanction. The Plaintiffs requested an injunction until a hearing could be held on the blatant disregard of NEPA by the Threat Reduction Agency and that injunction was imposed by ordering the government to maintain the status quo prior to the date of hearing.

The government fully intended to detonate Divine Strake. The Plaintiffs filed this litigation to stop the detonation. The Court ordered the status quo, or, in other words, no detonation. Without the Court's intervention, the Divine Strake would have occurred on June 2, 2006, and repeatedly was rescheduled to occur but the Court imposed thirty days notice and maintenance of the status quo.

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II.

The Ninth Circuit has carefully explained the circumstance under which attorneys' fees may be awarded.

In its most recent opinion regarding the award of attorneys' fees under EAJA, this Court emphasized that the plaintiffs must "receive some form of judicially-sanctioned relief. . ." [2] It was not enough in the ***Citizens*** case that the plaintiffs appealed to the this Court and won a reversal on the issue of standing. Standing was not a request for relief.

In this case an injunction was requested and the Court ordered the status quo be maintained. Clearly, the government was stopped in its attempt to detonate Divine Strake. Moreover, the issue in the ***Citizens*** case centered upon the Department of Agriculture adopting a rule without proper notice to the public and opportunity to comment regarding the environmental impact of the rule. Although this litigation dealt with the public notice and opportunity to review environmental documentation, the similarities end there. This was no rule-making exercise, this

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was detonation of 700 tons of explosives into radioactive dirt that would send a

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[2] ***Citizens for Better Forestry v. U.S. Department of Agriculture,*** 567 F.3d 1128, 1132, 1133 (9th Cir. June 9, 2009)

cloud 10,000 feet over Las Vegas by the government's own admission.

The Court effectively stopped the blast by ordering the government to maintain the status quo. The Plaintiffs prevailed in getting that relief by filing this litigation and arguing to the Court that unless the status quo were maintained, the hearing on notice and environmental review would be moot because the detonation would have occurred and the damage done to the health and safety of the Plaintiffs and all others who received the deposition of the particulate set airborne by the detonation.

III.

Conclusion

The Plaintiffs were able to obtain relief when the Court ordered that the status quo be maintained by the government. This relief granted by Court order was a material alteration of the legal relationship of the parties. Prior to the Court's order, the Agency for Threat Reduction announced that it would detonate the Divine Strake bomb without notice and without opportunity to comment on the environmental documentation. After the relief granted to the Plaintiffs, the agency was required by the District Court's order to maintain the status quo until a hearing could be held on the matters of the litigation. This was the necessary judicial imprimatur to confer prevailing party status upon the Plaintiffs. This Court should

reverse the District Court and require that a determination be made by the District Court regarding whether the agency had substantial justification for its act to detonate the 700 ton Divine Strake at the Nevada Test Site without an environmental impact statement and whether the government's stance in the conduct of this litigation had substantial justification. If the Court finds that the government had no substantial justification for its blatant disregard of the environmental protection laws and, thus, withdrew its decision when faced with litigation, after attempting to re-schedule the Divine Strake detonation two more times, then the Plaintiffs should be awarded their attorneys' fees.

DATED this 5th day of August, 2009.

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IV.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(70(C) and the Ninth Circuit Rules 32-1, the attached Reply Brief is:

1. Proportionately spaced with a typeface of 14 points or more, in Georgia font, generated in the WordPerfect 12 word processing software, and contains approximately 1646 words and 240 lines.

DATED this 5th day of August, 2009.

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V.

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of the law offices of HAGER & HEARNE , 245 E. Liberty Street, Ste. 110, Reno, NV 89501, and that on this date, I served the foregoing document(s) described as follows: **APPELLANTS' REPLY BRIEF**, On the party(s) set forth below by:

__X__ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

___ Personal delivery.

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Addressed as follows:

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DATED: this 5th day of August 2009.

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