

1 JAMES P. BENNETT (CA SBN 65179)
 JBennett@mofo.com
 2 EUGENE ILLOVSKY (CA SBN 117892)
 EIllovsky@mofo.com
 3 STACEY M. SPRENKEL (CA SBN 241689)
 SSprenkel@mofo.com
 4 BEN PATTERSON (CA SBN 268696)
 BPatterson@mofo.com
 5 MORRISON & FOERSTER LLP
 425 Market Street
 6 San Francisco, California 94105-2482
 Telephone: 415.268.7000
 7 Facsimile: 415.268.7522

8
 Attorneys for Plaintiffs
 9 Vietnam Veterans of America; Swords to Plowshares: Veterans
 Rights Organization; Bruce Price; Franklin D. Rochelle; Larry
 10 Meirow; Eric P. Muth; David C. Dufrane; Kathryn McMillan-
 Forrest; Tim Michael Josephs; and William Blazinski
 11

12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 OAKLAND DIVISION
 15

16 VIETNAM VETERANS OF AMERICA, *et al.*,
 17 Plaintiffs,
 18 v.
 19 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 20 Defendants.

Case No. CV 09-0037-CW

**PLAINTIFFS' RESPONSE TO
 DEFENDANTS' RESPONSE TO
 THE COURT'S PROPOSED
 INJUNCTION AND JUDGMENT**

Complaint filed January 7, 2009

1 Pursuant to the Court’s October 11, 2013 Notice of Intended Amended Order, Injunction
2 and Judgment (Docket No. 541), Plaintiffs hereby respond to Defendants’ October 21, 2013
3 Response to the Court’s Proposed Injunction and Judgment (Docket No. 542).

4 **I. INTENDED AMENDED ORDER REGARDING APA MEDICAL CARE CLAIM**

5 In the Court’s Intended Amended Order (Docket No. 541-1 at 50), the Court has now
6 “found that AR 70-25 entitles Plaintiffs to medical care for any disabilities, injuries or illnesses
7 suffered as a result of participation in the experimentation program.”¹ Despite this unequivocal
8 finding that AR 70-25—promulgated by the Army—creates a duty to provide Plaintiff class
9 members with medical care, the Court states that it will not “enjoin the DOD or the Army to
10 provide health care, because the DVA is required to do so.” (*Id.*)

11 Plaintiffs respectfully submit that the Court’s finding of a medical care duty, coupled with
12 the Army’s admission that it has not provided such medical care (Docket No. 495 at 39 n.39),
13 require the Court to order the Army to provide such care. Section 706(1) of the Administrative
14 Procedure Act (“APA”) does not leave the matter to the Court’s discretion; it directs that “[t]he
15 reviewing court *shall* . . . compel agency action unlawfully withheld or unreasonably delayed.”
16 *Norton v. S. Utah Wilderness Alliance* (“SUWA”), 542 U.S. 55, 62 (2004) (citing 5 U.S.C.
17 § 706(1)) (emphasis added). This APA mandate sits in sharp contrast to the court’s discretionary
18 mandamus power. 28 U.S.C. § 1361. As the Ninth Circuit has stated, once a court determines
19 that agency action is being unlawfully withheld or unreasonably delayed, the APA *requires* the
20 court to compel agency action. *Brower v. Evans*, 257 F.3d 1058, 1068 n.10 (9th Cir. 2001)
21 (“‘Shall’ means shall.”) (citing *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187-88 (10th Cir.
22 1999) (the use of the word “shall” means courts “must compel agency action unlawfully
23 withheld”)). And it is the Army, after all, that has “withheld” the “agency action” necessary to
24

25
26 ¹ In light of the Court’s new finding concerning duty, the Court should also add a
27 corresponding declaration to the Intended Judgment (Docket No. 541-2) concerning medical care:
28 “The Court also declares that AR 70-25 entitles Plaintiffs to medical care for any disabilities,
injuries or illnesses suffered as a result of participation in the experimentation program.”

1 comply with its own regulation. Plaintiffs have no further burden to establish their entitlement to
2 relief.

3 The Court's intended decision nevertheless denies Plaintiffs injunctive relief, stating
4 simply, and without legal citation, that "[t]he Court will not enjoin one government agency to
5 provide health care when another agency has been congressionally mandated to do so." (Docket
6 No. 541-1 at 47 (referring to the DVA).) Of course, there has been no "congressional[]
7 mandate[]" to "another agency" (i.e., the DVA) to provide medical care to the class of human test
8 subjects. Nor is there any other reason in the record to refuse the injunction the APA mandates.

9 In light of the Court's ruling finding a duty, the Court's intended decision that it will not
10 enjoin the Army suggests that it views the DVA as acting on the Army's behalf to provide care
11 pursuant to AR 70-25. But there is no evidence in the record to support such a conclusion. In
12 fact, the evidence is to the contrary. The Army admitted during discovery that it has no
13 agreement with the DVA for that agency to provide such care on its behalf. (Docket No. 359-61
14 at RFA No. 7 ("neither DoD nor DoA [the Army] has any formalized, written agreements with
15 VA for VA to provide health care specifically to TEST SUBJECTS.")) Furthermore, even if the
16 DVA could somehow be considered the Army's agent in providing the medical care to which the
17 test subjects are entitled under AR 70-25 (which no Defendant has ever argued), the Court has not
18 evaluated evidence or made any determination that DVA is actually providing such medical care.
19 Absent an injunction requiring that the Army provide medical care pursuant to AR 70-25, this
20 regulatory duty would be rendered unenforceable and Plaintiffs will have no remedy for the
21 injury caused by the Army's unlawful failure to act.

22 The Court continues that "Plaintiffs have not provided any evidence of a material dispute
23 of fact that class members cannot access the DVA health care system or that they are denied
24 compensation for their service-connected injuries." (Docket No. 541-1 at 48.) But Plaintiffs had
25 no such burden at summary judgment. Plaintiffs' motion for partial summary judgment focused
26 exclusively on duty (Docket No. 490). And none of Defendants' arguments on the merits in their
27 summary judgment motion (Docket No. 495 at 28-39) shifted the burden to Plaintiffs to produce
28 evidence that they could not access DVA health care, were being denied compensation for

1 service-connected injuries, or that DVA was systematically failing to offer them care. Even if
2 those issues had been raised, they are irrelevant to the APA analysis.

3 Indeed, to prevail on Plaintiffs' APA medical care claim, Plaintiffs needed to show only
4 that the Army has "failed to take a discrete agency action that it is *required* to take." *Sea Hawk*
5 *Seafoods, Inc. v. Locke*, 568 F.3d 757, 766 (9th Cir. 2009) (quoting *SUWA*, 542 U.S. at 64)). The
6 Army's admission that it is not providing medical care pursuant to AR 70-25 proves that the
7 Army is unlawfully withholding medical care. (Docket No. 495 at 39 n.39 (citing No. 496-58);
8 No. 541-1 at 50 (finding duty under AR 70-25).) Thus, the Court "shall compel" the agency
9 action being "unlawfully withheld." *See* 5 U.S.C. § 706(1); *SUWA*, 542 U.S. at 62; *Brower v.*
10 *Evans*, 257 F.3d at 1068 n.10. Accordingly, Plaintiffs respectfully request that the Court enter an
11 injunction similar to its Intended Injunction regarding notice (Docket No. 541-3) that compels the
12 Army to provide class members with "medical care for any disabilities, injuries or illnesses
13 suffered as a result of participation in the experimentation program." (*See* Docket No. 541-1 at
14 50.) Otherwise, the Court has identified an injury, but provided no remedy.

15 In any event, the record does contain substantial evidence that DVA has systematically
16 denied testing program related claims and devised a differential adjudication scheme which
17 prejudices test subject's claims. (*See, e.g.*, Docket No. 502 at 24-35 (Plaintiffs' Reply in Supp. of
18 Sum. Judg. Mot.); No. 503-17 (J. Salvatore Tr.); No. 503-18 at 497:5 (D. Abbot Tr. ("I'm sure it
19 was [denied]")); No. 503-20 at 4 (As of January 2010, only "two of the 86 decisions . . . include a
20 grant of service connection"); No. 503-21 at 12 ("two of the 86 decisions"); No. 503-22 at 10
21 ("two of the 79 decisions"); No. 503-13 at 2 (Training Letter inaccurately instructs that there are
22 "no significant long-term health effects in Edgewood Arsenal test participants"); No. 503-14
23 (draft Training Letter); No. 386 (T. Josephs Decl.); No. 389-2 at 57:5-21 (W. Blazinski Tr.);
24 No. 376 (W. Blazinski Decl.); No. 389-5 at 77:25-78:19 (D. Dufrane Tr.)) The Court did not
25 address this evidence in reaching its conclusion that the existence of the DVA scheme relieves the
26 Army from providing medical care as required by AR 70-25. The Court merely relies on the
27 existence of the DVA system without any review of the DVA's performance (or lack of
28 performance) of the AR 70-25 duty.

1 Even if DVA could somehow fulfill the Army's medical care duty (which Plaintiffs
2 respectfully submit it cannot), there is at least a genuine issue of material fact concerning whether
3 the DVA is fulfilling the Army's duty. If the Court is going to base its decision on these grounds,
4 Plaintiffs are at least entitled to a trial-type evidentiary hearing regarding DVA's purported
5 performance of the Army's regulatory duty (or unlawfully withholding thereof).

6 **II. INTENDED INJUNCTION & DEFENDANTS' RESPONSE**

7 Defendants' Response to the Court's Proposed Injunction and Judgment (Docket No. 542)
8 is really a motion for reconsideration in disguise that recycles numerous arguments the Court has
9 already rejected. Defendants once again argue that "the 'duty to warn' language in the 1988,
10 1989 and 1990 versions of AR 70-25 is not properly the subject of a section 706(1) claim in the
11 first instance" (*id.* at 1), and reargue that the "duty to warn" under AR 70-25 cannot form "the
12 basis for a prospective injunction" (*id.* at 2). But the Court has already rejected these same
13 arguments when issuing its July 24, 2013 Summary Judgment Order (Docket No. 537 at 21-44).

14 The Court has carefully crafted a minimally intrusive injunction requiring the Army to
15 comply with its notice duty (Docket No. 541-3)—a duty which even now the Army refuses to
16 acknowledge. Defendants have offered no compelling reasons to justify the Court reversing its
17 decision in Plaintiffs' favor ordering the Army "to provide test subjects with newly acquired
18 information that may affect their well-being that it has learned since its original notification, now
19 and in the future as it becomes available." (Docket No. 537 at 44, 72.)

20 Defendants also mention in passing that "the Court should not retain continuing
21 jurisdiction 'to enforce the terms of this Injunction and Order,' as such enforcement would
22 necessarily involve oversight into the adequacy of the Army's efforts." (Docket No. 542 at 5.)
23 But this is standard and uncontroversial language for any injunction; of course the Court may
24 retain jurisdiction to ensure that its injunctive order is followed. *See, e.g., Sierra Club v. Penfold*,
25 857 F.2d 1307, 1321-22 (9th Cir. 1988) (court did not abuse discretion in retaining jurisdiction to
26 review environmental studies as part of injunctive relief under APA); *Colorado Envtl. Coal. v.*
27 *Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1225 (D. Colo. 2011), *amended on*
28 *reconsideration*, No. 08-cv-01624, 2012 WL 628547, at *6 (D. Colo. Feb. 27, 2012) (issuing

1 injunctive relief under the APA “subject to the Court’s continuing jurisdiction to enforce full
2 compliance” with the injunction). Otherwise, even flagrant violations of the Court’s order would
3 require filing a new separate lawsuit.

4 Defendants also ask the Court to enlarge the proposed time periods in the Intended
5 Injunction to 90 days and 120 days. (Docket No. 542 at 5.) Plaintiffs are flexible and defer to the
6 Court’s judgment concerning these deadlines. In light of the advanced ages of the Plaintiff class
7 members and the fact that this lawsuit has been pending since January 2009, however, time is of
8 the essence. Defendants have also been aware for three months that the Court was going to enter
9 an injunction concerning notice.² (*See* Docket No. 537 at 44, 72.)

10 **III. INTENDED JUDGMENT**

11 Along with adding a declaration that AR 70-25 entitles Plaintiffs to medical care, as
12 explained above, Plaintiffs also request that the Court add the following sentence to the final
13 judgment: “The issues of fees and other awardable expenses will be reserved until after appeal.”
14 Pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d)(1), “a court shall
15 award to a prevailing party other than the United States fees and other expenses, in addition to
16 any costs awarded pursuant to subsection (a), incurred by that party in any civil action,” subject to
17 exceptions. Plaintiffs request, and assume Defendants would not object, that these issues be
18 reserved until post-appeal. *See* Civil L.R. 54-5(a); 10 Moore’s Federal Practice § 54.151
19 (Matthew Bender 3d Ed.).

20 Dated: October 25, 2013

JAMES P. BENNETT
EUGENE ILLOVSKY
STACEY M. SPRENKEL
BEN PATTERSON
MORRISON & FOERSTER LLP

23 By: /s/ Eugene Illovsky
EUGENE ILLOVSKY

24 Attorneys for Plaintiffs

26 ² Plaintiffs believe there is a small typo on page 2 of the Court’s Intended Injunction.
27 Plaintiffs assume that the Court meant to write the word “acquired,” not “required.” (*See* Docket
28 No. 541-3 at 2:6.)