

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STATE OF NEVADA, CLARK
COUNTY, NEVADA, and CITY
OF LAS VEGAS, NEVADA,

Petitioners,

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT
OF ENERGY, and SPENCER
ABRAHAM, in his official capacity
as SECRETARY OF ENERGY,

Respondents.

Case No. 03-1009

PETITION FOR REVIEW

The State of Nevada, Clark County, Nevada, and the City of Las Vegas, Nevada (collectively, “Petitioners”) hereby petition the Court for review of Public Law 107-200, 116 Stat. 735 (2002), the Joint Resolution enacted by Congress and signed by the President designating Yucca Mountain, Nevada for development as the Nation’s nuclear waste repository (hereinafter referred to as the “Joint Resolution”), on the ground that the Joint Resolution violates the United States Constitution.

JURISDICTION AND VENUE

1. This Court’s jurisdiction over this action is premised upon section 119(a)(1) of the Nuclear Waste Policy Act of 1982, as amended (“NWPA”), 42 U.S.C. § 10139(a)(1).

2. Venue is proper in this Court under section 119(a)(2) of the NWPA, 42 U.S.C. § 10139(a)(2).

THE PARTIES

3. Petitioner State of Nevada (“Nevada”) is a sovereign State of the United States, within which Yucca Mountain is entirely located.

4. Petitioner Clark County is the most populous county in Nevada, located 41 miles from Yucca Mountain at its nearest boundary.

5. Petitioner City of Las Vegas is the largest city in Clark County and in Nevada, and is located 90 miles from Yucca Mountain.

6. Respondent United States of America, acting by and through Congress, the President, and Executive Branch agencies, is obligated under the Constitution to respect the sovereignty of Nevada.

7. Respondent United States Department of Energy (“DOE”) is an agency of the United States and is charged under the NWPA with numerous duties and responsibilities relating to the disposal of nuclear waste.

8. Respondent Spencer Abraham, in his official capacity as Secretary of Energy (the “Secretary”), is responsible for DOE’s implementation of its duties under the NWPA, and is also charged with his own duties and responsibilities under the NWPA.

STATUTORY BACKGROUND

9. In 1982, Congress enacted the NWPA to provide for a coordinated effort to address the national problem associated with the accumulation of high-level nuclear waste currently being stored at the Nation’s commercial nuclear reactors (none of which are located in Nevada) and at federal defense installations.

10. The goal of the NWPA is the assessment and potential development of an underground repository designed to geologically isolate high-level nuclear waste from the human environment. Reflecting this overarching statutory purpose, the NWPA explicitly defines a “repository” as a “system” for the “permanent deep geologic disposal” of nuclear waste. NWPA § 2(18), 42 U.S.C. § 10101(18). Moreover, Section 112(a) of the NWPA requires that DOE promulgate guidelines for the recommendation of “candidate sites” for repositories that “shall specify detailed geologic considerations that shall be *primary criteria* for the selection of sites.” 42 U.S.C. § 10132(a) (emphasis added).

11. The extensive legislative history of the NWPA, as well as the original and longstanding interpretations of these NWPA requirements by DOE and the Nuclear Regulatory Commission (“NRC”), which has responsibility to license the repository pursuant to the NWPA, repeatedly confirm that it was the considered judgment of Congress that the repository is to be “primarily” a deep *geologic* repository, with so-called “engineered” or man-made containers and barriers providing additional protection during earlier years of operation.

12. In enacting the NWPA, Congress found that “State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel.” 42 U.S.C. § 10131(a)(6). A central purpose of the NWPA is therefore to “define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel.” 42 U.S.C. § 10131(b)(3).

13. In the 1982 NWPA, Congress prescribed a complex process for rationally selecting proposed sites for development of repositories in light of the standards it set out in that statute. In 1987, the NWPA was amended to name the site at Yucca Mountain as the only candidate site to be intensively studied, or “characterized,” for the potential development of a proposed nuclear

waste repository, but the standards under which the site was to be characterized were not changed. 42 U.S.C. § 10133.

14. Three federal agencies share responsibility for the assessment and potential development of a proposed repository. That responsibility includes elaborating on the standards mandated by Congress, licensing, and building the proposed repository under the NWPA and related federal statutes. If duly authorized, DOE is to build and operate the repository. 42 U.S.C. § 10134. NRC has the responsibility under the NWPA to determine whether to license the repository in accordance with statutory and regulatory standards. 42 U.S.C. §10134(d). Under its licensing powers, NRC regulates the construction of the repository, licenses the receipt and possession of high-level radioactive waste at the repository, and authorizes the closure and decommissioning of the repository. *See* 42 U.S.C. § 10141(b). The third federal agency, the Environmental Protection Agency (“EPA”), is charged with the statutory responsibility to set the radiological standards governing the proposed facility at Yucca Mountain. *See* 42 U.S.C. § 10141(a).

15. The NWPA, as amended, provides that after conducting detailed site characterization studies at Yucca Mountain, the Secretary is to make a recommendation to the President concerning whether that site should be developed as a repository. 42 U.S.C. § 10134(a). Before DOE could recommend

the site, it is required to prepare an environmental impact statement, hold public hearings, and notify the affected state, *i.e.*, Nevada.

16. Once receiving a recommendation from the Secretary, the President is authorized under the NWPA to recommend the Yucca Mountain site to Congress. The NWPA provides that if the President recommends the Yucca Mountain site, it is to become the approved site for a repository after 60 days, unless Nevada before that time submits to Congress a notice of disapproval. 42 U.S.C. § 10135(b). If such a notice of disapproval is received, the site is disapproved unless, during the first 90 days after receipt of the notice, Congress passes a resolution of repository siting approval, vetoing the notice of disapproval. 42 U.S.C. § 10135(c). The NWPA authorizes both the House of Representatives and the Senate to vote upon such a resolution pursuant to severely expedited and abbreviated procedures that limit debate, truncate opportunities for normal legislative deliberation, and omit many of the usual procedural protections for minority interests. *See* 42 U.S.C. § 10135.

FACTUAL BACKGROUND

17. For a decade and a half after enactment of the NWPA, DOE and the Secretary attempted to carry out their responsibilities under the statute in a manner that was consistent with Congress' judgment, as reflected in

the NWPA's text and legislative history, that "geologic" isolation was necessary for the safe, secure permanent disposal of nuclear waste. Thus, DOE's original site suitability/selection guidelines (10 C.F.R. Part 960), promulgated in 1984, made clear that geologic considerations were to play the primary role in determining whether a proposed repository site would qualify for development as a repository, and that so-called "engineered" barriers would not be used to compensate for an inadequate site or to mask geologic deficiencies in a site.

18. By the mid-1990s, however, the data from DOE's site characterization work at Yucca Mountain demonstrated that the Yucca Mountain geologic setting was incapable of serving as the primary isolation barrier for the planned repository, principally because groundwater flow was so fast that, absent perfect performance by the man-made waste packages, radiological emissions standards could never be met. The Yucca Mountain site, in short, did not qualify for development as a repository under DOE's statutorily-mandated site suitability rules.

19. Far from declaring the Yucca Mountain site unsuitable under NWPA section 113(c), 42 U.S.C. § 10133(c), however, DOE instead abandoned its site suitability rules to the extent they applied to Yucca Mountain, and substituted new site selection "guidelines" applicable *only* to Yucca

Mountain, which became effective in December 2001. DOE's new guidelines, 10 C.F.R. Part 963, ignore the judgment of Congress, embodied in the NWPA, that geologic isolation is to serve as the primary form of containment for radioactive wastes buried at Yucca Mountain, and so include no requirement that Yucca Mountain's natural barriers independently provide primary waste isolation capability. Rather, under the new guidelines, no specific demonstration of the primary role of Yucca's natural setting in isolating waste is to be made, in favor of a gross examination of how the "total system" of the repository will work. In practical terms, the new guidelines authorize the selection of Yucca Mountain even though man-made barriers, rather than the site's geology, would need to serve as the primary waste isolation barrier at that site.

20. At the same time it adopted the new guidelines, which are applicable only to the repository in Nevada, DOE also chose to maintain its earlier site suitability/selection guidelines, which did adhere to the NWPA's commitment to primary geologic isolation. However, DOE revised those guidelines to ensure that they applied to every potential repository site *other* than the chosen site in Nevada.

21. On February 14, 2002, the Secretary, applying DOE's new site suitability guidelines exclusively for Yucca Mountain, recommended the Yucca Mountain site to the President.

22. On the very next day, February 15, 2002, the President, acting pursuant to section 114(a)(2) of the NWPAA, 42 U.S.C. § 10134(a)(2), submitted a recommendation of the Yucca Mountain site to Congress.

23. Acting pursuant to section 116(b)(2) of the NWPAA, 42 U.S.C. § 10136(b)(2)(A), the Governor of Nevada on April 8, 2002 submitted to Congress a notice of disapproval of the President's February 15 site recommendation.

24. Pursuant to the expedited and truncated procedures established under section 115 of the NWPAA, 42 U.S.C. § 10135, Congress enacted the Joint Resolution vetoing Nevada's notice of disapproval. The Joint Resolution, in its entirety, provides as follows:

Approving the site at Yucca Mountain, Nevada, for the development of a repository for the disposal of high-level radioactive waste and spent nuclear fuel, pursuant to the Nuclear Waste Policy Act of 1982.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That there hereby is approved the site at Yucca Mountain, Nevada, for a repository, with respect to which a notice of disapproval was submitted by the Governor of the State of Nevada on April 8, 2002.

The President signed the Joint Resolution on July 23, 2002.

25. By virtue of DOE's and the President's site selection decisions, in combination with the Joint Resolution, the national government has acted in complete disregard of the fair and neutral site evaluation standards that had been established by Congress when, based upon Congress' reasoned and considered analysis of the nuclear waste issue and the appropriate manner to address that issue, it enacted the NWPA. Moreover, in disregarding such fair and neutral principles only in connection with the decision to select Yucca Mountain for development as a repository, but respecting such principles, as reflected in DOE's general site suitability/selection guidelines, for potential repository sites in *other* States, the national government has arbitrarily operated according to two sets of rules: one for Nevada and another for every other State.

26. Under the federal system of government established by the Constitution, the national government lacks the power to require a sovereign State to singularly bear the burden, and thereby relieve all other States from bearing any burden, of resolving a perceived serious problem of national scope, unless either (1) the sovereign State consents to the imposition of such a unique burden; or (2) Congress imposes such a burden on a particular State for compelling reasons justified by neutral, objective criteria. In at-

tempting to impose upon Nevada the burden of disposing of the Nation's nuclear waste, the national government has satisfied neither of these conditions.

27. By failing to honor the requirement that the Yucca Mountain site should have the neutral, rational, and objective characteristic of a geologic setting capable of being a repository's primary waste isolation barrier, the national government can point to no congressional determination, based on any compelling reasons justified by neutral, objective criteria, by which the Yucca Mountain site can be distinguished from potential sites in many other, or perhaps all other, States. Moreover, the Joint Resolution does not constitute such a Congressional determination, since in that Joint Resolution Congress simply vetoed Nevada's notice of disapproval of the President's recommendation of the Yucca Mountain site in truncated and expedited proceedings far removed from normal Congressional deliberation. Equally important, the Joint Resolution did not enact any fair and neutral site evaluation standards to replace the standard of primary geologic isolation adopted in the NWPA.

28. In arbitrarily and discriminatorily singling out Nevada to bear the burden of disposing of the Nation's nuclear waste, in a way that left Nevada politically isolated and powerless, Congress through the Joint Resolu-

tion took an act in derogation of the sovereignty of Nevada that exceeds the authority granted to the national government by the Constitution. The Joint Resolution therefore is inconsistent with, and runs afoul of, the structure and design of the federal system of government established by the Constitution.

WHEREFORE, the State of Nevada, Clark County, Nevada, and the City of Las Vegas, Nevada respectfully request that the Court, *inter alia*:

- (1) Grant this Petition for Review;
- (2) Declare that the Joint Resolution is unconstitutional;
- (3) Direct Respondents to cease and desist from taking any actions relating to implementation of the Joint Resolution, including but not limited to all activities relating to the development or licensing of a nuclear waste repository at Yucca Mountain; and
- (4) Provide for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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