

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3  
4  
5 IN RE: AIKEN COUNTY, ET AL.,

No. 11-1271

6 Petitioners,  
7  
8

9 Wednesday, May 2, 2012

10 Washington, D.C.

11 The above-entitled matter came on for oral  
12 argument pursuant to notice.

13 BEFORE:

14 CIRCUIT JUDGES GARLAND AND KAVANAUGH AND  
15 SENIOR CIRCUIT JUDGE RANDOLPH

16 APPEARANCES:

17 ON BEHALF OF THE PETITIONERS:

18 ANDREW A. FITZ, ESQ.

19 ON BEHALF OF THE RESPONDENT:

20 CHARLES E. MULLINS, ESQ.

21 ON BEHALF OF THE INTERVENOR:

22 MARTIN G. MALSCH, ESQ.  
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P R O C E E D I N G S

THE CLERK: Case number 11-1271, In re: Aiken County, et al., Petitioners. For the Petitioners, Mr. Fitz; for the Respondent, Mr. Mullins; and for the Intervenor, Mr. Malsch.

JUDGE GARLAND: Mr. Fitz.

ORAL ARGUMENT OF ANDREW A. FITZ, ESQ.

ON BEHALF OF THE PETITIONERS

MR. FITZ: Thank you, and good morning, Your Honors. May it please the Court, I'm Andrew Fitz from the Washington State Attorney General's Office on behalf of all Petitioners today.

Your Honors, we will never have a nuclear waste repository, at Yucca Mountain, or elsewhere if the process Congress mandates in law is not followed by the Executive. But that's what's happened here. The Nuclear Regulatory Commission taking it's lead from the Administration has abandoned all work on the Yucca Mountain license application, and dismissed its three-year deadline for issuing a decision on it. The NRC concedes that it has duties under the NHPA to consider the Yucca Mountain application and issue a final decision within three years. Mandamus should issue in this case because number one, the NRC has unreasonably delayed complying with these duties; and number two, mandamus is proper under the circumstances of the case.

1           Your Honors, first there is no reasonable basis for the  
2 NRC's non-compliance with its duties. As a factual matter it  
3 was the Administration's policy shift, and nothing that  
4 Congress did that precipitated the NRC's shut down. When it  
5 began its shut down the NRC was funded at a \$29 million level.  
6 It was moving forward at this level, and it makes no  
7 representation that it could not move forward at that level.  
8 In the NRC's own words the shut down began, "in accordance  
9 with the Commission's decision on the FY 2011 budget." Well,  
10 those Commission decisions were premised on a budget request  
11 which began with the words the Administration has indicated  
12 that it does not support developing a repository at Yucca  
13 Mountain. Congress had nothing to do with it. To the  
14 contrary, Congress had given the NRC a mandate, Congress had  
15 given the NRC funding.

16           It was the NRC's decision to shut down, and under those  
17 circumstances it was unreasonable for the NRC to abandon its  
18 duties. The NRC shut down its process pointing to a budget  
19 presumption that the Department of Energy was going to  
20 withdraw from its proceeding, from the very proceeding from  
21 which the NRC's Board had already denied DOE's withdrawal.  
22 This incongruity cannot be squared, and this incongruity  
23 traces directly to the NRC Chairman. The Chairman knew the  
24 DOE's withdraw had been denied, it was law of the case at that  
25 point. He knew that he did not have the votes on the

1 Commission to overturn that denial of withdrawal, but the  
2 Chairman held off on allowing the Commission's vote to become  
3 final at the same time he himself initiated the shut down, and  
4 defended the shut down based on DOE's decision, which had been  
5 rejected, not to proceed. The Agency chose to abdicate its  
6 duty.

7           Your Honors, the NRC cannot now justify its shut down  
8 activities as reasonable defensive steps anticipating limited  
9 funding. First, we are not aware of a single case in which a  
10 court has held that an agency can ignore mandatory duties  
11 simply because it thinks it might not get enough money in the  
12 future. Under this Circuit's case law in the *City of Los*  
13 *Angeles v. Adams* case, and *Raven Navajo* the Agency's  
14 obligation is to move forward with its mandates as best it can  
15 with the available funds in the anticipation of future full  
16 funding.

17           JUDGE GARLAND: Well, both of those cases were  
18 grants cases, right?

19           MR. FITZ: That's correct.

20           JUDGE GARLAND: So, it was very easy to order a pro  
21 rata distribution of the grant money. In this -- right?

22           MR. FITZ: I would agree.

23           JUDGE GARLAND: So, this case is somewhat different.  
24 This case you're actually asking for procedures and then some  
25 kind of a decision from the Agency, right? So, you said that

1 the Agency has shut down this project, that they closed down  
2 the licensing support network, that they transferred or  
3 donated infrastructure, that's all from your brief, right?

4 MR. FITZ: Correct.

5 JUDGE GARLAND: So, what's the current status? I  
6 understand your argument about what they did in the past, but  
7 we still -- the purpose of mandamus is to decide what they  
8 should do in the future. So, what's the status of the  
9 infrastructure to make the kind of decisions and to go forward  
10 now at the Agency?

11 MR. FITZ: Your Honor, I don't have direct knowledge  
12 of the status of their infrastructure, and I believe that  
13 under the *United Mine Workers* case the burden to show that  
14 they don't have the infrastructure or building to move forward  
15 would be on the NRC.

16 JUDGE GARLAND: Well, in --

17 MR. FITZ: I would --

18 JUDGE GARLAND: -- *United Mine Workers* we  
19 specifically said that just because an agency has failed, even  
20 in a clear duty, the court still retains discretion to decide  
21 whether to issue mandamus, right?

22 MR. FITZ: I think that there is some reason to look  
23 at the *Forest Guardians* case that in this --

24 JUDGE GARLAND: Well, that's a different Circuit.

25 MR. FITZ: I acknowledge that, Your Honor. Thank

1 you.

2 JUDGE GARLAND: Right. And we have three cases in  
3 our Circuit which go exactly in the opposite direction, right?  
4 That's right, isn't it?

5 MR. FITZ: I would agree with that.

6 JUDGE GARLAND: Yes. So, I guess my question is  
7 what -- assume for the purpose of this discussion just for the  
8 moment they only have the \$10 million that you've described as  
9 any ear funds, or that they've described as any ear funds, we  
10 don't have any idea of what they can do with that, I take it,  
11 right?

12 MR. FITZ: They provided no indication to this  
13 Court, that's correct.

14 JUDGE GARLAND: Nobody has provided, neither side  
15 has provided any.

16 MR. FITZ: That's correct.

17 JUDGE GARLAND: Okay. But as far as you know, your  
18 description is they basically shut the whole thing down,  
19 right? They got rid of the people, they got rid of the  
20 infrastructure, they got rid of the computer network. When  
21 you say they got rid of the computer network what does that  
22 mean? Do they -- I mean, do you just have to turn it back on,  
23 or is it in boxes somewhere, what --

24 MR. FITZ: Your Honor, as I understood, first, I  
25 want to provide a direct answer to the original question you

1 asked.

2 JUDGE GARLAND: Please. Thank you. Yes.

3 MR. FITZ: At a minimum, right now, today, I think  
4 it's reasonable to expect that if we assume for the sake of  
5 argument they have \$10 million available, and not conceding  
6 that, they could move forward to complete the safety  
7 evaluation reports, which are the underpinning of the NRC's  
8 consideration of the application, and the parties in the  
9 adjudicative proceeding could move forward with discovery at  
10 their own expense and advance the ball that way, with very  
11 little funds for the NRC to expend.

12 JUDGE GARLAND: Well, DOE's a party to the  
13 adjudicative proceeding, right?

14 MR. FITZ: Correct.

15 JUDGE GARLAND: And they were zeroed out,  
16 specifically zeroed out, right?

17 MR. FITZ: But there was no evidence provided to  
18 this Court as to what carry-over funds, any year carry-over  
19 funds may be available to the Department of Energy. The only  
20 representation made was the Department of Energy doesn't have  
21 the funds to see the proceeding through to its completion, and  
22 I think that's an important distinction.

23 JUDGE GARLAND: But so, you don't know either  
24 whether they're --

25 MR. FITZ: That's correct.



1 JUDGE GARLAND: I see.

2 MR. FITZ: And, Your Honor, I would posit that  
3 that's a matter for another day if after mandamus is issued  
4 there's an inability to comply with the mandamus. I think  
5 that that's an appropriate consideration if there were  
6 contempt proceedings.

7 JUDGE GARLAND: Why isn't that -- well, I mean, but  
8 there's an old adage which we've said in several of our own  
9 cases that mandamus will not issue to do useless thing. And  
10 we need to know before we issue mandamus whether this will be  
11 useful or useless, not after.

12 MR. FITZ: Your Honor, I would submit to the Court  
13 that if the only thing the NRC could do with the funds  
14 available is to issue those safety evaluation reports with the  
15 Agency's conclusions as to whether the Department of Energy's  
16 application fits the regulatory criteria that the NRC's has  
17 promulgated, that would be a significant advancement in this  
18 proceeding. And it would materially advance our country's  
19 knowledge as to whether a repository can be licensed at Yucca  
20 Mountain.

21 Your Honor, I'm happy to address the LSN question if  
22 you'd like, or I can also move on.

23 JUDGE GARLAND: Well, do you know -- I mean --

24 MR. FITZ: Well, my understanding is this, that the  
25 Licensing Support Network was a central database for all

1 information related to the adjudication. Now, what the NRC  
2 and the Board specifically has provided is that each party was  
3 to retain the information that it had provided to the LSN,  
4 that information has been provided to the NRC. I don't know  
5 at this point how feasible it is to reconstruct the Licensing  
6 Support Network, but the NRC has all the information that was  
7 contained in the network. So, I believe that the information  
8 is still there for the parties to proceed with the  
9 adjudication.

10 JUDGE GARLAND: Okay. And what's the nature of your  
11 argument that they have more than \$10 million to spend?

12 MR. FITZ: Your Honor, we agree with the NRC that  
13 nuclear waste fund monies can only be spent on Yucca Mountain  
14 activities, but we maintain that the opposite, the inverse, is  
15 not true, that unless there's a specific appropriation that  
16 would, you know, direct the NRC to use funds for a specific  
17 purpose the general appropriated funds are available unless  
18 there has been a denial of funds or a restriction of funds  
19 placed by Congress.

20 JUDGE KAVANAUGH: But GAO usually says when there's  
21 a specific funding scheme for one purpose, you can't, and  
22 that's exhausted, you can't then dip into the general  
23 appropriations to supplement that. It's a long-standing GAO  
24 principle.

25 MR. FITZ: Your Honors, I think the best way for me

1 to leave it is this, that the NRC's duty is to comply with the  
2 law.

3 JUDGE KAVANAUGH: Right. That doesn't hurt you on  
4 the \$10 million. I'm just saying to get more than \$10 million  
5 I think you have to tangle with this GAO principle, which is  
6 admittedly this tradition, and not written in the statute.

7 MR. FITZ: Not really in the statute.

8 JUDGE KAVANAUGH: Yes.

9 MR. FITZ: I agree. Your Honors, the NRC's actions  
10 were not --

11 JUDGE KAVANAUGH: Do you have any explanation about  
12 why the Department of Energy is not participating in this  
13 case?

14 MR. FITZ: Your Honor, we directed our petition  
15 specifically to the NRC. At this point based on --

16 JUDGE KAVANAUGH: I know. But the Department of  
17 Energy could have intervened, the Department of Justice could  
18 have filed an Amicus brief giving the views of the  
19 Administration on all this. But what we got instead was  
20 complete silence.

21 MR. FITZ: I don't have any basis to speculate as to  
22 why the Department of Energy may not have taken those actions.

23 Your Honors, the NRC's actions were not those of an  
24 Agency taking reasonable defensive steps to prepare for a  
25 potential shortfall. In the worst case, the NRC was not

1 looking at a situation where it would have no funds available  
2 going forward. In the worst case it could have eeked by  
3 under, as we spoke about the Doctrine in *City of Los Angeles*  
4 and *Raven Navajo*, and Judge Garland, while I recognize that  
5 those are disbursement cases, if you will, I think the legal  
6 principle that the Agency is obliged to follow its mandates as  
7 closely as it can is still appropriate to draw from those  
8 cases. That's what the NRC's own appropriation guidance tells  
9 the Agency to do, it's supposed to redirect available funds  
10 forestall and interruption in activity as long as possible,  
11 and only shut down when available funds have been exhausted.  
12 And if the NRC was worried about a situation in which it  
13 wouldn't have sufficient funds it could have triggered the  
14 extra year that it could have triggered under the statute, and  
15 it didn't. But the NRC acted here as if its program had been  
16 terminated, and remember, this is an orderly closure, not an  
17 orderly suspension.

18 JUDGE KAVANAUGH: But isn't the writing on the wall?

19 MR. FITZ: I would disagree with that, Your Honor.

20 JUDGE KAVANAUGH: I mean, the \$10 million will be  
21 exhausted, and looks realistically like that's it.

22 MR. FITZ: Well, I would not concede that that's  
23 realistically what it looks like. There has been a single  
24 instance where Congress has failed to appropriate funds to the  
25 NRC for Yucca Mountain activities, and that single instance

1 came after, three months after the orderly shut down was  
2 already completed, when the Agency was undertaking no  
3 activity, and when the Agency still had unspent funds left on  
4 the table, and this action was before the Courts.

5           JUDGE GARLAND: But that still goes to the question  
6 of what we should do in the future. I mean, you may well be  
7 right, or you may be wrong, but does it matter whether you're  
8 right or wrong as to whether the NRC misbehaved at that  
9 moment. The question still for us is what to do in the  
10 future, and if they went from zero for DOE, and 10 for NRC,  
11 and then in fiscal year 12 to zero for both, doesn't that  
12 suggest that maybe what we should do here is wait until  
13 there's some indication from the appropriators that they're  
14 willing to give enough money to make this a possible set of  
15 actions towards a decision? I mean, you could come back here,  
16 if you're right, that is, if you, if it turns out that this  
17 is, you know, just the bottom, and in fact next year it's  
18 going to be huge amounts of money, then, or an amount of money  
19 that suggests, you know, even conceivable that a decision  
20 could be reached in three years, you could come back then if  
21 they refused to spent the money, and ask for mandamus then. I  
22 understand your argument about what happened in the past, but,  
23 as I said before, we have to look at what we can do now.

24           MR. FITZ: So, Your Honor, when the two *Aiken* cases  
25 began we were in a situation where we had a functioning

1 proceeding. The proceeding is no longer functioning now as a  
2 result of the NRC's actions, and the Department of Energy's  
3 actions. Congress began the process with mandates to both  
4 agencies, and funding to both agencies. I think it's  
5 reasonable -- I don't think it's reasonable to expect Congress  
6 to fix this problem. Congress has already given the mandate,  
7 Congress has already given money in the past --

8 JUDGE KAVANAUGH: Suppose -- I'm sorry, keep going.

9 MR. FITZ: The last point, the Nuclear Waste Policy  
10 Act specifically provides for direct judicial review by this  
11 Court to review decisions not made, actions not taken by the  
12 NRC. It's a very unique provision.

13 JUDGE GARLAND: But still it's a jurisdictional  
14 provision, and we still have to have a cause of action, and  
15 that's the same cause of action we always deal with, it's  
16 either mandamus, or the APA, or some kind of meshing of the  
17 two, and so this is -- it is unique that they gave us, this  
18 Court, exclusive jurisdiction a certain way, but we have a lot  
19 of cases where there's mandamus, and I don't know whether I'm  
20 stealing the idea that Judge Kavanaugh was about to ask, but  
21 there are a lot of statutes that say that agencies have to act  
22 within a certain amount of time. As you saw in *Bar* there was,  
23 you know, there's quite a number of FDA statutes in that  
24 regard; the Health Reform Act that was passed has dozens of  
25 requirements that the Agency has to issue programs within X

1 amount of time, and some of that time is up. So, if Congress  
2 were to cut the funds would we -- I mean, say after the next  
3 election there's a new Congress and it appropriates less  
4 funds, but doesn't have enough votes to overturn the statute,  
5 either the FDA statute or the Affordable Care statute, or any  
6 of the other ones that have these kind of limits, we should be  
7 issuing mandamus in all of those under this theory because the  
8 Agency has a clear duty to act within a certain amount of time  
9 and hasn't done it. How do we draw a line that doesn't put us  
10 in the business of ordering the agencies to do things that  
11 Congress hasn't given them the money to do?

12 MR. FITZ: Well, again, I would, and I understand  
13 that you're looking at the situation now, and I keep wanting  
14 to go back.

15 JUDGE GARLAND: Right.

16 MR. FITZ: But the fact remains that when the Agency  
17 made its own bed it decided to shut down not based on anything  
18 Congress had done, but through its own actions. Now,  
19 Congress, I believe, is waiting for this Court to rule. This  
20 Court may look to Congress, but Congress has already done its  
21 part.

22 JUDGE KAVANAUGH: Well, that leads into my question,  
23 which is suppose we rule for you in this case and issue the  
24 mandamus, and then Congress zeroes out the funding, that would  
25 be an absolute defense in a contempt proceeding, correct?

1 MR. FITZ: I believe it would be a reasonable  
2 argument for them to maintain. I'd want to see --

3 JUDGE KAVANAUGH: Okay.

4 MR. FITZ: -- the circumstances at the time, but --

5 JUDGE KAVANAUGH: It's not an --

6 MR. FITZ: -- let me concede this --

7 JUDGE KAVANAUGH: Yes.

8 MR. FITZ: -- if they were given zero funding and  
9 had exhausted all carry over funds I think that then under the  
10 track analysis they would have a reasonable basis to forestall  
11 following this Court's mandamus until such time as they  
12 receive funds in the future.

13 JUDGE RANDOLPH: Who gets held in contempt in your  
14 scenario?

15 MR. FITZ: Well, in this case we've named as  
16 Respondents both the NRC Chairman and the Agency itself.

17 JUDGE RANDOLPH: So, what does it mean to hold the  
18 Agency in contempt? How does the Court enforce that? Put  
19 aside the individual.

20 MR. FITZ: Your Honor, I've actually been asking  
21 myself that question in a number of contexts. I think  
22 ultimately within our system of separated powers, at some  
23 point the Agency has to respect the authority of the Court.

24 JUDGE RANDOLPH: Yes, but how do you enforce it?  
25 Maybe you issue an injunction and hold the -- and the Agency



1 doesn't comply then what do you do?

2 MR. FITZ: Well, first, I think the Court would --

3 JUDGE RANDOLPH: You see, we run into this question  
4 over the years in a number of different ways. The EPA  
5 originally issued orders against states to have states conduct  
6 inspection and maintenance of vehicles with catalytic  
7 converters on it, and they suddenly realized that they had no  
8 means of enforcing, and so what happened, the case went up to  
9 the Supreme Court, by the way, and the Supreme Court for one  
10 reason or another didn't decide, but I know the case, because  
11 I argued it. But what happened is that EPA then backed off in  
12 terms, and everything began being tied to *Granson VIII*  
13 (phonetic sp.), and the federal highway funds, this, that, and  
14 the other thing, and what you do, you enforce it by cutting  
15 off the money, but that option's not available here. So,  
16 again, holding the NRC in contempt -- and let me ask you  
17 another thing, too, is there any indication that a majority of  
18 the NRC is responsible for anything that happened in the past?

19 MR. FITZ: I think in this circumstance from all the  
20 indications in the Inspector General report, which has not  
21 been countered in any way by the NRC in this case, it looks  
22 like a lot of the actions undertaken on behalf of the  
23 Commission were undertaken by the Chairman.

24 JUDGE RANDOLPH: By the Chairman. And so if the  
25 Agency itself, if a majority is not responsible, did not take

1 the actions that lead up to this mandamus, how is it that we  
2 have the authority under traditional mandamus law to hold the  
3 Agency in contempt?

4 MR. FITZ: Well --

5 JUDGE RANDOLPH: The Chairman is another matter  
6 entirely.

7 MR. FITZ: The bottom line in this case, and we're  
8 not asking for obviously contempt at this point, where we find  
9 ourselves, Your Honor, is in the --

10 JUDGE RANDOLPH: Well, to issue an injunction in  
11 mandamus for a clear violation of duty when the Agency is not  
12 responsible for that is really the action of the Chairman.

13 MR. FITZ: But the result for us as the people  
14 intended to be benefitted from this statute is that we have  
15 been deprived of a process that Congress put into place in a  
16 unique statute with the, no competing priority that's been  
17 identified before the Agency, or no action is being  
18 undertaken, whether it was the Chairman, or whether it was the  
19 Agency, the effect doesn't matter, the effect is the same for  
20 us in that we do not have a process to get to answer as to  
21 whether we can have a repository at Yucca Mountain when the  
22 statute directs the Agency to answer that very question. And  
23 if the Court does not enforce the statute in this instance,  
24 based on quite frankly a political decision to not move  
25 forward by the Executive, then we will never have a statutory

1 process to get to an answer with this particularly meddlesome  
2 issue.

3 JUDGE KAVANAUGH: But to pick up on Judge Randolph's  
4 question, and your mention of the separation of powers, it is  
5 difficult for a Court to force the Executive Branch to take  
6 affirmative acts, as opposed to prohibiting the Executive  
7 Branch from doing forbidden acts, and that's what you're  
8 asking in this case, and maybe you're right and just we should  
9 fact that in a contempt proceeding down the road that  
10 hopefully would never come to pass. But the overall system we  
11 have makes it difficult to force the Executive to do  
12 something.

13 MR. FITZ: I would agree with you, Your Honor. I  
14 hope we don't find ourselves in that situation down the road.  
15 But to go back, and this is addressing your comments about the  
16 *Bar* case, the Nuclear Waste Policy Act is a unique statute,  
17 and if you look in the legislative history which is included  
18 in our addendum, it specifically recognized that judicial  
19 review is an essential element of the statute to keep the  
20 process on track. Congress fully recognized that this is the  
21 ultimate not in my backyard issue. It devised a statute after  
22 already 30 years of inaction to try to get a process moving  
23 forward. Your Honors, a little over a year ago --

24 JUDGE RANDOLPH: Now, how much, can you tell me how  
25 much money is in that waste fund now?

1 MR. FITZ: I believe at this point, and I may be  
2 incorrect on this, I believe it's on the order of \$29  
3 billion -- no, is that correct?

4 UNIDENTIFIED SPEAKER: Yes.

5 MR. FITZ: Billion dollars.

6 JUDGE RANDOLPH: \$29 billion.

7 JUDGE GARLAND: That's great, we've got a lifeline  
8 back there.

9 JUDGE RANDOLPH: And the only thing that money can  
10 be used for is the --

11 MR. FITZ: Is this process.

12 JUDGE RANDOLPH: -- is this process. So, there's  
13 \$29 billion sitting out there, and is there any provision  
14 regarding what happens to that money if there is no waste, or  
15 depository process?

16 MR. FITZ: I'm not aware that there is. And I do  
17 know that there is other litigation presently before this  
18 Court addressing the issue of whether the Department of Energy  
19 can continue to collect to that fund.

20 JUDGE GARLAND: But isn't that telling us something  
21 that if there's \$29 billion that was collected for the purpose  
22 of this process, but Congress has given zero of it to DOE, and  
23 zero of it, again, to NRC, that Congress is telling us  
24 something here? It's not just that the administration that's  
25 responsible, Congress is telling us something. They could

1 have said take as much as you need to do what we told you to  
2 do, and instead they said take zero.

3 MR. FITZ: The most important thing at the end of  
4 the day is that Congress has never changed the underlying law,  
5 the mandates remain the same.

6 JUDGE GARLAND: I understand --

7 MR. FITZ: And those mandates are to benefit us, and  
8 that's why we're before this Court to enforce those mandates.

9 JUDGE GARLAND: No, I understand that. But Congress  
10 often acts, you know, if they have more than one power, they  
11 have authorization power, and they have appropriations power,  
12 and for people who have been in the Executive Branch they're  
13 well aware of the power of the purse, and the ability of  
14 Congress to say well, sorry, that office in the Justice  
15 Department is closing tomorrow, or you can't bring those  
16 cases, not because the law doesn't allow it, but because, you  
17 know, we're not allowing any amount of money to be spent on  
18 that subject. This isn't really new or surprising that  
19 Congress would act in this way, is it?

20 MR. FITZ: It may be that the flavor of Congress,  
21 and the interest of Congress in funding this project is going  
22 to wax and wane from year to year. But if the Court allows  
23 the Executive to make the unilateral decision that it's simply  
24 not going to move forward with the project, and we are not  
25 allowed recourse to be able to challenge the Executive, and

1 hold the Executive to the substantive law, then there is no,  
2 there is -- I don't know how to explain that to my children  
3 when they've just taken a --

4 JUDGE GARLAND: Well, there is a way, you go to  
5 Congress and you get them to appropriate \$29 billion, or at  
6 least \$50 million.

7 MR. FITZ: And that's fine as long as this Court has  
8 made clear that the mandate remains a mandate for the Federal  
9 Government to follow, that he can't simply ignore it.

10 JUDGE RANDOLPH: Well, the answer is --

11 MR. FITZ: That to the extent it is --

12 JUDGE RANDOLPH: -- that there's a way of changing  
13 the law, not to completely defy it in the manner that this  
14 record indicates happened. And the way to change it is to go  
15 get Congress to amend the statute so that they get rid of the  
16 three-year deadline and the requirement that you consider only  
17 Yucca, if that's the problem.

18 MR. FITZ: I would submit that if the Executive  
19 doesn't like those provisions of the law that's the  
20 Executive's duty to go get the law changed.

21 JUDGE RANDOLPH: Right.

22 MR. FITZ: I agree with you there. That's why we're  
23 here today.

24 JUDGE GARLAND: All right. Well, I know we've eaten  
25 up all of your rebuttal time, but this case looks pretty

1 important, so we'll let you have some time at the end.

2 MR. FITZ: Thank you.

3 JUDGE GARLAND: Now we're going to hear from Mr.  
4 Mullins from the NRC.

5 ORAL ARGUMENT OF CHARLES E. MULLINS, ESQ.

6 ON BEHALF OF THE RESPONDENT

7 MR. MULLINS: Good morning, Your Honor. May it  
8 please the Court, Charles Mullins for the Nuclear Regulatory  
9 Commission. I will speak for 15 minutes, and Mr. Malsch will  
10 speak for five.

11 This case is the most --

12 JUDGE GARLAND: Better get ready to talk for more  
13 than 15.

14 MR. MULLINS: Having seen my colleague up here I  
15 suspected that that might be the case.

16 JUDGE RANDOLPH: Do you have independent litigating  
17 authority? I'm just curious.

18 MR. MULLINS: We believe we do. Obviously, the  
19 Justice Department is aware of the case --

20 JUDGE RANDOLPH: Yes.

21 MR. MULLINS: -- has chosen not to intervene.

22 JUDGE GARLAND: Right.

23 JUDGE KAVANAUGH: Is that independent litigating  
24 authority in the Supreme Court, too? I don't think so, right?

25 MR. MULLINS: Your Honor, I have no idea. I

1 wouldn't go there --

2 JUDGE KAVANAUGH: Okay.

3 MR. MULLINS: -- myself. That's --

4 JUDGE KAVANAUGH: To the Court?

5 MR. MULLINS: Well, if we have a case that goes to  
6 the Court I'm assuming somebody at a higher pay grade would  
7 argue it, but that's --

8 JUDGE KAVANAUGH: Okay.

9 MR. MULLINS: -- that, obviously, I have not  
10 researched that. I have no idea.

11 JUDGE RANDOLPH: The reason I ask is that I looked  
12 at a number of cases in which the Nuclear Regulatory  
13 Commission has appeared in this Court and several others,  
14 including the Supreme Court, and the Department of Justice was  
15 in each one, was listed as representing the Agency, along with  
16 the Agency itself, I mean, the General Counsel. And I thought  
17 that was the customary mode, and then suddenly we get this,  
18 and you're alone.

19 MR. MULLINS: Most of the cases are under the Hobbs  
20 Act, and under the Hobbs Act the United States is a separate  
21 statutory party.

22 JUDGE RANDOLPH: Yes. Yes.

23 MR. MULLINS: And so we have independent litigating  
24 authority, but the Justice Department usually reviews the  
25 brief, concurs in the brief, and signs on. In this case, the



1 Justice Department didn't, you know, we communicated with the  
2 Justice Department, but the Justice Department indicated no  
3 interest in becoming involved in the case. We proceeded  
4 assuming on the assumption --

5 JUDGE GARLAND: Is that the same reason you don't  
6 want to appear before the Supreme Court?

7 MR. MULLINS: That -- I have no idea, Your Honor.  
8 You would have to ask the Justice Department that.

9 JUDGE RANDOLPH: Now, you're representing not only  
10 the Chairman, but according to --

11 MR. MULLINS: We represent the Agency at large, and  
12 the Chairman in his official capacity.

13 JUDGE RANDOLPH: Are there internal procedures in  
14 the Agency for determining what litigating positions -- I'm  
15 not asking any attorney/client question, I'm just saying --

16 MR. MULLINS: Fair enough.

17 JUDGE RANDOLPH: -- are there any internal  
18 procedures where the Agency itself that votes on litigating  
19 positions?

20 MR. MULLINS: Not that I'm aware of, Your Honor.

21 JUDGE RANDOLPH: Is that entirely up to the  
22 Chairman, then?

23 MR. MULLINS: No, this litigation has been handled  
24 by the Solicitor and myself, and the Office of General  
25 Counsel. We defend the Agency's position as best we can.

1                   JUDGE GARLAND: The same way with the, same way the  
2 NLRB proceeds, or --

3                   MR. MULLINS: That's correct. In other words, we  
4 stand for the Agency's interest, the Agency was sued in name.

5                   JUDGE RANDOLPH: Yes. I'm just looking for where I  
6 get the Agency's position apart from your brief. Where is  
7 there a vote, where is there a statement by the Agency as  
8 opposed to the Chairman? Where does that policy come from  
9 that you're now?

10                  MR. MULLINS: Well, first of all, you have the  
11 Commission decision on September 9th last year where the  
12 Commission A) announced it was split two to two on whether or  
13 not to reverse the Licensing Board's decision, and B) the  
14 Commission --

15                  JUDGE RANDOLPH: So, then under Agency rules it's  
16 affirmed, right?

17                  MR. MULLINS: Under the Agency rules it remains the  
18 law of the case. It wasn't the final decision. Had it been  
19 at the end of the proceeding, in other words, had the  
20 Licensing Board dismissed the contentions, authorized the  
21 staff to issue the license, and the Commission split two to  
22 two, then that decision would have been affirmed and the  
23 license would have issued.

24                  JUDGE RANDOLPH: Yes, but what that means is --

25                  MR. MULLINS: But this is an interlocutory decision

1 so it's not "affirmed," but it remains, it stands.

2 JUDGE RANDOLPH: So, that tells us that we don't  
3 have an Agency position, it's two to two?

4 MR. MULLINS: Well, it is officially, the Agency  
5 position is DOE cannot withdraw its application.

6 JUDGE RANDOLPH: Right.

7 MR. MULLINS: Second, the Commission unanimous --

8 JUDGE RANDOLPH: What's the consequence of that? If  
9 they can't withdraw the petition then doesn't it follow that  
10 the Board has to consider it? Isn't that the Agency's  
11 position?

12 MR. MULLINS: That's correct. And the Board was  
13 considering it, and holding proceedings during the pendency of  
14 the review by the Commission.

15 JUDGE KAVANAUGH: It's just shut it down.

16 MR. MULLINS: I'm sorry?

17 JUDGE KAVANAUGH: It's been shut down, right?

18 MR. MULLINS: It's been shut down now.

19 JUDGE KAVANAUGH: Right. Despite a legal mandate to  
20 consider.

21 MR. MULLINS: But from the -- I'm talking about --

22 JUDGE KAVANAUGH: And I'm trying to figure out how  
23 the Agency can justify ignoring the statutory mandate.

24 MR. MULLINS: Let me finish this question and can I  
25 come back?

1 JUDGE KAVANAUGH: Yes. I thought they were related.

2 JUDGE RANDOLPH: No, answer Judge Kavanaugh's.

3 MR. MULLINS: All right. The Commission, when the  
4 Department of Energy moved to withdraw the Licensing Board  
5 suspended other proceedings while it considered that motion.  
6 The Licensing Board in June of 2010 ruled that DOE could not  
7 withdraw. At that point, proceedings then re-commenced before  
8 the Licensing Board, and proceedings -- while the Commission  
9 took review of the matter to look at it proceedings still  
10 continued. The Licensing Board still issued decisions,  
11 discovery was available to the parties, and so the license --  
12 in other words, discovery was not shut down until May of 2011  
13 when the Licensing Board granted a protective order request  
14 from the Department of Energy.

15 JUDGE GARLAND: Wait. Wasn't there an order of the  
16 NRC September 9th --

17 MR. MULLINS: Of 2000 --

18 JUDGE GARLAND: -- of 2011 which wasn't -- and that  
19 was a decision of the Board, correct?

20 MR. MULLINS: No, September 9th --

21 JUDGE GARLAND: Of the Commission.

22 MR. MULLINS: -- was --

23 JUDGE GARLAND: Of the --

24 MR. MULLINS: -- a decision of the Commission --

25 JUDGE GARLAND: Of the Commission.

1 MR. MULLINS: Of the Commission --

2 JUDGE GARLAND: And it said we exercise our inherent  
3 supervisory authority to direct the Board by the close of the  
4 current year to complete all necessary and appropriate case  
5 management, including disposal of all matters currently  
6 pending.

7 MR. MULLINS: That's correct.

8 JUDGE GARLAND: Right.

9 MR. MULLINS: And that was a unanimous decision by  
10 all four Commissioners participating.

11 JUDGE GARLAND: So, that's the position of the  
12 Board, that's where --

13 MR. MULLINS: That is the --

14 JUDGE GARLAND: -- you get the position of the Board  
15 I take it?

16 MR. MULLINS: Commission.

17 JUDGE GARLAND: I mean, I'm sorry, that's where you  
18 get the position of the Commission.

19 MR. MULLINS: That's correct. In other words, the  
20 Commission unanimously said, and if you'll notice also in the  
21 opinion there it says based on budgetary considerations.

22 JUDGE GARLAND: Yes, I saw it.

23 JUDGE KAVANAUGH: But what's going on now is that  
24 there was a three-year deadline in order to make a decision on  
25 a license application, which has come and gone.

1 MR. MULLINS: That's correct.

2 JUDGE KAVANAUGH: And the Commission, at least  
3 you're representing, has no intent of reaching a resolution on  
4 that decision, thereby, I'll use a loaded term, disregarding  
5 the statutory mandate.

6 MR. MULLINS: Well, again, as the Commission  
7 unambiguously looked at the situation and said we don't have  
8 funds to continue. I believe Judge Garland --

9 JUDGE KAVANAUGH: But that's just false. You have  
10 the 10 million.

11 MR. MULLINS: We have 10 million --

12 JUDGE KAVANAUGH: Til that's gone you have, don't  
13 you have the 10 million?

14 MR. MULLINS: We do. Well, it's a little bit more,  
15 it's about 10.4 now.

16 JUDGE KAVANAUGH: Okay.

17 MR. MULLINS: We were closing out some accounts and  
18 we got a little bit --

19 JUDGE KAVANAUGH: Let me just make sure I have  
20 this --

21 MR. MULLINS: Correct.

22 JUDGE KAVANAUGH: -- established. Do you have the  
23 10.4 million to use --

24 MR. MULLINS: Yes.

25 JUDGE KAVANAUGH: -- on this project?

1 MR. MULLINS: We do.

2 JUDGE KAVANAUGH: Okay.

3 MR. MULLINS: Under --

4 JUDGE KAVANAUGH: So, until you use it up I don't  
5 understand how you can say we're not going to continue, we're  
6 just going to ignore the Congressional mandate. Usually when  
7 agencies ignore Congressional mandates it's either because  
8 they have come up with a creative legal interpretation, or  
9 because they say that there's something unconstitutional going  
10 on here, it's just we don't like it. We don't like it as a  
11 matter of policy. Well, that's not a good enough reason to  
12 ignore a statutory mandate as I understand it.

13 MR. MULLINS: I would agree. And the Commission is  
14 not saying that. The Commission is saying in effect --

15 JUDGE KAVANAUGH: Then why isn't it spending the  
16 money to continue compliance with what Congress has directed  
17 it to do?

18 MR. MULLINS: To use a phrase from the vernacular,  
19 the Commission did not feel that it would be appropriate to  
20 throw good money after bad. In other words, at this point  
21 there does not appear to be --

22 JUDGE KAVANAUGH: How do they know what's going to  
23 happen for fiscal year '13? How does anyone know?

24 MR. MULLINS: Well, the decision was made in 2011.

25 JUDGE KAVANAUGH: Right.

1 MR. MULLINS: And so, at that point the Commission  
2 went, had only the 10 million left, DOE had been zeroed out --

3 JUDGE KAVANAUGH: No, I know, but the whole --

4 MR. MULLINS: -- twice, two years in a row.

5 JUDGE KAVANAUGH: The whole theory of your position  
6 as I understand it is well, let's not waste another 10 million  
7 because we're not going to have any funding come October 1st,  
8 right?

9 MR. MULLINS: To some --

10 JUDGE KAVANAUGH: Is it?

11 MR. MULLINS: That's --

12 JUDGE KAVANAUGH: And how do you know that?

13 MR. MULLINS: I'm not quite sure I'd go quite that  
14 far. Essentially yes, Your Honor, it would --

15 JUDGE KAVANAUGH: Essentially yes, and how do you  
16 know that?

17 MR. MULLINS: Given the -- in other words, we have  
18 to go through --

19 JUDGE KAVANAUGH: Is it just political  
20 prognostication?

21 MR. MULLINS: Well, if you look at what -- in other  
22 words, we have to go through OMB to get a budget.

23 JUDGE KAVANAUGH: I understand.

24 MR. MULLINS: And so the Administration controls our  
25 budget --



1 JUDGE KAVANAUGH: Right.

2 MR. MULLINS: -- and so they --

3 JUDGE KAVANAUGH: No, they control the budget  
4 proposal.

5 MR. MULLINS: Well, they control the budget  
6 proposal.

7 JUDGE KAVANAUGH: Right. But they don't --

8 MR. MULLINS: And Congress has --

9 JUDGE KAVANAUGH: -- control the appropriation.

10 MR. MULLINS: -- so far has not appropriated money  
11 for the last several years for that. They --

12 JUDGE RANDOLPH: I don't understand what relevance  
13 there is to what the President requested in this budget. I  
14 mean, your brief is full of that, and then you compare with  
15 Congress appropriated, but the President's budget for the last  
16 several years hasn't gotten a single vote, so why do we care  
17 what the President's proposing?

18 MR. MULLINS: Because Congress in reaction to the  
19 proposed budget has severely limited and then zeroed out both  
20 DOE and ourselves, said we have \$10 million, DOE has very  
21 little money. The question was asked what does DOE have in  
22 carry-over, I'm informed that as of this month DOE has 17  
23 point --

24 JUDGE RANDOLPH: Yes, but I don't understand why it  
25 matters what the President proposed?

1 MR. MULLINS: Well, it mattered to -- because --

2 JUDGE RANDOLPH: What matters is --

3 MR. MULLINS: -- we --

4 JUDGE RANDOLPH: -- what Congress appropriated.

5 MR. MULLINS: And Congress appropriated what the  
6 President proposed.

7 JUDGE RANDOLPH: Not always, not in all these years.

8 MR. MULLINS: No, but in the last couple of years  
9 for Yucca Mountain it has.

10 JUDGE KAVANAUGH: But there's still money left over,  
11 and Congress is presumably aware of that --

12 MR. MULLINS: Correct.

13 JUDGE KAVANAUGH: -- right. And --

14 MR. MULLINS: Yes.

15 JUDGE KAVANAUGH: -- no one knows what's going to  
16 happen come October 1st, or presumably there will be a CR, you  
17 know, sometime after January, there will be a new  
18 appropriation, right?

19 MR. MULLINS: Well, I can't predict what Congress  
20 will do with the appropriations --

21 JUDGE KAVANAUGH: Well, your whole theory is based  
22 on predicting the --

23 MR. MULLINS: But our prediction --

24 JUDGE KAVANAUGH: Wait, wait, wait, wait, wait.

25 MR. MULLINS: But at this point --

1           JUDGE KAVANAUGH: Wait. Let me stop you here. Your  
2 whole theory is based on predicting, and I think you said it's  
3 based on predicting that Congress will do zero, and I just  
4 don't know how we could sit here and say yes, an Agency can  
5 ignore the law because it's unlikely that Congress will  
6 appropriate money in the future, even though the Agency has  
7 money now to continue complying with the law. I mean, what  
8 kind of theory is that?

9           MR. MULLINS: Your Honor, it's, I guess in another  
10 term it's reality. We are looking at what we have --

11           JUDGE KAVANAUGH: But it asks us to bless, I don't  
12 know any precedent for this, you tell me if you can cite a  
13 case, the idea that an Agency can ignore the law, again, not  
14 for constitutional reasons, and not based on any statutory  
15 interpretation, but just on this theory that the money will  
16 run out in the future.

17           MR. MULLINS: Well --

18           JUDGE KAVANAUGH: Are you aware of any case that  
19 says anything like that?

20           MR. MULLINS: The *City of Vernon* (phonetic sp.) is  
21 close to that.

22           JUDGE KAVANAUGH: What?

23           MR. MULLINS: The *City of Vernon*, which we cite in  
24 our brief is close, and that where the Corp of Engineers had  
25 started building a dam, it ran out of money, Congress did not

1 appropriate money for that --

2 JUDGE KAVANAUGH: How did it ran out of money?

3 MR. MULLINS: -- and --

4 JUDGE KAVANAUGH: That hasn't happened.

5 MR. MULLINS: -- in this case the Agency does not  
6 have money to continue the proceeding in a meaningful manner.

7 JUDGE KAVANAUGH: Well, lot's of big projects that  
8 agencies undertake, there's not enough money at the outset to  
9 get to the completion, but that we have annual appropriations  
10 under the constitution, and that's how --

11 MR. MULLINS: I understand that.

12 JUDGE KAVANAUGH: -- it works, and you expect, and  
13 they have five-year cycles and proposals, of course, as you're  
14 well aware --

15 MR. MULLINS: Yes, sir.

16 JUDGE KAVANAUGH: -- so agencies can plan on a more  
17 long term basis. But you don't have the money in hand. But  
18 that doesn't mean you can just disregard all your statutory  
19 mandates on the idea of well, we may not get it next year.

20 MR. MULLINS: No. But again, looking at the  
21 situation in this case, the Department of Energy had said it  
22 was not, it did not wish to pursue the matter, it did not have  
23 funds to proceed. Remember, in this case, this is an effect  
24 of trial between Nevada and DOE, DOE has the burden --

25 JUDGE KAVANAUGH: Right. And that would have been a

1 reason for the Commission to grant DOE's requests to withdraw  
2 a license application, but that didn't happen. And obviously,  
3 I expressed my view on that whole point last time around. But  
4 we are where we are with the system we have, and the system we  
5 have gives the NRC the final power here.

6 MR. MULLINS: But again, Your Honor, there are, you  
7 know, we could expend the \$10 million, that could be done, but  
8 at that point then we're right back where we are here again --

9 JUDGE KAVANAUGH: That assumes --

10 MR. MULLINS: -- suspending --

11 JUDGE KAVANAUGH: -- Congress will zero it out. You  
12 may be right, you may be wrong, and this may be an unfortunate  
13 system, but I just don't how can a court get behind a holding?  
14 We hold that the Agency can ignore the statute because it may  
15 not get funds in the future. I mean, that, the implications  
16 of that holding going back to some of Judge Garland's  
17 hypotheticals, are pretty extraordinary.

18 MR. MULLINS: Your Honor, again, the question, I  
19 guess, to some extent is what would that remedy? In other  
20 words, the Court can order us, for example, to complete the  
21 safety evaluation reports. My understanding is that can be  
22 done with the money in hand. The question is what would that  
23 redress? In other words, that leads in, of course, into the  
24 standing argument it would make --

25 JUDGE KAVANAUGH: Right. No, I understand, you're

1 focused on this case, and this case, this issue has many  
2 decades to go, probably. But I'm worried about the  
3 implications for other agencies, and the implication of the  
4 Court saying what you way us to say, and how that could be  
5 used to upset what other agencies, upset the balance of power,  
6 essentially.

7 MR. MULLINS: Again, Your Honor, there is -- the  
8 Commission can make some progress, but it would advance the  
9 ball maybe three, four, five yards down the field, to use our  
10 analogy --

11 JUDGE GARLAND: So, you're resting not on the clear  
12 duty, you're resting on the discretionary authority of the  
13 Court after there's a clear duty. We've said, I think my  
14 colloquy with opposing, with your opposing counsel suggests  
15 that even where there is a clear duty, even where the Agency  
16 has violated the clear duty, the Court has to make a  
17 discretionary decision as to whether to issue mandamus, and  
18 there the normal equitable considerations come into play,  
19 including the question of whether any value is served, or  
20 whether we're taking the \$10 million and lighting it on fire.  
21 And that's really the question before --

22 MR. MULLINS: That is --

23 JUDGE GARLAND: -- before us here. You say that you  
24 don't think that the budget is going to be provided, and you  
25 point for that purpose to the fact that it hasn't been

1 provided in the last two years.

2 MR. MULLINS: Well, again, I point to the  
3 Commission's decision in the September 9th decision, which was  
4 based on funds in hand, and the appropriations, or the budget  
5 submitted by the President, the intent, the advice that it  
6 would only get \$10 million and that was for close out. In  
7 other words, you could go back and look. The Commission asked  
8 for more money.

9 JUDGE GARLAND: But my colleagues have correctly  
10 pointed out that the President isn't the final arbiter of how  
11 much money you get. But it turned out you were right, that  
12 you got zero, is that right?

13 MR. MULLINS: Well, we got 10 for last, for fiscal  
14 year --

15 JUDGE GARLAND: No. But for fiscal year '12 --

16 MR. MULLINS: Fiscal year '12 --

17 JUDGE GARLAND: -- you got zero.

18 MR. MULLINS: -- we got zero.

19 JUDGE GARLAND: Right. And --

20 JUDGE KAVANAUGH: And for fiscal -- go ahead.

21 JUDGE GARLAND: -- my understanding is that the  
22 Senate's current appropriation committee again has not  
23 recommended any money at all.

24 MR. MULLINS: Both. The current appropriation, the  
25 committees held hearings last week, I believe, and there were

1 markups --

2 JUDGE KAVANAUGH: But that's not going to be filed,  
3 there's going to be a CR --

4 MR. MULLINS: I understand, I was answering --

5 JUDGE KAVANAUGH: Yes, I'm just responding on your  
6 committee point, that's --

7 MR. MULLINS: Right.

8 JUDGE KAVANAUGH: -- you know, we're a long way from  
9 the goal line on what the --

10 MR. MULLINS: I understand.

11 JUDGE KAVANAUGH: -- 2013 appropriations are going  
12 to look like, and what one committee says is unlikely to --  
13 there's going to be an intervening election almost certainly,  
14 so, before the final approps.

15 MR. MULLINS: But the current --

16 JUDGE GARLAND: So, maybe the question is who does  
17 have the burden here of showing the likelihood that this will  
18 be useful. That is you're asked how can we rely on the fact  
19 that you say there might not be money, I guess the question  
20 could be put exactly the same way to opposing counsel, which  
21 is why is it enough that there might be enough money, might  
22 not, might, might not, might, neither of those words sounds  
23 like mandamus words.

24 MR. MULLINS: Your Honor, I think your point earlier  
25 is the fair one, is there a meaningful reason to make us go



1 forward and spend the \$10 million.

2 JUDGE RANDOLPH: How about a court order.

3 MR. MULLINS: Obviously.

4 JUDGE RANDOLPH: Would that be a meaningful reason?

5 MR. MULLINS: That would be meaningful, Your Honor.

6 The Agency will follow --

7 JUDGE RANDOLPH: I mean, I'm not saying that  
8 facetiously because Counsel for the Petitioners here has said  
9 that Congress is waiting to see what this Court does. Do you  
10 agree with that? Because if we order mandamus then, and all  
11 we're doing is enforcing a mandate that Congress itself  
12 issued, then why should we suppose that Congress won't honor  
13 that, and take a few drops out of that \$29 billion waste fund  
14 that is accumulating?

15 MR. MULLINS: Your Honor, you're asking me to read  
16 Congress' mind, and I would not attempt to do that.

17 JUDGE RANDOLPH: Right. That's exactly what I'm  
18 asking, because that's your defense.

19 MR. MULLINS: Well, no. Our defense is that we took  
20 actions at the time, and the totality of the circumstances  
21 were reasonable. Given the limited funds that we had, and the  
22 limited appropriation we expected, we took the reasonable  
23 step, we were good servants of the public fisc. There was  
24 conserve the waste fund for a time when there might be a  
25 proceeding when Congress would fund the proceeding. But we

1 are limited to funds to use under the Nuclear Waste Fund.  
2 With all due respect to my colleague here, to use the general  
3 appropriations funds is simply not available. If you look at  
4 the Nuclear Waste Policy Act, when they established the  
5 Nuclear Waste Fund it said the purpose of that was so that the  
6 construction of Yucca Mountain and any repository would be  
7 born by those people who owned the waste, or who generated the  
8 spent fuel. So, having us use general appropriations funds  
9 would be contrary to the Nuclear Waste Policy Act. Moreover,  
10 as Judge Kavanaugh pointed out, it would be contrary to basic  
11 appropriations law.

12 JUDGE KAVANAUGH: Well, part of this is where our  
13 baseline is for how we look at this in the mandamus  
14 proceeding, it seems to be, because the baseline I've been  
15 positing in questioning you is the baseline that the Agency  
16 has to comply with the law, the mandate. I don't mean that  
17 sanctimoniously, I'm just --

18 MR. MULLINS: Right.

19 JUDGE KAVANAUGH: -- saying that's the baseline.  
20 And then the defense to that that I've been thinking about is,  
21 that you've posited is we don't have the money, and that's an  
22 absolute defense. But my problem with that is A) you do have  
23 \$10 million, and B) you're basing 2013 and beyond on a  
24 prognostication about Congress that you've said I think  
25 multiple times in response to Judge Randolph you don't know

1 what Congress is going to do, and so how can we, if the  
2 baseline is comply with the law unless you have no money how  
3 can we assume that you'll have no money in 2013?

4 MR. MULLINS: Again, Your Honor, we're looking at  
5 this as can we do something in a meaningful fashion.

6 JUDGE KAVANAUGH: Right. And on that your  
7 assumption, your statement we can't do something in a  
8 meaningful fashion.

9 MR. MULLINS: That's correct. That's --

10 JUDGE KAVANAUGH: Okay. If we knew --

11 MR. MULLINS: -- our position.

12 JUDGE KAVANAUGH: -- the \$10 million was going to  
13 run out and that was it forever that would be a tougher case,  
14 but your position is the \$10 million, but the reality is the  
15 \$10 million will be used, and there may and likely would be  
16 future appropriations, or at least may be future  
17 appropriations. And you can't guarantee that there won't be.

18 MR. MULLINS: I can't guarantee there won't be.

19 JUDGE KAVANAUGH: Right.

20 MR. MULLINS: But as I pointed out --

21 JUDGE KAVANAUGH: And until, since you can't  
22 guarantee there won't be isn't the safer course for a court to  
23 say comply with the law?

24 MR. MULLINS: Again, I would go back to Judge  
25 Garland's position, or the question, the comment that he made,

1 was it how meaningful would it be to advance the ball three  
2 yards down the field? We would argue that --

3 JUDGE KAVANAUGH: You're assuming -- yes. We're  
4 going around and around, but you're assuming it'll stop three  
5 yards down. If I knew three yards is it, okay, that's a  
6 different case. But I don't know that, I don't know what  
7 Congress is going to do. There's going to be a CR, and then  
8 there's going to be a big appropriations show down, and  
9 there's going to be an election before that, right? And then  
10 Yucca will probably be an issue for 2014 FY --

11 MR. MULLINS: Could be.

12 JUDGE KAVANAUGH: -- next summer, a year from now  
13 when they're debating over that, right?

14 MR. MULLINS: But in any --

15 JUDGE KAVANAUGH: In 2015.

16 MR. MULLINS: I understand.

17 JUDGE KAVANAUGH: And probably on for a long time.

18 MR. MULLINS: But even if we spend the money, as I  
19 made a comment a minute ago, it's not clear that that would  
20 redress the problem, or redress the Petitioners' entries,  
21 which gets into the standing argument that we have in our  
22 brief.

23 JUDGE GARLAND: Before, I think we take the standing  
24 on the -- unless my colleagues want to hear it we'll --

25 MR. MULLINS: Okay.

1 JUDGE GARLAND: -- take that on the briefs. But I'm  
2 interested in this other question, which I started asking  
3 opposing counsel, which is their brief said, and I think it  
4 seems quite obviously right, that you close the whole thing  
5 down, is that right?

6 MR. MULLINS: As we say in our brief, we point out  
7 what the actions that were taken. The staff reviews, the  
8 safety evaluation reports were converted, and, and -- but the  
9 Licensing Board --

10 JUDGE GARLAND: I got that. With respect to the  
11 bodies and the resources, you --

12 MR. MULLINS: Those people --

13 JUDGE GARLAND: -- got rid of the computers, and you  
14 gave them to some schools. You got rid of the buildings and  
15 you gave them to other places. You got rid of the people, is  
16 all that --

17 MR. MULLINS: We reassigned the people, we didn't  
18 fire them, but we reassigned them.

19 JUDGE GARLAND: But you reassigned them to tasks for  
20 which they have other funding for --

21 MR. MULLINS: Correct.

22 JUDGE GARLAND: -- another purpose, is that right?

23 MR. MULLINS: That's correct.

24 JUDGE GARLAND: And I take it that some amount of  
25 money was spent in order to preserve the records, and

1 everything else, so that it could be brought back up again if  
2 there was funding, is that right or wrong?

3 MR. MULLINS: There's a Commission decision, I  
4 believe in November of 2011, that discusses what happens with  
5 the documents, the license, the staff documents, and some of  
6 the DOE documents are on the Commission's ADAMS (phonetic sp.)  
7 system. A number of the -- the rest of the documents are not,  
8 I believe they are physically hard copies, both hard copy and  
9 disc at the NRC. They are not on an electronic system. You  
10 asked about the LSN system, I have seen an initial staff  
11 estimate which says to re-establish the LSN system would take  
12 an up front payment of \$5 million, and would cost  
13 approximately a million additional dollars for the first year,  
14 and it would take one to two years to re-establish.

15 JUDGE GARLAND: And you need that in order to do  
16 anything?

17 MR. MULLINS: Well, you need that to -- in other  
18 words, the Commission establishes the LSN system in order to  
19 try to meet the three or four year deadline. Remember, you're  
20 dealing with a case here where you've got several thousand --

21 JUDGE GARLAND: So, of the 10, just to be clear, of  
22 the \$10 million it's going to take \$5 million plus \$1 million,  
23 \$6 million just to get the system back up.

24 MR. MULLINS: That's correct.

25 JUDGE GARLAND: And I take it you have to hire some

1 people, or --

2 MR. MULLINS: That would be included in the extra \$1  
3 million, in other words --

4 JUDGE GARLAND: That's for operating that system.

5 MR. MULLINS: Yes.

6 JUDGE GARLAND: But what about --

7 MR. MULLINS: Correct.

8 JUDGE GARLAND: -- for the staff and the experts --

9 MR. MULLINS: Well, that would take --

10 JUDGE GARLAND: -- needed to --

11 MR. MULLINS: -- additional funding, we would have  
12 to re-assign people. In other words, assuming for a moment,  
13 just take the staff, the safety evaluation reports, that  
14 would, first of all they would have to be re-assigned from  
15 their current projects, which would take some time, but could  
16 be done. But then that would use up --

17 JUDGE GARLAND: And how much, how many people are  
18 necessary to do those projects, and how much do they cost?

19 MR. MULLINS: I had asked that question a couple of  
20 weeks ago. I was told that it could be done, but I haven't  
21 yet received a number of, on the FTE, or the budget. If the  
22 Court asks I can --

23 JUDGE GARLAND: Well, the --

24 MR. MULLINS: -- get that number and report to you.

25 JUDGE GARLAND: -- Petitioners said that, that the

1 proposal for FY 2011 was \$10 million for 32 full-time  
2 positions. It's at page 13 of the brief. I don't --

3 MR. MULLINS: Right.

4 JUDGE GARLAND: -- know whether this is --

5 MR. MULLINS: That was, I believe that's --

6 JUDGE GARLAND: -- transferable or not transferable,  
7 that's the only numbers that I can look at.

8 MR. MULLINS: I believe that that was what we -- let  
9 me ask, is that what we asked Congress, or asked the OMB? We  
10 don't know.

11 JUDGE GARLAND: That was to support work related  
12 orderly closure. That's 10 --

13 MR. MULLINS: Ten million --

14 JUDGE GARLAND: Yes.

15 MR. MULLINS: -- that sounds correct.

16 JUDGE GARLAND: And in the FY 2010 it asked for \$23  
17 million for 83 full-time positions.

18 MR. MULLINS: That's correct.

19 JUDGE GARLAND: Do we have any idea how many full-  
20 time positions it would take to do any of this work?

21 MR. MULLINS: No. I have asked that, and I have not  
22 yet received an answer. If --

23 JUDGE GARLAND: So, it's possible that just to staff  
24 up, just to re-constitute the computer system, just to re-  
25 hire, or at least start paying the bodies just to open up the,



1 to release buildings will cost more than the \$10 million?

2 MR. MULLINS: Yes. In other words, as I --

3 JUDGE GARLAND: And then if we, if you did that  
4 would you have to close it down again in order to protect all  
5 this stuff?

6 MR. MULLINS: Yes. I mean, we -- in other words we  
7 would --

8 JUDGE GARLAND: So, you wouldn't be able to spend  
9 the full amount necessary to get everything out of storage,  
10 you could only spend half of that because you'd have to spend  
11 the other half to put it back in.

12 MR. MULLINS: In other words we would, presuming  
13 that we order us to start back up we may not activate the LSN,  
14 we may simply treat the case as a large paper case.

15 JUDGE GARLAND: Well, you have to get the documents  
16 from somewhere, I take it.

17 MR. MULLINS: Well, yes. But the people, they were  
18 presumably, they still have copies of their own documents.

19 JUDGE GARLAND: Okay. Anything further? Okay.  
20 Thanks very much. We'll hear from I think Nevada, is that  
21 right?

22 MR. MULLINS: Thank you, Your Honor.

23 JUDGE GARLAND: Thank you. Mr. Malsch?

24 ORAL ARGUMENT OF MARTIN G. MALSCHE, ESQ.

25 ON BEHALF OF THE INTERVENOR

1                   MR. MALSCH: Yes, thank you, Your Honor. Good  
2 morning, Your Honors, and may it please the Court. My name is  
3 Martin Malsch, and I'm appearing at this proceeding on behalf  
4 of the Intervenor State of Nevada. In my time I would like to  
5 emphasize two important points, one, what exactly it is that  
6 the Commission did here, and why; and two, what possibly could  
7 be done with \$10 million.

8                   Let me address the first --

9                   JUDGE GARLAND: I've got some ideas.

10                  MR. MALSCH: The first point. There are four  
11 unanimous Commission and Licensing Board decisions that are  
12 the most important decisions here. All other decisions are  
13 either secondary or completely irrelevant. These are the May  
14 20, 2011 decision by the Licensing Board suspending all  
15 deposition discovery in the proceeding, later affirmed by the  
16 Commission on November 29, 2011. Then there is the Commission  
17 decision of September 9, effectively directing a suspension of  
18 the proceeding, and a Licensing Board decision dated September  
19 30, 2011 suspending the proceeding.

20                  The Licensing Board --

21                  JUDGE KAVANAUGH: And what was the authority for  
22 doing that?

23                  MR. MALSCH: There are --

24                  JUDGE KAVANAUGH: In the face of a statutory mandate  
25 to consider and reach a decision on a license application.

1                   MR. MALSCH: Well, the first decision that had any  
2 demonstrable effect on meeting the statutory deadline was the  
3 May 20 decision by the Licensing Board. On May 20 the  
4 Licensing Board was faced with the prospect that undue and  
5 unnecessary expenditures would need to be devoted to  
6 deposition discovery. Over 100 witnesses had been identified  
7 for deposition at the time. The Licensing Board in response  
8 to a motion for a protective order suspended deposition  
9 discovery noting that common sense may counsel the careful  
10 allocation of resources, and then noting a number of things  
11 that are important. First of all, suspending deposition  
12 discovery was in accord with the desires of, apparently  
13 desires of the vast majority of the parties. Only Nye County  
14 was opposed to suspending deposition. It cited budgetary --

15                   JUDGE KAVANAUGH: I guess I'm asking a bigger --

16                   MR. MALSCH: Yes.

17                   JUDGE KAVANAUGH: -- picture question -- sorry to  
18 interrupt -- which is given the statutory mandate to reach a  
19 decision, and given that DOE's motion to withdraw the license  
20 application had not been granted, what was the basis for  
21 shutting everything down when the statute required a  
22 continuing proceeding?

23                   MR. MALSCH: I would say there were two  
24 considerations here --

25                   JUDGE KAVANAUGH: And there was still money

1 available at that point to continue on.

2 MR. MALSCH: Correct. I would say if you look  
3 through these four decisions there are two considerations. I  
4 think as the NRC argued in its brief it's unreasonable to  
5 suppose that the three-year statutory deadline was still in  
6 effect. After all, Congress --

7 JUDGE KAVANAUGH: So, there had been a de facto  
8 suspension of the three-year --

9 MR. MALSCH: That's what I would say, because the  
10 history of the 2012 appropriations statute --

11 JUDGE KAVANAUGH: But they're not sitting here today  
12 saying just give us six more months, you know, they're saying  
13 this is over.

14 MR. MALSCH: Well, they're saying it's suspended.  
15 These four decisions --

16 JUDGE KAVANAUGH: Yes.

17 MR. MALSCH: -- never shut down the proceeding.

18 JUDGE KAVANAUGH: Right.

19 MR. MALSCH: The proceeding is still alive, it's  
20 suspended.

21 JUDGE KAVANAUGH: Okay.

22 MR. MALSCH: Now, the --

23 JUDGE KAVANAUGH: And you had a second one you were  
24 going to say.

25 MR. MALSCH: Well, there's two major factors propel

1 the Licensing Board. One, I think it's fair to say that the  
2 three-year deadline was suspended and no longer in effect. If  
3 we assume that's the case there remains in the statute a  
4 conceivable residual obligation to consider the application.  
5 But that obligation is conditions in Section 114(d) by  
6 compliance with the laws --

7 JUDGE KAVANAUGH: No, shall issue a final decision  
8 approving or disapproving within three years.

9 MR. MALSCH: Yes, but before then --

10 JUDGE KAVANAUGH: Shall. Shall.

11 MR. MALSCH: Shall.

12 JUDGE KAVANAUGH: Yes.

13 MR. MALSCH: But before then it says the Commission  
14 shall consider the application in accordance with the laws  
15 applicable to such applications except that it shall decide.  
16 If you take the except that out and regard it as suspended for  
17 the time being there remains the obligation to consider in  
18 accordance with the laws applicable to such applications.  
19 Those laws allow consideration of the factors which the  
20 Licensing Board considered, and they were most particularly  
21 they need to avoid imposing an undue and potentially  
22 unnecessary burden on the parties in virtue of the fact  
23 that --

24 JUDGE KAVANAUGH: Unnecessary because?

25 MR. MALSCH: Because depositions would be very

1 expensive. For example, at one time in the proceeding --

2 JUDGE KAVANAUGH: Right.

3 MR. MALSCH: -- when all the parties were proceeding  
4 diligently in an effort to meet the three-year deadline, as  
5 many as three depositions were scheduled to be conducted of  
6 experts per week. This was an immense and complicated  
7 proceeding. The upcoming burden to do deposition discovery  
8 was potentially large, and the Board, Licensing Board decided  
9 on May 20, 2011, later affirmed by the Commission, that to go  
10 forward at that time would pose an undue and potentially  
11 unnecessary burden on all the parties. And that's important  
12 here, because this isn't just about whether DOE should spend  
13 its remaining funds, or NRC, there are 12 other parties in  
14 this case, including the State of Nevada --

15 JUDGE GARLAND: Could you just -- if I could  
16 interrupt for just one second. You started by saying that all  
17 the parties other than Nye County agreed?

18 MR. MALSCH: The motion was filed by the Department  
19 of Energy, there were 14 parties --

20 JUDGE GARLAND: Well, does that include Washington  
21 State, who is arguing here, and Aiken County, and -- they all  
22 agreed to this?

23 MR. MALSCH: They did not -- the only party that  
24 answered --

25 JUDGE GARLAND: Because just keep in mind we're

1 going to be asking them the same questions.

2 MR. MALSCH: Yes. They were at the time, they were  
3 all parties. The individual Petitioners here were never  
4 parties in this case --

5 JUDGE GARLAND: Yes. Yes.

6 MR. MALSCH: -- they've always stayed away. The  
7 institutional Petitioners were then parties, and of the  
8 institutional Petitioners here only one responded to the  
9 motion to suspend discovery, and that was Nye County.

10 In terms of what could be done going forward, this is an  
11 immensely complicated proceeding as the NRC held early in its  
12 notice of hearing it is the most extensive NRC, most extensive  
13 proceeding in NRC history, and that's saying a lot. NRC has  
14 had over a quarter century of experience in very complicated,  
15 complex nuclear power plant licensing proceedings. The  
16 application alone is 8,600 pages, and that's just summary  
17 information. The actual meat and bones are in a million pages  
18 of supporting references. As I said, there are 14 parties,  
19 there are 288 issues outstanding. If the proceeding were to  
20 go forward all these issues would need to be resolved in an  
21 on-the-record adjudication with examination and cross-  
22 examination of witnesses in an oral hearing, initial decisions  
23 proposed findings and the like.

24 JUDGE KAVANAUGH: I guess I'm not understanding the  
25 thrust of what you're saying. You're saying it's very costly

1 and very burdensome, and I agree completely. But from what  
2 follows, very costly and very burdensome, therefore the Agency  
3 can disregard the statutory mandate? That doesn't follow  
4 right.

5 MR. MALSCH: No, it does not follow. But I think --

6 JUDGE KAVANAUGH: Okay.

7 MR. MALSCH: -- because it is very expensive and  
8 very burdensome I think what does follow, if the mandate to  
9 proceed to meet a three-year deadline that's temporarily  
10 suspended, what follows is an obligation, arguably an  
11 obligation, to consider the application in accordance with the  
12 usual laws, those usual laws allow consideration of avoiding  
13 undue burden and unnecessary expense, and trying to make a  
14 decision going forward, what makes sense here? If this Court  
15 order the proceeding to go forward --

16 JUDGE KAVANAUGH: But a lot of that depends on  
17 prognostication to go back about what kind of funding stream  
18 will be available in the future.

19 MR. MALSCH: Well, I wouldn't say it requires  
20 prognostications. I mean, if the Agency were required to go  
21 forward they would have to make a decision about allocation of  
22 current resources, and decide basically what makes sense. I  
23 think we've heard today that the first thing the Agency would  
24 probably do would be to re-constitute it's licensing support  
25 network. In fact, the regulations require that. That is a



1 network must be in place for the adjudicatory proceeding to  
2 proceed. If that takes \$6 million, that leaves about 10 for,  
3 that leaves about, I'm sorry, \$4 million. For \$4 million you  
4 could maybe hold a few case management conferences, conduct  
5 maybe a couple of the 103 expert depositions, and then shut  
6 down. I don't think that's meaningful progress. I don't  
7 think that's useful.

8 JUDGE GARLAND: Can you shut down for \$4 million if  
9 it costs you \$6 million to get it up?

10 MR. MALSCH: You would, if you have it would --

11 JUDGE GARLAND: I thought it costs almost \$10  
12 million to shut down in the first place.

13 MR. MALSCH: I'm sorry, you mean to shut the  
14 proceeding down in the first place? I assumed that meant  
15 close out contract expenses and the like. If the Agency has  
16 \$10 million, and it would take \$6 million to re-start, or a  
17 substantial part of that to re-start the licensing support  
18 network, that leaves a few million dollars for the  
19 adjudicatory proceeding itself. The safety evaluation report  
20 is really not important, that's just the position of one of  
21 the 14 parties in the case. If the proceeding were to be  
22 revived, and the licensing support network were to be revived,  
23 which would be necessary, then presumably the proceeding would  
24 pick up where it left off, which was the beginning of the  
25 depositions of 103 experts. You could do a few depositions, I

1 suppose, but that would be it. At that point it would shut  
2 down and await further guidance from Congress, that's the most  
3 you could do.

4 JUDGE KAVANAUGH: Your position in this case,  
5 though, and understand my concern is that I think would be a  
6 shift of power from Congress to the Executive because it would  
7 allow the Executive to disregard a mandate while there are  
8 funds still available to pursue that mandate even though  
9 Congress had not yet said no funds may be expended, to pick up  
10 on what Judge Randolph said, often times, or Judge Garland,  
11 often times Congress will say no funds may be expended on,  
12 they haven't done that here, right? And nor have they changed  
13 the mandate. And so that gives the Executive a power, to rule  
14 in your favor here gives the Executive a power that it has not  
15 previously had, and that is a shift in our system.

16 MR. MALSCH: Judge Kavanaugh, I guess I don't see  
17 it --

18 JUDGE KAVANAUGH: Unless you can tell me a good  
19 example of where something like this has happened previously  
20 where a court has essentially blessed an agency's disregard of  
21 a statutory mandate, even though there was money left to  
22 pursue it.

23 MR. MALSCH: Yes. I would not say -- the key  
24 question here is what remains of the mandate in Section 114  
25 via the Nuclear Policy Act.

1           JUDGE KAVANAUGH: Right. Well, we know as a matter  
2 of text it remains. And then as a matter of money some  
3 remains, and there may or may not be more in the future. But  
4 if it's zeroed out, then it's zeroed out. Or if there's a  
5 rider that says no funds may be expended, total defense. Or  
6 if they change the mandate, total defense.

7           MR. MALSCH: That's true, but --

8           JUDGE KAVANAUGH: None of those has happened yet, so  
9 I'm worried about the court's role in getting in the middle of  
10 this in a way that would alter that balance between Congress  
11 and the Executive from what it's traditionally been. That's  
12 my concern.

13          MR. MALSCH: I can see your concern, but I just  
14 don't think it applies here, because the Commission is  
15 faithfully following Congressional directions. After all,  
16 Congress zeroed out the budget for NRC notwithstanding being  
17 advised, and DOE, notwithstanding being advised that  
18 additional funds would be necessary to go on with the  
19 proceeding. I think it's a fair inference from what Congress  
20 did that the --

21          JUDGE RANDOLPH: Well, can't you also infer that the  
22 reason that Congress appropriated no money is because they got  
23 information indicating that the Chairman was going to obstruct  
24 the process anyway. And one of the Commissioner's had recused  
25 themselves and you had a deadlock, so why should Congress

1 appropriate money when the Commission is acting in defiance of  
2 the congressional mandate?

3 MR. MALSCH: Well, I don't --

4 JUDGE RANDOLPH: Isn't that a, that's a possible  
5 inference, isn't it? Do you have any information, any  
6 indication, any evidence that the inference that you propose  
7 is the correct one, as opposed to the one I just stated?

8 MR. MALSCH: Well, I don't think there's any  
9 evidence in the appropriations record that that was the, the  
10 supposedly improper action by the Chairman was a motivating  
11 factor. What you do see in the record of the House  
12 Appropriations Committee Report is that --

13 JUDGE RANDOLPH: Well, they read the Inspector  
14 General's Report, or at least had it available to them, didn't  
15 they?

16 MR. MALSCH: Well, they may have, and that report  
17 has been the subject to very interesting and sometimes very  
18 parse in congressional hearings. The fact is that the actions  
19 by the Chairman in arranging for the issuance of this October  
20 6, 2010 memo had no clear effect on the progress of the  
21 adjudicatory proceeding. The first step that any -- the first  
22 action or inaction by the Commission that had the effect of  
23 delaying completion of the proceeding was the May 20, 2011  
24 decision by the Licensing Board suspending discovery. As it  
25 turns out, it is not clear that the budget decision dealing

1 with preparation of the safety evaluation report had any  
2 effect on the progress of the proceeding. It only affected  
3 the issuance of the safety evaluation report, there was no --

4 JUDGE RANDOLPH: What action did -- do I remember  
5 correctly, did the Chairman take some action with respect to  
6 that report?

7 MR. MALSCH: What happened was that in connection  
8 with 2010 and 2011 budget deliberations the Chairman along  
9 with the Executive Director of the Agency issued a memo, a  
10 budget memo directing the staff to begin closing down safety  
11 evaluation activities, safety evaluation report activities.

12 JUDGE RANDOLPH: Was it removing some findings?

13 MR. MALSCH: I suppose it had that effect.

14 JUDGE RANDOLPH: Yes.

15 MR. MALSCH: But it had no effect on the pending  
16 adjudicatory proceeding, which is proceeding along on a  
17 separate track, and which was in fact not the SCR report, this  
18 proceeding was in fact the pacing item.

19 JUDGE RANDOLPH: But what was the purpose of that  
20 action with respect to the safety evaluation report?

21 MR. MALSCH: It was to conserve resources in the  
22 face of uncertainty whether the proceeding could ever be  
23 completed.

24 JUDGE GARLAND: I probably should have asked the NRC  
25 this question, but is there an element of shutting down that

1 would be necessary at the end? That is what happens, what  
2 would happen if the Agency spent reconstituted, spent the \$10  
3 million and then it happened that Congress did not, I don't  
4 know, even for one year or two years provide any money at all?  
5 Is there something that has to be done to save the documents,  
6 to save the computers, or can they just sort of sit there, or  
7 what? Is there an expense of re-packing that's required in  
8 order to make it possible for the Petitioners to move on later  
9 if there is money later, if there's a hiatus in money?

10 MR. MALSCH: There would be some expense associated  
11 with re-packing. There are, I'm going to say, 10 million  
12 documents that have been produced in discovery and were at one  
13 time on the licensing support network. The network is no  
14 longer operational, but those same documents have been  
15 preserved on CD, so they are available, although they may be  
16 somewhat difficult to search. There is knowledge capture in  
17 the form of the so-called technical evaluation reports, and  
18 they capture all of the progress of the staff up until around  
19 September, 2011. If the proceeding were to be re-started and  
20 money were then spent to re-constitute the licensing support  
21 network, and then the proceeding were to end the network would  
22 go down again, and I suppose it would be a large expenditure,  
23 millions of dollars, to bring it back up again, if that were  
24 to be necessary. There would be some additional expenditures  
25 to capture additional documents produced, and depositions

1 produced, and like I suspect that would be relatively modest.  
2 Of course, the NRC still has hearing rooms, just the fact that  
3 the Las Vegas hearing room was shut down is not terribly  
4 important. It has hearing rooms --

5 JUDGE RANDOLPH: Do you have any idea how much the  
6 Department of Energy and the Nuclear Regulatory Commission  
7 have spent to date on considering Yucca Mountain? And we've  
8 had cases going back into I think the '90s dealing with this.  
9 But do you have any idea how much?

10 MR. MALSCH: I'm going to say that the, so far the  
11 total appropriations from the waste fund for Yucca activities  
12 have been on the order of \$6 billion, most of that going to  
13 the Department of Energy.

14 JUDGE RANDOLPH: Six billion?

15 MR. MALSCH: Six billion dollars. The going forward  
16 costs in terms of completing the proceeding, constructing the  
17 repository, and so forth, are I think on the order of another  
18 \$50 billion. So, we are, you know, a quarter, a third of the  
19 way through if the project were ever to go forward. The  
20 licensing proceeding at one point was on a track in which one  
21 might expect using best efforts by everybody, and this is  
22 really knocking themselves out, to make a decision about 54  
23 months after docketing of the license application. That  
24 itself was very expensive. At its peak when everyone was  
25 basically knocking themselves out to meet the deadline the NRC

1 was spending on the order of \$2 to \$3 million a month, and DOE  
2 was spending on the order of \$16 million per month. You can  
3 see that from fiscal year '10 appropriations levels. We were  
4 spending somewhat less, but it was an immensely burdensome and  
5 complex proceeding, and if it were to be re-started all those  
6 burdens and complexity would once again come to the floor, and  
7 I frankly think if this Court were to ask the NRC to resume  
8 the proceeding the reality is that very little useful progress  
9 could be made.

10 JUDGE GARLAND: Hearing no further questions --

11 MR. MALSCH: Thank you.

12 JUDGE GARLAND: I'm sure he was out of time, right?

13 THE CLERK: He was out of time.

14 JUDGE GARLAND: We'll give you a few more minutes,  
15 and if the Judges have questions we'll keep you for more than  
16 a few minutes.

17 ORAL ARGUMENT OF ANDREW A. FITZ, ESQ.

18 ON BEHALF OF THE PETITIONERS

19 MR. FITZ: Thank you, I appreciate having a little  
20 more time. Your Honors, my colleague from Nevada described  
21 the state of affairs at the start of 2010 when this proceeding  
22 was functional. It reflects a functioning proceeding, it may  
23 not have been funded at the level the NRC would have ideally  
24 liked, but it was moving along. Today we have no proceeding  
25 whatsoever. We have no activity with the NRC reviewing the



1 application. That is 100 percent attributable to the NRC's  
2 own actions.

3 Counsel for the NRC posited that it was not appropriate  
4 to spend good money after bad. We would posit that it's not  
5 the prerogative of the NRC to make that call. Congress has  
6 put a mandate in law, Congress funded the proceeding at a  
7 level allowing it moving forward but for the one time after it  
8 was already shut down from which no legal inference can be  
9 taken, and we could argue as a practical matter a contrary  
10 inference could be taken from that argued by Respondents.

11 JUDGE GARLAND: Was the 10 million enough to --  
12 you're talking about before that year, before FY --

13 MR. FITZ: I'm sorry, yes, I am.

14 JUDGE GARLAND: I got it. Okay.

15 MR. FITZ: I'm speaking at the time that the shut  
16 down occurred, FY 2010, they were funded at a \$29 million  
17 level, and continuing resolutions continued that funding level  
18 clear past the October 4th decision to shut down to April,  
19 2011 through CRs.

20 JUDGE GARLAND: Can I just ask -- can you answer the  
21 question that surprised me, which is is it correct that you  
22 didn't object to the protective order?

23 MR. FITZ: Your Honor, the State of Washington did  
24 not take a position with respect to that motion.

25 JUDGE GARLAND: Wasn't that the same --

1 MR. FITZ: Nye County, which is also a Petitioner  
2 here --

3 JUDGE GARLAND: Yes.

4 MR. FITZ: -- did object.

5 JUDGE GARLAND: But isn't that not taking a  
6 position, that's the same thing as not opposing it. I mean,  
7 if they say they want to suspend discovery and you don't say  
8 anything --

9 MR. FITZ: There are two things I'd like to say  
10 about that --

11 JUDGE GARLAND: Yes.

12 MR. FITZ: -- first, the context is that in March of  
13 2010, or of 2011, rather, we had had oral argument on the  
14 *Aiken I* case, and we were waiting to see what would come of  
15 that case.

16 JUDGE GARLAND: But you still wanted to proceed. I  
17 mean, how can -- if you actually want to -- I understand that  
18 you do want the proceeding, so I'm not doubting this, but this  
19 does suggest that everybody understands there's some level of  
20 reality going on here, and that maybe it isn't the best thing  
21 to proceed under those circumstances, otherwise I'm not sure  
22 why the fact that there was a pending court case here makes  
23 any difference in terms of the discovery, why not just keep  
24 going?

25 MR. FITZ: Well, one --

1 JUDGE KAVANAUGH: Nye County objected, correct?

2 MR. FITZ: That's correct.

3 JUDGE KAVANAUGH: Okay.

4 JUDGE GARLAND: And there's --

5 MR. FITZ: And Nye County stands up just as equally  
6 with the State of Washington in terms --

7 JUDGE KAVANAUGH: Yes.

8 MR. FITZ: -- of this case.

9 JUDGE GARLAND: I'm not asking this as a standing  
10 question, I'm asking because I understand any one Petitioner  
11 can raise the standing issue, but if you and South Carolina,  
12 and the others that really have a strong interest here, I  
13 appreciate Nye has an interest, also, but if you are willing  
14 to let the discovery not proceed that must mean some kind of  
15 realization that things in your view something could be  
16 suspended even if the statute required it not to be suspended.

17 MR. FITZ: So, two other pieces of background, Your  
18 Honor.

19 JUDGE GARLAND: Yes.

20 MR. FITZ: First, almost --

21 JUDGE RANDOLPH: Can I just before you get to the  
22 two other pieces, you mentioned that the case was pending in  
23 this Court at that time, and the case was about whether DOE  
24 could withdraw the application. If you lost that case and we  
25 had held that DOE could withdraw the application, then any

1 discovery that took place while the case was pending would be  
2 a total waste of time.

3 MR. FITZ: That's absolutely a way to look at it,  
4 Your Honor.

5 JUDGE GARLAND: Did you think it likely you were  
6 going to lose that case?

7 MR. FITZ: Pardon me?

8 JUDGE GARLAND: Well, the same way you were asked,  
9 Judge Kavanaugh asked is it likely there's not going to be any  
10 money, I'll ask you the same question, you thought it likely  
11 you were going to lose that case, and if not why didn't you go  
12 forward?

13 MR. FITZ: And this gets to the two pieces.

14 JUDGE GARLAND: Yes.

15 MR. FITZ: First of all, we felt that we should win  
16 that case.

17 JUDGE GARLAND: Of course. Of course.

18 MR. FITZ: I certainly accept the Court's ruling.

19 The two pieces are number one --

20 JUDGE KAVANAUGH: Should, you said. It's different  
21 than likely.

22 MR. FITZ: Number one, we were admitted to the  
23 proceeding based on contentions, and this is a, it's an arcane  
24 system in front of the NRC, but your participation in the  
25 proceeding is based on what contentions you've put forward.

1 Our contentions coming in as Intervenors, were solely related  
2 to DOE's motion to withdraw. So, the discovery --

3 JUDGE GARLAND: I see.

4 MR. FITZ: -- that was going to move --

5 JUDGE GARLAND: I see.

6 MR. FITZ: -- forward was not going to involve --

7 JUDGE GARLAND: I see.

8 MR. FITZ: -- us directly.

9 JUDGE GARLAND: And was that true for everybody  
10 other than Nye County?

11 MR. FITZ: That is the case. Yes.

12 JUDGE GARLAND: Well, that explains it.

13 MR. FITZ: Okay.

14 JUDGE GARLAND: That's a lot easier answer than the  
15 others.

16 MR. FITZ: Thank you.

17 JUDGE GARLAND: What happens if 10 million actually  
18 is the end? That is what if NRC in the next year doesn't get  
19 it, what if we order to proceed until the money runs dry? Do  
20 you really want the proceeding to go till the money runs dry,  
21 even if, you know, you predict that in some future year the  
22 money will come back, do you not want any amount of money to  
23 be saved for re-packing, putting stuff in cold storage, or  
24 whatever it is you do to things in this kind of litigation?  
25 Or do you just, do you really want -- if we issued a mandamus

1 that said continue until the money runs dry is that what you  
2 want?

3 MR. FITZ: Your Honor, Counsel for Respondents  
4 suggested that I think the figure was \$6 million would need to  
5 go into reconstituting the LSN. Although the LSN is mandated  
6 by the NRC's rules, the LSN is not necessary for a proceeding  
7 to go forward. It would have allowed it to go forward most  
8 efficiently, but spending 6 million on the LSN may not be the  
9 best use of money. We believe that for almost no cost there  
10 are prepared safety evaluation reports ready to go that could  
11 be issued. Your Honor, the fact that those reports were ready  
12 to go in 2010 --

13 JUDGE GARLAND: It's not really -- I'm going to ask  
14 about this now that you've raised it, but that's not really  
15 the question. The question still is they're ready to go, you  
16 don't think with 10 million they can resolve this entire  
17 matter, do you?

18 MR. FITZ: I would concede that 10 million would not  
19 be enough --

20 JUDGE GARLAND: All right.

21 MR. FITZ: -- to resolve the entire amount.

22 JUDGE GARLAND: So, at the end of \$10 million we're  
23 somewhere along the way but not all the way, right?

24 MR. FITZ: Correct.

25 JUDGE GARLAND: Do you want them to spend all of it

1 on moving forward and none of it on preserving anything up  
2 until a certain time?

3 MR. FITZ: Your Honor, I'm going to accept what  
4 they've represented to the Court, which is they've already  
5 done the job of preserving information. I believe that the  
6 NRC at this point can make decisions with the funding  
7 available to direct those resources where they can provide the  
8 most bang for the buck in advancing the NRC's consideration of  
9 the application.

10 JUDGE GARLAND: Well, just to give a hypothetical  
11 that's very familiar to me, say you're taking a law school  
12 exam, you've got the blue book out, and you've got your  
13 pencils going, time runs out, now do you want to -- and, you  
14 know, you've got like one more sentence to go, time runs out  
15 and you just have to drop your pencil, and everybody walks  
16 away, and any blue book is, all the blue books are just left  
17 there for the next year, do you want that, or do you want the  
18 blue books to be filed somewhere? That is do you want  
19 something to be done with all of the progress that you've made  
20 over that period, or is it, maybe it's possible you could just  
21 drop everything and pick it up again two years later if two  
22 years later is when the money comes, is that possible?

23 MR. FITZ: I think Your Honor might have been  
24 describing my corporation's exam.

25 JUDGE GARLAND: Mine, too, actually.

1                   MR. FITZ: Your Honor, I am only speculating,  
2 because obviously, I can't get into the inner workings of the  
3 NRC. It seems to me reasonable to expect that the NRC can  
4 devise a way to move forward, issue the safety evaluation  
5 reports, have the parties commence with discovery, and advance  
6 at least the state as far as it can with the funds available,  
7 just as its guidance suggests it needs to do in anticipation  
8 of full funding in the future.

9                   JUDGE GARLAND: And you don't want us, or do you, to  
10 evaluate what the best way forward is?

11                   MR. FITZ: Your Honor, I think that this Court's  
12 role is to mandate compliance with the law. I think once the  
13 Court gets to that line the decisions on how to comply with  
14 the law rest with the NRC. We're getting into Agency  
15 discretion then.

16                   JUDGE GARLAND: Right. Let me ask just one more  
17 question, and plenty of time for my colleagues to ask. With  
18 respect to cases like *Bar* and *United Mine Workers* where we did  
19 not issue mandamus, and one of the reasons we said was that  
20 there are agency priorities, I suppose you could have  
21 eliminated agency priorities by just requiring the agencies to  
22 follow every one of their mandates to the end, right? Not to  
23 be able to prioritize, but they just have to follow every  
24 mandate to the end. And so that whether they have one  
25 priority or 10 Congress has told them these are all things



1 that they must do, and so they should be compelled to do them,  
2 why is this different than that?

3 MR. FITZ: It's different because this mandate is  
4 different. I'll make two points. Number one, this mandate is  
5 different than the case in *Bar* where you had similar time  
6 lines in which to act for any number of applicants for FDA  
7 approval. We have here a process in which the country has  
8 already, and the figure I've heard is invested more than \$10  
9 billion, we have a process that Congress mandated a unique  
10 statute to be followed to get to a decision. And we have a  
11 case where the NRC has not identified to this Court a single  
12 competing priority that would be affected by compliance with  
13 the statute. And that's why we're here today, Your Honors. I  
14 heard the representation that this proceeding was still alive.  
15 It's similar to what we heard in *Aiken I* where we'd been told  
16 as a matter of standing that we'd already won, there was  
17 nothing for the Court to decide. As one of my colleagues  
18 said, we can't take any more of these victories.

19 JUDGE RANDOLPH: I mentioned at the beginning that  
20 the Department of Energy is not here, which is obvious, and  
21 two questions. One, does the -- the \$10 million is just NRC's  
22 appropriation, right?

23 MR. FITZ: Correct.

24 JUDGE RANDOLPH: The Department of Energy for all we  
25 know has nothing.

1                   MR. FITZ: Your Honor, I submit that we can't read  
2 anything into the fact that there's no information before the  
3 Court. I would not concede that the Department of Energy has  
4 nothing.

5                   JUDGE RANDOLPH: Well, I don't know. I mean, has  
6 Congress appropriated anything out of the waste fund for the  
7 Department of Energy?

8                   MR. FITZ: Just as the NRC has carry over funds --

9                   JUDGE RANDOLPH: Yes.

10                  MR. FITZ: -- and this is speculation on my part, I  
11 don't have information --

12                  JUDGE RANDOLPH: They might.

13                  MR. FITZ: -- to base it on.

14                  JUDGE RANDOLPH: Okay.

15                  MR. FITZ: I'm speculating that the Department of  
16 Energy has carry over funds, as well.

17                  JUDGE RANDOLPH: The Department of Energy, the  
18 second point, is not very enthusiastic about going forward  
19 here. I mean, they have, they're an Executive Agency under  
20 the direction of the President, and, as Judge Kavanaugh  
21 pointed out, and serve as the President's pleasure, the  
22 President doesn't want this proceeding to go forward, and it  
23 was a campaign promise. But be that as it may there are 277  
24 objections pending, and the burden is on the Department of  
25 Energy to satisfy the Commission on each one of them, what's

1 the answer to that?

2 MR. FITZ: I can point to the fact that, and I was  
3 present for this at oral argument in front of the Board, the  
4 Department of Energy represented that if denial were denied,  
5 if withdrawal were denied it would be prepared to move  
6 forward. The ASLB reflected that in the ASLB's decision, the  
7 Board's order.

8 JUDGE RANDOLPH: Okay.

9 MR. FITZ: Secondly, the Department represented to  
10 this Court in *Aiken I* oral argument last year that it would  
11 move forward. And most recently, *Secretary II* represented to  
12 Congress that we would move forward if directed.

13 JUDGE GARLAND: Does it depend on them having money,  
14 or doesn't depend on them having money?

15 MR. FITZ: I don't recall that *Secretary II* taking  
16 the most recent representation was stated in terms of money.  
17 Again, I don't have direct knowledge.

18 JUDGE GARLAND: Right.

19 MR. FITZ: I'm sorry.

20 JUDGE GARLAND: But in the end it depends on  
21 whether -- I appreciate we don't know whether they have money,  
22 but in the end it depends on whether they do have money,  
23 right?

24 MR. FITZ: I'd agree with that.

25 JUDGE RANDOLPH: Did he say? When was his

1 testimony?

2 MR. FITZ: Your Honor, it's what we submitted in our  
3 28(j) letter --

4 JUDGE RANDOLPH: Okay.

5 MR. FITZ: -- which was --

6 JUDGE RANDOLPH: Okay.

7 MR. FITZ: -- I believe within the last month.

8 JUDGE RANDOLPH: But did he say -- I have not read  
9 it, but did he say that the budgetary constraints would  
10 prevent him, or prevent the Department from defending if a  
11 proceeding began again?

12 MR. FITZ: To the best of my recollection he made no  
13 statement in that regard.

14 JUDGE RANDOLPH: Okay.

15 MR. FITZ: Okay.

16 JUDGE GARLAND: He actually said he would go forward  
17 if he were ordered to go forward, right?

18 MR. FITZ: I believe that is -- I don't have the  
19 precise words in front of me, but I think that's accurate.  
20 Something --

21 JUDGE GARLAND: Yes.

22 MR. FITZ: -- close to that paraphrasing.

23 JUDGE GARLAND: And he's not here so we can't order  
24 him to go forward.

25 MR. FITZ: He's not before the Court. But I would

1 submit that it would be the NRC's, the -- a matter for the  
2 Board to direct the Department of Energy to proceed.

3 JUDGE GARLAND: Really? Does the Board have the  
4 power to order them to go forward, or just to declare that  
5 they've defaulted and they haven't proven their case?

6 MR. FITZ: The Board has the authority through its  
7 case management orders to order the parties as to how they  
8 conduct discovery, and how they conduct their case. If it  
9 comes to a matter of legal sanctioning, I am not going to  
10 suggest, and this is getting far out of my comfort zone in  
11 terms of being grounded in the law, but I'm not going to  
12 suggest that the NRC's Board has the authority to sanction a  
13 sister federal agency.

14 JUDGE GARLAND: Well, for example, in, I mean, in  
15 the area that I do know something about, which would be  
16 litigation in the District Court, if a Plaintiff doesn't  
17 continue its prosecution, case is dismissed for lack of  
18 prosecution. Can't force a Petitioner to continue.

19 MR. FITZ: I think it's different --

20 JUDGE GARLAND: Now, maybe we can because we can  
21 mandamus them based on the kind of statute we're talking about  
22 here, but I don't know of anything that would suggest the NRC  
23 can force them to continue.

24 MR. FITZ: The NRC may not be able to force them to  
25 continue, but --

1 JUDGE GARLAND: Maybe we'd have something now.

2 MR. FITZ: Well, thank you for my colleague.

3 Provided the direct words of Secretary Chu, which were that  
4 DOE, "will abide." Your Honors, we believe that the, this NRC  
5 proceeding is different from the normal NRC proceeding in  
6 which you have a voluntary applicant. That's part of the  
7 rationale for the Board to deny withdrawal. We believe that  
8 the Department of Energy has its own mandate to participate  
9 with NRC in moving forward in the licensing process. So, we  
10 haven't crossed the bridge of DOE not complying. If we do get  
11 to that bridge, and DOE fails to comply we would reserve the  
12 right to come before this Court again and argue that there's a  
13 mandatory duty.

14 JUDGE GARLAND: Okay. Questions? Questions? All  
15 right. Very well --

16 MR. FITZ: Thank you.

17 JUDGE GARLAND: -- argued on both sides. Very  
18 interesting case, and we appreciate the submissions of both  
19 sides, and we'll take it under submission.

20 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



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Paula Underwood

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May 6, 2012

DEPOSITION SERVICES, INC.