

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

_____)	
ROBERT L. FERGUSON,)	
WILLIAM LAMPSON, and)	
GARY PETERSEN,)	
)	
Petitioners,)	
)	
v.)	Case No. 10-1052
)	
BARACK OBAMA,)	
President of the United States,)	
STEVEN CHU, Secretary of Energy,)	
and THE UNITED STATES)	
DEPARTMENT OF ENERGY,)	
)	
Respondents.)	
_____)	

**MOTION OF THE STATE OF NEVADA
FOR LEAVE TO INTERVENE AS INTERVENOR-RESPONDENT**

Pursuant to Federal Rule of Appellate Procedure 15(d), the State of Nevada (“Nevada”) moves for leave to intervene in this action as an intervenor-respondent.

In support of this motion, Nevada states as follows:

1. In the instant case, Petitioners Robert L. Ferguson, William Lampson, and Gary Petersen (“FLP”) seek judicial review of what they describe as a final action by Respondent U.S. Department of Energy (“DOE”) to abandon and not to

proceed with plans to apply for and pursue a license for, and to construct a geologic repository for the permanent disposal of spent nuclear fuel and high-level radioactive waste at Yucca Mountain, Nevada. DOE filed its Yucca Mountain license application on June 3, 2008, and the U.S. Nuclear Regulatory Commission (“NRC”) docketed the application on September 8, 2008. The docketing of DOE’s application and the publication of a notice of hearing in the Federal Register shortly thereafter commenced a formal adjudicatory proceeding before the NRC, and Nevada was admitted as a party-intervenor in that proceeding on May 11, 2009. Nevada has been actively litigating numerous legal and technical contentions since then.

2. The NRC Rules of Practice provide that “[w]ithdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.” 10 C.F.R. § 2.107(a). On February 1, 2010, DOE notified the Atomic Safety and Licensing Board appointed by the NRC to preside over the formal licensing proceeding that it “intends to withdraw the pending application with prejudice and to submit a separate Motion, pursuant to 10 C.F.R. § 2.107(a), within the next 30 days, to determine the terms and conditions, if any, of that withdrawal,” and accordingly moved the Licensing Board to stay the proceedings until its filings could be made. On February 2, 2010, the Licensing Board suspended discovery, and on February 16, 2010, the Licensing Board stayed

the proceeding until it could resolve DOE's expected motion to withdraw its license application.

3. On March 3, 2010, DOE moved the Licensing Board "to withdraw its pending license application for a permanent geologic repository at Yucca Mountain, Nevada" and "ask[ed] the Board to dismiss its application with prejudice and to impose no additional terms of withdrawal." On March 5, 2010, the Licensing Board issued an Order scheduling the answers to three new petitions to intervene in the NRC licensing proceeding (raising issues similar to those raised by Petitioner FLP here) to be filed by March 29, 2010 (and replies thereto to be filed by April 5, 2010), and postponed the requirement for any party to the adjudicatory proceeding to file an answer to DOE's motion to withdraw until after the Licensing Board decides the petitions to intervene. Thus, DOE's motion to withdraw is still pending before the NRC and Nevada believes that no decision is likely to be made on that motion until May or later.

4. For the reasons set forth below, Nevada has a significant interest in this proceeding and sets forth three grounds for intervention.

a. First, for over 20 years Nevada has consistently opposed DOE's efforts to site and license a geologic repository at Yucca Mountain, based upon numerous and serious safety, environmental, social and economic injuries that would be inflicted upon Nevada's lands and resources, and its economy and

citizens if the repository should go forward. *See* Affidavit of Bruce Breslow, Executive Director, Nevada Agency for Nuclear Projects (attached hereto as Exhibit 1, and incorporated herein by reference). *See also*, “Mountain of Trouble: A Nation at Risk – Report on Impacts of the Proposed Yucca Mountain High-Level Nuclear Waste Program,” February 2002 (prepared by the Nevada Agency for Nuclear Projects, Office of the Governor of the State of Nevada), available at <http://www.state.nv.us/nucwaste/yucca/impactreport.pdf>. If, as FLP requests in its petition for judicial review, that this Court should vacate DOE’s decision to withdraw its license application, then the most straightforward and expeditious way to prevent those injuries to Nevada from occurring, an NRC dismissal of the application with prejudice, would be foreclosed.

b. Second, any merits decision in this case in favor of FLP would have an immediate and disruptive impact in any then-pending NRC proceeding on DOE’s withdrawal motion. Nevada is actively participating in that NRC proceeding, where it will support DOE’s motion before the Licensing Board and, if necessary, before the Commission, in any appeals from a Licensing Board decision.

c. Third, Congress has recognized that the host state for the waste repository should be accorded broad “rights of participation and consultation,” and that state participation “is essential in order to promote public confidence in the

safety of disposal of such waste and spent fuel.” Sections 101(b) and 111(a)(6) of the Nuclear Waste Policy Act of 1982 (“NWPA”), as amended, 42 U.S.C. §§ 10121(b) and 10131(a)(6). Accordingly, Nevada views were routinely solicited and their comments were timely considered throughout the Yucca Mountain site characterization process, the site approval process, the site selection process, and the construction authorization process. *See* NWPA Secs. 113(a) & (b), 114(a)(1)(H), 115(b), 116(a)-(c), and 117(a) & (b). Under the NRC Rules of Practice, Nevada was granted automatic standing to intervene in the Yucca Mountain licensing proceeding. 10 C.F.R. § 2.309(d)(2). The fact that Nevada has been heard and afforded full participation rights at every stage of the Yucca Mountain process suggests that this Court should similarly allow Nevada to participate as an intervenor in this proceeding to offer its unique views and perspectives as the host state for the repository.

5. Nevada’s interests will not be adequately represented in the absence of intervention. Only Nevada is in a position to represent its sovereign and other interests. Moreover, Nevada may be in a position to present arguments in support of Respondents that Respondents cannot make themselves given the pendency of the NRC proceeding. In sum, Nevada’s views on the likely arguments that may be advanced by Petitioner FLP will be of assistance to the Court.

6. Petitioner FLP filed its Petition for Review on February 25, 2010. Since not otherwise specified by statute, a motion for leave to intervene in this case must be filed within 30 days, or by March 27, 2010. Fed. R. App. P. 15(d). This motion meets that deadline. Nevada's participation as intervenor-respondent will not delay the proceedings or prejudice any party. Nevada also stands ready to cooperate with the parties and the Court to ensure efficient and timely adjudication of the present case.

7. Nevada is aware of two other petitions for judicial review of what the petitioners therein also describe as DOE's decision to withdraw its pending Yucca Mountain license application. *See Aiken County, v. Secretary Chu, et al.*, D.C. Cir. No. 10-1050 (Petition for Review filed Feb. 26, 2010); and *State of South Carolina, ex rel. Henry Dargan McMaster, Attorney General v. DOE, et al.*, 4th Cir. No. 10-1229 (Petition for Review filed Feb. 26, 2010) (Motion for Transfer to D.C. Circuit filed March 4, 2010). Since these two cases involve the same agency and the same decision, Nevada respectfully requests that this motion for leave to intervene be deemed a motion to intervene in those cases as well. *See* Local Circuit Rule 15(b).

8. Counsel for Nevada has contacted counsel for all parties regarding this motion for leave to intervene. Counsel for Petitioner FLP has stated that it is not opposed to Nevada's intervention. Counsel for Respondent NRC has stated

that it does not object to Nevada's intervention. Counsel for the other Federal Respondents has stated it does not oppose Nevada's intervention provided Nevada does not seek to change any schedules already in place in this proceeding. In that regard, Nevada is willing to take this proceeding as it finds it and comply with all applicable schedules for the filing of motions, other pleadings, or briefs.

Respectfully submitted,

/ s /

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Charles J. Fitzpatrick *
Martin G. Malsch *
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* Special Deputy Attorneys General

Attorneys for the State of Nevada

DATED: March 19, 2010

EXHIBIT 1

2. The primary responsibility of the Agency is to oversee and evaluate the U.S. Department of Energy's ("DOE's") programs (a) to characterize or otherwise study the proposed Yucca Mountain site in southern Nevada for the purpose of assessing its suitability as a repository for high-level radioactive waste and spent nuclear fuel ("Yucca Mountain Project"), (b) to apply for all necessary licenses for the Yucca Mountain Project, and (c) if the Yucca Mountain Project is licensed, to construct and operate it as a repository for the disposal of high-level radioactive waste and spent nuclear fuel.

3. I hire and supervise consultants and scientists that, for Nevada, oversee DOE's activities involving the Yucca Mountain site. My position also involves regularly tracking and evaluating the Yucca Mountain Project. That is the basis of my personal knowledge of the matters stated in this Affidavit.

4. Nevada has a strong interest in protecting the health and safety of its citizens from radiological injuries and in protecting its lands and groundwater from radioactive contamination. The disposal of high-level radioactive waste and spent nuclear fuel at Yucca Mountain will inevitably lead to increased radioactive doses to Nevada's citizens and to the contamination of the lands and the groundwater of Nevada with radioactive materials. Nevada's sovereign interests are injured because, under Nevada law, all groundwaters are owned by the people of Nevada and administered in trust by Nevada.

5. The Yucca Mountain Project would rank among the largest and most irreversible public works projects in history. Among other things, public lands in a corridor hundreds of miles long would have to be withdrawn so that waste could be transported to Yucca Mountain for disposal. These lands could not be used for public roads and bridges and other public infrastructure projects.

6. DOE's plans to transport spent nuclear fuel assemblies from their current

locations at nuclear power reactors and other storage sites around the United States to Yucca Mountain would be the largest spent nuclear fuel transportation campaign in the history of the United States. This transportation campaign would create the risk of discharges of radioactive materials and land contamination, both within and outside of Nevada. Nevada emergency response resources would need be called upon, especially if a release occurs or is threatened in Nevada urban areas.

7. Nevada would incur an enormous expense in escorting and monitoring DOE's transportation of high-level radioactive waste and spent nuclear fuel shipments into the state, as well as the resources expended in training, preparing and equipping first responders, hospitals and law enforcement in anticipation of such shipments. In addition, Nevada would be required to expend substantial resources improving its transportation infrastructure, in order to maintain and rebuild roads and highways which would inevitably be destroyed by their utilization by large numbers of extremely heavy vehicles transporting waste to Yucca Mountain.

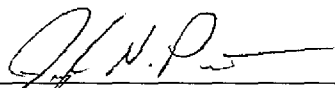
8. Another threat to Nevada arises from the intense negative perception and stigma associated with transportation to and disposal of high-level radioactive waste and spent nuclear fuel in Nevada. This could lead to losses of jobs and tax revenues.

Further, the affiant says not.

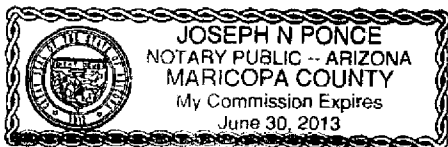


Bruce Breslow

The above-named affiant personally appeared before me this 16th day of March, 2010, and executed this affidavit.



Notary Public, State of Nevada *Arizona*
My Commission expires: June 30 2013



CERTIFICATE OF SERVICE

I certify that on March 19, 2010, the Motion of the State of Nevada for Leave to Intervene as Intervenor-Respondent, an Entry of Appearance, and a Disclosure Statement pursuant to Circuit Rule 26.1 were served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

For Petitioners Robert L. Ferguson, William Lampson and Gary Petersen:

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_____/ s /_____

John W. Lawrence

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

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Case Caption: Ferguson, Lampson & Peterson

v.
Obama, Chu & Department of Energy

Case No: 10-1052

ENTRY OF APPEARANCE

Party Information

The Clerk shall enter my appearance as counsel for the following parties:
(List each party represented individually. Use an additional blank sheet as necessary)

- Appellant(s)/Petitioner(s) Appellee(s)/Respondent(s) Intervenor(s) Amicus Curiae

State of Nevada

Names of Parties

Names of Parties

Counsel Information

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Notes: This form must be submitted by a member of the Bar of the U.S. Court of Appeals for the D.C. Circuit.

Names of non-member attorneys listed above will not be entered on the court's docket.

Applications for admission are available on the court's web site at <http://www.cadc.uscourts.gov/>

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1052

Short Caption: Ferguson, Lampson & Peterson v. Obama, Chu & Department of Energy

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[✓] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

State of Nevada, Intervenor-Respondent

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Egan, Fitzpatrick, Malsch & Lawrence, PLLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: [Handwritten Signature]
Attorney's Printed Name: John W. Lawrence

Date: March 19, 2010

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes [X] No []

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