

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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STATE OF SOUTH CAROLINA,  
EX REL. HENRY DARGAN  
MCMASTER, Attorney General,  
Petitioner,

v.

U.S. DEPARTMENT OF ENERGY;  
BARACK OBAMA, President of the  
United States, in his Official Capacity;  
STEVEN CHU, Secretary of Energy,  
in his Official Capacity; the NUCLEAR  
REGULATORY COMMISSION; and  
GREGORY B. JACZKO, Chairman of  
the Nuclear Regulatory Commission,  
in his Official Capacity; THOMAS  
MOORE, PAUL RYERSON and  
RICHARD WARDWELL, Nuclear  
Regulatory Commission Atomic Safety  
and Licensing Board Judges, in their  
Official Capacity, and NRC ATOMIC  
SAFETY AND LICENSING BOARD,  
Respondents.

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Case No. 10-1229

**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, Petitioner State of South Carolina (“South Carolina”) seeks judicial review of what it describes as a decision by Respondent U.S. Department of Energy (“DOE”) to withdraw with prejudice its license application (docketed September 8, 2008) for a construction authorization for a geologic repository for the permanent disposal of spent nuclear fuel and high-level radioactive waste at Yucca Mountain, Nevada, which is now pending before the U.S. Nuclear Regulatory Commission (“NRC”). 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. On February 26, 2010, South Carolina (Petitioner in this proceeding) moved before the Licensing Board to intervene as a full party in the proceeding, specifically to challenge DOE's anticipated motion to withdraw with prejudice its pending license application for Yucca Mountain.

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 South Carolina's petition to intervene (as well as two other parties that had filed similar petitions to intervene) 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 four 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 South Carolina claims in its petition for judicial review, DOE cannot 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, South Carolina has advanced several arguments regarding the harm that it will suffer if the Yucca Mountain license application is withdrawn. However, neither South Carolina nor any of the Respondents will fully

articulate, or articulate at all, the harm that will befall Nevada as the host state for the proposed repository if the Yucca Mountain repository project should go forward.

c. Third, any merits decision in this case in favor of South Carolina 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.

d. Fourth, 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 arguments advanced by Petitioner South Carolina will be of assistance to the Court.

6. Petitioner South Carolina filed its Petition for Review and Petition for Writ of Mandamus, Writ of Prohibition, Stay, and/or Declaratory and Injunctive Relief on February 26, 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 28, 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. Counsel for Nevada has contacted counsel for all parties regarding this motion for leave to intervene. Counsel for Petitioner South Carolina has stated that it takes no position on Nevada's intervention at this time. 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,

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/ s /

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Martin G. Malsch \*  
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\* Special Deputy Attorneys General

*Attorneys for the State of Nevada*

DATED: March 19, 2010

**EXHIBIT 1**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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STATE OF SOUTH CAROLINA, )  
EX REL. HENRY DARGAN )  
MCMASTER, Attorney General, )  
Petitioner, )  
  
v. )  
  
U.S. DEPARTMENT OF ENERGY; )  
BARACK OBAMA, President of the )  
United States, in his Official Capacity; )  
STEVEN CHU, Secretary of Energy, )  
in his Official Capacity; the NUCLEAR )  
REGULATORY COMMISSION; and )  
GREGORY B. JACZKO, Chairman of )  
the NUCLEAR REGULATORY )  
COMMISSION, in his Official Capacity;) )  
THOMAS MOORE, PAUL RYERSON )  
and RICHARD WARDWELL, )  
U.S. NUCLEAR REGULATORY )  
COMMISSION ATOMIC SAFETY )  
AND LICENSING BOARD JUDGES, )  
in their Official Capacity; and the NRC )  
ATOMIC SAFETY AND LICENSING )  
BOARD, )  
Respondents. )

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Case No. 10-1229

**AFFIDAVIT OF BRUCE BRESLOW**

I, Bruce Breslow, do hereby swear that the following matters are true and correct based on my personal knowledge:

1. I am the Executive Director of the Nevada Agency for Nuclear Projects ("Agency"), the Agency vested by state law to carry out the duties and responsibilities imposed on the State of Nevada ("Nevada"), by the Nuclear Waste Policy Act ("NWPA"), as amended. 42 U.S.C. 10101, *et seq.* I have been the Executive Director of the Agency since January 2009.

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.

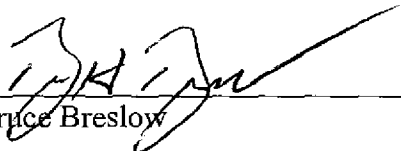
6. DOE's plans to transport spent nuclear fuel assemblies from their current

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.

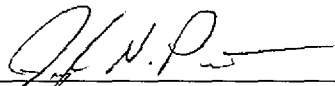
7. Nevada would incur an enormous expense in escorting and monitoring DOE's transportation of high-level radioactive waste and spent nuclear fuel shipments into the state, as well as the resources expended in training, preparing and equipping first responders, hospitals and law enforcement in anticipation 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.

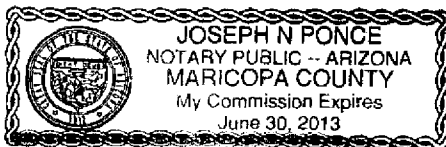
8. Another threat to Nevada arises from the intense negative perception and stigma associated with transportation to and disposal of high-level radioactive waste and spent nuclear fuel in Nevada. This could lead to losses of jobs and tax revenues.

Further, the affiant says not.

  
\_\_\_\_\_  
Bruce Breslow

The above-named affiant personally appeared before me this 16<sup>th</sup> 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 Appearance of Counsel Form, 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:

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\_\_\_\_\_  
/ s /  
John W. Lawrence

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

No. 10-1229

THE CLERK WILL ENTER MY APPEARANCE AS

[X] Retained [ ] Court-appointed(CJA) [ ] Court-assigned(non-CJA) [ ] Federal Defender [ ] Pro Bono [ ] Government

COUNSEL FOR: State of Nevada as the (party name)

[ ] appellant(s) [ ] appellee(s) [ ] petitioner(s) [ ] respondent(s) [ ] amicus curiae [X] intervenor(s)

/ s / (signature)

BAR ADMISSION & ECF REGISTRATION

If you have not been admitted to practice before the Fourth Circuit, you must complete and return an application for admission. If you were admitted to practice under a different name than you are using now, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing of documents by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at www.ca4.uscourts.gov/cmecf/tp.htm.

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OR, I AM NOT PARTICIPATING IN THIS CASE. APPELLATE COUNSEL IS:

N/A N/A (Name) (Phone)

CERTIFICATE OF SERVICE

\*\*\*\*\*

I certify that on March 19, 2010 the foregoing document was 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:

See the attached Certificate of Service

/ s / Signature

March 19, 2010 Date

