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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF NEVADA

10 UNITED STATES OF AMERICA,) Case No. CV-S-00-0268-RLH (LRL)
11 Plaintiff,)
12 v.)
13 STATE OF NEVADA; NEVADA STATE)
DEPARTMENT OF CONSERVATION)
14 AND NATURAL RESOURCES; R.)
MICHAEL TURNIPSEED, P.E., in his)
15 official capacity as Director, Department of)
Conservation and Natural Resources; and)
16 HUGH RICCI, P.E., in his official capacity)
as State Engineer for the State of Nevada,)
17 Defendants.)

**THE NEVADA AGENCY FOR
NUCLEAR PROJECTS' OPPOSITION
TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

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19 The Nevada Agency for Nuclear Projects (Nevada Agency), by and through the undersigned
20 counsel, hereby opposes Plaintiff's motion for summary judgment.¹ Plaintiff, United States of America
21 (United States), on behalf of the United States Department of Energy (DOE), argues that the
22 congressional override² of Nevada's notice of disapproval of the proposed high-level nuclear waste
23 repository at Yucca Mountain in July 2002 supports a summary judgment "invalidating Nevada

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25 ¹ Two separate agencies have participated in these proceedings on behalf of the State of Nevada, the Nevada Agency for Nuclear Projects and the Nevada State Engineer.

26 ² On May 8, 2002, the United States House of Representatives voted to override the April 8, 2002, notice of
27 disapproval filed by the Governor of Nevada pursuant to Section 116 of the Nuclear Waste Policy Act. On July 9, 2002, the
28 United States Senate voted to override Nevada's notice of disapproval. Subsequently, on July 23, 2002, the President signed House Joint Resolution 87 entitled "Approving the site at Yucca Mountain, Nevada, for the development of a repository for the disposal of high-level radioactive waste and spent nuclear fuel, pursuant to the Nuclear Waste Policy Act of 1982." Pub. L. No. 107-200, 116 Stat. 735 (2002) (Joint Resolution).

1 Revised Statute 459.910, overturning the State Engineer's decision denying DOE's permit applications,
2 requiring the State Engineer to grant DOE's permit applications, and prohibiting the state defendants
3 from unlawfully interfering with DOE's performance of its obligations under the Joint Resolution and
4 the Nuclear Waste Policy Act." Memorandum of Points and Authorities in Support of United States'
5 Motion for Summary Judgment (U.S. Memorandum) at 4.

6 I. INTRODUCTION.

7 The United States' disparaging tone, evidenced throughout its supporting memorandum, is
8 designed, apparently, to convince the Court that the State Engineer's ruling and his administrative
9 hearing constituted a kind of "kangaroo" court process within which DOE did not receive fair
10 treatment. *See, e.g.*, U.S. Memorandum at 6 ("the State's history of delay and obstruction concerning
11 this project warrants a specific intrusion by this Court into the process."). As the following arguments
12 illustrate, it is the United States that is not playing fairly here. The United States filed for water under
13 state law provisions, and instead of allowing the State Engineer's ruling to run its course according to
14 the water law's judicial review mechanisms, the government constructed a constitutional case reliant on
15 *one* aspect of the State Engineer's ruling, namely NRS 459.910, the state statute prohibiting the storage
16 of high-level radioactive waste in Nevada.

17 Unquestionably, the Nuclear Waste Policy Act (NWPA) requires that nuclear waste disposal is a
18 federal responsibility. This does not translate into federal preemption of state water law even if the
19 State Engineer erred in his decision. In its motion the United States asks this Court to interpret the
20 Joint Resolution. As set forth in Nevada Agency's Motion to Stay Proceedings and Request for Status
21 Conference, Nevada Agency has described certain Yucca Mountain-related litigation currently pending
22 in the United States Court of Appeals for the District of Columbia Circuit (alternatively D.C. Circuit).³
23 In that pending litigation, the meaning and the very legitimacy of the Joint Resolution within the
24 statutory scheme contained in the NWPA are pivotal issues. For purposes of this case, federal
25 preemption cannot exist if the federal law is determined to be invalid. Because of the pendency of the

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27 ³ *State of Nevada, et al. v. United States Department of Energy*, Case Nos. 01-1516, 02-1036, 02-1077, 02-1179,
28 and 02-1196; *State of Nevada v. United States Environmental Protection Agency*, Case No. 01-1258, and *State of Nevada, et al. v. United States Nuclear Regulatory Commission*, Case No. 02-1116, are pending in the United States Court of Appeals for the District of Columbia Circuit. All of these cases are scheduled to be argued *in tandem* in September 2003. It is anticipated that these cases will be decided in late 2003 or early 2004.

1 overarching cases in the D.C. Circuit, the fact that DOE has water for its temporary needs at Yucca
2 Mountain before it seeks licensure and the likelihood that these cases will be resolved within one year
3 to eighteen months, Nevada Agency has respectfully asked this Court to stay these proceedings.⁴

4 Distilled to its essence, the United States seeks summary judgment on the ground that the
5 selection by the federal government of Yucca Mountain as the site for a nuclear waste repository
6 constitutes a federal judgment that this choice is in the best interest of the public, and therefore,
7 preempts any competing state judgment that would deny water permits to DOE because the proposed
8 use of the water would be “detrimental to the public interest.” Yet, such a claim is clearly not
9 susceptible to resolution by the device of summary judgment.

10 First of all, it is elementary that, to have the preemptive effect claimed by DOE here, federal
11 action must be lawful, and the lawfulness of the selection of the Yucca site is hotly disputed. Most
12 importantly for DOE’s summary judgment claim, the question of whether this selection is lawful
13 ultimately rests in large measure on a question of fact: whether the Yucca site in fact meets the
14 requirement of the NWPA that the repository isolate this highly toxic waste primarily by geologic
15 means, that is, by relying primarily on the rock in which this material will be buried, not on man-made
16 packages whose effective life cannot be determined for the extraordinary time periods required for the
17 “permanent” disposal of highly radioactive waste. Thus, DOE’s summary judgment motion must be
18 denied because material issues of fact are in dispute.⁵ Moreover, the factual issues underlying the
19 question of the lawfulness of the Yucca Mountain site selection remain, irrespective of the Joint
20 Resolution by which Congress overrode Nevada’s veto of the selection of the Yucca site.

21 Second, neither the NWPA nor the Joint Resolution, either expressly or by implication, preempt
22 application of Nevada’s water law. Indeed, the Joint Resolution contains no reference to water and the
23 NWPA contains a single reference to water inapplicable to the issue before the Court.⁶ Because

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25 ⁴ By this reference, Nevada Agency incorporates the arguments made in its Motion to Stay into this memorandum.

26 ⁵ Indeed, as we have pointed out in our stay motion, these very issues are central to the proceedings challenging
27 the Yucca selection now pending in the Court of Appeals in the District of Columbia.

28 ⁶ Section 124 of the NWPA provides:

The Secretary shall give full consideration to whether the development, construction, and
operation of a repository may require any purchase or other acquisition of water rights

1 Congress could have addressed DOE's responsibility to file for state water permits in the NWPA but
2 chose not to, DOE is legally obligated to pursue its water applications under state law provisions.

3 Third, despite DOE's insistence that the State Engineer only relied on NRS 459.910, the
4 administrative proceedings before the State Engineer relative to DOE's water applications irrefutably
5 demonstrate that Ruling No. 4848 (Ruling 4848) addresses much more than simply the existence of the
6 state statute prohibiting the storage of nuclear waste in Nevada. It was only after the extensive
7 evidentiary hearing that the State Engineer fully understood the nature of DOE's proposed uses of the
8 water and the intent to use some of the water for the actual operation of the proposed repository.

9 Indisputably, one criterion the State Engineer must address with respect to *all* applications for
10 water is whether the proposed use of the water "threatens to prove detrimental to the public interest"
11 under the requirements of the water code. NRS 533.370(3). Even if the Court accepts the argument
12 that the State Engineer's partial reliance on NRS 459.910 is preempted, the State Engineer's authority
13 to reach a public interest determination pursuant to the water code remains intact. Clearly, if the Court
14 determines that the State Engineer's reliance on NRS 459.910 is preempted, the *only* appropriate
15 remedy would be a remand to the State Engineer for reconsideration of his public interest analysis
16 pursuant to the mandatory public interest requirement of the Nevada water statutes.

17 II. PROCEDURAL BACKGROUND OF THIS CASE.

18 In July 1997 DOE filed five applications⁷ with the office of the State Engineer under provisions
19 of state water law to permanently appropriate 430 acre-feet of groundwater in anticipation of a
20 congressional decision authorizing the construction and operation of a proposed high-level nuclear
21 waste repository at Yucca Mountain. In Ruling 4848 the State Engineer considered five days' worth of
22 testimony from a variety of experts and ultimately denied DOE's applications for the permanent use of
23 water. The State Engineer determined that the purposes intended for the water, namely for construction

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26 that will have a significant adverse effect on the present or future development of the
27 area in which such repository is located. The Secretary shall mitigate any such adverse
28 effects to the maximum extent practicable.

42 U.S.C. § 10144.

⁷ Application Nos. 63263, 63264, 63265, 63266, and 63267.

1 and operation of the proposed Yucca Mountain high-level nuclear waste repository,⁸ threaten to prove
2 detrimental to the public interest.

3 Following issuance of Ruling 4848, the United States filed both a complaint in this Court and a
4 “protective” notice of appeal in state district court in Tonopah.⁹ By order entered on September 21,
5 2000, this Court dismissed the federal complaint, abstaining from a review of Ruling 4848 on the
6 grounds that the appeal constitutes a state water law matter capable of resolution in state court. The
7 United States appealed this Court’s dismissal to the United States Court of Appeals for the Ninth
8 Circuit. Finding that the United States had set forth a not “insubstantial” claim of federal preemption,
9 the Ninth Circuit reversed and remanded the case to this Court for consideration of the federal
10 question.¹⁰ *See United States v. Morros*, 268 F.3d 695 (9th Cir. 2001). Now, in furtherance of the
11 appellate court’s remand, the Court has been directed to address the federal preemption claim allegedly
12 created by the State Engineer’s reliance on NRS 459.910, the provision of Nevada law which prohibits
13 the storage of nuclear waste in Nevada.

14 After initiating its appeal relative to Ruling 4848, DOE began pursuing extensions of its
15 temporary permits authorizing water use for Yucca Mountain site characterization. By letter dated
16 November 29, 2001, DOE requested extensions to its temporary water permits,¹¹ ostensibly to continue
17 its “industrial” use of water for *site characterization* purposes.¹² By the time the State Engineer
18 responded to DOE’s extension request for the temporary site characterization permits, the Secretary of
19 Energy had notified the Governor of his intention to recommend the Yucca Mountain site to the
20 President and had thus indicated that site characterization was complete.¹³ Based on DOE’s

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22 ⁸ Pursuant to his statutory directive, the State Engineer specifically determined that DOE intended the water for the
construction and operation of the proposed high-level nuclear waste repository at Yucca Mountain. *See* Ruling 4848 at 17.

23 ⁹ *United States v. State Engineer*, Case No. 15722, Fifth Judicial District Court, County of Nye, State of Nevada.

24 ¹⁰ By Order dated December 21, 2001, the Ninth Circuit also denied the State of Nevada’s Petition for Rehearing
and suggestion for Rehearing *En Banc* filed jointly by the Nevada Agency and the State Engineer.

25 ¹¹ Permit Nos. 57373, 57374, 57376, 58827, 58828, and 58829.

26 ¹² “Site characterization” constitutes statutorily-defined preparatory activities preceding recommendation of the
27 Yucca Mountain site for development of the proposed repository. 42 U.S.C. § 10133.

28 ¹³ On February 14, 2002, Secretary of Energy Spencer Abraham recommended the Yucca Mountain repository to
the President. On February 15, 2002, President George W. Bush recommended the repository to Congress.

1 representations that site characterization at Yucca Mountain is complete,¹⁴ State Engineer Hugh Ricci
2 denied the requested temporary extensions by letter dated February 7, 2002. The basis for the February
3 2002 denial is that DOE is no longer pursuing site characterization activities for which the water was
4 originally appropriated.

5 On or about March 7, 2002, the United States filed a First Amended Complaint for Declaratory
6 and Injunctive Relief, incorporating allegations relative to the State Engineer's February 2002 denial of
7 its temporary permits. On March 29, 2002, Nevada Agency and the Nevada State Engineer filed
8 Answers to the First Amended Complaint. In addition, Nevada Agency filed a Motion to Strike those
9 new paragraphs pertaining to the State Engineer's February 2002 temporary permit denial on the
10 grounds that such matters pertain to issues beyond those remanded to this Court by the Ninth Circuit.

11 On April 8, 2002, pursuant to the NWP, Governor Kenny Guinn submitted Nevada's official
12 notice of disapproval of the proposed Yucca Mountain repository to Congress, thereby vetoing the site
13 selection decision of the President. 42 U.S.C. § 10136(b). On May 8, 2002, the United States House of
14 Representatives voted to override the April 8, 2002, notice of disapproval filed by the Governor of
15 Nevada pursuant to Section 116 of the NWP. On July 9, 2002, the United States Senate voted to
16 override Nevada's notice of disapproval. Subsequently, on July 23, 2002, the President signed House
17 Joint Resolution 87 entitled "Approving the site at Yucca Mountain, Nevada, for the development of a
18 repository for the disposal of high-level radioactive waste and spent nuclear fuel, pursuant to the
19 Nuclear Waste Policy Act of 1982." Pub. L. No. 107-200, 116 Stat. 735 (2002) (Joint Resolution).

20 On December 3, 2002, the United States filed a renewed motion for preliminary injunction,
21 alleging an imminent shortage of potable water for site maintenance, fire protection, and other uses.
22 See Plaintiff's Renewed Motion for Preliminary Injunction. Following the entry of a stipulation
23 reached among the parties on December 18, 2002, the Court approved the stipulation and granted the
24 United States its motion. The Court vacated the hearing scheduled for December 23, 2002.

25 Now, in furtherance of its case relative to Ruling 4848, the United States has moved the Court
26 for entry of summary judgment. Because the United States has raised the issue of whether the Joint

27 ¹⁴ On January 10, 2002, the Secretary of Energy gave a 30-day notice to the Governor of Nevada of his intent to
28 recommend to the President approval of the Yucca Mountain site for the development of a high-level nuclear waste
repository.

1 Resolution preempts the State Engineer's ruling, Nevada Agency has moved this Court to stay these
2 proceedings until the United States Court of Appeals for the District of Columbia Circuit renders a
3 decision in late 2003 or early 2004. To avoid duplicative litigation and the unnecessary expenditure of
4 judicial resources, Nevada Agency has respectfully moved this Court to stay these proceedings pending
5 disposition of the litigation in the District of Columbia.

6 III. MATERIAL ISSUES OF FACT DEFEAT SUMMARY JUDGMENT.

7 FED. R. CIV. P. 56(c) requires that the Court must view the evidence in the light most favorable
8 to the nonmoving party when it determines whether there are genuine issues of material fact sufficient
9 to support summary judgment. *County of Tuolumne v. Sonora County Hosp.*, 236 F.3d 1148, 1164 (9th
10 Cir. 2001). The United States bears the initial burden of establishing the absence of a genuine issue of
11 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). In the instant case, in light of the
12 numerous material issues of fact contained in the following arguments and in the Affidavits of both R.
13 Michael Turnipseed and Robert R. Loux, the United States has failed to meet its burden.

14 The following material issues of fact defeat DOE's motion for summary judgment:

- 15 (1) Whether the Yucca Mountain site is capable of ensuring that geologic
16 isolation of the high-level nuclear waste is the primary site selection
17 criteria required by the NWPA.
- 18 (2) Whether the Joint Resolution, even if it is determined to be lawful,
19 speaks to the public interest at all.
- 20 (3) Whether unresolved public health and safety issues could support any
21 inference whatsoever as to a congressional public interest finding.
- 22 (4) Whether a prospective, three to four year licensing proceeding before
23 the United States Nuclear Regulatory Commission (NRC) designed to
24 insure public health and safety can be prejudged to constitute a public
25 interest finding.
- 26 (5) Whether the State Engineer solely relied on NRS 459.910 in reaching
27 his state public interest determination.

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1 (6) Whether the administrative record before the State Engineer contains
2 substantial evidence to support an alternative public interest finding by the
3 State Engineer in the event of a remand.

4 A. The NWPA Requires That Any Repository Must Rely Primarily on Geologic Isolation.

5 Embodied in the NWPA is the fundamental health and safety concept that the permanent
6 disposal of high-level radioactive waste and spent nuclear fuel requires geologic isolation. Congress,
7 therefore, defined the “repository” to be constructed under the NWPA as “any system . . . that is
8 intended to be used for, or may be used for, the permanent deep geologic disposal of high-level
9 radioactive waste and spent nuclear fuel.” 42 U.S.C. § 10101(18). To locate sites that meet this
10 fundamental criterion, Congress required DOE to “issue general guidelines for the recommendation of
11 sites for repositories,” and directed that “[s]uch guidelines shall specify detailed geologic
12 considerations that shall be primary criteria for the selection of sites in various geologic media.” 42
13 U.S.C. § 10132(a).

14 The capability of Yucca Mountain to ensure geologic isolation is the subject matter of litigation
15 entitled *State of Nevada, et al. v. United States Department of Energy, et al.* (D.C. Circuit No. 02-
16 1077). This litigation, among other things, challenges the revised siting guidelines issued by the
17 Secretary of Energy which dramatically depart from the NWPA’s primary directive that the repository
18 provide geologic isolation of nuclear waste from the human and natural environment. It is Nevada’s
19 contention in that litigation that DOE’s abandonment of geologic isolation as a primary criterion for
20 selection of the Yucca Mountain site is unlawful and effectively invalidates DOE’s subsequent
21 selection of the Yucca Mountain site. Consequently, the Joint Resolution did not operate to ratify
22 DOE’s unlawful action or to shield DOE’s unlawful action from judicial review in the case pending in
23 the D.C. Circuit.

24 As testified to in the Affidavit of Robert R. Loux (Loux Affidavit), DOE’s own performance
25 calculations demonstrate that the site’s geology is very poor and requires the use of engineering
26 measures for over 99 percent of Yucca Mountain’s projected performance. *See* Loux Affidavit, ¶ 11,
27 attached hereto as Exhibit A. The issue of Yucca Mountain’s geologic capability is fundamental to the
28 legitimacy of the Joint Resolution. The adequacy of Yucca Mountain’s geology is key to DOE’s

1 compliance with the NWPA and presents this Court with a serious material issue of fact. Moreover, as
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3 more fully discussed below, for purposes of DOE's preemption argument, there can be no preemption
4 where the federal law itself is invalid. *Free v. Bland*, 369 U.S. 663 (1962).

5 B. The Joint Resolution Neither Defines the Public Interest Nor Preempts the Application
6 of Nevada Water Law.

7 The Joint Resolution itself is one sentence with wording prescribed by Congress in the NWPA
8 over twenty years ago: "That there hereby is approved the site at Yucca Mountain, Nevada, for a
9 repository, with respect to which a notice of disapproval was submitted by the Governor of the State of
10 Nevada on April 8, 2002." 42 U.S.C. § 10145.

11 A natural interpretation of the Joint Resolution is that it overrides or cancels out Nevada's
12 disapproval of the President's designation of the Yucca Mountain site as the location for development
13 of the nation's first-of-a-kind high-level nuclear waste repository. There is nothing in the language of
14 the Joint Resolution which pertains to a congressional finding of the public interest or a congressional
15 intent to preempt state water law. Admittedly, despite the importance of Nevada's water law to
16 Nevada, that relative importance of state water law is not material *when there is a valid federal law*.
17 *Free v. Bland*, 369 U.S. at 668. Here there is a significant issue whether the Joint Resolution could
18 operate to ratify DOE's and the Presidential actions which are unlawful under the NWPA.¹⁵

19 Under the Supremacy Clause of the United States Constitution, state law is preempted when it
20 conflicts *specifically* with a federal law. U.S. CONST. art. VI. There are only three circumstances in
21 which state law is preempted by federal law: (1) where Congress expressly provides for preemption
22 ("express preemption"), (2) where federal law completely occupies the field ("field preemption"), and
23 (3) where there is a specific conflict between state and federal law ("conflict preemption"). *Southern*
24 *Pac. Transp. Co. v. Public Util. Comm'n*, 9 F.3d 807, 810 (9th Cir. 1993).

25 Conflict preemption occurs where it is impossible to comply with both state and federal

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27 ¹⁵ To the extent that the Resolution operates to shield DOE's arbitrary selection of the Yucca site from judicial
28 review under the NWPA and does so without in any way enacting new rational and neutral criteria for the selection of a site,
it is invalid under the Constitution for the reasons which will be litigated in Nevada's constitutional case. *See State of*
Nevada, et al. v. United States of America, et al. filed on December 9, 2003, in the United States Court of Appeals for the
District of Columbia, Case No. 03-1009. See Petition for Review, attached hereto as Exhibit C.

1 requirements or where state law stands as an obstacle to the accomplishment and execution of the full
2 purposes and objectives of Congress. *Id.* For the reasons outlined below, the State Engineer did not
3 comply or fail to comply with the statutory prohibition against nuclear waste storage in the state. He
4 merely relied on NRS 459.910 as an indicator of what the Nevada Legislature believes the public
5 interest to be. Assuming for the sake of argument that if one element of the State Engineer's ruling is
6 preempted, the State Engineer's ultimate authority under the water statutes still enables him to make a
7 public interest finding on other grounds. If the entire field of state regulation of water were preempted,
8 then certainly DOE would not have applied for water under state law in the first instance. Notably,
9 Congress did address the issue of water rights in the NWPA and obviously determined that DOE should
10 be held to state law requirements to obtain water. *See* 42 U.S.C. § 10144.

11 For purposes of the instant motion for summary judgment, the United States presents the Court
12 with a list of supposed uncontested facts. *See* United States' Statement of Uncontested Facts. Item 13
13 states: "DOE needs water to continue the activities mandated under the Joint Resolution and the
14 NWPA, particularly those regarding the development of a repository at Yucca Mountain."

15 Not only is the Joint Resolution silent on what constitutes the "public interest" and on activities
16 relating to water, but there are no activities mandated by the Joint Resolution. The activities to be
17 undertaken by DOE are contained in the NWPA. As explained below, during this hiatus period before
18 DOE files its license application with NRC, DOE's needs for water are minimal. Clearly, even if
19 Nevada is (as DOE argues) required to allocate water to the extent necessary to allow DOE to carry out
20 activities mandated by the NWPA, the activities so "mandated" do not include construction or
21 operation of the repository because, under the NWPA, DOE needs a license for these activities and does
22 not have one. In fact, given the recent agreement with the State Engineer to accommodate DOE's
23 potable water needs, DOE cannot be prejudiced by a stay of this Court's deliberations, or alternatively,
24 DOE would not be prejudiced by a remand to the State Engineer, particularly given that DOE has
25 sufficient water at its disposal for its needs before it files its license application with the NRC.

26 Although DOE repeatedly asserts that the Joint Resolution constitutes Congress's determination
27 that the Yucca Mountain Project is in the public interest, there is nothing in the Joint Resolution, either
28 directly or indirectly, which addresses the issue of the public interest. The motivation of the

1 congressmen and senators cannot be determined from the face of the Joint Resolution. Perhaps the vote
2 to override Nevada's veto rested in a desire to remove nuclear waste from the senators' own states or
3 perhaps there is a misapprehension of DOE's ability, or lack thereof, to comply with the law. Perhaps
4 even, the influence of the powerful nuclear power industry is so pervasive that concerns for public
5 health and safety are subordinated to political ends. What is undeniable, however, is that the Joint
6 Resolution itself does not address the public interest.

7 There are literally hundreds of unresolved public health and safety issues at Yucca Mountain.
8 Loux Affidavit, ¶ 9. In reality, given the hundreds of unresolved public health and safety issues
9 incident to the world's biggest public works project, a plausible conclusion is that the proposed
10 repository may not be in the national public interest. Regardless of the political decision to override
11 Nevada's notice of disapproval, the ultimate legality and technical viability of the proposed high-level
12 repository at Yucca Mountain will be resolved in the courts and before the NRC. At the very least,
13 there is a genuine issue of material fact as to what the public interest truly is and whether it coincides
14 with DOE's interpretation of the so-called public interest as divined from the Joint Resolution.

15 C. Ruling 4848 Is Not Based Entirely on NRS 459.910.

16 The State Engineer's statutory duties include administering the appropriation and management
17 of Nevada's public waters pursuant to NRS chapters 533 and 534. A decision of the State Engineer is
18 declared by statute to be prima facie correct and the burden of proof is imposed upon the party
19 attacking the same. NRS 533.450(9). A reviewing court's function is to review the evidence
20 supporting the State Engineer's decision to determine whether the evidence substantially supports the
21 decision. If the evidence supports the State Engineer's decision, the Court is bound to sustain it. *State*
22 *Engineer v. Curtis*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985). Stated otherwise, "[a] district court is
23 not free to substitute its judgment for that of the Engineer" *Id.*

24 The Nevada Supreme Court has limited the function of a reviewing court with respect to the
25 decisions of the State Engineer. A party aggrieved by a decision of the State Engineer is not entitled to
26 a *de novo* hearing in a reviewing court, and the review conducted by the court is "in the nature of an
27 appeal" characterized by "informal and summary proceedings." *Revert v. Ray*, 95 Nev. 782, 786, 603
28 P.2d 262 (1979). The Nevada Supreme Court has emphasized that:

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3 [N]either the district court nor this court will substitute its judgment for
4 that of the State Engineer; we will not pass upon the credibility of the
5 witnesses nor reweigh the evidence, but limit ourselves to a determination
6 of whether substantial evidence in the record supports the State Engineer's
7 decision.

6 *Id.*

7 Although this Court is free to decide purely legal issues without deference to the State
8 Engineer's conclusions of law, the State Engineer's legal conclusions are necessarily closely related to
9 his view of the facts and are therefore entitled to deference as long as they are supported by substantial
10 evidence. *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986). While not controlling, the
11 State Engineer's interpretation of his statutory authority is persuasive. *State Engineer v. Morris*, 107
12 Nev. at 701, 819 P.2d at 205 (quoting *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266
13 (1988).

14 Consistent with the law as well as the long-standing tradition of federal deference to western
15 water law, DOE applied to appropriate groundwater pursuant to Nevada's water statutes. *See, e.g.,*
16 *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). NRS 533.370
17 addresses approval or rejection of applications. NRS 533.370(3) provides, in pertinent part:

18 Except as otherwise provided in subsection 6, where there is no
19 unappropriated water in the proposed source of supply, or where its
20 proposed use . . . conflicts with existing rights . . . or *threatens to prove*
21 *detrimental to the public interest*, the state engineer shall reject the
22 application and refuse to issue the requested permit. [Emphasis added.]

21 DOE argues that:

22 The record of the administrative proceedings and the State Engineer's
23 decision shows [sic] that no grounds existed to deny DOE's permits under
24 the 'water-availability' or 'use-conflict' prongs of N.R.S. § 533.370 and
25 the State Engineer's decision was based on a state statute that is
26 superceded by federal law and, thus, is arbitrary, capricious and
27 characterized by an abuse of discretion.

26 U.S. Memorandum at 12. Regardless of DOE's persistent attempts to denigrate the public interest
27 prong of the State Engineer's analysis, the statute does not differentiate among the three criteria. If the
28 proposed use of the water "threatens to prove detrimental to the public interest," the State Engineer

1 shall reject the applications. The provisions of Nevada water law “not only lay down the method of
2 procedure, but strictly limit it to that provided.” *Application of Filippini*, 66 Nev. 17, 27, 202 P.2d 535,
3 540 (1949). If the State Engineer determines that a proposed use of water threatens the public interest,
4 he is duty bound to reject the application.

5 Notwithstanding DOE’s frequent claims that Ruling 4848 is based exclusively on NRS 459.910,
6 the history of this matter supports an entirely different conclusion. At the very least, there are disputed
7 material issues of fact relative to Ruling 4848 which make summary judgment inappropriate.

8 The State Engineer presided over protracted administrative proceedings before rendering Ruling
9 4848. Before the administrative hearing, Nevada Agency, in its role as a protestant, filed a motion with
10 the State Engineer to dismiss DOE’s applications, relying on a number of grounds including NRS
11 459.910 and the Nevada Legislature’s expressed prohibition against the storage of high-level
12 radioactive waste in Nevada. *See* Affidavit of R. Michael Turnipseed, P.E. (Turnipseed Affidavit), ¶ 8,
13 attached hereto as Exhibit B. On August 28, 1998, former State Engineer Turnipseed denied Nevada
14 Agency’s motion to dismiss, determining, *inter alia*, that NRS 459.910 did not prevent DOE from filing
15 the subject water right applications. Turnipseed Affidavit, ¶ 9. Clearly this fact alone shows that the
16 State Engineer was well aware that NRS 459.910 had been enacted by the Nevada Legislature and he
17 could, on that ground, have summarily denied DOE’s applications pursuant to Nevada Agency’s
18 motion to dismiss in 1998.

19 Later, during the actual contested hearing, Nevada Agency presented evidence through a variety
20 of witnesses of the adverse consequences to Nevada if the proposed nuclear waste repository at Yucca
21 Mountain is constructed and operated. Turnipseed Affidavit, ¶¶ 12, 13. Fundamental to Ruling 4848 is
22 the State Engineer’s ultimate determination that the water is intended for both construction *and*
23 operation of the proposed high-level nuclear waste repository at Yucca Mountain. Turnipseed
24 Affidavit, ¶ 15. Rather than relying exclusively on NRS 459.910 as DOE argues, the State Engineer
25 conducted an extensive administrative hearing to better understand DOE’s proposed uses of water.
26 During the administrative hearing, Nevada Agency presented evidence through a series of witnesses
27 that the proposed repository at Yucca Mountain poses deleterious risks for Nevada’s environment and
28 economy. Turnipseed Affidavit, ¶ 12.

1 The fact that the State Engineer heard evidence upon other “public detriment” grounds and was
2 persuaded by them is evident from the length of Ruling 4848 and the references the State Engineer
3 made to them. At pages 16-20 of the ruling, the State Engineer specifically referred to the testimony of
4 numerous witnesses bearing upon some of the other grounds offered by Nevada Agency: “Water would
5 be used for the decontamination of equipment contaminated with radiation”; that the proposed actions
6 of DOE “could cause people to consider moving out of the area”; “could cause people to reconsider
7 investing in southern Nevada”; “could cause people to be concerned over the risk associated with the
8 transportation of materials to the site” as well as testimony that it is “not in the economic interest of
9 Nevada to have a high-level nuclear waste repository at Yucca Mountain.”

10 The administrative record and Ruling 4848 itself make clear that there is substantial evidence in
11 the record supporting a number of different grounds advanced by Nevada Agency for the State
12 Engineer to reject the permits. The State Engineer’s conclusion that the Legislature had addressed its
13 view of the public interest when it enacted NRS 459.910 does not mean that the State Engineer ruled
14 against Nevada Agency on the other grounds. He simply did not reach those reasons because he did
15 not, at the time, see the need to. Turnipseed Affidavit, ¶ 20.

16 DOE seems to suggest that Nevada’s history of opposition to the Yucca Mountain dump
17 invalidates the integrity of the State Engineer’s proceedings. *See, e.g.*, U.S. Memorandum at 2 and 3.
18 Despite DOE’s pejorative tone, it was only upon reaching the conclusion that DOE’s intended purpose
19 for the water includes the actual storage of nuclear waste that the State Engineer considered NRS
20 459.910 as indicia of the Nevada Legislature’s view of the public interest. Only when the proposed use
21 was understood to include the actual storage of nuclear waste did the State Engineer invoke the
22 legislative intent as he understood it. Turnipseed Affidavit, ¶¶ 15, 17. Regardless of DOE’s insistence
23 that Ruling 4848 is preempted in its entirety, there is an obvious material issue of fact as to the extent to
24 which the State Engineer relied on NRS 459.910 in reaching his public interest determination.

25 Relying on the one Nevada Supreme Court decision addressing the “public interest” criteria in
26 Nevada’s water code, *Pyramid Lake Paiute Tribe of Indians v. Washoe County (Honey Lake)*, 112 Nev.
27 743, 918 P.2d 697 (1996), the State Engineer determined that the Nevada Legislature had offered an
28 interpretation of the public interest. Turnipseed Affidavit, ¶¶ 16, 18. The State Engineer

1 acknowledges,

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4 however, that the administrative record contains substantial additional alternative evidence independent
5 of NRS 459.910 upon which a public interest determination could be reached. Turnipseed Affidavit,
6 ¶ 20.

7 Thus not only the record upon which the State Engineer ruled, but the actual ruling itself makes
8 clear that there are a number of different “public interest” grounds advanced by Nevada Agency for the
9 State Engineer to have rejected DOE’s applications. Arguably, to the extent NRS 459.910 is preempted
10 by federal law, Ruling 4848 may be subject to an analogous set of circumstances faced by the State
11 Engineer in the *Honey Lake* case. See *Pyramid Lake Paiute Tribe of Indians v. Washoe County (Honey*
12 *Lake)*, 112 Nev. 743, 918 P.2d 697 (1996). In *Honey Lake*, the reviewing court determined that the
13 State Engineer did not specifically determine whether the applications were detrimental to the public
14 interest and remanded the matter to the State Engineer for further consideration of that criterion. In the
15 instant case, while presented with numerous grounds and substantial evidence upon which to have
16 based his public interest determination, the State Engineer limited himself to certain evidence and to the
17 Nevada Legislature’s expression of the public interest as expressed in NRS 459.910. Before the Court
18 can determine the legality of the State Engineer’s ruling, the Court should remand the matter to the
19 State Engineer to ascertain what his ruling would have been without his reliance on NRS 459.910.

20 D. DOE Is Not Yet an Applicant for an NRC License and as a Prospective Applicant Has
21 Minimal Needs for Water.

22 By letter dated November 29, 2001, DOE requested extensions to its temporary water permits,
23 for the purpose of continuing its “industrial” use of water for *site characterization* purposes. By the
24 time the State Engineer responded to DOE’s extension request for the temporary site characterization
25 permits, the Secretary of Energy had notified the Governor of his intention to recommend the Yucca
26 Mountain site to the President and had thereby indicated that site characterization is complete. Based
27
28

1 on DOE's own representations that site characterization at Yucca Mountain is complete,¹⁶ State
2 Engineer Hugh Ricci denied the requested temporary extensions by letter dated February 7, 2002. The
3 ///
4 basis for the February 2002 denial is that DOE is no longer pursuing site characterization activities for
5 which the water was originally appropriated.

6 With site characterization over, according to the United States, "[t]he NWPA now directs that
7 DOE therefore must expeditiously proceed to file a request with the NRC for authority to construct a
8 repository at Yucca Mountain." U.S. Memorandum at 17-18. The purpose of the licensing proceeding
9 before the NRC is to determine whether the proposed repository is in fact licenseable and meets public
10 health and safety standards. Loux Affidavit, ¶ 13. Given the multitude of unanswered public health
11 and safety issues, there is a material issue of fact as to whether the construction of the proposed
12 repository does in fact represent the public interest. Loux Affidavit, ¶ 9.

13 Nonetheless, DOE asserts that it "must continue to maintain and operate its facilities at the
14 Yucca Mountain site" and supports that with a footnote which states, "[t]he DOE Organization Act
15 independently authorizes the Secretary to provide for the maintenance and operation of DOE facilities
16 as he deems necessary." 42 U.S.C. § 7257, U.S. Memorandum at 18 n.6. Contrary to DOE's argument
17 here, § 7257 actually provides that "[t]he Secretary is authorized to acquire, construct, improve, repair,
18 operate, and maintain laboratories, research and testing sites, and facilities, quarters and related
19 accommodations for employees. . . ." Clearly, it is debatable whether § 7257 has any applicability here.

20 The United States argues that because the Joint Resolution was enacted to override Nevada's
21 notice of disapproval, certain scientific work necessitating the use of water must continue during this
22 period of time while DOE is preparing a license application for submission to the NRC. U.S.
23 Memorandum at 24. The contention that water is needed for continued "scientific" tests during this
24 pre-licensing phase is not supported by the law.

25 Section 114(b) of the NWPA provides that DOE must submit a license application within ninety
26 days of any congressional override of Nevada's notice of disapproval. 42 U.S.C. § 10134(b). Given

27 ¹⁶ On January 10, 2002, the Secretary of Energy gave a 30-day notice to the Governor of Nevada of his intent to
28 recommend to the President approval of the Yucca Mountain site for the development of a high-level nuclear waste
repository.

1 this relatively short period for DOE to actually file a license application with the NRC, it is not
2 unreasonable to assume that Congress anticipated little if any additional site-related activity occurring
3 during the modest time period following Congress's decision, but before DOE submits a license
4 application. DOE's public announcement that it will not file a license application until 2004 does not
5 change the statutory requirements under which the agency must operate. Beyond that, Congress
6 provided in Section 114(d) of the NWPA that NRC may spend three years, or even four (upon its
7 request), to consider and rule on DOE's license application. 42 U.S.C. § 10134(d). Given the NRC's
8 overriding mandate to license the repository only if public health and safety are proven to be duly
9 protected, it is ludicrous for DOE to suggest that by its resolution, Congress affirmatively rendered a
10 decision on the issue of possible detriment to the citizens of Nevada. Rather, DOE is attempting to
11 contort what was at most the preemption of a statute which automatically found public detriment to
12 exist (thus leaving a statutory silence on the issue), into an affirmative finding of no detriment. The
13 preemption at most removed one ground for the State Engineer's ruling, but left a five-day record of
14 evidence upon which a detriment finding can readily be based in the void left by the preempted statute.

15 Notably, 10 C.F.R. pt. 63 confers no independent jurisdiction on DOE to continue its scientific
16 activities following site characterization prior to submission of a license application. Part 63 is in fact a
17 regulation applicable to the NRC and its licensing of the proposed repository once an application is
18 submitted by DOE. Thus, Part 63 governs the *NRC's* conduct in its review and decision-making
19 process related to DOE's license application for construction authorization, operation, and permanent
20 closure of the repository. Part 63 is not a regulation imposing affirmative duties on DOE independent
21 of such a license application.

22 At present, DOE is a "prospective applicant" only. 10 C.F.R. § 63.16(g). Part 63 imposes no
23 obligations on a "prospective applicant" other than to report to the NRC on site characterization
24 activities not less than once every six months. 10 C.F.R. § 63.16(b). The NRC is authorized by Part 63
25 to review those activities, visit and inspect the site, and comment to DOE in what is described as an
26 "informal conference between a prospective applicant and the NRC staff . . . and [is] not part of a
27 proceeding under the Atomic Energy Act of 1954, as amended." 10 C.F.R. § 63.16(g).

1 Part 63 delineates the licensing process into “stages.” *See* § 63.102(c). The first stage is “[t]he
2 site characterization stage, when the performance confirmation program is started. . . .” *Id.* This stage
3 begins “before submission of a license application.” *Id.* It ends, according to the NWPA Section 114,
4 when the Secretary makes his site recommendation to the President. 42 U.S.C. § 10134. Consistent
5 with the State Engineer’s decision concerning the temporary permits, the Secretary ended site
6 characterization on February 14, 2002.

7 The next stage is the “construction stage,” which “would follow after the issuance of a
8 construction authorization.” *Id.* This stage is followed by the “operations stage,” during which
9 emplacement of the wastes occurs. *Id.* Finally, the “permanent closure stage” represents the end of the
10 performance confirmation program. *Id.*

11 “Performance confirmation” is defined in Part 63 as “the program of tests, experiments, and
12 analyses that is conducted to evaluate the adequacy of the information used to demonstrate compliance
13 with the performance objectives in subpart E” of Part 63. 10 C.F.R. § 63.2. Subpart E describes
14 “performance confirmation” as a program “conducted to evaluate the adequacy of assumptions, data,
15 and analyses that led to the findings that permitted *construction* of the repository. . . .” 10 C.F.R.
16 § 63.102(m) (emphasis added).

17 Although Part 63, Subpart F, states that the performance confirmation program “must have been
18 started during site characterization, and it will continue until permanent closure,” 10 C.F.R. §
19 63.131(b), there is nothing in Part 63 to suggest that performance confirmation should continue to occur
20 outside any of the various licensing stages identified elsewhere in Part 63. Instead, performance
21 confirmation occurs during site characterization, and it continues in each of the other phases of the
22 licensing process. At the present time, DOE is not in any of the identified licensing phases. Therefore,
23 10 C.F.R. § 63.132 describes performance confirmation as “a continuing program” that occurs “during
24 repository construction and operation. . . .”

25 The only Yucca Mountain-related activity that occurs at the NRC following site characterization
26 but before construction authorization is the licensing proceeding itself. The licensing proceeding does
27 not begin until DOE submits a license application. Because DOE has not submitted its license
28 application, the NRC has imposed no requirements on DOE to do performance confirmation at the

1 Yucca Mountain site.

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7 IV. CONCLUSION.

8 For all the reasons set forth above, Nevada Agency respectfully submits that the United States'
9 Motion for Summary Judgment should be denied. In view of the serious material issues of fact,
10 summary judgment is clearly inappropriate.

11 DATED this _____ day of January, 2003.

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CERTIFICATE OF SERVICE

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I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this _____ day of January, 2003, I deposited for mailing at Carson City, Nevada, postage prepaid, a true and correct copy of the foregoing document, addressed as follows:

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