

Case #89-51
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MCKAY FILES SUIT AGAINST ENERGY SECRETARY JAMES D. WATKINS

Carson City -- Attorney General Brian McKay filed a lawsuit today against Energy Secretary James D. Watkins, charging Watkins with violations of the Nuclear Waste Policy Act by continuing to target Yucca Mountain as the site of a high-level nuclear waste repository.

The suit, filed in the 9th Circuit Court of Appeals in San Francisco, seeks a declaration by the court that Assembly Joint Resolution 4 and Assembly Joint Resolution 6, adopted by the 1989 Nevada Legislature and signed by Governor Bob Miller, constitute a notice of disapproval of the Yucca Mountain site. Furthermore, it seeks to enjoin the Department of Energy from conducting any further studies of the site.

"Despite our notice to Congress that Nevada has disapproved the Yucca Mountain site, and Congress' silent acceptance of that fact, Secretary Watkins continues to pursue the project," McKay said. "By doing so, the DOE is in clear violation of the law as dictated by the Nuclear Waste Policy Act."

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Section 116(b) of the Act authorizes the state of Nevada to submit a notice of disapproval of the site to Congress. Under the law, Congress then has 90 days to override the disapproval notice. McKay in November issued an opinion saying that because Congress failed to respond to the notice conveyed with the adoption of AJR 4 and AJR 6, the designation of the Yucca Mountain site was disapproved as a matter of law.

The lawsuit charges that in a report to Congress on November 29, Watkins "...makes clear that the Department of Energy, under his direction, is pursuing the site...in disregard of Nevada's notice of disapproval and Congress' acquiescence in such notice."

Watkins' actions, the suit claims, "are arbitrary, capricious, in excess of his statutory jurisdiction and authority, and contrary to constitutional right." In addition, McKay charges Watkins with ignoring technical factors which would disqualify the site for further consideration as a repository.

The legal filing asks the court for an order directing Watkins to terminate further study or consideration of the Yucca Mountain site.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. _____

* * *

STATE OF NEVADA,

Petitioner,

vs.

JAMES D. WATKINS, SECRETARY OF
THE UNITED STATES DEPARTMENT
OF ENERGY,

Respondent.

PETITION
FOR
JUDICIAL REVIEW

I. FIRST CAUSE OF ACTION

1.1 The State of Nevada, by its Attorney General, Brian McKay, hereby petitions the Court for judicial review of certain final decisions and actions of James D. Watkins, Secretary of Energy, Respondent herein, and the failure of Respondent Watkins to take an action required by the Nuclear Waste Policy Act (NWPO), as amended, 42 U.S.C. 10101 et seq., as is set forth hereinafter.

1.2 The original and exclusive jurisdiction of the Court is set forth in Sec. 119(a)(1)A, B and C of the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10139 (a)(1)A, B and C (hereinafter the "Act").

1.3 The Petitioner State of Nevada is a member state of the United States. On February 2, 1983, the Governor and Legislature of the State of Nevada were notified pursuant to Section 116(a)

of the Act, 42 U.S.C. 10136(a), that a repository for the disposal and storage of high-level radioactive waste and spent nuclear fuel may be located in a tuff medium at Yucca Mountain in southern Nevada. On December 22, 1987, the Congress enacted the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203. Title V of the Omnibus Budget Reconciliation Act contains amendments to the NWPA, identified as the Nuclear Waste Policy Amendments Act of 1987 (NWPAA). In the 1987 amendments to the Act Congress selected the Yucca Mountain site as the only site to be characterized for possible development as a repository site.

1.4 On April 19, 1989, the acting Governor of the State of Nevada, Robert Miller, signed into law two resolutions of the Nevada Legislature, AJR 4 and AJR 6. These resolutions expressed the State of Nevada's adamant opposition to the location of a high-level nuclear waste repository in the State of Nevada and withheld the State's and Legislature's consent and refused the cession of any jurisdiction to the United States for repository purposes. Copies of said resolutions were transmitted to the President of the United States, the Vice President of the United States as the presiding officer of the Senate, the Speaker of the House of Representatives and to each member of the Nevada Congressional Delegation.

1.5 In addition to independent constitutional right and power, Governor Miller and the Nevada Legislature are authorized by Section 116(b)(1), 42 U.S.C. 10136(b)(1), of the Act to submit a notice of disapproval to the Congress, disapproving the Yucca

Mountain site designation. Governor Miller regards AJR 4 and AJR 6 as his notice of disapproval under Section 116 of the Act.

1.6 On November 1, 1989, the Nevada Attorney General, Brian McKay, confirmed by a written opinion that "a valid and effective notice of disapproval has been submitted to both houses of Congress."

1.7 Congress failed to enact, within 90 days of continuous session, a joint resolution overriding Nevada's notice of disapproval as provided in Section 115(c) of the Act, 42 U.S.C. 10135(c), and, therefore, the designation of the Yucca Mountain site was disapproved as a matter of law.

1.8 On November 29, 1989 Respondent Watkins transmitted a "Report to Congress on Reassessment of the Civilian Radioactive Waste Management Program". The Secretary recognized that "on November 1, 1989, the State Attorney General issued an opinion that the State had disapproved the site within the meaning of Section 115 of the Nuclear Waste Policy Act . . . ". The Secretary's Report makes clear that the Department of Energy, under his direction, is pursuing the siting of a high-level nuclear waste repository at Yucca Mountain in disregard of Nevada's notice of disapproval and Congress' acquiescence in such notice.

1.9 Respondent Watkins actions are arbitrary, capricious, in excess of his statutory jurisdiction and authority, and contrary to constitutional right.

1.10 The State of Nevada is entitled to declaratory and injunctive relief.

II. SECOND CAUSE OF ACTION

2.1 Petitioner State of Nevada incorporates herein by reference the allegations in Paragraphs 1.1 through 1.10 of its First Cause of Action.

2.2 On November 14, 1989, Nevada's Governor Miller transmitted to Respondent Watkins the State of Nevada's notice that the Yucca Mountain site is disqualified from further consideration based upon the presence of certain disqualifying technical conditions in relation to criteria established by the Department of Energy in guidelines promulgated in 10 C.F.R. Part 960 pursuant to Section 112(a), 42 U.S.C. 10132(a), of the Act.

2.3 The State of Nevada's opposition to the proposed repository, evidenced by its legislative and gubernatorial submittal of a notice of disapproval, is a further disqualifying factor rendering the Yucca Mountain site unsuitable for development as a repository.

2.4 As provided in Section 113(c)(3) of the Act, 42 U.S.C. 10133(c)(3), Respondent Watkins is required to terminate all site characterization activities at the Yucca Mountain site, reclaim the site, and report to Congress the need for new legislative authority when he determines the Yucca Mountain site is unsuitable for development as a repository.

2.5 In disregard of his duties under Section 113(c)(3) of the Act the Secretary reported to Congress on November 29, 1989 his commitment to proceed with the evaluation and characterization of the Yucca Mountain site for the purpose of siting a repository.

2.6 Respondent Watkins actions are arbitrary, capricious, an abuse of discretion, in excess of his statutory jurisdiction and authority, and contrary to constitutional right.

2.7 The State of Nevada is entitled to additional declaratory relief, injunctive relief and mandamus.

PRAYER FOR RELIEF

WHEREFORE, with respect to Petitioner's First Cause of Action, Petitioner prays for relief as follows:

1. For a declaration of the Court that Assembly Joint Resolutions, AJR 4 and AJR 6, enacted by the Nevada Legislature and signed by Governor Miller be adjudged a valid and effective notice of disapproval and Congress' acquiescence be adjudged a disapproval of the Yucca Mountain site for any further study or development as a repository.

With respect to the Petitioner's Second Cause of Action, Petitioner Prays for relief as follows:

2. For a declaration of the Court that the Yucca Mountain site is unsuitable for development as a repository;

3. For an Order directing Secretary of Energy Watkins to terminate site characterization activities at the Yucca Mountain

site, to reclaim the site and to report to Congress for new legislative authority;

4. For the Court's Order directed to Respondent Secretary of Energy Watkins or to his successor enjoining further site characterization activities and other activities associated with the siting of a repository at the Yucca Mountain site;

5. For costs of suit herein; and

6. For such other and further relief as to the Court appears equitable and proper.

DATED: This 26th day of December, 1989.

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