DOE/NE (196)

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November 1, 1989

The Honorable Robert Miller
Governor of the State of Nevada
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Carson City, Nevada 89710

Dear Governor Miller:

You have requested an opinion from the Attorney General concerning the legal implications for Nevada's permitting agencies who are considering applications filed by the Department of Energy for environmental permits attending Congress' failure to act after receiving the State's notice of disapproval of the selection of Yucca Mountain as a high-level radioactive repository site. We have taken the liberty to couch your request into the following question:

QUESTION

Given that Nevada has submitted a "notice of disapproval" pursuant to Section 116(b) of the Nuclear Waste Policy Act of 1982 as amended and that Congress has not enacted, within 90 days of continuous session, a "joint resolution of repository siting approval" pursuant to Section 115 (c), should the applications for a permit for the appropriation of water, for an air quality surface disturbance permit and for an underground injection control (UIC) permit for tracer tests, which were filed by the Department of Energy with State agencies for site characterization purposes, be addressed in a manner other than upon their merits as is customarily prescribed by the statutes which govern the permitting authority of the State Engineer and the Division of Environmental Protection?

FACTUAL BACKGROUND

A. The Federal Action

On February 2, 1983, the Secretary of Energy designated nine sites in six states pursuant to Section 116(a), 42 U.S.C. 10136(a), of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10101 et seq., as potentially acceptable sites for a federally constructed high-level radioactive waste repository. On May 28, 1986, the Secretary nominated five sites, one each in Mississippi, Texas, Utah, Washington and Nevada as suitable for characterization. See 51 Federal Register 19783. He also selected the sites in Texas, Washington and Nevada for actual characterization, pursuant to Section 112(b)(1)(B), 42 U.S.C. 10132(b)(1)(B), and made a preliminary determination that the three sites were suitable for development as repositories pursuant to Section 114(f), 42 U.S.C. 10134(f), consistent with the guidelines promulgated under Section 112(a), 42 U.S.C. 10132(a). At the same time he bowed to political pressure from the eastern states that had potentially acceptable granite sites and, contrary to Section 112, indefinitely postponed the search for a second repository site.

On December 15, 1987 conferees from the House of Representatives and the Senate met and agreed to substantively redirect the nuclear waste program by selecting Yucca Mountain, Nevada, as the sole site to be characterized, thus abandoning the site selection methodology prescribed in the Nuclear Waste Policy Act. The extensive amendments are contained in Title V of the Budget Reconciliation Act, Public Law 100-203, referred to as the Nuclear Waste Policy Amendments Act of 1987 (Amendments Act). No Nevada representatives were included in any of the conference committee discussions. In this milieu of political isolation Nevada was selected to shoulder the entire burden of a highly toxic waste disposal facility no other State wanted.[1]

In anticipation of site characterization, the Department of Energy issued its Site Characterization Plan on December 28, 1988, a nine-volume report describing the anticipated activities underlying its proposed investigation to determine whether Yucca Mountain is suitable for the development of a repository. In order for site characterization to proceed, it was necessary for the DOE to obtain a variety of land use, natural resource, and environmental permits and approvals from both federal and state agencies. On January 20, 1988 the Department applied for an Air Quality Surface Disturbance Permit to the Division of Environmental

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[1] It is fair to say that Nevada "was singled out in a way that left it politically isolated and powerless." South Carolina v. Baker, ___ U.S. ___ 108 S. Ct. 1355,1361 (1988).

Protection pursuant to Nevada Administrative Code provisions NAC 445.430 through NAC 445.995.[2]

On October 18, 1988 the Department of Energy filed an amended application (No. 52338) with the State Engineer for a water permit to appropriate water for site characterization purposes. The application was subsequently protested by the United States Park Service and Robert Loux, the Executive Director of the Nuclear Waste Project Office. The Attorney General petitioned the State Engineer for intervention in the proceeding on behalf of the State of Nevada and the Nuclear Waste Project Office. On October 10, 1989 the petition was granted. As a result of the protests, an administrative hearing may be held in advance of any action by the State Engineer on the application. See NRS 533.365, 533.375.

On April 6, 1989 the Department of Energy filed an application for an underground injection control (UIC) permit for tracer tests at the C-hole complex at Yucca Mountain in connection with site characterization.[3]

B. The State Response

It would unduly extend the length of this opinion if we were to address in any detail the substantial level of legislative activity in Nevada which preceded the plain and unequivocal policy statement contained in AJR 4 and AJR 6.[4] Suffice it to

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[2] The Nevada Legislature has declared that it is the public policy of the State of Nevada and the purpose of NRS 445.401 to 445.601 "to achieve and maintain levels of air quality which will protect human health and safety, prevent injury to plant and animal life, prevent damage to property, and preserve visibility and scenic, aesthetic, and historic values of the state." NRS 445.401(1). The quality of air is declared to be affected with the public interest, and NRS 445.401 to 445.601, inclusive, are enacted in the exercise of the police power of this state to protect the health, peace, safety and general welfare of its people." NRS 445.401(3).

Nevada Administrative Code ("NAC") Sections 445.430 through 445.995 are the regulations which have been promulgated to carry out the objectives of NRS 445.401 to 445.601. These regulations set forth the prerequisites for obtaining a permit to construct. (See particularly NAC 445.704 through 445.710).

On March 7, 1989, we advised you by letter opinion, dated March 7, 1989, that:

> "...the air quality permit is subject to [NAPA] Section 113 site characterization requirements including the public comment period. Because the public comments may affect the final site characterization plan, a delay in consideration of the air quality permit at least until April 15, 1989 is appropriate."

The public comment period was extended to June 1, 1989, and presumably, in the absence of the policy direction by the 1989 Nevada Legislature, the air permit would be ripe for consideration.

[3] The State of Nevada's Underground Injection Control (UIC) program has been approved by the Environmental Protection Agency. See 53 Fed. Reg. 39088, dated October 5, 1988.

[4] The following bills relating to the high-level radioactive waste repository program were introduced in the sessions for the years indicated:

1983: AJR 11, AJR 34, and SCR 52
1985: AJR 4, AJR 5, AJR 7, SB 55, SB 56, SB 67
1987: AJR 4, AJR 8, AJR 9, AJR 12, AJR 16, AJR 20, ACR 8, SJR 4, SJR 5, SJR 21, AB 754, AB 793,

say that between its sessions in 1983 and 1989 the Legislature has gone from uncommitted to adamantly opposed to the siting of the proposed repository.[5] It is reasonable to assume that the change in position reflects in significant part the attitude of the majority of the citizens of the State in the aftermath of the December 1987 Amendments to the NWPA which singled out the State of Nevada's site at Yucca Mountain as the only one in the nation to be considered for development as the nation's first high-level nuclear waste repository.

The Attorney General, in anticipation of the 1989 Legislative session, was concerned that self-serving arrangements between the DOE and State instrumentalities and political subdivisions of the State, when viewed collectively, may produce a pattern of consensual involvement which may jeopardize the Legislature's right to object to the repository and hamper vindication of that right in the courts. See letter opinion addressed to Robert Loux, Executive Director, Agency for Nuclear Projects/Nuclear Waste Project Office, dated September 22, 1988. In particular the Attorney General advised against actions which could be construed by the courts as an "implied consent" and thereby upstage the Legislature's policy determination. As the opinion stated:

> "We are primarily interested in assuring that the governmental processes leading to an expression or withholding of consent are recognized and followed without regard to the actual decision that the Legislature may reach on the consent issue."

As the 1989 Legislative session unfolded it was apparent that the Legislature and the Executive were unified in opposition to the repository. The stated purpose of the bills which passed and the inference attending those that failed was to send a clear signal to Congress that the State of Nevada was "adamantly opposed" to the repository.[6]

The September 22, 1988 letter opinion referred to above became a part of the legislative record in the hearings. It set

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SB 536, and SB 595

1989: AJR 4, AJR 6, AB 222, SJR 21 and SB 18.

[5] In an opinion addressed to former Governor Grant Sawyer, Chairman of the Commission on Nuclear Projects, dated February 24, 1986 we characterized the Legislature's position at that time in terms of "a neutral posture and a studied objectivity."

[6] SB 18 which would have created a committee to negotiate terms for the acceptance of a repository was voted down in the Senate by a 20 to 0 vote (1 not voting). AJR 4 and AJR 6 opposing the repository passed the Assembly by a 36 to 5 vote (2 absent) and 37 to 4 vote (1 absent) respectively; each passed the Senate by a vote of 19 to 2. AB 222 making the storage of high-level radioactive waste in Nevada unlawful passed the Assembly by a 38 to 3 vote (1 absent) and the Senate by a 11 to 3 vote (7 not voting).

forth two bases underlying the Legislature's and Governor's authority to withhold consent for the federal repository. The first is of constitutional origin; the second is based upon a statutory right to submit a notice of disapproval contained in Section 116(b), 42 U.S.C. 10136(b), of the NWPA.[7]

The full text of AJR 4 and AJR 6 are set forth in the margin.[8]

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[7] The legislative committees that conducted hearings on AJR 4 and AJR 6 had benefit of our advice relative to the Legislature's options as the latter opinion of September 27, 1988 was distributed by Mr. Loux to each of the legislators in advance of the session as a part of his duties contained in NRS 459.0095 to "provide information relating to radioactive waste to the legislature...". Furthermore, the "implied consent" problem addressed in the letter opinion was expressly referenced in the hearings.

[8] ASSEMBLY JOINT RESOLUTION 4 - Urging Congress not to allow the location of a repository for nuclear waste in Nevada.

WHEREAS, Because of the extremely dangerous nature of high level nuclear waste and the persistence of that danger for an extended period, the location of such waste in a repository in this state poses a serious hazard to the health and welfare of Nevadans; and

WHEREAS, The Residents of the State of Nevada are overwhelmingly opposed to permitting Nevada to become the dumping ground for nuclear waste generated in other states and foreign countries; now, therefore be it

RESOLVED BY THE ASSEMBLY AND SENATE OF THE STATE OF NEVADA, JOINTLY, that the Nevada Legislature expresses its adamant opposition to the placement of a high-level nuclear waste repository in the State of Nevada; and be it further

RESOLVED, That a copy of this resolution be transmitted forthwith by the Chief Clerk of the Assembly 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; and be it further

RESOLVED, That this resolution becomes effective upon passage and approval.

ASSEMBLY JOINT RESOLUTION 6 - Expressing the Legislature's refusal to consent to the placement of a repository for high-level radioactive waste in Nevada.

WHEREAS, on December 22, 1987, Congress enacted the Nuclear Waste Policy Amendments Act of 1987, specifying Yucca Mountain, Nevada, as the sole location for evaluation as a suitable site for the placement of a national repository for high-level radioactive waste; and

WHEREAS, The Nuclear Waste Policy Amendments Act of 1987 represents just one of the many instances of federal overreaching with regard to the public land in this state; and

WHEREAS, The federal Government claims ownership of approximately 87 percent of the total land in the State of Nevada, and has targeted that land for certain undesirable federal programs; and

WHEREAS, The placement of a repository for high-level radioactive waste in the State of Nevada poses serious concerns about the transportation and storage of such waste and the potential harm to the environment and health of the residents and guests of this state; and

WHEREAS, the Nevada economy is dependent upon tourism and the perception of a safe environment; and

WHEREAS, The United States has a duty to protect the economy, environment and public health of this state, which the Nevada Legislature is empowered to protect and preserve; and

WHEREAS, The federal Government has refused to assure full liability for any deleterious effects that could result from the placement of a repository for high-level radioactive waste in Nevada; and

WHEREAS, various polls of the people of this state, including our children in school, demonstrate an overwhelming opposition to the location of a repository for high-level radioactive waste at Yucca Mountain; now, therefore, be it

RESOLVED BY THE ASSEMBLY AND SENATE OF THE STATE OF NEVADA, JOINTLY, That the federal Government, its agencies and instrumentalities shall not establish a repository for high-level radioactive waste at Yucca Mountain, Nevada, without the prior consent of the Nevada Legislature or a cession of jurisdiction pursuant to chapter 328 of the Nevada Revised Statutes, which consent and cession are hereby refused; and be it further

RESOLVED, That copies of this resolution be prepared and transmitted forthwith by the Chief Clerk of the Assembly 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; and be it further

RESOLVED, That this resolution becomes effective upon passage and approval.

The active and operative language of the resolves: "... the Nevada Legislature expresses its adamant opposition to the placement of a high-level nuclear waste repository in the State of Nevada", in AJR 4, and "the Federal Government, its agencies and instrumentalities shall not establish a repository for high-level radioactive waste at Yucca Mountain, Nevada, without the prior consent of the Nevada Legislature or a cession of jurisdiction pursuant to Chapter 328 of the Nevada Revised Statutes, which consent and cession are hereby refused ...", in AJR 6, both individually and together express the Legislature's will with respect to either the constitutional or statutory basis for rejection of the federal repository in Nevada.

On June 28, 1989, the Nevada Legislature removed any conceivable doubt as to its intent and the State's policy when it enacted AB 222 into law.[9] The act states in part:

> It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.

We have independently verified that AJR 4 and AJR 6 were transmitted to the Congress and the President on April 19, 1989. While Congress has not responded to these transmittals, we have evidence that the Nevada Legislature's actions have not escaped Congress' attention. For instance, Senate Report No. 101-83 of the 101st Congress dated July 25, 1989, submitted by Senator Johnston, Chairman of the Committee on Appropriations reporting on the Energy and Water Development Appropriation Bill for FY 1990 (HR 2696) stated:

> The Committee notes with concern the recent enactment of Nevada Assembly Bill 222, making it unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.

We note that the Senate Report has been superseded in favor of the Conference Report submitted by Mr. Bevill, Report No. 101-235 dated September 7, 1989. Nothing was said concerning the Legislature's action or Yucca Mountain in the Committee of Conference report.

C. The Federal-State Connection

Nuclear reactor fuel rods are the basic component of the 70,000 metric tons of radioactive waste to be stored in the proposed repository. Given the nature of the waste as privately produced commercial waste, we assume that primary reliance is

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[9] We note that you approved AB 222 on July 6, 1989, and it became law.

placed upon the Spending Power, contained in Article I, Section 8, Clause 1 of the Constitution, as the basis for the Congressional power to enact the amendments to the NWPA in 1987. The structure of the NWPA and the amendments tend to confirm the premise that financial incentives to be provided from the Nuclear Waste Fund are the principal drivers of the program.[10] These include establishment of the Nuclear Waste Fund, a potential benefits agreement set forth in Subtitle F of the Amendments Act, consideration in siting Federal research projects set forth in Subtitle G of the Amendments Act, the grants equivalent to taxes provision set forth in Section 116(c)(3), impact mitigation assistance provided for in Section 116(c)(2), and negotiated agreements for benefits under the Nuclear Waste Negotiator provisions of Title IV of the Amendments Act.

Notwithstanding its acceptance of participation grants, the State of Nevada has rejected, as it legitimately may do[11] any and all benefits emanating from the NWPA as amended. It cannot be suggested, based upon the facts, that the State has been co-opted by the federal undertaking.

The foregoing facts demonstrate that the State of Nevada and Congress have been involved directly and indirectly for a long period of time in an institutional dialogue concerning their respective governmental positions regarding the repository program. It is accurate to say that very little that officials of either governmental entity do with respect to repository matters escapes the attention of the other.[12]

Against this factual background we address the question you have posed.

ANALYSIS

We are of the opinion that you have correctly characterized Assembly Joint Resolution 4 and Assembly Joint Resolution 6 as a notice of disapproval authorized by Section 116(b), 42 U.S.C. 10136(b), of the Nuclear Waste Policy Act of 1982 as Amended, 42 U.S.C. 10101 et seq. (NWPA).

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10 "The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare is not unusual." Oklahoma v. Civil Service Commission, 330 U.S. 127, 144 (1947).

11 See, e.g., Townsend v. Swank, 404 U.S. 282,292 (1971); Rosado v. Wyman, 397 U.S. 397,420 (1970); King v. Smith 392 U.S. 309,316 (1968); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 143-144 (1947).

12 We note also in this regard that Senator Richard Bryan, former Governor of the State of Nevada was one of the most outspoken opponents of the repository. He took office as a United States Senator in January 1989 and has continued his opposition in the Congress.

Section 116(b), 42 U.S.C. 10136(b), states in part:

> (1) Unless otherwise provided by State law, the Governor or legislature of each State shall have authority to submit a notice of disapproval to the Congress under paragraph (2).
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> * * *
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> (2) Upon the submission by the President to the Congress of a recommendation of a site for a repository, the Governor or legislature of the State in which such site is located may disapprove the site designation and submit to the Congress a notice of disapproval. Such Governor or legislature may submit such notice of disapproval to the Congress not later than the 60 days after the date that the President recommends such site to the Congress under Section 114. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why such Governor or legislature disapproved the recommended repository site involved.

The threshold question which we must address is whether a notice of disapproval transmitted by the Governor and the Legislature to the Congress is valid and effective if submitted before the President has recommended Yucca Mountain to the Congress. For the reasons discussed below we answer this question in the affirmative.

The Nuclear Waste Policy Act of 1982 was based upon a negotiated compromise which recognized a state's right to issue a notice of disapproval after site characterization at three sites was completed and the selection by the Secretary of Energy of a single site was made, based upon a comparative evaluation of the three sites. The elimination of the Hanford site in Washington and the Deaf Smith County site in Texas by the Amendments Act of 1987 abrogated the 1982 compromise and eliminated the need to await the completion of site characterization and the President's recommendation in the particular circumstance addressed by AJR 4 and AJR 6, as we shall show.

Section 114(a)(2)(A), 42 U.S.C. 10134(a)(2)(A), of the Amendments Act described the President's authority to recommend the Yucca Mountain site to Congress. Section 114 (a)(2)(A) states:

> If after recommendation by the Secretary, the President considers the Yucca Mountain site qualified for application for a construction authorization for a repository, the President shall submit a recommendation of such site to Congress.

It has been widely accepted, following the amendments to the Nuclear Waste Policy Act in 1987 singling out Yucca Mountain as the only site to be characterized for the nation's high-level nuclear waste repository, that if Yucca Mountain is found suitable for the development of a repository during site characterization, it will be recommended pro forma to the President by the Secretary of Energy and in turn by the President to the Congress. Recent confirmation of this proposition was contained in Senate Report No. 101-81 of the 101st Congress, dated July 25, 1989, accompanying the Energy and Water Development Appropriation Bill, 1990 (H.R. 2696), supra. The Report states in part:

> Yucca Mountain, NV, has been designated as the site for detailed site characterization activities. If the Nevada site is found suitable after completion of site characterization, the site will be recommended for development as a repository and a license application will be submitted to the Nuclear Regulatory Commission. (Emphasis added).

The President's recommendation is keyed to the Secretary's recommendation, both of which may be anticipated by the Secretary's preliminary determination that the Yucca Mountain site is suitable for development as a repository. See page 2, ante, regarding the Secretary's action under Section 114(f) on May 28, 1986, before the section was repealed. By his preliminary determination of suitability, the Secretary has gone on record that the site is regarded administratively as suitable until determined unsuitable.

The Department of Energy's siting guidelines contained in 10 CFR 960, promulgated pursuant to Section 112(a), 42 U.S.C. 10132(a), establish the "criteria to be used to determine the suitability of such candidate site for the location of a repository." Section 113(b)(1)(A)(iv), 42 U.S.C. 10133(b)(1)(A)(iv). The guidelines, however, were developed in a form that presumes suitability unless disqualifying conditions are found.

A major criticism of DOE's Site Characterization Plan by the State of Nevada is that the DOE is searching only for technical data that will support the selection of Yucca Mountain as a high-level nuclear waste repository site, is neglecting studies that could potentially disqualify the site, and thus is attempting to support a determination of suitability at the

expense of a rigorous scientific examination. See State of Nevada's Comments on the DOE's Consultation Draft Site Characterization Plan (September 1988) and State of Nevada's Comments on DOE's Site Characterization Plan (September 1989). The Nuclear Regulatory Commission has voiced similar criticisms.[11]

Technical suitability, we must recognize, largely has to do with the radiological health and safety aspects of the disposal of nuclear materials, a field that Congress has occupied since the enactment of the Atomic Energy Act. See, e.g., Pacific Gas & Electric v. Energy Resources Commission, 461 U.S. 190,212 (1983). Nevada has been accorded substantial health and safety oversight and monitoring responsibilities under the NWPA; the Amendments Act did not alter the State's oversight over the Department of Energy's technical evaluation of the site. See, e.g., Nevada v. Herrington, 777 F.2d 529 (9th Cir. 1985). Nevada officials have the opportunity, in keeping with the State's oversight role, of identifying disqualifying factors which would bring the site characterization process to a close.

If, a disqualifying condition is found, site characterization must terminate and the Yucca Mountain site must be reclaimed. Section 113(c)(3), 42 U.S.C. 10133(c)(3), provides in this regard:

> If the Secretary at any time determines the Yucca Mountain site to be unsuitable for development as a repository the Secretary shall -- (A) terminate all site characterization activities at such site; ... (D) take reasonable and necessary steps to reclaim the site ...

We reach the preliminary conclusion that factors affecting the technical suitability of the site which relate solely to the ability of the site to contain the radioactive waste during the operational lifetime of the repository do not provide suitable reasons, at this time, to support a notice of disapproval in ad-

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[11] In a letter to Stephen H. Kale, Director, Office of Geologic Repositories, USDOE, dated March 7, 1988, Robert E. Browning, Division of High-Level Waste Management, Office of Nuclear Materials Safety and Safeguards, Nuclear Regulatory Commission, remarked on behalf of the NRC staff relative to the Consultive Draft Site Characterization Plans:

> The NRC staff's most fundamental technical concern with the CDSCP is the failure to recognize the range of alternative conceptual models of the Yucca Mountain site that can be supported by the existing limited data base. ... [T]he site characterization program presented appears primarily designed to gather evidence in support of a preferred conceptual model rather than to obtain a thorough understanding of the site and the data necessary to reduce the uncertainties about which conceptual model best portrays the Yucca Mountain site.

vance of the completion of site characterization.[14] This does not mean that the State must stand by helplessly when disqualifying conditions are discovered. The structure of the NWPA, as amended, permits the State to petition the Secretary, based upon disqualifying factors which the State has identified, and unless the Secretary has evidence to refute the State's position he must terminate site characterization program based upon the Section 113(c)(3) requirement, set forth, supra. See also 10 C.F.R. 960.3-1-5; Section 119(a)(1), 42 U.S.C. 10139(a)(1). Congress, in the exercise of its preemptive authority, however, has reserved until after the President's recommendation a resolution of disputed questions of site suitability based on radiological health and safety factors underlying the State's statement of reasons in a notice of disapproval.

The foregoing discussion of technical suitability does not apply to the State's reasons for rejecting the repository which are otherwise within the State's competence and either not within the Congress' capability to preempt or not intended to be preempted. The PG&E case, supra, held that states are not preempted with regard to economic and environmental aspects of nuclear power generation.[15] The United States Supreme Court has held that, in the absence of preemption, a State is competent to object to and preclude the shipment of all of a particular type of waste into the State provided it may be accomplished by not discriminating against interstate commerce. See, e.g., City of Philadelphia v. New Jersey, 437 U.S. 617, 626-627 (1978). AJR 4 and AJR 6 when read with AB 222 establish a comprehensive legislative scheme of high-level radioactive waste exclusion from the State which is not preempted and which does not discriminate against interstate commerce.

The primary basis of the Legislature's objection to a continuation of the repository siting program as stated in AJR 6 was socioeconomic and environmental protection. As originally introduced the language of two "Whereas" provisions stated the primary reason for the resolution as viewed by the thirty-two sponsors in the Assembly:

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[14] Site characterization insofar as it relates to a proposed repository is defined in Section 2(21)(B), 42 U.S.C. §10101(21)(B), of the NWPA as:

(B) activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations of exploratory shafts, limited subsurface lateral excavations, excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

[15] The State of California was not preempted from conditioning the construction of nuclear power generation facilities on economic or environmental grounds. California maintained and the Court of Appeals agreed that California's law prohibiting new nuclear construction based upon the lack of a permanent means of waste disposal was not preempted because the law "was aimed at economic problems, not radiation hazards." PG&E at 213,221. The Supreme Court affirmed. See also L. Tribe, 7 Ecology Law Quarterly, 679-729 (1978).

Whereas, the placement of a perpetual repository for high-level radioactive waste in the State of Nevada could severely damage, if not, completely ruin, the economy and environment of this state; and

Whereas, the United States has no right to destroy the economy and environment of this state, which the Nevada Legislature is empowered to protect and preserve; and ...

It is readily apparent, despite the fact that the final language was ameliorated, that the basis of the Legislature's concern was irreparable and uncompensated damage to the State's economy and environment.[16] These are interests which are not preempted. See Atomic Energy Act, Section 271, 42 U.S.C. 2018, and Section 274(k), 42 U.S.C. 2021(k); see also Silkwood v. Kerr-McGee Corp., 464 U.S. 238,256 (1984); English v. General Electric Co., 683 F. Supp. 1006,1010 (E.D.N.C., 1988); Gaballah v. PG&E, 711 F. Supp. 988,991 (N.D. Cal., 1989); Norris v. Lumbermen's Mutual Casualty Company, 58 L.W. 2126 (1st Cir., No. 89-1019, August 3, 1989).

Unlike the situation which existed when three sites were available and subject to a comparative evaluation after site characterization, jeopardy attached immediately to the Yucca Mountain site upon the occurrence of two conditions: 1) the

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[16] Preliminary findings published by the Nevada Nuclear Waste Project Office suggest that the perceptions of risk and the negative imagery attending nuclear waste disposal when amplified by the media may significantly impact Nevada's tourism industry and in-migration for business and retirement purposes. See e.g. Yucca Mountain Socioeconomic Project, an Interim Report on the State of Nevada Socioeconomic Studies, prepared by Mountain West Research for the Nevada Agency for Nuclear Projects/Nuclear Waste Project Office (NWPO-SE-022-89, June 1989). The stigmatizing effect of these impacts present a continuing problem for the State's Executive branch and Legislature. See f.n. 21, infra.

While we stress the socioeconomic aspects of the notice of disapproval, similar objections may be advanced in terms of environmental impacts. The substantial defects of the NWPA in terms of environmental protection and the environmental record of the Department of Energy at the 127 sites under its control speak for themselves. See, e.g.,

J. Lemons, C. Malone, B. Piasecki, America's High-Level Nuclear Waste Repository: A Case Study of Environmental Science And Public Policy, 34 Intern. J. Environmental Science 25 (1989).

J. Lemons, C. Malone, Frameworks for Decisions About Nuclear Waste Disposal, 34 Intern. J. Environmental Science 263 (1989).

J. Lemons, C. Malone, Siting America's Geologic Repository for High-Level Nuclear Waste: Implications for Environmental Policy, 23(4) Environmental Management 431 (1989).

C. Malone, Environmental Review And Regulations for Siting A Nuclear Waste Repository At Yucca Mountain Nevada, 9(2) Environmental Impact Assessment Review 77 (June 1989).

See also:

S. Clary, M. Kraft, Impact Assessment And Policy Failure: The Nuclear Waste Policy Act of 1982, 8(1) Policy Studies Review 105 (Autumn 1988).

preliminary determination of suitability and 2) the elimination of other candidate sites. The State was then confronted with the immediate need to assess the impacts to its legitimate interests and to timely exercise the options that were available to register its opposition and pursue its remedies. The notice of disapproval under consideration herein is merely one of those options.

Congress waived the requirement that the State's notice of disapproval be submitted after the President's recommendation by providing an alternative procedure based upon State law as a substitute for the procedure contained in paragraph (2) of Section 116(b). The phrase "Unless otherwise provided by State law," which precedes the balance of the sentence, "the governor or legislature of each State shall have authority to submit a notice of disapproval to the Congress under paragraph (2)," suggests that the State may submit its notice according to the procedures established by State law rather than or in the alternative to the procedure in paragraph (2). This alternative does not apply to a notice based on the technical considerations, as we have pointed out, because federal law rather than state law is determinative as to the timing of the radiological health and safety technical matters. There is no apparent reason, however, why the State law alternative should not apply to a notice of disapproval based upon socioeconomic impact analysis which is not dependent upon site characterization and is not preempted.

The phrase "Unless otherwise provided by State law" has special significance in relation to Nevada law. In 1981 the Nevada Legislature amended NRS Chapter 328 relative to State consent for governmental activities on federal lands and for cessions of State jurisdiction to the United States. In particular, the Legislature enacted NRS 328.075 which provides:

> Upon application by an officer of an agency or instrumentality of the United States in accordance with Clause 17 of Section 8 of Article I, of the Constitution of the United States, the legislature, or the legislative commission when the legislature is not in regular session, may by resolution cede concurrent criminal jurisdiction to the United States respecting any land held by the United States for the erection of forts, magazines, arsenals, dockyards or other needful buildings, or for another governmental purpose authorized by the Constitution, subject to the conditions and reservations set forth in this Section and NRS 328.085. Jurisdiction other than concurrent criminal jurisdiction may be ceded only by the legislature when in regular session. (Emphasis added).

See Also Pandleton v. State, 103 Nev. 95,734 P.2d 693 (1987).

The jurisdiction required by the federal government to secure the integrity of an underground nuclear repository for 10,000 years must be exclusive as this office has opined on previous occasions.[17] See, e.g., the informal letter opinion addressed to Robert Loux, Executive Director of the Nuclear Waste Project Office/Nevada Agency for Nuclear Projects dated September 22, 1988; see also, the State's complaint in Nevada v. Watkins, No. 86-7308 (9th Cir.); Nevada v. Burford No. 89-15272 on appeal (9th Cir.). The Legislature, conscious of its own statute, NRS 328.075, directly addressed the Article I, Section 8, Clause 17 issue in AJR 6, as it was required to do, if at all, in regular session. We must presume that Congress is aware of the requirements of Article I, Section 8, Clause 17 and that State legislative action is necessary to invest the Federal government with the requisite jurisdiction to accomplish the repository siting program. Section 116 of the NWPA; Article I, Section 8, Clause 17 of the Constitution and NRS 328.075 are in pari materia in relation to the notice of disapproval since all three deal with substantive and procedural aspects of State consent and as a consequence must be construed with reference to each other. Since Nevada's Legislature meets in regular session only at two-year intervals, the only way that the three provisions may be construed so as to give effect to each is to recognize that the term "Unless otherwise provided by State law" permits State law which establishes biennial regular sessions of the Legislature (Nev. Const., Art. 4, § 2), to supplant the 60 day time period in Section 116(b)(2) of the NWPA and permit a timely notice of disapproval to be submitted during a regular session. We believe that such an interpretation is logically sound and consistent with the intent of Congress in relation to Congress' reservation of its authority to resolve conflicts in siting activities which are ripe for Congressional action.[18] Our interpretation is consistent with the congressional history of the notice of

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[17] A Nuclear Regulatory Commission requirement in 10 CFR 60.121 provides: "Both the geologic repository operations area and the controlled area shall be located in and on lands that are either acquired lands under the jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use."

[18] In October 1984 during consideration of S.1291 a bill authorizing appropriations for the Nuclear Regulatory Commission, an amendment was offered to the NWPA which reads:

> Section 126. The provisions of Sections 113, 116, 117, and 118 of this subtitle shall constitute the exclusive rights of participation by an affected State or Indian tribe in the planning, siting, development, construction, and operation of a repository or a monitored, retrievable storage facility that is required to be licensed by the Commission; provided, however, that nothing in this Act shall preclude any recognized right of any State or Indian tribe under existing law with respect to such repository or monitored, retrievable storage facility.

The amendment was rejected because the rights which the sponsors were attempting to preserve under both federal and state law were deemed already embodied in the NWPA. See, e.g., 130 Cong. Rec. S14177 (daily ed., October 10, 1984). We believe that it was not only Nevada's permitting authority which the sponsors were attempting to preserve and that Congress required DOE to recognize but provisions such as those contained in NRS Chapter 328 as well.

disapproval and the two house override.[19] Given the carefully crafted compromise underlying the NWPA we believe that the "Unless otherwise provided by state law" language was Congress' attempt to be cognizant of the "sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties," in an effort "to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted'." Merrill Lynch, Pierce Fenner & Smith v. Ware, 414 U.S. 117,127 (1973).[20]

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[19] Senator Proxmire offered Amendment No. UP 1579 which was debated on the floor of the Senate on December 20, 1982. Passage of the amendment established the notice of disapproval language and the two house override. See 128 Cong. Rec. S 15649 - 15652. Senator Mitchell, now Senate Majority Leader, speaking to the Proxmire amendment stated:

> The amendment, which is similar to the original House language, would require that a State's objection would stand unless both Houses of Congress vote to override the objection.
>
> The difference between the two provisions is, on the surface, a slim one. But the crucial difference centers in where the burden of proof lies once the State registers an objection. The Senate and House bills place the burden of proof on the State. The State would effectively be forced to convince one House to sustain its objections.
>
> The amendment, on the other hand, would place the burden of proof where it belongs - - with the Department of Energy. If DOE decides on a specific site on the basis of a number of considerations, it is only right that the Federal agency should bear the responsibility to convince both Houses of the Congress of the virtues of its decision.
>
> As both bills are presently written, the Department of Energy could decide on a specific site, but be in no way compelled to argue for that site before the Congress.
>
> Mr. President, there is no issue of greater importance in this legislation than the rights of states and ordinary citizens to participate in the evaluation, siting, and licensing processes. At the heart of this public participation discussion is the ability of States to object to the proposed siting of a repository and to be insured of a fair process after such an objection is made. This amendment would guarantee [sic] that a State's objections is dealt with in a fair and comprehensive manner. (Emphasis added).

128 Cong. Rec. S 15652 (daily ed., December 20, 1982)

During the debate regarding the Cannon amendment of April 29,1982 which was similar to the later enacted Proxmire amendment, Senator Riegle spoke to the Cannon amendment as follows:

> The Cannon amendment will establish an expedited congressional process, that is in the national interest, but will put the burden of 'selling' the site on the government rather than on the State. The Congress should be brought into the siting process, and should force that decision with an affirmative vote.
>
> To be sure, the burden of proof will be a difficult job for the government, but it really should be as difficult as possible. We must proceed very carefully in this area, and be confident that the States have a right to appeal, be heard, and possibly to modify the siting decisions.

[20] It is not unusual for the United States to look to state law for the creation, explication or vindication of important federal interests. See, e.g., Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 371 (1977); In re Water of Hallett Creek Stream Sys., 44 Cal. 3rd 448, 749 P.2d 324, 243 Cal. Rptr. 887 (1988), cert. denied sub nom., California v. United States, 109 S. Ct. 71 (October 3, 1988); State v. State Engineer, 104 Nev. ___, 766 P.2d 263 (1988); see also Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Rules of Decision Act, 28 U.S.C. 1652.

The question of impacts to Nevada's economy and environment which may result from site characterization and subsequent repository siting activities has been addressed in a variety of State reports and publications.[21] Congress directly invited an

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Our analysis recognizing the role that state law plays is directed primarily to the preservation of an opportunity for the Nevada Legislature to exercise an effective veto in the form of a notice of disapproval. Obviously, the governor is not constrained by the 60 day window in Section 116(b) as he has a continuing opportunity to submit his own notice of disapproval. Assuming for the sake of argument, that Section 116(b) were strictly construed without regard to NRS 328.075, and that the governor were so disposed, he could frustrate the Legislature's opportunity where the 60 day window occurred during the 18 months when the Legislature is out of session by simply not calling a special session. See Nev. Const. Art. 5, § 9. Such an interpretation would lead to an absurd result. Given the logical thrust of our analysis, we must also recognize a flip side to the opportunity coin, that is, that the Legislature should not be bound to issue a notice of disapproval only during a regular session despite the language of NRS 328.075 which specifies the procedure for such action because the governor, as noted, has the constitutional prerogative to "convene the Legislature by Proclamation" and to specify "the purpose for which they have been convened." Id. The constitutional provision takes precedence over the statute to the extent there is a conflict. See, e.g., Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237 (1967).

21 Nevada Nuclear Waste Project Office Reports:

J. S. Patterson, Impact Assessment Incorporated, Gloomis Incident Case Study, (NWPO-SE-103 June 1988)

M. A. Boyle, Growth Strategies Organization, Assessment of the Impact of a Nuclear Waste Repository at Yucca Mountain on the Economic Development Potential of Las Vegas, Clark County, and the Surrounding Area (NWPO-SE-016-89 January 1989)

N. Kunreuther, E. Easterling, D. Kleindorfer, Center for Risk and Decision Processes, The Wharton School, University of Pennsylvania, The Conventional Planning Process: Potential Impact of a High-Level Nuclear Waste Repository in Nevada (NWPO-SE-021-89 September 1988)

Mountain West Research, Yucca Mountain Socioeconomic Project: An Interim Report on the State of Nevada Socioeconomic Studies (NWPO-SE-022-89 June 1989)

P. Slovic, et al., Decision Research, J. Chalmers et al., Mountain West Research, Perceived Risk, Stigma, and Potential Economic Impacts of a High-Level Nuclear Waste Repository in Nevada (NWPO-SE-023-89 July 1989)

Periodicals & Papers:

N. Kunreuther, M. Desvouges, P. Slovic, Public Perceptions Of Risk From The Proposed Nuclear Waste Repository, 30(6) Environment 16, (Oct. 1988).

W. Freudenburg, Perceived Risk, Real Risk: Social Science And The Art of Probabilistic Risk Assessment, 242 Science 44 (Oct. 1988).

P. Slovic, Perceived Risk, Stigma, And Potential Economic Impacts Of A High-Level Nuclear Waste Repository In Nevada, Paper presented at Nuclear Waste Management '89" in Tucson, AR, Feb. 27, 1989.

N. Kunreuther, P. Slovic, Forecasting The Adverse Economic Consequences Of A Nuclear Waste Repository In Nevada, Paper presented at the AAAS Annual Meeting, San Francisco, CA, Jan. 17, 1989.

M. Desvouges, N. Kunreuther, P. Slovic, Perceived Risk and Nuclear Waste -- A National And Nevada Perspective, Papers presented at the AAAS Annual Meeting, San Francisco, CA, Jan. 14-19 1989.

early identification of impacts likely to result from site characterization so that remedial measures could be applied. See Section 116(c)(1)(B) and 116 (c)(2)(B). The State was provided financial assistance to prepare and submit a socioeconomic impact report to the Secretary of Energy under Section 116(c). Additionally, the Secretary was directed to submit a report to the Congress under Section 175 of the Amendments Act.

Section 175, 42 U.S.C. 10174(a), required that within one year of the Nuclear Waste Policy Amendments Act of 1987 "the Secretary shall report to Congress on the potential impacts of locating a repository at the Yucca Mountain site" setting forth fourteen specific reporting topics including "tourism and economic development" and "the potential loss of revenue and future economic growth." Congress obviously regarded these topics as requiring immediate attention by directing submittal of a report within one year. The Department of Energy superficially addressed the socioeconomic impacts on the Southern Nevada area in its Section 175 Report to the Congress dated December 1988, DOE/RW-0205.

The DOE's Section 175 Report and Nevada's AJR 4 and AJR 6 have properly joined the socioeconomic impact issue, the resolution of which, if properly presented to Congress was subject to the latter's resolution by inaction or affirmative vote.

The reasons stated in AJR 4 and AJR 6 identify a present basis for discontinuance of the repository program. It can not be maintained that the State's objection is premature because serious effects of the nuclear waste induced stigmatization of the Southern Nevada area may be cumulative and irreversible during and following the site characterization period. Furthermore, resolution of this objection is not dependent upon site characterization.

The Amendments Act identified economic, social, public health and safety, and environmental impacts that are likely to result from the site characterization activities at the Yucca Mountain site for early and special consideration by inviting reports from the State of Nevada and affected units of local government and from the Secretary. We believe Congress intended to be brought into the siting process to resolve legitimate objections raised by the State concerning these subjects. We do not believe that Congress intended to become involved only after major damage may have occurred.

AJR 4 and AJR 6 were legislative responses in part to drafts and discussions of the report compiled by the Nevada Nuclear Waste Project Office concerning projected socioeconomic impacts. See f.n. 16, supra.

In effect, Congress has invited a full explication and resolution of the impacts question. Both the State and DOE have responded and Congress has been fully advised by appropriate submittals from each. In view of the facts, we cannot ascribe to Congress an intent to ignore potentially irreparable and uncompensated socioeconomic and environmental impacts that may arise from further repository siting activities. To do so would impute a callous disregard on Congress' part to the State's economic health and other important interests. We are not prepared to impugn the integrity of Congress in this manner.

Advance notice of disapproval by the Governor or the Legislature and the Congressional attention triggered thereby are both responsible and appropriate given the fact that the Department of Energy intends to spend billions of dollars of the citizen ratepayer's contributions for the purpose of site characterization. See Section 302 of the NWPA, 42 U.S.C. 10222; Section 111(a)(5), 42 U.S.C. 10131(a)(5). Furthermore, early Legislative action is the best assurance against later claims of estoppel, acquiescence and implied consent which may be directed against the State.[2] See, e.g., Brown v. United States, 552 F.2d 817 (1977)

We consider it appropriate to address another requirement in Section 116(b)(2) of the NWPA which may affect the State's reliance upon the validity of AJR 4 and AJR 6 as a notice of disapproval. The section states that:

> Such notice of disapproval shall be accompanied by a statement of reasons explaining why such governor or legislature disapproved the recommended repository site involved.

Reference to AJR 4 discloses two WHEREAS clauses in support of the Resolve; AJR 6 contains eight WHEREAS clauses. These recitals are equivalent in form and content to a statement of reasons.

A final inquiry is whether the resolutions were communicated to Congress in a form which Congress should have regarded as official notice. The Nevada Legislative Manual for 1989 provides at page 51:

> A joint resolution is passed by both houses in the same manner as a bill. It, too, must be signed by the governor unless it is a measure amending the constitution of the State of Nevada. Joint resolutions

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[2] The legislature acted at the earliest possible time following the 1987 amendments which identified Yucca Mountain as the only site to be characterized.

are used for the purpose of requesting the Congress of the United States, the President, a federal agency, or member of the Nevada Congressional Delegation to perform some act believed to be for the best interests of the state or nation.

See also, Nev. Const. Art. 4, Sec. 16. It is reasonable to conclude that Congress, having been memorialized during previous years through joint resolutions from the Nevada Legislature, would regard the State's joint resolutions, AJR 4 and AJR 6, as valid communications when made in the form traditionally used for this type of communication with the Congress.

We note that copies of both 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.

Based upon the foregoing analysis, we are of the opinion that a valid and effective notice of disapproval has been submitted to both houses of Congress.

Having established the validity of the notice, we now address the implications attending Congress' failure to enact within 90 days a "joint resolution of repository siting approval." We address this inquiry with the appropriate admonition that Congress' silence is a political choice committed solely to Congress' discretion, which admits of no scrutiny and is not justiciable. See, e.g., Baker v. Carr 369 U.S. 186,217 (1962).

Insofar, as the present status of the repository program in Nevada is concerned, we must look to the plain meaning of the federal statutes. Section 116(b)(2) of the NWPA provides that "A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President pro tempore of the Senate." As indicated in your opinion request, you signed both AJR 4 and AJR 6 on April 19, 1989. We have independently verified that the resolutions were transmitted on April 19, 1989.

Section 115(c)(d)and(e) established the procedures which Congress imposed upon itself when a notice of disapproval is submitted to it. Section 115(c) provides in this regard:

> (c) CONGRESSIONAL REVIEWS OF PETITIONS.--If any notice of disapproval of a repository site designation has been submitted to the Congress under section 116 or 118 after a recommendation for approval of such site is made by the President under section 114, such site

shall be disapproved unless, during the first period of 90 calendar days of continuous session of the Congress after the date of the receipt by the Congress of such notice of disapproval, the Congress passes a resolution of repository siting approval in accordance with this subsection approving such site, and such resolution thereafter becomes law.

It is clear that 90 calendar days of continuous session have elapsed since April 19, 1989. See, e.g., Section 115(f), 42 U.S.C. 10135(f). Neither the Senate nor the House of Representatives has addressed a resolution of repository siting approval as required by the procedures in Section 115(c) and (d). As a consequence, we are of the opinion that public officials of the State of Nevada may justifiably rely upon a claim that the Yucca Mountain site is disapproved by Congress and shall not be considered for development as a repository.

Our opinion that Congress has decided to abandon Yucca Mountain is bolstered by the fact that the Conference Report (Report No. 101-235) dated September 7, 1989 to accompany H.R. 2696 superseded the Senate Report dated July 25, 1989 which had made extensive reference to the need for continuing the site characterization program at Yucca Mountain. The Conference Report is silent with respect to Yucca Mountain; the implications of such a silence are reinforced by Congress' silence in addressing AJR 4 and AJR 6.[8]

CONCLUSION

We frankly recognize that there is a great deal of uncertainty in terms of Congress' own assessment of the status of the high-level waste program, however, we are left with no choice, based upon Congress' actual response, but to conclude that because the legislature and the Governor of Nevada have unequivocally expressed opposition to the continued program to site a repository at Yucca Mountain based upon competent authority and material reasons, Congress has acceded to the State's wishes. Such a conclusion is consistent with concepts of federalism and the constitutional requirement for consent in Art. I, Section 8, Clause 17, and we consider it supported in fact and as a matter of law. We are therefore of the opinion that the Yucca Mountain site in Nevada is disapproved.

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[8] It is significant that the appropriation to the State of Nevada was reduced from $11,000,000 for the 1988-89 fiscal year to $3,000,000 for the 1989-90 fiscal year, with an additional $5,000,000 which may be provided to the State of Nevada, at the discretion of the Secretary of Energy. This reduction in the State's oversight grant would be anomalous given the fact that the State's need for funds is greatest during the site characterization period if it were not for the State's recently legislated policy position.

With respect to the pending applications for permits, it appears, based upon the foregoing conclusions, that they are moot. We advise you therefore to direct the agencies considering such permits to consider action upon the applications as unnecessary.

If we may be of further assistance in this matter please do not hesitate to contact us.

Very truly yours,
BRIAN McKAY
ATTORNEY GENERAL

BY: Harry W. Swainston
Harry W. Swainston
Deputy Attorney General

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