

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Judge Thomas S. Moore, Chairman

Judge Paul S. Ryerson

Judge Richard E. Wardwell

In the Matter of
U.S. DEPARTMENT OF ENERGY

Docket No. 63-001-HLW

ASLBP No.

09-892-HLW-CABO4

(High Level Waste Repository)

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1 APPEARANCES (Continued)

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1 P R O C E E D I N G S

2 >>JUDGE MOORE: Good morning, I'm Judge
3 Thomas Moore. On my left is Judge Richard
4 wardwell. On my right is Judge Paul Ryerson.

5 Construction Authorization Board 04 is
6 hearing argument today on the Department of Energy
7 motion to withdraw, with prejudice, its pending
8 license application to construct a geologic
9 repository at Yucca Mountain.

10 As set forth in our May 18th order, we
11 will not hear argument this morning on the grant
12 or denial of the five pending intervention
13 petitions. And in the event a member of the Board
14 has a question concerning any petition or answer
15 to any petition, we will address our questions to
16 the appropriate counsel when they are in front of
17 us arguing the DOE motion.

18 The terms of the argument this morning
19 were set forth in our May 18th order, giving
20 both the proponents and the opponents 2-1/2 hours
21 for argument. We have before us the time
22 allocation provided by counsel for DOE and counsel
23 for the State of Washington, and we will follow
24 that time allocation. The Board will keep the
25 clock and, as always, we will be mindful of the

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1 time our questioning takes in keeping time. I
2 would remind counsel that they are under no
3 obligation to use all of their allotted time
4 should they -- should there not be any questions
5 from the bench from the bench.

6 And we are fully familiar with your
7 filings, so you would be well advised to focus
8 your arguments on those of your on opponents,
9 especially those arguments that you've not had an
10 opportunity to respond in writing to.

11 I would also caution counsel that are
12 presenting rebuttal this morning, that rebuttal is
13 just that, it should be strictly confined to
14 responding to the arguments advanced by opposing
15 counsel.

16 The argument this morning is being
17 recorded on the DDMS. It is also being
18 web-streamed for public viewing on the web sites
19 set forth in our May 18th order, as well as
20 being broadcast on the NRC's broadband network.

21 we will begin this morning by having
22 counsel identify themselves for the record. And
23 if they would please state their name,
24 affiliation, and who they represent, it would be
25 appreciated.

1 we'll start with DOE, the movant.

2 >>MR. LEV: Sean Lev for DOE.

3 >>MR. IRWIN: Donald Irwin for the Department
4 of Energy.

5 >>JUDGE MOORE: Excuse me one moment. If
6 counsel will always speak directly into the
7 microphone. You need to push the button to make
8 the microphone live, and then when you're through
9 speaking, if you would push the button again to
10 make the microphone mute, and then we will avoid
11 one or the other of us hearing things that we
12 shouldn't.

13 Please continue.

14 >>MR. FITZPATRICK: Charles Fitzpatrick,
15 representing the State of Nevada.

16 >>MR. LAWRENCE: John Lawrence, State of
17 Nevada.

18 >>MR. MALSCH: Marty Malsch, also State of
19 Nevada.

20 >>MS. SILVIA: Andrea Sylvia, NRC staff.

21 >>MS. BIELECKI: Jessica Bielecki, NRC staff.

22 >>MR. HEMBACHER: Brian Hembacher, State of
23 California.

24 >>MR. BELL: Kevin Bell, State of California.

25 >>MR. JAMES: Greg James for Inyo County.

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1 >>MS. LEIGH: Rovianna Leigh, on behalf of
2 the Native Community Action Council.

3 >>MS. ROBY: Debra Roby on behalf of Clark
4 County, Nevada.

5 >>MR. ROBBINS: Alan Robbins on behalf of
6 Clark County, Nevada.

7 >>MR. BAUSER: Mike Bauser, Nuclear Energy
8 Institute.

9 >>MR. LIST: Robert List of Armstrong
10 Teasdale, on behalf of the Four Counties, being
11 Esmeralda, Mineral, Churchill and Lander, Nevada.

12 >>MS. GARTH: Jennifer Garth, on behalf of
13 the Four Counties.

14 >>MR. SEARS: Rich Sears, White Pine County.

15 >>MR. VAN NIEL: Jeff VanNiel, Nye County.

16 >>MR. ANDERSON: Robert Anderson,
17 representing Nye counsel.

18 >>JUDGE MOORE: Thank you, counsel.

19 >>MR. SHEALY: Ross Shealy of Haynesworth
20 Sinkler Boyd, representing Aiken County.

21 >>MR. GOTTSBALL: Tom Goffshall of
22 Haynesworth Sinkler Boyd in Columbia,
23 South Carolina, representing Aiken County,
24 South Carolina.

25 >>JUDGE MOORE: I apologize, counsel. I

1 wasn't looking far enough to my right..

2 >>MR. MAHOWALD: Phil Mahowald for the
3 Prairie Island Indian Community.

4 >>MR. KESKEY: Don Keskey, representing the
5 Prairie Island Indian Community.

6 >>MR. WOODINGTON: Ken Woodington,
7 representing the State of South Carolina.

8 >>MR. OVERTON: Lee Overton, State of
9 Washington.

10 >>MR. FITZPATRICK: Andy Fitzpatrick,
11 representing the State of Washington.

12 >>JUDGE MOORE: Now, thank you, counsel.

13 One final quick note. I'm sure the
14 court reporter would greatly appreciate it, as
15 well as those viewing this argument on the web
16 screen or on the agency's broadband network, if
17 you would identify yourself and whom you represent
18 before you start your argument.

19 And to keep you from guessing, at a
20 convenient time this morning, we will take a
21 brief -- at least one brief recess, and then we
22 will break for no less than 90 minutes for a
23 luncheon recess, and resume and convene with a --
24 at least one brief afternoon recess. And we will,
25 hopefully, finish by 5:00, but certainly no later

1 than 6:00.

2 with that, movant, DOE, if you would
3 approach the podium and begin your argument.

4 >>MR. LEV: Thank you, Judge Moore, and good
5 morning.

6 I will take Judge Moore's advice and
7 focus on the key arguments made by our opponents,
8 and start right there.

9 what I understand to be the central
10 position of our opponents is that the Nuclear
11 Waste Policy Act changes the ordinary procedures
12 that this Commission and this Board has had --

13 >>JUDGE MOORE: Well, I'll interrupt you with
14 the first question.

15 >>MR. LEV: Sure.

16 >>JUDGE MOORE: Your position, as I
17 understand it, hangs, first and foremost, that DOE
18 has authority under section 3 of the Atomic Energy
19 Act to regulate waste.

20 >>MR. LEV: Well, under both -- the
21 discretion under the Atomic Energy Act and the DOE
22 Organization Act is preserved by the Nuclear waste
23 Policy Act.

24 "Regulate" is a term -- I mean, you
25 know, licensing and regulatory activities are in

1 our C functions. Policy making is a DOE function.

2 >>JUDGE MOORE: But as I understand your
3 filings, your argument hinges on Section 3, first
4 and foremost, of the Atomic Energy Act.

5 >>MR. LEV: We certainly believe the
6 Department of Energy has authority under that.

7 >>JUDGE MOORE: Section 3, what chapter is
8 that in?

9 >>MR. LEV: It's in Chapter 1. I don't have
10 the -- let me get it.

11 >>JUDGE MOORE: Well, there should be right
12 on --

13 >>MR. LEV: It's Title 1.

14 >>JUDGE MOORE: -- on the bench.

15 >>MR. LEV: Title 1.

16 >>JUDGE MOORE: And it's Chapter 1; is that
17 correct?

18 >>MR. LEV: That's correct.

19 >>JUDGE MOORE: And what is Section 3?

20 >>MR. LEV: It says "purpose."

21 >>JUDGE MOORE: Now, besides the fact that
22 the snippet of that that you cite to us in your
23 motion and then expand on considerably in your
24 reply, it sets forth a very general purpose, as do
25 all purpose sections of organic acts, as opposed

1 to the operational sections of an act. And I,
2 frankly, do not know of any instance in which one
3 can hang their authority as if it's operational
4 authority on a purpose section of a statute.

5 And you didn't cite any authority for
6 the proposition that the purpose section of a
7 statute stands in the same shoes as the operative
8 section of a statute.

9 >>MR. LEV: Your Honor, several answers.
10 First of all, under 161(p), I believe, of the
11 Atomic Energy Act, the Secretary's given authority
12 to carry out the purposes of the act. So that's
13 one.

14 And then Congress later spoke in the DOE
15 Organization Act, specifically to the matter of
16 Nuclear waste, and it gave DOE authority -- and
17 this is section 208(a)(8)(c) of the DOE
18 Organization Act, which we've also cited, as
19 creating authority over nuclear waste management
20 activities, including the temporary and permanent
21 facilities for storage, management and ultimate
22 disposal of nuclear waste.

23 I want to add as well, Your Honor, that
24 all the activities that DOE engaged in before the
25 Nuclear Waste Policy Act was passed, confirmed

1 that DOE had this authority. The very history
2 that, for instance, the State of Washington talks
3 about, about the Lyons, Kansas experiment, and
4 those other demonstrate that before the Nuclear
5 Waste Policy Act, DOE had authority here.

6 I think the background authority is
7 important, and it's extremely important as a canon
8 of interpretation. But it is not the end of the
9 story, because I think we have to look at the
10 specific provision, as well, of the Nuclear Waste
11 Policy Act that speaks to how the Board's
12 proceeding should be run. And I think those --
13 yes, Your Honor?

14 >>JUDGE MOORE: Well, before we get to that.
15 Even if DOE has general authority under the DOE
16 Reorganization Act, and 161 to carry out the
17 purposes of the Atomic Energy Act, the Nuclear
18 Waste Policy Act is much more specific than that
19 very general DOE authority. And that's does not
20 generally -- the specific control over the
21 general.

22 >>MR. LEV: Your Honor, I think, first of
23 all, that's correct, it is more specific. But, if
24 I might, and I don't want to interrupt, what's
25 notable is it's specific in telling DOE that it

1 shall do and shall not do a variety of things.

2 Congress plainly knew how to say DOE
3 shall do things and shall not do. So it channels
4 DOE's discretion in a variety of ways. But
5 there's several points that are crucial here.
6 First is, the best evidence of Congressional
7 intent is, of course, the language of the statute.
8 That's the cardinal canon of statutory
9 interpretation. I think we would all agree.

10 And here, Congress has spoken directly
11 to the issue. Our opponents say ordinary
12 procedures can't apply here, this is different,
13 this case is different. But Congress said the
14 opposite. Congress said --

15 >>JUDGE MOORE: Well, did they? You're now
16 speaking of Section 114(d), I assume?

17 >>MR. LEV: I am, Your Honor, yes.

18 >>JUDGE MOORE: And I believe we put it --

19 >>MR. LEV: I have a copy of that.

20 >>JUDGE MOORE: -- the act in front of you so
21 --

22 >>MR. LEV: Yes, and I have my own copy.

23 >>JUDGE MOORE: And it would be cruel and
24 unusual punishment to have to have you memorize
25 all of that.

1 >>MR. LEV: I can't claim to have memorized
2 every section. There are a few that I have,
3 actually, yes.

4 >>JUDGE MOORE: But you're speaking to the
5 plain language and you're focusing on the in
6 accordance with the laws applicable to such
7 applications clause.

8 >>MR. LEV: Yes, Your Honor.

9 >>JUDGE MOORE: Before you get to that, could
10 you tell me -- it says "The Commission shall
11 consider."

12 >>MR. LEV: That's correct.

13 >>JUDGE MOORE: Can you tell me what the word
14 "consider" means?

15 >>MR. LEV: I think evaluate, consider -- in
16 this instance I think it means move forward and
17 evaluate the positions of the parties in
18 accordance with the ordinary rules. I --

19 >>JUDGE MOORE: So you're in agreement that
20 in interpreting words in the statute, unless
21 they're defined, their ordinary common definitions
22 apply, and we often look to the dictionary to see
23 what that is?

24 >>MR. LEV: As a general matter, yes. All
25 words have to -- I believe the Supreme Court said

1 in a case -- in King v. Saint Vincent, among other
2 cases, that all words have to be understood in
3 context. So dictionary definitions by themselves
4 may or may not be helpful. But I think in context
5 here, it's very clear that we're talking about
6 evaluating the application, and then the rest of
7 the sentence makes clear that you're supposed to
8 do that in accordance with ordinary procedures.
9 And I don't see any -- yes, Your Honor?

10 >>JUDGE MOORE: I was puzzled by the
11 arguments of all of you, and so I went to
12 Webster's Third International Dictionary to see
13 what consider means.

14 >>MR. LEV: Okay.

15 >>JUDGE MOORE: And there are about six
16 definitions throwing out throwing out the
17 obsolete definitions to reflect on: "Think about
18 with a degree of care or caution; to think of,
19 regard or treat in an attentive solicitous or
20 kindly way; to look at; to think of; to regard
21 highly; to give thought to with a view to
22 purchasing, accepting or adopting." And it has
23 synonyms of "contemplate, study, weigh, resolve.

24 >>MR. LEV: I'll accept those definitions,
25 Your Honor.

1 >>JUDGE MOORE: Then if you withdraw the
2 application, how can the Commission do any of
3 those things, accepting any one of those
4 definitions, because unless we get into the
5 metaphysical, if it ain't there, it can't be
6 considered?

7 >>MR. LEV: Your Honor, several answers.
8 First of all, I think what it suggests is that you
9 need to consider all of the application in
10 accordance with the ordinary rules. So that
11 includes all the motions that have been filed to
12 date. And, obviously, the consideration is during
13 the period where the proceeding is docketed.

14 This Commission has made very clear that
15 the period under 14 -- 114(d) applies from the
16 date of docketing. So that the Commission's
17 duties are not dependent on DOE's actions in
18 filing an application that's good or bad or
19 sufficient or not. So similarly this --

20 >>JUDGE MOORE: Well, that dealt with the
21 word "submit."

22 >>MR. LEV: Well, I think it has to deal with
23 the -- the point the Commission made was that it
24 was not going to be dependent on DOE's action. So
25 you have to consider the application while it's

1 before you. I would submit that that's exactly,
2 no pun intended, what has been done, that you are
3 considering that application while it's before
4 you. Considering that application also involves
5 considering dispositive motions. And that's what
6 this is, this is a motion to withdraw under the
7 ordinary rules.

8 Now, no party has explained why the
9 ordinary rules of the Commission, which Congress
10 expressly adopted, should not be applied.

11 Again, the plain language has to control
12 here, as you said.

13 >>JUDGE MOORE: Well, let's try to consider
14 that plain language. Again, if I'm to reflect
15 upon, think about, which is what consider means,
16 it's an application for a construction
17 authorization for all or part of a repository.

18 So that's what I'm reflecting upon, the
19 application which is put in front of me.

20 >>MR. LEV: Yes, sir.

21 >>JUDGE MOORE: In accordance with the laws
22 applicable to such applications. It doesn't say
23 all laws, it says the laws, and it says such
24 applications; applications in the plural.

25 >>MR. LEV: Let me answer that. And I want

1 to make a larger point, if I might. When it says
2 "the laws applicable," it includes all the laws,
3 and I want to make clear, there's a specific
4 except clause after that.

5 So the ordinary reading of -- it says
6 "the laws except one," that would be everything
7 except the one. But I think, also, Your Honor, to
8 answer your specific question as to consideration,
9 that's what this motion asks you to do. We're
10 asking you to consider the application, including
11 the motion to withdraw.

12 Ultimately, there's going to have to be
13 final determinations or determinations to withdraw
14 the license, as in this instance, and that's in
15 accordance with the ordinary rules.

16 Congress had the opportunity to say the
17 ordinary rules don't apply. It didn't do that.
18 And I want to make another point about the
19 statute. That is, if you were to read the statute
20 to the contrary, what you would be saying is, this
21 is a process to nowhere. That, because everyone
22 acknowledges, as I understand it, the Secretary
23 has authority not to build a facility at Yucca
24 Mountain. There's nothing in the statute that
25 requires -- and I haven't seen any party's briefs

1 that says the opposite.

2 So what you would be saying, what this
3 Board would be saying, with all respect, is what
4 Congress intended, regardless of whether there's
5 going to be an actual facility, and here DOE has
6 made a policy determination that there shall be no
7 such facility, that we are going to require a
8 process to nowhere, a process for the sake of
9 process.

10 >>JUDGE MOORE: Counsel, I'm sorry. That is
11 truly is a red herring, because what's in front of
12 us in Section 114(d) deals merely, at this point
13 in time, with the construction permit application.
14 This is a process. This is a step-by-step
15 process.

16 Indeed, the very purpose sections of
17 this act, like the purpose sections of the Atomic
18 Energy Act you rely upon, spells out specifically
19 that it is a process, it sets us to establish a
20 schedule.

21 >>MR. LEV: Absolutely, Your Honor --

22 >>JUDGE MOORE: And this is, if you will, one
23 of the stops along the bus route.

24 >>MR. LEV: Your Honor, but the entire
25 schedule, and this is clear throughout the

1 statutory scheme, is dependent on the Secretary
2 choosing to go forward.

3 If this -- at the preapplication stage,
4 if the secretary determined that this was
5 unsuitable, in his discretion, he did not have to
6 go to any other party. He only had to go to the
7 president, to the State of Nevada and,
8 potentially, to Congress. If he chose not to
9 go -- if he chose to go forward. If he chose not
10 -- I'm sorry, Your Honor.

11 >>JUDGE WARDWELL: He chosen to go through
12 with this?

13 >>MR. LEV: He has not -- he chose to go
14 through with that.

15 >>JUDGE WARDWELL: Under 113 and 114.

16 >>MR. LEV: Right. And the question then,
17 Your Honor, is, if -- does the statute -- the
18 secretary having made the decision in 2002 to go
19 forward to the next stage, is the Secretary
20 forever bound, regardless of his discretion and
21 his determination about the current facts, to
22 continue a license application for a process
23 that -- for a repository he has no intention to
24 build and is not required by the statute to build.

25 I would submit that that creates an

1 extremely awkward and futile statutory scheme.

2 >>JUDGE WARDWELL: We'll get into that, but
3 let's get back quickly to something you said
4 earlier in regards to what was in the Noise Policy
5 Act.

6 You mentioned that there were some
7 shalls and some shall nots of what the Secretary
8 could do.

9 >>MR. LEV: Yes.

10 >>JUDGE WARDWELL: Could you point me to
11 those shall nots, just to refresh my memory --

12 >>MR. LEV: Sure.

13 >>JUDGE WARDWELL: -- in 113 and 114 --

14 >>MR. LEV: Yes, sir.

15 >>JUDGE WARDWELL: -- where it says they
16 shall not do something?

17 >>MR. LEV: Let me point to -- let me point
18 you to our brief, where we collect these and then
19 I'll identify some of them.

20 I believe -- yeah, in Section 112(b)(3),
21 the --

22 >>JUDGE MOORE: I was specifically interested
23 in 113 and 114.

24 >>MR. LEV: Okay. Well, 112 is part of --

25 >>JUDGE WARDWELL: I don't care about 112.

1 >>MR. LEV: I have identified -- there's a
2 series of shalls, obviously, in 113 --

3 >>JUDGE WARDWELL: There's several shalls,
4 aren't there, in 113 and 114?

5 >>MR. LEV: Yeah, there are.

6 >>JUDGE WARDWELL: Okay. We'll get back to
7 that later. Fine, I just wanted to clarify that
8 point.

9 >>MR. LEV: That's correct. But let me talk
10 about one of the shalls you might have in mind,
11 which is Section 114(b), which says "shall submit
12 an application."

13 And it says "shall submit an application
14 not later than 90 days after the recommendation is
15 submitted to go into effect."

16 I want to talk about that specifically,
17 because there are several things that are
18 important about it. First is that given the
19 structure of the statute, that the Secretary and
20 the President --

21 >>JUDGE WARDWELL: Could I interrupt quickly,
22 before we get to that, though? If we're going to
23 do that at this time, I'd rather go through it
24 sequentially for a bit.

25 >>MR. LEV: Okay.

1 >>JUDGE WARDWELL: And let's step back just a
2 couple of steps before that. And let me ask this:
3 when the amendments came in in '87, for the waste
4 Policy Act, the site selection process was
5 streamlined, was it not, and Yucca Mountain was
6 chosen as the only option; is that correct?

7 >>MR. LEV: It's the only option that was --
8 that characterization was allowed to continue to.

9 >>JUDGE WARDWELL: Do you think that the
10 Secretary had full authority to change that policy
11 on his own and start, or continue to look at the
12 other sites, or start to look at some other site
13 besides that?

14 >>MR. LEV: What the Secretary had full
15 authority to do, Your Honor, is to determine in
16 his own discretion not to go forward with the
17 Yucca site. And that's exactly what's going --
18 that's exactly the term --

19 >>JUDGE WARDWELL: With regards to my
20 question, could the Secretary, with that mandate,
21 move forward on other sites at that time?

22 >>MR. LEV: Well, the one thing the Secretary
23 can do now, and this is because the authority
24 given in the Appropriations Act this year under --

25 >>JUDGE WARDWELL: Could you go back to my

1 question?

2 >>MR. LEV: Yes.

3 >>JUDGE WARDWELL: I'm not interested in what
4 he can do now.

5 At that point in time, did the Secretary
6 have authority to look at other sites?

7 >>MR. LEV: No.

8 >>JUDGE WARDWELL: So there was a mandate
9 within the Waste Policy Act that changed and
10 limited the policy that the Secretary could do; is
11 that correct?

12 >>MR. LEV: There's no doubt -- there's no
13 doubt that the Nuclear Waste Policy Act channels
14 the discretion of the Secretary in certain ways.
15 There are things the Secretary shall and shall not
16 do. And I think the shall nots are significant as
17 well, because 112 is part of the site evaluation
18 process.

19 But, nevertheless, there are things the
20 Secretary is told he shall or shall not do. That
21 does not apply here. And the basic determination
22 as to whether to go forward, as throughout this
23 process, has been at the discretion of the
24 Secretary. It's notable that for all the things
25 the Secretary is told to do throughout the

1 statute, at no point is the Secretary required to
2 go forward with a Yucca Mountain repository,
3 against his own policy determination. And I think
4 that's --

5 >>JUDGE WARDWELL: Where in the Waste Policy
6 Act has he been designated the authority to
7 withdraw the application, specifically?

8 >>MR. LEV: In Section 114(d), which
9 incorporates the ordinary rules of the NRC, which
10 Congress, under ordinary canons of statutory
11 interpretation, is bound to understand. And
12 beyond that --

13 >>JUDGE WARDWELL: And does that hinge
14 specifically only on 2.107 of the Part 2 rules?

15 >>MR. LEV: 2.107 is the principle -- it
16 incorporates the principles that Congress adopted,
17 as this Board acknowledge in its December 22nd
18 order, when it reminded the parties that 2.107
19 applies, yes.

20 >>JUDGE WARDWELL: What does 107 say; do you
21 remember, or do you have that?

22 >>MR. LEV: Yes, I have it.

23 It says, "The Commission may permit an
24 applicant to withdraw an application prior to the
25 issuance of -- do you want me to read the entire

1 thing?

2 >>JUDGE WARDWELL: Sure.

3 >>MR. LEV: Of a notice of hearing on such
4 terms as conditions as it may prescribe, or may,
5 upon receiving a request for withdrawal of an
6 application, deny the application or dismiss it
7 with prejudice.

8 If the application is withdrawn prior to
9 issuance of a notice of hearing, the Commission
10 shall dismiss the proceeding. Withdrawal of an
11 application after the issuance of a notice of
12 hearing shall be on such terms as the presiding
13 officer shall prescribe.

14 >>JUDGE WARDWELL: And where in there does it
15 say that all applications that -- there's
16 authority for all applicants to unilaterally
17 withdraw their application, if they wish?

18 >>MR. LEV: Well, Your Honor, we have not
19 claimed that. What we have claimed is that the
20 ordinary procedure --

21 >>JUDGE WARDWELL: So there isn't anything in
22 there that that --

23 >>MR. LEV: The precedent --

24 >>JUDGE WARDWELL: -- that allows an
25 applicant to unilaterally withdraw their

1 application?

2 >>MR. LEV: Your Honor --

3 >>JUDGE WARDWELL: There's no permission
4 granted; is that correct?

5 >>MR. LEV: The precedent under that
6 provision makes it very clear that -- first of
7 all, in every instance, the Commission has done
8 so.

9 The one instance where the Commission
10 suggested it might do so -- not do so, excuse me,
11 the Sequoia Fuels case, involved an instance where
12 a party was -- a hypothetical, where a party would
13 continue to operate without a license.

14 And the Commission's precedent has
15 suggested that you do not force parties to proceed
16 with applications that they do not desire to
17 pursue.

18 And that makes all the sense in the
19 world, and it makes particular sense when applied
20 to the Secretary of Energy, who does have
21 policy-making authority here, not only under
22 section 113, which preserves his discretion, but
23 under the preexisting Atomic Energy Act, which
24 does -- which is not overridden as to this
25 specific issue. And, in fact, as I've said, the

1 Nuclear Waste Policy Act preserves the ultimate
2 discretion as to whether to go forward for the
3 Secretary. If --

4 >>JUDGE WARDWELL: Let's move back to 114
5 again, quickly.

6 >>MR. LEV: Sure.

7 >>JUDGE WARDWELL: When the President, under
8 the recommendation of the Secretary, signed off on
9 the site, did the Secretary have any option but to
10 submit that application at that time?

11 >>MR. LEV: He did not. But the question
12 is --

13 >>JUDGE WARDWELL: Thank you.

14 >>MR. LEV: The question is --

15 >>JUDGE WARDWELL: No.

16 >>MR. LEV: The question is -- may I -- I'm
17 sorry, do you want --

18 >>JUDGE WARDWELL: You can answer it later in
19 some other fashion, but I want to just -- I want
20 to go back there quickly to fix that point before
21 we got into 107 again.

22 So, in fact, he was required to submit
23 that application. Is there anything in 107 that
24 prohibits the NRC Commission from denying that
25 application?

1 >>MR. LEV: Denying --

2 >>JUDGE WARDWELL: The withdrawal, the motion
3 to withdraw.

4 >>MR. LEV: I think the NRC's precedence as
5 applied to this circumstances, strongly indicates
6 that --

7 >>JUDGE WARDWELL: Does that -- can you cite
8 any precedence where the applicant was a full
9 volunteer in the submittal of their application?

10 >>MR. LEV: I think, Your Honor, that the
11 question is, what happens -- what does the statute
12 say after the motion is submitted. Okay --

13 >>JUDGE WARDWELL: You answer my question,
14 and then go on if you want to elaborate? Is there
15 anything within there that prohibits -- or is
16 there anything in your precedence that related to
17 an applicant that submitted an application that
18 wasn't a volunteer application?

19 >>MR. LEV: As far as I'm aware, no. But let
20 me explain. Now may I explain?

21 >>JUDGE WARDWELL: Please.

22 >>MR. LEV: Okay. Section 114(b) says how
23 the proceeding starts. And I think the key part
24 to remember there is the time limit. It says
25 "shall submit not less than 90 days," right? Not

1 more than 90 days, excuse me.

2 There's no real dispute that at the time
3 of the submittal, that the Secretary would have
4 had every desire to do so, because the way the
5 statutory structure contemplates it, it would have
6 only been a mere number of months. In fact, in
7 practice it was about 158 days from the
8 Secretary's recommendation to Congress' action.

9 The guts of 114(b) is the 90 days.
10 shall -- we have to read all the language in
11 context. Shall submit within 90 days or no more
12 than 90 days.

13 That is what 114(b) -- and it says how
14 the proceeding starts. And then the rest of 114
15 addresses what happens once the proceeding starts.
16 How is the Commission to conduct the proceeding.
17 And the conducting of the proceeding is according
18 to ordinary rules.

19 And I think if you read the shall submit
20 language to mean that the Secretary has no choice
21 but to continue with an application, which is a
22 term determined to be contrary to the public
23 interest, then you would read 114(b) to be in
24 conflict with 114(d), which say the ordinary rules
25 apply under which applicants ordinarily are not

1 required --

2 >>JUDGE MOORE: That's true, only, counsel,
3 isn't it, if you accept your premise that the
4 Secretary has the authority to withdraw the
5 application.

6 If -- without that premise, there's no
7 conflict at all.

8 >>MR. LEV: Well, no, I think there is a --

9 >>JUDGE MOORE: How is there a conflict?

10 >>MR. LEV: Well, first of all, the Secretary
11 plainly has absent a shall not. The Secretary
12 plainly has authority to make these determinations
13 under the Atomic Energy Act and the DOE
14 Organization Act.

15 As to -- there is authority here. I
16 don't hear anyone here saying, absent the NWPA,
17 the Secretary would have lacked authority to make
18 this decision. I don't think there's a dispute on
19 that point. I may be wrong, but I didn't see
20 anyone challenging that the Secretary's
21 preexisting authority would have allowed it.

22 There has to be something in the NWPA
23 that prohibits that. There has to be a shall not
24 as to this under standard principles of statutory
25 --

1 >>JUDGE RYERSON: Mr. Lev, can there be an
2 applied shall not?

3 >>MR. LEV: No, it --

4 >>JUDGE RYERSON: There is a difference, is
5 there not, between 113 and 114? 113 has a fairly
6 elaborate procedure to be followed if, during site
7 characterization, the Secretary determines that
8 the Yucca Mountain location is inappropriate.

9 And there are a whole bunch of things
10 the Secretary is supposed to do then, including
11 reporting back to Congress, and Congress is
12 supposed to figure out what to do.

13 There is nothing, one way or the other,
14 wouldn't you agree, in 114, as to what should
15 happen if the Secretary concludes, after filing
16 the application, that the site is no longer
17 suitable.

18 >>MR. LEV: Well --

19 >>JUDGE RYERSON: 114 does not address the
20 issue explicitly one way or the other; is that
21 correct?

22 >>MR. LEV: Well, I don't believe that we
23 have a suitability determination here. The
24 Secretary has not made a determination of
25 suitability. I do believe that there are

1 report --

2 >>JUDGE RYERSON: what is the word the
3 Secretary has used? It's not workable. It's not
4 workable.

5 >>MR. LEV: The Secretary has made a
6 determination not to go forward with this
7 facility.

8 >>JUDGE RYERSON: He's made a determination
9 it's not a workable option, correct?

10 >>MR. LEV: That's correct. And he's also
11 gone beyond that to say that there are better
12 alternatives and -- precisely because this is an
13 important policy issue.

14 >>JUDGE WARDWELL: Hasn't he also said that
15 the scientific and engineering technology has
16 evolved immensely over the last 20 years,
17 something to that effect?

18 >>MR. LEV: I don't know if the word
19 "immensely" was used, but, yes, he has said
20 something to that effect.

21 >>JUDGE WARDWELL: Yeah, I don't think that
22 word was, I may have --

23 >>MR. LEV: But I don't --

24 >>JUDGE WARDWELL: -- taken some license
25 there and --

1 >>MR. LEV: So -- but to go back to Judge
2 Ryerson's question, if I might. There are
3 reporting requirements in 114(c) and in 114(f)
4 that all would allow for similar reporting to
5 congress. And, of course, Congress, through the
6 Blue Ribbon Commission, has effectively said, we
7 want to how hear how you want to go forward.

8 Now, I think it's really important to
9 understand that what -- that the basic structure
10 of this act is, this Board and other checks or
11 hoops need to be gone through, if the Secretary
12 wants to go forward. That what we want to make
13 sure is, in this Board in particular, that if you
14 want to go forward, it's safe.

15 But the Board -- and the NRC's role is
16 not to second guess the policy judgment of the
17 Secretary and require the Secretary to go forward
18 with a license application which he believes is
19 contrary to the public interest, in his
20 discretion.

21 The Board has made -- the Board and the
22 NRC, in a variety of contexts, has made clear,
23 one -- first of all, in this particular context,
24 under 2.107 -- and this is part of what I wanted
25 to answer to Judge Wardwell before -- is that what

1 -- you don't second guess the sound judgment of an
2 applicant.

3 >>JUDGE WARDWELL: You, counsel --

4 >>JUDGE RYERSON: If I could ask about that,
5 because I may read 2.107 somewhat differently.
6 Suppose 2.107 did not exist, would that mean that
7 applicants couldn't withdraw applications?

8 I mean, most applicants are voluntary
9 and, presumably, they can walk away from an
10 application at any time. Now, there may be some
11 implied authority that boards would have to try to
12 condition withdrawal for fairness purposes in such
13 a situation. But I guess I don't see 2.107 as
14 authorizing withdrawal. I see 2.107 as expressly
15 authorizing boards to condition withdrawal, which,
16 in effect, is a way of authorizing boards to deny
17 withdrawal.

18 >>MR. LEV: With respect, Your Honor, I
19 disagree in several ways. First of all, I don't
20 disagree that there would likely be a implied
21 opportunity to withdraw, but it's important that
22 it was codified, because it was codified well
23 before Congress acted. And Congress understood,
24 is intended to act against the process. And this
25 is not --

1 >>JUDGE RYERSON: I assume there's nothing in
2 the legislative history that suggests that
3 Congress was actually aware of 2.107, as opposed
4 to being presumed aware?

5 >>MR. LEV: Well, there are two answers.
6 First, the canon of construction is, of course,
7 that Congress understands the legis -- the
8 regulatory scheme against which it acts.

9 Second, Congress actually did consider
10 playing with and modifying the NRC's process. Not
11 as to this in particular, but -- and that's in the
12 HR5016, I believe, and it chose not to do so.

13 And again, the more general point is
14 that even as to a private applicant, the Board
15 doesn't second guess the judgment that a
16 withdrawal is appropriate. That should apply much
17 more strongly --

18 >>JUDGE WARDELL: And where is that stated in
19 107? Help me with that. I don't see where that
20 is stated that the Board does not have -- the
21 Board or the Commission -- the Commission does not
22 have the authority to deny a motion to withdraw.

23 >>MR. LEV: I'm sorry. That's not what I
24 said, with all respect. What I said -- and it's
25 in the precedent under -- in the Stanislaus case,

1 which we have cited, that when the Board looks to
2 determine whether to grant a motion to withdraw on
3 particular conditions, it does not second guess
4 the judgment of a particular applicant that it's a
5 good idea to withdraw.

6 Now, that should apply particularly
7 strongly when we're talking about.

8 >>JUDGE WARDWELL: So 107 isn't -- isn't --
9 doesn't have that implied position that you're
10 stating?

11 >>MR. LEV: It's not -- it's stronger than
12 implied, it's the Commission's present
13 interpreting section to -- when applying --

14 >>JUDGE WARDWELL: But, again, that precedent
15 is based on situations where the applicant was a
16 volunteer, correct?

17 >>MR. LEV: And, Your Honor, this is a
18 stronger --

19 >>JUDGE WARDWELL: Is that correct?

20 >>MR. LEV: Yes.

21 >>JUDGE WARDWELL: Thank you.

22 >>MR. LEV: This is a stronger situation.
23 You have here, not just a private party, but the
24 Secretary of Energy, who Congress and the
25 President have given discretion to decide

1 important matters of policy; the right way to go
2 forward here. what's the best policy for the
3 country.

4 If Congress -- if the Secretary of
5 Energy has discretion to take this action, I
6 believe that it's not the role of this Board to
7 say, we disagree with the policy judgment of the
8 Secretary of Energy.

9 >>JUDGE WARDWELL: whose role is it?

10 >>JUDGE RYERSON: I don't think the parties
11 are arguing your policy decision. I think the
12 parties are arguing, as I understand it, that the
13 Secretary does not have discretion to make that
14 policy decision.

15 That -- in other words, 113 -- the
16 Secretary -- to sort of shortcut some of the
17 arguments, if I understand them, it's -- under
18 113, the Secretary had an opportunity to declare
19 the site unsuitable.

20 once the whole process got past that
21 point and you're at 114, where an application has
22 been filed, then isn't it the NRC's responsibility
23 to decide whether the site is, in effect,
24 suitable? Hasn't DOE's responsibility for that
25 moment, with respect to the application, stopped?

1 >>MR. LEV: Absolutely not, for three
2 reasons.

3 >>JUDGE RYERSON: Okay.

4 >>MR. LEV: First of all, the NRC's
5 responsibility is to make sure that the site is
6 technically safe. And the policy making goes well
7 beyond that.

8 Second, and even more importantly -- I
9 should have led with this, frankly. The statute
10 tells us the opposite. The statute says ordinary
11 procedures apply in accordance with the laws
12 applicable to such proceedings. So the question
13 is, is this different? The answer Congress gave
14 us is no. We looked at 2.107 and the cases
15 involving the volunteers.

16 To answer judge wardwell's question
17 before --

18 >>JUDGE MOORE: Go ahead -- you brought up
19 and keep repeating, it's a policy decision. And
20 your brief, your reply brief, no less than seven
21 times on a quick count, policy decision, policy
22 judgment, policy this, policy that. What's a
23 policy decision?

24 >>MR. LEV: The decision is that this is
25 not -- not based on.

1 >>JUDGE MOORE: what's the definition of a
2 policy decision?

3 >>MR. LEV: The definition of a policy
4 decision. The definition of a policy decision to
5 me is a discretionary judgment as to the best
6 course of action in the context of --

7 >>JUDGE MOORE: what's the definition of a
8 political decision?

9 >>MR. LEV: I would assume that would be a
10 judgment made by a political body. I don't mean
11 to be -- I'm not trying to be flip. I don't have
12 a definition --

13 >>JUDGE MOORE: Was this decision made by the
14 Secretary or was it made by the President?

15 >>MR. LEV: This decision -- the decision
16 that is being defended here is the decision of the
17 Secretary of Energy --

18 >>JUDGE MOORE: Alone?

19 >>MR. LEV: Well, the Secretary of Energy,
20 unsurprisingly, agrees with the determinations of
21 the President.

22 >>JUDGE MOORE: what does --

23 >>MR. LEV: But the Secretary of Energy has
24 repeatedly identified his policy --

25 >>JUDGE MOORE: Was the Secretary following

1 instructions?

2 >>MR. LEV: Your Honor, I am not aware of
3 decisions between the Secretary and the President.
4 But --

5 >>JUDGE MOORE: And would it make a
6 difference --

7 >>MR. LEV: Nor whether it matters.

8 >>JUDGE MOORE: Okay. That's what I wanted
9 to know.

10 >>MR. LEV: It would not, Your Honor. The
11 Secretary of Energy is part of the Executive
12 Branch.

13 But what's being defended here is the
14 decision -- and the position in this brief is the
15 decision of the Secretary of Energy full stop.
16 And I want to go back to this, because I think it
17 goes to the last point --

18 >>JUDGE MOORE: I'd like to continue one
19 moment.

20 >>MR. LEV: Okay.

21 >>JUDGE MOORE: I'm puzzled that the
22 rationale given in your papers was that this was
23 not a workable option. And yet, you concede in a
24 footnote that this was not a judgment based on a
25 safety problem, a Yucca Mountain, or a defect in

1 the DOE application.

2 >>MR. LEV: Absolutely.

3 >>JUDGE MOORE: If that's the case, how can
4 it be determined whether it's a workable option
5 before the NRC -- most particularly, the staff
6 that reviews the application on a parallel path
7 from anything that happens on the microcosm of
8 adjudication, which deals only with contested
9 issues, has reached a decision.

10 I don't understand how you can come to
11 the conclusion that something's not a workable
12 option until the staff has done its job and
13 released an SER and said whether -- at least as
14 far as what we know now, because it's an -- over a
15 100-year process, it can or cannot go forward.

16 >>MR. LEV: May I respond?

17 >>JUDGE MOORE: You may.

18 >>MR. LEV: The decision as to whether to go
19 forward is more than a technical decision. I
20 think this is a core distinction between the role
21 of the NRC and its staff and the role of the
22 Department of Energy.

23 The Department of Energy's decision here
24 looks at whether there are better alternatives,
25 among other things, and whether this is a route

1 that is likely to be effective in dealing with
2 what is an important problem.

3 It's precisely because this is an
4 important problem that the Secretary of Energy
5 wants to do this in the best way possible, and not
6 to be following the course that was decided on 25
7 years ago, if he determines that's no longer the
8 appropriate course, as he has.

9 That's a policy decision that goes
10 beyond the technical judgment as to whether this
11 facility would meet the standards for safety. And
12 that's a --

13 >>JUDGE MOORE: In seeking to justify it, you
14 cite opinion poles. Now, that has all the
15 hallmarks, not of a policy decision, but of a
16 political decision.

17 >>MR. LEV: No, Your Honor, it's not simply
18 the opinion poles, but what those show is that
19 there are still among the people of the State of
20 Nevada, an extraordinarily significant opposition
21 to this facility, which has made it unworkable to
22 try to get this done.

23 We've been trying to do this --

24 >>JUDGE WARDWELL: In your footnote, didn't
25 you use the phrase "many Nevadians"?

1 >>MR. LEV: We probably had --

2 >>JUDGE WARDWELL: I didn't hear that. Did
3 you use the word "significantly," significant --

4 >>MR. LEV: I don't have the footnote before
5 me, but I will take your word as what I've said,
6 as to what the brief said.

7 >>JUDGE WARDWELL: And what -- could you
8 define what is unworkable with this.?

9 >>JUDGE MOORE:

10 >>MR. LEV: Your Honor, this process has been
11 going on for more than two decades and, frankly,
12 there is no resolution in sight. We could not
13 build -- if the Secretary determined he wanted --

14 >>JUDGE WARDELL: Why isn't there a
15 resolution in sight?

16 >>MR. LEV: That's what I'd like to explain.
17 If -- among other things, there is still --
18 Congress would still have to pass legislation.
19 Congress --

20 >>JUDGE WARDWELL: But that's all laid out in
21 the Policy Act, isn't it.?

22 >>MR. LEV: No, it's not, Your Honor.

23 >>JUDGE WARDWELL: The steps are there. I
24 mean, the process is defined. There is --

25 >>MR. LEV: That's -- with all respect,

1 that's incorrect. What -- under this Commission's
2 rule, 63.121, we'd have to have land withdrawal
3 legislation. Land withdrawal legislation would
4 have to pass both houses of Congress and signed by
5 the President.

6 Nowhere is land withdrawal legislation
7 discussed in the Nuclear Waste Policy Act. So
8 It's simply not correct that this is a --

9 >>JUDGE WARDWELL: Sure, there is other
10 issues that need to be resolved, but no one says
11 that the Waste Policy Act was guaranteeing a site
12 there.

13 All we're trying to do and what we're
14 dealing with here, isn't it, is strictly the
15 construction authorization license?

16 >>MR. LEV: That's my point exactly,
17 Your Honor, there is no guarantee. And beyond
18 that, there are an enormous number of additional
19 hoops that would have to be crossed?

20 >>JUDGE WARDWELL: So how is that relevant?

21 >>MR. LEV: Well, it's relevant in the
22 following way: If the Nuclear Waste Policy Act,
23 as we agree, does not require the opening of a
24 repository Yucca -- or even permit it right now --
25 and that's very clear, we could not -- if we had

1 all our authorizations, absent additional
2 legislation --

3 >>JUDGE WARDELL: what was the purpose of the
4 waste Policy Act?

5 >>MR. LEV: The purpose of the waste Policy
6 Act is to create a schedule towards the opening of
7 a repository.

8 >>JUDGE WARDELL: why do they call it a
9 policy act, then. wasn't it to limit, define and
10 restrict the policy options available to DOE and
11 the NRC?

12 >>MR. LEV: Yes.

13 >>JUDGE WARDWELL: Thank you.

14 >>MR. LEV: And the limited options are to go
15 forward with Yucca or not. And the Secretary has
16 chosen --

17 >>JUDGE WARDELL: where does it say that in
18 regards to go forward or not?

19 >>MR. LEV: well, it certainly says that in
20 section 113 and in section 114, by adopting the
21 ordinary rules of this Commission.

22 >>JUDGE WARDWELL: And where -- where -- in
23 113 they specifically allow the Secretary to
24 terminate the process, stop the train, as it were,
25 correct?

1 >>MR. LEV: Exactly -- and they --

2 >>JUDGE WARDWELL: There isn't that in
3 specific in 114; is that right?

4 >>MR. LEV: Well, your Honor, I respectfully
5 disagree. When Congress adopts rules that allow
6 parties to move to withdraw on their -- based on
7 their own judgment, and adopts the ordinary
8 practice of the private volunteers to apply here,
9 then I believe Congress has -- understands exactly
10 what it's doing. And to read the other -- the
11 other way reads exceptions into the statute that
12 do not exist. And I --

13 >>JUDGE MOORE: Counsel, you brought up and
14 keep bringing up that Congress was aware, well
15 aware, knew the legislative landscape of the NRC's
16 rules.

17 You previously answered Judge Ryerson's
18 question that there's nowhere in the legislative
19 history that Congress ever heard of 2.107, which I
20 believe is accurate. But you point in your
21 reply -- and you cite four cases for a statutory
22 construction presumption that, in your language,
23 you stated a little more broadly that Congress is
24 presumed to know the regulatory background against
25 which it legislates.

1 And you cite four cases. The first one
2 -- three of them Supreme Court cases, and the
3 fourth one a CADC case. The first one, Newark
4 Morning Ledger Company v. U.S.

5 And, yes, counsel, some of us actually
6 read the things you cite. I was somewhat taken
7 aback immediately that although your citation
8 doesn't so state, you're talking about something
9 that's on page 575. That's the dissent, counsel.

10 That aside, the dissent does point out,
11 and I believe the case is a revenue -- it's a tax
12 interpretation case. And the dissent goes to
13 great lengths to point out how it had been
14 reenacted seven times by Congress, that the REG
15 rule was well-known as to the specific term that
16 was used. And also pointed to legislative history
17 specifically dealing with that problem.

18 When you move on to the Goodyear case,
19 your second citation, that involved the federal
20 statute that was involved with dealing with state
21 workmen's Compensation laws, and it was
22 specifically dealing, as a federal matter, with
23 liability on federal facilities under state
24 workmen Compensation law, and it was a particular
25 question that came out of Ohio with a special

1 exception to the Ohio rule.

2 And the Court went to great lengths to
3 explaining how the Congress was well aware of the
4 legislative landscape of workmen Compensation law
5 and all of the exceptions of which one was
6 involved in that particular case.

7 Moving on to your third cite. Again, it
8 dealt with the interpretation of an amendment to a
9 federal statute. In that case I believe it was a
10 Medicaid amendment for the Social Security Act.
11 And the meaning of a term of the statute
12 specifically addressed -- that term was addressed
13 in the legislative history.

14 And, again, I found that to be a far cry
15 from 2.107. And the same situation pertains to
16 the last case you say. Many miles -- which it was
17 a case in the CDC that involved the NRC and
18 whether the NRC had the authority to regulate
19 IFSFIS -- those are independent fuel --

20 >>MR. LEV: Yes.

21 >>JUDGE MOORE: -- storage facilities, prior
22 to the enactment of the waste Policy Act and the
23 limitations in the waste Policy Act. And the
24 Court, in citing to the legislative history, it
25 said, in text, of which Congress was aware, and

1 cites to the legislative history. And
2 specifically cites to Chairman Paladino's
3 testimony about how the agency had enacted
4 regulations just dealing with ISFSIs and were
5 ready to regulate that subject.

6 So the Court was talking about the
7 general subject of spent fuel storage facilities,
8 not a specific buried term like 2.107. So, I'm
9 very troubled, and I found no case and, indeed,
10 the cases that these cases you cite are even more
11 specific in nailing down how Congress was pointing
12 directly to the specific matter at hand, not a
13 provision in a whole series of rules of procedure,
14 and that there is some presumption that Congress
15 said, okay, anything you want to do in your rules
16 of procedure controls over the legislative intent
17 of this statute, which was to establish a schedule
18 for the siting, the construction, and the
19 operation.

20 That's the first of the purposes set
21 forth in 111. So I'm troubled that you keep
22 referring to the fact that Congress was well aware
23 of 2.107, and that allows this activity, and
24 Congress has blessed it. Because I don't find
25 anything you cited, and I couldn't find in my

1 research anything that comes close to this
2 situation.

3 >>MR. LEV: Your Honor, may I respond?

4 >>JUDGE MOORE: You certainly may.

5 >>MR. LEV: First of all, the key evidence
6 that Congress intended to adopt the procedures,
7 full stop, all the procedures, is the statutory
8 text.

9 The statutory text says, in accordance
10 with the laws applicable to such applications.
11 The canon that we've referred to is -- bolsters
12 that text.

13 >>JUDGE MOORE: Which canon?

14 >>MR. LEV: The canon that Congress has
15 presumed to know the precedent and the regulatory
16 scheme against which it acts, or the preexisting
17 determinations and the meanings.

18 That only bolsters the plain meaning.
19 If Your Honor wants to stop at the plain meaning,
20 that's fine.

21 >>JUDGE MOORE: Well, but we have to also
22 look at all the cannons of the statutes to be
23 interpreted as a whole, and that you don't just
24 look at one section, but other --

25 >>MR. LEV: Absolutely.

1 >>JUDGE MOORE: -- sections to provide
2 meaning to others. In that regard, look at 121.

3 >>MR. LEV: Sure. And I'd like to do -- may
4 I finish my answer to your last question?

5 >>JUDGE MOORE: After you look at 121.

6 >>MR. LEV: Yes, Your Honor.

7 >>JUDGE MOORE: 121(b). And you keep
8 focusing on shall -- with the laws applicable to
9 such applications. And I was struck by the
10 phraseology in 114(d) and the phraseology in
11 121(b) that says, "Commission requirements and
12 criteria. Not later than January 1, 1984, the
13 Commission, pursuant to authority under other
14 provisions of law, shall, by rule, promulgate
15 technical requirements and criteria that will
16 apply under the Atomic Energy Act, et cetera, in
17 approving or disproving," there are those pesky
18 words again, "applications for authorization to
19 construct repositories."

20 Now, doesn't that language inform what
21 was meant in 114 --

22 >>MR. LEV: Not in the sense --

23 >>JUDGE MOORE: -- (d), as to what they were
24 talking about when they say "such applications"?

25 >>MR. LEV: Your Honor, the -- there's no

1 doubt that the laws include the statutory laws and
2 the substantive regulatory rules. But, if you
3 look at 114(d), it makes clear by its terms that
4 it's not simply talking about the substantive
5 rules, but the procedural rules, because there's
6 an except clause that comes right after that,
7 which is about the three to four-year period,
8 which would make no sense if all they were talking
9 about are substantive requirements and statutes.

10 I also want --

11 >>JUDGE MOORE: why?

12 >>MR. LEV: why? Because then if all you
13 were talking about were the technical rules, the
14 technical rules don't deal with time periods.
15 That's a procedural rule.

16 >>JUDGE MOORE: Neither -- when this act was
17 passed, one of the major complaints was that the
18 NRC could never get a license application from
19 filing to completion.

20 >>MR. LEV: Precisely, Your Honor. And
21 that's why they said the normal practices apply,
22 except for that, except for the practice that you
23 can take as long as you want.

24 >>JUDGE RYERSON: Could the --

25 >>MR. LEV: And that's why it was --

1 >>JUDGE RYERSON: If I may interrupt. Could
2 the except clause in 114(d) essentially trump
3 2.107? In other words, if the Commission is
4 required to issue a final decision approving or
5 disapproving issuance of a construction
6 authorization, does that not trump 2.107?

7 >>MR. LEV: No. For two reasons, Your Honor.
8 First of all, as I stated before, that that
9 proceeding -- that rule applies while the
10 Department's application is docketed. If this is
11 withdrawn, it will not be docketed.

12 And that's important, because as Judge
13 Moore just said, the whole point here was to make
14 sure that the NRC acted quickly on a pending
15 application. If the application isn't pending,
16 there's no rule.

17 Moreover, if we get to the point
18 where -- if the Commission -- let me put it this
19 way: If the Board and the Commission approve our
20 request, that will constitute a disapproval,
21 because the same application cannot be filed
22 again. So in that sense too. But both of those
23 are either way one looks at --

24 >>JUDGE RYERSON: Let me ask you one more
25 question on 2.107. If 2.107 did not exist --

1 >>MR. LEV: Yes.

2 >>JUDGE RYERSON: -- but, you know,
3 obviously, over time various applications had been
4 withdrawn without the authority of 2.107, would
5 you fold up your papers and go home or you would
6 still argue that under the Atomic Energy Act and
7 under Chevron, I suppose, that 114 should be
8 interpreted in the same way?

9 >>MR. LEV: Well, I would say two things. I
10 would certainly say the first thing that
11 Your Honor is saying that the discretion exists --
12 that the preexisting Atomic Energy Act discretion
13 is that you have to have an explicit stripping of
14 that discretion as to this decision in the Nuclear
15 Waste Policy Act.

16 And the entire structure of the Nuclear
17 Waste Policy Act is when the Secretary decides not
18 to go forward, that's his decision. He doesn't
19 need anyone else's approval. That's part one.

20 The second is, I think it would -- if
21 there were precedent under -- the adoption would
22 include the sort of the common law precedent of
23 the NRC in the voluntary applications, regardless
24 of whether 2.107 existed or not.

25 I want to take that --

1 >>JUDGE WARDWELL: I want to make one point
2 before we get to that, though, on 2.107.

3 >>MR. LEV: Sure.

4 >>JUDGE WARDWELL: Let's say, hypothetically,
5 the motion to withdraw was denied. Can you
6 explain to me how or why 2.107 has been violated?
7 2.107 has been violated, the regulation has been
8 violated.

9 >>MR. LEV: Yes, sir. The precedent under
10 that regulation --

11 >>JUDGE WARDWELL: No, the regulation itself.
12 Could you point to where that regulation has been
13 violated --

14 >>MR. LEV: Well, I think the regulation --

15 >>JUDGE WARDWELL: -- or you can give me some
16 precedence for a non-volunteer applicant also.
17 But if that's been denied, where has 107 been
18 violated?

19 >>MR. LEV: Well, let me say, first of all,
20 it can be fairly read to say that, on its face,
21 that can you can determine -- if the application
22 is withdrawn -- withdrawal of an application after
23 the issuance of a notice says "Shall be on such
24 terms as the presiding officer may prescribe."

25 One could fairly read that language to

1 say that you get to describe the terms, not
2 whether the application goes forward. That's
3 what -- you know, on its face, that's what --
4 that's a very fair reading of 2.107. I don't
5 think --

6 Now, the precedent also informs that,
7 and I know Your Honor says those are volunteer
8 cases, but what Congress said is this case should
9 be treated just like the volunteer cases. And the
10 precedent in those cases says that what the Board
11 does is not second guess the policy judgment of
12 even a private party.

13 And those should apply even more when
14 the Secretary of Energy acting under his authority
15 given to him by Congress under the Atomic Energy
16 Act decides this case should not go forward, it is
17 contrary to public interest.

18 >>JUDGE WARDWELL: We're on a continuous do
19 loop here, because then we're right back to, well,
20 hasn't the Waste Policy Act defined and limited,
21 you as have said it does, the policy options
22 available to the Secretary?

23 >>MR. LEV: Limited, but not -- but not --
24 not -- not to one option. There are two options
25 under the Nuclear Waste Policy Act, which is to go

1 forward with Yucca or not to go forward with
2 Yucca.

3 >>JUDGE WARDWELL: Where is where do you see
4 that?

5 >>MR. LEV: Well, that's in Section 113,
6 where the Secretary gets to decide whether --

7 >>JUDGE WARDWELL: And that's one he --
8 because the site is determined unsuitable.

9 >>MR. LEV: Well --

10 >>JUDGE WARDWELL: But there's been a mandate
11 to look at this site. There's been a mandate that
12 the Secretary move forward on that site only.
13 There's been a mandate that you investigate that
14 site. And, if you determine it's bad, sure,
15 terminate it, but then if you don't, then there's
16 a process by which it then requires an application
17 to be submitted. Isn't that logical?

18 >>MR. LEV: No, Your Honor, for several
19 reasons.

20 >>JUDGE WARDWELL: It is logical.

21 >>MR. LEV: Not if you mean that the
22 application has to be submitted and concluded and
23 continue to a merits judgment as to whether -- as
24 to the technical basis, regardless of the policy
25 judgment of the Secretary. And let me give you

1 three reasons.

2 First of all, because there's
3 preexisting authority under the Atomic Energy Act,
4 you have to find a shall not withdrawal. What the
5 statute -- what the precedent requires is whether
6 a preexisting judgment --

7 >>JUDGE WARDWELL: And why is that needed --

8 >>MR. LEV: And Bull Creek is, by the way,
9 one of the cases Judge Moore talks about stands
10 for that proposition, among others.

11 >>JUDGE WARDWELL: So it hinges on that site?

12 >>MR. LEV: No, it does not, no. That's one
13 of the many cases that say when you have a
14 preexisting statute, the later statute should not
15 be read to repeal the authority under that
16 statute, unless it's explicit. Morton v. Mancari
17 from the Supreme Court, a variety of cases stand
18 for that proposition.

19 I want to -- but I don't want to end
20 there. I want to make clear to Your Honor that
21 what you would be saying is that despite the
22 Secretary's decision that he's not going to use
23 this site, that this -- and that's a decision he's
24 plainly allowed to make under the Nuclear Waste
25 Policy Act, no one has disputed that -- that we're

1 going to have a process, as I said in the
2 beginning, a process to nowhere. That there's a
3 whole other series of discretionary acts that he
4 does not have to do under the statute. He'd have
5 to seek a receive and possess license, not
6 mentioned in the statute. He'd have to get water
7 rights. Not mention --

8 >>JUDGE MOORE: Oh, yes, it is. Excuse me,
9 counsel. Look at 114 -- is it 121?

10 >>MR. LEV: 120, Your Honor, speaks about the
11 timing for other applications, that point in
12 time --

13 >>JUDGE MOORE: It specifically says,
14 "Applications for licenses to receive and
15 possess."

16 >>MR. LEV: Your Honor, you're exactly right.
17 I apologize. What I meant to say is he's not
18 required to file it. I misspoke. But there are
19 other applications that are not even mentioned.
20 And I apologize, I did misspeak.

21 >>JUDGE MOORE: And also that same section
22 speaks to closure, which is at the end of forever.
23 And so doesn't that disapprove the exact points
24 you're making, that Congress was well aware that
25 this was a process, it was a schedule, it was a

1 long drawn out process?

2 And you keep saying, Congress would have
3 to do that, Congress would have to do this,
4 Congress -- yes, Congress every year has to
5 appropriate money to allow the NRC to do this, and
6 to allow DOE to do this. Those are congressional
7 acts every bit as important as what you're talking
8 about Congress has to do to get this process to
9 move forward under the Waste Policy Act.

10 >>MR. LEV: Your Honor --

11 >>JUDGE WARDWELL: What's the difference?

12 >>MR. LEV: Well, what Congress understood,
13 and this is very clear in the legislative history,
14 is that there's a process that could end at a
15 variety of points.

16 There may never be any closure. I think
17 we all have to acknowledge, if the secretary
18 doesn't have to open the site, he doesn't ever
19 have to close the site.

20 But beyond that, I think we should think
21 about what it would mean to say, the Secretary has
22 decided that this procedure -- this proceeding is
23 continuing -- this is contrary to the public
24 interest, and is inconsistent with his policy
25 judgment as the applicant.

1 But, nevertheless, this Board is going
2 to require the Secretary to continue with the
3 process. I would note that even our opponents,
4 several of them have said, that's an unworkable
5 system. And if Congress could have required that,
6 I don't despite that Congress could have said,
7 despite the judgment of the Secretary, that this
8 is contrary to his sound policy judgment about how
9 we should proceed on these important issues, we're
10 going to require him to go forward anyway.

11 Congress could have said that, but
12 that's a very awkward and unworkable --

13 >>JUDGE WARDWELL: Do you think, Mr. Lev.

14 >>JUDGE MOORE: There are five or seven cases
15 in the Court of Appeals right now. And assume the
16 Court of Appeals says that the Secretary of Energy
17 does not have the authority to withdraw its
18 license application, because that's all the Court
19 of Appeals has to say, because that's the issue in
20 front of it; does that say that the Secretary has
21 to go forward?

22 what it says is that, no, the Secretary
23 can't withdraw its license application and,
24 basically, it kicks the whole football right back
25 into Congress' lap; does it not?

1 >>MR. LEV: No, I think -- I may not
2 have been --

3 >>JUDGE MOORE: In the appropriations
4 process. And, two, for all the various things you
5 say, whether Congress is going to make all these
6 decisions?

7 >>MR. LEV: I may not have been clear. What
8 I mean was the Secretary determines not to go
9 forward, not only with the repositories, but with
10 the application, that continuing with this
11 application is not a prudent use of resources, is
12 inconsistent with public policy. That's the
13 determination the Secretary has made.

14 If this Board were to say, despite that,
15 the Secretary has to prosecute this application,
16 what you would be imputing to Congress is an
17 intent to require the Secretary to continue with
18 an application that he believes is contrary to the
19 public interest. I'm not saying that Congress
20 couldn't have required that --

21 >>JUDGE MOORE: You say "It would be
22 requiring the Secretary to prosecute the
23 application." I want your view on 114(c). And
24 you in your motion and then again in your reply,
25 give back of the hand treatment to this as a mere

1 reporting requirement. And, indeed, the subtitle
2 is status reports on application.

3 >>MR. LEV: That's correct.

4 >>JUDGE MOORE: But it specifically says "The
5 Commission shall submit a report to the Congress,"
6 that's an annual report, describing the proceeding
7 undertaking through the date of such report with
8 regard to such application, including a
9 description of any major unresolved safety issues,
10 and the explanation of the Secretary with respect
11 to the design and operation plans for resolving
12 such issues."

13 Now, is that not an underlying
14 substantive requirement that the Secretary, in the
15 normal -- which goes on every day with every
16 applicant, a give and take between the staff of
17 the NRC and the applicant -- and there are things
18 like request for additional information that go
19 forward; and isn't that the substantive
20 requirement that says that Congress is expecting
21 the Secretary to be acting as in prosecuting the
22 application after it filed it, which Congress
23 demanded that it do?

24 >>MR. LEV: Your Honor, with respect, I
25 disagree.

1 >>JUDGE MOORE: Okay. why?

2 >>MR. LEV: Well, because what it --

3 >>JUDGE MOORE: Because your brief says it's
4 a mere reporting requirement.

5 >>MR. LEV: No, Your Honor, because the
6 fact -- whether or not the Secretary believes this
7 is a technically -- a facility that can meet the
8 technical requirements established by the EPA, is
9 not the end of the inquiry.

10 The secretary could -- can give those
11 descriptions, as long as this application is
12 pending. That does not mean that the Secretary,
13 in his judgment, his policy judgment, stemming
14 from the Atomic Energy Act, thinks it's a good
15 idea to go forward still. He does not.

16 And this Board, with all respect, should
17 not be in the position of saying, we understand
18 that the Secretary has made it his policy
19 determination under the Atomic Energy Act that
20 this is not the best way to go forward, and that
21 the Nuclear Waste Policy Act -- there is nothing
22 in the Nuclear waste Policy Act that says he shall
23 not make that determination.

24 In fact, the Nuclear Waste Policy Act
25 fairly read, on its face, incorporates the

1 ordinary procedures which allows applicants,
2 voluntary applicants in those cases --

3 >>JUDGE MOORE: What do you do with the
4 legislative history that indicates that Congress
5 wanted to be in -- control this process to keep
6 its thumb on the button.

7 And that was the point of the exercise,
8 because I was, frankly, taken aback when I read
9 the legislative history. And not to be trite, but
10 to -- I mean one should always be careful about
11 quoting Yogi Berra, but it struck me that
12 Americans saved Yogi when he said de jevu all over
13 again.

14 when I read that legislative history
15 about how the political branches of government had
16 failed, and the federal government had failed in
17 their entirety over, at that point, 20 years, to
18 wrestle with this problem when they listed all the
19 failures, the debacle in Kansas, the debacle in
20 Michigan. And, of course, that was long before
21 the 20 years that we've put into Yucca Mountain
22 and the \$20 billion.

23 But the whole point of that legislative
24 history that Congress came to the conclusion that
25 Congress had to take control of the situation, it

1 had to make the decision it was making the policy
2 that this process had to be removed from what had
3 gone before, and it was taking all of the politics
4 out of the process and it was making the hard
5 judgments.

6 And yet you're saying that after -- and
7 NEI's brief tells us -- and I can't remember the
8 precise numbers -- five presidents, nine
9 secretaries of energy, and some ungodly number of
10 billions of dollars that have been spent on this
11 process, that suddenly, in light of this
12 legislation that Congress -- at least as I read
13 that legislative history, specifically passed to
14 avoid the very problem where we are now, and
15 you're saying that the Secretary has -- this
16 discretion for decision and policy that the
17 Congress already made.

18 >>MR. LEV: Your Honor, let me answer that in
19 three ways. First of all, there is no dispute
20 that the Secretary actually has the discretion not
21 to create this facility.

22 I don't see anything in this statute
23 that requires the Secretary to create the facility
24 to file all the -- all the permit requirements
25 that would be necessary to do so, or that -- for

1 Congress to pass the legislation that would be
2 needed. That's simply not here.

3 But let me talk specifically about the
4 leg --

5 >>JUDGE MOORE: Let's stop just a second.

6 >>MR. LEV: Can I address the legislative
7 history question?

8 >>JUDGE MOORE: I'm totally puzzled that you,
9 I believe, said that the Secretary had to file the
10 application, correct?

11 >>MR. LEV: That's correct.

12 >>JUDGE MOORE: Well, there were all of --
13 many of those same things were in play up to
14 there; why was it any different prior to the
15 filing of the application, as far as what the
16 Secretary could and couldn't do, and all the
17 things that had to be done, and post application?

18 >>MR. LEV: Your Honor, that's -- I think you
19 make my point exactly, in the sense that the --
20 what you would be saying is that the Secretary of
21 Energy at a one point has discretion, but then
22 later, though there's nothing in the statute that
23 says it, that he has no choice but to
24 continue despite the change in policy --

25 >>JUDGE WARDWELL: Well, let me ask you a

1 question on that, then. If the Secretary, in its
2 wisdom, said, oh, this is a nonworkable option,
3 and did that 20 years ago, right after the
4 amendments, limited it to Yucca Mountain, and he
5 was required to go ahead with site
6 characterization of Yucca Mountain, could the
7 Secretary proceed without any other congressional
8 authority?

9 >>MR. LEV: If he did the things in Section
10 113, absolutely. If he did --

11 >>JUDGE WARDWELL: If he's just starting on
12 that, I mean, that -- the amendment was in '87, so
13 20 years ago, 22, if I'd be more precise, let's
14 say, the Secretary said, gee, it's a nonworkable
15 option and scientific and engineering knowledge
16 has changed that this is unworkable.

17 Is there anything in the waste Policy
18 Act that allows him then to terminate site
19 characterization?

20 >>MR. LEV: This goes to the point that I was
21 going to try to answer to Judge Moore. There are
22 provisions in the Nuclear Waste Policy Act that
23 channel the Secretary's discretion. There's no
24 doubt about that. But the ultimate decision as to
25 whether to go forward or not with the -- first of

1 all, with the repository, is the Secretary's. And
2 as to the prior --

3 >>JUDGE WARDWELL: So are you saying, then,
4 in 1988, if he had decided it's a nonworkable
5 option, even though the site characterization was
6 just starting off, he could terminate all
7 activities and just go on his merry way without
8 any other -- without violating the Waste Policy
9 Act?

10 >>MR. LEV: No, Your Honor, because there are
11 specific -- in 113 there are specific items he has
12 to provide in his recommendation. To the --

13 >>JUDGE WARDWELL: But let's say, no, but
14 what I'm saying that, hypothetically, he makes the
15 same decision he made in February of this year,
16 but he made it in '88. Could he have just
17 stopped, I'm not going to do the site --

18 >>MR. LEV: I misunderstood the question.

19 >>JUDGE WARDWELL: Hasn't he violated the
20 Waste Policy Act if he made that decision back
21 then?

22 >>MR. LEV: Absolutely not. It says "If the
23 Secretary at any time determines the Yucca
24 Mountain site to be unsuitable, he shall terminate
25 all site characterization activities.

1 >>JUDGE WARDWELL: Unsuitable.

2 >>MR. LEV: Right.

3 >>JUDGE WARDWELL: But not for these
4 nonworkable, and because of these abstract, he
5 doesn't want to proceed ahead with that process.

6 >>MR. LEV: Your Honor, unsuitable is not
7 defined in the statute.

8 >>JUDGE WARDWELL: He has to complete that.
9 How can he -- it's defined by all those other
10 steps in 113; is it not? That's the suitability
11 characterization; is it not?

12 >>MR. LEV: No, because --

13 >>JUDGE WARDELL: why isn't it?

14 >>MR. LEV: 113(c)(3)(A) says he has to
15 terminate site characterization activities, which
16 suggests that they're not completed.

17 >>JUDGE WARDWELL: He's got enough done so
18 that there's something that shows it unsuitable.

19 >>MR. LEV: Right. Your --

20 >>JUDGE WARDWELL: And what is he doing?
21 He's been doing all of those steps that are
22 defined in 113. He hasn't even started those.
23 It's 1988.

24 >>MR. LEV: Let me point Your Honor --

25 >>JUDGE WARDWELL: You don't believe he would

1 be violating the Waste Policy Act and would need
2 congressional authority to terminate Yucca, that
3 he'd have to go back to Congress and say, no,
4 Yucca is not a good option for this reason, and I
5 can't do it under 113, because I haven't even
6 started the site characterization?

7 >>MR. LEV: There are certain activities that
8 he plainly had to do before he made a decision.
9 But the ultimate decision is his to make at any
10 time under 113. Now --

11 >>JUDGE WARDELL: Can you explain to me,
12 then, what scientific -- or give me some examples
13 of scientific and engineering knowledge that has
14 changed that led to his decision that it's time to
15 terminate this process?

16 >>MR. LEV: Well, one of the things -- there
17 are two things that the Secretary is pointing
18 to -- well, three, but let me highlight two,
19 because I understand I'm running out of time, and
20 I don't want to impede on other people's time.

21 Secretary's pointed to advances in dry
22 cask storage, the increased confidence in the life
23 expectancy of that. He's pointed to that during
24 the period -- now that we know that we have a lot
25 of time for dry cask storage, they are promising

1 developments in recycling, and he's pointing to
2 the success of the WHIP facility, which is a
3 different --

4 >>JUDGE WARDWELL: And how has that changed
5 in the last 24 months or so, since the application
6 was submitted in the last 12 months, when he
7 rigorously defended all the contentions and said
8 they were bogus in regards to the suitability of
9 Yucca?

10 >>MR. LEV: There are different
11 determinations, Your Honor. One of them is
12 whether Yucca Mountain can meet the standards in
13 this regulation for licensing. We have not
14 disputed that.

15 what we are saying is -- what the
16 Secretary has said, and the Department's position,
17 is that this is not the best way to go. There are
18 better alternatives.

19 >>JUDGE WARDWELL: And that's a policy
20 decision, correct?

21 >>MR. LEV: And that is a policy decision
22 that the Secretary is entitled to make. And I do
23 think it's important to go back to this point,
24 because --

25 >>JUDGE WARDWELL: Is he restricted by the

1 waste Policy Act, from implementing that policy
2 decision based on the steps that are outlined in
3 the waste Policy Act?

4 >>MR. LEV: Your Honor, with all --

5 >>JUDGE WARDWELL: And it's your position
6 that there is stuff in the waste -- that the waste
7 Policy Act allows, correct.?

8 >>MR. LEV: The waste Policy Act does not
9 require the Secretary to go forward against his
10 will. The waste Policy Act does not permit, much
11 less require, the building of a repository at
12 Yucca Mountain, Your Honor.

13 >>JUDGE WARDWELL: No one argues that.

14 >>MR. LEV: Okay. well, if that is the
15 case --

16 >>JUDGE WARDWELL: Let's stay away from that
17 red herring. No one is arguing that the waste
18 Policy Act requires it to be built or any --

19 >>MR. LEV: Okay. If that's the case --

20 >>JUDGE WARDWELL: we're dealing with a
21 construction authorization.

22 >>MR. LEV: I'm sorry, I didn't mean to
23 interrupt.

24 If that is the case, then it is also the
25 case that it does not make sense to read the

1 statute to require one intermediate step when all
2 the other intermediate steps necessary to get
3 there are not required, in some instance, not even
4 permitted. That is not a reasonable way to read
5 the statute, and it puts the Secretary in a -- and
6 it puts this Board, I would submit, in an
7 inappropriate position of determining whether --
8 of evaluating the policy judgment of the
9 Secretary.

10 The Secretary's judgment -- unless the
11 Nuclear Waste Policy Act prohibits the Secretary
12 from making his judgment, and it does not, the
13 Nuclear Waste Policy Act gives -- has -- gives the
14 Secretary two alternatives, to proceed with Yucca
15 right now or not to proceed. And he has chosen
16 the second.

17 He is allowed to do that under the
18 statute unless the Nuclear Waste Policy Act says
19 he may not, and it does not do that.

20 So given that, the Secretary's judgment
21 should be respected, even more so than the
22 judgments of private applicants. And can I go
23 back to Judge Moore's earlier --

24 >>JUDGE RYERSON: Mr. Lev --

25 >>MR. LEV: I'm sorry.

1 >>JUDGE RYERSON: You cite a case at footnote
2 28 of your reply brief that says, "where Congress
3 includes particular language in one section of the
4 statute, but omits it in another section of the
5 same act, it is generally presumed that Congress
6 acts intentionally and purposefully in the
7 disparate conclusion or exclusion.

8 And applying that doctrine to 113 and
9 114, doesn't that mean that the Secretary's
10 discretion has been taken away by 114, which does
11 not include the very language that's in 113?

12 >>MR. LEV: No, because what -- 114 adopts
13 the ordinary rules of the Commission, which permit
14 withdrawal. Congress could not have been
15 clearer --

16 >>JUDGE RYERSON: Let me ask again, the
17 question I had before was: without 2.107,
18 assuming that we read it differently, do you still
19 argue that 114 conveys discretion on the
20 Secretary?

21 >>MR. LEV: Not if the ordinary practice of
22 the Commission were to allow such withdrawals,
23 which is what's being adopted here. I think
24 what's significant there, though, is that Congress
25 knew how to tell the Secretary how not to do

1 things.

2 To look at 114(b) in isolation and say
3 you have to submit and then not read 114(d) to
4 tell you what happens after you submit, that the
5 ordinary rules apply, that the Secretary is
6 treated like a volunteer, I think ignores the
7 structure of that provision. I also, if I
8 might --

9 >>JUDGE RYERSON: In interpreting 114(d),
10 which instructs the Commission to examine the
11 application and consider it, is it your argument
12 that we owe Chevron deference to DOE's
13 interpretation of the NRC's responsibility?

14 >>MR. LEV: No, except for the -- in the
15 following sense; that part of what any
16 determination there has to be understood against
17 the background authority of the Secretary, the
18 discretion to make these decisions.

19 And the question is, in giving authority
20 to the NRC to adjudicate, was Congress telling the
21 NRC that it can second guess the policy discretion
22 of the Secretary under the Atomic Energy Act; and
23 I don't think there's any evidence that Congress
24 did that.

25 And I think we need to remember the

1 context here, which is the Secretary is not going
2 forward with the repository, and has decided that
3 this application is contrary to public interest.

4 And I think that unless -- let me put it
5 this way; what you would -- the reason why Nye
6 County has said, what you should do here is grant
7 an indefinite suspension, is because it's
8 untenable to put the Department of Energy in the
9 position of -- and the Secretary in a position of
10 continuing to prosecute a license application that
11 the Secretary determines to be contrary to public
12 interest.

13 We will do what we're ordered to do.
14 But if Congress wanted such a scheme, where the
15 Secretary has determined that prosecuting the
16 application is contrary to public interest, but
17 because of the NRC's determinations he has to do
18 so anyway, Congress would have to have been a lot
19 more explicit than it was.

20 >>JUDGE MOORE: Well, excuse me, counsel, I
21 thought Congress and you agreed that you had an
22 obligation to file that application, and I thought
23 Congress told you to do it 90 days, and it took
24 you four years. So for four years, you were out
25 of compliance with the law, and you didn't have

1 any trouble with that.

2 So you -- what's the difference between
3 disobeying one statute and -- one section of the
4 statute and disobeying another, as far as your
5 likes and dislikes?

6 >>MR. LEV: As to 114(b), for the reasons
7 I've explained, the guts of that is the 90-day
8 deadline.

9 what Congress contemplated -- and
10 Your Honor is right, it was not met. But what
11 Congress contemplated was that very soon after the
12 secretary chose to recommend this, that he would
13 file an application with the Commission.

14 There's no reason to believe at that
15 point that the Secretary wouldn't have wanted to
16 file the application, he had just recommended it.

17 So the guts of 114(b) is to make sure
18 that he does it quickly. That you have to read
19 the sentence as a whole, which is to submit the
20 application in not longer than 90 days.

21 That said, the question then becomes,
22 what does the Secretary -- what options does the
23 Secretary have once the application is submitted.
24 And there is nothing in the statute that says the
25 Secretary does not have his ordinary discretion to

1 decide this is not the right way to go forward.

2 In fact, the structure of the NWPA, and
3 this comes back to Your Honor's question about the
4 legislative history.

5 The structure of the NWPA is that the
6 Secretary has to go through a series of hoops if
7 he wants to go forward. But throughout the
8 statutory scheme, he does not have to go through
9 hoops, he can unilaterally decide not to go
10 forward. That structure is quite powerful
11 throughout the scheme.

12 And to use your example -- I want to
13 come back to the legislative history, the example
14 Your Honor --

15 >>JUDGE WARDWELL: But not with 113, you
16 would have to complete 113 is what you just told
17 me earlier, the steps --

18 >>MR. LEV: No, he has to comply with the
19 steps, but he makes the decision -- subject -- on
20 his own, does not need authority.

21 And that's why the Lyons, Kansas example
22 is important, because what that actually shows --
23 that was an instance where the Secretary was
24 trying to go forward and hadn't obtained
25 concurrence of important stakeholders. That's

1 what the legislative history there was about. It
2 was not about the secretary making a decision not
3 to go forward. The Lyons, Kansas example supports
4 our position here, that there's an asymmetry in
5 the statute.

6 The Secretary wants to go forward. And
7 the problem before was the Secretary wanted to go
8 forward, had not gotten the concurrence of
9 important stakeholders. As I said, that was the
10 problem Congress was addressing.

11 Congress was not addressing a problem
12 where the Secretary decided not to go forward for
13 bad reasons. What happened in Lyons is the
14 Secretary went forward, it turned out that there
15 were problems with the site that the Secretary had
16 not discovered before he had decided to try to go
17 forward.

18 That's why the Secretary's discretion to
19 go forward was structured and channeled --

20 >>JUDGE MOORE: Wait. Didn't Congress -- as
21 I understand it here in Nevada, the '87
22 amendments, which are called, I think, the Yucca
23 Mountain Development Act, is called the Screw
24 Nevada Act.

25 Didn't Congress, in the face of all of

1 that, what you tell us from the poles you site to
2 us, is rather substantial Nevada citizenry
3 opposition. Didn't Congress know all about that
4 in 1987, when they leaped forward in the process
5 over the three candidate sites and chose Yucca
6 Mountain?

7 >>MR. LEV: Not at all.

8 >>JUDGE MOORE: And there was huge unrest
9 among the populous of Nevada about that decision.
10 But it was probably the largest NIMBE case that's
11 ever come down.

12 So Congress, acting in its political
13 wisdom, did that.

14 >>MR. LEV: No --

15 >>JUDGE MOORE: And now, aren't you trying to
16 second guess Congress' judgment?

17 >>MR. LEV: No, Your Honor, because what
18 Congress said was you have to go forward -- you
19 can only look at Yucca, but it didn't say that you
20 have to build a repository at Yucca or that the
21 Yucca process would go to the end.

22 The legislative history is actually
23 quite clear on that. Even as late as 2002,
24 Congress said it was not committed to Yucca and
25 that all this did was allow the next step in the

1 process.

2 Congress -- there is a limiting of
3 discretion, I think I said this before, between --
4 the Secretary's choices right now are to go
5 forward with Yucca or not, but that is still
6 discretion, and the Secretary is allowed to choose
7 between those choices.

8 >>JUDGE MOORE: But, I'm sorry, that 2002 --
9 and especial all the litigation, emphasizes the
10 legislative history; emphasizes, I believe, that
11 the not going forward was because of the
12 technological and safety possibilities that you
13 have forecasted in the future, not the political
14 side and the -- that you are now pounding on
15 about, that they take into account the fact that
16 the people of Nevada were against the site.

17 >>MR. LEV: There is no doubt from the 2002
18 legislative history that Congress left the
19 Secretary with the discretion not to go forward
20 with Yucca.

21 Congress said they are not committed to
22 Yucca, we are not authorizing the building of a
23 facility or the placement of any waste at Yucca.

24 Nor is it accurate with all respect --

25 >>JUDGE MOORE: Wasn't that on the basis of

1 safety and technological problems?

2 >>MR. LEV: Not --

3 >>JUDGE MOORE: Because nobody knew about
4 them yet because it's a 100-year process and it
5 hasn't gone forward and the application hasn't
6 been filed and reviewed by the supposed expertise
7 of the NRC.

8 >>MR. LEV: But that is as to safety
9 decisions. And that's not the only discretion the
10 Secretary has. And there's nothing in the statute
11 that suggests otherwise.

12 In fact, as I said, under the Atomic
13 Energy Act and the DOE Organization Act, the
14 Secretary has that discretion. Beyond that, the
15 Secretary has pointed to better alternatives.
16 This is not a determination simply that we don't
17 want to go forward with Yucca, it's a
18 determination that we want to look at better
19 alternatives informed by what we know over the
20 last 20 years.

21 >>JUDGE MOORE: You've gone over your time.
22 Judge Ryerson has a couple of questions.

23 >>MR. LEV: I'm sorry.

24 >>JUDGE RYERSON: One question on a slightly
25 different point.

1 >>MR. LEV: Sure.

2 >>JUDGE RYERSON: You've asked for dismissal
3 with prejudice.

4 >>MR. LEV: Absolutely.

5 >>JUDGE RYERSON: In your view, what does
6 that mean? That could mean, for example, that
7 there could never be a site -- there could never
8 be a repository built in accordance with this
9 application, or there could never be a long-term,
10 high-level waste repository, or there could never
11 be any kind off repository whatsoever.

12 what does it mean in your view?

13 >>MR. LEV: It means -- and I'll try to be as
14 precise as I can -- that we cannot file an
15 application under the Nuclear Waste Policy Act for
16 a permanent repository of for high-level waste and
17 spent nuclear fuel at this site.

18 And it doesn't mean, to be clear, two
19 things, some of which have been identified by
20 other parties and we agree with.

21 One is, it doesn't mean if Congress
22 passed a new statute requiring us to file an -- to
23 file and prosecute an application, that that
24 wouldn't -- that Congress would, obviously, not be
25 bound by that. Second, it doesn't mean that all

1 the contentions which have not been resolved have
2 collateral estoppel effect. It only means,
3 essentially, res judicata effect.

4 And the Secretary has a policy
5 determination behind here, that we need to move to
6 a different discussion. Not a discussion about --
7 that we've had for more than two decades, about
8 whether we should go forward with Yucca or not.

9 what we need to have a discussion is
10 what alternatives are the best ones, and how else
11 should we proceed. And as long as Yucca is on the
12 table, we can't have that discussion.

13 >>JUDGE WARDELL: why not?

14 >>MR. LEV: well, because we continually
15 rehash this same debate that's been going on for
16 20 years; is it right to put it in Yucca. Is that
17 the right -- that's the debate that's been going
18 on for 20 years.

19 >>JUDGE WARDWELL: But isn't the Blue Ribbon
20 Commission independent of that. They're looking
21 -- isn't the capacity of Yucca fairly limited?
22 And, in fact, it will be used up by all the
23 existing spent nuclear fuel and high level waste
24 that exists now? Isn't --

25 >>MR. LEV: well, the Yucca.

1 >>JUDGE WARDWELL: Is that your
2 understanding?

3 >>MR. LEV: The Yucca facility is not going
4 to be built, but I do understand that to be true.

5 >>JUDGE WARDWELL: I just said the capacity
6 of Yucca Mountain.

7 >>MR. LEV: Yes.

8 >>JUDGE WARDWELL: Is there that is already
9 taken up, if you will, by the waste that's waiting
10 to go in there, correct.?

11 >>MR. LEV: The Yucca facility, it would be,
12 essentially, slightly -- the amount of waste right
13 now, I understand, is slightly over what would be
14 required -- what the current capacity is. But --

15 >>JUDGE WARDWELL: Sure. So it's perfectly
16 logical to have a Blue Ribbon Commission to look
17 at all kinds of options, knowing that, in fact, --
18 and Yucca's still on that Blue Ribbon Commission's
19 table or certainly geological repository is
20 certainly an option there.

21 It makes perfect sense, doesn't it, in
22 the future, to continue to look for that, because
23 we need more capacity as it stands right now?

24 >>MR. LEV: Your Honor, I understand that
25 there's --

1 >>JUDGE WARDWELL: It's a separate issue,
2 isn't it? So isn't the Blue Ribbon -- all this
3 discussion about the Blue Ribbon Commission really
4 irrelevant here in what we're dealing with?

5 >>MR. LEV: No, it isn't, Your Honor, because
6 we need to have a policy debate informed by what
7 the Blue Ribbon Commission recommends. That is a
8 new and different policy debate. That doesn't
9 rehash the debate that we've had to date, because
10 we're not going to have a facility at Yucca.

11 I understand Your Honor may disagree
12 with that --

13 >>JUDGE WARDWELL: Well, whether Yucca moves
14 forward or not, this doesn't interfere with that.
15 How does that taint or interfere with anything the
16 Blue Ribbon Commission is, in their mandates or
17 their funding to move forward with their
18 evaluation process?

19 >>MR. LEV: Well, let me answer this. The
20 legal question before this Board, when an
21 applicant asks to move with prejudice, is a very
22 narrow one. In fact, the court -- the Commission
23 has adopted 41(a)(2) as the paradigm, which is the
24 Federal Rules of Civil Procedure.

25 Under the Federal Rules of Civil

1 Procedure, if a plaintiff -- and including the
2 United States, in one of the cases we've cited --
3 seeks to dismiss its complaint with prejudice,
4 it's an abuse of discretion not to grant it.

5 In the Smoot v. Fox case we cited, the
6 court granted mandamus because that motion was
7 denied. So as a legal matter, the narrow -- the
8 issue is very narrow.

9 I understand there are different policy
10 views, that people disagree, and that this is a
11 matter of concern to some people, that there is a
12 degree of finality, people disagree as to whether
13 finality on that point is a good idea or a bad
14 identity.

15 >>JUDGE MOORE: So do you agree with Nevada,
16 that I believe states that there's no question
17 that Congress could pass -- assume that --

18 >>MR. LEV: Yes.

19 >>JUDGE MOORE: -- it's dismissed with
20 prejudice by an administrative agency.

21 >>MR. LEV: Yes, I agree that if there were a
22 new statute --

23 >>JUDGE MOORE: There's no question that
24 Congress could pass a statute.

25 Now, this is the question. Assume that

1 the agency is incorrect in its view of the Nuclear
2 waste Policy Act, the statute, obviously, would
3 trump any administrative decision, whether it's
4 with or without prejudice; would it not?

5 >>MR. LEV: Well, as an abstract matter, I
6 agree with you, but the decisions that you're
7 contemplating would be under those statutes.

8 >>JUDGE MOORE: The NEI takes the NRC to
9 court, and the court says, just hypothetically,
10 that the -- that's DOE's interpretation, the NRC's
11 acceptance of that interpretation is all wrong.

12 >>MR. LEV: If --

13 >>JUDGE MOORE: The Waste Policy Act is not
14 overridden by an obscure 2.107 that Congress had
15 no idea was there. Just if the court so ruled,
16 then with or without prejudice is irrelevant; is
17 it not?

18 >>MR. LEV: It's certainly the case that if
19 the ultimate court order disagreed with us as to
20 our authority here --

21 >>JUDGE MOORE: How about the next
22 administration comes in and they think that Yucca
23 Mountain is a good site and this next secretary
24 says, back to Yucca Mountain, and someone throws
25 up their hands and says, oh horrors, it was

1 released -- dismissed with prejudice, that's
2 binding. And they say, no, the administrative
3 action can't trump the Nuclear Waste Policy Act,
4 go to court, and the Court says, you're right.

5 So there's no guarantees, as far as
6 anything this Board does with the -- with or
7 without prejudice, that it could ever stand in the
8 face of either a current statute or a future
9 statute; is that not correct?

10 >>MR. LEV: well, in -- certainly it's the
11 case that if the court, in reviewing this
12 decision, disagreed with the authority that the
13 Secretary --

14 >>JUDGE MOORE: Or later.

15 >>MR. LEV: It's hard for me to understand
16 how it would occur later. But if that would
17 happen, I agree. There's no --

18 >>JUDGE MOORE: well, that's the example I
19 gave you, that you cease all activity and the next
20 administration refires up the boiler of the engine
21 to put it back on what it perceives as the tracks,
22 and somebody takes it to court then. Same
23 question, isn't it?

24 >>MR. LEV: well, Your Honor, it certainly is
25 the case --

1 >>JUDGE MOORE: Okay.

2 >>MR. LEV: -- that we cannot have
3 guaranteed finality, because we can't predict what
4 Congress will do.

5 >>JUDGE MOORE: Or what the courts will do.

6 >>MR. LEV: Well, what the courts would do in
7 an appropriate case. It's not clear to me the
8 second one where a decision had been made in a
9 prior case that it would be appropriate for --

10 >>JUDGE MOORE: No, no, no, no. It just
11 stops at the administrative level.

12 >>MR. LEV: That may have res judicata effect
13 in a later case, but I'd have to -- we'd have to
14 look --

15 >>JUDGE MOORE: Okay.

16 >>MR. LEV: I'm not going to hypothesize.

17 >>JUDGE MOORE: Well, we've gone past your
18 time because of our questioning, take -- you have
19 one more question?

20 >>JUDGE RYERSON: No.

21 >>JUDGE MOORE: One last thing, quick. you've
22 asked us to give deference to the Secretary's
23 decision. And you cite several cases, and Chevron
24 lays out the deference rules. And you also cite
25 Skidmore, which is four decades in advance of

1 Chevron. And those cases all lay out a whole
2 series of factors that are to be taken into
3 account on the degree of deference that is to be
4 given the decision.

5 And when you run down the list of those
6 factors, I'd like you quickly -- I don't know if
7 you're familiar with them, but if you just take
8 those from Skidmore, which you cite, the weight of
9 such judgment will -- in a particular case, will
10 depend upon the thoroughness evident in its
11 consideration, the validity of its reasoning, its
12 consistency with earlier and later pronouncements,
13 and all those factors which give it the power to
14 persuade.

15 And then there's a host of other cases
16 that, the two in particular that limit Chevron,
17 Meade and Christensen v. Harris County, that list
18 other factors.

19 >>MR. LEV: Sure.

20 >>JUDGE MOORE: How do you weigh -- do we
21 ignore those factors in weighing the deference --

22 >>MR. LEV: No.

23 >>JUDGE MOORE: -- or do we have to pay
24 attention to those and do that kind of weighing
25 and determining whether we give -- what degree of

1 deference we give the Secretary's decision?

2 >>MR. LEV: Well, I think those are fair
3 factors, but I don't agree with the way Your Honor
4 has referred to those.

5 For instance, the fact -- there has been
6 no change of position here as to the legal
7 question of whether the Secretary has authority to
8 withdraw. That's the legal question that's
9 presented here. I'm not aware of any prior
10 determination.

11 Even if there had been a change of
12 position -- as we know, under Chevron, Chevron
13 itself involved a change of position. Second, a
14 lot of the cases deal with the -- Your Honor
15 referred to the degree of care and consideration.
16 This is not a decision that was made lightly, it
17 was announced by the Secretary, and it's a
18 defendant in an informal briefing.

19 I would point the Court to Hour v.
20 Robbins, the Supreme Court case where they said
21 that they're not as -- the Court is not concerned
22 about deferring to a brief where it's not post hoc
23 for a prior decision.

24 Here the decision is announced and
25 defended in this brief. It's much more like Hour

1 v. Robbins. Then there was a decision that had
2 been made years ago, that's later defended by
3 lawyers.

4 Here the decision -- the decision not to
5 go forward is announced in the briefs, not going
6 forward. So I think there's a significant reason
7 for deference.

8 But I have to say, aside from that --

9 >>JUDGE MOORE: Well, that is why I asked the
10 question whether -- what the difference was
11 between a policy decision and a political
12 decision, because the Court has also spoken to
13 that, and political decisions are obviously worth
14 less deference than some other kinds of
15 decisions --

16 >>MR. LEV: But the legal determination here
17 has always been that the Secretary has authority
18 to withdraw. That has not changed --

19 >>JUDGE MOORE: We understand your position.

20 >>MR. LEV: Okay.

21 >>JUDGE MOORE: You have made that loud and
22 clear. Your time is up. We will hear from the
23 State of Nevada.

24 >>MR. MALSCH:

25 >>JUDGE MOORE: Mr. Malsch, I'm sorry to have

1 brought you to the podium. At this time we'll
2 take a brief ten-minute recess.

3 >>MR. MALSCH: I'm very happy with that.

4 >>JUDGE MOORE: Thank you, Mr. Malsch.

5 (Recess was taken.)

6 >>JUDGE MOORE: Please be seated. Please
7 come to order.

8 Mr. Malsch.

9 >>MR. MALSCH: Thank you, Judge Moore. I'm
10 Marty Malsch for the State of Nevada. I would
11 like to make just one brief point about the
12 authority to withdraw under the Nuclear waste
13 Policy Act question and then, in the interest of
14 avoiding duplication, focus the remainder of my
15 remarks on the question of whether the withdrawal
16 should be with or without prejudice.

17 Just to make the one brief point on the
18 authority to withdraw -- I mean, that is the
19 question, whether DOE has the authority to ask the
20 NRC to withdraw the license application.

21 If we were to say, for purposes of
22 argument, that the statute -- that Congress, in
23 the Nuclear Waste Policy Act, did not address this
24 precise question, and that the statute was
25 ambiguous. The question then comes under Chevron,

1 whether, from an NRC standpoint, what is the most
2 reasonable interpretation of the statute. And
3 I --

4 >>JUDGE MOORE: You didn't mention Chevron in
5 your filing.

6 >>MR. MALSCH: We did not.

7 >>JUDGE MOORE: And is that because we're at
8 the administrative level and Chevron is a
9 Appellate -- Federal Court Appellate review of an
10 administrative action and you did not think it
11 applicable?

12 >>MR. MALSCH: In part, that. But more
13 directly, I think our position was that the only
14 reasonable reading of the statute was one that
15 allowed DOE to withdraw the license application.

16 That's step one of Chevron. And step
17 one of Chevron just supplies the usual rules of
18 statutory interpretation. There's no deference
19 involved in step one. My point here would be,
20 though, if we go to Chevron step two and we were
21 to assume the statute is ambiguous, and ask what
22 is the most reasonable interpretation from an
23 regulatory agency standpoint, from an NRC
24 standpoint, I would submit that it makes, from a
25 regulatory agency standpoint, no sense whatsoever

1 to continue with a licensing proceeding over the
2 objections of an applicant who doesn't wish to go
3 forward.

4 That would be a very strange proceeding,
5 especially in this case, confronting determined
6 opposition from the State of Nevada and others.
7 It would be an odd proceeding, a proceeding which
8 I submit, from a regulatory standpoint, would lose
9 an essential amount of credibility associated with
10 determined opponents presenting determined cases
11 on both sides.

12 >>JUDGE RYERSON: Mr. Malsch, do you think
13 Congress was aware of the interactive nature of
14 the application process before the NRC?

15 Do you think they fully understood the
16 extent to which an applicant is required,
17 particularly when there are 300 contentions to
18 adjudicate, to participate in the NRC's
19 decision-making process? Or do you think Congress
20 perhaps had more of a notion that, much like
21 sending off an application to Harvard, you just
22 kind of send it off and wait to hear what happens?

23 what do you think is a realistic
24 assessment of where Congress was on that?

25 >>MR. MALSCH: Oh, I think Congress was very

1 well aware of the very interactive nature of the
2 licensing process and of the fact that a
3 repository proceeding was likely to be very
4 contested, and this would be a very determined
5 proceeding, which required a very determined and
6 aggressive applicant.

7 After all, consider that in 1981 they
8 took brief consideration of legislation. They
9 would have completely revamped the entire rules of
10 practice at the NRC and developed very special
11 rules just for a repository.

12 So they wouldn't have even thought about
13 that as a possibility were it not for the fact
14 that they were aware of NRC licensing proceedings
15 in general.

16 >>JUDGE WARDWELL: with all the other
17 mandates that were listed in the Waste Policy Act
18 under 113 and 114, the shells that we will
19 describe them as or categorize them as, why wasn't
20 Congress -- well, let me rephrase it.

21 Congress didn't seem to be concerned
22 about having very strange activities taking place,
23 like executing the site characterization, even
24 though the Secretary could have reached the same
25 policy decision back at that point, but yet they

1 were mandated to complete those and determine the
2 suitability of the site.

3 That would be strange, too, wouldn't it?

4 >>MR. MALSCH: I guess I don't understand
5 your question.

6 >>JUDGE WARDWELL: Under 113, the Secretary
7 has to do certain site characterization steps.

8 >>MR. MALSCH: Right.

9 >>JUDGE WARDWELL: And that was under the
10 amendment in '87. They required you got to look
11 at Yucca Mountain, and here's what you got to do;
12 you got to characterize the site. And oh, yeah,
13 by the way, you can terminate it if some of that
14 characterization shows the site to be unsuitable.

15 well, if the Secretary had determined
16 back then, when those were first being initiated,
17 in 1988, under the '87 amendments, that it was not
18 in the best interest to move ahead with Yucca, and
19 it was a nonworkable option and, you know, these
20 very broad-based just policy descriptions of
21 what's generating his and motivating his decision
22 at this point in time, if those were made back in
23 '88, doesn't the Waste Policy Act still require
24 him -- there's no option to just terminate his
25 site characterization activity at that point on

1 his own, he would have to get some permission from
2 Congress; wouldn't he?

3 >>MR. MALSCH: I think that's correct, but
4 it's missing an important point about the next
5 step. I think Congress -- one of the lessons
6 Congress learned from the Lyons, Kansas fiasco,
7 was that agencies developing repository should not
8 overcommit themselves before all the technical
9 analyses had been completed.

10 And for that reason, Congress said,
11 basically, you shall characterize sites before you
12 recommend them. And I think for that reason
13 Congress said, you can only stop site
14 characterization if you conclude the site is not
15 suitable, because we want you to finish site
16 characterization.

17 But at the point where site
18 characterization has been completed, there's
19 actually nothing in the statute that compels the
20 Secretary to recommend the site to the President,
21 even if the site proves to be suitable.

22 >>JUDGE WARDWELL: But he went ahead and did
23 that.

24 >>MR. MALSCH: He did so here.

25 >>JUDGE WARDWELL: And the president had

1 mandates that the president had to follow by --
2 well, the Secretary was required to notify Nevada
3 as a shall, for instance.

4 >>MR. MALSCH: That's right.

5 >>JUDGE WARDWELL: So there was other
6 mandates in regards to things that the Secretary
7 could not ignore, even though he may have made
8 that same broad-based policy decision back in '88,
9 correct?

10 >>MR. LEV: I think he --

11 >>JUDGE WARDWELL: And isn't that strange?

12 >>MR. MALSCH: No, I think in '88 he -- after
13 completion of site characterization, he could have
14 made the decision he made today, and not gone
15 forward.

16 >>JUDGE WARDELL: After. But in '88, he
17 wouldn't have completed site characterization.

18 >>MR. MALSCH: No, I think he -- I think he
19 was obligated to complete site characterization.

20 >>JUDGE WARDWELL: Right. But that's a
21 strange thing, where he's actually going out and
22 doing site characterization on a site that he's
23 not going to file an application on even.

24 >>MR. MALSCH: well, I think it goes back to
25 the Congress' resolution of the Lyons, Kansas

1 lesson learned; we want you to complete site
2 characterization., we want you to have all the
3 information before us. It would still --

4 >>JUDGE WARDWELL: Don't you think it's more
5 relevant that they realize this is a long-term
6 process and what one secretary thinks today isn't
7 going to be what one secretary thinks during the
8 next administration when other decisions are being
9 reached?

10 >>MR. MALSCH: well, they must have thought
11 of that.

12 >>JUDGE WARDWELL: And that's certainly a
13 plausible reason for -- an explanation of why, in
14 fact, they said we're going to start this train,
15 and here's the steps along the train, and there's
16 going to be different drivers of that train as we
17 move along. And don't you think that's a
18 motivation for why those various steps are
19 required within the waste Policy Act?

20 >>MR. MALSCH: Yes. I mean, there are
21 various steps in the Nuclear waste Policy Act.
22 The point would be, at various steps along the way
23 there was also discretion within the Secretary not
24 to go forward.

25 >>JUDGE WARDWELL: And if this current

1 secretary doesn't -- if, in fact, for the sake of
2 argument, it's determined by the Court, which is
3 really going to be the one that's going to decide
4 this, that DOE does not have authority to withdraw
5 their motion and this process then continues, it
6 doesn't say that a secretary in some future
7 administration won't pick it up in earnest.

8 >>MR. MALSCH: That's theoretically possible.

9 >>JUDGE WARDWELL: Just it's practical. It's
10 not theoretical, it's very realistically possible.

11 >>MR. MALSCH: well, I mean, we would assume,
12 absent congressional direction, that if the Court
13 tells DOE it can't withdraw its license
14 application, it can't withdraw the license
15 application.

16 I would hope that a court wouldn't do so
17 in recognition of the fact that directing an
18 unwilling applicant to go forward in the midst of
19 a lion's den of a contested proceeding doesn't
20 make a whole lot of sense --

21 >>JUDGE MOORE: Mr. Malsch, though, this is,
22 is it not, an annual fight and -- during the
23 appropriations process?

24 >>MR. MALSCH: It is indeed an annual fight
25 in the appropriations process.

1 >>JUDGE MOORE: And won't it be -- the --
2 this year's chapter, yet to be fought, I guess,
3 and next year's, and next year's, just as every
4 preceding year -- isn't that where either this
5 Board, acting as all we can do is in adjudicatory
6 capacity, and if it goes to court, that removes
7 all politics. And they just need to decide that
8 there's no authority -- the strict legal question,
9 the relief ultimately is going to be whether money
10 is appropriated for this process. And if money is
11 appropriated, then DOE has very limited discretion
12 but to follow the mandates of the appropriation
13 and spend the money for which it is appropriated,
14 and as does the NRC.

15 If Congress does not appropriate money,
16 then that doesn't change the law as to what the
17 Nuclear Waste Policy Act says. What it says is
18 that there's not going to be any money to carry
19 this out. And there are a lot of statutes on the
20 book gathering dust that -- for programs that are
21 not appropriated -- is that not really where all
22 this ends up?

23 >>MR. MALSCH: I don't disagree with that.
24 All I would say is that in the meantime, you know,
25 pending congressional action in appropriation

1 statutes, or other congressional action, it's a
2 duty of this Board and the courts to read the law
3 as they see it, and do the best they can.

4 >>JUDGE MOORE: Which you answered Judge
5 Ryerson's question that you thought Congress,
6 because of the history, was aware of the
7 interaction between the NRC and DOE, the
8 applicant, or what would become the interaction.

9 Do you see 114(c) as underlying the
10 reporting requirement in which the Commission has
11 to report to Congress what the Secretary's answer
12 to the unresolved safety questions are as evidence
13 of that interaction right in the statute?

14 >>MR. MALSCH: I would say that would be
15 certainly evidence of an interaction between the
16 Secretary and the staff on an application going
17 forward.

18 >>JUDGE MOORE: And that would fall, at least
19 in my understanding of how the process between the
20 technical staff and the applicant works, that's
21 under the rubric of prosecuting the application,
22 isn't not?

23 >>MR. MALSCH: It is, but I don't think that
24 particular section necessarily precludes the
25 possibility of an application of withdraw.?

1 >>JUDGE MOORE: I was just asking whether
2 that evidence is Congress' expectation of
3 prosecution of the application, because I don't
4 know how the Commission could report to the
5 Congress on an annual basis what the resolution of
6 problems are that a secretary is required to tell
7 him about, which is what every applicant has to do
8 first and foremost with regard to anything that
9 affects their application that involves safety
10 issue.

11 >>MR. MALSCH: That's true, but I don't think
12 it rules out the possibility of the Commission
13 reporting to Congress that DOE has withdrawn the
14 license application, and the Commission has
15 approved of the withdrawal.

16 I would just also make some small
17 observation about that section, and that we should
18 be careful how we read it because it literally
19 says, the Commission shall report to Congress
20 annually until the authorization is granted.

21 >>JUDGE MOORE: I know.

22 >>MR. MALSCH: So in theory if we denied it
23 --

24 >>JUDGE MOORE: I was assuming that that was
25 a Freudian slip on the part of the Congress.

1 >>MR. MALSCH: I think it suggests maybe less
2 than careful congressional drafting of this
3 particular section.

4 >>JUDGE MOORE: Or it suggests that, in 1987,
5 it was the largest NIMBE case that ever came
6 down -- came down the pike.

7 >>MR. MALSCH: Perhaps.

8 >>JUDGE MOORE: And they were just following
9 through with what was said in 1982 knowing that,
10 but that is Congress' problem, not ours.

11 >>MR. MALSCH: As we pointed out in our
12 brief, this section also indicates that there
13 could be possibly unresolved safety questions, and
14 the only reasonable approach for DOE to take, when
15 confronted with an unresolvable safety question,
16 is not to march forward with the application but
17 to withdraw it.

18 >>JUDGE MOORE: Isn't that the point, that
19 under this statutory scheme they must report it to
20 the NRC, and the NRC must determine, as part of
21 whether or not the application can be granted or
22 denied, if it's not fixable, the NRC has to deny
23 it?

24 And isn't there shifting of drivers from
25 when the application is filed to the NRC to

1 determine whether that application will be granted
2 or denied, and every applicant, DOE no different,
3 and this section 114(c) only emphasizes that, is
4 under an obligation, even without 114(c), every
5 applicant is under an obligation to tell
6 immediately the NRC of any problem in their
7 application that involves a safety matter.

8 Isn't that the point, that there's a
9 switch of who decides the NRC, acting on DOE's
10 information; they'll have to deny it if there's a
11 safety problem.

12 >>MR. MALSCH: I actually would not read the
13 statute that way. It seems to me that if there is
14 an unresolvable safety problem, the most natural
15 and ordinary thing to happen would be to simply
16 withdraw the license application.

17 >>JUDGE MOORE: Is that more natural than
18 denying it?

19 >>MR. MALSCH: well, then you would be asking
20 DOE to put on a case for the proposition that its
21 application should be denied; that strikes me as a
22 very strange kind of proceeding?

23 >>JUDGE MOORE: well, wait a minute. There
24 are some unknown number that could be literally
25 tens of thousands of issues, that the technical

1 staff is considering that are not in adjudication.
2 Any one of which could be a show stopper, from the
3 technical staff's viewpoint, and say the license
4 application cannot be granted.

5 >>MR. MALSCH: That's true, in which case --

6 >>JUDGE MOORE: So --

7 >>MR. MALSCH: I would say that's --

8 >>JUDGE MOORE: Doesn't have to be fought out
9 here.

10 >>MR. MALSCH: But if the application has
11 been --

12 >>JUDGE MOORE: And that would be -- and the
13 staff would deny the application. That would
14 bring a halt to the adjudication. But for reasons
15 that have nothing to do with the contested matters
16 here, there are literally tens of thousands of
17 issues that the staff potentially could be
18 considering, that we know nothing about, in the
19 adjudication.

20 >>MR. MALSCH: Well, that's true, but even in
21 the event the staff itself should identify an
22 unresolved safety question, the natural reaction
23 of the applicant, or any applicant, would be not
24 to press forward with the application, not to
25 press the staff issues of notice of denial, and

1 not to have a separate proceeding on whether the
2 application should be denied. That really doesn't
3 make any sense.

4 >>JUDGE MOORE: Well, and what would they do
5 if the statute keeps using the word granting or
6 denying, approving or disapproving. I'm not sure
7 that lumping Yucca Mountain with every other
8 proceeding is a good analogy, because, from the
9 start the Commission has recognized, and certainly
10 I think everyone in this room has recognized, this
11 is a unique proceeding.

12 >>MR. MALSCH: Well, it is certainly a unique
13 proceeding, but 114(d) certainly suggests that
14 Congress did not have in mind a unique set of
15 rules to apply to it, with the exception of the
16 time deadline.

17 Congress had the opportunity to fashion
18 special rules that would apply to this proceeding
19 and didn't do so. The usual rules applied.

20 >>JUDGE WARDWELL: On page 4 and 5 of your
21 brief you said it's not clear from DOE's motion
22 why DOE concludes that Yucca Mountain is not a
23 workable option for long term disposal of these
24 materials, (spent nuclear fuel, high level waste)
25 although Nevada's contention, including legal

1 issue contentions, would offer ample support for
2 such a conclusion.

3 Doesn't DOE's refute of every allegation
4 of your's, major contention, would render this
5 hypothesis invalid. I mean, it does not support
6 your conclusion, it would be the opposite,
7 wouldn't it? Because they disagreed with every
8 one of your contentions?

9 >>MR. MALSCH: That's true. All we were
10 saying was that we think a reasonable and expert
11 and rational review of our contentions would reach
12 the conclusion that we are right and they are
13 wrong. Certainly would be -- would have been
14 reasonable for DOE to say we are right on some of
15 those contentions. They chose not to so do.

16 >>JUDGE WARDWELL: Do you have any idea what
17 this workable -- the unworkability of Yucca
18 Mountain is at this present time, that motivates
19 such a position by the Secretary?

20 >>MR. MALSCH: well, I really should defer to
21 them on that, but my understanding --

22 >>JUDGE WARDWELL: what did you interpret, in
23 response to the questions asked earlier this
24 morning, in regards to trying to pin down what
25 this workability was that so motivated them?

1 >>MR. MALSCH: I think that one of the
2 principal lessons that one might learn from this
3 process, as it has continued to date, that as a
4 practical matter we will never get a repository
5 built and operational without the support of state
6 and local government.

7 >>JUDGE WARDWELL: That speaks like it's a
8 political issue as much as a technical issue, is
9 that what you're saying?

10 >>MR. MALSCH: I think it's a practical
11 question. If the goal is to get an operational
12 repository, then the question is what is the most
13 practical way to get there, and I think one of the
14 lessons learned is, we're just not going to get
15 there over the determined opposition of state and
16 local government.

17 >>JUDGE WARDWELL: Do you know if Washington
18 and Texas were disappointed when they were
19 eliminated from consideration?

20 >>MR. MALSCH: I doubt it.

21 >>JUDGE MOORE: What's the difference between
22 a policy decision and a political decision?

23 >>MR. MALSCH: I would just define it in
24 terms of who's making the decision. I mean,
25 Congress makes political decisions which make

1 policy choices. So I think a political decision
2 is one made by Congress, a policy decision is one
3 made by an administrative agency.

4 So if an administrative agency makes it
5 based on -- I mean, the 800 pound gorilla in the
6 room, was this a political decision, their
7 upcoming elections, and the majority leader of the
8 senate is up for election. That's the 800 pound
9 gorilla.

10 Does a political decision change the
11 deference that's due that decision, from one
12 agency to another, especially if one of the
13 agencies is an independent regulatory agency
14 commission that is, in theory, and hopefully in
15 practice, immune to politics?

16 >>MR. MALSCH: well, I think it's actually
17 irrelevant. I think the Commission, in looking at
18 DOE's motion, is obligated to look on its face for
19 the reasons DOE gave in that motion, for seeking
20 to withdraw. And the case law suggests, a long
21 line of case law suggests that NRC, as a
22 regulatory agency, not a promotional agency, does
23 not second guess applicants' reasons for wishing
24 to withdraw.

25 >>JUDGE RYERSON: But, Mr. Malsch, hasn't the

1 Commission asked us not to second guess policy,
2 but to make a legal determination as to whether --
3 whether there's lawful discretion here?

4 I mean, but for the Commission's
5 April 23 order, and I don't speak for the whole
6 Board on this, but some of us might have thought
7 that, well, we could deduct this issue, we could
8 assume but not decide the authority. I think the
9 Commission, do you agree, has pretty clearly asked
10 us to adjudicate the DOE's legal authority to file
11 such a motion. So that issue's before us, is it
12 not?

13 >>MR. MALSCH: That issue is before you. My
14 only point would be that, if you conclude that DOE
15 has the authority to withdraw, I don't think you
16 have the authority under established case law to
17 second guess DOE on its reasons for choosing to
18 withdraw.

19 >>JUDGE WARDWELL: Do you have any case law
20 that deals with an involuntary applicant, an
21 applicant that was required to submit an
22 application, as opposed to a voluntary applicant
23 that did it on its own free will.

24 >>MR. MALSCH: You know, I thought about
25 that, I can't think of one. The closest analogy

1 that comes to mind is the Clinch River Breeder
2 Reactor proceeding, where I recall, generally,
3 that there may have been a congressional direction
4 at one point to proceed with the license
5 application.

6 >>JUDGE WARDWELL: Do you know of any other
7 activity that's mandated by Congress to take
8 place, that then has in that same statute that
9 requires that activity -- this is outside -- just
10 as another -- as trying to have an analogy to
11 what's happening here at this unique situation
12 that we're dealing with, with the Waste Policy Act
13 and exclusive nature of the Yucca Mountain
14 consideration.

15 But is there any other thing in
16 congressional activity that has mandated a
17 specific action, and all I can think of is, say,
18 the selective service, has required young men, and
19 I don't know if it extends to women now, have to
20 register. I don't think it is yet.

21 But would you be surprised if in the
22 Selective Service Law that there wasn't a
23 statement in there saying, you shall not retract
24 or withdraw your registration, if that was
25 missing; would that surprise you?

1 >>MR. MALSCH: You know, I don't know the
2 answer to that question. I've never looked at the
3 selective service statute.?

4 >>JUDGE WARDWELL: Yeah, I know, but just as
5 a practical matter, as a common sense matter,
6 would that surprise you if it was missing, that
7 they didn't go on to say, after they said you
8 shall register, and I forgot what it is, because I
9 got my draft card was a long time ago, and -- but
10 the selective service said something to the effect
11 you shall register such and such period after your
12 18th birthday, most likely.

13 would you be surprised if, in fact, they
14 then didn't go on and say, oh, by the way, you
15 shall not withdraw that registration the same day
16 or the next day. You cannot withdraw that
17 registration. would you be surprised if that was
18 missing?

19 >>MR. MALSCH: I guess I wouldn't necessarily
20 be surprised if it was missing, if the statute
21 also said in the end, when we call you to serve,
22 you needn't come.

23 So it depends on the statute. I mean,
24 the point that DOE is making that there's no
25 obligation in any statute for DOE to actually

1 build and operate a repository.

2 >>JUDGE WARDWELL: And no one is saying that.
3 All they are saying is, what the opponents are
4 saying is that you've got to continue to ride the
5 train through this construction authorization.
6 And we're close to that now anyhow. And so it's
7 not a big monumental thing that's taking place.

8 The fact that nothing's getting built, I
9 think, works against DOE's argument, isn't it,
10 because we're so close as it is, let's decide
11 what's on the merits, disapprove or approve, like
12 we're mandated to do, and then the fate of Yucca
13 Mountain will be determined under future policy
14 decisions, and other technical issues, also with
15 other permits required.

16 >>MR. MALSCH: Yeah. I just don't think that
17 that precludes the option of DOE withdrawing a
18 license application.

19 >>JUDGE WARDWELL: It also doesn't preclude
20 denial of that application, if one interprets the
21 Yucca Mountain -- the Waste Policy Act in 114 in a
22 different manner.

23 >>MR. MALSCH: Right. That's correct. I
24 would just fall back on the provision that if it's
25 unclear, if the statute doesn't address the

1 precise question, the question then before the
2 agency is what's the most reasonable thing, what
3 is the most --

4 >>JUDGE WARDWELL: One more thing. I see
5 Judge Moore getting excited, and I'll be cut it
6 out. I just want to ask one more question, and
7 then I'll turn it over to him.

8 >>JUDGE MOORE: You may ask a question.

9 >>JUDGE WARDWELL: we talked about the
10 interaction between the staff and DOE during the
11 license review process. And if something did come
12 up, a fatal flaw did come up, and you mentioned, I
13 think, that the most logical thing would be for
14 DOE to withdraw its application. What would be
15 the process by which it would do that, then,
16 wouldn't it be 107?

17 >>MR. MALSCH: Yes, it would be 107.

18 >>JUDGE WARDWELL: And is there anything in
19 107 that prohibits the Board from denying that
20 application to withdraw?

21 >>MR. MALSCH: I think there's nothing in 107
22 that addresses that question, although case law --

23 >>JUDGE WARDWELL: It's silent on that.

24 >>MR. MALSCH: 107 is silent.

25 >>JUDGE WARDWELL: In fact, 107 wasn't

1 generated for any review of whether or not an
2 application should or should not be withdrawn.
3 Isn't it as you -- do you read it the same way I
4 do, that it's more of a granting additional
5 authority to the Board to do some other activity,
6 during that motion to withdraw, if they wish,
7 because there's all kinds of may's in there; they
8 may do this, if you want to, and it gives the
9 Commission more authority with a withdrawal than
10 what would have been if, in fact, 107 didn't
11 exist.

12 >>MR. MALSCH: well, it certainly describes
13 the procedures that should apply if an applicant
14 wishes to withdraw.

15 I think, though, the first -- I think
16 the first part of 107, recognizing a right to
17 withdraw, and the second part of 107 specifies who
18 decides whether that right can be exercised once
19 the notice of hearing is issued. But I think it
20 is implicit in the regulation that there is a
21 right to withdraw, otherwise there would be no
22 need for the regulation in the first place.

23 >>JUDGE WARDWELL: But there's also no
24 provision saying to the Board, you must grant it
25 one way or the other.

1 >>MR. MALSCH: I think that is true,
2 although, you know, the laws applicable to such
3 applications include a large body of case law, and
4 that large body of case law does suggest, as we
5 indicate in our brief, that it would be a very
6 rare circumstance, if at all, in which an
7 applicant would not be allowed to withdraw its
8 license application.

9 >>JUDGE MOORE: Well, there's no question
10 that if that's the statutory, instruction to 107
11 cannot stand in the statute's way, it's trumped by
12 the statute under the supremacy clause, isn't that
13 correct?

14 >>MR. MALSCH: Yes.

15 >>JUDGE MOORE: You said that in determining
16 whether the statute was ambiguous, which you went
17 on, but it -- and I was asking you whether it was
18 a political question or not -- whether it was a
19 political decision or a policy decision, and you
20 said it didn't matter.

21 In Food and Drug Administration v.
22 Brown & Williamson Tobacco Corporation, the
23 Supreme Court's 2000 decision, one of the factors
24 in determining whether the question was addressed
25 by the statute was, finally, the court must be

1 guided to a degree by common sense as to the
2 manner in which Congress is likely to delegate a
3 policy decision of such economic and political
4 magnitude to an administrative agency.

5 Now, isn't that more or less the
6 question we're faced with in determining the first
7 step in Chevron, whether Congress addressed the
8 issue?

9 >>MR. MALSCH: Yes, that is the question in
10 step one of Chevron.

11 >>JUDGE MOORE: And that's the last of the
12 factors that the court, in Brown & Williamson set
13 forth, recognizing the regulation of tobacco was
14 highly contentious and with enormous political
15 implications, political and economic implications,
16 two factors that are also very much at play here.

17 Is that a factor that is to be
18 considered in whether or not Congress spoke,
19 unambiguously or ambiguously, however you want to
20 phrase it, in step one of Chevron, which was what
21 Justice O'Connor was talking about when she laid
22 out the Chevron factors?

23 >>MR. MALSCH: Well, I think, though, you end
24 up being pulled in different directions. I mean,
25 one direction would be that if Congress thought it

1 was so important that DOE, against all odds, and
2 no matter what, prosecute its license application
3 after it had been filed, why didn't it say so.
4 And why didn't it make an exception when it
5 inferred to the laws applicable to such
6 applications?

7 >>JUDGE MOORE: That always is the
8 metaphysical question of how a five-four decision
9 can say the plain language of the statute is
10 unambiguous.

11 >>MR. MALSCH: well, I mean, it is a fact
12 that there are lots of decisions in the court of
13 appeals which are sharply contested, but they're
14 ultimately resolved under Chevron step one no
15 matter what.

16 >>JUDGE MOORE: Often five-four, that it's --

17 >>MR. MALSCH: But a five-four decision is
18 still a decision.

19 I do, though, want to spend some time on
20 the question whether there should be withdrawal
21 with or without prejudice.

22 >>JUDGE WARDWELL: with that I'd just like to
23 ask one more question?

24 >>MR. MALSCH: Sure.

25 >>JUDGE WARDWELL: And that is, that in your

1 past discussions with various boards, over the
2 years, you've been pretty forthright in describing
3 the strengths and weaknesses of your arguments,
4 compared to your opponents. And I would be
5 curious in your forthright opinion of how you rate
6 the strength of your argument, and that of DOE's,
7 which was eloquently presented by Mr. Lev this
8 morning, in regards to the broad based policy
9 authority granted by the AEA in allowing DOE, at
10 any time, to essentially stop going forward,
11 compared to the mandates that the proponents claim
12 are there in the Waste Policy Act, that requires
13 it to move forward.

14 How would you judge the strength of your
15 arguments?

16 >>MR. MALSCH: I do think that's a very good
17 argument. I mean, it is a fact that DOE possessed
18 residual authority with respect to developing
19 waste disposal facilities, and clearly possessed
20 residual authority to abandon a project once it
21 began. It did that in Lyons, Kansas. It's also
22 true that there is nothing specific in Nuclear
23 Waste Policy Act that detracts from that
24 authority.

25 From my standpoint, if I put my

1 regulator hat on, I come back to the question I
2 posed in the beginning: what possible sense does
3 it make for a regulatory agency to force an
4 applicant to prosecute a license application over
5 its objection, and its unwillingness to go
6 forward, and if it did, what on earth would that
7 proceeding look like, when there's determined
8 opposition.

9 I think you would end up with a very
10 strange proceeding, that possibly resulted in a
11 default, or a motion for summary disposition
12 granted. It just --

13 >>JUDGE WARDWELL: If the Court decides that
14 that is what should take place, wouldn't DOE be
15 obligated to pursue it in vigor, and consistent
16 with how they've vigorously denied any of your
17 contentions as being frivolous, as I would
18 paraphrase.

19 >>MR. MALSCH: I think that is theoretically
20 correct, but I would submit that would be a very
21 silly decision.

22 >>JUDGE WARDWELL: And likewise, there is
23 nothing to say that the Secretary, at the time
24 that the prosecution of this took place would, in
25 fact, not have a different global view, and may

1 not see the unworkability in Yucca that the
2 current Secretary sees, also.

3 >>MR. MALSCH: That's possible. Although I
4 have a suspicion, frankly, that beginning in 2002
5 the project was on, essentially, autopilot, and no
6 one gave any serious thought to the issues which
7 the current Secretary has given consideration to.

8 I have to say, I'm not an insider, I
9 can't offer inside information.

10 >>JUDGE WARDWELL: And isn't that the
11 obligation of the Secretary, to go to Congress and
12 say, let's change some stuff so that it's clear,
13 and we can do this in an appropriate manner,
14 instead of relying on the Waste Policy Act that we
15 now have; isn't he bound to do that?

16 >>MR. MALSCH: well, I wouldn't say bound to
17 do that?

18 >>JUDGE WARDWELL: Is it a reasonable thing
19 to do?

20 >>MR. MALSCH: That would have been a
21 reasonable thing to do, but I don't think that
22 says that what he did now is not also a reasonable
23 thing to do.

24 >>JUDGE MOORE: Hasn't it been on autopilot
25 because of the appropriations process and the

1 political process, since 2002?

2 >>MR. MALSCH: I would say it was really more
3 a matter of bureaucratic initiative instead of
4 inertia. I just don't think people thought about
5 the larger questions.

6 >>JUDGE MOORE: I could be totally wrong. I
7 thought that the funding impingements began about
8 that time.

9 >>MR. MALSCH: Oh, well, that's true.

10 >>JUDGE MOORE: Well, if that's true, that
11 kind of has a direct impact on the bureaucratic
12 inertia, as you put it.

13 >>MR. MALSCH: But I still think it did. I
14 mean, it cut it back a bit. But I still think
15 there was that determined bureaucratic inertia. I
16 just don't think until recently anybody in the
17 administration of DOE thought about the larger
18 questions, and whether it made any sense to go
19 forward in the situation, only to determine the
20 opposition of the state and local government.

21 I think that consideration, which was
22 important years ago, just recently came to the
23 fore.

24 I have to say, that's speculation on my
25 part, I'm not part of DOE. I don't know actually

1 what was going on, but it's a plausible
2 explanation for what occurred.

3 >>JUDGE MOORE: But Clark County points out
4 in its brief, and refers to the State -- State of
5 Nevada's 1500 page presentation, when it sought to
6 veto the Secretary's recommendation and then went
7 through the carefully prescribed process of the
8 waste Policy Act, it cited all of those polls that
9 showed consistently for 20 years the State of
10 Nevada had vigorously opposed Yucca Mountain, and
11 Congress, nevertheless, in -- or the
12 administration, nevertheless, in 2002, went ahead,
13 and the application was filed as late as 2008,
14 and developed the whole application, and,
15 essentially, as you know, because you fought it
16 vigorously and sought to obtain the 2004 version
17 of it, all of that was going on.

18 That doesn't strike me as bureaucratic
19 and lack of bureaucratic inertia. DOE had its
20 back to the wheel and was producing, through its
21 contractors and the funding, such as it was, to
22 produce that application.

23 >>MR. MALSCH: well, I think, though, Judge
24 Moore, that makes my point. They were focused
25 laser-like on preparing application, and it was

1 not until recently that they gave consideration to
2 the larger questions of where are we going with
3 this, why prosecute an application in the face of
4 determined opposition, even to a successful
5 conclusion, if the result is we'll never be able
6 to build the repository because Congress won't
7 step in and override state and local laws on water
8 use permits, won't step in and grant the necessary
9 land use authorizations.

10 I think that my speculation is they were
11 focused laser-like on Part 63 in the regulations,
12 and until recently just didn't consider the larger
13 questions of whether this really made any sense.

14 If I may just go through briefly the
15 with or without prejudice question?

16 >>JUDGE RYERSON: One quick question on that
17 point, before you begin. You're brief,
18 Mr. Malsch, and I assume you're going to speak
19 now, your brief dealt with some very practical
20 aspects of Nevada's situation, and why with
21 prejudice, from Nevada's standpoint, would be more
22 fair and make sense.

23 If I understood Mr. Lev's argument this
24 morning, he was arguing that were the Board to
25 conclude that DOE has discretion to withdraw, then

1 the Board has very little, if any, discretion but
2 to exceed to DOE's policy judgment that withdraw
3 with prejudice is the appropriate way to go.

4 You have some independent reasons that
5 you're going to talk about, I assume, but do you
6 agree with that -- with Mr. Lev's analysis, or are
7 you less convinced that that's the case?

8 >>MR. MALSCH: Oh, no, I agree with that
9 analysis. I think, first of all, that it's clear
10 that the entire body of NRC case law, on whether
11 applications should be withdrawn, with or without
12 prejudice, was developed in situations in which an
13 applicant was seeking to withdraw without
14 prejudice, and the interveners were opposed to
15 that and seeking withdrawals with prejudice.

16 So there really is no NRC case law
17 directly on point. But DOE certainly is correct.
18 The case law in the federal courts is very clear,
19 that when a plaintiff wishes to withdraw with
20 prejudice, then that wish must be granted, unless
21 some other party comes forward and shows it would
22 be prejudiced.

23 >>JUDGE MOORE: Absent a settlement, at least
24 in my 35 years of experience, before going on the
25 bench, it was essentially unheard of for a

1 plaintiff to seek to withdraw with prejudice, but
2 I guess --

3 >>MR. MALSCH: It is unusual, but it has
4 happened. There's an interesting example of a
5 case, actually cited by NEI in its brief, the case
6 is ITT Direct v. Healthy Solutions, in which an
7 applicant, a plaintiff, sought to withdraw with
8 prejudice, and it was actually denied in that case
9 because of prejudice that would be suffered by a
10 third party intervener.

11 So it's rare, but it has happened. But
12 I think it does illustrate the point that where an
13 applicant seeks to withdraw its application, that
14 motion must be granted, absent some showing by
15 some other party that they would be prejudiced,
16 and in this case there was certainly no such
17 showing. In fact, only Nevada submitted evidence
18 on the prejudice question, in the form of an
19 affidavit. Everyone else is submitting arguments
20 of counsel.

21 And, in fact, we can find no prejudice
22 here, because no one has a right to have Yucca
23 Mountain licensed, no one has a right to send
24 their waste to Yucca Mountain. It's not been
25 established that Yucca Mountain is safe, or even

1 that disposal at Yucca Mountain is safer than
2 leaving it where it is, half in Savannah River or
3 the commercial sites.

4 The only possible right that I can think
5 of in this case that could be at issue is the
6 right granted to owners and generators of
7 commercial spent fuel to have DOE begin disposing
8 of their spent fuel, in 1998.

9 But as the standard contract cases in
10 the D.C. Circuits made clear, that right exists
11 completely independent of any repository, and
12 completely independent of whether Yucca Mountain
13 is licensed. So nothing this Board can do, with
14 respect to DOE's motion to withdraw, can possibly
15 effect that, right?

16 >>JUDGE MOORE: What do you say in response
17 to the staff's argument?

18 >>MR. MALSCH: They have, I would say, a very
19 peculiar argument. They seem to be saying that
20 you cannot grant the application to withdraw with
21 prejudice, because then, if DOE were to file it,
22 it could be considered on its merits, contrary to
23 114(d) of the Nuclear Waste Policy Act.

24 But wait a minute, 114(d) says that such
25 a refiled application would be considered in

1 accordance with the laws applicable to such
2 applications, and one of those laws would be the
3 prior decision, saying that the withdraw was with
4 prejudice and the application may not be refiled.
5 So staff argument, I think, ends up getting itself
6 nowhere. Nor does its reference to the Clinch
7 River Breeder Reactor offer much guidance,
8 because, in that case, after various fits and
9 starts, the application was withdrawn without
10 prejudice, and no one was contesting that. No one
11 asked for it to be withdrawn with prejudice.

12 I would say, though, again, in response
13 to Judge Ryerson, we took a different tact in our
14 brief, took a different approach than the one DOE
15 took, because if we had taken the approach DOE
16 took, we would have been required to speculate
17 about whether other parties would have suffered
18 prejudice. And since we were all filing
19 simultaneously, it didn't seem to us that would be
20 a very worthwhile exercise.

21 So instead we posed a slightly different
22 question, and the question we posed was whether
23 Nevada is entitled to withdraw with prejudice,
24 even if DOE had not asked for one. And I think we
25 make a very strong case that, in fact, we are so

1 entitled.

2 >>JUDGE MOORE: Because of the enormity of
3 the decision, and the depth of what you filed, and
4 the fact that nobody's had any chance to in any
5 way rebut it, is any of it a factual matter that
6 would require hearing before you could reach a
7 conclusion?

8 >>MR. MALSCH: I think no, in the absence of
9 any party indicating, up until this point, that it
10 desired to present evidence. I think --

11 >>JUDGE MOORE: Well, how could they, they
12 never saw what Nevada presented. As you said, it
13 was by our sufferance the DOE was able to file a
14 reply. And that being the case, because of
15 motion, answers, one reply, nobody knew what
16 anybody else was going to say.

17 >>MR. MALSCH: Well, I think that's true, but
18 I think it is also fair to have required the other
19 parties, before today, to serve notice on this
20 Board that they wish to present evidence contrary
21 to the evidence offered by the State of Nevada.

22 >>JUDGE MOORE: Well, a number of them did
23 with respect to anything DOE would have to say,
24 because they didn't know what was going to be in
25 DOE's reply, and so that may well stand as notice

1 that they may be objecting, I don't know, they all
2 speak for themselves. But the process we're under
3 doesn't leave much room for anybody to have had an
4 opportunity to contest anything.

5 And so what I was wondering was, are any
6 of the matters that you've put forth matters of
7 fact that could be challenged and would have to be
8 established?

9 >>MR. MALSCH: I think the facts we set
10 forth in our affidavit are probably not
11 challengeable. I mean, they deal with the effort
12 and expense of Nevada in reaching this point, and
13 we're talking here about years of effort. I mean,
14 after all, if you look at this proceeding and
15 consider that it started effectively in 2004, when
16 the Commission first appointed a preapplication
17 presiding officer board, if you say the proceeding
18 first started in 2004, and would end,
19 hypothetically, in sometime around 2012, after the
20 last volume of status SCR.

21 we were, when staff filed -- when DOE
22 filed its motion, three-quarters of the way
23 through the proceeding, at a point when Nevada had
24 already spent tens of millions of dollars of its
25 own money, and many more, much more money in grant

1 funds, reaching this point, in comparing and
2 certifying its output. End collection reviewing
3 multiple versions of the application in SCR
4 preparing contention. It was a very large, very
5 large expenditure, I don't think there's any way
6 they could contest that.

7 The other important point in our
8 affidavit is the testimony in the affidavit that
9 it took extraordinary efforts by Nevada to find
10 highly qualified experts in the relevant fields.
11 And because of business and other conflicts, we
12 had to go abroad to get just about half of our
13 experts.

14 The affidavit says that you just simply
15 cannot maintain that expert team indefinitely, and
16 that it would be almost impossible to reconstitute
17 any kind of a team. And I don't think that's
18 really contestable in the circumstances of this
19 case. And I think that is a factor that argues
20 strongly in favor of a dismissal with prejudice.

21 We mentioned several other factors here
22 also; DOE's failure to prosecute the application
23 diligently. And by here we weren't referring to
24 the fact that they failed to prosecute it
25 diligently once they filed it, but the fact they

1 took a full six years beyond the deadline to file
2 it in the first place, during which time we had to
3 spend six years keeping up to date and following
4 what they were doing, and what was going on, the
5 fact that in effect motions for summary judgment
6 were pending in the form of legal contentions,
7 when they filed their motion to withdraw.

8 I think all these factors argue strongly
9 in favor of withdrawing with prejudice. But I do
10 want to mention two things, though. One is,
11 first, we did make an issue over the failure --
12 the inability to have meaningful discovery, if
13 there were refiled application because of DOE's
14 reluctance to make the necessary commitments
15 regarding preservation of its LSN collection.

16 You know, DOE has changed its position
17 in this respect in its answers to the Board's
18 questions, and if those answers stick, and subject
19 to any changes in the case conference hearing
20 tomorrow, which we don't expect, we no longer
21 think we will be prejudiced by a lack of discovery
22 to the application being filed, so that argument
23 really is, for now, off the table.

24 But the other arguments, the other four
25 factors argue strongly in favor of a dismissal

1 with prejudice.

2 >>JUDGE WARDWELL: Do you agree with
3 what was stated earlier this morning, that even if
4 there was a withdrawal with prejudice, that this
5 necessarily wouldn't put Yucca Mountain to bed,
6 and mothball it for time infinitum; it could still
7 come back in some form, some shape, as a disposal
8 option for high level waste?

9 >>MR. MALSCH: I mean, even if it is true,
10 even if the Commission accepts and grants the
11 withdrawal with prejudice, Congress could always,
12 at any time in the future, direct otherwise, and
13 that would obviously trump whatever the Commission
14 may have said on the subject.

15 >>JUDGE WARDWELL: And a Blue Ribbon Panel
16 may say that's a good option for any of these
17 things.

18 >>MR. MALSCH: who knows. who knows what's
19 going to happen, but I think if the Board and the
20 Commission were to grant the withdraw with
21 prejudice, the result really would be that it
22 would be up to Congress then to take the ball, if
23 they wanted to move Yucca Mountain forward.

24 >>JUDGE WARDWELL: I guess that gets to my
25 question, then, why wouldn't you be better off

1 served by moving forward now, as far as your
2 prejudice arguments are concerned. If that's the
3 only thing we're dealing with here now, seems to
4 me you'd be better off served by moving ahead with
5 the construction authorization license, and
6 resolve the issue and release all your experts,
7 because either it will show a fatal flaw or it
8 won't, depending on the hearing.

9 >>MR. MALSCH: well, but that ignores another
10 consideration. I mean, if you -- if you believe
11 that in the end, no matter what we do under the
12 current process, we will not end up with an
13 operational repository, there's a lot to be said
14 for cutting your losses now and not further
15 wasting the taxpayers' money, and I think that's
16 what, primarily, is motivating the withdrawal at
17 this particular point.

18 >>JUDGE WARDWELL: You think that's that big
19 of a significant thing that's motivating this
20 workable determination, the unworkability
21 determination?

22 >>MR. MALSCH: I think that is a major -- I
23 would say, and I can't speak for DOE, from my
24 standpoint, a major reason for not doing what you
25 suggest, which is to go forward and see what

1 happens, would be if the ultimate result is no
2 repository, why waste the taxpayers' money in the
3 process.

4 >>JUDGE WARDWELL: It would have been a lot
5 smarter to do that at the earlier stages of site
6 characterization, wouldn't it, with the same
7 public disfavor.

8 >>MR. MALSCH: It would have been, all I can
9 say is better late than never.

10 >>JUDGE MOORE: One quick point on page 8,
11 you point, as part of your prejudice argument,
12 that Nevada's analyses have been decisively
13 contradictory to DOE. The persons involved in
14 this work, and the value of their work product,
15 such as scientific notebooks, will be lost should
16 the proceeding be dismissed.

17 The question immediately came to mind as
18 to why would they be lost and aren't these
19 materials that you described documentary material,
20 and shouldn't they already be in the LSN?

21 >>MR. MALSCH: Yes. I mean, they should be
22 in the LSN. The question up until DOE's most
23 recent responses was whether the LSN would be
24 available.

25 >>JUDGE MOORE: It's not that they would be

1 lost, it's that if the LSN material is jettisoned
2 they would be lost.

3 >>MR. MALSCH: Right. And I just wanted to
4 make one last important point, though, on the with
5 or without prejudice question.

6 others have made a big deal of the fact
7 that, according to them, NRC case law suggests
8 that there cannot be a withdraw with prejudice
9 unless it is associated with or is equivalent to a
10 decision on the merits of the application, and
11 that is -- that just can't be.

12 There is suggestions in two appeal board
13 decisions. I'm thinking of North Coast and
14 Fulton, that ordinarily you dismiss things with
15 prejudice, when there is a merits decision, or its
16 associated with a merits decision, but that was
17 not actually the holding of those cases. The
18 holding was somewhat different.

19 And, in fact, the case cited for that
20 language in the Fulton case, which is Jameson v.
21 Miracle Mile, actually did not say.

22 >>JUDGE WARDWELL? Is that the Fifth
23 Circuit case?

24 >>MR. MALSCH: It is -- no, Third Circuit.
25 My notes say Third Circuit. That decision did not

1 say that a dismissal with prejudice is equivalent
2 to a decision on the merits, all it said was that
3 if the judgment in that case had not been tainted
4 by fraud, there would have been claim preclusions
5 associated with it, and there's no dispute about
6 that. That simply means the application couldn't
7 be refiled.

8 But as the case we cited shows, there is
9 no issue preclusion associated with a dismissal
10 with prejudice because there's been no
11 adjudication of the merits. And so it simply
12 cannot be that admissible with prejudice is equal
13 to a decision of the merits.

14 And several of the cases we cited
15 actually involved situations where the district
16 court granted a motion to withdraw, or denied a
17 motion to withdraw, and there was no decision on
18 the merits in those cases.

19 So there is no indication that
20 necessarily there must be a decision on the merits
21 in order to grant a motion for withdrawal with
22 prejudice.

23 >>JUDGE MOORE: Thank you, Mr. Malsch.

24 >>MR. MALSCH: Thank you.

25 >>JUDGE RYERSON: I have more questions for

1 him in another area. Just three or four.

2 >>JUDGE WARDWELL: That's in regard to your
3 NEPA discussion on page 25 through 27.

4 You posit that the withdrawal of this
5 application was not a federal action by NRC. And
6 it's clear it isn't. We're not involved with it.
7 But NRC is required to adopt or address the EIS
8 that DOE has, and hasn't DOE's EIS been
9 constrained by some limitations that the Waste
10 Policy Act has allowed it to move forward with,
11 that wouldn't necessarily be there on any other
12 application?

13 >>MR. MALSCH: That's true, but there was
14 nothing in the Nuclear Waste Policy Act that
15 dispensed with DOE's obligation to discuss the no
16 action alternative. And I think it is a
17 legitimate point to say that an environmental
18 impact statement, if one were to be prepared, and
19 if one had to get prepared, I mean a decision to
20 withdraw the license application would have
21 basically evaluated the no action alternative. So
22 I'm not sure what's missing here at all.

23 >>JUDGE WARDWELL: Do you think the same
24 constraints in the Waste Policy Act would apply to
25 this -- let's posit that this is, in fact, a

1 federal action that requires DOE to either amend
2 their EIS, or at least, at a minimum, create
3 another rod from that particular decision.

4 Do you believe that the constraints in
5 the waste Policy Act apply to that action, the
6 withdrawal of this, as it would to the application
7 submittal itself?

8 >>MR. MALSCH: You know, I specifically,
9 specifically.

10 >>JUDGE WARDWELL: 114(f)2 that says,
11 compliance with the procedures and requirements of
12 this act, by just complying to this act, the waste
13 Policy Act, that will be adequate consideration of
14 the need for the repository, the time of the
15 initial availability of the repository, and all
16 alternatives to the isolation of high level
17 radioactive waste and spent nuclear fuel and
18 repository.

19 114(f)(3) says the Secretary need not
20 consider alternative sites to the Yucca Mountain
21 site for the repository under this subtitle.
22 Those seem to be pretty focused limitations, and
23 again, in support of how they want to make sure
24 this is being focused towards this site. Almost
25 all other options are off the table for this.

1 Has not that put a tremendous
2 constraint, or at least a perception of a
3 tremendous constraint, on the no action
4 alternative associated with the EIS, that was
5 generated under those constraints, that wouldn't
6 exist now, when you're dealing with this now not
7 being a no action alternative, but this is the
8 action that they're now taking, and those options
9 and alternatives come to play again now?

10 >>MR. MALSCH: well, I do think if that
11 section applies, it would impose certain
12 constraints on the consideration of certain
13 alternatives, namely, timing of the repository,
14 alternatives of geologic disposal. But I don't
15 think it placed any constraints on DOE's
16 evaluation of the no action alternative.

17 Now, I do think that if DOE -- first of
18 all, I think DOE is correct. I think they don't
19 need to do an environmental impact statement on
20 their decision to seek withdrawal of the license
21 application, because it doesn't change the status
22 quo. But if, hypothetically, they were so
23 required, I don't think those restrictions in
24 section 114 would apply.

25 >>JUDGE MOORE: what's the outstanding

1 problem under NEPA with the rod. You have a
2 record of decision supported by an EIS, that now
3 you have a decision that is at odds with the
4 record of decision.

5 Doesn't DOE need a new record of
6 decision, and that would demand a -- at least a
7 minor supplement to the EIS saying there's been a
8 180-degree change in course, because remember that
9 EIS lays out the, for lack of a better term, the
10 parade of horrors of what happens if DOE does
11 not go forward with Yucca Mountain?

12 >>MR. MALSCH: I --

13 >>JUDGE MOORE: How do you -- how does the
14 record of decision support EIS, and doesn't there
15 have to be a new record of decision recognizing
16 the change in course?

17 >>MR. MALSCH: I, frankly, don't know the
18 answer to that question because, as you know,
19 records of decisions are creatures of agencies
20 NEPA rules. And I'm just not an expert on DOE's
21 NEPA regulations.

22 >>JUDGE MOORE: Well, they flow directly from
23 NEPA, but there's nothing in NEPA specifically
24 about records of decision, all there is is in
25 NEPA, 1022(c) is the obligation to prepare

1 environmental impact statements when there's major
2 federal actions significantly affecting the
3 environment.

4 The rest is all agency and CEQ
5 regulations, and I, frankly, would have to defer
6 to DOE on how best to answer that question.

7 >>JUDGE MOORE: Thank you, Mr. Malsch.

8 >>MR. MALSCH: Thank you.

9 >>JUDGE MOORE: Clark County.

10 >>MR. ROBBINS: Good morning, Your Honors,
11 thank you. Alan Robbins on behalf of Clark
12 County.

13 If you have a decision in front of you,
14 it's the legal question of whether or not DOE has
15 authority to withdraw. Of course, it's our
16 position that you don't have such a question, that
17 they have the authority, and, therefore, their
18 motion is an authorized act and should be granted.

19 You do not have before you, in any
20 event, in our opinion, a question regarding the
21 propriety of the exercise of their decision, of
22 their authority. You either conclude that they
23 have the authority, in which case it's up to them
24 to exercise as they see fit, or you conclude they
25 don't have the authority --

1 >>JUDGE MOORE: Counsel, do you believe
2 Chevron analysis is applicable?

3 >>MR. ROBBINS: No, sir.

4 >>JUDGE MOORE: why?

5 >>MR. ROBBINS: Well, for that reason,
6 because all you're getting to is the authority
7 question of whether they have the authority or
8 not.

9 >>JUDGE MOORE: But isn't that a question of
10 statutory interpretation?

11 >>MR. ROBBINS: It is.

12 >>JUDGE MOORE: Okay.

13 >>MR. ROBBINS: So perhaps that first step of
14 Chevron, at most. But pure legal questions also.
15 Then you get into it as a matter of deference
16 because it's their statute, or their statute that
17 they have expertise, or is it a pure legal
18 question and, therefore, a fresh look, in any
19 event.

20 My principal point is that, at most,
21 what you have in front of you is the statutory
22 interpretation question, if you take that view.
23 But concerns about whether this was a political
24 decision; a policy decision; a safety decision,
25 you know; is it meritorious or not, is beyond this

1 Commission and this Board's determination.

2 >>JUDGE MOORE: Well, excuse me, counsel, but
3 that's all of determining under Chevron, the first
4 step of Chevron is whether the issue was addressed
5 by Congress. There are all those factors that you
6 just said are irrelevant. Those all play as the
7 factors that go into the judgment of whether the
8 issue, the precise issue, was addressed by
9 Congress.

10 >>MR. ROBBINS: Well, we take a different
11 view, Your Honor, and that is in construing the
12 statute, if you feel there's construction
13 required, to determine whether they have the
14 authority to file the motion, you're looking at
15 the words of the statute, and what
16 congressional -- what did Congress say, and what
17 do you believe Congress meant when they said it.

18 That happened years ago. And,
19 therefore, statements have been put out in the
20 last few months by the Secretary, or stated even
21 by the DOE, in its motion before this Board, don't
22 go directly to what the words of the statute do or
23 do not mean. And that's our point.

24 By analogy, you know, if you were a
25 medical doctor, working at a hospital, and you saw

1 some patient climbing under their bed and leave
2 and said I've had enough, you may think they're
3 crazy, you may believe, maybe believe you know,
4 that they're doing something that's medically --

5 >>JUDGE MOORE: -- unsound.

6 >>MR. ROBBINS: -- ill advised, unsound. But
7 in the end you can't keep them hostage.

8 >>JUDGE MOORE: That's not always.

9 >>JUDGE WARDWELL: Not always true, is it? I
10 mean, there are people that are committed to
11 hospitals for their own safety and health, and if
12 they try to leave they would have to be
13 constrained, aren't there?

14 >>MR. ROBBINS: Well, that -- if you want
15 to -- that's not the analogy I had in mind. If
16 you're now -- you want to change it.

17 >>JUDGE WARDWELL: That -- isn't that closer
18 to what we have here? You're back to assuming
19 that one doesn't interpret the Waste Policy Act as
20 having very significant mandates that limits the
21 policy of DOE, before your analogy even comes into
22 play.

23 >>MR. ROBBINS: With all due respect, your
24 variation analogy assumes that there --

25 >>JUDGE WARDWELL: There's another reading of

1 it, is the opponent, is what I trust would be the
2 opponent's reading of it, so I'm saying that's an
3 even wash. A little significance will help.

4 >>JUDGE RYERSON: I'm not so sure the
5 analogies are helpful, but do I understand your
6 point, Mr. Robbins?

7 In other words, what you're saying is,
8 in your view, the Board has to make a legal
9 judgment, and the legal judgment is, does DOE have
10 discretion or not, under 114, once it's filed an
11 application to withdraw. If it does not have that
12 discretion, as a legal matter or decision is then
13 relatively simple, and you're suggesting that if
14 it has discretion it's not our role to review the
15 wisdom of DOE's decision; is that an accurate
16 statement?

17 >>MR. ROBBINS: That is accurate. And I
18 would add to that, then, insofar as
19 conditioning -- I'm sorry. Insofar as whether the
20 withdrawal is granted with prejudice, as
21 requested, or not. That, too, in this instance,
22 is up to the applicant.

23 The case law, I believe, that others
24 have cited, suggesting that there either has to be
25 a decision on the merits, in order for a dismissal

1 to be with prejudice, or that the Board has
2 discretion to make those determinations. Those
3 all rise in other settings where the concern was
4 would withdrawal cause prejudice to other parties,
5 or should it be made prejudicial, so that the
6 applicant can't come back and do this again in
7 some other way. It's not been in situations where
8 it was the applicant itself, as you have here
9 requesting or that its own request of withdrawal
10 be with prejudice.

11 The State and we have elaborated on the
12 various consequences, and you've just discussed
13 further concerns about the refiling, and LSN and
14 the like, and I won't reiterate that, at this
15 point.

16 I wanted to emphasize here that, in our
17 view, your job, maybe easy is not the right word,
18 but is narrowly focused, in that you either grant
19 the motion, with all due respect, unless you
20 determine that there's no legal authority for the
21 motion to be granted.

22 I would suggest that even that
23 determination, plainly, ultimately, is going to be
24 made or reviewed elsewhere, in any event.

25 >>JUDGE WARDWELL: I'm interpreting what

1 you're suggesting, and is there any discussion of
2 what the Secretary said, in regards to the motion
3 to withdraw is irrelevant to us; is that correct?

4 >>MR. ROBBINS: Yes, sir.

5 >>JUDGE WARDWELL: So why do you use it in
6 your argument? On page 5 you state that DOE has
7 reevaluated Yucca Mountain. Can you point us to
8 where that reevaluation has been enumerated?

9 >>MR. ROBBINS: All I can point you to is
10 the -- I'm not going to use the right term here
11 because I'm blanking, and I apologize, is
12 essentially the press release.

13 >>JUDGE WARDWELL: Likewise, on page 7 you
14 reiterate the infamous Secretary's term to be
15 unworkable. Can you point to anything that has
16 defined why it is unworkable now? You bring that
17 up in your brief.

18 >>MR. ROBBINS: Again, it was really more by
19 way of illustration of the fact that, if the
20 Secretary has determined to not go forward, for
21 whatever reason, then it makes, in our view, no
22 sense to proceed with the proceeding.

23 Now, we also -- if I recall correctly,
24 in part, were responding to, at least our reading
25 of Aikens' reply to the DOE motion, where in our

1 view, at least implicit in their argument, is that
2 the NWPA basically presented a done deal, short of
3 a rejection by the -- well, actually they don't
4 even say that, we don't think. That the mandated
5 filing and application was tantamount to the
6 granting or issuance of the license, and that the
7 proceeding was nothing more than a formality, and
8 we were pointing out we don't think that's the
9 case at all, the history was very clear that's not
10 the case.

11 >>JUDGE WARDWELL: Page 9 of your
12 application, you state that the funding from Blue
13 Ribbon Panel indicates that Congress is aware and
14 supportive of the President's and Secretary's
15 decision to terminate this proceeding.

16 Can you point to any reference that
17 supports that interpretation that you have, in
18 regards to the funding motivations of the Blue
19 Ribbon Panel?

20 >>MR. ROBBINS: Simply the act of granting
21 the funding for the panel, knowing what it's
22 about, and certainly knowing the history.

23 >>JUDGE WARDWELL: Aren't there numerous
24 other reasons why that makes sense, to have a Blue
25 Ribbon Panel, exclusive of whether Yucca Mountain

1 proceeds or not?

2 >>MR. ROBBINS: I think in different
3 circumstances there could be, but it's my
4 understanding, from what has been made available
5 publicly, that, you know, it was understood that
6 the notion of the panel was to look at
7 alternatives instead of Yucca Mountain, and in
8 light of the proposed shut down of Yucca Mountain,
9 not as chapter two beyond Yucca.

10 >>JUDGE WARDWELL: You believe Yucca Mountain
11 is off the table for the Blue Ribbon Panel?

12 >>MR. ROBBINS: It is my understanding, from
13 what's been said publicly, Your Honor. I have no
14 insight or particular information on that.

15 >>JUDGE RYERSON: One question about the
16 scope of review, or consideration of DOE's
17 judgment.

18 Now, we have a very unusual statute here
19 that provides direct action in the Court of
20 Appeals, under section 119, which is rare or
21 unique, as far as I can tell.

22 Doesn't the Court of Appeals have a
23 somewhat broader responsibility, for example, I
24 believe in the 119 actions, they're Administrative
25 Procedure Act claims, and under that statute,

1 which will be applied by the court, DOE has to
2 have -- has to have a rational basis for its
3 decision?

4 In other words, there is a second
5 guessing, if you will, by the Court of some
6 minimal level of rationality. Now that's the APA
7 standard for administrative action. Is that
8 broader than our standard? I don't believe we
9 apply the AEA directly, but do we have something
10 analogous like that as a responsibility?

11 >>MR. ROBBINS: I don't think in the context
12 of a motion to withdraw an application, no, sir.
13 I think that is the applicant's decision, and,
14 let's face it, it -- I think if -- if one does not
15 believe that the NWPA forecloses such a motion,
16 then what DOE is arguing, what the State of Nevada
17 has argued, what I'm arguing right now, is very
18 conventional, and I think would be highly
19 noncontroversial.

20 I think the only thing that potentially
21 makes some of that not quite add up, is if one
22 either believes, or is struggling with the thought
23 of whether the NWPA creates a different paradigm
24 that takes convention off the table. But
25 otherwise, the notion, if you dismiss any thought

1 that DOE has been involuntarily committed, beyond
2 escape, then they're an applicant like anybody
3 else. And unless engaged, as the case law has
4 indicated, in some licenseable activity, that has
5 not been licensed, surely it is not up to this
6 Board or this Commission to say you will go get a
7 license. Or, boy, having asked for one, there's
8 no turning back. It is not this Board's role. It
9 is not this Commission's.

10 >>JUDGE WARDWELL: Haven't you merely defined
11 the question as before, because we're in this
12 continuous do loop, as I say, because if one could
13 read the waste Policy Act differently it says
14 known fact it does put constraints on what they
15 can do.

16 >>MR. ROBBINS: I guess in part I hope that's
17 what I've done, Your Honor, because, you know,
18 part of my point is that the discussion about this
19 political decision, was it, you know, made by the
20 Secretary alone, or was the Secretary taking
21 orders from the President, you know, was it
22 properly viewed as a political decision or a
23 policy call, et cetera.

24 As I said, I think there are matters
25 that, they're interesting, and certainly will be

1 debated elsewhere, but are beyond the scope of
2 this Board's deliberations at this time on the DOE
3 motion. So if I've helped clarify that, that's
4 good, that's part of what I was hoping to do.

5 >> JUDGE MOORE: I guess I've missed a
6 portion of your point. The fact that it's a legal
7 issue that requires the interpretation of a
8 statute, I don't see how that avoids the
9 determination that, if Chevron is applicable, the
10 first step of Chevron, there's a series of steps
11 that you go through in determining whether the
12 precise question at issue was considered by
13 Congress, and that goes directly to this statutory
14 interpretation question.

15 And those factors that come into play in
16 determining that question, that was precisely what
17 Justice O'Connor was outlining in the FDA v. Brown
18 & Williamson Tobacco case.

19 In the first step of Chevron, was this
20 precise issue considered by Congress in
21 determining whether the statute was ambiguous or
22 whether it was not ambiguous.

23 >>MR. ROBBINS: My point, Your Honor, is
24 that -- let me call it rationale or explanation,
25 put out by the administration a few months ago, as

1 to why they exercised their authority in this
2 instance. I don't think those sheds any light,
3 and hence is not relevant to the statutory
4 interpretation question of whether they have the
5 authority to withdraw an application at all, or
6 whether, under the NWPA, having been instructed by
7 Congress to file an application, they must see it
8 through to the bitter end, whatever that end may
9 be.

10 I agree with Mr. Malsch that, not only
11 is that contrary to the language of the statute,
12 but it's contrary to practicality, and any way of
13 proceeding. It's just that we cannot conceive
14 that Congress would have created a paradigm that
15 contemplated involving so much time and resources
16 of all the different parties, and of this
17 Commission, on an empty exercise, and that's what
18 the exercise licensing proceeding would be, if
19 they're mandated to go forward with the
20 proceeding, the outcome of which, in the end,
21 really doesn't matter, because the DOE is not
22 going to build the facility anyway, and they're
23 not going to operate it anyway, then that makes
24 going forward with this proceeding an interesting,
25 academic, lucrative for some, and very costly for

1 others, but, ultimately, meaningless exercise.
2 And there's no indication, in our view, in the
3 statute of legislative history, that Congress
4 contemplated any such empty exercise, and yet a
5 conclusion that the DOE does not have authority to
6 withdraw the application inherently adopts such an
7 interpretation.

8 >>JUDGE MOORE: Thank you, Mr. Robbins. The
9 State of California.

10 >>MR. ROBBINS: Thank you, Your Honor.

11 >>MR. HEMBACHER: Good afternoon, Your Honor,
12 I'm offering my comments on behalf of the State of
13 California, and I've also been asked to make these
14 comments on behalf of the County of Inyo, which
15 has made a similar request to the Board, which is
16 to make findings.

17 we know that it's unusual for there to
18 be a request that a adjudicatory body make
19 findings about what it hasn't decided, but because
20 of the unique nature of the proceedings here, the
21 fact that it's likely that there will be future
22 applications filed by the Department of Energy,
23 and the fact that there are previous NRC decisions
24 that have indicated that a decision to withdraw
25 with prejudice is a decision upon the merits.

1 We want to make it, maybe in an excess
2 of caution, we want to make it clear that at least
3 the NEPA contentions raised by the State of
4 California, and the County of Inyo have not been
5 adjudicated by this body, and that they're
6 reserved for a future date.

7 As you know, the NEI decision held that
8 the Commission could determine the NEPA
9 contentions, or at least indicated that the NRC
10 had the authority to consider NEPA contentions,
11 and we want to make sure that there is no
12 confusion in a future proceeding, either in a form
13 before the NRC or, as you know, there's challenges
14 that have been filed both in the Ninth Circuit and
15 the D.C. Circuit. We support DOE's motion to
16 withdraw.

17 As you know, we thought it was legally
18 deficient for NEPA reasons, but there's been no
19 litigation, no discovery, no motions, or any other
20 form of litigation as to the merits of California
21 and Inyo's contentions, therefore, we are asking
22 that this body make -- in making its
23 determination, if it does, in fact, grant the
24 motion to withdraw with prejudice, that it make it
25 clear that the NEPA contentions have not been

1 adjudicated.

2 And that's all I have, unless you have
3 questions.

4

5 >>JUDGE WARDWELL: I just have one. On the
6 bottom of page 2 you state that the Board has the
7 power to grant DOE's motions for withdrawal.

8 >>MR. HEMBACHER: Yes.

9 >>JUDGE WARDWELL: So is it your position, is
10 there anything, you're aware of, in our part two
11 rules, the AEA, or the Waste Policy Act, that
12 revokes any power that you feel we do have to deny
13 that motion, and specifically a motion such as
14 this, to withdraw the application..

15 >>MR. HEMBACHER: I'm not aware of that.

16 >>JUDGE WARDWELL: Thank you.

17 >>JUDGE MOORE: NACA.

18 >>MS. LEIGH: Thank you, Your Honors.

19 Rovianna Leigh, on behalf of the Native Community
20 Action Council. I'm also authorized to say today
21 that JTS supports and concurs an in NCAC's
22 position. And of course, as the Court is already
23 aware, some of our members and tribal elders are
24 members of the Timbisha Shoshone group.

25 We also have tribal members of a number

1 of other tribes, other western, Shoshone and
2 Southern Paiute Indian tribes, in and around the
3 area where the proposed repository would be cited.

4 Today I'd just like to briefly emphasize
5 the points that we made in our short filing for
6 the Board, regarding the unique issues and
7 concerns of the Indian people and tribes that have
8 been on these lands since time immemorial.

9 The Board has noted, and many other
10 parties have noted, the large number of changes
11 that have occurred in the past couple of decades,
12 since the decision was made to move forward with
13 this site.

14 There's one thing that has not changed,
15 and that has been the opposition and concern of
16 Indian people and tribes that live on these lands,
17 and depend on the resources of these lands.

18 As we mentioned, these Indian people and
19 their tribal culture are inextricably tied to the
20 land; their tribal ceremonies; their tribal
21 religion; their traditional ways of life, are
22 intertwined with these resources. With the water,
23 with traditional diet, which can include, hunting,
24 for example, wild rabbits; a gathering of pinon
25 nuts. These resources are the resources that they

1 have relied upon since time immemorial.

2 The people that live on these lands and
3 use these resources have been there forever, and
4 are simply not going anywhere. The increased
5 threat to their health, and to their culture, and
6 to their way of life, is something of grave
7 concern, and that's why the NCAC was created by
8 the members of Indian tribes in these areas.

9 I would like to emphasize especially the
10 burden, in terms of the lack of resources that
11 these communities have. In general, there is a
12 lack of resources, and these populations are
13 vulnerable.

14 Securing legal counsel and fundraising
15 to do so was a very difficult feat, and it's one
16 that the NCAC is quite proud of having been able
17 to do, simply secure a seat at the table during
18 these proceedings.

19 An additional burden to try to preserve
20 the testimony of tribal elders. In the event that
21 the dismissal is granted without prejudice is an
22 extremely large burden for this community to bear.
23 This is a community that has rallied together, to
24 fund raise, to participate, to monitor, and, of
25 course, to secure grants to try and do research on

1 the health impacts to these communities, and the
2 disproportionate, adverse health impacts that they
3 purport would result as a result of the repository
4 being constructed.

5 In addition, it would be difficult,
6 should we be able to garner these resources, to
7 preserve the testimony of tribal elders to
8 determine what to preserve, so that would be an
9 additional burden, in addition to the resources
10 needed to preserve the testimony of tribal elders.

11 As this Board is aware, in tribal
12 culture, the elders are the keepers of the
13 knowledge. These elders are not a fungible
14 resource, may not be available should this
15 dismissal be granted without prejudice.

16 It's uncertain whether there could be a
17 refiling in five, ten, 20 years, and certainly it
18 is the goal of tribal elders to pass on the
19 knowledge they have today.

20 But as we know, tribal culture is not
21 static, and it is evolving, and there's no
22 guarantee that the next generation of tribal
23 elders will have the same information that this
24 generation of tribal elders has today. If the
25 Board has no further questions I would submit.

1 >>JUDGE MOORE: One, and I'm afraid it's a
2 nonlegal question, it goes back to the fact that I
3 was a history major, and always thought I'd be
4 happy as a history professor.

5 But why on earth -- I accept what you
6 say and fully understand it, but the value of
7 preserving what the knowledge of the tribal elders
8 would seem to have an enormous value, certainly
9 outside of this proceeding. So I'm troubled that
10 that is a reason given for granting a motion
11 without prejudice.

12 It would seem to me, independent of
13 anything this Board or, after us, the Commission,
14 or any Court does, there's an enormous value in
15 that, and it should be undertaken for its own
16 sake. If this is the nudge that makes it happen,
17 isn't that a good thing?

18 >>MS. LEIGH: Certainly, Your Honor, I agree
19 that preserving this knowledge would be in the
20 tribe's best interest, and would have a larger
21 value than to these specific proceedings. But
22 what NCAC would endeavor to do is preserve
23 testimony specific to the risks relevant to the
24 construction of this repository.

25 So while there's a larger value and a

1 larger base of knowledge that should be preserved,
2 there would also be a smaller specific type of
3 information that the NCAC would wish to preserve,
4 relevant to this repository.

5 As an example, some of our tribal
6 elders, and although this is irrelevant to these
7 proceedings, have suffered through contamination
8 from the nuclear test site, so they have
9 knowledge, for example, of the color of skin
10 changing, or contamination within the wild game,
11 contamination within milk from cows living in the
12 area. That type of knowledge would be specific to
13 a threat of contamination, and specific to the
14 traditional diet of hunting and gathering.

15 Does that answer your question?

16 >>JUDGE MOORE: Thank you, counsel.

17 >>MS. LEIGH: Thank you.

18 >>JUDGE MOORE: The NRC staff.

19 >>MS. SILVIA: Good morning, Your Honors.

20 Andrea Silvia for the NRC staff.

21 The staff's position is that the Board
22 has authority to grant DOE's request to withdraw
23 its license application, but withdrawal with
24 prejudice is not justified. Section 114 --

25 >>JUDGE WARDWELL: That do you mean -- I

1 mean, you used the phrase, I think you used it
2 here, too, but in your filings you said DOE's
3 motion to withdraw may be granted by the Board.
4 Does that imply that we also may deny it.

5 >>MS. SILVIA: That is correct, Your Honor.
6 Section 114(d) of the Nuclear waste Policy Act
7 provides that the Commission shall consider an
8 application in accordance with the laws applicable
9 to such applications.

10 The Commission's regulation on
11 withdrawal 10CFR 2.107 had existed for
12 approximately 20 years when the Nuclear waste
13 Policy Act was enacted, and the Board should
14 presume that Congress was aware of it.

15 Furthermore, if Congress had intended to
16 prevent DOE from withdrawing its license
17 application, it could have specified that in the
18 Nuclear waste Policy Act, but it did not do so.

19 DOE has not demonstrated that dismissal
20 with prejudice is justified. Under NRC case law
21 dismissal with prejudice requires a showing on the
22 record of an injury to a public or private
23 interest. Any condition, including with
24 prejudice, requires such a showing.

25 >>JUDGE MOORE: Counsel, I understand your

1 point. Does that showing have to be made by the
2 movement -- movant who's asking for the withdrawal
3 with prejudice, or would in this instance,
4 Nevada's showing suffice, because DOE has not made
5 one?

6 >>MS. SILVIA: I think in Fulton, for
7 example, the appeal Board uses the term, the party
8 requesting the sanction.

9 >>JUDGE MOORE: I was aware of that. But we
10 are presented with a unique circumstance. DOE has
11 not made a showing. Nevada has. And they support
12 the withdrawal. Will that suffice, in the staff's
13 view?

14 >>MS. SILVIA: In the staff's view, Nevada
15 has not made such a showing. However, if a -- if
16 any party to this proceeding were to make such a
17 showing, I think that is something the Board could
18 consider, when --

19 >>JUDGE MOORE: Why in the staff's view
20 hasn't Nevada made that showing?

21 >>MS. SILVIA: In terms of the arguments
22 about future litigation, expenses and
23 difficulties, the appeal boards in both north
24 coast and Fulton noted that the possibility of
25 future litigation with its attendant expenses and

1 uncertainties is a consequence of any dismissal
2 without prejudice, and that alone does not provide
3 a basis from departing from the usual rule.

4 >>JUDGE MOORE: But that usual rule, the
5 Board in Fulton, for example, and north coast,
6 both, were not faced with something on the order
7 of 20 years of activity in the expenditure of at
8 least millions, if not tens of millions of dollars
9 on the part of Nevada, in both federal funds that
10 flowed to Nevada, as well as state appropriated
11 funds.

12 Does that not make a difference?

13 >>MS. SILVIA: I think it's something that
14 the Board could weigh. However, I don't think
15 Nevada has cited any case to support that --

16 >>JUDGE MOORE: Counsel, I would suggest to
17 you that you, as well as every other counsel here,
18 would be hard pressed to find any cases that come
19 close to being this situation.?

20 >>MS. SILVIA: I don't think Nevada has cited
21 any cases that suggest that, maybe, you know, it's
22 after a certain amount of expenses or certain
23 difficulties that.

24 >>JUDGE MOORE: How about the very real and
25 practical problem of Nevada being able to get

1 expert witnesses, which is something that we were
2 made aware of back in 2004, in the first
3 challenge, the DOE certification of its LSN
4 collection?

5 >>MS. SILVIA: It sounds as if Nevada had a
6 very real difficulty in obtaining experts,
7 initially, and they were able to do so. So I'm
8 not sure that what Nevada's prevented -- presented
9 so far is convincing that they will not be able to
10 overcome a similar difficulty.

11 >>JUDGE MOORE: Having done it once, they can
12 do it again.

13 >>JUDGE RYERSON: Ms. Silvia, I have a
14 question about your suggestion that we may deny or
15 may grant the motion. You probably heard
16 Mr. Robbins speak, and I thought he was
17 essentially saying we either must deny or we must
18 grant. He was suggesting that we could make,
19 conceivably, a determination that DOE has no
20 discretion to withdraw, and, therefore, would have
21 to deny the motion; or if we don't make that
22 determination, if I understood his position, then
23 it's not our role to second guess the policy
24 judgments that might underlie a decision to
25 withdraw, and we must grant.

1 Now, you're saying, if I hear you, that
2 we may deny or we may grant. And could you
3 elaborate on the basis for that view?

4 >>MS. SILVIA: I think under 2.107, the Board
5 has leeway, and the Commission case law
6 interpreting 2.107 gives the Board substantial
7 leeway in making such decisions.

8 >>JUDGE RYERSON: But you're saying, in the
9 staff's view then, under the Nuclear Waste Policy
10 Act, and specifically 114, which requires the
11 filing of the application -- I don't think there's
12 any question about that -- you're saying that, at
13 least in certain circumstances, DOE does have
14 discretion to move to withdraw. That's the
15 staff's view?

16 >>MS. SILVIA: Correct. The staff's view is
17 that 114(d) does allow DOE to withdraw its
18 application. However, there might be some
19 situation, under 2.107, where, even if DOE has the
20 legal authority, there might be some other
21 consideration that the Board --

22 >>JUDGE RYERSON: Okay. So your view is
23 quite different from Mr. Robins, then, is that
24 fair to say?

25 >>MS. SILVIA: I believe so.

1 >>JUDGE RYERSON: Okay.

2 >>MS. SILVIA: DOE has argued that the NRC
3 cases addressing with prejudice are inapposite
4 here because those cases involved applicants who
5 opposed dismissal of the application with
6 prejudice, while here the applicant supports it.

7 However, because the with prejudice
8 condition is ordinarily associated with some
9 measure of resolutions on the merits, it does not
10 matter whether the with prejudice disposition was
11 sought by the applicant or another party.

12 Moreover, the Nuclear Waste Policy Act
13 is still in effect, and it requires the NRC to
14 consider an application, so if DOE were to submit
15 another application in the future, the NRC would
16 be under a statutory duty to review that
17 application. Therefore, DOE's comparison to the
18 federal civil procedure authority, where a court
19 must grant a plaintiff's motion to --

20 >>JUDGE MOORE: You're talking about
21 submitting an application for a repository at the
22 Yucca Mountain site?

23 >>MS. SILVIA: Correct, Your Honor.

24 >>JUDGE RYERSON: Now, Mr. Malsch dealt with
25 that argument, as I recall, in his presentation to

1 the court. What's your response to his argument?

2 >>MS. SILVIA: I'm not sure.

3 >>JUDGE RYERSON: His argument is, if I
4 recall it, was that, well, the NRC could still
5 consider a new -- in effect, the second
6 application under the NRC's rules, and applying, I
7 guess, res judicata -- applying the with prejudice
8 rule of the earlier decision, it would be
9 considering it, but it would be denying the second
10 application on that basis.

11 what's your response to that?

12 >>MS. SILVIA: I think if you look at 114(d),
13 and keep reading, it talks about a final decision
14 approving or denying the construction
15 authorization, and I think that that section of
16 114(d) envisions the NRC making a merits
17 determination on the application.

18 So I don't think a ruling on the motion
19 to dismiss in this circumstance would constitute a
20 decision on the merits of the application.?

21 >>JUDGE WARDWELL: Doesn't that cut against
22 your very argument that if, what you just recited,
23 Congress was anticipating a decision on the merits
24 approving or disapproving?

25 Doesn't that cut against your argument

1 that a motion to withdraw is in -- is appropriate,
2 under the same section?

3 >>MS. SILVIA: I think in terms of NRC
4 responsibility, the NRC has the responsibility if
5 there's an application before the NRC that DOE
6 wishes to prosecute, NRC has an obligation to
7 issue a decision on the merits of that
8 application.

9 However, if that application is
10 withdrawn, that obligation of the NRC to issue a
11 decision on the merits is similarly withdrawn.

12 >>JUDGE WARDWELL: I'd like to go back to the
13 NEPA issue, if I might, and staff's position on
14 that.

15 Do you see any constraints by Sections
16 114(f)(2) and (3) on DOE's initial EIS that would
17 require you, as an agency, if it did move forward,
18 to require either DOE to amend their EIS, or at a
19 minimum issue a new ROD in order for you to be
20 able to adopt their EIS, like you had previously?

21 >>MS. SILVIA: I think the NRC's
22 responsibility, with respect to the adoption of
23 the environmental impact statement was with
24 respect to the decision on a construction
25 authorization. So if the DOE's decision is now a

1 discontinuance of the Yucca Mountain project, DOE
2 might have a separate obligation for -- to issue a
3 new ROD to support that. However, because the
4 original environmental impact statement did have
5 the no action alternative, which was considered by
6 did NRC staff when it issued its adoption
7 determination report on the EIS.

8 >>JUDGE WARDWELL: Wasn't that no action
9 alternative created, and the ROD from that
10 generated under considerable restraints, for the
11 license application that don't exist for the
12 withdrawal. If, in fact, we, for the sake of
13 argument, assume that this is a federal action
14 that requires either a modification of the EIS or
15 a new Rod.

16 >>MS. SILVIA: If that is the circumstance,
17 then I think that is something that is outside the
18 NRC's responsibilities, under section 114.

19 >>JUDGE WARDWELL: By granting that
20 withdrawal, which you agree, you state we do have
21 the authority to grant the withdrawal, we're doing
22 the same thing as approving an application, and so
23 we're allowing something to move forward by
24 another agency, and don't we, as a separate
25 regulatory agency also have an obligation to meet

1 NEPA under that circumstance?

2 >>MS. SILVIA: I don't think there are any
3 cases that say that one federal agency that has
4 some role in the discontinuance of another
5 agency's application for a project --

6 >>JUDGE WARDWELL: Yeah, but we all agree we
7 can't go to other cases here. I mean, we've got a
8 unique situation where an applicant's required to
9 submit an application and now it's withdrawing it.
10 And the argument comes up that here we, at a
11 minimum they have to at least to revise their NEPA
12 or amend their NEPA EIS, or at least present a
13 ROD, a revised ROD, and the question is what would
14 you believe your obligations are, exclusive of any
15 statement in the -- we recognize there are no
16 cases like this.

17 >>MS. SILVIA: I don't think that a Board's
18 decision granting a withdrawal would constitute a
19 major federal action that requires the NEPA
20 treatment.

21 However, if, assuming that is not the
22 case, I think the no action alternative does
23 encompass the situation that we're presented with,
24 in terms of the withdrawal.

25 >>JUDGE MOORE: Thank you, counsel.

1 we will now take a recess, luncheon, and
2 recognizing the logistics of this facility, only
3 slightly more remote than Yucca Mountain, as far
4 as restaurants are concerned, we will take an hour
5 and 45 minute luncheon recess, so that you all
6 will be able to get out and get back. So it's
7 now, we'll call it 12:30. We will reconvene in an
8 hour and 45 minutes.

9 (Luncheon recess)

10 A F T E R N O O N S E S S I O N

11 MR. MOORE: We will begin this afternoon by
12 hearing opponents to DOE's motion from the State
13 of Washington.

14 >> MR. FITZ: Good afternoon, Your Honors.
15 My name is Andy Fitz, senior counsel with the
16 Washington Attorney General's Office. I'm also
17 the lead attorney for the State of Washington on
18 matters related today to Hanford Nuclear
19 Reservation.

20 Washington will be the first of seven
21 parties and proposed parties to oppose DOE's
22 motion today. I want to just remind you at the
23 outset that while the opponents share many views
24 and comments, and in my opinion are in lock step
25 on the key issues here, we do represent distinct

1 entities with distinct interests, so we may not
2 agree on each and every single point.

3 I'm going to argue two key things today.

4 First, that under the plain terms of the
5 Nuclear waste Policy Act, the Nuclear waste Policy
6 Act process cannot be terminated, short of a
7 determination on the merits.

8 In our view, the best of reading of
9 Section 114 or subsections A and D, is that
10 they -- is that the words under such laws, as
11 applicable to such applications, are conditioned
12 by the words to follow, conditioned by the express
13 exception clause that follows.

14 That express exception clause provides
15 that this Commission, the NRC, shall issue a final
16 decision approving or disapproving of a
17 construction authorization within a time certain.

18 >> JUDGE WARDWELL: : But doesn't DOE
19 have a pretty good argument that if, in fact, the
20 application isn't before the Commission, this is
21 moot?

22 Mr. FITZ: I understand that argument.

23 I understand they are actually arguing
24 two things, and I don't think that they actually
25 fit together.

1 On the one hand, they argue that the
2 withdrawal regulation, 10 CFR 2.107 of the
3 withdrawal regulation, I'll just call it the
4 withdrawal regulation for short, has been
5 incorporated wholesale without any limitations.

6 >>JUDGE MOORE: Might be better to call it
7 107.

8 >> : MR. FITZ: Thank you.

9 So on one hand they argue that 107 has
10 been incorporated without any limitation, and any
11 withdrawal that would be available to any
12 voluntary applicant would also be available to
13 DOE.

14 On the other hand they, and also the
15 State of Nevada, and the NRC staff, make arguments
16 that, you know, that tend to go toward the words
17 in the "accept clause," that tend to give them
18 some effect.

19 DOE argues that a decision on this
20 pending motion to withdraw will be a decision that
21 approves or disapproves.

22 >> JUDGE WARDWELL: : How are they
23 disconnected, though, because it seems as I
24 interpret what they are saying 107, or an
25 authority from DEA, allows them to stop the

1 process at any time, without any other
2 authorization.

3 And therefore, by the time we get to
4 this, there is no need, because it's not before
5 the Commission.

6 >>MR. FITZ: I'll answer that in two parts.

7 First, the way that they are
8 disconnected arguments, in my view, is that if
9 you're going to make the argument that 107 has
10 been incorporated without any limits, then there
11 is no need to give any effect to the words that
12 follow.

13 DOE could submit the application, DOE
14 could withdraw it in the very same motion, and it
15 would make no difference.

16 So, looking at those words that follow
17 concedes that those words have some effect. And
18 when we start looking at those words, and we look
19 at their plain meaning, and we look at the words
20 first in their plain meaning, then we look at it
21 in the larger statutory context, and then you look
22 at it in relation to the legislative history, it's
23 clear to us that those words convey that a final
24 decision will be made saying yes or no, approve or
25 disapprove the authorization, the merits of that

1 authorization. That's consistent with this act.

2 So that's one level.

3 >>JUDGE RYERSON: Suppose, though, suppose
4 there were some major intervening event after the
5 filing of the application. Are there any
6 circumstances under which DOE could withdraw the
7 application, or seek to withdraw the application;
8 for example, an unforeseen major seismic event,
9 within ten miles of Yucca Mountain, what would
10 they do then? What would the appropriate
11 procedure be?

12 >>MR. FITZ: I think there are two
13 appropriate procedures, and yes, I do think that
14 there is that window.

15 Number one, there was reference earlier today
16 to the NRC's reporting to Congress.

17 If there were an event that the
18 Commission felt that it was not ready to act on,
19 in terms of approving or disapproving the
20 application, but it wanted Congress to be aware
21 of, it could report that in its annual report.

22 The second thing is --

23 >>JUDGE MOORE: It could also just deny the
24 license.

25 >>MR. FITZ: That's what I'm getting at with

1 my second thing.

2 I think that under 107, there is a limited
3 range of withdrawals and dismissals, with
4 prejudice, that would be permissible within the
5 language of the act. Those are merits-based
6 withdrawals, merits-based dismissals.

7 So if it becomes apparent that there is a
8 major seismic event that rules out and renders
9 moot this application, that all the presumptions
10 it's been based on have been shown wrong. I think
11 that would be a merits-based circumstance that
12 could allow this proceeding to be acted on under
13 107.

14 But that is not what DOE's presented
15 today, and that's the second point, I'm going to
16 argue. DOE's motion contains nothing about the
17 merits of this application, or the suitability of
18 Yucca Mountain as a repository.

19 Every consideration put forth by DOE was
20 before Congress in 2002, has already been
21 accounted for in the policy decisions, in deciding
22 to, first, enact the NWPA, and then limit site
23 authorization to Yucca Mountain, and then
24 ultimately approve Yucca Mountain.

25 And those are choices, that if DOE has an

1 disagreement on, should be taken up with Congress,
2 not played out before this proceeding.

3 >>JUDGE MOORE: And the Court in NEI versus
4 EPA, I think that was the litigation in which all
5 of those same arguments, nearly all of the same
6 arguments that Nevada presented to the Congress,
7 with regard to its veto of the site
8 recommendation, other than the EPA striking the
9 EPA's rule on 10,000 years, did the Court accept
10 any of those other arguments that were run, which
11 is the same litany, I think, you're speaking of?

12 >>MR. FITZ: In my reading of the case, the
13 Court did not retain those arguments. The Court
14 said those arguments were made before DOE, and
15 presented before Congress, considered by Congress,
16 and Congress made the policy choice. That was the
17 end of the matter.

18 I'll provide a roadmap of how I intend
19 to argue, and I recognize that you may not accept
20 this roadmap, and I'll follow your direction, but
21 I first want to provide some background on the
22 Nuclear Policy Act and its history, because I
23 think that's critical, both to looking at the
24 words of the act itself, the context of the act,
25 but also understanding DOE's argument about its

1 AEA authority remaining intact.

2 I then will look at the specific words
3 of sections 114(a) and 114(d), and in doing that I
4 will address the two primary proponent arguments
5 that I see with respect to those words.

6 The first of those arguments, as I mentioned
7 a moment ago, is that 107 has been incorporated
8 without any sort of limitation. The second
9 argument is that even if you look at those words
10 in the "accept that clause" that follows, those
11 words don't have the effect of limiting 107
12 withdrawal authority.

13 I then look at those two
14 interpretations, in terms of the statute as a
15 whole, to see which one better fits within that
16 statutory context. And I'll look at those two
17 interpretations, back with respect to the
18 legislative history, to again see which one better
19 fits.

20 >>JUDGE MOORE: Counsel, that is a big menu
21 at 45 minutes.

22 >>MR. FITZ: I'll do my best.

23 I intend to address DOE's AEA argument, and I
24 intend to finally address why DOE's motion fails
25 to present a merits-base basis for withdrawing or

1 dismissing of this proceeding with prejudice, and
2 why, even if we were to assume that 107 applies
3 with no limitations, the precedent of this Board
4 would not lead us to a prejudicial dismissal.

5 Your Honors, in 1982 Congress was faced
6 with the question of what we, as a nation, should
7 do with what, at that time, was already some 40
8 years of accumulated high level waste and spent
9 nuclear fuel.

10 There have been all kinds of options
11 studied and abated, putting in deep sea bed,
12 shooting into outer space, reprocessing
13 technologies for spent fuel, but there was no
14 definitive direction, there was no policy choice
15 made as to what road to take.

16 And by 1982 Congress had lost patience with
17 that situation, with continued study and debate,
18 and the promise it would lead to a solution. And
19 it was already faced with two failed efforts to
20 site a repository, both of them mentioned today,
21 the one in Kansas, the event in 1971, and the
22 Michigan attempt five years later.

23 Congress specifically singled out that
24 Lyons Kansas attempt as a "Landmark event which
25 would color future repository siting activities

1 through the present day." It had that in mind in
2 enacting this act, and it responded with this act.
3 And the Nuclear Waste Policy Act did two key
4 things.

5 Number one, it settled that policy debate as
6 to what to do with this waste, selected deep
7 geologic disposal as a "definite federal policy."

8 The second thing it did was to
9 establish, in the words of the act, which have
10 been repeated this morning, a schedule for the
11 siting, construction and operation of
12 repositories.

13 And according to that final bill report,
14 the NWPA was based on a series of special
15 commission reports and task force reports --
16 again, the de jure all over again -- that all
17 agreed on the need for legislation to "solidify a
18 program and keep it on track.

19 The remarkably prescriptive structure of the
20 NWPA reflects Congress's attempt to solidify the
21 repository program and keep it on track.

22 The structure emphasizes technical
23 evaluation, and does not simply leave the program
24 to the discretion of DOE.

25 >> JUDGE WARDWELL: : But likewise, it

1 does not lead to a repository.

2 >>MR. FITZ: It does not lead to a
3 repository, but it built a process, but even as we
4 play it out to a construction authorization, gives
5 the country the opportunity to utilize repository.

6 >> JUDGE WARDWELL: : Well, just so you
7 don't run out of time before you address this,
8 I'll ask it now. Two thoughts that come to that
9 are what was discussed early this morning, one
10 deals with the unseemly nature of DOE being forced
11 to -- an application that they have no intention
12 of supporting.

13 And then the second is, looking at the
14 practical merits of this, what would happen if we
15 do, or the Court ends up saying, either way,
16 whether they support or not support a motion to
17 withdraw, will anything ever occur to this.

18 >>JUDGE MOORE: Does it make much sense to
19 fight this battle? You can address both.

20 >>MR. FITZ: I'll do my best.

21 I have three things to cover on that.

22 Number one, it is not unique to this act
23 or this set of circumstances, the administrations,
24 and even individual secretaries can come and go
25 with different perceptions.

1 when Congress enacted the NHPA in 1982,
2 it had a schedule put out to 1995, when it
3 accepted a repository to actually be open.

4 It is a long time frame, Congress
5 expected administrations to come and
6 administrations to go, but it provided a mandate
7 to follow.

8 Congress expected that policy
9 differences might arise, but the place to resolve
10 those is in Congress itself.

11 Second, it is not unusual for executive
12 agencies to follow edicts that they, frankly, at
13 the secretary level, disagree with.

14 There's a recent case, and I apologize
15 because this issue came up this morning and I
16 didn't decide it in my response brief, but
17 Massachusetts versus EPA on greenhouse gas
18 emissions. You know, the last administration did
19 not believe that EPA should be regulating
20 greenhouse gas emissions. The courts told it
21 otherwise. The courts told it no, your mandate is
22 to figure out how to address these.

23 So it's certainly not unique here, that
24 an administration may be forced to do something
25 that, frankly, on a policy level, it disagrees

1 with.

2 >>JUDGE MOORE: Counsel, on your roadmap, and
3 I will confess, the number of bills that comprise
4 the legislative history and the number of Senate
5 and House reports and conference reports on them,
6 before the ultimate enactment of what became, at
7 '82, the Nuclear Waste Policy Act, is a tad
8 difficult to follow.

9 You, as an exhibit, provided us with, I
10 believe it's house report 897-471.

11 what was -- in the scheme of the
12 ultimate enactment, where does that act does this
13 report lie?

14 >>MR. FITZ: My understanding is that's the
15 report on the version that eventually was adopted
16 into the Nuclear Waste Policy Act. So among that
17 myriad of different versions that you see, this is
18 the one that's closest to the mark of what
19 actually found its way into law.

20 >>JUDGE MOORE: So, and I think you may have
21 cited this to us, but when it says the need for
22 legislation to solidify a program and keep it on
23 track, and then it says it is necessary,
24 therefore, to provide close congressional control
25 and public and state participation in the program

1 to assure that the political and programmatic
2 errors of our past experience will not be
3 repeated.

4 It is your position that the legislative
5 history is reflected in the language as the act.
6 And they meant exactly what they were saying, here
7 in the legislative history.

8 >>MR. FITZ: That's what I take from that,
9 looking at the plain words.

10 >>JUDGE MOORE: And ending a legislative
11 schedule for federal decisions and actions for
12 repository development?

13 >>MR. FITZ: Correct.

14 To go back to your question, Judge
15 Wardwell, you asked, you know, this act does not
16 take us through to an actual functioning
17 repository. And what the act does is to prescribe
18 a process to be followed, to get to get at the
19 point that one is authorized.

20 I think what Congress wanted to do, and
21 I can only expect, is at that point make the final
22 decision on when to move forward. I'm not sure
23 that I agree, it's DOE's choice.

24 But the argument, that final step that
25 has not been answered yet, does not excuse any of

1 the intermediate steps. By that argument DOE
2 could have chosen to not follow a single edict of
3 the NWPA.

4 I'm going to turn to our reading of
5 Section 114, because that's really at the heart of
6 the issue here.

7 >>JUDGE MOORE: One last part of this
8 legislative history. It says -- just before they
9 lay out the programmatic diagram of the steps, the
10 risk that a site which had been considered
11 probably adequate for development could be
12 abandoned.

13 Now, this, of course, all preceded the
14 '87 intervention in the process, where Congress
15 decreed that it would be YUCCA Mountain as the
16 sole site, adequate for development, could be
17 abandoned after significant commitment had been
18 made to the site, is a technically unavoidable
19 aspect of repository development. It is a result
20 of the limit of our ability to know with certainty
21 all the characteristics of a rock formation deep
22 underground until the rock site has been actually
23 excavated and surveyed from the horizon, or level
24 of the repository.

25 Does that tell us that Congress was

1 fully cognizant that there would be reasons, but
2 they only used the words technically unavoidable,
3 that they were discounting other reasons, looking
4 only at technical reasons why it could not go
5 forward, with regard to '82 it would have been
6 regardless of the site selected.

7 >>MR. FITZ: I would agree with that, and
8 I'll add two other things to reinforce that.

9 Number one, in the words of the statute
10 itself, we had a discussion earlier today about
11 the Section 113 termination authority.

12 There was some question about what
13 unsuitability might mean in that section. I would
14 posit that it means reference back to the
15 suitability criteria adopted, promulgated under
16 Section 112, which are technical criteria.

17 The second thing is that that sentiment
18 of Congress in 1982 was reinforced in 2002, in the
19 bill report cited in that NEI case. Congress
20 again said, we don't know at this point whether
21 this repository, Yucca Mountain, can be licensed,
22 we need to go through that exercise. In fact, it
23 used the words "Continuation of the process."

24 >>JUDGE MOORE: You're talking '87 amendment?

25 >>MR. FITZ: I'm talking in 2002, the

1 approval --

2 >>JUDGE MOORE: The 2000 overridden --

3 >>MR. FITZ: Nevada, exactly. So at that
4 point Congress recognized it was still not a done
5 deal, but recognized, stated in the interpretation
6 of the DC Circuit, that the process should
7 continue.

8 It also recognized that enough
9 information had been put forward, in terms of the
10 suitability determination of the prior Secretary,
11 that it looked like, you know, although we'd not
12 yet gone through the exercise, that this looks
13 like it could be approved.

14 So I think those are key, again, in
15 looking at the Secretary's policy discretion now,
16 and I mean no disrespect to the Secretary
17 whatsoever. But I do take the position that every
18 justification presented in DOE's motion is a
19 disagreement on a policy level with the choices
20 Congress has already made in the NWPA.

21 So I'm going to go back to Section 114
22 and look at the words themselves.

23 Our interpretation is really quite
24 simple, it reads the words in Section 114(a), that
25 upon repository approval DOE shall submit an

1 application to NRC in conjunction with the words
2 in section 114(d), that the NRC shall consider the
3 application and shall issue a final decision
4 approving or disapproving the issuance of
5 construction authorization.

6 We read those words together to mean
7 that Congress intended that the licensing phase
8 play out on the decision on the merits of DOE's
9 application. Even if the statute does not tell
10 DOE, and after you submit it, you shall prosecute
11 this license application, Congress, of course,
12 intended that result. In order for the NRC to
13 consider the application to give it thought, to
14 cogitate on it, and to say either yes or no,
15 ultimately, to that application, and whether to
16 issue a construction authorization, DOE has to be
17 on hand.

18 >> JUDGE MOORE: : Question, counsel;
19 how does the Commission comply with 114(c)(3), if
20 it grants the DOE's motion?

21 >>MR. FITZ: without having 114, do you see
22 that, the reporting requirement, the annual --

23 >> JUDGE MOORE: : Isn't there a copy
24 on it on the podium?

25 >>MR. FITZ: Yeah, and I've got it. From

1 memory, I believe that's the annual reporting
2 requirement.

3 >>JUDGE MOORE: The last one is any
4 Commission's actions regarding the granting or
5 denial of such authorization.

6 If they grant the motion to withdraw,
7 and that is obviously not a grant, but it is also,
8 obviously, not a denial, the best it could be
9 would be deemed a denial, and I'm not even sure
10 that it could be deemed.

11 So, is not the Commission being put in a
12 bind as to what it reports, if it grants this to
13 Congress? They are not complying -- they have two
14 choices there as well, to grant or deny?

15 >>MR. FITZ: I think it puts the Commission
16 in the position of having to report on nothing.

17 It could provide a report that says we
18 don't have a docketed application in front of us,
19 and this is where I take deference with NRC
20 staff's position. But that would really render
21 that provision useful.

22 >>JUDGE MOORE: But they do have one in front
23 of them. You're saying if they grant the motion
24 they wouldn't have one.

25 >>MR. FITZ: Right, exactly. Exactly.

1 I'm sorry, maybe I misunderstood the
2 premise of the question.

3 >>JUDGE MOORE: No, I'm sorry. That's the
4 most trouble I have with DOE's position.
5 Actually, I don't think -- DOE does make the
6 point, the staff makes the point, that they are
7 required to file it, if we take it away you have
8 complied with your statutory duties, because it
9 metaphysically disappeared, and that's -- I think
10 that is a specious argument.

11 >>MR. FITZ: That is the same problem I have
12 with their position as well. I don't think it
13 gives effect to the words of section 114(d)
14 either.

15 If you no longer have a docketed
16 application in front of you, you have nothing to
17 act on, to approve or disapprove. And by DOE's
18 argument, literally under 107, they could submit
19 the application one day, remove it the next, and
20 never resubmit it, by their choice.

21 You would never have an application to
22 consider. You would never have an application to
23 approve or disapprove. It would render the plain
24 words, not just of section 114(d), but also
25 114(c)(3).

1 >> JUDGE MOORE: : I don't think that
2 is a fair characterization of DOE's position, and
3 I'm sure they will tell us at rebuttal, but they
4 are saying there is a difference, and you're
5 positing the situation, where on day 90, after
6 congressional approval, they fulfilled their
7 obligation and filed the application. And on day
8 91 they withdraw it, and you are stating that's
9 what they could do.

10 DOE's position, I believe, is no, no,
11 no, we're not saying that, per se. Maybe they are
12 and I misunderstood. They are saying that there's
13 been this four year plus period in which they were
14 out of compliance with the law, and that makes a
15 difference.

16 That now their discretion kicks in and
17 surely Congress intended that they should have
18 that discretion, which they had before the
19 enactment of the Nuclear Waste Policy Act in '82,
20 and that discretion under, what I guess is, I
21 believe they said 161 of the Atomic Energy Act, as
22 well as the DOE Authorization Act permits them,
23 independent of the waste Policy Act, to decide not
24 to go forward.

25 >>MR. FITZ: So I think there are two

1 questions there and I will try to answer both.

2 Number one, I think they argued, as I
3 said earlier, two things, both, and not just in
4 the alternative.

5 I think they argue that 107 has been
6 incorporated, without limitation, into this law.
7 And my hypothetical, about the day 91 scenario
8 would be allowable if that are the case. And I'm
9 saying that hypothetical would not meet the letter
10 or the intent of the NWPA. That is a reason to
11 reject it.

12 With respect to the AEA authority, I
13 think that we have 280-degree readings of what the
14 effect of the NWPA reading was on DOE's AEA
15 authority.

16 One reading, this is what's advanced by
17 DOE, is that the NWPA did nothing to revoke that
18 preexisting discretion. All it did was to provide
19 a schedule.

20 The other reading, by Congress looking
21 at the situation and deciding to step in and take
22 over the driver's wheel. Congress was displacing
23 and directing and constraining the discretion of
24 the Secretary.

25 And I believe that that reading isn't

1 more consistent with the letter of the act and the
2 legislative history.

3 Let me give you one example that I think
4 makes this clear. The Section 113(c)(3)
5 termination authority. By DOE's reading that
6 would be the one place in the act where perhaps
7 Congress had limited the Secretary's discretion by
8 saying, you can only terminate site
9 characterization activities on a finding of
10 unsuitability, and you have to come back to
11 Congress with a report, including on the need for
12 new legislative authority, et cetera. It's not a
13 wholesale discretion.

14 But if there were any circumstance,
15 where you would expect Congress to let the
16 Secretary act with unfettered discretion, it seems
17 like it would be a circumstance where you found
18 the site to be unsuitable.

19 So rather than reading that as a
20 narrowing down of the Secretary's discretion, I
21 look at it as an express grant, that unless we
22 otherwise tell you, you do not have discretion to
23 pull the plug on this project, except under this
24 one circumstance, based on technical suitability.

25 Two ways to read it.

1 Now, if you were to read it DOE's way,
2 why would Congress narrow the Secretary's
3 discretion in the pre-decisional phase, based on
4 an unsuitability discretion, and yet leave the
5 door wide open, for whatever reason, could be, you
6 know, and we don't need to postulate as to why the
7 secretary would act, just a nontechnical reason to
8 pull the plug, clear up to the day before this
9 Commission renders a decision.

10 It makes no sense. It does not
11 effectuate the purpose of this act, which is to
12 provide a process for building a repository
13 program and keeping it on track.

14 The very heart, returning to our
15 statutory construction argument, with Section
16 114(b). The very heart of it is that the words in
17 the clause, talking about the applicability of
18 laws to applications, are followed by an express
19 "accept that clause."

20 It is not a matter, as DOE suggested
21 earlier today, of reading in some limitation. The
22 limitation is right there in the act.

23 It provides, expressly where Congress
24 has said, you can act under whatever applicable
25 laws there are, whatever they might say or not

1 say, but, you have to issue a final decision
2 approving or disapproving.

3 Those words limit whatever discretion
4 there exists under 107, it's as clear as that.

5 So in a nutshell, your argument, in
6 response to the DOE's 2.107 argument is, it's a
7 simple supremacy clause argument, that the
8 language in the statute trumps the regulation?

9 >>MR. FITZ: Exactly, exactly.

10 And it gets us out of the do loop
11 argument that we had earlier, I believe it makes
12 it clear. And it does preserve that narrow window
13 for potential withdrawal, based on a merits based
14 consideration.

15 >>JUDGE MOORE: Counsel, I don't remember
16 whether your brief relies on Chevron?

17 >>MR. FITZ: We have a footnote that
18 addresses Chevron.

19 >>JUDGE MOORE: Refresh my recollection.

20 >>MR. FITZ: I think we made three arguments.
21 The first clear argument is, the plain words of
22 the statute answer the question, there is no room
23 for Chevron deference here because Congress has
24 spoken. You don't get the Chevron deference if
25 the statute is clear, and it is.

1 we also take the position that this is
2 not just a DOE interpretation, it is also an NRC
3 matter. DOE holds no more position of authority
4 to construe those words than the NRC.

5 >>JUDGE MOORE: But Chevron, step one is, I
6 think, pretty much a standard rule of statutory
7 interpretation, whether or not you are into a
8 deference situation.

9 And it is whether Congress addressed the
10 precise question that is at issue.

11 >>JUDGE MOORE: And we are saying it did, it
12 did with that express "accept that clause."

13 >> JUDGE WARDWELL: : The Congress then
14 said if they had DOE you shall not withdraw your
15 application?

16 >>MR. FITZ: well, Congress also did not
17 anywhere in the legislative history or the statute
18 itself expressly reference 107.

19 You can get into all kinds of
20 hypothetical questions about how far you stretch
21 that applicable laws clause. Does it mean only
22 those regulations that existed when the NMPA was
23 passed, or could the NRC and DOE promulgate some,
24 at the suggestion of DOE, promulgate a later
25 regulation that said you don't need to submit a

1 application, and that would give them the out
2 right there.

3 I think that it is a question of how far
4 you stretch the words of a generic clause
5 incorporating unspecified, quote, laws versus the
6 clear statutory direction that you make a final
7 decision approving or disapproving.

8 >>JUDGE RYERSON: what if the language of the
9 statute were slightly different, what if the
10 statute said: The commission shall consider an
11 application in accordance with the laws,
12 applicable to such applications, and then instead
13 of saying accept that, simply said, moreover, the
14 commission shall issue a final decision approving
15 or disapproving construction authorization within
16 three years; would you argue that that carves out
17 107 as well, if it worked that way? I mean,
18 you're relying -- well, what would your response
19 be if the statute read that way?

20 >>MR. FITZ: I'm sorry, I missed part of your
21 question.

22 JUDGE RYERSON: If you look at 114(d), and if
23 instead of the "accept that language," essentially
24 the first sentence ended with, "In accordance with
25 the laws applicable to such applications."

1 And then the statute continued with a
2 second sentence that said something like,
3 moreover, the Commission shall issue; in other
4 words, there was no accept to that clause, that
5 arguably takes 107 out of the equation. What
6 would your position be then? If 107, in effect,
7 arguably was one of the laws that still applied?

8 >>MR. FITZ: My position would be the same.

9 You get to a same result because it
10 would still be an affront to that next independent
11 sentence to allow withdrawal on a non merits base
12 reason.

13 I think the actual statute that we have
14 in front of us is clearer, because it is in an
15 accept that clause.

16 >> JUDGE MOORE: : I go back to a
17 question I raised earlier today. The reason I
18 asked the question whether this was a policy
19 decision or a political decision.

20 In the Food and Drug Administration
21 versus Brown and Williamson, Tobacco Court. The
22 Court said, in determining whether Congress has --
23 this is the first step in Chevron: In determining
24 whether Congress has specifically addressed the
25 question at issue, the Court should not confine

1 itself to examining a particular statutory
2 provision, isolation rather, must place the
3 provision in context, interpreting the statute to
4 greater symmetrical and coherent statutory scheme.

5 In addition, the meaning of one statute
6 may be effected by other actions. And then the
7 Court said, finally, the Court must be guided to a
8 degree by common sense, as to the manner in which
9 Congress is likely to delegate a policy decision
10 of such economic and political magnitude to an
11 administrative agency.

12 And I was trying to determine if this is
13 a political decision, is that something Congress
14 would give under the Waste Policy Act to DOE or to
15 the NRC?

16 >>MR. FITZ: I think, based on the
17 circumstances under which the NMPA was created,
18 the answer is no. The legislative history is
19 reflecting the fact that Congress was trying to
20 avoid those political pitfalls that had befallen
21 two prior repository efforts. I think the
22 structure of the act as well, where Congress is a
23 constant presence.

24 If Congress just does not step back from
25 this process, those reporting requirements to me

1 are substantive. Yes, it is a procedure to
2 follow, but you are supposed to be conveying
3 substance to Congress, it's supposed kept in the
4 loop. And most startling, it takes the form of
5 the approval process, where DOE, up to the point
6 of recommending to the President can employ an
7 awful lot of discretion, but once it goes past the
8 President, the host states has equal power with
9 the executive to disapprove a site.

10 The Secretary, and even the President,
11 are not the last word on the matter. And Congress
12 reserves for itself the ultimate authority to make
13 that siting decision.

14 And again, when we go back and we look
15 at this construction of how far Congress has
16 reserved DOE's authority in the AEA, it does not
17 make common sense to think that after going
18 through a Congressional approval process, Congress
19 would then wholly rely on the Secretary's whim,
20 and I don't mean that in any pejorative sense, to
21 terminate the a project in the licensing phase.
22 It simply does not make sense.

23 >>JUDGE MOORE: That's the reason the Court,
24 I guess, in NEI versus EPA, kept hounding that it
25 was now a statute and had been decided, because,

1 am I correct that the act, in spelling out the
2 rules for the house to consider Nevada's veto, and
3 the rules for the Senate to consider that Nevada's
4 veto, never spoke that it had to be a statute,
5 just a joint resolution, it never had to go to the
6 President for signature, Congress would have had
7 the last words, so they didn't treat it as if it
8 would be a law.

9 >>MR. FITZ: And I think that that's an
10 unusual circumstance in statute. It's not common
11 that you see that prescriptive approval process
12 spelled out.

13 >>JUDGE MOORE: It is unique to this statute.
14 The legislative history was avoiding all -- and
15 they make no bones about it, avoiding all of the
16 legislative pitfalls that can happen to a piece of
17 legislation.

18 >>MR. FITZ: Right, exactly.

19 >>JUDGE MOORE: So they were taking all of
20 the rules of the Senate and rules of the House out
21 of play.

22 >> : Mr. Fitz: I agree entirely.

23 >>JUDGE MOORE: So --

24 >>MR. FITZ: The other thing it reflects --
25 I'm sorry.

1 >> JUDGE MOORE: : I'm just curious,
2 how did it happen that that joint resolution,
3 which has been presented to the President for
4 signature and became a law, as opposed to just a
5 joint resolution of Congress? I'm just curious,
6 because what you just said made it all suddenly
7 make sense.

8 Those provisions never intended for it to be
9 a law.

10 >>MR. FITZ: I think it's Congress taking the
11 ultimate role of the siting approval
12 authority. Congress took the authority that the
13 Secretary otherwise would ordinarily employ under
14 the AEA. And once Congress did that, I really
15 view it is almost more of a ministerial task to
16 move forward with the licensing process. And I
17 don't mean to diminish the technical discourse
18 that occurs between DOE and the NRC staff. But,
19 you know, fundamentally, DOE is not like any other
20 applicant here. It is carrying not DOE's
21 application, not an application that it decided
22 would be a good idea, it is carrying an
23 application that Congress wanted carried forward
24 in the public interest.

25 DOE is the messenger, it's the vehicle

1 through which this application is being carried
2 forward. Congress But congress did not bless DOE
3 with the discretion now, at this point in the
4 process, after the site has been approved, to
5 exercise discretion under the AEA, to decide it is
6 a bad idea.

7 The one window Congress has given is
8 for this application to fall on the technical
9 merits, that could be in an ultimate determination
10 on the merits, or if there's some horrific example
11 that shows unsuitability tomorrow, be it a seismic
12 event, suddenly realizing there is going to be a
13 flood in a hundred years, I don't know. You know,
14 it seems like that would provide an opportunity,
15 through 107, potentially, as a channel, to dismiss
16 the proceeding, but it would be a merits based
17 reason, and that is the end of the story.

18 >>JUDGE MOORE: I'm still puzzled why, if
19 you could make that exception, why DOE is not
20 correct, because, it would seem to me that if the
21 statute says what it means and means what it says.

22 The phrase often used by courts in statutory
23 interpretation, that the only remedy is in the event of
24 a catastrophic event, DOE notifies the NRC that it has
25 happened, and the NRC denies the application. That

1 never stops DOE from fixing it or/and later reapplying,
2 or says hold up, we have a major issue to study that
3 may effect -- that is a safety issue, that needs to be
4 resolved before we could move forward.

5 It strikes me that DOE may be right, if you're willing
6 to say that some event could occur, that legitimately
7 under the statute would allow DOE to withdraw its
8 application, because I see no exception in the statute
9 for that, therefore, if the Secretary has that
10 discretion in the event of a catastrophic event, why
11 doesn't he have it less than that, because none of
12 those words are in the statute.

13 >>MR. FITZ: It makes sense in my read,
14 because as I'm envisioning this type of situation,
15 this hypothetical, it would result in a
16 merits-based determination that is a disapproval,
17 in other words, it's almost a summary
18 determination.

19 >>JUDGE MOORE: would DOE be doing that or
20 would the NRC be doing that?

21 >>MR. FITZ: I think it could be either.

22 I think it could be DOE coming to the
23 NRC and saying, we believe this is the
24 circumstance, and that's really the way I saw it
25 playing out.

1 Given the role of the NRC staff, I think
2 that's one avenue, also. But, it is not the only
3 way, as I mentioned earlier. I think that if the
4 NRC were hesitant to take that stuff, the report
5 to Congress would be another vehicle to provide
6 that information.

7 >> JUDGE WARDWELL: : Was it your
8 position that DOE could not just unilaterally
9 withdraw the application based on that, it would
10 have to either go through NRC or Congress, to
11 achieve it?

12 >>MR. FITZ: Correct.

13 And I know I'm short on time here, but
14 the point I want to make about DOE's motion today
15 is that is not the kind of circumstance they
16 presented.

17 I have looked very hard at everything
18 they have written, and I have seen no indication
19 of anything that goes to suitability of the Yucca
20 Mountain or this application.

21 >> JUDGE MOORE: : What does
22 suitability mean?

23 >>MR. FITZ: That is a great question,
24 actually. In my mind, I think, it's something
25 going to the merits of the application, something

1 that they now realize is wrong. Incorrect
2 information or some information that shows that it
3 is not going to be protective application that is
4 not protective under 10 CFR 63, for instance. But
5 when I look at the circumstances laid out in their
6 reply, mostly, and I want to make the point, and
7 we made this point in our response, that in our
8 view, under this Court's precedent, DOE was
9 beholden as the moving party seeking the
10 prejudicial sanction on itself, to put that forth
11 in an evidentiary form, to answer to that, and we
12 didn't see them doing that.

13 But when you look at considerations like
14 dry cask storage, and the success of WHIP, and the
15 fact there may be better alternatives, none of
16 those things -- DOE never connects the dot as to
17 why it mandates this application to be dismissed
18 in a prejudicial fashion.

19 Never, and I've looked hard.

20 And with respect to spent nuclear fuel
21 issues, from what I understand, a repository is
22 still going to be needed, even if you have
23 reprocessing technology.

24 >>JUDGE MOORE: Accept for the moment the
25 grant of the motion. Now, with respect to the

1 prejudiced without prejudice.

2 DOE even under existing agency
3 precedence, arguably has not made a case for it to
4 be dismissed with prejudice.

5 Nevada on the other hand has come forth
6 how it would be severely prejudiced if the
7 withdrawal is not with prejudice.

8 The staff, because of what is said in
9 one of the agency old appeal board decisions, said
10 that the request need comes from -- and did in
11 that case, come from -- I'm sorry, I may be
12 mistaken on that -- needs to come from the movant,
13 but if the movant fails to make the case, why
14 can't Nevada's prejudice suffice as a party, so
15 that it is dismissed with prejudice?

16 >>MR. FITZ: well, Nevada's prejudice, at
17 first accepting -- and I'm not going to except for
18 the sake of argument -- well, excepting for the
19 sake of argument for the moment, that Nevada would
20 suffer that prejudice, it is only going to result
21 if the motion to withdraw is granted.

22 Obviously if the motion is not granted
23 that prejudice would not be suffered. So that is
24 my first response.

25 Second response is, you know, I hate to refer

1 to other litigation, but we brought a preliminary
2 junction motion with evidence that DOE was
3 descopeing its side of the Yucca Mountain project,
4 people. Have moved for Las Vegas taking other
5 jobs, selling their homes.

6 Those are irreplaceable resources in the
7 same sense, I think, as what Nevada is positing,
8 and I have sympathy for Nevada, I've been in that
9 position, I've looked for experts, and those are
10 real circumstances.

11 But the DC Circuit did not grant our PI
12 motion based specifically on not showing
13 irreparable harm. The fact is, you know, if there
14 is --

15 >>JUDGE MOORE: But is that comparable? Is
16 the decision of whether to grant or deny
17 application with or without prejudice depending on
18 a showing of irreparable harm?

19 >>MR. FITZ: It is a showing of harm under
20 this Board's precedence. But what this Board has
21 also done is to balance, its first NRC staff
22 pointed out, made the declaration already in
23 precedent that, simply having to re-litigate an
24 application is not sufficient for harm. And I
25 recognize this is not your typical application.

1 But you add on to that the fact that the
2 Board has taken -- allowed itself to take into
3 consideration public interest factors. And the
4 same factors that led the Board to say that
5 relitigating an application is not enough to, you
6 know, allow prejudicial sanctions, is amplified
7 here.

8 We are in the one location ever to get
9 this far in the process.

10 And we have no guarantee whatsoever that
11 any other repository site is going to get this far
12 in the process. There is no legal mechanism in
13 place.

14 And the same non-merits based
15 considerations that are at play here, I think I
16 can comfortably predict, they will play themselves
17 out with any other location.

18 So to foreclose this is against the
19 public interest.

20 And I recognize Nevada's legitimate
21 concern, but under what this Board has already
22 said, I don't believe that that rises to the level
23 of overriding the public interest in maintaining
24 the flexibility of a potential repository site.
25 It's been approved by Congress.

1 >>JUDGE MOORE: Actually, the appeal board
2 case that the public interest demands that it not
3 be with prejudice?

4 >>MR. FITZ: There was the Puerto Rico case.

5 JUDGE RYERSON: If I recall, your brief does
6 not deal with any of the NEPA issues; is that
7 correct?

8 >>MR. FITZ: We did not address them before
9 this Board because we felt that, really, they were
10 potentially beyond the jurisdiction, but I'm happy
11 to answer any questions you might have.

12 >> JUDGE RYERSON: That was basically my
13 question, what is your position as to whether we
14 have jurisdiction to adjudicate NEPA issues and
15 whether you have a view on it.

16 >>MR. FITZ: I think you have jurisdiction to
17 adjudicate NEPA issues as they go to the NRC. One
18 of our concerns is that, to the extent DOE relies
19 upon the Yucca Mountain final EIS in its
20 supplement, and the no-action alternative, DOE has
21 not adopted that in a rod, which its own CFR NEPA
22 regulations would require.

23 So we don't see that they have actually
24 employed that EIS, as the justification of taking
25 a different course. But that's an argument.

1 JUDGE RYERSON: You're unclear as to whether
2 we have jurisdiction to consider that?

3 >>MR. FITZ: Correct. I think that there are
4 aspects of DOE's decision to terminate this
5 project that go beyond the strict license
6 application, and that this Board may not have
7 jurisdiction on.

8 >> JUDGE WARDWELL: : The Commission was
9 responsible for dealing with the NEPA issues
10 associated with the application itself, and has to
11 deal with them, and has to deal with EIS. And the
12 way it was done of course was it adopted DOEs,
13 EIS.

14 why wouldn't a similar situation occur,
15 if one assumes that this DOEs is a federal action
16 warranting either a review of an amendment to
17 their EIS, because of restrictions in the Waste
18 Policy Act, regarding what was looked at for their
19 EIS.

20 But if one takes a -- if one assumes for
21 the sake of argument that this is a major federal
22 action and withdrawal of this by DOE, doesn't NRC
23 have to follow suit also, before it can -- because
24 if it grants the motion to deny, it is allowing
25 something to go forward that requires a NEPA

1 review, and doesn't NRC, by default, also have to
2 address the EIS, the same way it does for the
3 granting of our review on the application?

4 >>MR. FITZ: It is a great question and I
5 wish I could provide an easy answer.

6 I actually was thinking about that
7 question quite a bit over the lunch break and I am
8 simply not in a position right now to --

9 >>JUDGE MOORE: It's not in your brief, so
10 really, yeah.

11 >>MR. FITZ: I just don't want to say
12 something that I might wish I hadn't said later.

13 >>JUDGE MOORE: The staff's regulations --
14 the Commission's regulations, with regard to NEPA
15 contentions are unique, and because of the
16 statutory scheme that says that DOE, as the
17 applicant, does the EIS, and the agency just
18 determines whether it's adequate or needs
19 supplementation. And so the Commission's
20 regulations, because of that statutory scheme,
21 provides that the determination, as far as being
22 able to challenge what the staff has done, is
23 whether or not the staff's acceptance was
24 appropriate.

25 If DOE's record of decision which, as Mr. Ma'sch

1 correctly points out, is a matter of DOE's
2 environmental regulations, does not -- is no longer
3 supported by its EIS. Does that problem flow into what
4 the NRC staff can or can't do respecting challenges to
5 its action in accepting that EIS?

6 >>MR. FITZ: If I've followed your question I
7 think the answer is no. What I see having
8 happened here is what we in Washington view as DOE
9 deciding to terminate, not just this license
10 application but a larger program.

11 We believe that is a major federal
12 action significantly affecting the environment
13 that required EIS support. And we have not seen
14 DOE come out with a rod that adopts any NEPA
15 support in that regard.

16 Now, does that affect the fact that DOE
17 has presented the FEIS in supplements to support
18 its application, and that the staff can rely on
19 that? I'm not sure that it does affect that.
20 Maybe there is an implication there but, again,
21 going back to some of the nonmerits-based approach
22 to this motion, I don't see DOE saying we
23 discovered new information that puts the EIS in
24 question. So I think the EIS is probably still
25 there to be relied upon.

1 That's my sense.

2 You know, Judge Wardwell, I wanted to go
3 back to something that I was thinking of earlier
4 today when you were asking questions about the
5 statutory provision that basically narrows down
6 the scope of that EIS.

7 I would take that as another indication
8 in the statute that the Secretary's discretion has
9 been constrained. In other words, the Secretary
10 was directed to do a NEPA process that basically
11 assumes only Yucca Mountain or no national
12 alternative. That NEPA basis really isn't
13 sufficient to support a termination decision, or
14 at least there is no allowance made for looking at
15 other alternatives.

16 I think it is another indication of the
17 statutory framework that is consistent with our
18 interpretation.

19 >>JUDGE MOORE: Do you have anything to wrap
20 up with, counsel?

21 >>MR. FITZ: I will just add this.

22 There is, obviously, the Secretary has
23 disagreed with policy choices made in the NHPA.
24 The proper place for those policies to be carried
25 out is before Congress.

1 The only question before this Board,
2 really, is a legal question of whether a basis for
3 withdrawal that gets to the merits of an approval
4 or disapproval has been presented before you, and
5 it has not.

6 I understand that this motion creates a
7 difficult circumstance for this Board, but the
8 decision is not difficult.

9 The law mandates that you dismiss the
10 motion, that you deny the motion.

11 Thank you.

12 >> JUDGE MOORE: : We will take a very
13 brief ten minutes recess and reconvene at 3:25.

14 (Recess taken)

15 >> JUDGE MOORE: we will now hear from
16 counsel for South Carolina.

17 >>MR. KESKEY: I believe on the schedule, the
18 next speaker is Don Keskey, who -- that is who I
19 am.

20 >> : JUDGE MOORE: I apologize,
21 counsel. I was going by what the law clerks put
22 in front of me, and perhaps I didn't pay attention
23 to the final, as I should.

24 Please proceed.

25 >>MR. KESKEY: Yes, Your Honors. We will

1 speak briefly about primarily the Chevron doctrine
2 and background and the situation.

3 But we will preliminarily note that we
4 agree with those parties that would claim that DOE
5 does not have the authority nor the discretion
6 either with or without prejudice.

7 First of all, the withdrawal motion is
8 not consistent with the plain language and the
9 purposes and the objectives of Congress as clearly
10 stated in the Nuclear Waste Policy Act and as
11 reinforced by that act with the adoption of a
12 standard contract between nuclear roll.

13 Both the NWPA and the standard contract
14 clearly requires a multi-step process of
15 prescriptive approach, a multi-step approach to
16 obtain a repository, and also for the
17 characterization of Yucca Mountain site as the
18 first repository to be studied.

19 We are well into that process, after
20 some 20 or 30 years and over 8 or 10 billion
21 dollars worth of effort, because we have now gone
22 through the amendments of 1987, we've gone through
23 the site selection by the Secretary, the approval
24 by the President, the approval by Congress
25 overriding Nevada's veto, and the actual

1 submission of a very comprehensive license
2 application, exactly two years ago today, by the
3 DOE.

4 Now, we have heard nothing in the
5 pleadings or in the briefing, or in the motion,
6 that there is something wrong with the license
7 application.

8 It has been docketed by this Commission,
9 it has been reviewed preliminary by the NRC staff.
10 There has been no explanation of an unexpected
11 event or a scientific problem, that would serve as
12 a basis for changing the decision as to going
13 forward on the license application.

14 Now, Your Honors, at this point in time
15 what we have is the filed application and this
16 Secretary's duty is now to progress that
17 application through to a final decision on the
18 merits, either up or down.

19 That is the only discretion that exists,
20 and, in fact, we would say that it's not really
21 discretionary, it's really more ministerial.

22 Now, we would suggest that it is highly
23 counter-intuitive for the Secretary to withdraw
24 the license application, and thereby attempt to
25 retroactively reverse all of the steps required by

1 the NWPA and the standard contract up to now, and
2 in fact to even take the additional step of trying
3 to bar the Yucca Mountain as a feature site by
4 asking for this procedure to be withdrawn with
5 prejudice.

6 How can that one secret decision, made
7 with no explanation and no rationale, and no
8 process by the new DOE secretary, override the
9 policy and the intent of Congress in the NWPA, and
10 all the steps that have been accomplished up to
11 now by both the executive and the legislative
12 branch.

13 Now, Your Honors, we would also assert
14 that DOE cannot rely on a Chevron doctrine. It
15 simply does not apply here. There is no explained
16 gap in the statute, there is no policy gap.

17 As I said, there is no rationale
18 provided, no process, no inquiry, no comments, no
19 formal decision by the Secretary explaining the
20 reasons why he would seek to withdraw the
21 application, no ability for the nation to input on
22 that proposed decision. And there is no basis to
23 understand why the Secretary has done this,
24 relative to any kind of a merits-based approach
25 rather than a political approach.

1 Now, Judge Moore, you've wisely quoted
2 Yogi Berra, deja vu all over again. We have been
3 through this Chevron argument before. Back in
4 1993 and 1994, the DOE started changing its
5 position.

6 And as the states and utilities and the
7 rate payers were paying billions of dollars into
8 the nuclear waste fund, they were raising the
9 question as to performance under the contract, as
10 mandated by both the statute and by the standard
11 contract.

12 The responses that were coming back
13 were, we sort of believe that we no longer have an
14 obligation to start disposing spent nuclear fuel
15 by 1998 because we have no repository in place.

16 Then the DOE started a notice of
17 inquiry, a formal process, to put forth that
18 interpretation for comment. And after over a
19 thousand comments were filed, they issued in 1995
20 a formal interpretation that that was their
21 interpretation of the statute.

22 They had no obligation to start
23 disposing of spent nuclear fuel until a repository
24 was in place. And of course, they omitted largely
25 the fact that they had a lot to do with the

1 obligation to obtain a repository, by timely
2 action, under the NWPA.

3 So in effect, the agency citing and
4 relying on Chevron tried to so-called fill the
5 statutory gap, the policy gap, and absolve itself
6 of the responsibility under the statute and the
7 standard contract, to start disposing of spent
8 fuel, and they have a program that accomplishes
9 that.

10 well, that was appealed to the Courts,
11 and the clerk in I&M Power in 1996 reversed the
12 DOE's interpretation, rejected outright the
13 rationale of the agency based on Chevron, based on
14 the first part of the analysis, they didn't have
15 to go through the factor analysis of Chevron under
16 the first step of Chevron they said that the DOE
17 interpretation was contrary to the plain language
18 and the purposes of the NWPA.

19 Now, thereafter, the DOE did not comply
20 with the Court's order I&M, and the parties
21 started asking DOE again as to what they were
22 going to do to comply.

23 That resulted in petitions from
24 mandamus, the U.S. Court of Appeals in the DC
25 Circuit, resulting in the 1997 of decision of

1 Northern States Power, which case reaffirmed all
2 of the holdings and findings of the I&M power
3 case, including the Chevron rejection, and issued
4 a partial mandamus against the DOE for their
5 failure to comply with the statute.

6 Now, that's 13 years ago.

7 >> >>JUDGE MOORE: : Counsel, without
8 -- perhaps I should not ask this question at this
9 particular time but, should this Board decide that
10 DOE does not have the authority under the Waste
11 Policy Act to withdraw, what mechanism does the
12 NRC have to ensure that DOE would prosecute its
13 application?

14 And I ask that question because the
15 normal case is you have a volunteer in front of us
16 who wants a license application, and so they have
17 every incentive to comply with Commission orders
18 and directions and request.

19 Here you have an involuntary applicant,
20 so to speak, under the statute, who, if it has the
21 discretion -- who, if we say they don't have the
22 authority under the act to do what they did, they
23 can just ignore it, and there is not a thing in
24 the world this agency can do about it.

25 Is that not the case?

1 >>MR. KESKEY: No, that's not the case.

2 >>JUDGE MOORE: What is the case?

3 >>MR. KESKEY: Well, I would suggest, first
4 of all --

5 >>JUDGE MOORE: You can deny the application,
6 which is -- that strikes me as very, very rabid,
7 throw me in the deep blue sea, don't throw me in
8 the briar patch.

9 >>MR. KESKEY: I would think that you might
10 look at what the courts did in I&M and Northern
11 States Power, and they recognized that there was
12 not going to be a repository finished by 1998, but
13 they still enforced and followed the statute.

14 Then, there are other remedies that
15 follow.

16 I would suggest that this agency, given
17 its independent authority to ensure public health
18 safety in an environmental respect to nuclear
19 power and nuclear waste, along with its specific
20 duties it's supposed to perform under the NHPA, is
21 faced with a similar situation.

22 You have a duty to enforce the rules and
23 purposes of the Atomic Energy Act as well as the
24 NHPA, and so, therefore, you have to come as close
25 as you can with the terms and conditions that you

1 would place in your order of denial. It may be a
2 denial of a motion with a temporary suspension.

3 >>JUDGE MOORE: How can this Board, in light
4 of what the Commission did in ordering us to go
5 forward, and not await on the Court, which has the
6 full power not only to decide but to enforce its
7 order, and carries with it all of the history of
8 the executive obeying the courts. This Board has
9 none of that. This agency has none of that. And
10 it's further complicated by the fact that it is a
11 federal department, not a private entity.

12 >>MR. KESKEY: Well, I believe that the NRC
13 reversing their other order and sending it back
14 here for this proceeding does not, or should not
15 necessarily be interpreted as foreclosing their
16 interest, and certainly the nation's interest, in
17 having you wrestle, in the most honest and
18 forthright way you can, to make this agency and
19 DOE comply with the NWA and Atomic Energy Act
20 and, therefore, have terms and conditions that
21 would come closest to accomplishing that.

22 Yes, there may be some more delays, but
23 what kind of remedies would come closest to
24 holding the statutory intent of Congress and the
25 statute in place, so that it is not destroyed by

1 some secret decision by a new energy secretary who
2 has provided no process or no rationale.

3 I would think that you can look at terms
4 on whether they have complied with NEPA, whether
5 they have made all the steps, whether they are --
6 they should re-notice this and conduct a formal
7 inquiry before they can proceed, that there be
8 steps to really protect the public interest here
9 and the preservation of the statute.

10 Now, there have been some suggestions
11 here today, almost that, well, we should just let
12 Congress decide this again.

13 Why does Congress, who passed the
14 statute in 1982 that had time lines and safeguards
15 and schedules clearly getting to an end result, if
16 possible, and that is the proper and safe disposal
17 of S&F. Why would Congress be placed in a
18 position of having to repeat itself.

19 >> : JUDGE MOORE: Well, in effect,
20 they're there every year in the appropriation
21 process; are they not?

22 >> : MR. KESKEY: They are, although
23 appropriations are an annual kind of thing,
24 oftentimes really should not be interpreted as
25 changing an inventory policy-making statute.

1 >>JUDGE MOORE: But once you turn off the
2 spigot, and there is no money or if the spigot is
3 just dripping instead of flowing, that's the
4 annual, that's the way it works, isn't it?

5 >>MR. KESKEY: Yes, and I'm not asking you to
6 ignore the practicalities of no budget and nobody
7 can work on the case.

8 I do think there are alternatives to
9 bridge that gap so that you comply with the NWPA,
10 the standard contract, and the Atomic Energy Act,
11 and bridge the gap during that period of problem,
12 which, hopefully, will be temporary.

13 So you come closest to doing what the
14 Congress intended and achieving the goals of this
15 program.

16 >>JUDGE MOORE: You made the suggestion, what
17 are the specifics? How on earth can this Board,
18 with no enforcement power, other than to give DOE
19 its wishes, which would be the normal case for the
20 norm, normal applicant. The ultimate sanction,
21 under the regulation, from a applicant who
22 continues to fail to comply, for any party, if it
23 is an applicant deny the application, if it is
24 another party, dismiss them from the proceeding.

25 That does not work here.

1 >>MR. KESKEY: I believe you can look at
2 denying the application, providing from some
3 temporary time period of suspension of the
4 proceedings, until there is more clarity with the
5 appropriations. Perhaps requiring DOE to conduct
6 some kind of a proceeding to explain itself.

7 JUDGE MOORE: We have no authority to either
8 order it or enforce it.

9 >> : MR. KESKEY: Well, I think you
10 have the authority to look at the motion and
11 determine whether you think it is adequate or not?

12 >>JUDGE MOORE: That we can do. But
13 interpreted as a practical matter, until the Court
14 acts, it's going to stay in limbo.

15 >>MR. KESKEY: Yes, but whatever decision you
16 make, I think that should not be a reason why you
17 grant the DOE's motion. I think the overriding
18 concept must be how do you comply with the
19 statutes, protect the public interest, and
20 remember, there is an entire nation out there
21 that's had huge reliance on the Nuclear Waste
22 Policy Act, and on the standard contract, because
23 of all the waste that is stored all over the
24 United States. Sites were never studied or
25 intended to be long term or potentially, permanent

1 waste disposal sites.

2 >> JUDGE WARDWELL: : In your limited
3 time remaining, would you like to comment on why
4 you think this is a major federal action that
5 requires review by DOE of NEPA, and why that, in
6 turn, affects NRC, whatsoever?

7 >>MR. KESKEY: Yes, thank you, Judge
8 Wardwell.

9 First of all, this is a major action
10 that changes the status quo. Right now we've been
11 under this Congressional framework of moving
12 towards step by step --

13 >> JUDGE WARDWELL: : That is a paper
14 status quo, it's not a physical status quo,
15 there's nothing out there.

16 >>MR. KESKEY: Well, when the states and
17 utilities first sued the DOE, the first time they
18 started to cite characterization.

19 So there has been 8 or 10 billion
20 dollars worth of effort in Yucca Mountain, to
21 characterize the site. We're beyond that stage.

22 So now we are in the actual licensing
23 stage, and so now, with all that reliance, and all
24 the history, this is a major action.

25 Yes, as the other side would say, there

1 is no guarantee that Yucca Mountain would
2 ultimately happen because maybe you would deny
3 someday the license application.

4 >> JUDGE WARDWELL: : Or Congress not
5 fund it, or Congress not eventually approve it, or
6 they may not get the other licenses they need,
7 other regulatory bodies?

8 >>MR. KESKEY: That could be, but as long as
9 the progress is being made, and there's
10 likelihood, or even a substantial possibility,
11 that the license application would be granted,
12 then is the time to get the appropriations to do
13 the railroad, et cetera, and you're making
14 progress.

15 But this decision puts certainty to the
16 end of the entire program, so the repository
17 policy of Congress, by the unexplained decision of
18 one person, or perhaps two people. And the point
19 is, that's a major action, changes the status quo,
20 because we no longer have all that.

21 What changes then is that all of the
22 sites where the waste is presently situated by
23 default, by no action, become nuclear waste sites.

24 >> JUDGE WARDWELL: : Maybe you would
25 site any other case where NEPA evaluation was

1 required, when someone abandoned studies from a
2 potential project, merely studies?

3 well, conceptually, the Lock case had
4 some similarities, but as has been said here
5 today, this is really a unique case extraordinary,
6 and finding other cases about fish or timber
7 really does not do justice to what we are facing
8 here.

9 The reality is here, the examples
10 applied to Prairie Island Indian Community. The
11 casks are only there because the state and
12 community relied on this Nuclear Waste Policy Act
13 and a standard contract that this would be
14 temporary.

15 Then, when the utility went in for a
16 license extension, the promise was still made, and
17 the site grew bigger and bigger. And now they go
18 in for a license extension, so now there will be a
19 hundred casks sitting on that site within that
20 time frame, located 600-yards from the Mississippi
21 River, very close or virtually within the flood
22 plain, and only 600 yards from the residence of
23 the community.

24 Now, by default, if you would take away
25 the nuclear waste solution or the prospect of a

1 solution, as provided by Congress, you are
2 condemning that waste to sit there for decades, if
3 not hundreds of years, and there are no studies
4 done by anyone that that site is suitable for that
5 many casks in that location for that period of
6 time without a substantial risk of harm to the
7 public health, safety, welfare, the environment,
8 not only that which is substantial, but huge
9 financial risks including, the Prairie Island
10 Community, and all the other host localities
11 around the country.

12 And you have to keep your eye on the
13 bigger picture. The policy of what Congress sets,
14 and I think this bears in your question, too, when
15 you would mentioned the unwilling applicant.

16 Through the long history of this
17 program, there has been changes back and forth
18 between willing applicant and an unwilling
19 applicant, so to speak.

20 In other words, those who progress the
21 program and those who delay it. The politics went
22 back and forth.

23 Despite all that, and after a lot of
24 delay, we do finally have a license application,
25 and a fairly good one, filed before this agency.

1 One of the things that should be done is
2 to ensure that the national policy is upheld and
3 that we don't have temporary whims and changes of
4 policy and no continuity and no reasoning for when
5 major steps occur or don't occur to ensure proper
6 disposal of spent fuel.

7 We have to look at the bigger picture
8 and hold the statute together, unless Congress
9 changes them. We have to do our best to put terms
10 and conditions together to bridge a gap in the
11 temporary problem of appropriations, and changes
12 in personnel, and do our best to make it work.
13 It's not going to be perfect. But at least, we
14 have a program still on the loom.

15 If maybe you would grant this
16 application to withdraw license application, what
17 is left of the Nuclear Waste Policy Act? The only
18 thing that's left is DOE's position that they
19 should still collect from the rate payers all of
20 the fees that they collected, as if they had
21 performed under the statute and under the
22 contract, forever.

23 Now, I know this body does not get into
24 contracts dealing with those fees as much as other
25 bodies, but, how can one motion of nine pages,

1 written by an outside counsel, without an
2 affidavit from the Secretary, without a process
3 from the Secretary, override this entire structure
4 of Congress, this entire history, the standard
5 contract, the unconditional obligation set by the
6 courts and I&M power and Northern States Power,
7 that they have an obligation to start disposing of
8 spent nuclear fuel.

9 They will be unable to have the
10 prospects of complying with those final
11 unappealable court orders, and interpretations of
12 the statute, if the motion is granted.

13 They have no ability to dispose of spent
14 nuclear fuel. And the country is left bereft,
15 with no program. And so, Your Honor, the impact
16 on the Prairie Island Indian community, and any
17 other host community or state, and the nation, is
18 what's of overriding importance.

19 The status question has changed. It is
20 a major action. By granting this, you are not
21 requiring the DOE to take the required hard look
22 at what the environmental impacts are under the
23 National Environmental Policy Act, of their
24 default on any one of the now new default waste
25 sites.

1 They have not studied that, they have
2 not done any EIS on that, and yet, that is their
3 preferred option.

4 So first, NEPA applies, and they have
5 not complied with that, and that's one of the
6 things you can do to bridge the gap, is require
7 that they first comply with NEPA and some of these
8 other requirements.

9 Thank you, Your Honor.

10 >>JUDGE MOORE: We've will now hear from
11 Aiken County.

12 >> : MR. GOTTSBALL: Good afternoon,
13 Tom Gottshall. Let me just take a moment to say
14 what Aiken County's involvement is.

15 Aiken County is the location of the
16 Savannah River site that comprises about ten
17 percent of the County. The Savannah River site is
18 the temporary repository of high level radioactive
19 waste, and it is one of the five DOE identified
20 sites in the country, that would have widespread
21 contamination, if the Yucca Mountain project were
22 not built.

23 I'm not saying, of course, the end of
24 this process results in Yucca Mountain, but this
25 is a process that we are talking about.

1 It seems to us that you ought to deny
2 this request to withdraw the application.

3 DOE really is asking the Board and the
4 NRC to abdicate their waiting duty to render a
5 final decision, including or disapproving the
6 repository construction application, on its
7 technical merits.

8 So here, and Judge Moore, I would like
9 to direct this to you, because you asked a
10 question of Mr. Fitz, and I think we would part
11 company with him slightly here, because we would
12 say, come hell or high water, or seismic event,
13 the obligation to assess this application belongs
14 to the NRC, and they have a duty to perform with
15 it, and if that event occurred, then you would
16 have to deal with that in the context of reviewing
17 this application, and approving or disapproving.

18 I want to --

19 >>JUDGE MOORE: Or, while you're on that
20 subject, the construction permit is one stop on
21 the bus line.

22 >> : MR. GOTTSHALL: Correct.

23 >> : JUDGE MOORE: There still comes a
24 possession received, receive and possess
25 application and license, an operating license and

1 a closure.

2 So, as I understand it, there are four
3 steps to the NRC's process, any one of which could
4 deny and keep from the repository from opening; is
5 that accurate?

6 >> : MR. GOTTSBALL: First, this
7 process that you're dealing with right now could
8 result in a disapproval. And that certainly is a
9 possibility.

10 We think the process that has been
11 decided on by Congress, we have already heard the
12 history concerning that, and so we believe that
13 your obligation is to see that process through,
14 and if you find that to be the case, then you
15 would disapprove this, after having seen the
16 technical information.

17 >>JUDGE MOORE: Am I correct, that after the
18 site process under 113, there is no provision in
19 the act, other than reported to Congress, which
20 was required, if DOE had found unsuitable a site?
21 Was there a process that DOE was to follow after
22 having found the site under 113 unsuitable?

23 >> MR. GOTTSBALL: I'm not sure. The
24 situation that you find yourself in now is having
25 to work through this process of considering and

1 rendering a final decision.

2 You used the word "considering," and
3 then "rendering a final decision," so there is no
4 way out at this point from the process, if that is
5 the question you ask.

6 Now, they could bring to you technical
7 information, which might lead you to a conclusion
8 more quickly than otherwise, with respect to this
9 being disapproved, but otherwise, we don't think
10 there is an out at this point.

11 I wanted to address the word "consider"
12 in 114(d), which does say, as pointed out earlier,
13 the Commission shall consider an application and,
14 Judge Moore, you referenced the dictionary and
15 looked to see what consideration meant, what does
16 it mean to consider an ordinary plain meaning?

17 I would suggest also to you that the
18 case of in re: DOE, a 2006 case, helps in that
19 respect, because there, the NRC Commission was
20 considering the regulatory scheme and said, he
21 characterized it as a statutory obligation to
22 complete its examination of the application within
23 3 years of its filing.

24 So that it seems to us it fits in
25 perfectly with the consideration aspect of 114(d),

1 the Commission itself has expressed what this
2 scheme is all about.

3 We would reference, as well, the various
4 "shall's" that are in 114(d). We agree that the
5 "accept clause" really would trump 107, the
6 regulation.

7 I do want to speak about 107 just for a
8 moment, and bring one other authority to your
9 attention.

10 We cited the case of in re: Sequoia
11 Fuels in our brief. That probably comes the
12 closest to an involuntary application in the
13 hypothetical that you opposed in that case.

14 And let me read what the Commission said
15 there.

16 It said, we do not foreclose the
17 possibility that in limited instances, denial may
18 be appropriate as, for example, where a licensee
19 seeks to withdraw a license application but, in
20 fact, continues to conduct some production
21 activity.

22 So that if the utility was faced with
23 that kind of an application to move forward a
24 renewal license, and sought to withdraw it, that
25 comes closest, it seems to us, to being an

1 involuntary application. And in that situation
2 the Commission said there are limited instances
3 where it would, indeed, deny withdrawal of the
4 application.

5 DOE seems to recognize, as well, the
6 requirements, to some extent, if only in the
7 breach of 114(d), because they want to cloak a
8 withdrawal as a "disapproval."

9 They suggested under 107, you could, in
10 effect, have a disapproval.

11 But we think, frankly, the statutory
12 construction, which is a plain meaning, and the
13 history doesn't mean that at all, it really
14 contemplates a decision on the merits.

15 DOE invites the Board to decline a clear
16 command of Congress. We suggest that we decline
17 that invitation. The rest of what has been argued
18 has already been said well, and I have nothing
19 further to suggest unless there is a further
20 question.

21 Thank you.

22 >>JUDGE MOORE: We will now hear from the
23 state of South Carolina.

24 >> : MR. WOODINGTON: Good afternoon,
25 I'm Ken Woodington from the law firm of Davidson &

1 Lindermann in Columbia, South Carolina. I
2 represent the State of South Carolina, as I did
3 for almost 30 years with the Attorney General's
4 office in South Carolina, which brought me into
5 court a few times on DOE-related NEPA cases,
6 although we do not raise NEPA in this matter.

7 The topics that we sort of divided up
8 for me to talk about, primarily Chevron, and a
9 little bit about the last years Appropriations
10 Act.

11 The second of those hasn't been
12 discussed at all, and may not need to be, the
13 first one has been discussed quit a bit and may
14 not need to be.

15 I would like to talk about a couple of
16 things that have come up in the course of this
17 argument, and get to those others as time permits.
18 One is this idea of the unseemliness of DOE having
19 to defend the application or prosecute the
20 application if it no longer believes that the
21 application is worth pursuing.

22 One thing you have to think about in
23 this context is that the Department of Energy,
24 U.S. Department of Energy consists of public
25 officials and public servants in the executive

1 branch of the government. The constitution
2 requires that the President, and by extension all
3 of his designees faithfully execute the laws of
4 the United States.

5 I think that if this Board were to deny
6 the motion of withdrawal, then in all likelihood
7 the department would faithfully execute the law as
8 public officials, go ahead and pursue the
9 application in good faith. If they he did not
10 there are people around like South Carolina, and
11 others, who would be happy to take them to the
12 District of Columbia, D.C. Circuit, under 119, for
13 failure to do a duty that was imposed by the
14 statute, if they it comes to that.

15 But there is a higher duty, I mean there
16 is nothing, there's no outside, there's no
17 faithful execute for a private power applicant to
18 continue pursuing its license application.

19 There is that outside, above all
20 command, that applies to public officials and the
21 executive branch. And really, if it really got
22 bad and they decided no, they are not going to do
23 it, even if this Board says they can't withdraw
24 the application, I can think of cases in the
25 criminal context where, if for some reason the

1 prosecutor doesn't want to go forward or the
2 defense lawyer doesn't go forward and the Court
3 just appoints somebody else to do it, in the
4 nature of independent counsel or special counsel,
5 or something like that.

6 It is kind of far out to think that it
7 might come to that, but nevertheless, that is a
8 possibility, I suppose, that it could come to, if
9 they declined to do their statutory duty, as
10 recognized by this Board. And let's face it, this
11 Board, as everybody said, will probably not be the
12 end of it, you have the Commission after that and
13 a reviewing Court after that, so one way or the
14 other, it will probably wind up with a court
15 order, and again, probably with some intervening
16 action by Congress, before it all takes place.

17 Another aspect of this that has come up,
18 and I agree with Mr. Gottshall, that I would like
19 to part company with Washington State, just a
20 little bit on their idea of what happens if you
21 have a seismic event or something.

22 As you said, Judge Moore, the 2002
23 statute for resolution call for a change of shift
24 of drivers, and again, I think what you can call
25 that is a prima facie case by the Congress to

1 determine that a prima facie case in the Yucca
2 Mountain would do, be appropriate, and that any
3 decision to not go with Yucca Mountain in the
4 future was one that would have to be made by this
5 body and by the Commission.

6 Again, it is not that strange, really,
7 for somebody who is formerly proposing something
8 to then advocate its denial when circumstances
9 change. Again, to use the criminal analogy, when
10 a prosecutor discovers something dreadfully wrong
11 with his case he goes to the court and tells the
12 court why he can't continue to prosecute the case
13 in good faith, and makes that argument.

14 On the other side, a guilty plea.
15 Somebody has been protesting his innocence all
16 along decides to plead guilty and changes his tune
17 180 degrees, and tries to persuade the Court that,
18 yes, I am guilty, I really did it, and I'm now
19 pleading guilty.

20 Or to use the other third example, class
21 actions. You know, one day you're in the fighting
22 in a class action, and then you decide to settle
23 it with the plaintiff's lawyer, and you have to
24 tell the Court the pros and cons of, you know, the
25 Court has to approve the class action settlement,

1 and you tell the Court the pros and cons of why,
2 maybe your case wasn't all that good after all,
3 and why you were lucky to get what you could get
4 in the settlement. It's just not that unusual
5 thing, especially if circumstances change, as in
6 the case of a seismic event or on some other
7 unanticipated, presently unknown, scientific
8 development.

9 So there are a couple of things along
10 those lines that have been discussed here as
11 possible alternatives or unseemingly or unusual,
12 maybe if you reflect on it in another context, it
13 really may aren't all that unusual and
14 unseemingly, after all.

15 To get to my Chevron points, just
16 briefly, I'd say that has been discussed at
17 length, if not ad nauseam, but we never get passed
18 the first point of saying, the first point, is the
19 statute clear. That's been argued, and I won't
20 talk about any more.

21 The second point, let's assume for the
22 sake of my argument we don't, concede unless it is
23 for the sake of argument, that the statute is not
24 clear, you have to look for somebody's
25 interpretation of it.

1 whose interpretation? The Commission in
2 its order in late April said that the NWPA is for
3 us to interpret, doesn't seem to be talking about
4 the DOE interpretation of the NWPA. If that's the
5 case, that's another cutoff for the Chevron
6 analysis, because it is not DOE's interpretation,
7 it's the NRC's.

8 And certainly, I don't think DOE argues
9 that 107 is something that you have to look to
10 their administrative interpretation of.

11 Still another point on Chevron is there
12 has to be something to which to defer as one of
13 the cases we cite said, what is it that DOE is
14 requesting that this body defer.

15 As far as I can tell from Mr. Lev,
16 though, you may not have a great deal of respect
17 for him, and in his brief he says DOE has not
18 previously interpreted the NWPA to preclude
19 withdrawal. And I guess that is the
20 administrative interpretation, that they have not
21 ever said this in the past so they must mean the
22 question that they believe that they can withdraw,
23 because they never said otherwise in the 20, 30
24 years in NWPA's existence.

25 That's not much, as Mr. Keskey said,

1 there's no process, there's no rationale. Judge
2 Moore, you cited earlier, I think, the Skidmore
3 case that talks about how good does it have to be,
4 does it have to be well-reasoned, well-developed,
5 and so forth. Again, there is none of that.
6 There's no wrestling, but it is not a regulation,
7 does not have to be a regulation, it's not a
8 regulation.

9 It's not really in any formal, or even
10 informal pronouncement, simply an advocacy
11 position taken in this litigation.

12 Then, briefly, if I can just get to the
13 question that's hardly been discussed at all, and
14 may not need to be, and that's the effect of a of
15 the 2010 Appropriations Act.

16 Apparently what DOE -- all that DOE says
17 about that, as I understand it, and it's on page
18 20 of their brief, is that Congress' appropriation
19 and creation of the Blue Ribbon Commission
20 indicates that Congress understands the NMPA in a
21 matter consistent with DOE's interpretation, that
22 is Congress understands that DOE is not required
23 to construct a repository on Yucca Mountain.

24 And Judge Wardwell says nobody from
25 either side argues that DOE is required to

1 construct a repository, at least at this stage of
2 the game. We have argued, all of us on this side
3 argue that they are required to follow through to
4 final decision made by this Board.

5 So if that's all they argue, than really
6 nobody has really said much about that and we
7 probably don't need to even discuss the fact of
8 the 2010 appropriations bill.

9 >>JUDGE MOORE: Does that bill, the
10 Appropriations Act, require the consideration of
11 Yucca Mountain by the Blue Ribbon Commission?

12 >> : MR. WOODINGTON: I think, reading
13 the statute of the legislative history together, I
14 think it's very clear that the answer is yes.

15 What it says is, that of the funds made
16 available in this act for nuclear waste disposal
17 \$5 million shall be provided to create a Blue
18 Ribbon Commission to consider all alternatives for
19 nuclear waste disposal. And if there was any
20 doubt about that, the house committee report says
21 that --

22 >>JUDGE MOORE: You're quoting from the
23 conference report?

24 >> : MR. WOODINGTON: No, from the
25 committee report 111-278.

1 >>JUDGE MOORE: It's the House committee
2 report?

3 >> MR. WOODINGTON: Correct. And one of the
4 opponents has noted that conference report says
5 unless there is something in the conference report
6 that's directly opposed to what's in one of the
7 committee reports, and the committee report still
8 is good, it expresses the will of the committee.

9 And what the house committee report
10 says: Is that, look, if you're going to
11 considerable alternatives, we can't imagine that
12 you would not include Yucca within those
13 alternatives, and they say in so many words, okay,
14 we are willing to have the Blue Ribbon Commission
15 created, so long as you consider Yucca as one of
16 the alternatives?

17 Specifically, it says "Committee makes
18 the \$5 million dollars for the Blue Ribbon
19 Commission available provided the Yucca Mountain
20 is considered in the review, that's on page 85 of
21 111.203. I'm sorry, 111.203, page 85.

22 The \$5 million is available provided the
23 Yucca Mountain is considered in the review, and
24 that is consistent with the language of the
25 statute itself, it says "all alternatives."

1 So that -- the statute, the
2 appropriations bill does not affect NEPA -- NWPA
3 in any way because it is not even inconsistent
4 with it. Keeps Yucca on the table, as far as that
5 committee is concerned. And by implication, as
6 far as Congress is concerned.

7 Even if somehow it could be read to
8 somehow diminish NWPA, which I don't think it can,
9 it's got two problems; one is the strong
10 presumption against the amendment itself --

11 >> >>JUDGE MOORE: : Is there anything
12 in the senate report which is inconsistent with
13 the language in the conference report, that the
14 conference report adopts the language -- the
15 directions of the committee reports, if it is not
16 inconsistent with the conference report?

17 >> : MR. WOODINGTON: AS I recall, the
18 Senate report is basically silent on whether Yucca
19 gets considered or not. I don't think it said a
20 thing one way or the other about that.

21 We are relying on memory, but I'm almost
22 100 percent sure that's what it did not say.
23 Anyway, that's basically it. I was going to say
24 that the Appropriations Act cannot repeal
25 substantive law, normally there's a strong

1 presumption that it does not repeal substantive
2 law.

3 And secondly, that the other part of the
4 problem is it would be a repeal by implication.
5 And we would get back to your Brown and Williamson
6 point, one more time. We would have a hugely
7 debated NHPA that's been out there and debated
8 basically three times in Congress; '82, '87 and
9 '02.

10 Repealed by indirection, by implication,
11 everything, and by an agency, when it's such a
12 huge policy choice that it would -- not to provide
13 a way to do it. That's basically all I have.

14 >>JUDGE MOORE: Thank you, counsel.

15 We will now hear from NEI.

16 >> : MR. BAUSER: Mr. Chairman, members
17 of the Board --

18 >> >>JUDGE MOORE: : Mr. Bauser, you're
19 filing in response to the motion specifically
20 raises the issue of the conference report of the
21 Appropriations Act with regard to the Blue Ribbon
22 Commission.

23 >> : MR. BAUSER: MR. Chairman, it does.

24 >> : JUDGE MOORE: And do you agree
25 with South Carolina that there is nothing with his

1 memory -- that there's nothing in the Senate
2 report that contradicts the language of the
3 conference report?

4 >> : MR. BAUSER: First.

5 >> : JUDGE MOORE: So the language of
6 the House report, which is adopted by the
7 conference report, indirectly prevails?

8 >> : MR. WOODINGTON: I believe I agree
9 with Mr. Woodington's statement, yes.

10 >> : JUDGE MOORE: So if that is
11 accurate, there can't be any inconsistency with
12 the Blue Ribbon's action and the Nuclear Waste
13 Policy Act?

14 Because they -- one of the alternatives
15 that is being considered is, is the very question
16 apparently in front of us, should Yucca Mountain
17 be going forward?

18 >> : MR. BAUSER: Well, I think that
19 question raises two issues. One, the first issue
20 being the weight to be attributed to reports of
21 the appropriations committees and the conference
22 committee with respect to what need to be done.

23 It's entitled certainly to a certain
24 amount of weight. I think the more important
25 point with respect to appropriations perhaps goes

1 to fiscal year 2010, which is the current fiscal
2 year which indicates to appropriations perhaps
3 goes to fiscal year, 2010 which is the current
4 fiscal year which indicates again, the committee
5 report that the licensing process is to proceed to
6 whatever weight you ascribe to that, that's the
7 current directive.

8 To avoid repetition and consistent with
9 the allocations made by the opponents to DOE's
10 motion to withdraw, I would like to focus on three
11 particular points.

12 One, the applicability of Section 2.107,
13 now referred to as 107 of NRC's regulations. Two,
14 this proceeding. Two, the desirability of
15 suspending the proceeding at this point, in
16 response to DOE's motion. And thirdly, I would
17 like to talk about why in no event should the
18 proceeding be terminated with prejudice.

19 Insofar as the application of 107 to
20 this proceeding is concerned, this point stems
21 from the Nuclear Waste Policy's Act provision
22 directing that the Yucca mountain license
23 application be considered "in accordance with laws
24 applicable to such application."

25 The reasoning then follows that that

1 applicable law includes 107 and, thus, offers some
2 sort of framework to accommodate DOE's motion to
3 withdraw.

4 However, it is questionable that 107
5 applies and, in fact, it appears it does not.

6 NRC regulations and Subpart J, Section
7 2.1000 specifically say that it's Subpart J and,
8 quote, the rules in Subpart C and Subpart G of
9 this part" that apply to the instant proceeding.

10 107, however, is in Subpart A, so it is
11 not applicable.

12 DOE says on pages 26 and 27 of its
13 reply, that 107 is generally applicable and has
14 been applied in reactor and materials licensing
15 proceedings. That's correct.

16 But repository licensing is very
17 special. Directed to proceed in detail by statute
18 and Subpart and the regulations referenced therein
19 are crafted carefully to serve this special
20 proceeding.

21 DOE takes the position on page 27 of
22 its reply that Subpart A must apply, because
23 Subpart J references two of its provisions.
24 Specifically, sections 2.101 and 2.105. But that
25 reference is simply used to specify the

1 applicability of Subpart J.

2 And, in fact, both sections 2.101 and
3 2.105 themselves specifically do reference
4 repository licensing; 107 does not.

5 DOE suggests in footnote 79 on page 26
6 of its reply that others sections of Subpart A
7 which do not specifically reference repository
8 licensing are, nevertheless, obviously applicable
9 to the instant licensing proceeding. And,
10 therefore, so must all of Subpart A-2. But that
11 is far from clear either.

12 Breaking it down, Section 2.109 referred
13 to by DOE, concerning the effects of timely and
14 license renewal, would seem to have no
15 applicability to Yucca Mountain licensing, since
16 there's no expiration date of a construction
17 authorization.

18 Further, Section 2.108 denial of an
19 application for failure to provide information
20 doesn't seem to have a place here either, because
21 DOE, the applicant, is directed by statute to
22 provide the information.

23 Finally, section 2.111, prohibiting sex
24 discrimination, also would not seem pertinent to
25 the instant proceeding here, given the nature of

1 the applicant, the federal government, and other
2 participants, governmental agencies and
3 organizations.

4 However, we don't have to confront 2.107
5 now, because the proper move at this point in time
6 is essentially to maintain the status quo, which
7 is the current suspension.

8 We now only have the budget
9 administration's budget request as a manifestation
10 of the Government's intent to withdraw the
11 application and terminate the proceeding.

12 No basis for action with respect to
13 fiscal 2011 in fact exists. And as I mentioned
14 earlier, the current fiscal year direction is to
15 proceed with licensing, as discussed in our answer
16 in footnote 12.

17 At this point, all that can be done is
18 to take a shot in the dark. It makes perfect
19 sense to wait and see what action Congress finally
20 takes on the budget request in appropriations and
21 then act in light of pertinent applicable law.

22 As DOE has said itself on page 34 of its
23 reply, ultimately, whether or not to proceed with
24 the Yucca Mountain project, "should be decided by
25 political bodies, not this Board."

1 Of course, that political decision
2 process is properly reached through normal
3 legislation.

4 Mr. Bauser, hasn't the Commission
5 directed us, in its April 23 order, to reach the
6 merits of the Nuclear Waste Policy Act issues by
7 June 1 and no later than as soon as possible after
8 June 1?

9 >>MR. BAUSER: I went back recently and read
10 that order, and I see nothing in that order which
11 would preclude responding to the motion at this
12 point, with a continuation of the, in effect,
13 suspension.

14 What the Commission directed or what the
15 Commission talked about and directed is on page 4
16 of the Order.

17 And it noted that, among other things,
18 judicial review may well benefit from the NRC's
19 consideration of the issues surrounding DOE's
20 motion. And that rather than await a judicial
21 decision, the timing and result of which is
22 uncertain and absent a contrary instruction from
23 the Court, we think that the prudent course of
24 action is to resolve the matters pending before
25 the agency as expeditiously as possible.

1 I believe a stay is an appropriate
2 resolution at this point, based on the
3 consideration of the issues. Again --

4 >> JUDGE WARDWELL: : And that stay
5 would -- are you proposing that stay only exists
6 until the appropriations become clear or passed?

7 >> : MR. BAUSER: well, that would
8 certainly be a milestone with respect to this
9 proceeding in that, again, the only --

10 >>MR. WARDWELL: That's a small permeation
11 that is not necessarily indicative of the
12 fundamental legal issue we're trying to address
13 here, is it?

14 >> : MR. BAUSER: well, as far as the
15 fundamental legal issue is concerned, NEI is in
16 full support of the position of all of the
17 opponents, including all of those who have
18 appeared before you today, that the Department of
19 Energy is not properly empowered to withdraw the
20 application.

21 So what we would propose, and as is
22 stated in our answer, is denial of the motion to
23 withdraw, but continued suspension of the
24 proceedings so that the Board may act with full
25 benefit of what the existing law is at the end of

1 this Congress.

2 Most importantly, I think, and directly,
3 action on the budget, which could either result in
4 law contrary to the determination that withdrawal
5 is impossible or some other possibility in which
6 we cannot the predict right now. That's largely
7 the problem.

8 >> JUDGE WARDWELL: : would it be a
9 better solution that when and if we did decide
10 anything like that, to deny the motion, that then
11 other motions would come forward and be briefed
12 and fully vetted, in regards to whether or not any
13 suspension should take place and for how long and
14 for what reasons, rather than do it as part of
15 this decision?

16 why is there a need to do it as part of
17 this decision?

18 >> : MR. BAUSER: I don't know that
19 there is a need to do it as part of this decision.
20 I want it to be complete in position of the
21 nuclear regul -- excuse me, of the NEI, which that
22 would be appropriate.

23 But so far as bifurcation is concerned,
24 I don't know that we would oppose that either.

25 >> >>JUDGE MOORE: : Mr. Bauser, to

1 back up a moment, in your response to DOE's
2 argument and their reply, DOE argues that part 2,
3 including Subpart A, that would be the 2.0 series
4 and the 2.100 series of regulations, is in
5 applicable because 2.1, I believe, starts by
6 saying it applies to -- I'm sorry, 2.1, "This part
7 governs the conduct of all proceedings."

8 And you said and went through a list of
9 why that general provision didn't apply. And I
10 recognize what Subpart J says.

11 >>MR. BAUSER: Okay.

12 >>MR. WARDWELL: But 2.1055 -- I'm sorry, 6,
13 is the notice provision for high level waste
14 repository.

15 And there is no other notice provision
16 in Subpart J and is 2.105-6 mentioned anywhere in
17 Subpart J?

18 >> : MR. BAUSER: May I get my
19 regulations?

20 >>MR. WARDWELL: Certainly.

21 >>MR. BAUSER: I think I know the answer to
22 that, but --

23 >>JUDGE MOORE: Isn't there a set right in
24 front of you on the desk? I'm sorry, there was --

25 >> : MR BAUSER: I see the statutes,

1 but let me just grab my book.

2 >>JUDGE MOORE: Thank you.

3 >> : MR BAUSER: 2.105 of the
4 Commission's Regulations does indeed refer to
5 notices, but I believe the references there with
6 respect to the notices include references to
7 licenses to receive and possess.

8 >> >>JUDGE MOORE: : Now, the 6 is an
9 amendment for construction authorization of a high
10 level waste --

11 >> : MR. BAUSER: Amendment to a
12 construction authorization, yes.

13 >>JUDGE MOORE: Oh, an amendment to a
14 construction.

15 So that would answer my question,
16 presumably, because we don't have an amendment in
17 front of us, we have a construction authorization
18 application and --

19 >> : Mr. Bauser: Yes, Mr. Chairman,
20 we're not within the ambit of that particular
21 question.

22 >>MR. WARDWELL:

23 >>JUDGE MOORE: So then it is completely
24 consistent with Subpart J that subpart 2 does not
25 apply?

1 I'm sorry, the 2.1 and 2.100 series,
2 which is Subpart A, and the indoctrines of
3 provisions of 2.1 do not apply.

4 >> : MR. BAUSER: I believe so, a
5 unified reading of all the provisions reaches that
6 result.

7 Again turning to my final point, in any
8 event, even assuming 107 is applicable, withdrawal
9 and termination "with prejudice" is not justified.

10 There is a high applicable standard that
11 has not been met with respect to the application
12 of 107 in this regard.

13 withdrawal with prejudice here would be
14 proper only in case of legal harm from going
15 ahead, which no one has identified.

16 Harm would actually be to utilities if
17 dismissal were granted with prejudice. In terms
18 of NEI, as was noticed in the May 11th, 2009 Board
19 Memorandum and Order Ruling on Participants and
20 Contentions, "NEI represents those who are the
21 intended beneficiaries of the Nuclear waste Policy
22 Act."

23 Continuing: "Indeed, they can claim to
24 be the really parties in interest in the success
25 of DOE's application and have been supplying its

1 financing through the targeted financial levy on
2 their generation of power."

3 Money committed amounts thus far to more
4 than \$34 billion. Expenditures total \$11 billion.
5 The importance of the repository to the management
6 of spent fuel is clear in that it is intended to
7 be the final resting place for spent fuel
8 currently in the possession of utilities.

9 The waste program has been pursued for
10 27 years, through the administration of five
11 Presidents, during 15 congresses, and leadership
12 of nine secretaries.

13 We now have a fully characterized
14 repository site following program expenditures, as
15 I mentioned, of \$11 billion.

16 Yucca Mountain thus constitutes a major
17 national resource, not only for the disposal of
18 commercial radioactive waste, but that from the
19 nation's defense activities as well.

20 DOE, for its part, takes the position on
21 pages 33 and 34 of its reply, that dismissal with
22 prejudice is required on the basis of certain case
23 law, holding that it is an abuse of discretion for
24 a Court to deny a plaintiff's request for
25 voluntary dismissal with prejudice.

1 In none of the cases cited, however, was
2 there legal prejudice to any of the parties in
3 litigation; Defendants in particular.

4 In fact, in all cases but one, the
5 Defendant supported dismissal with prejudice. The
6 only other case involved the desire of the
7 Defendant to have awarded attorney's fees, along
8 with dismissal, in order for it to go along with
9 dismissal with prejudice. The Court decided that
10 was a separate matter, and decided as such.

11 Further, and more basically, DOE's
12 position here is not analogous to that of a
13 Plaintiff. DOE was obligated by statute to
14 commence this proceeding, where Plaintiffs initial
15 litigation of their own volition against others.

16 In addition, Nevada, for its part,
17 expressed a special concern over not being able to
18 "conduct meaningful discovery on the LSN in a
19 future licensing proceeding."

20 This concern, in NEI's view, however,
21 does not reflect the licensing support network
22 administrators and DOE's answers to the Board's
23 April 21st questions, which indicate, we believe,
24 that with proper condition, which the Board may
25 prescribe, appropriate records and documentation

1 can be preserved.

2 To summarize, any basis for dismissal
3 stemming from 107 is questionable, at best. In
4 any event, the proper action at this point is to
5 maintain the current stay initiated February 16 by
6 this Board, until Congress completes action on the
7 administration's budget request.

8 Finally, in no event is dismissal with
9 prejudice proper.

10 That concludes our remarks.

11 >> >>JUDGE MOORE: : Mr. Bauser, in
12 one of -- and I could be incorrect in my
13 recollection, but DOE has argued that the Blue
14 Ribbon Commission is indicative of Congress'
15 intention, fully consistent with scraping, for
16 lack of a better term, Yucca Mountain.

17 Is there language in one of those
18 appropriations bills that the collection of waste
19 fund was to be suspended?

20 >>MR. BAUSER: There was nothing in any of
21 the appropriations legislation or reports that
22 talked to that.

23 However, in the reports, as discussed in
24 detail in footnote 11 of our proceeding, the
25 appropriation -- one of the appropriations reports

1 I believe does talk to the Blue ribbon Commission
2 going ahead and being established to look at all
3 alternatives with respect to waste disposal.

4 That, by no means, would eliminate Yucca
5 Mountain -- the Yucca Mountain proceeding for
6 continuing. And also, as I mentioned, one of the
7 reports talks to, indeed, the Yucca Mountain
8 proceeding continuing through fiscal year 2010.

9 >> JUDGE MOORE: Thank you, counsel.

10 We will now hear from the Four Counties.

11 >> MR. LIST: Your Honors, I'm Robert
12 List from the law firm of Armstrong, Teasedale on
13 behalf of Four Nevada Counties.

14 Before I discuss the -- some of the
15 constitutional thoughts I have prepared to
16 address, I'd like to touch on a couple of matters
17 brought up in the course of these arguments today.

18 Let me say preliminarily that these are
19 some of the most interesting and well done and
20 thoughtful and professional arguments that I have
21 heard in a long time before a bench, and my
22 compliments to all of the colleagues here today
23 who made their arguments.

24 First, if I may, I would like to address
25 the question I think was just presented to a

1 moment ago to Mr. Bauser concerning the Blue
2 Ribbon Commission.

3 I -- and I don't mean this in the form
4 of testimony, but I know it's a matter of record;
5 that the Secretary of Energy appeared before that
6 Commission at its first meeting and specifically
7 directed them, do not consider siting of any
8 repositories. They were not to look at citing.

9 The charge, as I understand the law, and
10 the charge that he gave them on that occasion, was
11 simply to look at alternative means of storage or
12 disposal of spent fuel or high level waste.

13 Secondly, a word or two about the
14 suggestion that Mr. Bauser made that this Board
15 might suspend the proceedings through the end of
16 this Congressional term.

17 I would simply say that, number one, I
18 don't believe Judge Wardwell, as you indicated,
19 that that would be a sound matter to consider in
20 conjunction with this process before you now, this
21 issue.

22 And secondly, there is certainly no
23 closure at the end of this Congressional term.

24 Oftentimes, as you may -- as I'm certain
25 you're aware, the CRs, the continuing resolutions,

1 stand well beyond that time, sometimes for 10 or
2 11 months into the following fiscal year.

3 So I don't see that as a reasonable way
4 to go.

5 I would also touch on one other factor
6 preliminarily, and that is, during Mr. Fitz's
7 excellent arguments, he was asked whether 107
8 might be used as a basis for dismissal or
9 withdrawal in the event of some cataclysmic event
10 or some unexpected phenomenon out at the site.
11 And he indicated that it might be utilized in that
12 circumstance.

13 I think, Judge Moore, you indicated that
14 that might open the door to its utilization for
15 lesser circumstances.

16 It would be our position that there are
17 a number of tools in the tool box of this Board
18 and of the NRC itself, to deal with that
19 circumstance, should it arise.

20 Among those, I would suggest that first
21 is the element of the contentions themselves,
22 which seek to raise just those kinds of scenarios.

23 This Board and, ultimately, the
24 Commission, would act upon that contention, or
25 those contentions, and could use that as the basis

1 for the denial, ultimately, of the application.

2 I also think, as was mentioned earlier,
3 the reports to Congress could result in a change
4 of policy by Congress. And in no circumstance
5 would it be necessary to resort to utilization of
6 107.

7 I think that pretty well -- oh, one
8 other thing I would touch upon. There's been
9 quite a bit of discussion this afternoon about the
10 topic of an involuntary applicant being compelled
11 to proceed with -- if this Board were to deny this
12 motion to withdraw.

13 And I would say simply that such
14 circumstances exist constantly in executive
15 government, where legislative overrides or
16 legislative directives -- or judicial directives,
17 reverse a course of action that an executive
18 agency is following.

19 Among those would be, for example, a
20 local -- and it's at every level of government --
21 a local city council or county commission directed
22 by a court, for example, to grant zoning or grant
23 building permits contrary to a policy that the
24 city council or commission wishes to follow, you
25 have to go ahead and comply and do it.

1 I can tell you one example at the state
2 level. The state legislature had directed that a
3 prison be built up in White Pine County. My
4 administration disagreed with that, my parole and
5 probation people said no, it should not be built
6 near Las Vegas, where the families can visit and
7 lawyers can visit with inmates and so forth. The
8 legislature determined that it ought to go in ELI
9 (phn) because of the unemployment situation.

10 Guess what, we built it in ELI, that was
11 the legislative policy directed the law, which my
12 administration followed as a matter of compliance
13 with our constitutional mandate.

14 Other examples would be at the federal
15 level. I think we all recall the so-called bridge
16 to nowhere that was directed by Congress to be
17 built in Alaska.

18 I'm sure the Department of
19 Transportation was not happy about that, but they
20 commenced the design of it. Ultimately, the
21 funding of it was withdrawn, but that was
22 something that would have happened.

23 DOD constantly makes requests for
24 appropriations for various kinds of weapon
25 systems. Congress chooses among them, it

1 doesn't always choose the first choice. But DOD
2 fulfills their commitment under the law to carry
3 out and proceed as directed by Congress.

4 And in this instance, I think it's
5 noteworthy that DOE itself has not said that Yucca
6 Mountain wouldn't work.

7 So it isn't as if they have a conflict
8 of interest in advocating something that,
9 scientifically, they have questioned. So I don't
10 see that they're disqualified, in any sense, from
11 advancing that application.

12 The -- and it is, I think, noteworthy
13 also that in terms of what the powers of this
14 Board or the NRC might be to compel any other
15 Government entity to proceed before it, is traced
16 right back to Article 2, Section 3 of the United
17 States Constitution, which indeed directs the
18 President to faithfully, execute the laws of the
19 land.

20 So he has to be faithful to the law.
21 And he took an oath to do so and that, of course,
22 is a Constitutional mandate.

23 To touch for just a few moments in my
24 remaining time upon the Constitutional issues. We
25 all know that there are, obviously, three branches

1 of government, and what I would suggest to you
2 that occurred here, is that the Legislative Branch
3 has fixed the law, the Executive Branch has
4 determined on its own, because I believe the
5 statute to be clear, they determined on their own
6 that they wish to do otherwise.

7 And I think that it's fundamental
8 Hornbook law that goes back most recently to a
9 case called Youngstown Sheet & Tube that's been
10 cited to this body, when you're dealing with the
11 question of intrusion of one branch upon the
12 powers of another branch. And the question in
13 that case was whether the President's action
14 amounted to law-making. That was a case where the
15 President ordered the seizure of steel plants in
16 1952.

17 The Court, Justice Black writing for the
18 U.S. Supreme Court, said that the President's
19 action amounted to law-making; a legislative
20 function which the Constitution has expressly
21 confided to the Congress and not to the President.

22 The President's power, if any, to take
23 the action in question, must stem from either an
24 act of Congress or from the Constitutional itself.

25 And there are no statutes that expressly

1 authorize the President to take the action in
2 question. That's what he said and that, of
3 course, is precisely what we have here, an absence
4 of authority to proceed as they have.

5 Justice Frankfurter, in the same
6 opinion, said this: "Congress has expressed --"
7 or in the same case, rather. "Congress has
8 expressed its will to withhold this power from the
9 President as though it had said so in so many
10 words."

11 And finally, Justice Jackson said this:
12 "The executive accept for recommendation and veto
13 has no legislative power. Executive action we
14 have here originates in the individual will of the
15 President and represents an exercise in authority
16 without law."

17 I think the facts in this case are even
18 more egregious, because notwithstanding the fact
19 that Congress had mandated something, what we
20 have, they mandated the scius (phn) and they've
21 mandated a process.

22 what we have here is a situation where
23 they told the executive agencies to follow an
24 enumerated procedure, leading to the design and
25 construction and, ultimately, potentially, the

1 operation. Executive Branch simply decided,
2 without Constitutional or statutory authority, and
3 without citing any safety concerns -- and we
4 believe somewhat brazenly and perhaps arbitrarily
5 -- abandoned the statutory mandated process and
6 ignored the established legal policy and embarked
7 on an entirely different course of action of their
8 own choosing, and that is to abandon this entire
9 procedure.

10 Congress has clearly stated its intent.
11 They did so, although it is in the matter of
12 operational law, they did so in the findings of
13 the Nuclear Waste Policy Act and their statement
14 of purposes, where they stated specifically, this
15 is the establishment of a definite federal policy
16 for the disposal of such waste.

17 And as Judge Wardwell said earlier, in
18 fact, the act itself is styled as a Nuclear Waste
19 Policy Act. This was the intent.

20 Nevertheless, in its -- even in the
21 reply brief, DOE is still contending that they
22 have the right to set the policy.

23 Page 19 of their reply brief, they seem
24 to be affronted by our position that the Secretary
25 should be required "to proceed with this

1 application no matter his view as to whether that
2 is a wise policy".

3 That is obviously our view, that he does
4 not have the right to do so. And, in fact, again
5 at page 28 in their brief they advance the
6 assertion that DOE has "policy discretion to
7 withdraw the application without being second
8 guessed. DOE's notion that the setting of policy
9 can take place at the agency level, is
10 self-anointing approach, in light of Congress'
11 declaration that they are establishing the policy
12 is simply a mistaken approach."

13 The internal view of their supremacy
14 within that agency is not only contrary to the
15 command of the Legislative Branch, but also
16 contrary to the command of the Judicial Branch,
17 because in the NEI case in the quotation that
18 appears in several of the briefs, the Court
19 specifically referred to the conclusion of the
20 senate committee report on the Congressional
21 resolution following the veto by the State of
22 Nevada by stating that the effect of the report
23 was as follows: "Approval of the site and the
24 continuation of the repository development
25 process, therefore, was determined to be in the

1 national interest."

2 Specifically laid out, basically
3 confirmed by the Judicial Branch as well.

4 So the Court found that Congress had
5 determined the national interest and yet we
6 have -- which amounts to the policy, and yet we
7 have DOE still asserting, as I just referred to in
8 their brief, that they may usurp that policy. And
9 it's simply not the case.

10 Only Congress can change it. And if the
11 votes were there to do so, frankly, I think they
12 would have done it.

13 After 27 years -- in closing, after 27
14 years of administering the act and reporting to
15 Congress' required and conducting unprecedented
16 scientific studies and analyses, spending billions
17 and billions of dollars, some 11 billion,
18 according to NEI, appropriated by Congress to
19 further the Congressional national policy and the
20 law of the land, DOE now seeks to exalt its policy
21 over the acts of Congress and the
22 judicially-recognized national interest.

23 This conduct is, to put it charitably,
24 of the very nature that Congress intended to
25 preclude when it adopted the National -- Nuclear

1 Waste Policy Act.

2 It must be treated by this Board as a
3 mistaken effort to usurp the powers of Congress.
4 In the Nevada vernacular, DOE must, like the Four
5 Counties, the industry, the public, the utilities,
6 all of the stakeholders, let the chips fall where
7 they may. In the course of proper independent
8 analysis by NRC, pursuant to the law of the land,
9 must proceed to consideration of the license
10 application.

11 In closing, I simply want to give a bit
12 of a disclaimer and that is that the Four Counties
13 certainly do not take a position on the ultimate
14 merits of the application, but simply believe that
15 the law is very clear, and we expect it to be
16 followed and confident that this Board will, with
17 all due respect, deny the motion.

18 Thank you very much.

19 >>JUDGE MOORE: We will now hear from Nye
20 County, but one moment. Go ahead, counsel, be
21 seated.

22 I have a quick question for Mr. Bauser.
23 The senate report 111-45 states, given the
24 administration's decision to terminate the Yucca
25 mountain repository program while developing

1 disposal alternatives, the committee expects the
2 Secretary of Energy to suspend collection of
3 payments to the Nuclear waste Fund.

4 Is -- was that contradicted in the
5 conference report and is that the current state of
6 appropriations for 2010?

7 >>MR. BAUSER: Mr. Chairman, I'm sorry, I'm
8 not prepared --

9 >>JUDGE MOORE: Okay.

10 >>MR. BAUSER: -- to answer that question.

11 >>JUDGE MOORE: Nye County.

12 >> MR. ANDERSON: Good afternoon,
13 Mr. Chairman and Board members. Given the
14 lateness of the hour and being last, and the
15 Board's admonition I'm going to try right to jump
16 right in to address matters that are specific to
17 either Nye County or we believe are important
18 enough to require a specific comment by Nye
19 County.

20 In doing that, I'm going to say the
21 following: I think that we vetted the issue on
22 whether or not there was a statutory authority for
23 DOE to withdraw its application. And rather than
24 to add to that, I'll simply say that both in our
25 brief and what I heard today from the State of

1 Washington, who gave an excellent explication of
2 the opponent's view of the law on the Nuclear
3 Waste Policy Act, just to simply endorse that so
4 we can move on to some other issues that I think
5 do require further attention.

6 First would be, I found it extraordinary
7 that in footnote 102 of DOE's brief, they had
8 stated the following: "The secretary's judgment
9 here is not that YUCCA Mountain is unsafe or that
10 there are any flaws in the LA, but rather that it
11 is not a workable option and that alternatives
12 will better would serve the public interest."

13 That, in and of itself, struck me as the
14 end of the argument about whether or not an LA
15 could be dismissed with prejudice, certainly, and
16 extraordinary relief under all of NRC doctrine,
17 whether applicable or not.

18 That seems to be a standard statement
19 contained in the case law, that it's
20 extraordinary, and it's wholly unjustified if the
21 project is not deemed unsafe and the LA is without
22 a flaw.

23 The administration can state it has no
24 intention of refiling an application if a motion
25 to dismiss is granted. But I see no reason that

1 they can claim prejudice if someone else would
2 refile?

3 And they are fully in control of whether
4 or not they refile after this Board and the
5 Commission rules on the merits that they have been
6 asked to rule on.

7 I also find the discussion of the Blue
8 Ribbon panel to be virtually irrelevant. What the
9 Blue Ribbon panel may or may not suggest in the
10 future, we don't know.

11 I can suggest this to my younger
12 colleague from DOE, having been around a lot
13 longer, that reprocessing is not a new issue. Its
14 economic and technological possibilities and
15 feasibilities have been debated since the Carter
16 Administration, at least, and before, and those
17 communications and discussions will go on for
18 quite some time. It certainly isn't the basis for
19 the withdrawal of an application.

20 I also found it peculiar that it appears
21 that the Secretary and DOE have already determined
22 what the Blue Ribbon Panel will find.

23 I know some of the individuals on that
24 Blue Ribbon Panel, it's an independent-minded
25 group, they can could come up with quite a new

1 study, but I doubt it.

2 The National Academy of Science has over
3 a hundred reports on nuclear waste policy issues,
4 it seems to come back to the same issues over and
5 over again.

6 I would like to address 107.

7 >> >>JUDGE MOORE: : Counsel, was Yucca
8 Mountain taken off the table by DOE for
9 consideration by the Blue Ribbon Commission?

10 >> : MR. ANDERSON: No, Your Honor.
11 And we have addressed that issue in footnote 15 of
12 our brief, and I'll just briefly go over it.

13 The House Committee report, the
14 Committee actually stated its support for the
15 position that YUCCA Mountain application review
16 should continue --

17 >> : JUDGE MOORE: I know what the
18 Appropriation Act said. I just asked whether it
19 had been taken off the table by the Secretary?

20 >> : MR. ANDERSON: I'm not aware of
21 that, Your Honor.

22 And if he did, I would have to say that
23 it isn't based on what was -- what we call in
24 D.C., fiscal law principles.

25 You have to, when you have multiple

1 committee reports, you have to take a look at
2 them, see if there is anything, quote/unquote,
3 inconsistent. And if there are not, then the
4 conference report -- and to reiterate this
5 principle of fiscal law -- that you take
6 everybody's report and try to comply with it to
7 the extent possible.

8 So whether it considers Yucca mountain
9 or not, I wanted to make that point. I really
10 don't think that becomes the basis of what they do
11 and don't not say about preprocessing and other
12 options, is all speculation. It's for the future.
13 And DOE could have awaited those results, but they
14 decided not to.

15 Another avenue that they could have
16 proceeded, just so -- I don't think anybody has
17 said today what they think should have happened in
18 this case, if the President and the Secretary
19 decided that the Nuclear Waste Policy Act was
20 flawed, especially in its designation of a sole
21 repository and the process for determining whether
22 or not the license should be approved or
23 disapproved, it had the option of taking that
24 matter to the appropriate committees for an
25 authorization amendment. And they choose not to.

1 why they choose not to, I won't
2 speculate. But that certainly was available to
3 them and is what I think, in fact, is what was
4 required by the law.

5 I wanted to make one reference to
6 something that was said by DOE's counsel regarding
7 our position on stay.

8 The appropriate way to look at what we
9 said both in our conclusion and in our brief, and
10 that is the following: we believe that this Board
11 should deny the motion. It could then impose or
12 continue a stay of the discovery until either the
13 appropriation process has run and/or the Court has
14 had a chance to review the pending litigation
15 that's on some or similar issues and/or anything
16 that the Commission then decides with respect to
17 these matters as it goes up the appeal or petition
18 process.

19 I just wanted to clarify that, Your
20 Honor, we're not advocating that you not decide,
21 as you were required to do from the Commission.
22 We're not advocating that you not come up with a
23 final decision. That is the Commission itself
24 come up with a final decision.

25 We're simply saying, as this Board has

1 done in the past, you make a stay for purposes of
2 awaiting other actions that could clarify and make
3 matters simpler and more efficient in the near
4 future. We're not asking for an indefinite
5 suspension, but a stay simply to await those
6 things that are near term.

7 I want to make one other statement, I
8 could not find anywhere in the literature of 107,
9 of a situation where NRC actually granted a motion
10 to dismiss with prejudice, and that includes a
11 case where applicant at least acquiesced into the
12 Defendant's request for a motion to dismiss with
13 prejudice, and that a Cincinnati Electric Company
14 Case, and the William Zimmer facility, and it's
15 cited in our brief and I won't belabor it any
16 further.

17 >> JUDGE WARDWELL: : Counsel, why do
18 you believe that this withdrawal is a major
19 federal action that requires NEPA review?

20 >>MR. ANDERSON: That's based on both the
21 fact that there's been over 20 years of activity
22 with respect to the designation of the site
23 characterization of the site, and, for now -- and
24 at this point, for DOE to suggest we are
25 abandoning that option in the teeth of the nuclear

1 waste Policy Act, it clearly is a major federal
2 action, regardless of what was thought about in
3 terms of no-action alternative. I do not consider
4 this action to be a no-action alternative.

5 It's to revert the position that's been
6 taken for many years on going forward. And so
7 that's DOE's obligation in the first instance, to
8 then prepare the appropriate supplement to the
9 EIS --

10 >> JUDGE WARDWELL: : But the,
11 quote/unquote, action, as it were, is merely
12 withdrawing an application of which there is --
13 the only physical action is really abandoning any
14 studies that have occurred. And how is that
15 something that requires DOE to review any impacts
16 associated.

17 >>MR. ANDERSON: well, in spite of the fact
18 that Congress will have to act and many other
19 administrative actions must take place before it
20 can be built, we're all in agreement on that.

21 It really is more than that. If they
22 abandon at this point, it is going to push out
23 into the future, at least a determination of
24 whether or not any repository can be built safely
25 and environmentally sound -- in an environmentally

1 sound manner.

2 That's something that is of value. I
3 want to state that for the record. I don't think
4 it has been said. There would be value if this
5 application were processed through at least the
6 construction authorization phase. And if I'm not
7 mistaken, the Secretary said so not much more than
8 a year ago.

9 I want to make one point along that same
10 line. During the appropriation process that the
11 Blue Ribbon panel was appropriated, in the same
12 appropriation, DOE and the administration were
13 appropriated money to go forward with the
14 licensing application. The exact same
15 appropriation.

16 >> >>JUDGE MOORE: : Counsel, with
17 respect to Judge Wardwell's question regarding
18 NEPA, does the fact that even though there has not
19 been a construction permit as part of the -- I
20 guess you would call it the siting activity, the
21 main tunnel of Yucca Mountain was still excavated,
22 drilled, whatever the proper terminology is --
23 with enormous mountains removed from Yucca
24 Mountain, of material.

25 Now, normally, for a federal action --

1 under NEPA there has to be a major federal action.
2 Here, in -- while all of that was going on, in the
3 -- as all part of the site determination, which
4 was exempt from NEPA requirements, does that come
5 into place because there's a five-mile hole in
6 Yucca Mountain, sitting there with what was
7 excavated sitting next to it, that makes this
8 rather different from the normal NEPA activity
9 that nothing is done before the EIS is done?

10 >>MR. ANDERSON: I think it's another example
11 of this being a very unique situation, Your Honor.
12 And that activity has taken place in our County
13 that I represent. So we have concerns about how,
14 in the event it is abandoned, how that would be
15 remediated.

16 But I want to make -- the key point is,
17 the abandonment of this at the construction
18 authorization phase, at this point, will have
19 trickled down environmental and fiscal and other
20 social economic effects that have to be accounted
21 for as -- because they wouldn't have been
22 triggered by the abandonment at this point.

23 >> >>JUDGE MOORE: : You don't mean by
24 abandonment, you mean the continuation?

25 >>MR. ANDERSON: If they were allowed to

1 abandon, they would have to prepare, in our view,
2 an EIS that would like at the specific impacts
3 that would be triggered both environmental,
4 socioeconomic (phn) and other, of walking away from
5 something that's taken 25 or more years to get to.

6 >>JUDGE MOORE: Thank you, Counsel.

7 >>MR. ANDERSON: Your Honor, one other thing
8 that I don't think enough has been said about is,
9 assuming 107 does apply, and assuming,
10 hypothetically, we still want you to rule that the
11 Nuclear Waste Policy Act does not authorize
12 withdrawal of the application.

13 But in the event you do get to 107;
14 what's applicable about 107? Is it the entire
15 case law that has been rendered regarding nuclear
16 power plants or is it the 107 itself and the
17 principles of 107 that apply to every case, and
18 that is, who has the burden of proof on this? We
19 maintain DOE, as the entity that's requested the
20 withdrawal, has the burden of proof on that and
21 they --

22 >>JUDGE MOORE: Burden of proof on what
23 issue, the prejudice issue?

24 >>MR. ANDERSON: Burden of proof of showing
25 harm, okay.

1 Now, your case law, not just the Puerto
2 Rico case and others, I think uniformly hold that
3 you have to account for the harm to all the
4 parties, and that group may be expanding, but even
5 if we take the initial set of parties, you have to
6 take into account the impacts to NEI's and its
7 constituents, our host county, the Indian tribes
8 that are represented. And moreover, the harm of
9 abandoning a project funded by the taxpayers to
10 the tune of over \$10 billion and over a
11 20-some-year period.

12 We maintain in our brief, and I believe
13 it's legitimate, that even if we hadn't raised it
14 or another party hadn't raised it, you would be
15 authorized under 107 to say, here's how we balance
16 the harm to all the parties and, more importantly,
17 to the public.

18 And that, I think, is clear, what the
19 result is when you put it into a weighing
20 situation and weighing and balancing the harm, it
21 clearly falls towards denying the motion.

22 Your Honors, I don't think I have missed
23 anything of great consequences that I wanted -- I
24 want to thank you for the opportunity to speak
25 today and your indulgence at the late hour, and if

1 you have any other questions, I'll be glad to
2 answer them.

3 >>JUDGE MOORE: Thank you, counsel.

4 We will take a brief ten-minute recess
5 so that counsel can have a drink of water before
6 they present their rebuttal.

7 Thank you.

8 (Short recess taken.)

9 >> : JUDGE MOORE: We will now have
10 brief rebuttal.

11 DOE. You asked to reserve 15 minutes.
12 We were very generous this morning with your time,
13 please approach the podium. The lateness of the
14 hour impinges upon our generosity.

15 >>MR. LEV: Understood and understandable,
16 and I will be as terse as I can. Of course, I'm
17 happy to answer questions.

18 I think there is a fundamental issue
19 underlying a lot of discussion here, which is the
20 difference between the technical issues that this
21 Board has before it and the policy-making
22 discretion under both the Atomic Energy Act and
23 the Policy Act and the NWSA; that's the Department
24 of Energy, which goes beyond the technical issues
25 that are before their Board.

1 And I think that is a fundamental
2 distinction, that a lot of the argument that we
3 have heard today missed, because if you look at
4 what's preserved for the Secretary under the NWPA,
5 under Section 113 and 114, they talk about that.
6 It's not simply a technical judgment.

7 The Secretary, under 114(a), when he
8 recommends approval, there is certainly a
9 technical baseline. If it was his judgment that
10 this was technically inadequate, this should not
11 go forward. But he is also supposed to rely on G,
12 on subsection G, on such other information that
13 the Secretary considers important.

14 This is what the Secretary considers
15 appropriate as a reason to go forward. Not a
16 technical reason. Whatever the Secretary
17 determines in his judgment is a basis to go
18 forward.

19 >> : JUDGE MOORE: The Section you were
20 citing?

21 >> : MR. LEV: 114(a)(1)(G).

22 >> : JUDGE MOORE: Of the Nuclear Waste
23 Policy Act?

24 >> : MR. LEV: Yes. There is certainly
25 the case that the job of this Board is to decide

1 technical issues. But that's not the limit of the
2 Secretary's judgment.

3 The question is given that the Secretary
4 is given, allowed to consider other factors before
5 the license is submitted. What is the basis to
6 say that, now, Congress anticipated that, unlike
7 other parties, he doesn't have the policy
8 discretion to decide this is not a good idea to go
9 forward, this is counter to the public interest.

10 Now, I would say, and I think Congress
11 has answered that question. And it's answered the
12 question in a way that is very specific. It has
13 said the Secretary should be treated like other
14 parties.

15 We can talk about plain language and we
16 can talk about specific aspects of plain language,
17 but there is the plain language that actually
18 addresses what happens once the application is
19 filed.

20 And it says, in accordance with the law
21 applicable to such application, which means if
22 nothing else, that the Secretary should be treated
23 like another applicant, like the voluntary
24 applicant. That is Congress' judgment.

25 The Secretary isn't anointing himself in

1 any way. He is exercising the policy discretion
2 that he had under the Atomic Energy Act, and that
3 was preserved in the pre-submittal stage. And
4 that is entirely reasonable to say it is preserved
5 here, because every other applicant under the
6 precedent of this Commission does not get to
7 second-guess as to their judgment as to whether it
8 is sound to go forward.

9 That is the Commission's decision in
10 Stanislaus. So yes, there are controversial
11 policy and the Secretary understands that there
12 are others who may disagree with it. And there
13 are places who raise those, but not before this
14 technical Board.

15 The job of this technical Board, with
16 all respect, is to determine whether the
17 Secretary's judgment is consistent -- is
18 permissible under the law, full stop.

19 The Secretary can be required to defend,
20 in a variety of forms, his judgment. And the
21 Department can be required to do so. But it is
22 not, with all respect, the job of this Board to
23 second-guess policy. That's specifically resolved
24 by the language that the Secretary gets treated
25 like other applicants. And that's true whether

1 2.107 applies or not because as Judge Ryerson
2 said, 2.107 reflects principles in federal rules
3 of procedure. By the way, section 107 does apply
4 by term and I want to talk about that just a
5 little bit because I think there are some
6 important aspects that were missed in Mr. Bauser's
7 discussion.

8 First of all, the plain language of
9 2.107 says it applies when an applicant seeks to
10 withdraw an application. No limitation. In fact,
11 subpart A says it applies when 2.100 says it
12 prescribes procedures for issuance of a license,
13 doesn't limit in any other way. And if Mr. Bauser
14 were right, the specific parts of subpart A that
15 were cited were the only ones that were relevant.

16 The way the provision here relies upon
17 2.1000 would have been written is that Subpart A
18 does not apply except for or subpart C and G apply
19 for accept for this subpart.

20 That's not what it says.

21 So throughout, and --

22 >>JUDGE MOORE: The provision you cited about
23 amendments since that is not cross-referenced and
24 lineally apply that is means that same part of A
25 applies. And so I want to clear that up.

1 So it then becomes, Congress has said we
2 should be treated like a normal applicant. If we
3 are treated like a normal applicant, the rule is
4 the Board does not second guess the judgment of an
5 applicant as to whether to go forward.

6 In this instance, already lots of other
7 body that is can do that but that is not the job
8 of this Board.

9 Second, what the Board does do is look
10 at whether someone else has shown that there is a
11 legal harm that requires an that is the judge job
12 of board, someone has shown a legal harm, that's
13 what the presidents requires I believe no one has
14 shown it but, regardless, the normal rule is that
15 applicant have a discretion to withdraw
16 application and Congress specifically adopted that
17 rule by saying we get treated like a normal
18 applicant.

19 I want to point one other thing out
20 here, is that we should actually have greater
21 deference than is given to a normal applicant
22 because under the precedent of this Commission,
23 when executive agencies active in their policy
24 making discretion the NRC which is an adjudicatory
25 licensing body does not second guess the judgments

1 of executive branch agencies so even beyond what
2 normal applicant have as discretion, I understand
3 people may disagree as technical or political
4 matter but this is not the way, if parties believe
5 what the Secretary is doing, that can be raised in
6 a variety of ways.

7 I want to take absolutely few of the
8 cases and other specific issues just very, very
9 briefly.

10 The NEI case was raised several times
11 and what is important to understand is that case
12 is what it said was specifically was determination
13 as to whether to previous suitability decision and
14 recommendations those were moot because Congress
15 permitted the Secretary to go forward, absolutely
16 correct.

17 We have no dispute with that holding but
18 that does not mean the question then is once its
19 goes forward, what is the rule that applies and
20 Congress in the very 2002 act that was that the
21 D.C. Circuit relied on in the NEI case said that
22 all we are doing is committed to Yucca, we are not
23 requiring anything beyond permitting the progress
24 forward, so far as licensing application, full
25 stop.

1 The EPA v. Massachusetts case was raised
2 and some other arguments and the executive often
3 is required to do things it doesn't want, by law.

4 That's obviously the case.

5 What's different here, Your Honor, and
6 where courts and agencies are normally very
7 hesitant to assume that Congress is required the
8 executive to act, is you would be requiring the
9 executive to act as an advocate.

10 What you would be saying is you have to
11 advocate for a position you don't believe in.
12 That -- having the Secretary advocate for the
13 approval of a licensing he does not believe in the
14 public interest, is not likely to break public
15 confidence.

16 I'm not saying Congress could not have
17 required it, not saying that at all but if
18 Congress want to require something so awkward, so
19 untenable to use the word with Nye County used,
20 then, it should have said so specifically, it said
21 shall not throughout the statute when it intended
22 to limit the Secretary's discretion, it did not do
23 so.

24 The problem here is that Congress is not
25 the -- Congress could not have done it but

1 Congress should not be understood to have done
2 something so awkward absent clear language and I
3 want to make one additional point there.

4 There's a series of cases under the
5 Assembled decision's Heckler v. Chaney, which is
6 somewhat like this, where the courts struggle very
7 hard to avoid the conclusion that legislation
8 requires administrative agencies to undertake
9 enforcement proceedings, for very -- for many of
10 the same reasons.

11 That you don't want to have someone do
12 and an enforcement proceeding that they don't
13 believe in, that they don't think is the right use
14 of their resources. So that's not 100 percent the
15 same cases that we have here, I don't dispute
16 that, but I think the underlying principle is
17 quite similar.

18 I did say I'd be short, and I'm going to
19 try and do so. Judge Ryerson, you -- excuse me,
20 Judge Moore, you said that 114(c) was the biggest
21 problem you had with my argument, so I want to
22 talk about that briefly, if I might.

23 I don't see any -- I want to be fair,
24 but I think that 114(c) can be complied with by
25 its terms very naturally if the motion to withdraw

1 is granted. In particular, I believe 114(c)(3)
2 was the provision you were interested in.

3 The Commission is required to include a
4 description of any actions regarding the granting
5 or denial of such authorization

6 well, the Commission should simply say,
7 if you treat a motion to withdraw as the granting
8 or the denial of an application, you can say that.
9 But if you don't treat it that way, you would
10 simply say the Commission is not granted or
11 denied.

12 The plain language of that can be
13 explained, and I would assume you would then have
14 an additional sentence that says that it's not
15 pending before the Board now, it's not docketed,
16 the time is not running, because it has been
17 withdrawn.

18 I have see no difficulty providing that
19 report. You can simply -- the Board and the
20 Commission can simply say, are there any such
21 Commission actions, yes or no. Depends on how you
22 construe our motion. But, in either event, a
23 straightforward and natural reading can be given
24 to that provision.

25 I want to -- there is a lot of things

1 before this Commission and we need to say some
2 things that are not or and that really should not
3 be part of the discussion here.

4 For instance, the nuclear waste fee, the
5 nuclear waste fee, the Secretary has an obligation
6 under the Nuclear waste Policy Act to make an
7 adequacy determination every year.

8 He will do so, parties -- that is then
9 reviewable if parties want to review it. Parties
10 have petitioned for review of prior decisions,
11 those are pending in the D.C. circuit, they are
12 perfectly adequate means to address those issues.
13 The Secretary will address them and they will then
14 be reviewable, but I don't believe they have any
15 relevance to the Secretary's authority to withdraw
16 this application.

17 Similarly, the Blue Ribbon Commission,
18 the Secretary has made very clear that it's not a
19 sitting Commission. And the Secretary -- it's
20 also -- it's not news that the Department of
21 Energy has said that it does not believe that
22 Yucca Mountain is within the scope of that
23 Commission as created by the statute, not by the
24 reports, which are not the binding statements, but
25 the statute.

1 And the statute says "all alternatives."
2 That's naturally read to reflect alternatives to
3 the current approach.

4 Now, you don't have to agree with me
5 here, I have to say, because my -- the sole point
6 we want to make there is that Congress understands
7 that there are still options other than Yucca
8 Mountain. There are still other ways to go
9 forward. And that's all we want to say.

10 You don't have to agree with the
11 Secretary's interpretation or disagree. But I
12 think that it's clear that the Secretary is
13 allowed to consider other options.

14 Your Honor, I have plenty more things I
15 can talk about, I'm going to -- I think those are
16 the core points that I want to make. You want me
17 to just wrap up in a few sentences, unless Your
18 Honors have questions. Okay. I'll wrap it up in
19 a few sentences.

20 Fundamentally, Your Honor, the Secretary
21 of Energy has made a decision not to go forward.
22 The question before this Board is whether the
23 statute requires the Secretary, nevertheless, to
24 go forward.

25 For the reasons we've stated, the

1 statute does not require that. It requires
2 instead that the Secretary be treated like other
3 applicants. What that means is that this Board
4 does not second guess the judgment as to whether
5 the application goes forward.

6 with all respect, this Board should not
7 be sitting to second guess the policy judgments of
8 the Secretary, or force him to go forward with a
9 license application he does not believe is
10 consistent with the public interest.

11 The job of this Board is, if the
12 Secretary chooses to go forward, to determine
13 whether the application is consistent with
14 relevant health and safety standards. That's what
15 this Board should be doing, not reviewing the
16 judgments of the Secretary as to whether this is
17 sound policy.

18 Thank you, Your Honor. I ask that the
19 motion be granted as requested.

20 >> >>JUDGE MOORE: : One two-second
21 question.

22 >>MR. LEV: Sure.

23 >>JUDGE MOORE: What was the vessel the
24 Secretary used to decide they wouldn't go forward
25 with Yucca Mountain?

1 >>MR. LEV: The --

2 >>JUDGE MOORE: Was an order issued under 161
3 of the Atomic Energy Act?

4 >>MR. LEV: Your Honor, the Secretary's
5 motion is before this Board.

6 >>JUDGE MOORE: I understand that. Was that
7 -- did the Secretary issue an order saying that
8 they would not go forward with Yucca --

9 >>MR. LEV: The Secretary has directed that
10 the --

11 >>JUDGE MOORE: Okay. He has direct -- did
12 he issue an order?

13 >>MR. LEV: I don't believe there is a
14 written.

15 >>JUDGE MOORE: Is there a written record of
16 what that official action by the Secretary is?

17 >>MR. LEV: The written record is what you
18 have before you.

19 >>JUDGE MOORE: So the motion is --

20 >>MR. LEV: Well, there is actually -- there
21 are other -- you know, there's an Administrative
22 Procedure Act record that's been submitted, but
23 that's not -- the secretary's determination -- not
24 just under the Atomic Energy Act. You have to
25 remember, the Secretary has specific authority

1 under the DOE --

2 >>JUDGE MOORE: I understand that. Where is
3 that memorialized?

4 >>MR. LEV: It's memorialized in the papers
5 that have been filed here, because it's, by
6 nature, a motion to withdraw.

7 >>JUDGE MOORE: Okay. So that's where the
8 Secretary's decision is memorialized and you want
9 me to withdraw the application --

10 >>MR. LEV: In his request to --

11 >>JUDGE MOORE: Okay, that's fine. You have
12 answered the question.

13 We will now hear from Mr. Malsch.

14 >>MR. MALSCH: Thank you, Judge Moore. We
15 have six brief points to make. We were originally
16 allocated five minutes for rebuttal, but my
17 understanding is that Clark County does not wish
18 any rebuttal time, so we would like, if possible,
19 to take their five minutes, although, frankly, I
20 think I will take no more than five minutes.

21 As I said, I have six brief points to
22 make.

23 First over all, if, as the opponents of
24 DOE's motion say, section 104(d) trumps the
25 application of 2.107. Then they have struggled

1 with how to address the situation that would arise
2 if DOE and, let's say, staff would agree if there
3 was an unresolvable safety problem.

4 And two suggestions have been made as to
5 how to address that situation. The first
6 suggestion, was, well, they can report it to
7 Congress. Well, that's all very nice, but as we
8 all know, reports to Congress don't ordinarily
9 result in any Congressional action, and that
10 doesn't really address what is supposed to happen
11 at the NRC proceeding.

12 So perhaps in recognition of that
13 difficulty, they have said well, then, obviously,
14 the only option would be for the agency to deny
15 the license application, that would be consistent
16 with section 114(d).

17 The problem is there is no rule on the
18 NRC's rule books that apply to that situation.
19 True there is a rule that provides for the staff
20 to issue a notice of denial of a license
21 application, but that rule provides that in such
22 situations, the staff must offer the applicant an
23 opportunity for a hearing.

24 So, obviously, that provision only
25 applies in circumstances in which the staff wishes

1 to deny an application over the applicant's
2 objection. Not a situation in which both
3 applicant and staff agree the application should
4 not go forward.

5 In that circumstance, I would submit
6 that the only regulation that could conceivably
7 apply is 2.107, which allows DOE to withdraw.

8 Second point. Perhaps in recognition of
9 how awkward it would be if the motion were to be
10 denied and NRC would be put in a position of
11 trying to force DOE to prosecute diligently a
12 licensing application over its objection, several
13 opponents of DOE's motion have suggested that the
14 proceeding could be suspended.

15 Well, I would submit that's very
16 interesting. This would be an indefinite
17 suspension, because we have no guarantee when
18 Congress would act, if Congress would act at all.

19 So they are caught in an inconsistent
20 position of saying that while a withdrawal of the
21 application would be -- would run afoul of some
22 statutory scheme that sets forth a time schedule
23 that will inevitably lead to some decision on
24 the merits, but it is perfectly okay to suspend
25 the proceeding indefinitely, which will also not

1 lead to any decision on the merits. So I would
2 submit that that position on their part is
3 inconsistent.

4 Third point. Staff in Washington have
5 objected to part of Nevada's argument for a
6 withdrawal with prejudice on the ground that we
7 have urged, in part, that the application be
8 withdrawn with prejudice because of the prospect
9 for future litigation expenses in a future
10 licensing proceeding. And they are quite right
11 that that is not a basis for prejudice and that is
12 why we made no such argument.

13 Instead, we argued on the basis of our
14 existing expenses to date. And that is a basis
15 for a withdrawal with prejudice, according to
16 federal case law.

17 Fourth point. 2.107, the observation
18 has been made that 2.107 is part of Subpart A,
19 which 2.100, on its face, says "applies to
20 proceedings such as this."

21 I just wanted to observe that the
22 Commission, in its notice of hearing in this
23 proceeding, also specifically applied a provision
24 in Subpart A, namely, 2.106-C.

25 At this point, DOE drew an analogy to

1 Heckler v. Chaney. I would like to draw an
2 analogy to another case which I think is an
3 interesting one, and that is Town of Castle Rock
4 v. Gonzalez, 543 U.S. 748. In this case the
5 Supreme case was confronted with a statute which
6 appeared to require on its face that a government
7 use all available means to prosecute and enforce a
8 certain statute.

9 And the Court said that despite what was
10 apparently mandatory language, it would not read
11 that language as mandatory in lieu -- in light of
12 the deep-rooted nature of law enforcement
13 discretion.

14 I think there is also a deep-rooted
15 assumption and principle here that license
16 applications and license applicants should not go
17 forward over their objections.

18 Finally, one last point. I would say on
19 behalf of the State of Nevada that we would
20 exercise and recognize some comity with our sister
21 states of Washington and South Carolina, and
22 sympathize with and appreciate that they are
23 saddled with high level waste and spent fuel in --
24 stored in locations that were never intended as
25 permanent repositories.

1 I only would ask them to extend the same
2 comedy to the State of Nevada and recognize
3 Nevada's position that Yucca Mountain is not a
4 safe place for nuclear waste disposal and that
5 this application is not a solution to their
6 problem.

7 If you have no further questions, that's
8 the end of my rebuttal.

9 >>JUDGE MOORE: Thank you, counsel.

10 >>MR. MALSCH: Thank you.

11 >>JUDGE MOORE: I would like, on behalf of
12 the Board, to thank all counsel for their --
13 Staff, do you wish to expend any time on rebuttal?

14 >> : MS. SYLVIA: Two minutes, if you
15 will allow us.

16 >>JUDGE MOORE: I am sorry?

17 >>MS. SYLVIA: Two minutes, if you will allow
18 us.

19 Andrea Sylvia for the NRC staff. We
20 have three quick points. One is the Nuclear Waste
21 Policy Act Section 114(c), reporting requirement,
22 which has been discussed.

23 I just wanted to mention that the
24 reporting requirement has been repealed by Section
25 3003 of the Federal Reports Elimination and Sunset

1 Act of 1995.

2 Second, the NRC's NEPA responsibilities
3 are with respect to a proposed construction
4 authorization and license for a repository at
5 Yucca Mountain, not for withdrawal.

6 what their decision -- what the decision
7 not to pursue the repository is a major federal
8 action, is a DOE NEPA issue, not an NRC issue.

9 NRC's NEPA responsibilities under the
10 Nuclear Waste Policy Act and its regulations are
11 with respect to an NRC proposed action, which
12 would be a licensing action.

13 The NRC does not have the role in
14 enforcing DOE record of decision regulations or
15 other DOE regulations.

16 And, finally, with respect to the
17 applicability of 2.107, we would like to note that
18 the pre-2004 versions of part G did not say that
19 -- did not specifically say that 2.107 applied,
20 but it had been applied over the years.

21 If the Board does believe that Section
22 2.107 does not apply to this proceeding, the Staff
23 believes that it should refer its ruling to the
24 Commission under 2.1015-D.

25 NEI's reading would have Section 2.103

1 not apply either. And 2.103 specifically mentions
2 a construction authorization and directs the
3 Director of the Office of Nuclear Material Safety
4 and Safeguards to inform the state, tribal and
5 local officials specified in Section 2.104-E of
6 the issuance of a license, if it were to be
7 issued. Thank you.

8 >>JUDGE MOORE: Thank you, counsel.

9 Now, on behalf of the Board, I would
10 like to thank all counsel for their excellent
11 presentations and arguments today and their
12 patience in answering our questions and their
13 excellent answers to our questions.

14 We will now take the matter under
15 advisement and wrestle with it. And we stand
16 adjourned until tomorrow morning at 9:00 a.m, in
17 which we will convene a case management conference
18 to deal, hopefully quickly, with LSN document
19 collection matters that remain outstanding.

20 Thank you all again, and we stand
21 adjourned.

22 (Whereupon, the proceedings were
23 adjourned.)

24
25