

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

June 3, 2010

ASLBP 09-892-HLW-CAB04
(High Level Waste Repository)

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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

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.

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 Gottshall 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. FITZ: Andy Fitz, representing the
11 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. Policymaking part is a DOE
2 function.

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

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

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

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

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

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

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

16 >>MR. LEV: Title 1.

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

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

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

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

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

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

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

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

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

24 I want to add as well, Your Honor, that
25 all the activities that DOE engaged in before the

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

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

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

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

1 notable is it's specific in telling DOE that it
2 shall do and shall not do a variety of things.

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

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

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

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

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

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

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

22 --

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

24 >>JUDGE MOORE: And it would be cruel and
25 unusual punishment to have to have you memorize

1 all of that.

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

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

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

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

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

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

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

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

25 >>MR. LEV: As a general matter, yes. All

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

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

15 >>MR. LEV: Okay.

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

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

1 Your Honor.

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

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

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

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

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

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

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

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

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

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

21 >>MR. LEV: Yes, sir.

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

1 >>MR. LEV: Let me answer that. And I want
2 to make a larger point, if I might. When it says
3 "the laws applicable," it includes all the laws,
4 and I want to make clear, there's a specific
5 except clause after that.

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

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

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

1 requires -- and I haven't seen any party's briefs
2 that says the opposite.

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

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

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

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

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

25 >>MR. LEV: Your Honor, but the entire

1 schedule, and this is clear throughout the
2 statutory scheme, is dependent on the Secretary
3 choosing to go forward.

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

12 >>JUDGE WARDWELL: He's chosen to go through
13 with this?

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

16 >>JUDGE WARDWELL: Under 113 and 114.

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

1 I would submit that that creates an
2 extremely awkward and futile statutory scheme.

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

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

10 >>MR. LEV: Yes.

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

13 >>MR. LEV: Sure.

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

15 >>MR. LEV: Yes, sir.

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

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

21 I believe -- yeah, in section 112(b)(3),
22 the --

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

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

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

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

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

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

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

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

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

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

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

1 >>MR. LEV: Okay.

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

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

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

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

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

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

1 >>JUDGE WARDWELL: Could you go back to my
2 question?

3 >>MR. LEV: Yes.

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

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

8 >>MR. LEV: No.

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

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

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

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

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

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

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

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

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

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

24 It says, "The Commission may permit an
25 applicant to withdraw an application prior to the

1 issuance of -- do you want me to read the entire
2 thing?

3 >>JUDGE WARDWELL: Sure.

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

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

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

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

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

24 >>MR. LEV: The precedent --

25 >>JUDGE WARDWELL: -- that allows an

1 applicant to unilaterally withdraw their
2 application?

3 >>MR. LEV: Your Honor --

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

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

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

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

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

1 specific issue. And, in fact, as I've said, the
2 Nuclear Waste Policy Act preserves the ultimate
3 discretion as to whether to go forward for the
4 Secretary. If --

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

7 >>MR. LEV: Sure.

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

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

14 >>JUDGE WARDWELL: Thank you.

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

16 >>JUDGE WARDWELL: No.

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

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

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

1 application?

2 >>MR. LEV: Denying --

3 >>JUDGE WARDWELL: The withdrawal, the motion
4 to withdraw?

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

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

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

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

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

22 >>JUDGE WARDWELL: Please.

23 >>MR. LEV: Okay. Section 114(b) says how
24 the proceeding starts. And I think the key part
25 to remember there is the time limit. It says

1 "shall submit not less than 90 days," right? Not
2 more than 90 days, excuse me.

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

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

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

20 And I think if you read the shall submit
21 language to mean that the Secretary has no choice
22 but to continue with an application, which is a
23 term determined to be contrary to the public
24 interest, then you would read 114(b) to be in
25 conflict with 114(d), which say the ordinary rules

1 apply under which applicants ordinarily are not
2 required --

3 >>JUDGE MOORE: That's true, only, counsel,
4 isn't it, if you accept your premise that the
5 Secretary has the authority to withdraw the
6 application, if -- without that premise, there's
7 no 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 pre-existing 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 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 -- doesn't
9 have that implied position that you're stating?

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

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

16 >>MR. LEV: And your Honor, this is a
17 stronger --

18 >>JUDGE WARDWELL: Is that correct?

19 >>MR. LEV: Yes.

20 >>JUDGE WARDWELL: Thank you.

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

1 forward here, what's the best policy for the
2 country.

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

8 >>JUDGE WARDWELL: Whose role is it?

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

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

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

25 >>MR. LEV: Absolutely not, for three

1 reasons.

2 >>JUDGE RYERSON: Okay.

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

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

15 To answer Judge Wardwell's question
16 before --

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

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

25 >>JUDGE MOORE: What's the definition of a

1 policy decision?

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

6 >>JUDGE MOORE: What's the definition of a
7 political decision?

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

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

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

17 >>JUDGE MOORE: Alone?

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

21 >>JUDGE MOORE: What does --

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

24 >>JUDGE MOORE: Was the Secretary following
25 instructions?

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

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

6 >>MR. LEV: No, it would not it matters.

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

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

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

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

19 >>MR. LEV: Okay.

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

1 >>MR. LEV: Absolutely.

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

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

15 >>MR. LEV: May I respond?

16 >>JUDGE MOORE: You may.

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

22 The Department of Energy's decision here
23 looks at whether there are better alternatives,
24 among other things, and whether this is a route
25 that is likely to be effective in dealing with

1 what is an important problem.

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

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

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

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

22 We've been trying to do this --

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

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

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

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

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

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

12 >>JUDGE WARDELL: Why isn't there a
13 resolution in sight?

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

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

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

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

23 >>MR. LEV: That's -- with all respect,
24 that's incorrect. What -- under this Commission's
25 Rule, 63.121, we'd have to have land withdrawal

1 legislation. Land withdrawal legislation would
2 have to pass both houses of Congress and signed by
3 the President.

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

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

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

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

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

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

1 >>JUDGE WARDELL: What was the purpose of the
2 waste Policy Act?

3 >>MR. LEV: The purpose of the Waste Policy
4 Act is to create a schedule towards the opening of
5 a repository.

6 >>JUDGE WARDELL: Why do they call it a
7 policy act, then? Wasn't it to limit, define and
8 restrict the policy options available to DOE and
9 the NRC?

10 >>MR. LEV: Yes.

11 >>JUDGE WARDWELL: Thank you.

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

15 >>JUDGE WARDELL: Where does it say that in
16 regards to go forward or not?

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

20 >>JUDGE WARDWELL: And where -- where -- in
21 113 they specifically allow the Secretary to
22 terminate the process, stop the train, as it were,
23 correct?

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

25 >>JUDGE WARDWELL: There -- isn't that in

1 specific in 114; is that right?

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

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

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

24 And you cite four cases. The first one
25 -- three of them Supreme Court cases, and the

1 fourth one a CADC case. The first one, Newark
2 Morning Ledger Company v. U.S.

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

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

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

25 And the Court went to great lengths to

1 explaining how the Congress was well aware of the
2 legislative landscape of workmen Compensation law
3 and all of the exceptions of which one was
4 involved in that particular case.

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

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

18 >>MR. LEV: Yes.

19 >>JUDGE MOORE: -- storage facilities, prior
20 to the enactment of the Waste Policy Act and the
21 limitations in the Waste Policy Act. And the
22 Court, in citing to the legislative history, it
23 said, in text, of which Congress was aware, and
24 cites to the legislative history. And
25 specifically cites to Chairman Paladino's

1 testimony about how the agency had enacted
2 regulations just dealing with ISFSIs and were
3 ready to regulate that subject.

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

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

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

2 >>JUDGE MOORE: You certainly may.

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

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

11 >>JUDGE MOORE: Which canon?

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

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

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

23 >>MR. LEV: Absolutely.

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

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

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

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

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

18 Now, doesn't that language inform what
19 was meant in 114 --

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

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

23 >>MR. LEV: Your Honor, the -- there's no
24 doubt that the laws include the statutory laws and
25 the substantive regulatory rules. But, if you

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

8 I also want --

9 >>JUDGE MOORE: why?

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

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

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

22 >>JUDGE RYERSON: Could the --

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

24 >>JUDGE RYERSON: If I may interrupt. Could
25 the except clause in 114(d) essentially trump

1 2.107? In other words, if the Commission is
2 required to issue a final decision approving or
3 disapproving issuance of a construction
4 authorization, does that not trump 2.107?

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

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

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

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

24 >>MR. LEV: Yes.

25 >>JUDGE RYERSON: -- but, you know,

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

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

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

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

23 I want to take that --

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

1 >>MR. LEV: Sure.

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

7 >>MR. LEV: Yes, sir. The precedent under
8 that regulation --

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

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

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

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

23 One could fairly read that language to
24 say that you get to describe the terms, not
25 whether the application goes forward. That's

1 what -- you know, on its face, that's what --
2 that's a very fair reading of 2.107. I don't
3 think --

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

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

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

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

1 >>JUDGE WARDWELL: Where is -- where do you
2 see that?

3 >>MR. LEV: Well, that's in section 113,
4 where the Secretary gets to decide whether --

5 >>JUDGE WARDWELL: And that's one he --
6 because the site is determined unsuitable?

7 >>MR. LEV: Well --

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

16 >>MR. LEV: No, Your Honor, for several
17 reasons.

18 >>JUDGE WARDWELL: It is logical.

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

25 First of all, because there's

1 preexisting authority under the Atomic Energy Act,
2 you have to find a shall not withdrawal. What the
3 statute -- what the precedent requires is whether
4 a preexisting judgment --

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

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

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

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

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

1 whole other series of discretionary acts that he
2 does not have to do under the statute. He'd have
3 to seek a receive and possess license, not
4 mentioned in the statute. He'd have to get water
5 rights. Not mention --

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

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

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

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

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

25 And you keep saying, Congress would have

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

8 >>MR. LEV: Your Honor --

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

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

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

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

24 But, nevertheless, this Board is going
25 to require the Secretary to continue with the

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

9 Congress could have said that, but
10 that's a very awkward and unworkable --

11 >>JUDGE WARDWELL: Do you think, Mr. Lev --

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

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

24 >>MR. LEV: No, I think -- I may not
25 have been --

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

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

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

19 >>JUDGE MOORE: You say it would be requiring
20 the Secretary to prosecute the application. I want
21 your view on 114(c). And you in your motion and
22 then again in your reply, give back of the hand
23 treatment to this as a mere reporting requirement.
24 And indeed, the subtitle is Status Reports On
25 Application.

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

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

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

22 >>MR. LEV: Your Honor, with respect, I
23 disagree.

24 >>JUDGE MOORE: Okay. why?

25 >>MR. LEV: well, because what it --

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

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

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

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

22 In fact, the Nuclear Waste Policy Act
23 fairly read, on its face, incorporates the
24 ordinary procedures which allows applicants,
25 voluntary applicants in those cases --

1 >>JUDGE MOORE: what do you do with the
2 legislative history that indicates that Congress
3 wanted to be in -- control this process to keep
4 its thumb on the button?

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

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

21 But the whole point of that legislative
22 history that Congress came to the conclusion that
23 Congress had to take control of the situation, it
24 had to make the decision it was making the policy
25 that this process had to be removed from what had

1 gone before, and it was taking all of the politics
2 out of the process and it was making the hard
3 judgments.

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

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

20 I don't see anything in this statute
21 that requires the Secretary to create the facility
22 to file all the -- all the permit requirements
23 that would be necessary to do so, or that -- for
24 Congress to pass the legislation that would be
25 needed. That's simply not here.

1 But let me talk specifically about the
2 leg --

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

4 >>MR. LEV: Can I address the legislative
5 history question?

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

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

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

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

23 >>JUDGE WARDWELL: Well, let me ask you a
24 question on that, then. If the Secretary, in its
25 wisdom, said, oh, this is a non-workable option,

1 and did that 20 years ago, right after the
2 amendments, limited it to Yucca Mountain, and he
3 was required to go ahead with site
4 characterization of Yucca Mountain, could the
5 Secretary proceed without any other congressional
6 authority?

7 >>MR. LEV: If he did the things in Section
8 113, absolutely. If he did --

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

15 Is there anything in the Waste Policy
16 Act that allows him then to terminate site
17 characterization?

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

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

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

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

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

17 >>JUDGE WARDWELL: Hasn't he violated the
18 waste Policy Act if he made that decision back
19 then?

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

24 >>JUDGE WARDWELL: Unsuitable.

25 >>MR. LEV: Right.

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

4 >>MR. LEV: Your Honor, unsuitable is not
5 defined in the statute.

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

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

11 >>JUDGE WARDELL: Why isn't it?

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

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

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

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

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

23 >>JUDGE WARDWELL: You don't believe he would
24 be violating the Waste Policy Act and would need
25 congressional authority to terminate Yucca, that

1 he'd have to go back to Congress and say, no,
2 Yucca is not a good option for this reason, and I
3 can't do it under 113, because I haven't even
4 started the site characterization?

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

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

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

19 Secretary's pointed to advances in dry
20 cask storage, the increased confidence in the life
21 expectancy of that. He's pointed to that during
22 the period -- now that we know that we have a lot
23 of time for dry cask storage, they are promising
24 developments in recycling, and he's pointing to
25 the success of the WHIP facility, which is a

1 different --

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

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

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

17 >>JUDGE WARDWELL: And that's a policy
18 decision, correct?

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

23 >>JUDGE WARDWELL: Is he restricted by the
24 waste Policy Act, from implementing that policy
25 decision based on the steps that are outlined in

1 the Waste Policy Act?

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

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

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

11 >>JUDGE WARDWELL: No one argues that.

12 >>MR. LEV: Okay. Well, if that is the
13 case --

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

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

18 >>JUDGE WARDWELL: We're dealing with a
19 construction authorization.

20 >>MR. LEV: I'm sorry, I didn't mean to
21 interrupt.

22 If that is the case, then it is also the
23 case that it does not make sense to read the
24 statute to require one intermediate step when all
25 the other intermediate steps necessary to get

1 there are not required, in some instance, not even
2 permitted. That is not a reasonable way to read
3 the statute, and it puts the Secretary in a -- and
4 it puts this Board, I would submit, in an
5 inappropriate position of determining whether --
6 of evaluating the policy judgment of the
7 Secretary.

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

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

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

22 >>JUDGE RYERSON: Mr. Lev --

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

24 >>JUDGE RYERSON: You cite a case at footnote
25 28 of your reply brief that says, "Where Congress

1 includes particular language in one section of the
2 statute, but omits it in another section of the
3 same act, it is generally presumed that Congress
4 acts intentionally and purposefully in the
5 disparate conclusion or exclusion.

6 And applying that doctrine to 113 and
7 114, doesn't that mean that the Secretary's
8 discretion has been taken away by 114, which does
9 not include the very language that's in 113?

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

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

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

25 To look at 114(b) in isolation and say

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

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

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

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

23 And I think we need to remember the
24 context here, which is the Secretary is not going
25 forward with the repository, and has decided that

1 this application is contrary to public interest.

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

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

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

25 So you -- what's the difference between

1 disobeying one statute and -- one section of the
2 statute and disobeying another, as far as your
3 likes and dislikes?

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

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

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

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

19 That said, the question then becomes,
20 what does the Secretary -- what options does the
21 Secretary have once the application is submitted?
22 And there is nothing in the statute that says the
23 Secretary does not have his ordinary discretion to
24 decide this is not the right way to go forward.

25 In fact, the structure of the NWPA, and

1 this comes back to Your Honor's question about the
2 legislative history.

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

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

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

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

19 And that's why the Lyons, Kansas example
20 is important, because what that actually shows --
21 that was an instance where the Secretary was
22 trying to go forward and hadn't obtained
23 concurrence of important stakeholders. That's
24 what the legislative history there was about. It
25 was not about the Secretary making a decision not

1 to go forward. The Lyons, Kansas example supports
2 our position here, that there's an asymmetry in
3 the statute.

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

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

16 That's why the Secretary's discretion to
17 go forward was structured and channeled --

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

22 Didn't Congress -- in the face of all of
23 that, what you tell us from the polls you cite to
24 us, is rather substantial Nevada citizenry
25 opposition. Didn't Congress know all about that

1 in 1987, when they leaped forward in the process
2 over the three candidate sites and chose Yucca
3 Mountain?

4 >>MR. LEV: Not at all.

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

9 So Congress, acting in its political
10 wisdom, did that.

11 >>MR. LEV: No --

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

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

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

24 Congress -- there is a limiting of
25 discretion, I think I said this before, between --

1 the Secretary's choices right now are to go
2 forward with Yucca or not, but that is still
3 discretion, and the Secretary is allowed to choose
4 between those choices.

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

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

18 Congress said they are not committed to
19 Yucca, we are not authorizing the building of a
20 facility or the placement of any waste at Yucca.

21 Nor is it accurate with all respect --

22 >>JUDGE MOORE: Wasn't that on the basis of
23 safety and technological problems?

24 >>MR. LEV: Not --

25 >>JUDGE MOORE: Because nobody knew about

1 them yet because it's a 100-year process and it
2 hasn't gone forward and the application hasn't
3 been filed and reviewed by the supposed expertise
4 of the NRC.

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

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

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

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

21 >>JUDGE RYERSON: One question on a slightly
22 different point.

23 >>MR. LEV: Sure.

24 >>JUDGE RYERSON: You've asked for dismissal
25 with prejudice.

1 >>MR. LEV: Absolutely.

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

9 what does it mean in your view?

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

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

18 One is, it doesn't mean if Congress
19 passed a new statute requiring us to file an -- to
20 file and prosecute an application, that that
21 wouldn't -- that Congress would, obviously, not be
22 bound by that. Second, it doesn't mean that all
23 the contentions which have not been resolved have
24 collateral estoppel effect. It only means,
25 essentially, res judicata effect.

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

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

10 >>JUDGE WARDELL: Why not?

11 >>MR. LEV: Well, because we continually
12 rehash this same debate that's been going on for
13 20 years; is it right to put it in Yucca? Is that
14 the right -- that's the debate that's been going
15 on for 20 years.

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

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

24 >>JUDGE WARDWELL: I just said the capacity
25 of Yucca Mountain.

1 >>MR. LEV: Yes --

2 >>JUDGE WARDWELL: -- there that is already
3 taken up, if you will, by the waste that's waiting
4 to go in there, correct?

5 >>MR. LEV: The Yucca facility, it would be,
6 essentially, slightly -- the amount of waste right
7 now, I understand, is slightly over what would be
8 required -- what the current capacity is. But --

9 >>JUDGE WARDWELL: Sure. So it's perfectly
10 logical to have a Blue Ribbon Commission to look
11 at all kinds of options, knowing that, in fact, --
12 and Yucca's still on that Blue Ribbon Commission's
13 table or certainly geological repository is
14 certainly an option there.

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

18 >>MR. LEV: Your Honor, I understand that
19 there's --

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

24 >>MR. LEV: No, it isn't, Your Honor, because
25 we need to have a policy debate informed by what

1 the Blue Ribbon Commission recommends. That is a
2 new and different policy debate. That doesn't
3 rehash the debate that we've had to date, because
4 we're not going to have a facility at Yucca.

5 I understand Your Honor may disagree
6 with that --

7 >>JUDGE WARDWELL: Well, whether Yucca moves
8 forward or not, this doesn't interfere with that.
9 How does that taint or interfere with anything the
10 Blue Ribbon Commission xxxis, in their mandates or
11 their funding to move forward with their
12 evaluation process?

13 >>MR. LEV: Well, let me answer this. The
14 legal question before this Board, when an
15 applicant asks to move with prejudice, is a very
16 narrow one. In fact, the Court -- the Commission
17 has adopted 41(a)(2) as the paradigm, which is the
18 Federal Rules of Civil Procedure.

19 Under the Federal Rules of Civil
20 Procedure, if a plaintiff -- and including the
21 United States, in one of the cases we've cited --
22 seeks to dismiss its complaint with prejudice,
23 it's an abuse of discretion not to grant it.

24 In the Smoot v. Fox case we cited, the
25 Court granted mandamus because that motion was

1 denied. So as a legal matter, the narrow -- the
2 issue is very narrow.

3 I understand there are different policy
4 views, that people disagree, and that this is a
5 matter of concern to some people, that there is a
6 degree of finality. People disagree as to whether
7 finality on that point is a good idea or a bad
8 identity.

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

12 >>MR. LEV: Yes.

13 >>JUDGE MOORE: -- it's dismissed with
14 prejudice by an administrative agency?

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

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

19 Now, this is the question. Assume that
20 the agency is incorrect in its view of the Nuclear
21 Waste Policy Act, the statute, obviously, would
22 trump any administrative decision whether it's
23 with or without prejudice; would it not?

24 >>MR. LEV: Well, as an abstract matter, I
25 agree with you, but the decisions that you're

1 contemplating would be under those statutes.

2 >>JUDGE MOORE: The NEI takes the NRC to
3 Court, and the Court says, just hypothetically,
4 that the -- that's DOE's interpretation, the NRC's
5 acceptance of that interpretation is all wrong.

6 >>MR. LEV: If --

7 >>JUDGE MOORE: The waste Policy Act is not
8 overridden by an obscure 2.107 that Congress had
9 no idea was there. Just if the Court so ruled,
10 then with or without prejudice is irrelevant; is
11 it not?

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

15 >>JUDGE MOORE: How about the next
16 administration comes in and they think that Yucca
17 Mountain is a good site and this next Secretary
18 says, back to Yucca Mountain, and someone throws
19 up their hands and says, oh horrors, it was
20 released -- dismissed with prejudice, that's
21 binding. And they say, no, the administrative
22 action can't trump the Nuclear Waste Policy Act,
23 go to Court, and the Court says, you're right.

24 So there's no guarantees, as far as
25 anything this Board does with the -- with or

1 without prejudice, that it could ever stand in the
2 face of either a current statute or a future
3 statute; is that not correct?

4 >>MR. LEV: Well, in -- certainly it's the
5 case that if the Court, in reviewing this
6 decision, disagreed with the authority that the
7 Secretary --

8 >>JUDGE MOORE: Or later.

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

12 >>JUDGE MOORE: Well, that's the example I
13 gave you, that you cease all activity and the next
14 administration refires up the boiler of the engine
15 to put it back on what it perceives as the tracks,
16 and somebody takes it to Court then. Same
17 question, isn't it?

18 >>MR. LEV: Well, Your Honor, it certainly is
19 the case --

20 >>JUDGE MOORE: Okay.

21 >>MR. LEV: -- that we cannot have
22 guaranteed finality, because we can't predict what
23 Congress will do.

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

25 >>MR. LEV: Well, what the courts would do in

1 an appropriate case. It's not clear to me the
2 second one where a decision had been made in a
3 prior case that it would be appropriate for --

4 >>JUDGE MOORE: No, no, no, no. It just
5 stops at the administrative level.

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

9 >>JUDGE MOORE: Okay.

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

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

14 >>JUDGE RYERSON: No.

15 >>JUDGE MOORE: One last thing, quick.

16 You've asked us to give deference to the
17 Secretary's decision. And you cite several cases,
18 and Chevron lays out the deference rules. And you
19 also cite Skidmore, which is four decades in
20 advance of Chevron. And those cases all lay out a
21 whole series of factors that are to be taken into
22 account on the degree of deference that is to be
23 given the decision.

24 And when you run down the list of those
25 factors, I'd like you quickly -- I don't know if

1 you're familiar with them, but if you just take
2 those from Skidmore, which you cite, the weight of
3 such judgment will -- in a particular case, will
4 depend upon the thoroughness evident in its
5 consideration, the validity of its reasoning, its
6 consistency with earlier and later pronouncements,
7 and all those factors which give it the power to
8 persuade.

9 And then there's a host of other cases
10 that, the two in particular that limit Chevron,
11 Meade and Christensen v. Harris County, that list
12 other factors.

13 >>MR. LEV: Sure.

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

16 >>MR. LEV: No.

17 >>JUDGE MOORE: -- or do we have to pay
18 attention to those and do that kind of weighing
19 and determining whether we give -- what degree of
20 deference we give the Secretary's decision?

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

24 For instance, the fact -- there has been
25 no change of position here as to the legal

1 question of whether the Secretary has authority to
2 withdraw. That's the legal question that's
3 presented here. I'm not aware of any prior
4 determination.

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

13 I would point the Court to Hour v.
14 Robbins, the Supreme Court case where they said
15 that they're not as -- the Court is not concerned
16 about deferring to a brief where it's not post hoc
17 for a prior decision.

18 Here the decision is announced and
19 defended in this brief. It's much more like Hour
20 v. Robbins. Then there was a decision that had
21 been made years ago, that's later defended by
22 lawyers.

23 Here the decision -- the decision not to
24 go forward is announced in the briefs, not going
25 forward. So I think there's a significant reason

1 for deference.

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

3 >>JUDGE MOORE: Well, that is why I asked the
4 question whether -- what the difference was
5 between a policy decision and a political
6 decision, because the Court has also spoken to
7 that, and political decisions are obviously worth
8 less deference than some other kinds of
9 decisions --

10 >>MR. LEV: But the legal determination here
11 has always been that the Secretary has authority
12 to withdraw. That has not changed --

13 >>JUDGE MOORE: We understand your position.

14 >>MR. LEV: Okay.

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

18 >>MR. MALSCH:

19 >>JUDGE MOORE: Mr. Malsch, I'm sorry to have
20 brought you to the podium. At this time we'll
21 take a brief ten-minute recess.

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

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

24 (Recess was taken)

25 >>JUDGE MOORE: Please be seated. Please

1 come to order.

2 Mr. Malsch.

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

11 Just to make the one brief point on the
12 authority to withdraw -- I mean, that is the
13 question, whether DOE has the authority to ask the
14 NRC to withdraw the license application.

15 If we were to say, for purposes of
16 argument, that the statute -- that Congress, in
17 the Nuclear Waste Policy Act, did not address this
18 precise question, and that the statute was
19 ambiguous, the question then comes under Chevron,
20 whether, from an NRC standpoint, what is the most
21 reasonable interpretation of the statute. And
22 I --

23 >>JUDGE MOORE: You didn't mention Chevron in
24 your filing.

25 >>MR. MALSCH: We did not.

1 >>JUDGE MOORE: And is that because we're at
2 the administrative level and Chevron is a
3 Appellate -- federal court appellate review of an
4 administrative action and you did not think it
5 applicable?

6 >>MR. MALSCH: In part, that. But more
7 directly, I think our position was that the only
8 reasonable reading of the statute was one that
9 allowed DOE to withdraw the license application.

10 That's step one of Chevron. And step
11 one of Chevron just supplies the usual rules of
12 statutory interpretation. There's no deference
13 involved in step one. My point here would be,
14 though, if we go to Chevron step two and we were
15 to assume the statute is ambiguous, and ask what
16 is the most reasonable interpretation from an
17 regulatory agency standpoint, from an NRC
18 standpoint, I would submit that it makes, from a
19 regulatory agency standpoint, no sense whatsoever
20 to continue with a licensing proceeding over the
21 objections of an applicant who doesn't wish to go
22 forward.

23 That would be a very strange proceeding,
24 especially in this case, confronting determined
25 opposition from the State of Nevada and others.

1 It would be an odd proceeding, a proceeding which
2 I submit, from a regulatory standpoint, would lose
3 an essential amount of credibility associated with
4 determined opponents presenting determined cases
5 on both sides.

6 >>JUDGE RYERSON: Mr. Malsch, do you think
7 Congress was aware of the interactive nature of
8 the application process before the NRC?

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

17 what do you think is a realistic
18 assessment of where Congress was on that?

19 >>MR. MALSCH: Oh, I think Congress was very
20 well aware of the very interactive nature of the
21 licensing process and of the fact that a
22 repository proceeding was likely to be very
23 contested, and this would be a very determined
24 proceeding, which required a very determined and
25 aggressive applicant.

1 After all, consider that in 1981 they
2 took brief consideration of legislation. They
3 would have completely revamped the entire rules of
4 practice at the NRC and developed very special
5 rules just for a repository.

6 So they wouldn't have even thought about
7 that as a possibility were it not for the fact
8 that they were aware of NRC licensing proceedings
9 in general.

10 >>JUDGE WARDWELL: And so with all the other
11 mandates that were listed in the Waste Policy Act
12 under 113 and 114, the "shalls" that we will
13 describe them as or categorize them as, why wasn't
14 Congress -- well, let me rephrase it.

15 Congress didn't seem to be concerned
16 about having very strange activities taking place,
17 like executing the site characterization, even
18 though the Secretary could have reached the same
19 policy decision back at that point, but yet they
20 were mandated to complete those and determine the
21 suitability of the site.

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

23 >>MR. MALSCH: I guess I don't understand
24 your question.

25 >>JUDGE WARDWELL: Under 113, the Secretary

1 has to do certain site characterization steps.

2 >>MR. MALSCH: Right.

3 >>JUDGE WARDWELL: And that was under the
4 amendment in '87. They required you got to look
5 at Yucca Mountain, and here's what you got to do;
6 you got to characterize the site. And oh, yeah,
7 by the way, you can terminate it if some of that
8 characterization shows the site to be unsuitable.

9 well, if the Secretary had determined
10 back then when those were first being initiated in
11 1988, under the '87 amendments, that it was not in
12 the best interest to move ahead with Yucca, and it
13 was a nonworkable option and, you know, these very
14 broad-based just policy descriptions of what's
15 generating his and motivating his decision at this
16 point in time, if those were made back in '88,
17 doesn't the Waste Policy Act still require him --
18 there's no option to just terminate his site
19 characterization activity at that point on his
20 own. He would have to get some permission from
21 Congress; wouldn't he?

22 >>MR. MALSCH: I think that's correct, but
23 it's missing an important point about the next
24 step. I think Congress -- one of the lessons
25 Congress learned from the Lyons, Kansas fiasco,

1 was that agencies developing repository should not
2 overcommit themselves before all the technical
3 analyses had been completed.

4 And for that reason, Congress said,
5 basically, you shall characterize sites before you
6 recommend them. And I think for that reason
7 Congress said, you can only stop site
8 characterization if you conclude the site is not
9 suitable, because we want you to finish site
10 characterization.

11 But at the point where site
12 characterization has been completed, there's
13 actually nothing in the statute that compels the
14 Secretary to recommend the site to the President,
15 even if the site proves to be suitable.

16 >>JUDGE WARDWELL: But he went ahead and did
17 that.

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

19 >>JUDGE WARDWELL: And the President had
20 mandates that the President had to follow by --
21 well, the Secretary was required to notify Nevada
22 as a shall, for instance.

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

24 >>JUDGE WARDWELL: So there was other
25 mandates in regards to things that the Secretary

1 could not ignore, even though he may have made
2 that same broad-based policy decision back in '88,
3 correct?

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

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

6 >>MR. MALSCH: No, I think in '88 he -- after
7 completion of site characterization, he could have
8 made the decision he made today, and not gone
9 forward.

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

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

14 >>JUDGE WARDWELL: Right. But that's a
15 strange thing, where he's actually going out and
16 doing site characterization on a site that he's
17 not going to file an application on even.

18 >>MR. MALSCH: well, I think it goes back to
19 the Congress' resolution of the Lyons, Kansas
20 lesson learned; we want you to complete site
21 characterization. We want you to have all the
22 information before us. It would still --

23 >>JUDGE WARDWELL: Don't you think it's more
24 relevant that they realize this is a long-term
25 process and what one Secretary thinks today isn't

1 going to be what one Secretary thinks during the
2 next administration when other decisions are being
3 reached?

4 >>MR. MALSCH: well, they must have thought
5 of that.

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

14 >>MR. MALSCH: Yes. I mean, there are
15 various steps in the Nuclear waste Policy Act.
16 The point would be, at various steps along the way
17 there was also discretion within the Secretary not
18 to go forward.

19 >>JUDGE WARDWELL: And if this current
20 Secretary doesn't -- if, in fact, for the sake of
21 argument, it's determined by the Court, which is
22 really going to be the one that's going to decide
23 this, that DOE does not have authority to withdraw
24 their motion and this process then continues, it
25 doesn't say that a Secretary in some future

1 administration won't pick it up in earnest.

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

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

5 >>MR. MALSCH: well, I mean, we would assume,
6 absent congressional direction, that if the Court
7 tells DOE it can't withdraw its license
8 application, it can't withdraw the license
9 application.

10 I would hope that a Court wouldn't do so
11 in recognition of the fact that directing an
12 unwilling applicant to go forward in the midst of
13 a lion's den of a contested proceeding doesn't
14 make a whole lot of sense --

15 >>JUDGE MOORE: Mr. Malsch, though, this is,
16 is it not, an annual fight and -- during the
17 appropriations process?

18 >>MR. MALSCH: It is indeed an annual fight
19 in the appropriations process.

20 >>JUDGE MOORE: And won't it be -- the --
21 this year's chapter, yet to be fought, I guess,
22 and next year's, and next year's, just as every
23 preceding year -- isn't that where either this
24 Board, acting as all we can do is in adjudicatory
25 capacity, and if it goes to court, that removes

1 all politics. And they just need to decide that
2 there's no authority -- the strict legal question,
3 the relief ultimately is going to be whether money
4 is appropriated for this process. And if money is
5 appropriated, then DOE has very limited discretion
6 but to follow the mandates of the appropriation
7 and spend the money for which it is appropriated,
8 and as does the NRC.

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

17 >>MR. MALSCH: I don't disagree with that.
18 All I would say is that in the meantime, you know,
19 pending congressional action in appropriation
20 statutes, or other congressional action, it's a
21 duty of this Board and the courts to read the law
22 as they see it, and do the best they can.

23 >>JUDGE MOORE: Which you answered Judge
24 Ryerson's question that you thought Congress,
25 because of the history, was aware of the

1 interaction between the NRC and DOE, the
2 applicant, or what would become the interaction.

3 Do you see 114(c) as underlying the
4 reporting requirement in which the Commission has
5 to report to Congress what the Secretary's answer
6 to the unresolved safety questions are as evidence
7 of that interaction right in the statute?

8 >>MR. MALSCH: I would say that would be
9 certainly evidence of an interaction between the
10 Secretary and the staff on an application going
11 forward.

12 >>JUDGE MOORE: And that would fall, at least
13 in my understanding of how the process between the
14 technical staff and the applicant works, that's
15 under the rubric of prosecuting the application,
16 isn't not?

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

20 >>JUDGE MOORE: I was just asking whether
21 that evidence is Congress' expectation of
22 prosecution of the application, because I don't
23 know how the Commission could report to the
24 Congress on an annual basis what the resolution of
25 problems are that a Secretary is required to tell

1 him about, which is what every applicant has to do
2 first and foremost with regard to anything that
3 affects their application that involves safety
4 issue.

5 >>MR. MALSCH: That's true, but I don't think
6 it rules out the possibility of the Commission
7 reporting to Congress that DOE has withdrawn the
8 license application, and the Commission has
9 approved of the withdrawal.

10 I would just also make some small
11 observation about that section, and that we should
12 be careful how we read it because it literally
13 says, the Commission shall report to Congress
14 annually until the authorization is granted.

15 >>JUDGE MOORE: I know.

16 >>MR. MALSCH: So in theory if we denied it
17 --

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

20 >>MR. MALSCH: I think it suggests maybe less
21 than careful congressional drafting of this
22 particular section.

23 >>JUDGE MOORE: Or it suggests that, in 1987,
24 it was the largest NIMBE case that ever came
25 down -- came down the pike.

1 >>MR. MALSCH: Perhaps.

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

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

12 >>JUDGE MOORE: Isn't that the point, that
13 under this statutory scheme they must report it to
14 the NRC, and the NRC must determine, as part of
15 whether or not the application can be granted or
16 denied. If it's not fixable, the NRC has to deny
17 it?

18 And isn't there shifting of drivers from
19 when the application is filed to the NRC to
20 determine whether that application will be granted
21 or denied, and every applicant, DOE no different,
22 and this Section 114(c) only emphasizes that, is
23 under an obligation, even without 114(c), every
24 applicant is under an obligation to tell
25 immediately the NRC of any problem in their

1 application that involves a safety matter.

2 Isn't that the point, that there's a
3 switch of who decides, the NRC acting on DOE's
4 information; they'll have to deny it if there's a
5 safety problem.xxx

6 >>MR. MALSCH: I actually would not read the
7 statute that way. It seems to me that if there is
8 an unresolvable safety problem, the most natural
9 and ordinary thing to happen would be to simply
10 withdraw the license application.

11 >>JUDGE MOORE: Is that more natural than
12 denying it?

13 >>MR. MALSCH: well, then you would be asking
14 DOE to put on a case for the proposition that its
15 application should be denied. That strikes me as
16 a very strange kind of proceeding?

17 >>JUDGE MOORE: well, wait a minute. There
18 are some unknown number that could be literally
19 tens of thousands of issues, that the technical
20 staff is considering that are not in adjudication.
21 Any one of which could be a show stopper, from the
22 technical staff's viewpoint, and say the license
23 application cannot be granted.

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

25 >>JUDGE MOORE: So --

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

2 >>JUDGE MOORE: Doesn't have to be fought out
3 here.

4 >>MR. MALSCH: But if the application has
5 been --

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

14 >>MR. MALSCH: Well, that's true, but even in
15 the event the staff itself should identify an
16 unresolved safety question, the natural reaction
17 of the applicant, or any applicant, would be not
18 to press forward with the application, not to
19 press the staff issues of notice of denial, and
20 not to have a separate proceeding on whether the
21 application should be denied. That really doesn't
22 make any sense.

23 >>JUDGE MOORE: Well, and what would they do
24 if the statute keeps using the word "granting" or
25 "denying, "approving" or "disapproving?" I'm not

1 sure that lumping Yucca Mountain with every other
2 proceeding is a good analogy, because, from the
3 start the Commission has recognized, and certainly
4 I think everyone in this room has recognized, this
5 is a unique proceeding.

6 >>MR. MALSCH: well, it is certainly a unique
7 proceeding, but 114(d) certainly suggests that
8 Congress did not have in mind a unique set of
9 rules to apply to it, with the exception of the
10 time deadline.

11 Congress had the opportunity to fashion
12 special rules that would apply to this proceeding
13 and didn't do so. The usual rules applied.

14 >>JUDGE WARDWELL: On page 4 and 5 of your
15 brief you said it's not clear from DOE's motion
16 why DOE concludes that Yucca Mountain is not a
17 workable option for long term disposal of these
18 materials, (spent nuclear fuel, high level waste)
19 although Nevada's contention, including legal
20 issue contentions, would offer ample support for
21 such a conclusion.

22 Doesn't DOE's refute of every allegation
23 of your's, major contention, would render this
24 hypothesis invalid. I mean, it does not support
25 your conclusion. It would be the opposite,

1 wouldn't it, because they disagreed with every one
2 of your contentions?

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

10 >>JUDGE WARDWELL: Do you have any idea what
11 this workable -- the unworkability of Yucca
12 Mountain is at this present time that motivates
13 such a position by the Secretary?

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

16 >>JUDGE WARDWELL: what did you interpret, in
17 response to the questions asked earlier this
18 morning, in regards to trying to pin down what
19 this workability was that so motivated them?

20 >>MR. MALSCH: I think that one of the
21 principle lessons that one might learn from this
22 process as it has continued to date, that as a
23 practical matter, we will never get a repository
24 built and operational without the support of state
25 and local government.

1 >>JUDGE WARDWELL: That speaks like it's a
2 political issue as much as a technical issue. Is
3 that what you're saying?

4 >>MR. MALSCH: I think it's a practical
5 question. If the goal is to get an operational
6 repository, then the question is what is the most
7 practical way to get there, and I think one of the
8 lessons learned is, we're just not going to get
9 there over the determined opposition of state and
10 local government.

11 >>JUDGE WARDWELL: Do you know if Washington
12 and Texas were disappointed when they were
13 eliminated from consideration?

14 >>MR. MALSCH: I doubt it.

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

17 >>MR. MALSCH: I would just define it in
18 terms of who's making the decision. I mean,
19 Congress makes political decisions which make
20 policy choices. So I think a political decision
21 is one made by Congress, a policy decision is one
22 made by an administrative agency.

23 So if an administrative agency makes it
24 based on -- I mean, the 800 pound gorilla in the
25 room, was this a political decision, their

1 upcoming elections, and the majority leader of the
2 Senate is up for election. That's the 800 pound
3 gorilla.

4 xxxdoes a political decision change the
5 deference that's due that decision, from one
6 agency to another, especially if one of the
7 agencies is an independent regulatory agency,
8 commission that is, in theory, and hopefully in
9 practice, immune to politics?

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

19 >>JUDGE RYERSON: But, Mr. Malsch, hasn't the
20 Commission asked us not to second guess policy,
21 but to make a legal determination as to whether --
22 whether there's lawful discretion here?

23 I mean, but for the Commission's
24 April 23 order, and I don't speak for the whole
25 Board on this, but some of us might have thought

1 that, well, we could deduct this issue, we could
2 assume but not decide the authority. I think the
3 Commission, do you agree, has pretty clearly asked
4 us to adjudicate the DOE's legal authority to file
5 such a motion. So that issue's before us, is it
6 not?

7 >>MR. MALSCH: That issue is before you. My
8 only point would be that, if you conclude that DOE
9 has the authority to withdraw, I don't think you
10 have the authority under established case law to
11 second guess DOE on its reasons for choosing to
12 withdraw.

13 >>JUDGE WARDWELL: Do you have any case law
14 that deals with an involuntary applicant, an
15 applicant that was required to submit an
16 application, as opposed to a voluntary applicant
17 that did it on its own free will.

18 >>MR. MALSCH: You know, I thought about
19 that, I can't think of one. The closest analogy
20 that comes to mind is the Clinch River Breeder
21 Reactor proceeding, where I recall, generally,
22 that there may have been a congressional direction
23 at one point to proceed with the license
24 application.

25 >>JUDGE WARDWELL: Do you know of any other

1 activity that's mandated by Congress to take
2 place, that then has in that same statute that
3 requires that activity -- this is outside -- just
4 as another -- as trying to have an analogy to
5 what's happening here at this unique situation
6 that we're dealing with, with the Waste Policy Act
7 and exclusive nature of the Yucca Mountain
8 consideration.

9 But is there any other thing in
10 congressional activity that has mandated a
11 specific action? And all I can think of is, say,
12 the selective service, has required young men, and
13 I don't know if it extends to women now, have to
14 register. I don't think it is yet.

15 But would you be surprised if in the
16 Selective Service Law that there wasn't a
17 statement in there saying, you shall not retract
18 or withdraw your registration. If that was
19 missing; would that surprise you?

20 >>MR. MALSCH: You know, I don't know the
21 answer to that question. I've never looked at the
22 Selective Service Statute?

23 >>JUDGE WARDWELL: Yeah, I know, but just as
24 a practical matter, as a common sense matter,
25 would that surprise you if it was missing, that

1 they didn't go on to say, after they said you
2 shall register, and I forgot what it is, because I
3 got my draft card was a long time ago, and -- but
4 the Selective Service said something to the
5 effect, you shall register such and such period
6 after your 18th birthday, most likely.

7 would you be surprised if, in fact, they
8 then didn't go on and say, oh, by the way, you
9 shall not withdraw that registration the same day
10 or the next day. You cannot withdraw that
11 registration. would you be surprised if that was
12 missing?

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

17 So it depends on the statute. I mean,
18 the point that DOE is making that there's no
19 obligation in any statute for DOE to actually
20 build and operate a repository.

21 >>JUDGE WARDWELL: And no one is saying that.
22 All they are saying is, what the opponents are
23 saying is that you've got to continue to ride the
24 train through this construction authorization.
25 And we're close to that now anyhow. And so it's

1 not a big monumental thing that's taking place.

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

10 >>MR. MALSCH: Yeah. I just don't think that
11 that precludes the option of DOE withdrawing a
12 license application.

13 >>JUDGE WARDWELL: It also doesn't preclude
14 denial of that application, if one interprets the
15 Yucca Mountain -- the Waste Policy Act in 114 in a
16 different manner.

17 >>MR. MALSCH: Right. That's correct. I
18 would just fall back on the provision that if it's
19 unclear, if the statute doesn't address the
20 precise question, the question then before the
21 agency is what's the most reasonable thing, what
22 is the most --

23 >>JUDGE WARDWELL: One more thing. I see
24 Judge Moore getting excited, and I'll cut it out.
25 I just want to ask one more question, and then

1 I'll turn it over to him.

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

3 >>JUDGE WARDWELL: We talked about the
4 interaction between the staff and DOE during the
5 license review process. And if something did come
6 up, a fatal flaw did come up, and you mentioned, I
7 think, that the most logical thing would be for
8 DOE to withdraw its application. What would be
9 the process by which it would do that, then,
10 wouldn't it be 107?

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

12 >>JUDGE WARDWELL: And is there anything in
13 107 that prohibits the Board from denying that
14 application to withdraw?

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

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

18 >>MR. MALSCH: 107 is silent.

19 >>JUDGE WARDWELL: In fact, 107 wasn't
20 generated for any review of whether or not an
21 application should or should not be withdrawn.
22 Isn't it as you -- do you read it the same way I
23 do, that it's more of a granting additional
24 authority to the Board to do some other activity,
25 during that motion to withdraw, if they wish,

1 because there's all kinds of ways in there; they
2 may do this, if you want to, and it gives the
3 Commission more authority with a withdrawal than
4 what would have been if, in fact, 107 didn't
5 exist.

6 >>MR. MALSCH: well, it certainly describes
7 the procedures that should apply if an applicant
8 wishes to withdraw.

9 I think, though, the first -- I think
10 the first part of 107, recognizing a right to
11 withdraw, and the second part of 107 specifies who
12 decides whether that right can be exercised once
13 the notice of hearing is issued. But I think it
14 is implicit in the regulation that there is a
15 right to withdraw, otherwise there would be no
16 need for the regulation in the first place.

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

20 >>MR. MALSCH: I think that is true,
21 although, you know, the laws applicable to such
22 applications include a large body of case law, and
23 that large body of case law does suggest, as we
24 indicate in our brief, that it would be a very
25 rare circumstance, if at all, in which an

1 applicant would not be allowed to withdraw its
2 license application.

3 >>JUDGE MOORE: Well, there's no question
4 that if that's the statutory instruction to 107,
5 cannot stand in the statute's way, it's trumped by
6 the statute under the supremacy clause, isn't that
7 correct?

8 >>MR. MALSCH: Yes.

9 >>JUDGE MOORE: You said that in determining
10 whether the statute was ambiguous, which you went
11 on, but it -- and I was asking you whether it was
12 a political question or not -- whether it was a
13 political decision or a policy decision, and you
14 said it didn't matter.

15 In Food and Drug Administration v.
16 Brown & Williamson Tobacco Corporation, the
17 Supreme Court's 2000 decision, one of the factors
18 in determining whether the question was addressed
19 by the statute was, finally, the Court must be
20 guided to a degree by common sense as to the
21 manner in which Congress is likely to delegate a
22 policy decision of such economic and political
23 magnitude to an administrative agency.

24 Now, isn't that more or less the
25 question we're faced with in determining the first

1 step in Chevron, whether Congress addressed the
2 issue?

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

5 >>JUDGE MOORE: And that's the last of the
6 factors that the Court, in Brown & Williamson set
7 forth, recognizing the regulation of tobacco was
8 highly contentious and with enormous political
9 implications, political and economic implications,
10 two factors that are also very much at play here.

11 Is that a factor that is to be
12 considered in whether or not Congress spoke,
13 unambiguously or ambiguously, however you want to
14 phrase it, in step one of Chevron, which was what
15 Justice O'Connor was talking about when she laid
16 out the Chevron factors?

17 >>MR. MALSCH: Well, I think, though, you end
18 up being pulled in different directions. I mean,
19 one direction would be that if Congress thought it
20 was so important that DOE, against all odds, and
21 no matter what, prosecute its license application
22 after it had been filed, why didn't it say so?
23 And why didn't it make an exception when it
24 inferred to the laws applicable to such
25 applications?

1 >>JUDGE MOORE: That always is the
2 metaphysical question of how a five-four decision
3 can say the plain language of the statute is
4 unambiguous.

5 >>MR. MALSCH: Well, I mean, it is a fact
6 that there are lots of decisions in the Court of
7 Appeals which are sharply contested, but they're
8 ultimately resolved under Chevron step one no
9 matter what.

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

11 >>MR. MALSCH: But a five-four decision is
12 still a decision.

13 I do, though, want to spend some time on
14 the question whether there should be withdrawal
15 with or without prejudice.

16 >>JUDGE WARDWELL: With that, I'd just like
17 to ask one more question?

18 >>MR. MALSCH: Sure.

19 >>JUDGE WARDWELL: And that is, that in your
20 past discussions with various boards over the
21 years, you've been pretty forthright in describing
22 the strengths and weaknesses of your arguments,
23 compared to your opponents. And I would be
24 curious in your forthright opinion of how you rate
25 the strength of your argument, and that of DOE's,

1 which was eloquently presented by Mr. Lev this
2 morning, in regards to the broad based policy
3 authority granted by the AEA in allowing DOE, at
4 any time, to essentially stop going forward,
5 compared to the mandates that the proponents claim
6 are there in the Waste Policy Act, that requires
7 it to move forward.

8 How would you judge the strength of your
9 arguments?

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

19 From my standpoint, if I put my
20 regulator hat on, I come back to the question I
21 posed in the beginning: what possible sense does
22 it make for a regulatory agency to force an
23 applicant to prosecute a license application over
24 its objection, and its unwillingness to go
25 forward; and if it did, what on earth would that

1 proceeding look like, when there's determined
2 opposition?

3 I think you would end up with a very
4 strange proceeding, that possibly resulted in a
5 default, or a motion for summary disposition
6 granted. It just --

7 >>JUDGE WARDWELL: If the Court decides that
8 that is what should take place, wouldn't DOE be
9 obligated to pursue it in vigor, and consistent
10 with how they've vigorously denied any of your
11 contentions as being frivolous, as I would
12 paraphrase?

13 >>MR. MALSCH: I think that is theoretically
14 correct, but I would submit that would be a very
15 silly decision.

16 >>JUDGE WARDWELL: And likewise, there is
17 nothing to say that the Secretary, at the time
18 that the prosecution of this took place would, in
19 fact, not have a different global view, and may
20 not see the unworkability in Yucca that the
21 current Secretary sees, also.

22 >>MR. MALSCH: That's possible. Although I
23 have a suspicion, frankly, that beginning in 2002
24 the project was on essentially, autopilot, and no
25 one gave any serious thought to the issues which

1 the current Secretary has given consideration to.

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

4 >>JUDGE WARDWELL: And isn't that the
5 obligation of the Secretary, to go to Congress and
6 say, let's change some stuff so that it's clear,
7 and we can do this in an appropriate manner,
8 instead of relying on the Waste Policy Act that we
9 now have; isn't he bound to do that?

10 >>MR. MALSCH: Well, I wouldn't say bound to
11 do that?

12 >>JUDGE WARDWELL: Is it a reasonable thing
13 to do?

14 >>MR. MALSCH: That would have been a
15 reasonable thing to do, but I don't think that
16 says that what he did now is not also a reasonable
17 thing to do.

18 >>JUDGE MOORE: Hasn't it been on autopilot
19 because of the appropriations process and the
20 political process, since 2002?

21 >>MR. MALSCH: I would say it was really more
22 a matter of bureaucratic initiative instead of
23 inertia. I just don't think people thought about
24 the larger questions.

25 >>JUDGE MOORE: I could be totally wrong. I

1 thought that the funding impingements began about
2 that time.

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

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

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

15 I think that consideration, which was
16 important years ago, just recently came to the
17 fore.

18 I have to say, that's speculation on my
19 part, I'm not part of DOE. I don't know actually
20 what was going on, but it's a plausible
21 explanation for what occurred.

22 >>JUDGE MOORE: But Clark County points out
23 in its brief, and refers to the State -- State of
24 Nevada's 1500 page presentation, when it sought to
25 veto the Secretary's recommendation and then went

1 through the carefully prescribed process of the
2 waste Policy Act, it cited all of those polls that
3 showed consistently for 20 years the State of
4 Nevada had vigorously opposed Yucca Mountain, and
5 Congress, nevertheless, in -- or the
6 administration, nevertheless in 2002, went ahead,
7 and the application was filed as late as 2008,
8 and developed the whole application and,
9 essentially, as you know, because you fought it
10 vigorously and sought to obtain the 2004 version
11 of it, all of that was going on.

12 That doesn't strike me as bureaucratic
13 and lack of bureaucratic inertia. DOE had its
14 back to the wheel and was producing, through its
15 contractors and the funding, such as it was, to
16 produce that application.

17 >>MR. MALSCH: well, I think, though, Judge
18 Moore, that makes my point. They were focused
19 laser-like on preparing application, and it was
20 not until recently that they gave consideration to
21 the larger questions of where are we going with
22 this, why prosecute an application in the face of
23 determined opposition, even to a successful
24 conclusion, if the result is we'll never be able
25 to build the repository because Congress won't

1 step in and override state and local laws on water
2 use permits, won't step in and grant the necessary
3 land use authorizations.

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

8 If I may just go through briefly the
9 with or without prejudice question?

10 >>JUDGE RYERSON: One quick question on that
11 point, before you begin. Your brief, Mr. Malsch,
12 and I assume you're going to speak now, your brief
13 dealt with some very practical aspects of Nevada's
14 situation, and why with prejudice, from Nevada's
15 standpoint, would be more fair and make sense.

16 If I understood Mr. Lev's argument this
17 morning, he was arguing that were the Board to
18 conclude that DOE has discretion to withdraw, then
19 the Board has very little, if any, discretion but
20 to exceed to DOE's policy judgment that withdraw
21 with prejudice is the appropriate way to go.

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

1 >>MR. MALSCH: Oh, no, I agree with that
2 analysis. I think, first of all, that it's clear
3 that the entire body of NRC case law on whether
4 applications should be withdrawn, with or without
5 prejudice, was developed in situations in which an
6 applicant was seeking to withdraw without
7 prejudice, and the interveners were opposed to
8 that and seeking withdrawals with prejudice.

9 So there really is no NRC case law
10 directly on point. But DOE certainly is correct.
11 The case law in the federal courts is very clear,
12 that when a plaintiff wishes to withdraw with
13 prejudice, then that wish must be granted, unless
14 some other party comes forward and shows it would
15 be prejudiced.

16 >>JUDGE MOORE: Absent a settlement, at least
17 in my 35 years of experience, before going on the
18 bench, it was essentially unheard of for a
19 plaintiff to seek to withdraw with prejudice, but
20 I guess --

21 >>MR. MALSCH: It is unusual, but it has
22 happened. There's an interesting example of a
23 case actually cited by NEI in its brief. The case
24 is ITT Direct v. Healthy Solutions, in which an
25 applicant, a plaintiff, sought to withdraw with

1 prejudice, and it was actually denied in that case
2 because of prejudice that would be suffered by a
3 third party intervener.

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

14 And, in fact, we can find no prejudice
15 here, because no one has a right to have Yucca
16 Mountain licensed, no one has a right to send
17 their waste to Yucca Mountain. It's not been
18 established that Yucca Mountain is safe, or even
19 that disposal at Yucca Mountain is safer than
20 leaving it where it is, half in Savannah River or
21 the commercial sites.

22 The only possible right that I can think
23 of in this case that could be at issue is the
24 right granted to owners and generators of
25 commercial spent fuel to have DOE begin disposing

1 of their spent fuel, in 1998.

2 But as the standard contract cases in
3 the D.C. Circuit made clear, that right exists
4 completely independent of any repository, and
5 completely independent of whether Yucca Mountain
6 is licensed. So nothing this Board can do, with
7 respect to DOE's motion to withdraw, can possibly
8 effect that, right?

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

11 >>MR. MALSCH: They have, I would say, a very
12 peculiar argument. They seem to be saying that
13 you cannot grant the application to withdraw with
14 prejudice, because then, if DOE were to file it,
15 it could be considered on its merits, contrary to
16 114(d) of the Nuclear Waste Policy Act.

17 But wait a minute, 114(d) says that such
18 a refiled application would be considered in
19 accordance with the laws applicable to such
20 applications, and one of those laws would be the
21 prior decision, saying that the withdraw was with
22 prejudice and the application may not be refiled.
23 So staff's argument, I think, ends up getting
24 itself nowhere. Nor does its reference to the
25 Clinch River Breeder Reactor offer much guidance,

1 because, in that case, after various fits and
2 starts, the application was withdrawn without
3 prejudice, and no one was contesting that. No one
4 asked for it to be withdrawn with prejudice.

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

14 So instead we posed a slightly different
15 question, and the question we posed was whether
16 Nevada is entitled to withdraw with prejudice,
17 even if DOE had not asked for one. And I think we
18 make a very strong case that, in fact, we are so
19 entitled.

20 >>JUDGE MOORE: Because of the enormity of
21 the decision, and the depth of what you filed, and
22 the fact that nobody's had any chance to in any
23 way rebut it, is any of it a factual matter that
24 would require a hearing before you could reach a
25 conclusion?

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

4 >>JUDGE MOORE: Well, how could they, they
5 never saw what Nevada presented. As you said, it
6 was by our sufferance the DOE was able to file a
7 reply. And that being the case, because of
8 motion, answers, one reply, nobody knew what
9 anybody else was going to say.

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

15 >>JUDGE MOORE: Well, a number of them did
16 with respect to anything DOE would have to say,
17 because they didn't know what was going to be in
18 DOE's reply, and so that may well stand as notice
19 that they may be objecting, I don't know, they all
20 speak for themselves. But the process we're under
21 doesn't leave much room for anybody to have had an
22 opportunity to contest anything.

23 And so what I was wondering was, are any
24 of the matters that you've put forth matters of
25 fact that could be challenged and would have to be

1 established?

2 >>MR. MALSCH: I think the facts we set
3 forth in our affidavit are probably not
4 challengeable. I mean, they deal with the effort
5 and expense of Nevada in reaching this point, and
6 we're talking here about years of effort. I mean,
7 after all, if you look at this proceeding and
8 consider that it started effectively in 2004, when
9 the Commission first appointed a preapplication
10 presiding officer board, if you say the proceeding
11 first started in 2004, and would end,
12 hypothetically, in sometime around 2012, after the
13 last volume of status SCR.

14 we were, when staff filed -- when DOE
15 filed its motion, three-quarters of the way
16 through the proceeding, at a point when Nevada had
17 already spent tens of millions of dollars of its
18 own money, and many more, much more money in grant
19 funds, reaching this point, in comparing and
20 certifying its LSN collection, reviewing multiple
21 versions of the application in SCR preparing
22 contention. It was a very large, very large
23 expenditure. I don't think there's any way they
24 could contest that.

25 The other important point in our

1 affidavit is the testimony in the affidavit that
2 it took extraordinary efforts by Nevada to find
3 highly qualified experts in the relevant fields.
4 And because of business and other conflicts, we
5 had to go abroad to get just about half of our
6 experts.

7 The affidavit says that you just simply
8 cannot maintain that expert team indefinitely, and
9 that it would be almost impossible to reconstitute
10 any kind of a team. And I think -- I don't think
11 that's really contestable in the circumstances of
12 this case. And I think that is a factor that
13 argues strongly in favor of a dismissal with
14 prejudice.

15 We mentioned several other factors here
16 also; DOE's failure to prosecute the application
17 diligently. And by here, we weren't referring to
18 the fact that they failed to prosecute it
19 diligently once they filed it, but the fact they
20 took a full six years beyond the deadline to file
21 it in the first place, during which time we had to
22 spend six years keeping up to date and following
23 what they were doing, and what was going on, the
24 fact that in effect, motions for summary judgment
25 were pending in the form of the legal contentions

1 when they filed their motion to withdraw.

2 I think all these factors argue strongly
3 in favor of withdrawing with prejudice. But I do
4 want to mention two things, specifically though.
5 One is, first, we did make an issue over the
6 failure -- the inability to have meaningful
7 discovery, if there were refiled applications
8 because of DOE's reluctance to make the necessary
9 commitments regarding preservation of its LSN
10 collection.

11 You know, DOE has changed its position
12 in this respect in its Answers to the Board's
13 questions. And if those answers stick, and
14 subject to any changes in the case conference
15 hearing tomorrow, which we don't expect, we no
16 longer think we will be prejudiced by a lack of
17 discovery to the application being filed. So that
18 argument really is, for now, off the table.

19 But the other arguments, the other four
20 factors argue strongly in favor of a dismissal
21 with prejudice.

22 >>JUDGE WARDWELL: Do you agree with
23 what was stated earlier this morning, that even if
24 there was a withdrawal with prejudice, that this
25 necessarily wouldn't put Yucca Mountain to bed,

1 and mothball it for time infinitum; it could still
2 come back in some form, some shape, as a disposal
3 option for high level waste?

4 >>MR. MALSCH: I mean, even if it is true,
5 even if the Commission accepts and grants the
6 withdrawal with prejudice, Congress could always,
7 at any time in the future, direct otherwise, and
8 that would obviously trump whatever the Commission
9 may have said on the subject.

10 >>JUDGE WARDWELL: And a Blue Ribbon Panel
11 may say that's a good option for any of these
12 things.

13 >>MR. MALSCH: who knows. who knows what's
14 going to happen, but I think if the Board and the
15 Commission were to grant the withdraw with
16 prejudice, the result really would be that it
17 would be up to Congress then to take the ball, if
18 they wanted to move Yucca Mountain forward.

19 >>JUDGE WARDWELL: I guess that gets to my
20 question, then, why wouldn't you be better off
21 served by moving forward now, as far as your
22 prejudice arguments are concerned? If that's the
23 only thing we're dealing with here now, seems to
24 me you'd be better off served by moving ahead with
25 the construction authorization license, and

1 resolve the issue and release all your experts,
2 because either it will show a fatal flaw or it
3 won't, depending on the hearing.

4 >>MR. MALSCH: well, but that ignores another
5 consideration. I mean, if you -- if you believe
6 that in the end, no matter what we do under the
7 current process, we will not end up with an
8 operational repository, there's a lot to be said
9 for cutting your losses now and not further
10 wasting the taxpayers' money, and I think that's
11 what, primarily, is motivating the withdrawal at
12 this particular point.

13 >>JUDGE WARDWELL: You think that's that big
14 of a significant thing that's motivating this
15 workable determination, the unworkability
16 determination?

17 >>MR. MALSCH: I think that is a major -- I
18 would say, and I can't speak for DOE, from my
19 standpoint, a major reason for not doing what you
20 suggest, which is to go forward and see what
21 happens, would be if the ultimate result is no
22 repository, why waste the taxpayers' money in the
23 process.

24 >>JUDGE WARDWELL: It would have been a lot
25 smarter to do that at the earlier stages of site

1 characterization, wouldn't it, with the same
2 public disfavor.

3 >>MR. MALSCH: It would have been, all I can
4 say is better late than never.

5 >>JUDGE MOORE: One quick point; on page 8,
6 you point as part of your prejudice argument, that
7 Nevada's analyses have been decisively
8 contradictory to DOE. The persons involved in
9 this work, and the value of their work product,
10 such as scientific notebooks, will be lost should
11 the proceeding be dismissed.

12 The question immediately came to mind as
13 to why would they be lost and aren't these
14 materials that you described documentary material,
15 and shouldn't they already be in the LSN?

16 >>MR. MALSCH: Yes. I mean, they should be
17 in the LSN. The question up until DOE's most
18 recent responses was whether the LSN would be
19 available.

20 >>JUDGE MOORE: It's not that they would be
21 lost, it's that if the LSN material is jettisoned
22 they would be lost.

23 >>MR. MALSCH: Right. And I just wanted to
24 make one last important point, though, on the with
25 or without prejudice question.

1 Others have made a big deal of the fact
2 that, according to them, NRC case law suggests
3 that there cannot be a withdraw with prejudice
4 unless it is associated with or is equivalent to a
5 decision on the merits of the application, and
6 that is -- that just can't be.

7 There is suggestions in two appeal board
8 decisions. I'm thinking of North Coast and
9 Fulton, that ordinarily you dismiss things with
10 prejudice, when there is a merits decision, or its
11 associated with a merits decision, but that was
12 not actually the holding of those cases. The
13 holding was somewhat different.

14 And, in fact, the case cited for that
15 language in the Fulton case, which is Jameson v.
16 Miracle Mile, actually did not say.

17 >>JUDGE WARDWELL? Is that the Fifth
18 Circuit case?

19 >>MR. MALSCH: It is -- no, Third Circuit.
20 My notes say Third Circuit. That decision did not
21 say that a dismissal with prejudice is equivalent
22 to a decision on the merits. All it said was that
23 if the judgment in that case had not been tainted
24 by fraud, there would have been claim preclusions
25 associated with it, and there's no dispute about

1 that. That simply means the application couldn't
2 be refiled.

3 But as the case we cited shows, there is
4 no issue preclusion associated with a dismissal
5 with prejudice because there's been no
6 adjudication of the merits. And so it simply
7 cannot be that admissible with prejudice is equal
8 to a decision of the merits.

9 And several of the cases we cited
10 actually involved situations where the District
11 Court granted a motion to withdraw, or denied a
12 motion to withdraw, and there was no decision on
13 the merits in those cases.

14 So there is no indication that
15 necessarily there must be a decision on the merits
16 in order to grant a motion for withdrawal with
17 prejudice.

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

19 >>MR. MALSCH: Thank you.

20 >>JUDGE RYERSON: I have more questions for
21 him in another area. Just three or four.

22 >>JUDGE WARDWELL: That's in regard to your
23 NEPA discussion on page 25 through 27.

24 You posit that the withdrawal of this
25 application was not a federal action by NRC. And

1 it's clear it isn't. We're not involved with it.
2 But NRC is required to adopt or address the EIS
3 that DOE has, and hasn't DOE's EIS been
4 constrained by some limitations that the Waste
5 Policy Act has allowed it to move forward with,
6 that wouldn't necessarily be there on any other
7 application?

8 >>MR. MALSCH: That's true, but there was
9 nothing in the Nuclear Waste Policy Act that
10 dispensed with DOE's obligation to discuss the no
11 action alternative. And I think it is a
12 legitimate point to say that an environmental
13 impact statement, if one were to be prepared, and
14 if one had to get prepared, I mean a decision to
15 withdraw the license application would have
16 basically evaluated the no action alternative. So
17 I'm not sure what's missing here at all.

18 >>JUDGE WARDWELL: Do you think the same
19 constraints in the Waste Policy Act would apply to
20 this -- let's posit that this is, in fact, a
21 federal action that requires DOE to either amend
22 their EIS, or at least, at a minimum, create
23 another rod from that particular decision.

24 Do you believe that the constraints in
25 the Waste Policy Act apply to that action, the

1 withdrawal of this, as it would to the application
2 submittal itself?

3 >>MR. MALSCH: You know, I --

4 >>JUDGE WARDWELL: Specifically, 114(f)2 that
5 says, compliance with the procedures and
6 requirements of this act, by just complying to
7 this act, the Waste Policy Act, that will be
8 adequate consideration of the need for the
9 repository, the time of the initial availability
10 of the repository, and all alternatives to the
11 isolation of high level radioactive waste and
12 spent nuclear fuel and repository.

13 114(f)(3) says the Secretary need not
14 consider alternative sites to Yucca Mountain site
15 for the repository under this subtitle. Those
16 seem to be pretty focused limitations, and again,
17 in support of how they want to make sure this is
18 being focused towards this site. Almost all other
19 options are off the table for this.

20 Has not that put a tremendous
21 constraint, or at least a perception of a
22 tremendous constraint, on the no action
23 alternative associated with the EIS that was
24 generated under those constraints, that wouldn't
25 exist now, when you're dealing with this now not

1 being a no action alternative? But this is the
2 action that they're now taking, and those options
3 and alternatives come to play again, now?

4 >>MR. MALSCH: well, I do think if that
5 section applies, it would impose certain
6 constraints on the consideration of certain
7 alternatives, namely, timing of the repository,
8 alternatives of geologic disposal. But I don't
9 think it placed any constraints on DOE's
10 evaluation of the no action alternative.

11 Now, I do think that if DOE -- first of
12 all, I think DOE is correct. I think they don't
13 need to do an environmental impact statement on
14 their decision to seek withdrawal of the license
15 application, because it doesn't change the status
16 quo. But if, hypothetically, they were so
17 required, I don't think those restrictions in
18 section 114 would apply.

19 >>JUDGE MOORE: what's the outstanding
20 problem under NEPA with the rod? You have a
21 record of decision supported by an EIS, that now
22 you have a decision that is at odds with the
23 record of decision.

24 Doesn't DOE need a new record of
25 decision, and that would demand a -- at least a

1 minor supplement to the EIS saying there's been a
2 180-degree change in course, because remember that
3 EIS lays out the, for lack of a better term, the
4 parade of horrors of what happens if DOE does
5 not go forward with Yucca Mountain?

6 >>MR. MALSCH: I --

7 >>JUDGE MOORE: How do you -- how does the
8 record of decision support EIS, and doesn't there
9 have to be a new record of decision recognizing
10 the change in course?

11 >>MR. MALSCH: I frankly don't know the
12 answer to that question because, as you know,
13 records of decisions are creatures of agencies,
14 NEPA rules. And I'm just not an expert on DOE's
15 NEPA regulations.

16 >>JUDGE MOORE: Well, they flow directly from
17 NEPA, but there's nothing in NEPA specifically
18 about records of decision. All there is, is in
19 NEPA, 1022(c) is the obligation to prepare
20 environmental impact statements when there's major
21 federal actions significantly affecting the
22 environment.

23 The rest is all agency and CEQ
24 regulations. And I frankly would have to defer to
25 DOE on how best to answer that question.

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

2 >>MR. MALSCH: Thank you.

3 >>JUDGE MOORE: Clark County.

4 >>MR. ROBBINS: Good morning, Your Honors,
5 thank you. Alan Robbins on behalf of Clark
6 County.

7 If you have a decision in front of you,
8 it's the legal question of whether or not DOE has
9 authority to withdraw. Of course, it's our
10 position that you don't have such a question, that
11 they have the authority, and, therefore, their
12 motion is an authorized act and should be granted.

13 You do not have before you, in any
14 event, in our opinion, a question regarding the
15 propriety of the exercise of their decision, of
16 their authority. You either conclude that they
17 have the authority, in which case it's up to them
18 to exercise as they see fit, or you conclude they
19 don't have the authority --

20 >>JUDGE MOORE: Counsel, do you believe
21 Chevron analysis is applicable?

22 >>MR. ROBBINS: No, sir.

23 >>JUDGE MOORE: Why?

24 >>MR. ROBBINS: Well, for that reason,
25 because all you're getting to is the authority

1 question of whether they have the authority or
2 not.

3 >>JUDGE MOORE: But isn't that a question of
4 statutory interpretation?

5 >>MR. ROBBINS: It is.

6 >>JUDGE MOORE: Okay.

7 >>MR. ROBBINS: So perhaps that first step of
8 Chevron, at most. But pure legal questions also.
9 Then you get into it as a matter of deference
10 because it's their statute, or their statute that
11 they have expertise, or is it a pure legal
12 question and, therefore, a fresh look, in any
13 event.

14 My principal point is that, at most,
15 what you have in front of you is the statutory
16 interpretation question, if you take that view.
17 But concerns about whether this was a political
18 decision, a policy decision, a safety decision,
19 you know; is it meritorious or not, is beyond this
20 Commission and this Board's determination.

21 >>JUDGE MOORE: Well, excuse me, Counsel, but
22 that's all of determining under Chevron. The
23 first step of Chevron is whether the issue was
24 addressed by Congress. There are all those
25 factors that you just said are irrelevant. Those

1 all play as the factors that go into the judgment
2 of whether the issue, the precise issue, was
3 addressed by Congress.

4 >>MR. ROBBINS: Well, we take a different
5 view, Your Honor, and that is in construing the
6 statute, if you feel there's construction
7 required, to determine whether they have the
8 authority to file the motion, you're looking at
9 the words of the statute, and what
10 congressional -- what did Congress say, and what
11 do you believe Congress meant when they said it.

12 That happened years ago. And therefore,
13 statements have been put out in the last few
14 months by the Secretary, or stated even by the DOE
15 in its motion before this Board, don't go directly
16 to what the words of the statute do or do not
17 mean. And that's our point.

18 By analogy, you know, if you were a
19 medical doctor working at a hospital, and you saw
20 some patient climbing under their bed and leave
21 and said I've had enough, you may think they're
22 crazy. You may believe, maybe believe you know,
23 that they're doing something that's medically --

24 >>JUDGE MOORE: -- unsound.

25 >>MR. ROBBINS: -- ill advised, unsound. But

1 in the end, you can't keep them hostage.

2 >>JUDGE WARDWELL: That's not true, is it? I
3 mean, there are people that are committed to
4 hospitals for their own safety and health, and if
5 they try to leave, they would have to be
6 constrained, aren't they?

7 >>MR. ROBBINS: Well, that -- if you want
8 to -- that's not the analogy I had in mind. If
9 you're now -- you want to change it.

10 >>JUDGE WARDWELL: That -- isn't that closer
11 to what we have here? You're back to assuming
12 that one doesn't interpret the Waste Policy Act as
13 having very significant mandates that limits the
14 policy of DOE, before your analogy even comes into
15 play.

16 >>MR. ROBBINS: With all due respect, your
17 variation analogy assumes that there --

18 >>JUDGE WARDWELL: There's another reading of
19 it, is the opponent, is what I trust would be the
20 opponent's reading of it, so I'm saying that's an
21 even wash. A little significance will help.

22 >>JUDGE RYERSON: I'm not so sure the
23 analogies are helpful, but do I understand your
24 point, Mr. Robbins?

25 In other words, what you're saying is,

1 in your view, the Board has to make a legal
2 judgment, and the legal judgment is, does DOE have
3 discretion or not, under 114, once it's filed an
4 application to withdraw. If it does not have that
5 discretion, as a legal matter or decision is then
6 relatively simple, and you're suggesting that if
7 it has discretion it's not our role to review the
8 wisdom of DOE's decision; is that an accurate
9 statement?

10 >>MR. ROBBINS: That is accurate. And I
11 would add to that, then, insofar as
12 conditioning -- I'm sorry, insofar as whether the
13 withdrawal is granted with prejudice, as
14 requested, or not. That, too, in this instance,
15 is up to the applicant.

16 The case law, I believe that others have
17 cited, suggesting that there either has to be a
18 decision on the merits, in order for a dismissal
19 to be with prejudice, or that the Board has
20 discretion to make those determinations. Those
21 all rise in other settings where the concern was-
22 would withdrawal cause prejudice to other parties,
23 or should it be made prejudicial, so that the
24 applicant can't come back and do this again in
25 some other way. It's not been in situations where

1 it was the applicant itself, as you have here
2 requesting or that its own request of withdrawal
3 be with prejudice.

4 The State and we have elaborated on the
5 various consequences, and you've just discussed
6 further concerns about the refiling, and LSN and
7 the like, and I won't reiterate that, at this
8 point.

9 I wanted to emphasize here that, in our
10 view, your job, maybe easy is not the right word,
11 but is narrowly focused, in that you either grant
12 the motion, with all due respect, unless you
13 determine that there's no legal authority for the
14 motion to be granted.

15 I would suggest that even that
16 determination, plainly, ultimately, is going to be
17 made or reviewed elsewhere, in any event.

18 >>JUDGE WARDWELL: I'm interpreting what
19 you're suggesting, and is there any discussion of
20 what the Secretary said, in regards to the motion
21 to withdraw is irrelevant to us; is that correct?

22 >>MR. ROBBINS: Yes, sir.

23 >>JUDGE WARDWELL: So why do you use it in
24 your argument? On page 5 you state that DOE has
25 reevaluated Yucca Mountain. Can you point us to

1 where that reevaluation has been enumerated?

2 >>MR. ROBBINS: All I can point you to is
3 the -- I'm not going to use the right term here
4 because I'm blanking, and I apologize, is
5 essentially the press release.

6 >>JUDGE WARDWELL: Likewise, on page 7 you
7 reiterate the infamous Secretary's term to be
8 unworkable. Can you point to anything that has
9 defined why it is unworkable now? You bring that
10 up in your brief.

11 >>MR. ROBBINS: Again, it was really more by
12 way of illustration of the fact that, if the
13 Secretary has determined to not go forward, for
14 whatever reason, then it makes, in our view, no
15 sense to proceed with the proceeding.

16 Now, we also -- if I recall correctly,
17 in part, were responding to, at least our reading
18 of Aikens' reply to the DOE motion, where in our
19 view, at least implicit in their argument, is that
20 the NWPB basically presented a done deal, short of
21 a rejection by the -- well, actually they don't
22 even say that, we don't think. That the mandated
23 filing and application was tantamount to the
24 granting or issuance of the license, and that the
25 proceeding was nothing more than a formality, and

1 we were pointing out we don't think that's the
2 case at all, the history was very clear that's not
3 the case.

4 >>JUDGE WARDWELL: Page 9 of your
5 application, you state that the funding from Blue
6 Ribbon Panel indicates that Congress is aware and
7 supportive of the President's and Secretary's
8 decision to terminate this proceeding.

9 Can you point to any reference that
10 supports that interpretation that you have, in
11 regards to the funding motivations of the Blue
12 Ribbon Panel?

13 >>MR. ROBBINS: Simply the act of granting
14 the funding for the panel, knowing what it's
15 about, and certainly knowing the history.

16 >>JUDGE WARDWELL: Aren't there numerous
17 other reasons why that makes sense, to have a Blue
18 Ribbon Panel, exclusive of whether Yucca Mountain
19 proceeds or not?

20 >>MR. ROBBINS: I think in different
21 circumstances there could be, but it's my
22 understanding, from what has been made available
23 publicly, that, you know, it was understood that
24 the notion of the panel was to look at
25 alternatives instead of Yucca Mountain, and in

1 light of the proposed shut down of Yucca Mountain,
2 not as chapter two beyond Yucca.

3 >>JUDGE WARDWELL: You believe Yucca Mountain
4 is off the table for the Blue Ribbon Panel?

5 >>MR. ROBBINS: It is my understanding, from
6 what's been said publicly, Your Honor. I have no
7 insight or particular information on that.

8 >>JUDGE RYERSON: One question about the
9 scope of review, or consideration of DOE's
10 judgment.

11 Now, we have a very unusual statute here
12 that provides direct action in the Court of
13 Appeals, under section 119, which is rare or
14 unique, as far as I can tell.

15 Doesn't the Court of Appeals have a
16 somewhat broader responsibility, for example, I
17 believe in the 119 actions, they're Administrative
18 Procedure Act claims, and under that statute,
19 which will be applied by the court, DOE has to
20 have -- has to have a rational basis for its
21 decision?

22 In other words, there is a second
23 guessing, if you will, by the Court of some
24 minimal level of rationality. Now that's the APA
25 standard for administrative action. Is that

1 broader than our standard? I don't believe we
2 apply the AEA directly, but do we have something
3 analogous like that as a responsibility?

4 >>MR. ROBBINS: I don't think in the context
5 of a motion to withdraw an application, no, sir.
6 I think that is the applicant's decision, and,
7 let's face it, it -- I think if -- if one does not
8 believe that the NWPA forecloses such a motion,
9 then what DOE is arguing, what the State of Nevada
10 has argued, what I'm arguing right now, is very
11 conventional, and I think would be highly
12 noncontroversial.

13 I think the only thing that potentially
14 makes some of that not quite add up, is if one
15 either believes, or is struggling with the thought
16 of whether the NWPA creates a different paradigm
17 that takes convention off the table. But
18 otherwise, the notion, if you dismiss any thought
19 that DOE has been involuntarily committed, beyond
20 escape, then they're an applicant like anybody
21 else. And unless engaged, as the case law has
22 indicated, in some licenseable activity, that has
23 not been licensed, surely it is not up to this
24 Board or this Commission to say you will go get a
25 license. Or, boy, having asked for one, there's

1 no turning back. It is not this Board's role. It
2 is not this Commission's.

3 >>JUDGE WARDWELL:

4 Haven't you merely defined the question
5 as before, because we're in this continuous do
6 loop, as I say, because if one could read the
7 waste Policy Act differently it says known fact it
8 does put constraints on what they can do.

9 >>MR. ROBBINS: I guess in part I hope that's
10 what I've done, Your Honor, because, you know,
11 part of my point is that the discussion about this
12 political decision, was it, you know, made by the
13 Secretary alone, or was the Secretary taking
14 orders from the President, you know, was it
15 properly viewed as a political decision or a
16 policy call, et cetera.

17 As I said, I think there are matters
18 that, they're interesting, and certainly will be
19 debated elsewhere, but are beyond the scope of
20 this Board's deliberations at this time on the DOE
21 motion. So if I've helped clarify that, that's
22 good, that's part of what I was hoping to do.

23 >> JUDGE MOORE: I guess I've missed a
24 portion of your point. The fact that it's a legal
25 issue that requires the interpretation of a

1 statute, I don't see how that avoids the
2 determination that, if Chevron is applicable, the
3 first step of Chevron, there's a series of steps
4 that you go through in determining whether the
5 precise question at issue was considered by
6 Congress, and that goes directly to this statutory
7 interpretation question.

8 And those factors that come into play in
9 determining that question, that was precisely what
10 Justice O'Connor was outlining in the FDA v. Brown
11 & Williamson Tobacco case.

12 In the first step of Chevron, was this
13 precise issue considered by Congress in
14 determining whether the statute was ambiguous or
15 whether it was not ambiguous.

16 >>MR. ROBBINS: My point, Your Honor, is
17 that -- let me call it rationale or explanation,
18 put out by the administration a few months ago, as
19 to why they exercised their authority in this
20 instance. I don't think those sheds any light,
21 and hence is not relevant to the statutory
22 interpretation question of whether they have the
23 authority to withdraw an application at all, or
24 whether, under the NWPA, having been instructed by
25 Congress to file an application, they must see it

1 through to the bitter end, whatever that end may
2 be.

3 I agree with Mr. Malsch that, not only
4 is that contrary to the language of the statute,
5 but it's contrary to practicality, and any way of
6 proceeding. It's just that we cannot conceive
7 that Congress would have created a paradigm that
8 contemplated involving so much time and resources
9 of all the different parties, and of this
10 Commission, on an empty exercise, and that's what
11 the exercise licensing proceeding would be, if
12 they're mandated to go forward with the
13 proceeding, the outcome of which, in the end,
14 really doesn't matter, because the DOE is not
15 going to build the facility anyway, and they're
16 not going to operate it anyway, then that makes
17 going forward with this proceeding an interesting,
18 academic, lucrative for some, and very costly for
19 others, but, ultimately, meaningless exercise.
20 And there's no indication, in our view, in the
21 statute of legislative history, that Congress
22 contemplated any such empty exercise, and yet a
23 conclusion that the DOE does not have authority to
24 withdraw the application inherently adopts such an
25 interpretation.

1 >>JUDGE MOORE: Thank you, Mr. Robbins. The
2 State of California.

3 >>MR. ROBBINS: Thank you, Your Honor.

4 >>MR. HEMBACHER: Good afternoon, Your Honor,
5 I'm offering my comments on behalf of the State of
6 California, and I've also been asked to make these
7 comments on behalf of the County of Inyo, which
8 has made a similar request to the Board, which is
9 to make findings.

10 We know that it's unusual for there to
11 be a request that a adjudicatory body make
12 findings about what it hasn't decided, but because
13 of the unique nature of the proceedings here, the
14 fact that it's likely that there will be future
15 applications filed by the Department of Energy,
16 and the fact that there are previous NRC decisions
17 that have indicated that a decision to withdraw
18 with prejudice is a decision upon the merits.

19 We want to make it, maybe in an excess
20 of caution, we want to make it clear that at least
21 the NEPA contentions raised by the State of
22 California, and the County of Inyo have not been
23 adjudicated by this body, and that they're
24 reserved for a future date.

25 As you know, the NEI decision held that

1 the Commission could determine the NEPA
2 contentions, or at least indicated that the NRC
3 had the authority to consider NEPA contentions,
4 and we want to make sure that there is no
5 confusion in a future proceeding, either in a form
6 before the NRC or, as you know, there's challenges
7 that have been filed both in the Ninth Circuit and
8 the D.C. Circuit. We support DOE's motion to
9 withdraw.

10 As you know, we thought it was legally
11 deficient for NEPA reasons, but there's been no
12 litigation, no discovery, no motions, or any other
13 form of litigation as to the merits of California
14 and Inyo's contentions, therefore, we are asking
15 that this body make -- in making its
16 determination, if it does, in fact, grant the
17 motion to withdraw with prejudice, that it make it
18 clear that the NEPA contentions have not been
19 adjudicated.

20 And that's all I have, unless you have
21 questions.

22
23 >>JUDGE WARDWELL: I just have one. On the
24 bottom of page 2 you state that the Board has the
25 power to grant DOE's motions for withdrawal.

1 >>MR. HEMBACHER: Yes.

2 >>JUDGE WARDWELL: So is it your position, is
3 there anything, you're aware of, in our Part Two
4 rules, the AEA, or the Waste Policy Act, that
5 revokes any power that you feel we do have to deny
6 that motion, and specifically a motion such as
7 this, to withdraw the application?

8 >>MR. HEMBACHER: I'm not aware of that.

9 >>JUDGE WARDWELL: Thank you.

10 >>JUDGE MOORE: NACA.

11 >>MS. LEIGH: Thank you, Your Honors.

12 Rovianna Leigh, on behalf of the Native Community
13 Action Council. I'm also authorized to say today
14 that JTS supports and concurs in NCAC's position.
15 And of course, as the Court is already aware, some
16 of our members and tribal elders are members of
17 the Timbisha Shoshone Group.

18 We also have tribal members of a number
19 of other tribes, other western, Shoshone and
20 Southern Paiute Indian tribes, in and around the
21 area where the proposed repository would be sited.

22 Today I'd just like to briefly emphasize
23 the points that we made in our short filing for
24 the Board, regarding the unique issues and
25 concerns of the Indian people and tribes that have

1 been on these lands since time immemorial.

2 The Board has noted, and many other
3 parties have noted, the large number of changes
4 that have occurred in the past couple of decades
5 since the decision was made to move forward with
6 this site.

7 There's one thing that has not changed,
8 and that has been the opposition and concern of
9 Indian people and tribes that live on these lands,
10 and depend on the resources of these lands.

11 As we mentioned, these Indian people and
12 their tribal culture are inextricably tied to the
13 land; their tribal ceremonies; their tribal
14 religion; their traditional ways of life, are
15 intertwined with these resources. With the water,
16 with traditional diet, which can include, hunting,
17 for example, wild rabbits; a gathering of pinon
18 nuts. These resources are the resources that they
19 have relied upon since time immemorial.

20 The people that live on these lands and
21 use these resources have been there forever, and
22 are simply not going anywhere. The increased
23 threat to their health, and to their culture, and
24 to their way of life, is something of grave
25 concern, and that's why the NCAC was created by

1 the members of Indian tribes in these areas.

2 I would like to emphasize especially the
3 burden, in terms of the lack of resources that
4 these communities have. In general, there is a
5 lack of resources, and these populations are
6 vulnerable.

7 Securing legal counsel and fundraising
8 to do so was a very difficult feat, and it's one
9 that the NCAC is quite proud of having been able
10 to do, simply secure a seat at the table during
11 these proceedings, an additional burden to try to
12 preserve the testimony of tribal elders. In the
13 event that the dismissal is granted without
14 prejudice is an extremely large burden for this
15 community to bear. This is a community that has
16 rallied together, to fundraise, to participate, to
17 monitor, and, of course, to secure grants to try
18 and do research on the health impacts to these
19 communities, and the disproportionate, adverse
20 health impacts that they purport would result as a
21 result of the repository being constructed.

22 In addition, it would be difficult,
23 should we be able to garner these resources, to
24 preserve the testimony of tribal elders to
25 determine what to preserve, so that would be an

1 additional burden in addition to the resources
2 needed to preserve the testimony of tribal elders.

3 As this Board is aware, in tribal
4 culture, the elders are the keepers of the
5 knowledge. These elders are not a fungible
6 resource, may not be available should this
7 dismissal be granted without prejudice.

8 It's uncertain whether there could be a
9 refiling in five, ten, twenty years, and certainly
10 it is the goal of tribal elders to pass on the
11 knowledge they have today.

12 But as we know, tribal culture is not
13 static, and it is evolving, and there's no
14 guarantee that the next generation of tribal
15 elders will have the same information that this
16 generation of tribal elders has today. If the
17 Board has no further questions, I would submit.

18 >>JUDGE MOORE: One, and I'm afraid it's a
19 nonlegal question; it goes back to the fact that I
20 was a history major, and always thought I'd be
21 happy as a history professor.

22 But why on earth -- I accept what you
23 say and fully understand it, but the value of
24 preserving what the knowledge of the tribal elders
25 would seem to have an enormous value, certainly

1 outside of this proceeding. So I'm troubled that
2 that is a reason given for granting a motion
3 without prejudice.

4 It would seem to me, independent of
5 anything this Board or, after us, the Commission,
6 or any Court does, there's an enormous value in
7 that, and it should be undertaken for its own
8 sake. If this is the nudge that makes it happen,
9 isn't that a good thing?

10 >>MS. LEIGH: Certainly, Your Honor, I agree
11 that preserving this knowledge would be in the
12 tribe's best interest, and would have a larger
13 value than to these specific proceedings. But
14 what NCAC would endeavor to do is preserve
15 testimony specific to the risks relevant to the
16 construction of this repository.

17 So while there's a larger value and a
18 larger base of knowledge that should be preserved,
19 there would also be a smaller specific type of
20 information that the NCAC would wish to preserve,
21 relevant to this repository.

22 As an example, some of our tribal
23 elders, and although this is irrelevant to these
24 proceedings, have suffered through contamination
25 from the nuclear test site, so they have

1 knowledge, for example, of the color of skin
2 changing, or contamination within the wild game,
3 contamination within milk from cows living in the
4 area. That type of knowledge would be specific to
5 a threat of contamination, and specific to the
6 traditional diet of hunting and gathering.

7 Does that answer your question?

8 >>JUDGE MOORE: Thank you, Counsel.

9 >>MS. LEIGH: Thank you.

10 >>JUDGE MOORE: The NRC staff.

11 >>MS. SILVIA: Good morning, Your Honors.

12 Andrea Silvia for the NRC staff.

13 The staff's position is that the Board
14 has authority to grant DOE's request to withdraw
15 its license application, but withdrawal with
16 prejudice is not justified. Section 114 --

17 >>JUDGE WARDWELL: What do you mean -- I
18 mean, you used the phrase, I think you used it
19 here, too, but in your filings, you said DOE's
20 motion to withdraw may be granted by the Board.
21 Does that imply that we also may deny it?

22 >>MS. SILVIA: That is correct, Your Honor.
23 Section 114(d) of the Nuclear Waste Policy Act
24 provides that the Commission shall consider an
25 application in accordance with the laws applicable

1 to such applications.

2 The Commission's regulation on
3 withdrawal 10 CFR 2.107 had existed for
4 approximately 20 years when the Nuclear Waste
5 Policy Act was enacted, and the Board should
6 presume that Congress was aware of it.

7 Furthermore, if Congress had intended to
8 prevent DOE from withdrawing its license
9 application, it could have specified that in the
10 Nuclear Waste Policy Act, but it did not do so.

11 DOE has not demonstrated that dismissal
12 with prejudice is justified. Under NRC case law,
13 dismissal with prejudice requires a showing on the
14 record of an injury to a public or private
15 interest. Any condition, including with
16 prejudice, requires such a showing.

17 >>JUDGE MOORE: Counsel, I understand your
18 point. Does that showing have to be made by the
19 movement -- movant who's asking for the withdrawal
20 with prejudice, or would in this instance,
21 Nevada's showing suffice because DOE has not made
22 one?

23 >>MS. SILVIA: I think in Fulton, for
24 example, the Appeal Board uses the term, the party
25 requesting the sanction.

1 >>JUDGE MOORE: I was aware of that. But we
2 are presented with a unique circumstance. DOE has
3 not made a showing. Nevada has. And they support
4 the withdrawal. Will that suffice, in the staff's
5 view?

6 >>MS. SILVIA: In the staff's view, Nevada
7 has not made such a showing. However, if a -- if
8 any party to this proceeding were to make such a
9 showing, I think that is something the Board could
10 consider, when --

11 >>JUDGE MOORE: Why, in the staff's view
12 hasn't Nevada made that showing?

13 >>MS. SILVIA: In terms of the arguments
14 about future litigation, expenses and
15 difficulties, the appeal boards in both North
16 Coast and Fulton noted that the possibility of
17 future litigation with its attendant expenses and
18 uncertainties is a consequence of any dismissal
19 without prejudice, and that alone does not provide
20 a basis from departing from the usual rule.

21 >>JUDGE MOORE: But that usual rule, the
22 Board, in Fulton, for example, and North Coast,
23 both were not faced with something on the order of
24 20 years of activity in the expenditure of at
25 least millions, if not tens of millions of dollars

1 on the part of Nevada, in both federal funds that
2 flowed to Nevada, as well as state appropriated
3 funds.

4 Does that not make a difference?

5 >>MS. SILVIA: I think it's something that
6 the Board could weigh. However, I don't think
7 Nevada has cited any case to support that --

8 >>JUDGE MOORE: Counsel, I would suggest to
9 you that you, as well as every other counsel here,
10 would be hard pressed to find any cases that come
11 close to being this situation.

12 >>MS. SILVIA: I don't think Nevada has cited
13 any cases that suggest that, maybe, you know, it's
14 after a certain amount of expenses or certain
15 difficulties that --xxx

16 >>JUDGE MOORE: How about the very real and
17 practical problem of Nevada being able to get
18 expert witnesses, which is something that we were
19 made aware of back in 2004, in the first
20 challenge, the DOE certification of its LSN
21 collection?

22 >>MS. SILVIA: It sounds as if Nevada had a
23 very real difficulty in obtaining experts,
24 initially, and they were able to do so. So I'm
25 not sure that what Nevada's prevented -- presented

1 so far is convincing that they will not be able to
2 overcome a similar difficulty.

3 >>JUDGE MOORE: Having done it once, they can
4 do it again.

5 >>JUDGE RYERSON: Ms. Silvia, I have a
6 question about your suggestion that we may deny or
7 may grant the motion. You probably heard
8 Mr. Robbins speak, and I thought he was
9 essentially saying we either must deny or we must
10 grant. He was suggesting that we could make,
11 conceivably, a determination that DOE has no
12 discretion to withdraw, and, therefore, would have
13 to deny the motion; or if we don't make that
14 determination, if I understood his position, then
15 it's not our role to second guess the policy
16 judgments that might underlie a decision to
17 withdraw, and we must grant.

18 Now, you're saying, if I hear you, that
19 we may deny or we may grant. And could you
20 elaborate on the basis for that view?

21 >>MS. SILVIA: I think under 2.107, the Board
22 has leeway, and the Commission case law
23 interpreting 2.107 gives the Board substantial
24 leeway in making such decisions.

25 >>JUDGE RYERSON: But you're saying, in the

1 staff's view then, under the Nuclear Waste Policy
2 Act, and specifically 114, which requires the
3 filing of the application -- I don't think there's
4 any question about that -- you're saying that, at
5 least in certain circumstances, DOE does have
6 discretion to move to withdraw. That's the
7 staff's view?

8 >>MS. SILVIA: Correct. The staff's view is
9 that 114(d) does allow DOE to withdraw its
10 application. However, there might be some
11 situation, under 2.107, where, even if DOE has the
12 legal authority, there might be some other
13 consideration that the Board --

14 >>JUDGE RYERSON: Okay. So your view is
15 quite different from Mr. Robbins, then, is that
16 fair to say?

17 >>MS. SILVIA: I believe so.

18 >>JUDGE RYERSON: Okay.

19 >>MS. SILVIA: DOE has argued that the NRC
20 cases addressing with prejudice are inapposite
21 here because those cases involved applicants who
22 opposed dismissal of the application with
23 prejudice, while here the applicant supports it.

24 However, because the with prejudice
25 condition is ordinarily associated with some

1 measure of resolution on the merits, it does not
2 matter whether the with prejudice disposition was
3 sought by the applicant or another party.

4 Moreover, the Nuclear Waste Policy Act
5 is still in effect, and it requires the NRC to
6 consider an application, so if DOE were to submit
7 another application in the future, the NRC would
8 be under a statutory duty to review that
9 application. Therefore, DOE's comparison to the
10 federal civil procedure authority, where a court
11 must grant a plaintiff's motion to --

12 >>JUDGE MOORE: You're talking about
13 submitting an application for a repository at the
14 Yucca Mountain site?

15 >>MS. SILVIA: Correct, Your Honor.

16 >>JUDGE RYERSON: Now, Mr. Malsch dealt with
17 that argument, as I recall, in his presentation to
18 the Court. What's your response to his argument?

19 >>MS. SILVIA: I'm not sure.

20 >>JUDGE RYERSON: His argument is, if I
21 recall it, was that, well, the NRC could still
22 consider a new -- in effect, the second
23 application under the NRC's rules, and applying, I
24 guess, res judicata -- applying the with prejudice
25 rule of the earlier decision, it would be

1 considering it, but it would be denying the second
2 application on that basis.

3 what's your response to that?

4 >>MS. SILVIA: I think if you look at 114(d),
5 and keep reading, it talks about a final decision
6 approving or denying the construction
7 authorization, and I think that that section of
8 114(d) envisions the NRC making a merits
9 determination on the application.

10 So I don't think a ruling on the motion
11 to dismiss in this circumstance would constitute a
12 decision on the merits of the application.

13 >>JUDGE WARDWELL: Doesn't that cut against
14 your very argument that if, what you just recited,
15 Congress was anticipating a decision on the merits
16 approving or disapproving?

17 Doesn't that cut against your argument
18 that a motion to withdraw is in -- is appropriate,
19 under the same section?

20 >>MS. SILVIA: I think in terms of NRC
21 responsibility, the NRC has the responsibility if
22 there's an application before the NRC that DOE
23 wishes to prosecute, NRC has an obligation to
24 issue a decision on the merits of that
25 application.

1 However, if that application is
2 withdrawn, that obligation of the NRC to issue a
3 decision on the merits is similarly withdrawn.

4 >>JUDGE WARDWELL: I'd like to go back to the
5 NEPA issue, if I might, and staff's position on
6 that.

7 Do you see any constraints by Sections
8 114(f)(2) and (3) on DOE's initial EIS that would
9 require you, as an agency, if it did move forward,
10 to require either DOE to amend their EIS, or at a
11 minimum, issue a new ROD in order for you to be
12 able to adopt their EIS, like you had previously?

13 >>MS. SILVIA: I think the NRC's
14 responsibility, with respect to the adoption of
15 the environmental impact statement was with
16 respect to the decision on a construction
17 authorization. So if the DOE's decision is now a
18 discontinuance of the Yucca Mountain project, DOE
19 might have a separate obligation for -- to issue a
20 new ROD to support that. However, because the
21 original environmental impact statement did have
22 the no action alternative, which was considered by
23 the NRC staff when it issued its adoption
24 determination report on the EIS --

25 >>JUDGE WARDWELL: Wasn't that no action

1 alternative created, and the ROD from that
2 generated under considerable restraints for the
3 license application that don't exist for the
4 withdrawal if, in fact, we, for the sake of
5 argument, assume that this is a federal action
6 that requires either a modification of the EIS or
7 a new Rod?

8 >>MS. SILVIA: If that is the circumstance,
9 then I think that is something that is outside the
10 NRC's responsibilities, under Section 114.

11 >>JUDGE WARDWELL: By granting that
12 withdrawal, which you agree, you state we do have
13 the authority to grant the withdrawal, we're doing
14 the same thing as approving an application, and so
15 we're allowing something to move forward by
16 another agency. And don't we, as a separate
17 regulatory agency also have an obligation to meet
18 NEPA under that circumstance?

19 >>MS. SILVIA: I don't think there are any
20 cases that say that one federal agency that has
21 same role in the discontinuance of another
22 agency's application for a project --

23 >>JUDGE WARDWELL: Yeah, but we all agree we
24 can't go to other cases here. I mean, we've got a
25 unique situation where an applicant's required to

1 submit an application and now it's withdrawing it.
2 And the argument comes up that here we -- at a
3 minimum they have to at least to revise their NEPA
4 or amend their NEPA EIS, or at least present a
5 ROD, a revised ROD. And the question is what
6 would you believe your obligations are, exclusive
7 of any statement in the -- we recognize there are
8 no cases like this.

9 >>MS. SILVIA: I don't think that a Board's
10 decision granting a withdrawal would constitute a
11 major federal action that requires the NEPA
12 treatment.

13 However, if, assuming that is not the
14 case, I think the no action alternative does
15 encompass the situation that we're presented with,
16 in terms of the withdrawal.

17 >>JUDGE MOORE: Thank you, Counsel.

18 We will now take a recess luncheon, and
19 recognizing the logistics of this facility, only
20 slightly more remote than Yucca Mountain, as far
21 as restaurants are concerned, we will take an hour
22 and 45 minute luncheon recess, so that you all
23 will be able to get out and get back. So it's
24 now, we'll call it 12:30. We will reconvene in an
25 hour and 45 minutes.

1 (Luncheon recess)

2 A F T E R N O O N S E S S I O N

3 MR. MOORE: We will begin this afternoon by
4 hearing opponents to DOE's motion from the State
5 of Washington.

6 >> MR. FITZ: Good afternoon, Your Honors.
7 My name is Andy Fitz, senior counsel with the
8 Washington Attorney General's Office. I'm also
9 the lead attorney for the State of Washington on
10 matters related today to Hanford Nuclear
11 Reservation.

12 Washington will be the first of seven
13 parties and proposed parties to oppose DOE's
14 motion today. I want to just remind you at the
15 outset that while the opponents share many views
16 and comments, and in my opinion are in lock step
17 on the key issues here, we do represent distinct
18 entities with distinct interests, so we may not
19 agree on each and every single point.

20 I'm going to argue two key things today.

21 First, that under the plain terms of the
22 Nuclear Waste Policy Act, the Nuclear Waste Policy
23 Act process cannot be terminated, short of a
24 determination on the merits.

25 In our view, the best of reading of

1 Section 114 or subsections A and D, is that
2 they -- is that the words under such laws, as
3 applicable to such applications, are conditioned
4 by the words to follow, conditioned by the express
5 exception clause that follows.

6 That express exception clause provides
7 that this Commission, the NRC, shall issue a final
8 decision approving or disapproving of a
9 construction authorization within a time certain.

10 >> JUDGE WARDWELL: : But doesn't DOE
11 have a pretty good argument that if, in fact, the
12 application isn't before the Commission, this is
13 moot?

14 Mr. FITZ: I understand that argument.

15 I understand they are actually arguing
16 two things, and I don't think that they actually
17 fit together.

18 On the one hand, they argue that the
19 withdrawal regulation, 10 CFR 2.107 of the
20 withdrawal regulation, I'll just call it the
21 withdrawal regulation for short, has been
22 incorporated wholesale without any limitations.

23 >>JUDGE MOORE: Might be better to call it
24 107.

25 >> : MR. FITZ: Thank you.

1 So on one hand, they argue that 107 has
2 been incorporated without any limitation, and any
3 withdrawal that would be available to any
4 voluntary applicant would also be available to
5 DOE.

6 On the other hand, they, and also the
7 State of Nevada and the NRC staff, make arguments
8 that, you know, that tend to go toward the words
9 in the "accept clause," that tend to give them
10 some effect.

11 DOE argues that a decision on this
12 pending motion to withdraw will be a decision that
13 approves or disapproves.

14 >>JUDGE WARDWELL: How are they disconnected,
15 though, because it seems as I interpret what they
16 are saying 107, or an authority from DEA, allows
17 them to stop the process at any time, without any
18 other authorization.

19 And therefore, by the time we get to
20 this, there is no need, because it's not before
21 the Commission.

22 >>MR. FITZ: I'll answer that in two parts.

23 First, the way that they are
24 disconnected arguments, in my view, is that if
25 you're going to make the argument that 107 has

1 been incorporated without any limits, then there
2 is no need to give any effect to the words that
3 follow.

4 DOE could submit the application, DOE
5 could withdraw it in the very same motion, and it
6 would make no difference.

7 So, looking at those words that follow
8 concedes that those words have some effect. And
9 when we start looking at those words, and we look
10 at their plain meaning, and we look at the words
11 first in their plain meaning, then we look at it
12 in the larger statutory context, and then you look
13 at it in relation to the legislative history, it's
14 clear to us that those words convey that a final
15 decision will be made saying yes or no, approve or
16 disapprove the authorization, the merits of that
17 authorization. That's consistent with this act.

18 So that's one level.

19 >>JUDGE RYERSON: Suppose, though, suppose
20 there were some major intervening event after the
21 filing of the application. Are there any
22 circumstances under which DOE could withdraw the
23 application, or seek to withdraw the application?
24 For example, an unforeseen major seismic event,
25 within ten miles of Yucca Mountain, what would

1 they do then? what would the appropriate
2 procedure be?

3 >>MR. FITZ: I think there are two
4 appropriate procedures, and yes, I do think that
5 there is that window.

6 Number one, there was reference earlier today
7 to the NRC's reporting to Congress.

8 If there were an event that the
9 Commission felt that it was not ready to act on in
10 terms of approving or disapproving the
11 application, but it wanted Congress to be aware
12 of, it could report that in its Annual Report.

13 The second thing is --

14 >>JUDGE MOORE: It could also just deny the
15 license.

16 >>MR. FITZ: That's what I'm getting at with
17 my second thing.

18 I think that under 107, there is a limited
19 range of withdrawals and dismissals with
20 prejudice, that would be permissible within the
21 language of the act. Those are merits based
22 withdrawals, merits based dismissals.

23 So if it becomes apparent that there is a
24 major seismic event that rules out and renders
25 moot this application, that all the presumptions

1 it's been based on have been shown wrong. I think
2 that would be a merits based circumstance that
3 could allow this proceeding to be acted on under
4 107.

5 But that is not what DOE's presented
6 today, and that's the second point, I'm going to
7 argue. DOE's motion contains nothing about the
8 merits of this application, or the suitability of
9 Yucca Mountain as a repository.

10 Every consideration put forth by DOE was
11 before Congress in 2002, has already been
12 accounted for in the policy decisions, in deciding
13 to first, enact the NWPA, and then limit site
14 authorization to Yucca Mountain, and then
15 ultimately approve Yucca Mountain.

16 And those are choices, that if DOE has an
17 disagreement on, should be taken up with Congress,
18 not played out before this proceeding.

19 >>JUDGE MOORE: And the Court in NEI versus
20 EPA, I think that was the litigation in which all
21 of those same arguments, nearly all of the same
22 arguments that Nevada presented to the Congress,
23 with regard to its veto of the site
24 recommendation, other than the EPA striking the
25 EPA's rule on 10,000 years, did the Court accept

1 any of those other arguments that were run, which
2 is the same litany, I think, you're speaking of?

3 >>MR. FITZ: In my reading of the case, the
4 Court did not retain those arguments. The Court
5 said those arguments were made before DOE, and
6 presented before Congress, considered by Congress,
7 and Congress made the policy choice. That was the
8 end of the matter.

9 I'll provide a roadmap of how I intend
10 to argue, and I recognize that you may not accept
11 this roadmap, and I'll follow your direction, but
12 I first want to provide some background on the
13 Nuclear Policy Act and its history, because I
14 think that's critical, both to looking at the
15 words of the act itself, the context of the act,
16 but also understanding DOE's argument about its
17 AEA authority remaining intact.

18 I then will look at the specific words
19 of sections 114(a) and 114(d), and in doing that I
20 will address the two primary proponent arguments
21 that I see with respect to those words.

22 The first of those arguments, as I mentioned
23 a moment ago, is that 107 has been incorporated
24 without any sort of limitation. The second
25 argument is that even if you look at those words

1 in the "accept that clause" that follows, those
2 words don't have the effect of limiting 107
3 withdrawal authority.

4 I then look at those two interpretations
5 in terms of the statute as a whole, to see which
6 one better fits within that statutory context.
7 And I'll look at those two interpretations, back
8 with respect to the legislative history, to again
9 see which one better fits.

10 >>JUDGE MOORE: Counsel, that is a big menu
11 at 45 minutes.

12 >>MR. FITZ: I'll do my best.

13 I intend to address DOE's AEA argument, and I
14 intend to finally address why DOE's motion fails
15 to present a merits base basis for withdrawing or
16 dismissing of this proceeding with prejudice, and
17 why, even if we were to assume that 107 applies
18 with no limitations, the precedent of this Board
19 would not lead us to a prejudicial dismissal.

20 Your Honors, in 1982 Congress was faced
21 with the question of what we, as a nation, should
22 do with what at that time, was already some 40
23 years of accumulated high level waste and spent
24 nuclear fuel.

25 There have been all kinds of options

1 studied and abated, putting in deep sea bed,
2 shooting into outer space, reprocessing
3 technologies for spent fuel, but there was no
4 definitive direction, there was no policy choice
5 made as to what road to take.

6 And by 1982 Congress had lost patience with
7 that situation, with continued study and debate,
8 and the promise it would lead to a solution. And
9 it was already faced with two failed efforts to
10 site a repository, both of them mentioned today,
11 the one in Kansas, the event in 1971, and the
12 Michigan attempt five years later.

13 Congress specifically singled out that
14 Lyons Kansas attempt as a "Landmark event which
15 would color future repository siting activities
16 through the present day." It had that in mind in
17 enacting this act, and it responded with this act.
18 And the Nuclear Waste Policy Act did two key
19 things.

20 Number one, it settled that policy debate as
21 to what to do with this waste, selected deep
22 geologic disposal as a "Definite federal policy."

23 The second thing it did was to establish
24 in the words of the act, which have been repeated
25 this morning, a schedule for the siting,

1 construction and operation of repositories.

2 And according to that final bill report,
3 the NWPA was based on a series of special
4 commission reports and task force reports --
5 again, the de javu all over again -- that all
6 agreed on the need for legislation to solidify a
7 program and keep it on track, the remarkably
8 prescriptive structure of the NWPA reflects
9 Congress's attempt to solidify the repository
10 program and keep it on track.

11 The structure emphasizes technical
12 evaluation, and does not simply leave the program
13 to the discretion of DOE.

14 >> JUDGE WARDWELL: : But likewise, it
15 does not lead to a repository.

16 >>MR. FITZ: It does not lead to a
17 repository, but it built a process, but even as we
18 play it out to a construction authorization, gives
19 the country the opportunity to utilize repository.

20 >>JUDGE WARDWELL: well, just so you don't
21 run out of time before you address this, I'll ask
22 it now. Two thoughts that come to that are what
23 was discussed early this morning, one deals with
24 the unseemly nature of DOE being forced to -- an
25 application that they have no intention of

1 supporting.

2 And then the second is, looking at the
3 practical merits of this, what would happen if we
4 do, or the Court ends up saying, either way,
5 whether they support or not support a motion to
6 withdraw, will anything ever occur to this.

7 >>JUDGE MOORE: Does it make much sense to
8 fight this battle? You can address both.

9 >>MR. FITZ: I'll do my best.

10 I have three things to cover on that.

11 Number one, it is not unique to this act
12 or this set of circumstances, the administrations,
13 and even individual secretaries can come and go
14 with different perceptions.

15 When Congress enacted the NWPA in 1982,
16 it had a schedule put out to 1995, when it
17 accepted a repository to actually be open.

18 It is a long time frame. Congress
19 expected administrations to come and
20 administrations to go, but it provided a mandate
21 to follow.

22 Congress expected that policy
23 differences might arise, but the place to resolve
24 those is in Congress itself.

25 Second, it is not unusual for executive

1 agencies to follow edicts that they, frankly, at
2 the secretary level, disagree with.

3 There's a recent case, and I apologize
4 because this issue came up this morning and I
5 didn't decide it in my response brief, but
6 Massachusetts v EPA on Greenhouse Gas Emissions.
7 You know, the last administration did not believe
8 that EPA should be regulating greenhouse gas
9 emissions. The courts told it otherwise. The
10 courts told it no, your mandate is to figure out
11 how to address these.

12 So it's certainly not unique here, that
13 an administration may be forced to do something
14 that, frankly, on a policy level, it disagrees
15 with.

16 >>JUDGE MOORE: Counsel, on your roadmap, and
17 I will confess, the number of bills that comprise
18 the legislative history and the number of Senate
19 and House reports and conference reports on them,
20 before the ultimate enactment of what became at
21 '82, the Nuclear Waste Policy Act, is a tad
22 difficult to follow.

23 You, as an exhibit, provided us with, I
24 believe it's House Report 897-471.

25 What was -- in the scheme of the

1 ultimate enactment, where does that act, does this
2 report lie?

3 >>MR. FITZ: My understanding is that's the
4 report on the version that eventually was adopted
5 into the Nuclear Waste Policy Act. So among that
6 myriad of different versions that you see, this is
7 the one that's closest to the mark of what
8 actually found its way into law.

9 >>JUDGE MOORE: So, and I think you may have
10 cited this to us, but when it says the need for
11 legislation to solidify a program and keep it on
12 track, and then it says it is necessary,
13 therefore, to provide close congressional control
14 and public and state participation in the program
15 to assure that the political and programmatic
16 errors of our past experience will not be
17 repeated.

18 It is your position that the legislative
19 history is reflected in the language as the act.
20 And they meant exactly what they were saying, here
21 in the legislative history.

22 >>MR. FITZ: That's what I take from that,
23 looking at the plain words.

24 >>JUDGE MOORE: And ending a legislative
25 schedule for federal decisions and actions for

1 repository development?

2 >>MR. FITZ: Correct.

3 To go back to your question, Judge
4 Wardwell, you asked, you know, this act does not
5 take us through to an actual functioning
6 repository. And what the act does is to prescribe
7 a process to be followed, to get at the point that
8 one is authorized.

9 I think what Congress wanted to do, and
10 I can only expect is at that point, make the final
11 decision on when to move forward. I'm not sure
12 that I agree it's DOE's choice.

13 But the argument, that final step that
14 has not been answered yet, does not excuse any of
15 the intermediate steps. By that argument, DOE
16 could have chosen to not follow a single edict of
17 the NMPA.

18 I'm going to turn to our reading of
19 Section 114, because that's really at the heart of
20 the issue here.

21 >>JUDGE MOORE: One last part of this
22 legislative history. It says -- just before they
23 lay out the programmatic diagram of the steps, the
24 risk that a site which had been considered
25 probably adequate for development could be

1 abandoned.

2 Now, this, of course, all preceded the
3 '87 intervention in the process, where Congress
4 decreed that it would be YUCCA Mountain as the
5 sole site, adequate for development, could be
6 abandoned after significant commitment had been
7 made to the site, is a technically unavoidable
8 aspect of repository development. It is a result
9 of the limit of our ability to know with certainty
10 all the characteristics of a rock formation deep
11 underground until the rock site has been actually
12 excavated and surveyed from the horizon, or level
13 of the repository.

14 Does that tell us that Congress was
15 fully cognizant that there would be reasons, but
16 they only used the words "technically
17 unavoidable," that they were discounting other
18 reasons, looking only at technical reasons why it
19 could not go forward, with regard to '82 it would
20 have been regardless of the site selected.

21 >>MR. FITZ: I would agree with that, and
22 I'll add two other things to reinforce that.

23 Number one, in the words of the statute
24 itself, we had a discussion earlier today about
25 the Section 113 termination authority.

1 There was some question about what
2 unsuitability might mean in that section. I would
3 posit that it means reference back to the
4 suitability criteria adopted, promulgated under
5 Section 112, which are technical criteria.

6 The second thing is that that sentiment
7 of Congress in 1982 was reinforced in 2002, in the
8 bill report cited in that NEI case. Congress
9 again said, we don't know at this point whether
10 this repository, Yucca Mountain, can be licensed,
11 we need to go through that exercise. In fact, it
12 used the words "Continuation of the process."

13 >>JUDGE MOORE: You're talking '87 amendment?

14 >>MR. FITZ: I'm talking in 2002, the
15 approval --

16 >>JUDGE MOORE: The 2000 overrided --

17 >>MR. FITZ: Nevada, exactly. So at that
18 point, Congress recognized it was still not a done
19 deal, but recognized, stated in the interpretation
20 of the DC Circuit, that the process should
21 continue.

22 It also recognized that enough
23 information had been put forward in terms of the
24 suitability determination of the prior Secretary,
25 that it looked like, you know, although we'd not

1 yet gone through the exercise, that this looks
2 like it could be approved.

3 So I think those are key, again, in
4 looking at the Secretary's policy discretion now,
5 and I mean no disrespect to the Secretary
6 whatsoever. But I do take the position that every
7 justification presented in DOE's motion is a
8 disagreement on a policy level with the choices
9 Congress has already made in the NWPA.

10 So I'm going to go back to Section 114
11 and look at the words themselves.

12 Our interpretation is really quite
13 simple, it reads the words in Section 114(a), that
14 upon repository approval DOE shall submit an
15 application to NRC in conjunction with the words
16 in Section 114(d), that the NRC shall consider the
17 application and shall issue a final decision
18 approving or disapproving the issuance of
19 construction authorization.

20 We read those words together to mean
21 that Congress intended that the licensing phase
22 play out on the decision on the merits of DOE's
23 application. Even if the statute does not tell
24 DOE, and after you submit it, you shall prosecute
25 this license application, Congress, of course,

1 intended that result. In order for the NRC to
2 consider the application to give it thought, to
3 cogitate on it, and to say either yes or no,
4 ultimately, to that application, and whether to
5 issue a construction authorization, DOE has to be
6 on hand.

7 >> JUDGE MOORE: : Question, counsel;
8 how does the Commission comply with 114(c)(3), if
9 it grants the DOE's motion?

10 >>MR. FITZ: without having 114, do you see
11 that, the reporting requirement, the annual --

12 >> JUDGE MOORE: : Isn't there a copy
13 on it on the podium?

14 >>MR. FITZ: Yeah, and I've got it. From
15 memory, I believe that's the annual reporting
16 requirement.

17 >>JUDGE MOORE: The last one is any
18 Commission's actions regarding the granting or
19 denial of such authorization.

20 If they grant the motion to withdraw,
21 and that is obviously not a grant, but it is also,
22 obviously, not a denial, the best it could be
23 would be deemed a denial, and I'm not even sure
24 that it could be deemed.

25 So, is not the Commission being put in a

1 bind as to what it reports, if it grants this to
2 Congress? They are not complying -- they have two
3 choices there as well, to grant or deny?

4 >>MR. FITZ: I think it puts the Commission
5 in the position of having to report on nothing.

6 It could provide a report that says we
7 don't have a docketed application in front of us,
8 and this is where I take deference with NRC
9 staff's position. But that would really render
10 that provision useful.

11 >>JUDGE MOORE: But they do have one in front
12 of them. You're saying if they grant the motion
13 they wouldn't have one.

14 >>MR. FITZ: Right, exactly. Exactly.

15 I'm sorry, maybe I misunderstood the
16 premise of the question.

17 >>JUDGE MOORE: No, I'm sorry. That's the
18 most trouble I have with DOE's position.
19 Actually, I don't think -- DOE does make the
20 point, the staff makes the point, that they are
21 required to file it, if we take it away you have
22 complied with your statutory duties, because it
23 metaphysically disappeared, and that's -- I think
24 that is a specious argument.

25 >>MR. FITZ: That is the same problem I have

1 with their position as well. I don't think it
2 gives effect to the words of section 114(d)
3 either.

4 If you no longer have a docketed
5 application in front of you, you have nothing to
6 act on, to approve or disapprove. And by DOE's
7 argument, literally under 107, they could submit
8 the application one day, remove it the next, and
9 never resubmit it, by their choice.

10 You would never have an application to
11 consider. You would never have an application to
12 approve or disapprove. It would render the plain
13 words, not just of section 114(d), but also
14 114(c)(3).

15 >> JUDGE MOORE: : I don't think that
16 is a fair characterization of DOE's position, and
17 I'm sure they will tell us at rebuttal, but they
18 are saying there is a difference, and you're
19 positing the situation, where on day 90, after
20 congressional approval, they fulfilled their
21 obligation and filed the application. And on day
22 91 they withdraw it, and you are stating that's
23 what they could do.

24 DOE's position, I believe, is no, no,
25 no, we're not saying that, per se. Maybe they are

1 and I misunderstood. They are saying that there's
2 been this four year plus period in which they were
3 out of compliance with the law, and that makes a
4 difference.

5 That now their discretion kicks in and
6 surely Congress intended that they should have
7 that discretion, which they had before the
8 enactment of the Nuclear Waste Policy Act in '82,
9 and that discretion under, what I guess is, I
10 believe they said 161 of the Atomic Energy Act, as
11 well as the DOE Authorization Act permits them,
12 independent of the waste Policy Act, to decide not
13 to go forward.

14 >>MR. FITZ: So I think there are two
15 questions there and I will try to answer both.

16 Number one, I think they argued, as I
17 said earlier, two things, both, and not just in
18 the alternative.

19 I think they argue that 107 has been
20 incorporated, without limitation, into this law.
21 And my hypothetical, about the day 91 scenario
22 would be allowable if that are the case. And I'm
23 saying that hypothetical would not meet the letter
24 or the intent of the NWPA. That is a reason to
25 reject it.

1 with respect to the AEA authority, I
2 think that we have 280-degree readings of what the
3 effect of the NWPA reading was on DOE's AEA
4 authority.

5 One reading, this is what's advanced by
6 DOE, is that the NWPA did nothing to revoke that
7 preexisting discretion. All it did was to provide
8 a schedule.

9 The other reading, by Congress looking
10 at the situation and deciding to step in and take
11 over the driver's wheel. Congress was displacing
12 and directing and constraining the discretion of
13 the Secretary.

14 And I believe that that reading isn't
15 more consistent with the letter of the act and the
16 legislative history.

17 Let me give you one example that I think
18 makes this clear. The section 113(c)(3)
19 termination authority. By DOE's reading that
20 would be the one place in the act where perhaps
21 Congress had limited the Secretary's discretion by
22 saying, you can only terminate site
23 characterization activities on a finding of
24 unsuitability, and you have to come back to
25 Congress with a report, including on the need for

1 new legislative authority, et cetera. It's not a
2 wholesale discretion.

3 But if there were any circumstance,
4 where you would expect Congress to let the
5 Secretary act with unfettered discretion, it seems
6 like it would be a circumstance where you found
7 the site to be unsuitable.

8 So rather than reading that as a
9 narrowing down of the Secretary's discretion, I
10 look at it as an express grant, that unless we
11 otherwise tell you, you do not have discretion to
12 pull the plug on this project, except under this
13 one circumstance, based on technical suitability.

14 Two ways to read it.

15 Now, if you were to read it DOE's way,
16 why would Congress narrow the Secretary's
17 discretion in the pre-decisional phase, based on
18 an unsuitability discretion, and yet leave the
19 door wide open, for whatever reason, could be, you
20 know, and we don't need to postulate as to why the
21 secretary would act, just a nontechnical reason to
22 pull the plug, clear up to the day before this
23 Commission renders a decision.

24 It makes no sense. It does not
25 effectuate the purpose of this act, which is to

1 provide a process for building a repository
2 program and keeping it on track.

3 The very heart, returning to our
4 statutory construction argument, with Section
5 114(b). The very heart of it is that the words in
6 the clause, talking about the applicability of
7 laws to applications, are followed by an express
8 "accept that clause."

9 It is not a matter, as DOE suggested
10 earlier today, of reading in some limitation. The
11 limitation is right there in the act.

12 It provides, expressly where Congress
13 has said, you can act under whatever applicable
14 laws there are, whatever they might say or not
15 say, but, you have to issue a final decision
16 approving or disapproving.

17 Those words limit whatever discretion
18 there exists under 107, it's as clear as that.

19 So in a nutshell, your argument, in
20 response to the DOE's 2.107 argument is, it's a
21 simple supremacy clause argument, that the
22 language in the statute trumps the regulation?

23 >>MR. FITZ: Exactly, exactly.

24 And it gets us out of the do loop
25 argument that we had earlier, I believe it makes

1 it clear. And it does preserve that narrow window
2 for potential withdrawal, based on a merits based
3 consideration.

4 >>JUDGE MOORE: Counsel, I don't remember
5 whether your brief relies on Chevron?

6 >>MR. FITZ: We have a footnote that
7 addresses Chevron.

8 >>JUDGE MOORE: Refresh my recollection.

9 >>MR. FITZ: I think we made three arguments.
10 The first clear argument is, the plain words of
11 the statute answer the question, there is no room
12 for Chevron deference here because Congress has
13 spoken. You don't get the Chevron deference if
14 the statute is clear, and it is.

15 We also take the position that this is
16 not just a DOE interpretation, it is also an NRC
17 matter. DOE holds no more position of authority
18 to construe those words than the NRC.

19 >>JUDGE MOORE: But Chevron, step one is, I
20 think, pretty much a standard rule of statutory
21 interpretation, whether or not you are into a
22 deference situation.

23 And it is whether Congress addressed the
24 precise question that is at issue.

25 >>JUDGE MOORE: And we are saying it did, it

1 did with that express "accept that clause."

2 >> JUDGE WARDWELL: : The Congress then
3 said if they had DOE you shall not withdraw your
4 application?

5 >>MR. FITZ: well, Congress also did not
6 anywhere in the legislative history or the statute
7 itself expressly reference 107.

8 You can get into all kinds of
9 hypothetical questions about how far you stretch
10 that applicable laws clause. Does it mean only
11 those regulations that existed when the NHPA was
12 passed, or could the NRC and DOE promulgate some,
13 at the suggestion of DOE, promulgate a later
14 regulation that said you don't need to submit a
15 application, and that would give them the out
16 right there.

17 I think that it is a question of how far
18 you stretch the words of a generic clause
19 incorporating unspecified, quote, laws versus the
20 clear statutory direction that you make a final
21 decision approving or disapproving.

22 >>JUDGE RYERSON: what if the language of the
23 statute were slightly different, what if the
24 statute said: The commission shall consider an
25 application in accordance with the laws,

1 applicable to such applications, and then instead
2 of saying accept that, simply said, moreover, the
3 commission shall issue a final decision approving
4 or disapproving construction authorization within
5 three years; would you argue that that carves out
6 107 as well, if it worked that way? I mean,
7 you're relying -- well, what would your response
8 be if the statute read that way?

9 >>MR. FITZ: I'm sorry, I missed part of your
10 question.

11 JUDGE RYERSON: If you look at 114(d), and if
12 instead of the "accept that language," essentially
13 the first sentence ended with, "In accordance with
14 the laws applicable to such applications."

15 And then the statute continued with a
16 second sentence that said something like,
17 moreover, the Commission shall issue; in other
18 words, there was no accept to that clause, that
19 arguably takes 107 out of the equation. What
20 would your position be then? If 107, in effect,
21 arguably was one of the laws that still applied?

22 >>MR. FITZ: My position would be the same.

23 You get to a same result because it
24 would still be an affront to that next independent
25 sentence to allow withdrawal on a non merits base

1 reason.

2 I think the actual statute that we have
3 in front of us is clearer, because it is in an
4 accept that clause.

5 >> JUDGE MOORE: : I go back to a
6 question I raised earlier today. The reason I
7 asked the question whether this was a policy
8 decision or a political decision.

9 In the Food and Drug Administration
10 versus Brown and Williamson, Tobacco Court. The
11 Court said, in determining whether Congress has --
12 this is the first step in Chevron: In determining
13 whether Congress has specifically addressed the
14 question at issue, the Court should not confine
15 itself to examining a particular statutory
16 provision, isolation rather, must place the
17 provision in context, interpreting the statute to
18 greater symmetrical and coherent statutory scheme.

19 In addition, the meaning of one statute
20 may be effected by other actions. And then the
21 Court said, finally, the Court must be guided to a
22 degree by common sense, as to the manner in which
23 Congress is likely to delegate a policy decision
24 of such economic and political magnitude to an
25 administrative agency.

1 And I was trying to determine if this is
2 a political decision, is that something Congress
3 would give under the Waste Policy Act to DOE or to
4 the NRC?

5 >>MR. FITZ: I think, based on the
6 circumstances under which the NWPA was created,
7 the answer is no. The legislative history is
8 reflecting the fact that Congress was trying to
9 avoid those political pitfalls that had befallen
10 two prior repository efforts. I think the
11 structure of the act as well, where Congress is a
12 constant presence.

13 If Congress just does not step back from
14 this process, those reporting requirements to me
15 are substantive. Yes, it is a procedure to
16 follow, but you are supposed to be conveying
17 substance to Congress, it's supposed kept in the
18 loop. And most startling, it takes the form of
19 the approval process, where DOE, up to the point
20 of recommending to the President can employ an
21 awful lot of discretion, but once it goes past the
22 President, the host states has equal power with
23 the executive to disapprove a site.

24 The Secretary, and even the President,
25 are not the last word on the matter. And Congress

1 reserves for itself the ultimate authority to make
2 that siting decision.

3 And again, when we go back and we look
4 at this construction of how far Congress has
5 reserved DOE's authority in the AEA, it does not
6 make common sense to think that after going
7 through a Congressional approval process, Congress
8 would then wholly rely on the Secretary's whim,
9 and I don't mean that in any pejorative sense, to
10 terminate the a project in the licensing phase.
11 It simply does not make sense.

12 >>JUDGE MOORE: That's the reason the Court,
13 I guess, in NEI versus EPA, kept hounding that it
14 was now a statute and had been decided, because,
15 am I correct that the act, in spelling out the
16 rules for the house to consider Nevada's veto, and
17 the rules for the Senate to consider that Nevada's
18 veto, never spoke that it had to be a statute,
19 just a joint resolution, it never had to go to the
20 President for signature, Congress would have had
21 the last words, so they didn't treat it as if it
22 would be a law.

23 >>MR. FITZ: And I think that that's an
24 unusual circumstance in statute. It's not common
25 that you see that prescriptive approval process

1 spelled out.

2 >>JUDGE MOORE: It is unique to this statute.
3 The legislative history was avoiding all -- and
4 they make no bones about it, avoiding all of the
5 legislative pitfalls that can happen to a piece of
6 legislation.

7 >>MR. FITZ: Right, exactly.

8 >>JUDGE MOORE: So they were taking all of
9 the rules of the Senate and rules of the House out
10 of play.

11 >> : Mr. Fitz: I agree entirely.

12 >>JUDGE MOORE: So --

13 >>MR. FITZ: The other thing it reflects --
14 I'm sorry.

15 >> JUDGE MOORE: : I'm just curious,
16 how did it happen that that joint resolution,
17 which has been presented to the President for
18 signature and became a law, as opposed to just a
19 joint resolution of Congress? I'm just curious,
20 because what you just said made it all suddenly
21 make sense.

22 Those provisions never intended for it to be
23 a law.

24 >>MR. FITZ: I think it's Congress taking the
25 ultimate role of the siting approval

1 authority. Congress took the authority that the
2 Secretary otherwise would ordinarily employ under
3 the AEA. And once Congress did that, I really
4 view it is almost more of a ministerial task to
5 move forward with the licensing process. And I
6 don't mean to diminish the technical discourse
7 that occurs between DOE and the NRC staff. But,
8 you know, fundamentally, DOE is not like any other
9 applicant here. It is carrying not DOE's
10 application, not an application that it decided
11 would be a good idea, it is carrying an
12 application that Congress wanted carried forward
13 in the public interest.

14 DOE is the messenger, it's the vehicle
15 through which this application is being carried
16 forward. Congress But congress did not bless DOE
17 with the discretion now, at this point in the
18 process, after the site has been approved, to
19 exercise discretion under the AEA, to decide it is
20 a bad idea.

21 The one window Congress has given is
22 for this application to fall on the technical
23 merits, that could be in an ultimate determination
24 on the merits, or if there's some horrific example
25 that shows unsuitability tomorrow, be it a seismic

1 event, suddenly realizing there is going to be a
2 flood in a hundred years, I don't know. You know,
3 it seems like that would provide an opportunity,
4 through 107, potentially, as a channel, to dismiss
5 the proceeding, but it would be a merits based
6 reason, and that is the end of the story.

7 >>JUDGE MOORE: I'm still puzzled why, if
8 you could make that exception, why DOE is not
9 correct, because, it would seem to me that if the
10 statute says what it means and means what it says.

11 The phrase often used by courts in statutory
12 interpretation, that the only remedy is in the event of
13 a catastrophic event, DOE notifies the NRC that it has
14 happened, and the NRC denies the application. That
15 never stops DOE from fixing it or/and later reapplying,
16 or says hold up, we have a major issue to study that
17 may effect -- that is a safety issue, that needs to be
18 resolved before we could move forward.

19 It strikes me that DOE may be right, if you're willing
20 to say that some event could occur, that legitimately
21 under the statute would allow DOE to withdraw its
22 application, because I see no exception in the statute
23 for that, therefore, if the Secretary has that
24 discretion in the event of a catastrophic event, why
25 doesn't he have it less than that, because none of

1 those words are in the statute.

2 >>MR. FITZ: It makes sense in my read,
3 because as I'm envisioning this type of situation,
4 this hypothetical, it would result in a
5 merits-based determination that is a disapproval,
6 in other words, it's almost a summary
7 determination.

8 >>JUDGE MOORE: Would DOE be doing that or
9 would the NRC be doing that?

10 >>MR. FITZ: I think it could be either.

11 I think it could be DOE coming to the
12 NRC and saying, we believe this is the
13 circumstance, and that's really the way I saw it
14 playing out.

15 Given the role of the NRC staff, I think
16 that's one avenue, also. But, it is not the only
17 way, as I mentioned earlier. I think that if the
18 NRC were hesitant to take that stuff, the report
19 to Congress would be another vehicle to provide
20 that information.

21 >> JUDGE WARDWELL: : Was it your
22 position that DOE could not just unilaterally
23 withdraw the application based on that, it would
24 have to either go through NRC or Congress, to
25 achieve it?

1 >>MR. FITZ: Correct.

2 And I know I'm short on time here, but
3 the point I want to make about DOE's motion today
4 is that is not the kind of circumstance they
5 presented.

6 I have looked very hard at everything
7 they have written, and I have seen no indication
8 of anything that goes to suitability of the Yucca
9 Mountain or this application.

10 >> JUDGE MOORE: : What does
11 suitability mean?

12 >>MR. FITZ: That is a great question,
13 actually. In my mind, I think, it's something
14 going to the merits of the application, something
15 that they now realize is wrong. Incorrect
16 information or some information that shows that it
17 is not going to be protective application that is
18 not protective under 10 CFR 63, for instance. But
19 when I look at the circumstances laid out in their
20 reply, mostly, and I want to make the point, and
21 we made this point in our response, that in our
22 view, under this Court's precedent, DOE was
23 beholden as the moving party seeking the
24 prejudicial sanction on itself, to put that forth
25 in an evidentiary form, to answer to that, and we

1 didn't see them doing that.

2 But when you look at considerations like
3 dry cask storage, and the success of WHIP, and the
4 fact there may be better alternatives, none of
5 those things -- DOE never connects the dot as to
6 why it mandates this application to be dismissed
7 in a prejudicial fashion.

8 Never, and I've looked hard.

9 And with respect to spent nuclear fuel
10 issues, from what I understand, a repository is
11 still going to be needed, even if you have
12 reprocessing technology.

13 >>JUDGE MOORE: Accept for the moment the
14 grant of the motion. Now, with respect to the
15 prejudiced without prejudice.

16 DOE even under existing agency
17 precedence, arguably has not made a case for it to
18 be dismissed with prejudice.

19 Nevada on the other hand has come forth
20 how it would be severely prejudiced if the
21 withdrawal is not with prejudice.

22 The staff, because of what is said in
23 one of the agency old appeal board decisions, said
24 that the request need comes from -- and did in
25 that case, come from -- I'm sorry, I may be

1 mistaken on that -- needs to come from the movant,
2 but if the movant fails to make the case, why
3 can't Nevada's prejudice suffice as a party, so
4 that it is dismissed with prejudice?

5 >>MR. FITZ: well, Nevada's prejudice, at
6 first accepting -- and I'm not going to except for
7 the sake of argument -- well, excepting for the
8 sake of argument for the moment, that Nevada would
9 suffer that prejudice, it is only going to result
10 if the motion to withdraw is granted.

11 Obviously if the motion is not granted
12 that prejudice would not be suffered. So that is
13 my first response.

14 Second response is, you know, I hate to refer
15 to other litigation, but we brought a preliminary
16 junction motion with evidence that DOE was
17 descoping its side of the Yucca Mountain project,
18 people. Have moved for Las Vegas taking other
19 jobs, selling their homes.

20 Those are irreplaceable resources in the
21 same sense, I think, as what Nevada is positing,
22 and I have sympathy for Nevada, I've been in that
23 position, I've looked for experts, and those are
24 real circumstances.

25 But the DC Circuit did not grant our PI

1 motion based specifically on not showing
2 irreparable harm. The fact is, you know, if there
3 is --

4 >>JUDGE MOORE: But is that comparable? Is
5 the decision of whether to grant or deny
6 application with or without prejudice depending on
7 a showing of irreparable harm?

8 >>MR. FITZ: It is a showing of harm under
9 this Board's precedence. But what this Board has
10 also done is to balance, its first NRC staff
11 pointed out, made the declaration already in
12 precedent that, simply having to re-litigate an
13 application is not sufficient for harm. And I
14 recognize this is not your typical application.

15 But you add on to that the fact that the
16 Board has taken -- allowed itself to take into
17 consideration public interest factors. And the
18 same factors that led the Board to say that
19 relitigating an application is not enough to, you
20 know, allow prejudicial sanctions, is amplified
21 here.

22 We are in the one location ever to get
23 this far in the process.

24 And we have no guarantee whatsoever that
25 any other repository site is going to get this far

1 in the process. There is no legal mechanism in
2 place.

3 And the same non-merits based
4 considerations that are at play here, I think I
5 can comfortably predict, they will play themselves
6 out with any other location.

7 So to foreclose this is against the
8 public interest.

9 And I recognize Nevada's legitimate
10 concern, but under what this Board has already
11 said, I don't believe that that rises to the level
12 of overriding the public interest in maintaining
13 the flexibility of a potential repository site.
14 It's been approved by Congress.

15 >>JUDGE MOORE: Actually, the appeal board
16 case that the public interest demands that it not
17 be with prejudice?

18 >>MR. FITZ: There was the Puerto Rico case.

19 JUDGE RYERSON: If I recall, your brief does
20 not deal with any of the NEPA issues; is that
21 correct?

22 >>MR. FITZ: We did not address them before
23 this Board because we felt that, really, they were
24 potentially beyond the jurisdiction, but I'm happy
25 to answer any questions you might have.

1 >> JUDGE RYERSON: That was basically my
2 question, what is your position as to whether we
3 have jurisdiction to adjudicate NEPA issues and
4 whether you have a view on it.

5 >>MR. FITZ: I think you have jurisdiction to
6 adjudicate NEPA issues as they go to the NRC. One
7 of our concerns is that, to the extent DOE relies
8 upon the Yucca Mountain final EIS in its
9 supplement, and the no-action alternative, DOE has
10 not adopted that in a rod, which its own CFR NEPA
11 regulations would require.

12 So we don't see that they have actually
13 employed that EIS, as the justification of taking
14 a different course. But that's an argument.

15 JUDGE RYERSON: You're unclear as to whether
16 we have jurisdiction to consider that?

17 >>MR. FITZ: Correct. I think that there are
18 aspects of DOE's decision to terminate this
19 project that go beyond the strict license
20 application, and that this Board may not have
21 jurisdiction on.

22 >> JUDGE WARDWELL: : The Commission was
23 responsible for dealing with the NEPA issues
24 associated with the application itself, and has to
25 deal with them, and has to deal with EIS. And the

1 way it was done of course was it adopted DOEs,
2 EIS.

3 why wouldn't a similar situation occur,
4 if one assumes that this DOEs is a federal action
5 warranting either a review of an amendment to
6 their EIS, because of restrictions in the Waste
7 Policy Act, regarding what was looked at for their
8 EIS.

9 But if one takes a -- if one assumes for
10 the sake of argument that this is a major federal
11 action and withdrawal of this by DOE, doesn't NRC
12 have to follow suit also, before it can -- because
13 if it grants the motion to deny, it is allowing
14 something to go forward that requires a NEPA
15 review, and doesn't NRC, by default, also have to
16 address the EIS, the same way it does for the
17 granting of our review on the application?

18 >>MR. FITZ: It is a great question and I
19 wish I could provide an easy answer.

20 I actually was thinking about that
21 question quite a bit over the lunch break and I am
22 simply not in a position right now to --

23 >>JUDGE MOORE: It's not in your brief, so
24 really, yeah.

25 >>MR. FITZ: I just don't want to say

1 something that I might wish I hadn't said later.

2 >>JUDGE MOORE: The staff's regulations --
3 the Commission's regulations, with regard to NEPA
4 contentions are unique, and because of the
5 statutory scheme that says that DOE, as the
6 applicant, does the EIS, and the agency just
7 determines whether it's adequate or needs
8 supplementation. And so the Commission's
9 regulations, because of that statutory scheme,
10 provides that the determination, as far as being
11 able to challenge what the staff has done, is
12 whether or not the staff's acceptance was
13 appropriate.

14 If DOE's record of decision which, as Mr. Malsch
15 correctly points out, is a matter of DOE's
16 environmental regulations, does not -- is no longer
17 supported by its EIS. Does that problem flow into what
18 the NRC staff can or can't do respecting challenges to
19 its action in accepting that EIS?

20 >>MR. FITZ: If I've followed your question I
21 think the answer is no. What I see having
22 happened here is what we in Washington view as DOE
23 deciding to terminate, not just this license
24 application but a larger program.

25 We believe that is a major federal

1 action significantly affecting the environment
2 that required EIS support. And we have not seen
3 DOE come out with a rod that adopts any NEPA
4 support in that regard.

5 Now, does that affect the fact that DOE
6 has presented the FEIS in supplements to support
7 its application, and that the staff can rely on
8 that? I'm not sure that it does affect that.
9 Maybe there is an implication there but, again,
10 going back to some of the nonmerits-based approach
11 to this motion, I don't see DOE saying we
12 discovered new information that puts the EIS in
13 question. So I think the EIS is probably still
14 there to be relied upon.

15 That's my sense.

16 You know, Judge Wardwell, I wanted to go
17 back to something that I was thinking of earlier
18 today when you were asking questions about the
19 statutory provision that basically narrows down
20 the scope of that EIS.

21 I would take that as another indication
22 in the statute that the Secretary's discretion has
23 been constrained. In other words, the Secretary
24 was directed to do a NEPA process that basically
25 assumes only Yucca Mountain or no national

1 alternative. That NEPA basis really isn't
2 sufficient to support a termination decision, or
3 at least there is no allowance made for looking at
4 other alternatives.

5 I think it is another indication of the
6 statutory framework that is consistent with our
7 interpretation.

8 >>JUDGE MOORE: Do you have anything to wrap
9 up with, counsel?

10 >>MR. FITZ: I will just add this.

11 There is, obviously, the Secretary has
12 disagreed with policy choices made in the NWPA.
13 The proper place for those policies to be carried
14 out is before Congress.

15 The only question before this Board,
16 really, is a legal question of whether a basis for
17 withdrawal that gets to the merits of an approval
18 or disapproval has been presented before you, and
19 it has not.

20 I understand that this motion creates a
21 difficult circumstance for this Board, but the
22 decision is not difficult.

23 The law mandates that you dismiss the
24 motion, that you deny the motion.

25 Thank you.

1 >> JUDGE MOORE: : We will take a very
2 brief ten minutes recess and reconvene at 3:25.

3 (Recess taken)

4 >> JUDGE MOORE: we will now hear from
5 counsel for South Carolina.

6 >>MR. KESKEY: I believe on the schedule, the
7 next speaker is Don Keskey, who -- that is who I
8 am.

9 >> : JUDGE MOORE: I apologize,
10 counsel. I was going by what the law clerks put
11 in front of me, and perhaps I didn't pay attention
12 to the final, as I should.

13 Please proceed.

14 >>MR. KESKEY: Yes, Your Honors. We will
15 speak briefly about primarily the Chevron doctrine
16 and background and the situation.

17 But we will preliminarily note that we
18 agree with those parties that would claim that DOE
19 does not have the authority nor the discretion
20 either with or without prejudice.

21 First of all, the withdrawal motion is
22 not consistent with the plain language and the
23 purposes and the objectives of Congress as clearly
24 stated in the Nuclear Waste Policy Act and as
25 reinforced by that act with the adoption of a

1 standard contract between nuclear roll.

2 Both the NMPA and the standard contract
3 clearly requires a multi-step process of
4 prescriptive approach, a multi-step approach to
5 obtain a repository, and also for the
6 characterization of Yucca Mountain site as the
7 first repository to be studied.

8 We are well into that process, after
9 some 20 or 30 years and over 8 or 10 billion
10 dollars worth of effort, because we have now gone
11 through the amendments of 1987, we've gone through
12 the site selection by the Secretary, the approval
13 by the President, the approval by Congress
14 overriding Nevada's veto, and the actual
15 submission of a very comprehensive license
16 application, exactly two years ago today, by the
17 DOE.

18 Now, we have heard nothing in the
19 pleadings or in the briefing, or in the motion,
20 that there is something wrong with the license
21 application.

22 It has been docketed by this Commission,
23 it has been reviewed preliminary by the NRC staff.
24 There has been no explanation of an unexpected
25 event or a scientific problem, that would serve as

1 a basis for changing the decision as to going
2 forward on the license application.

3 Now, Your Honors, at this point in time
4 what we have is the filed application and this
5 Secretary's duty is now to progress that
6 application through to a final decision on the
7 merits, either up or down.

8 That is the only discretion that exists,
9 and, in fact, we would say that it's not really
10 discretionary, it's really more ministerial.

11 Now, we would suggest that it is highly
12 counter-intuitive for the Secretary to withdraw
13 the license application, and thereby attempt to
14 retroactively reverse all of the steps required by
15 the NMPA and the standard contract up to now, and
16 in fact to even take the additional step of trying
17 to bar the Yucca Mountain as a feature site by
18 asking for this procedure to be withdrawn with
19 prejudice.

20 How can that one secret decision, made
21 with no explanation and no rationale, and no
22 process by the new DOE secretary, override the
23 policy and the intent of Congress in the NMPA, and
24 all the steps that have been accomplished up to
25 now by both the executive and the legislative

1 branch.

2 Now, Your Honors, we would also assert
3 that DOE cannot rely on a Chevron doctrine. It
4 simply does not apply here. There is no explained
5 gap in the statute, there is no policy gap.

6 As I said, there is no rationale
7 provided, no process, no inquiry, no comments, no
8 formal decision by the Secretary explaining the
9 reasons why he would seek to withdraw the
10 application, no ability for the nation to input on
11 that proposed decision. And there is no basis to
12 understand why the Secretary has done this,
13 relative to any kind of a merits-based approach
14 rather than a political approach.

15 Now, Judge Moore, you've wisely quoted
16 Yogi Berra, *deja vu* all over again. We have been
17 through this Chevron argument before. Back in
18 1993 and 1994, the DOE started changing its
19 position.

20 And as the states and utilities and the
21 rate payers were paying billions of dollars into
22 the nuclear waste fund, they were raising the
23 question as to performance under the contract, as
24 mandated by both the statute and by the standard
25 contract.

1 The responses that were coming back
2 were, we sort of believe that we no longer have an
3 obligation to start disposing spent nuclear fuel
4 by 1998 because we have no repository in place.

5 Then the DOE started a notice of
6 inquiry, a formal process, to put forth that
7 interpretation for comment. And after over a
8 thousand comments were filed, they issued in 1995
9 a formal interpretation that that was their
10 interpretation of the statute.

11 They had no obligation to start
12 disposing of spent nuclear fuel until a repository
13 was in place. And of course, they omitted largely
14 the fact that they had a lot to do with the
15 obligation to obtain a repository, by timely
16 action, under the NWPA.

17 So in effect, the agency citing and
18 relying on Chevron tried to so-called fill the
19 statutory gap, the policy gap, and absolve itself
20 of the responsibility under the statute and the
21 standard contract, to start disposing of spent
22 fuel, and they have a program that accomplishes
23 that.

24 Well, that was appealed to the Courts,
25 and the clerk in I&M Power in 1996 reversed the

1 DOE's interpretation, rejected outright the
2 rationale of the agency based on Chevron, based on
3 the first part of the analysis, they didn't have
4 to go through the factor analysis of Chevron under
5 the first step of Chevron they said that the DOE
6 interpretation was contrary to the plain language
7 and the purposes of the NWPA.

8 Now, thereafter, the DOE did not comply
9 with the Court's order I&M, and the parties
10 started asking DOE again as to what they were
11 going to do to comply.

12 That resulted in petitions from
13 mandamus, the U.S. Court of Appeals in the DC
14 Circuit, resulting in the 1997 of decision of
15 Northern States Power, which case reaffirmed all
16 of the holdings and findings of the I&M power
17 case, including the Chevron rejection, and issued
18 a partial mandamus against the DOE for their
19 failure to comply with the statute.

20 Now, that's 13 years ago.

21 >> >>JUDGE MOORE: : Counsel, without
22 -- perhaps I should not ask this question at this
23 particular time but, should this Board decide that
24 DOE does not have the authority under the Waste
25 Policy Act to withdraw, what mechanism does the

1 NRC have to ensure that DOE would prosecute its
2 application?

3 And I ask that question because the
4 normal case is you have a volunteer in front of us
5 who wants a license application, and so they have
6 every incentive to comply with Commission orders
7 and directions and request.

8 Here you have an involuntary applicant,
9 so to speak, under the statute, who, if it has the
10 discretion -- who, if we say they don't have the
11 authority under the act to do what they did, they
12 can just ignore it, and there is not a thing in
13 the world this agency can do about it.

14 Is that not the case?

15 >>MR. KESKEY: No, that's not the case.

16 >>JUDGE MOORE: What is the case?

17 >>MR. KESKEY: Well, I would suggest, first
18 of all --

19 >>JUDGE MOORE: You can deny the application,
20 which is -- that strikes me as very, very rabid,
21 throw me in the deep blue sea, don't throw me in
22 the briar patch.

23 >>MR. KESKEY: I would think that you might
24 look at what the courts did in I&M and Northern
25 States Power, and they recognized that there was

1 not going to be a repository finished by 1998, but
2 they still enforced and followed the statute.

3 Then, there are other remedies that
4 follow.

5 I would suggest that this agency, given
6 its independent authority to ensure public health
7 safety in an environmental respect to nuclear
8 power and nuclear waste, along with its specific
9 duties it's supposed to perform under the NWPA, is
10 faced with a similar situation.

11 You have a duty to enforce the rules and
12 purposes of the Atomic Energy Act as well as the
13 NWPA, and so, therefore, you have to come as close
14 as you can with the terms and conditions that you
15 would place in your order of denial. It may be a
16 denial of a motion with a temporary suspension.

17 >>JUDGE MOORE: How can this Board, in light
18 of what the Commission did in ordering us to go
19 forward, and not await on the Court, which has the
20 full power not only to decide but to enforce its
21 order, and carries with it all of the history of
22 the executive obeying the courts. This Board has
23 none of that. This agency has none of that. And
24 it's further complicated by the fact that it is a
25 federal department, not a private entity.

1 >>MR. KESKEY: Well, I believe that the NRC
2 reversing their other order and sending it back
3 here for this proceeding does not, or should not
4 necessarily be interpreted as foreclosing their
5 interest, and certainly the nation's interest, in
6 having you wrestle, in the most honest and
7 forthright way you can, to make this agency and
8 DOE comply with the NHPA and Atomic Energy Act
9 and, therefore, have terms and conditions that
10 would come closest to accomplishing that.

11 Yes, there may be some more delays, but
12 what kind of remedies would come closest to
13 holding the statutory intent of Congress and the
14 statute in place, so that it is not destroyed by
15 some secret decision by a new energy secretary who
16 has provided no process or no rationale.

17 I would think that you can look at terms
18 on whether they have complied with NEPA, whether
19 they have made all the steps, whether they are --
20 they should re-notice this and conduct a formal
21 inquiry before they can proceed, that there be
22 steps to really protect the public interest here
23 and the preservation of the statute.

24 Now, there have been some suggestions
25 here today, almost that, well, we should just let

1 Congress decide this again.

2 why does Congress, who passed the
3 statute in 1982 that had time lines and safeguards
4 and schedules clearly getting to an end result, if
5 possible, and that is the proper and safe disposal
6 of S&F. why would Congress be placed in a
7 position of having to repeat itself.

8 >> : JUDGE MOORE: well, in effect,
9 they're there every year in the appropriation
10 process; are they not?

11 >> : MR. KESKEY: They are, although
12 appropriations are an annual kind of thing,
13 oftentimes really should not be interpreted as
14 changing an inventory policy-making statute.

15 >>JUDGE MOORE: But once you turn off the
16 spigot, and there is no money or if the spigot is
17 just dripping instead of flowing, that's the
18 annual, that's the way it works, isn't it?

19 >>MR. KESKEY: Yes, and I'm not asking you to
20 ignore the practicalities of no budget and nobody
21 can work on the case.

22 I do think there are alternatives to
23 bridge that gap so that you comply with the NWPA,
24 the standard contract, and the Atomic Energy Act,
25 and bridge the gap during that period of problem,

1 which, hopefully, will be temporary.

2 So you come closest to doing what the
3 Congress intended and achieving the goals of this
4 program.

5 >>JUDGE MOORE: You made the suggestion, what
6 are the specifics? How on earth can this Board,
7 with no enforcement power, other than to give DOE
8 its wishes, which would be the normal case for the
9 norm, normal applicant. The ultimate sanction,
10 under the regulation, from a applicant who
11 continues to fail to comply, for any party, if it
12 is an applicant deny the application, if it is
13 another party, dismiss them from the proceeding.

14 That does not work here.

15 >>MR. KESKEY: I believe you can look at
16 denying the application, providing from some
17 temporary time period of suspension of the
18 proceedings, until there is more clarity with the
19 appropriations. Perhaps requiring DOE to conduct
20 some kind of a proceeding to explain itself.

21 JUDGE MOORE: We have no authority to either
22 order it or enforce it.

23 >> : MR. KESKEY: well, I think you
24 have the authority to look at the motion and
25 determine whether you think it is adequate or not?

1 >>JUDGE MOORE: That we can do. But
2 interpreted as a practical matter, until the Court
3 acts, it's going to stay in limbo.

4 >>MR. KESKEY: Yes, but whatever decision you
5 make, I think that should not be a reason why you
6 grant the DOE's motion. I think the overriding
7 concept must be how do you comply with the
8 statutes, protect the public interest, and
9 remember, there is an entire nation out there
10 that's had huge reliance on the Nuclear Waste
11 Policy Act, and on the standard contract, because
12 of all the waste that is stored all over the
13 United States. Sites were never studied or
14 intended to be long term or potentially, permanent
15 waste disposal sites.

16 >> JUDGE WARDWELL: : In your limited
17 time remaining, would you like to comment on why
18 you think this is a major federal action that
19 requires review by DOE of NEPA, and why that, in
20 turn, affects NRC, whatsoever?

21 >>MR. KESKEY: Yes, thank you, Judge
22 Wardwell.

23 First of all, this is a major action
24 that changes the status quo. Right now we've been
25 under this Congressional framework of moving

1 towards step by step --

2 >> JUDGE WARDWELL: : That is a paper
3 status quo, it's not a physical status quo,
4 there's nothing out there.

5 >>MR. KESKEY: well, when the states and
6 utilities first sued the DOE, the first time they
7 started to cite characterization.

8 So there has been 8 or 10 billion
9 dollars worth of effort in Yucca Mountain, to
10 characterize the site. We're beyond that stage.

11 So now we are in the actual licensing
12 stage, and so now, with all that reliance, and all
13 the history, this is a major action.

14 Yes, as the other side would say, there
15 is no guarantee that Yucca Mountain would
16 ultimately happen because maybe you would deny
17 someday the license application.

18 >> JUDGE WARDWELL: : Or Congress not
19 fund it, or Congress not eventually approve it, or
20 they may not get the other licenses they need,
21 other regulatory bodies?

22 >>MR. KESKEY: That could be, but as long as
23 the progress is being made, and there's
24 likelihood, or even a substantial possibility,
25 that the license application would be granted,

1 then is the time to get the appropriations to do
2 the railroad, et cetera, and you're making
3 progress.

4 But this decision puts certainty to the
5 end of the entire program, so the repository
6 policy of Congress, by the unexplained decision of
7 one person, or perhaps two people. And the point
8 is, that's a major action, changes the status quo,
9 because we no longer have all that.

10 what changes then is that all of the
11 sites where the waste is presently situated by
12 default, by no action, become nuclear waste sites.

13 >> JUDGE WARDWELL: : Maybe you would
14 site any other case where NEPA evaluation was
15 required, when someone abandoned studies from a
16 potential project, merely studies?

17 well, conceptually, the Lock case had
18 some similarities, but as has been said here
19 today, this is really a unique case extraordinary,
20 and finding other cases about fish or timber
21 really does not do justice to what we are facing
22 here.

23 The reality is here, the examples
24 applied to Prairie Island Indian Community. The
25 casks are only there because the state and

1 community relied on this Nuclear waste Policy Act
2 and a standard contract that this would be
3 temporary.

4 Then, when the utility went in for a
5 license extension, the promise was still made, and
6 the site grew bigger and bigger. And now they go
7 in for a license extension, so now there will be a
8 hundred casks sitting on that site within that
9 time frame, located 600-yards from the Mississippi
10 River, very close or virtually within the flood
11 plain, and only 600 yards from the residence of
12 the community.

13 Now, by default, if you would take away
14 the nuclear waste solution or the prospect of a
15 solution, as provided by Congress, you are
16 condemning that waste to sit there for decades, if
17 not hundreds of years, and there are no studies
18 done by anyone that that site is suitable for that
19 many casks in that location for that period of
20 time without a substantial risk of harm to the
21 public health, safety, welfare, the environment,
22 not only that which is substantial, but huge
23 financial risks including, the Prairie Island
24 Community, and all the other host localities
25 around the country.

1 And you have to keep your eye on the
2 bigger picture. The policy of what Congress sets,
3 and I think this bears in your question, too, when
4 you would mentioned the unwilling applicant.

5 Through the long history of this
6 program, there has been changes back and forth
7 between willing applicant and an unwilling
8 applicant, so to speak.

9 In other words, those who progress the
10 program and those who delay it. The politics went
11 back and forth.

12 Despite all that, and after a lot of
13 delay, we do finally have a license application,
14 and a fairly good one, filed before this agency.

15 One of the things that should be done is
16 to ensure that the national policy is upheld and
17 that we don't have temporary whims and changes of
18 policy and no continuity and no reasoning for when
19 major steps occur or don't occur to ensure proper
20 disposal of spent fuel.

21 We have to look at the bigger picture
22 and hold the statute together, unless Congress
23 changes them. We have to do our best to put terms
24 and conditions together to bridge a gap in the
25 temporary problem of appropriations, and changes

1 in personnel, and do our best to make it work.
2 It's not going to be perfect. But at least, we
3 have a program still on the loom.

4 If maybe you would grant this
5 application to withdraw license application, what
6 is left of the Nuclear waste Policy Act? The only
7 thing that's left is DOE's position that they
8 should still collect from the rate payers all of
9 the fees that they collected, as if they had
10 performed under the statute and under the
11 contract, forever.

12 Now, I know this body does not get into
13 contracts dealing with those fees as much as other
14 bodies, but, how can one motion of nine pages,
15 written by an outside counsel, without an
16 affidavit from the Secretary, without a process
17 from the Secretary, override this entire structure
18 of Congress, this entire history, the standard
19 contract, the unconditional obligation set by the
20 courts and I&M power and Northern States Power,
21 that they have an obligation to start disposing of
22 spent nuclear fuel.

23 They will be unable to have the
24 prospects of complying with those final
25 unappealable court orders, and interpretations of

1 the statute, if the motion is granted.

2 They have no ability to dispose of spent
3 nuclear fuel. And the country is left bereft,
4 with no program. And so, Your Honor, the impact
5 on the Prairie Island Indian community, and any
6 other host community or state, and the nation, is
7 what's of overriding importance.

8 The status question has changed. It is
9 a major action. By granting this, you are not
10 requiring the DOE to take the required hard look
11 at what the environmental impacts are under the
12 National Environmental Policy Act, of their
13 default on any one of the now new default waste
14 sites.

15 They have not studied that, they have
16 not done any EIS on that, and yet, that is their
17 preferred option.

18 So first, NEPA applies, and they have
19 not complied with that, and that's one of the
20 things you can do to bridge the gap, is require
21 that they first comply with NEPA and some of these
22 other requirements.

23 Thank you, Your Honor.

24 >>JUDGE MOORE: We've will now hear from
25 Aiken County.

1 >> : MR. GOTTSBALL: Good afternoon,
2 Tom Gottshall. Let me just take a moment to say
3 what Aiken County's involvement is.

4 Aiken County is the location of the
5 Savannah River site that comprises about ten
6 percent of the County. The Savannah River site is
7 the temporary repository of high level radioactive
8 waste, and it is one of the five DOE identified
9 sites in the country, that would have widespread
10 contamination, if the Yucca Mountain project were
11 not built.

12 I'm not saying, of course, the end of
13 this process results in Yucca Mountain, but this
14 is a process that we are talking about.

15 It seems to us that you ought to deny
16 this request to withdraw the application.

17 DOE really is asking the Board and the
18 NRC to abdicate their waiting duty to render a
19 final decision, including or disapproving the
20 repository construction application, on its
21 technical merits.

22 So here, and Judge Moore, I would like
23 to direct this to you, because you asked a
24 question of Mr. Fitz, and I think we would part
25 company with him slightly here, because we would

1 say, come hell or high water, or seismic event,
2 the obligation to assess this application belongs
3 to the NRC, and they have a duty to perform with
4 it, and if that event occurred, then you would
5 have to deal with that in the context of reviewing
6 this application, and approving or disapproving.

7 I want to --

8 >>JUDGE MOORE: Or, while you're on that
9 subject, the construction permit is one stop on
10 the bus line.

11 >> : MR. GOTTSHALL: Correct.

12 >> : JUDGE MOORE: There still comes a
13 possession received, receive and possess
14 application and license, an operating license and
15 a closure.

16 So, as I understand it, there are four
17 steps to the NRC's process, any one of which could
18 deny and keep from the repository from opening; is
19 that accurate?

20 >> : MR. GOTTSHALL: First, this
21 process that you're dealing with right now could
22 result in a disapproval. And that certainly is a
23 possibility.

24 We think the process that has been
25 decided on by Congress, we have already heard the

1 history concerning that, and so we believe that
2 your obligation is to see that process through,
3 and if you find that to be the case, then you
4 would disapprove this, after having seen the
5 technical information.

6 >>JUDGE MOORE: Am I correct, that after the
7 site process under 113, there is no provision in
8 the act, other than reported to Congress, which
9 was required, if DOE had found unsuitable a site?
10 Was there a process that DOE was to follow after
11 having found the site under 113 unsuitable?

12 >> MR. GOTTSHALL: I'm not sure. The
13 situation that you find yourself in now is having
14 to work through this process of considering and
15 rendering a final decision.

16 You used the word "considering," and
17 then "rendering a final decision," so there is no
18 way out at this point from the process, if that is
19 the question you ask.

20 Now, they could bring to you technical
21 information, which might lead you to a conclusion
22 more quickly than otherwise, with respect to this
23 being disapproved, but otherwise, we don't think
24 there is an out at this point.

25 I wanted to address the word "consider"

1 in 114(d), which does say, as pointed out earlier,
2 the Commission shall consider an application and,
3 Judge Moore, you referenced the dictionary and
4 looked to see what consideration meant, what does
5 it mean to consider an ordinary plain meaning?

6 I would suggest also to you that the
7 case of in re: DOE, a 2006 case, helps in that
8 respect, because there, the NRC Commission was
9 considering the regulatory scheme and said, he
10 characterized it as a statutory obligation to
11 complete its examination of the application within
12 3 years of its filing.

13 So that it seems to us it fits in
14 perfectly with the consideration aspect of 114(d),
15 the Commission itself has expressed what this
16 scheme is all about.

17 We would reference, as well, the various
18 "shalls" that are in 114(d). We agree that the
19 "accept clause" really would trump 107, the
20 regulation.

21 I do want to speak about 107 just for a
22 moment, and bring one other authority to your
23 attention.

24 We cited the case of in re: Sequoia
25 Fuels in our brief. That probably comes the

1 closest to an involuntary application in the
2 hypothetical that you opposed in that case.

3 And let me read what the Commission said
4 there.

5 It said, we do not foreclose the
6 possibility that in limited instances, denial may
7 be appropriate as, for example, where a licensee
8 seeks to withdraw a license application but, in
9 fact, continues to conduct some production
10 activity.

11 So that if the utility was faced with
12 that kind of an application to move forward a
13 renewal license, and sought to withdraw it, that
14 comes closest, it seems to us, to being an
15 involuntary application. And in that situation
16 the Commission said there are limited instances
17 where it would, indeed, deny withdrawal of the
18 application.

19 DOE seems to recognize, as well, the
20 requirements, to some extent, if only in the
21 breach of 114(d), because they want to cloak a
22 withdrawal as a "disapproval."

23 They suggested under 107, you could, in
24 effect, have a disapproval.

25 But we think, frankly, the statutory

1 construction, which is a plain meaning, and the
2 history doesn't mean that at all, it really
3 contemplates a decision on the merits.

4 DOE invites the Board to decline a clear
5 command of Congress. We suggest that we decline
6 that invitation. The rest of what has been argued
7 has already been said well, and I have nothing
8 further to suggest unless there is a further
9 question.

10 Thank you.

11 >>JUDGE MOORE: We will now hear from the
12 state of South Carolina.

13 >> : MR. WOODINGTON: Good afternoon,
14 I'm Ken Woodington from the law firm of Davidson &
15 Lindermann in Columbia, South Carolina. I
16 represent the State of South Carolina, as I did
17 for almost 30 years with the Attorney General's
18 Office in South Carolina, which brought me into
19 court a few times on DOE-related NEPA cases,
20 although we do not raise NEPA in this matter.

21 The topics that we sort of divided up
22 for me to talk about, primarily Chevron, and a
23 little bit about the last years Appropriations
24 Act.

25 The second of those hasn't been

1 discussed at all, and may not need to be, the
2 first one has been discussed quit a bit and may
3 not need to be.

4 I would like to talk about a couple of
5 things that have come up in the course of this
6 argument, and get to those others as time permits.
7 One is this idea of the unseemliness of DOE having
8 to defend the application or prosecute the
9 application if it no longer believes that the
10 application is worth pursuing.

11 One thing you have to think about in
12 this context is that the Department of Energy,
13 U.S. Department of Energy consists of public
14 officials and public servants in the executive
15 branch of the government. The constitution
16 requires that the President, and by extension all
17 of his designees faithfully execute the laws of
18 the United States.

19 I think that if this Board were to deny
20 the motion of withdrawal, then in all likelihood
21 the department would faithfully execute the law as
22 public officials, go ahead and pursue the
23 application in good faith. If they he did not
24 there are people around like South Carolina, and
25 others, who would be happy to take them to the

1 District of Columbia, D.C. Circuit, under 119, for
2 failure to do a duty that was imposed by the
3 statute, if they it comes to that.

4 But there is a higher duty, I mean there
5 is nothing, there's no outside, there's no
6 faithful execute for a private power applicant to
7 continue pursuing its license application.

8 There is that outside, above all
9 command, that applies to public officials and the
10 executive branch. And really, if it really got
11 bad and they decided no, they are not going to do
12 it, even if this Board says they can't withdraw
13 the application, I can think of cases in the
14 criminal context where, if for some reason the
15 prosecutor doesn't want to go forward or the
16 defense lawyer doesn't go forward and the Court
17 just appoints somebody else to do it, in the
18 nature of independent counsel or special counsel,
19 or something like that.

20 It is kind of far out to think that it
21 might come to that, but nevertheless, that is a
22 possibility, I suppose, that it could come to, if
23 they declined to do their statutory duty, as
24 recognized by this Board. And let's face it, this
25 Board, as everybody said, will probably not be the

1 end of it, you have the Commission after that and
2 a reviewing Court after that, so one way or the
3 other, it will probably wind up with a court
4 order, and again, probably with some intervening
5 action by Congress, before it all takes place.

6 Another aspect of this that has come up,
7 and I agree with Mr. Gottshall, that I would like
8 to part company with Washington State, just a
9 little bit on their idea of what happens if you
10 have a seismic event or something.

11 As you said, Judge Moore, the 2002
12 statute for resolution call for a change of shift
13 of drivers, and again, I think what you can call
14 that is a prima facia case by the Congress to
15 determine that a prima facie case in the Yucca
16 Mountain would do, be appropriate, and that any
17 decision to not go with Yucca Mountain in the
18 future was one that would have to be made by this
19 body and by the Commission.

20 Again, it is not that strange, really,
21 for somebody who is formerly proposing something
22 to then advocate its denial when circumstances
23 change. Again, to use the criminal analogy, when
24 a prosecutor discovers something dreadfully wrong
25 with his case he goes to the court and tells the

1 court why he can't continue to prosecute the case
2 in good faith, and makes that argument.

3 On the other side, a guilty plea.
4 Somebody has been protesting his innocence all
5 along decides to plead guilty and changes his tune
6 180 degrees, and tries to persuade the Court that,
7 yes, I am guilty, I really did it, and I'm now
8 pleading guilty.

9 Or to use the other third example, class
10 actions. You know, one day you're in the fighting
11 in a class action, and then you decide to settle
12 it with the plaintiff's lawyer, and you have to
13 tell the Court the pros and cons of, you know, the
14 Court has to approve the class action settlement,
15 and you tell the Court the pros and cons of why,
16 maybe your case wasn't all that good after all,
17 and why you were lucky to get what you could get
18 in the settlement. It's just not that unusual
19 thing, especially if circumstances change, as in
20 the case of a seismic event or on some other
21 unanticipated, presently unknown, scientific
22 development.

23 So there are a couple of things along
24 those lines that have been discussed here as
25 possible alternatives or unseemingly or unusual,

1 maybe if you reflect on it in another context, it
2 really may aren't all that unusual and
3 unseemingly, after all.

4 To get to my Chevron points, just
5 briefly, I'd say that has been discussed at
6 length, if not ad nauseam, but we never get passed
7 the first point of saying, the first point, is the
8 statute clear. That's been argued, and I won't
9 talk about any more.

10 The second point, let's assume for the
11 sake of my argument we don't, concede unless it is
12 for the sake of argument, that the statute is not
13 clear, you have to look for somebody's
14 interpretation of it.

15 whose interpretation? The Commission in
16 its Order in late April said that the NMPA is for
17 us to interpret, doesn't seem to be talking about
18 the DOE interpretation of the NMPA. If that's the
19 case, that's another cutoff for the Chevron
20 analysis, because it is not DOE's interpretation,
21 it's the NRC's.

22 And certainly, I don't think DOE argues
23 that 107 is something that you have to look to
24 their administrative interpretation of.

25 Still another point on Chevron is there

1 has to be something to which to defer as one of
2 the cases we cite said, what is it that DOE is
3 requesting that this body defer.

4 As far as I can tell from Mr. Lev,
5 though, you may not have a great deal of respect
6 for him, and in his brief he says DOE has not
7 previously interpreted the NWPA to preclude
8 withdrawal. And I guess that is the
9 administrative interpretation, that they have not
10 ever said this in the past so they must mean the
11 question that they believe that they can withdraw,
12 because they never said otherwise in the 20, 30
13 years in NWPA's existence.

14 That's not much, as Mr. Keskey said,
15 there's no process, there's no rationale. Judge
16 Moore, you cited earlier, I think, the Skidmore
17 case that talks about how good does it have to be,
18 does it have to be well-reasoned, well-developed,
19 and so forth. Again, there is none of that.
20 There's no wrestling, but it is not a regulation,
21 does not have to be a regulation, it's not a
22 regulation.

23 It's not really in any formal, or even
24 informal pronouncement, simply an advocacy
25 position taken in this litigation.

1 Then, briefly, if I can just get to the
2 question that's hardly been discussed at all, and
3 may not need to be, and that's the effect of a of
4 the 2010 Appropriations Act.

5 Apparently what DOE -- all that DOE says
6 about that, as I understand it, and it's on page
7 20 of their brief, is that Congress' appropriation
8 and creation of the Blue Ribbon Commission
9 indicates that Congress understands the NMPA in a
10 matter consistent with DOE's interpretation, that
11 is Congress understands that DOE is not required
12 to construct a repository on Yucca Mountain.

13 And Judge Wardwell says nobody from
14 either side argues that DOE is required to
15 construct a repository, at least at this stage of
16 the game. We have argued, all of us on this side
17 argue that they are required to follow through to
18 final decision made by this Board.

19 So if that's all they argue, than really
20 nobody has really said much about that and we
21 probably don't need to even discuss the fact of
22 the 2010 appropriations bill.

23 >>JUDGE MOORE: Does that bill, the
24 Appropriations Act, require the consideration of
25 Yucca Mountain by the Blue Ribbon Commission?

1 >> : MR. WOODINGTON: I think, reading
2 the statute of the legislative history together, I
3 think it's very clear that the answer is yes.

4 what it says is, that of the funds made
5 available in this act for nuclear waste disposal
6 \$5 million shall be provided to create a Blue
7 Ribbon Commission to consider all alternatives for
8 nuclear waste disposal. And if there was any
9 doubt about that, the house committee report says
10 that --

11 >>JUDGE MOORE: You're quoting from the
12 conference report?

13 >> : MR. WOODINGTON: No, from the
14 committee report 111-278.

15 >>JUDGE MOORE: It's the House committee
16 report?

17 >> MR. WOODINGTON: Correct. And one of the
18 opponents has noted that conference report says
19 unless there is something in the conference report
20 that's directly opposed to what's in one of the
21 committee reports, and the committee report still
22 is good, it expresses the will of the committee.

23 And what the house committee report
24 says: Is that, look, if you're going to
25 considerable alternatives, we can't imagine that

1 you would not include Yucca within those
2 alternatives, and they say in so many words, okay,
3 we are willing to have the Blue Ribbon Commission
4 created, so long as you consider Yucca as one of
5 the alternatives?

6 Specifically, it says "Committee makes
7 the \$5 million dollars for the Blue Ribbon
8 Commission available provided the Yucca Mountain
9 is considered in the review, that's on page 85 of
10 111.203. I'm sorry, 111.203, page 85.

11 The \$5 million is available provided the
12 Yucca Mountain is considered in the review, and
13 that is consistent with the language of the
14 statute itself, it says "all alternatives."

15 So that -- the statute, the
16 appropriations bill does not affect NEPA -- NWPA
17 in any way because it is not even inconsistent
18 with it. Keeps Yucca on the table, as far as that
19 committee is concerned. And by implication, as
20 far as Congress is concerned.

21 Even if somehow it could be read to
22 somehow diminish NWPA, which I don't think it can,
23 it's got two problems; one is the strong
24 presumption against the amendment itself --

25 >> >>JUDGE MOORE: : Is there anything

1 in the senate report which is inconsistent with
2 the language in the conference report, that the
3 conference report adopts the language -- the
4 directions of the committee reports, if it is not
5 inconsistent with the conference report?

6 >> : MR. WOODINGTON: As I recall, the
7 Senate report is basically silent on whether Yucca
8 gets considered or not. I don't think it said a
9 thing one way or the other about that.

10 We are relying on memory, but I'm almost
11 100 percent sure that's what it did not say.
12 Anyway, that's basically it. I was going to say
13 that the Appropriations Act cannot repeal
14 substantive law, normally there's a strong
15 presumption that it does not repeal substantive
16 law.

17 And secondly, that the other part of the
18 problem is it would be a repeal by implication.
19 And we would get back to your Brown and Williamson
20 point, one more time. We would have a hugely
21 debated NWPA that's been out there and debated
22 basically three times in Congress; '82, '87 and
23 '02.

24 Repealed by indirection, by implication,
25 everything, and by an agency, when it's such a

1 huge policy choice that it would -- not to provide
2 a way to do it. That's basically all I have.

3 >>JUDGE MOORE: Thank you, counsel.

4 We will now hear from NEI.

5 >> : MR. BAUSER: Mr. Chairman, members
6 of the Board --

7 >> >>JUDGE MOORE: : Mr. Bauser, you're
8 filing in response to the motion specifically
9 raises the issue of the conference report of the
10 Appropriations Act with regard to the Blue Ribbon
11 Commission.

12 >> : MR BAUSER: MR. Chairman, it does.

13 >> : JUDGE MOORE: And do you agree
14 with South Carolina that there is nothing with his
15 memory -- that there's nothing in the Senate
16 report that contradicts the language of the
17 conference report?

18 >> : MR. BAUSER: First.

19 >> : JUDGE MOORE: So the language of
20 the House report, which is adopted by the
21 conference report, indirectly prevails?

22 >> : MR. WOODINGTON: I believe I agree
23 with Mr. Woodington's statement, yes.

24 >> : JUDGE MOORE: So if that is
25 accurate, there can't be any inconsistency with

1 the Blue Ribbon's action and the Nuclear Waste
2 Policy Act?

3 Because they -- one of the alternatives
4 that is being considered is, is the very question
5 apparently in front of us, should Yucca Mountain
6 be going forward?

7 >> : MR. BAUSER: Well, I think that
8 question raises two issues. One, the first issue
9 being the weight to be attributed to reports of
10 the appropriations committees and the conference
11 committee with respect to what need to be done.

12 It's entitled certainly to a certain
13 amount of weight. I think the more important
14 point with respect to appropriations perhaps goes
15 to fiscal year 2010, which is the current fiscal
16 year which indicates to appropriations perhaps
17 goes to fiscal year, 2010 which is the current
18 fiscal year which indicates again, the committee
19 report that the licensing process is to proceed to
20 whatever weight you ascribe to that, that's the
21 current directive.

22 To avoid repetition and consistent with
23 the allocations made by the opponents to DOE's
24 motion to withdraw, I would like to focus on three
25 particular points.

1 One, the applicability of Section 2.107,
2 now referred to as 107 of NRC's regulations. Two,
3 this proceeding. Two, the desirability of
4 suspending the proceeding at this point, in
5 response to DOE's motion. And thirdly, I would
6 like to talk about why in no event should the
7 proceeding be terminated with prejudice.

8 Insofar as the application of 107 to
9 this proceeding is concerned, this point stems
10 from the Nuclear Waste Policy's Act provision
11 directing that the Yucca mountain license
12 application be considered "in accordance with laws
13 applicable to such application."

14 The reasoning then follows that that
15 applicable law includes 107 and, thus, offers some
16 sort of framework to accommodate DOE's motion to
17 withdraw.

18 However, it is questionable that 107
19 applies and, in fact, it appears it does not.

20 NRC regulations and Subpart J, Section
21 2.1000 specifically say that it's Subpart J and,
22 quote, the rules in Subpart C and Subpart G of
23 this part" that apply to the instant proceeding.

24 107, however, is in Subpart A, so it is
25 not applicable.

1 DOE says on pages 26 and 27 of its
2 reply, that 107 is generally applicable and has
3 been applied in reactor and materials licensing
4 proceedings. That's correct.

5 But repository licensing is very
6 special. Directed to proceed in detail by statute
7 and Subpart and the regulations referenced therein
8 are crafted carefully to serve this special
9 proceeding.

10 DOE takes the position on page 27 of
11 its reply that Subpart A must apply, because
12 Subpart J references two of its provisions.
13 Specifically, sections 2.101 and 2.105. But that
14 reference is simply used to specify the
15 applicability of Subpart J.

16 And, in fact, both sections 2.101 and
17 2.105 themselves specifically do reference
18 repository licensing; 107 does not.

19 DOE suggests in footnote 79 on page 26
20 of its reply that others sections of Subpart A
21 which do not specifically reference repository
22 licensing are, nevertheless, obviously applicable
23 to the instant licensing proceeding. And,
24 therefore, so must all of Subpart A-2. But that
25 is far from clear either.

1 Breaking it down, Section 2.109 referred
2 to by DOE, concerning the effects of timely and
3 license renewal, would seem to have no
4 applicability to Yucca Mountain licensing, since
5 there's no expiration date of a construction
6 authorization.

7 Further, Section 2.108 denial of an
8 application for failure to provide information
9 doesn't seem to have a place here either, because
10 DOE, the applicant, is directed by statute to
11 provide the information.

12 Finally, section 2.111, prohibiting sex
13 discrimination, also would not seem pertinent to
14 the instant proceeding here, given the nature of
15 the applicant, the federal government, and other
16 participants, governmental agencies and
17 organizations.

18 However, we don't have to confront 2.107
19 now, because the proper move at this point in time
20 is essentially to maintain the status quo, which
21 is the current suspension.

22 We now only have the budget
23 administration's budget request as a manifestation
24 of the Government's intent to withdraw the
25 application and terminate the proceeding.

1 No basis for action with respect to
2 fiscal 2011 in fact exists. And as I mentioned
3 earlier, the current fiscal year direction is to
4 proceed with licensing, as discussed in our answer
5 in footnote 12.

6 At this point, all that can be done is
7 to take a shot in the dark. It makes perfect
8 sense to wait and see what action Congress finally
9 takes on the budget request in appropriations and
10 then act in light of pertinent applicable law.

11 As DOE has said itself on page 34 of its
12 reply, ultimately, whether or not to proceed with
13 the Yucca Mountain project, "should be decided by
14 political bodies, not this Board."

15 Of course, that political decision
16 process is properly reached through normal
17 legislation.

18 Mr. Bauser, hasn't the Commission
19 directed us, in its April 23 order, to reach the
20 merits of the Nuclear Waste Policy Act issues by
21 June 1 and no later than as soon as possible after
22 June 1?

23 >>MR. BAUSER: I went back recently and read
24 that order, and I see nothing in that order which
25 would preclude responding to the motion at this

1 point, with a continuation of the, in effect,
2 suspension.

3 what the Commission directed or what the
4 Commission talked about and directed is on page 4
5 of the Order.

6 And it noted that, among other things,
7 judicial review may well benefit from the NRC's
8 consideration of the issues surrounding DOE's
9 motion. And that rather than await a judicial
10 decision, the timing and result of which is
11 uncertain and absent a contrary instruction from
12 the Court, we think that the prudent course of
13 action is to resolve the matters pending before
14 the agency as expeditiously as possible.

15 I believe a stay is an appropriate
16 resolution at this point, based on the
17 consideration of the issues. Again --

18 >> JUDGE WARDWELL: : And that stay
19 would -- are you proposing that stay only exists
20 until the appropriations become clear or passed?

21 >> : MR. BAUSER: well, that would
22 certainly be a milestone with respect to this
23 proceeding in that, again, the only --

24 >>MR. WARDWELL: That's a small permeation
25 that is not necessarily indicative of the

1 fundamental legal issue we're trying to address
2 here, is it?

3 >> : MR. BAUSER: Well, as far as the
4 fundamental legal issue is concerned, NEI is in
5 full support of the position of all of the
6 opponents, including all of those who have
7 appeared before you today, that the Department of
8 Energy is not properly empowered to withdraw the
9 application.

10 So what we would propose, and as is
11 stated in our answer, is denial of the motion to
12 withdraw, but continued suspension of the
13 proceedings so that the Board may act with full
14 benefit of what the existing law is at the end of
15 this Congress.

16 Most importantly, I think, and directly,
17 action on the budget, which could either result in
18 law contrary to the determination that withdrawal
19 is impossible or some other possibility in which
20 we cannot the predict right now. That's largely
21 the problem.

22 >> JUDGE WARDWELL: : would it be a
23 better solution that when and if we did decide
24 anything like that, to deny the motion, that then
25 other motions would come forward and be briefed

1 and fully vetted, in regards to whether or not any
2 suspension should take place and for how long and
3 for what reasons, rather than do it as part of
4 this decision?

5 why is there a need to do it as part of
6 this decision?

7 >> : MR. BAUSER: I don't know that
8 there is a need to do it as part of this decision.
9 I want it to be complete in position of the
10 nuclear regul -- excuse me, of the NEI, which that
11 would be appropriate.

12 But so far as bifurcation is concerned,
13 I don't know that we would oppose that either.

14 >> >>JUDGE MOORE: : Mr. Bauser, to
15 back up a moment, in your response to DOE's
16 argument and their reply, DOE argues that part 2,
17 including Subpart A, that would be the 2.0 series
18 and the 2.100 series of regulations, is in
19 applicable because 2.1, I believe, starts by
20 saying it applies to -- I'm sorry, 2.1, "This part
21 governs the conduct of all proceedings."

22 And you said and went through a list of
23 why that general provision didn't apply. And I
24 recognize what Subpart J says.

25 >>MR. BAUSER: Okay.

1 >>MR. WARDWELL: But 2.1055 -- I'm sorry, 6,
2 is the notice provision for high level waste
3 repository.

4 And there is no other notice provision
5 in Subpart J and is 2.105-6 mentioned anywhere in
6 Subpart J?

7 >> : MR. BAUSER: May I get my
8 regulations?

9 >>MR. WARDWELL: Certainly.

10 >>MR. BAUSER: I think I know the answer to
11 that, but --

12 >>JUDGE MOORE: Isn't there a set right in
13 front of you on the desk? I'm sorry, there was --

14 >> : MR BAUSER: I see the statutes,
15 but let me just grab my book.

16 >>JUDGE MOORE: Thank you.

17 >> : MR BAUSER: 2.105 of the
18 Commission's Regulations does indeed refer to
19 notices, but I believe the references there with
20 respect to the notices include references to
21 licenses to receive and possess.

22 >> >>JUDGE MOORE: : Now, the 6 is an
23 amendment for construction authorization of a high
24 level waste --

25 >> : MR. BAUSER: Amendment to a

1 construction authorization, yes.

2 >>JUDGE MOORE: Oh, an amendment to a
3 construction.

4 So that would answer my question,
5 presumably, because we don't have an amendment in
6 front of us, we have a construction authorization
7 application and --

8 >> : Mr. Bauser: Yes, Mr. Chairman,
9 we're not within the ambit of that particular
10 question.

11 >>MR. WARDWELL:

12 >>JUDGE MOORE: So then it is completely
13 consistent with Subpart J that subpart 2 does not
14 apply?

15 I'm sorry, the 2.1 and 2.100 series,
16 which is Subpart A, and the indoctrines of
17 provisions of 2.1 do not apply.

18 >> : MR. BAUSER: I believe so, a
19 unified reading of all the provisions reaches that
20 result.

21 Again turning to my final point, in any
22 event, even assuming 107 is applicable, withdrawal
23 and termination "with prejudice" is not justified.

24 There is a high applicable standard that
25 has not been met with respect to the application

1 of 107 in this regard.

2 withdrawal with prejudice here would be
3 proper only in case of legal harm from going
4 ahead, which no one has identified.

5 Harm would actually be to utilities if
6 dismissal were granted with prejudice. In terms
7 of NEI, as was noticed in the May 11th, 2009 Board
8 Memorandum and Order Ruling on Participants and
9 Contentions, "NEI represents those who are the
10 intended beneficiaries of the Nuclear Waste Policy
11 Act."

12 Continuing: "Indeed, they can claim to
13 be the really parties in interest in the success
14 of DOE's application and have been supplying its
15 financing through the targeted financial levy on
16 their generation of power."

17 Money committed amounts thus far to more
18 than \$34 billion. Expenditures total \$11 billion.
19 The importance of the repository to the management
20 of spent fuel is clear in that it is intended to
21 be the final resting place for spent fuel
22 currently in the possession of utilities.

23 The waste program has been pursued for
24 27 years, through the administration of five
25 Presidents, during 15 congresses, and leadership

1 of nine secretaries.

2 We now have a fully characterized
3 repository site following program expenditures, as
4 I mentioned, of \$11 billion.

5 Yucca Mountain thus constitutes a major
6 national resource, not only for the disposal of
7 commercial radioactive waste, but that from the
8 nation's defense activities as well.

9 DOE, for its part, takes the position on
10 pages 33 and 34 of its reply, that dismissal with
11 prejudice is required on the basis of certain case
12 law, holding that it is an abuse of discretion for
13 a Court to deny a plaintiff's request for
14 voluntary dismissal with prejudice.

15 In none of the cases cited, however, was
16 there legal prejudice to any of the parties in
17 litigation; Defendants in particular.

18 In fact, in all cases but one, the
19 Defendant supported dismissal with prejudice. The
20 only other case involved the desire of the
21 Defendant to have awarded attorney's fees, along
22 with dismissal, in order for it to go along with
23 dismissal with prejudice. The Court decided that
24 was a separate matter, and decided as such.

25 Further, and more basically, DOE's

1 position here is not analogous to that of a
2 Plaintiff. DOE was obligated by statute to
3 commence this proceeding, where Plaintiffs initial
4 litigation of their own volition against others.

5 In addition, Nevada, for its part,
6 expressed a special concern over not being able to
7 "conduct meaningful discovery on the LSN in a
8 future licensing proceeding."

9 This concern, in NEI's view, however,
10 does not reflect the licensing support network
11 administrators and DOE's answers to the Board's
12 April 21st questions, which indicate, we believe,
13 that with proper condition, which the Board may
14 prescribe, appropriate records and documentation
15 can be preserved.

16 To summarize, any basis for dismissal
17 stemming from 107 is questionable, at best. In
18 any event, the proper action at this point is to
19 maintain the current stay initiated February 16 by
20 this Board, until Congress completes action on the
21 administration's budget request.

22 Finally, in no event is dismissal with
23 prejudice proper.

24 That concludes our remarks.

25 >> >>JUDGE MOORE: : Mr. Bauser, in

1 one of -- and I could be incorrect in my
2 recollection, but DOE has argued that the Blue
3 Ribbon Commission is indicative of Congress'
4 intention, fully consistent with scraping, for
5 lack of a better term, Yucca Mountain.

6 Is there language in one of those
7 appropriations bills that the collection of waste
8 fund was to be suspended?

9 >>MR. BAUSER: There was nothing in any of
10 the appropriations legislation or reports that
11 talked to that.

12 However, in the reports, as discussed in
13 detail in footnote 11 of our proceeding, the
14 appropriation -- one of the appropriations reports
15 I believe does talk to the Blue ribbon Commission
16 going ahead and being established to look at all
17 alternatives with respect to waste disposal.

18 That, by no means, would eliminate Yucca
19 Mountain -- the Yucca Mountain proceeding for
20 continuing. And also, as I mentioned, one of the
21 reports talks to, indeed, the Yucca Mountain
22 proceeding continuing through fiscal year 2010.

23 >> JUDGE MOORE: Thank you, counsel.

24 We will now hear from the Four Counties.

25 >> MR. LIST: Your Honors, I'm Robert

1 List from the law firm of Armstrong, Teasedale on
2 behalf of Four Nevada Counties.

3 Before I discuss the -- some of the
4 constitutional thoughts I have prepared to
5 address, I'd like to touch on a couple of matters
6 brought up in the course of these arguments today.

7 Let me say preliminarily that these are
8 some of the most interesting and well done and
9 thoughtful and professional arguments that I have
10 heard in a long time before a bench, and my
11 compliments to all of the colleagues here today
12 who made their arguments.

13 First, if I may, I would like to address
14 the question I think was just presented to a
15 moment ago to Mr. Bauser concerning the Blue
16 Ribbon Commission.

17 I -- and I don't mean this in the form
18 of testimony, but I know it's a matter of record;
19 that the Secretary of Energy appeared before that
20 Commission at its first meeting and specifically
21 directed them, do not consider siting of any
22 repositories. They were not to look at citing.

23 The charge, as I understand the law, and
24 the charge that he gave them on that occasion, was
25 simply to look at alternative means of storage or

1 disposal of spent fuel or high level waste.

2 Secondly, a word or two about the
3 suggestion that Mr. Bauser made that this Board
4 might suspend the proceedings through the end of
5 this Congressional term.

6 I would simply say that, number one, I
7 don't believe Judge Wardwell, as you indicated,
8 that that would be a sound matter to consider in
9 conjunction with this process before you now, this
10 issue.

11 And secondly, there is certainly no
12 closure at the end of this Congressional term.

13 Oftentimes, as you may -- as I'm certain
14 you're aware, the CRs, the continuing resolutions,
15 stand well beyond that time, sometimes for 10 or
16 11 months into the following fiscal year.

17 So I don't see that as a reasonable way
18 to go.

19 I would also touch on one other factor
20 preliminarily, and that is, during Mr. Fitz's
21 excellent arguments, he was asked whether 107
22 might be used as a basis for dismissal or
23 withdrawal in the event of some cataclysmic event
24 or some unexpected phenomenon out at the site.
25 And he indicated that it might be utilized in that

1 circumstance.

2 I think, Judge Moore, you indicated that
3 that might open the door to its utilization for
4 lesser circumstances.

5 It would be our position that there are
6 a number of tools in the tool box of this Board
7 and of the NRC itself, to deal with that
8 circumstance, should it arise.

9 Among those, I would suggest that first
10 is the element of the contentions themselves,
11 which seek to raise just those kinds of scenarios.

12 This Board and, ultimately, the
13 Commission, would act upon that contention, or
14 those contentions, and could use that as the basis
15 for the denial, ultimately, of the application.

16 I also think, as was mentioned earlier,
17 the reports to Congress could result in a change
18 of policy by Congress. And in no circumstance
19 would it be necessary to resort to utilization of
20 107.

21 I think that pretty well -- oh, one
22 other thing I would touch upon. There's been
23 quite a bit of discussion this afternoon about the
24 topic of an involuntary applicant being compelled
25 to proceed with -- if this Board were to deny this

1 motion to withdraw.

2 And I would say simply that such
3 circumstances exist constantly in executive
4 government, where legislative overrides or
5 legislative directives -- or judicial directives,
6 reverse a course of action that an executive
7 agency is following.

8 Among those would be, for example, a
9 local -- and it's at every level of government --
10 a local city council or county commission directed
11 by a court, for example, to grant zoning or grant
12 building permits contrary to a policy that the
13 city council or commission wishes to follow, you
14 have to go ahead and comply and do it.

15 I can tell you one example at the state
16 level. The state legislature had directed that a
17 prison be built up in White Pine County. My
18 administration disagreed with that, my parole and
19 probation people said no, it should not be built
20 near Las Vegas, where the families can visit and
21 lawyers can visit with inmates and so forth. The
22 legislature determined that it ought to go in ELI
23 (phn) because of the unemployment situation.

24 Guess what, we built it in ELI, that was
25 the legislative policy directed the law, which my

1 administration followed as a matter of compliance
2 with our constitutional mandate.

3 Other examples would be at the federal
4 level. I think we all recall the so-called bridge
5 to nowhere that was directed by Congress to be
6 built in Alaska.

7 I'm sure the Department of
8 Transportation was not happy about that, but they
9 commenced the design of it. Ultimately, the
10 funding of it was withdrawn, but that was
11 something that would have happened.

12 DOD constantly makes requests for
13 appropriations for various kinds of weapon
14 systems. Congress chooses among them, it
15 doesn't always choose the first choice. But DOD
16 fulfills their commitment under the law to carry
17 out and proceed as directed by Congress.

18 And in this instance, I think it's
19 noteworthy that DOE itself has not said that Yucca
20 Mountain wouldn't work.

21 So it isn't as if they have a conflict
22 of interest in advocating something that,
23 scientifically, they have questioned. So I don't
24 see that they're disqualified, in any sense, from
25 advancing that application.

1 The -- and it is, I think, noteworthy
2 also that in terms of what the powers of this
3 Board or the NRC might be to compel any other
4 Government entity to proceed before it, is traced
5 right back to Article 2, Section 3 of the United
6 States Constitution, which indeed directs the
7 President to faithfully, execute the laws of the
8 land.

9 So he has to be faithful to the law.
10 And he took an oath to do so and that, of course,
11 is a Constitutional mandate.

12 To touch for just a few moments in my
13 remaining time upon the Constitutional issues. We
14 all know that there are, obviously, three branches
15 of government, and what I would suggest to you
16 that occurred here, is that the Legislative Branch
17 has fixed the law, the Executive Branch has
18 determined on its own, because I believe the
19 statute to be clear, they determined on their own
20 that they wish to do otherwise.

21 And I think that it's fundamental
22 Hornbook law that goes back most recently to a
23 case called Youngstown Sheet & Tube that's been
24 cited to this body, when you're dealing with the
25 question of intrusion of one branch upon the

1 powers of another branch. And the question in
2 that case was whether the President's action
3 amounted to law-making. That was a case where the
4 President ordered the seizure of steel plants in
5 1952.

6 The Court, Justice Black writing for the
7 U.S. Supreme Court, said that the President's
8 action amounted to law-making; a legislative
9 function which the Constitution has expressly
10 confided to the Congress and not to the President.

11 The President's power, if any, to take
12 the action in question, must stem from either an
13 act of Congress or from the Constitutional itself.

14 And there are no statutes that expressly
15 authorize the President to take the action in
16 question. That's what he said and that, of
17 course, is precisely what we have here, an absence
18 of authority to proceed as they have.

19 Justice Frankfurter, in the same
20 opinion, said this: "Congress has expressed --"
21 or in the same case, rather. "Congress has
22 expressed its will to withhold this power from the
23 President as though it had said so in so many
24 words."

25 And finally, Justice Jackson said this:

1 "The executive accept for recommendation and veto
2 has no legislative power. Executive action we
3 have here originates in the individual will of the
4 President and represents an exercise in authority
5 without law."

6 I think the facts in this case are even
7 more egregious, because notwithstanding the fact
8 that Congress had mandated something, what we
9 have, they mandated the scius (phn) and they've
10 mandated a process.

11 what we have here is a situation where
12 they told the executive agencies to follow an
13 enumerated procedure, leading to the design and
14 construction and, ultimately, potentially, the
15 operation. Executive Branch simply decided,
16 without Constitutional or statutory authority, and
17 without citing any safety concerns -- and we
18 believe somewhat brazenly and perhaps arbitrarily
19 -- abandoned the statutory mandated process and
20 ignored the established legal policy and embarked
21 on an entirely different course of action of their
22 own choosing, and that is to abandon this entire
23 procedure.

24 Congress has clearly stated its intent.
25 They did so, although it is in the matter of

1 operational law, they did so in the findings of
2 the Nuclear Waste Policy Act and their statement
3 of purposes, where they stated specifically, this
4 is the establishment of a definite federal policy
5 for the disposal of such waste.

6 And as Judge Wardwell said earlier, in
7 fact, the act itself is styled as a Nuclear Waste
8 Policy Act. This was the intent.

9 Nevertheless, in its -- even in the
10 reply brief, DOE is still contending that they
11 have the right to set the policy.

12 Page 19 of their reply brief, they seem
13 to be affronted by our position that the Secretary
14 should be required "to proceed with this
15 application no matter his view as to whether that
16 is a wise policy".

17 That is obviously our view, that he does
18 not have the right to do so. And, in fact, again
19 at page 28 in their brief they advance the
20 assertion that DOE has "policy discretion to
21 withdraw the application without being second
22 guessed. DOE's notion that the setting of policy
23 can take place at the agency level, is
24 self-anointing approach, in light of Congress'
25 declaration that they are establishing the policy

1 is simply a mistaken approach."

2 The internal view of their supremacy
3 within that agency is not only contrary to the
4 command of the Legislative Branch, but also
5 contrary to the command of the Judicial Branch,
6 because in the NEI case in the quotation that
7 appears in several of the briefs, the Court
8 specifically referred to the conclusion of the
9 senate committee report on the Congressional
10 resolution following the veto by the State of
11 Nevada by stating that the effect of the report
12 was as follows: "Approval of the site and the
13 continuation of the repository development
14 process, therefore, was determined to be in the
15 national interest."

16 Specifically laid out, basically
17 confirmed by the Judicial Branch as well.

18 So the Court found that Congress had
19 determined the national interest and yet we
20 have -- which amounts to the policy, and yet we
21 have DOE still asserting, as I just referred to in
22 their brief, that they may usurp that policy. And
23 it's simply not the case.

24 Only Congress can change it. And if the
25 votes were there to do so, frankly, I think they

1 would have done it.

2 After 27 years -- in closing, after 27
3 years of administering the act and reporting to
4 Congress' required and conducting unprecedented
5 scientific studies and analyses, spending billions
6 and billions of dollars, some 11 billion,
7 according to NEI, appropriated by Congress to
8 further the Congressional national policy and the
9 law of the land, DOE now seeks to exalt its policy
10 over the acts of Congress and the
11 judicially-recognized national interest.

12 This conduct is, to put it charitably,
13 of the very nature that Congress intended to
14 preclude when it adopted the National -- Nuclear
15 Waste Policy Act.

16 It must be treated by this Board as a
17 mistaken effort to usurp the powers of Congress.
18 In the Nevada vernacular, DOE must, like the Four
19 Counties, the industry, the public, the utilities,
20 all of the stakeholders, let the chips fall where
21 they may. In the course of proper independent
22 analysis by NRC, pursuant to the law of the land,
23 must proceed to consideration of the license
24 application.

25 In closing, I simply want to give a bit

1 of a disclaimer and that is that the Four Counties
2 certainly do not take a position on the ultimate
3 merits of the application, but simply believe that
4 the law is very clear, and we expect it to be
5 followed and confident that this Board will, with
6 all due respect, deny the motion.

7 Thank you very much.

8 >>JUDGE MOORE: We will now hear from Nye
9 County, but one moment. Go ahead, counsel, be
10 seated.

11 I have a quick question for Mr. Bauser.
12 The senate report 111-45 states, given the
13 administration's decision to terminate the Yucca
14 mountain repository program while developing
15 disposal alternatives, the committee expects the
16 Secretary of Energy to suspend collection of
17 payments to the Nuclear Waste Fund.

18 Is -- was that contradicted in the
19 conference report and is that the current state of
20 appropriations for 2010?

21 >>MR. BAUSER: Mr. Chairman, I'm sorry, I'm
22 not prepared --

23 >>JUDGE MOORE: Okay.

24 >>MR. BAUSER: -- to answer that question.

25 >>JUDGE MOORE: Nye County.

1 >> MR. ANDERSON: Good afternoon,
2 Mr. Chairman and Board members. Given the
3 lateness of the hour and being last, and the
4 Board's admonition I'm going to try right to jump
5 right in to address matters that are specific to
6 either Nye County or we believe are important
7 enough to require a specific comment by Nye
8 County.

9 In doing that, I'm going to say the
10 following: I think that we vetted the issue on
11 whether or not there was a statutory authority for
12 DOE to withdraw its application. And rather than
13 to add to that, I'll simply say that both in our
14 brief and what I heard today from the State of
15 Washington, who gave an excellent explication of
16 the opponent's view of the law on the Nuclear
17 Waste Policy Act, just to simply endorse that so
18 we can move on to some other issues that I think
19 do require further attention.

20 First would be, I found it extraordinary
21 that in footnote 102 of DOE's brief, they had
22 stated the following: "The secretary's judgment
23 here is not that YUCCA Mountain is unsafe or that
24 there are any flaws in the LA, but rather that it
25 is not a workable option and that alternatives

1 will better would serve the public interest."

2 That, in and of itself, struck me as the
3 end of the argument about whether or not an LA
4 could be dismissed with prejudice, certainly, and
5 extraordinary relief under all of NRC doctrine,
6 whether applicable or not.

7 That seems to be a standard statement
8 contained in the case law, that it's
9 extraordinary, and it's wholly unjustified if the
10 project is not deemed unsafe and the LA is without
11 a flaw.

12 The administration can state it has no
13 intention of refileing an application if a motion
14 to dismiss is granted. But I see no reason that
15 they can claim prejudice if someone else would
16 refile?

17 And they are fully in control of whether
18 or not they refile after this Board and the
19 Commission rules on the merits that they have been
20 asked to rule on.

21 I also find the discussion of the Blue
22 Ribbon panel to be virtually irrelevant. What the
23 Blue Ribbon panel may or may not suggest in the
24 future, we don't know.

25 I can suggest this to my younger

1 colleague from DOE, having been around a lot
2 longer, that reprocessing is not a new issue. Its
3 economic and technological possibilities and
4 feasibilities have been debated since the Carter
5 Administration, at least, and before, and those
6 communications and discussions will go on for
7 quite some time. It certainly isn't the basis for
8 the withdrawal of an application.

9 I also found it peculiar that it appears
10 that the Secretary and DOE have already determined
11 what the Blue Ribbon Panel will find.

12 I know some of the individuals on that
13 Blue Ribbon Panel, it's an independent-minded
14 group, they can could come up with quite a new
15 study, but I doubt it.

16 The National Academy of Science has over
17 a hundred reports on nuclear waste policy issues,
18 it seems to come back to the same issues over and
19 over again.

20 I would like to address 107.

21 >> >>JUDGE MOORE: : Counsel, was Yucca
22 Mountain taken off the table by DOE for
23 consideration by the Blue Ribbon Commission?

24 >> : MR. ANDERSON: No, Your Honor.

25 And we have addressed that issue in footnote 15 of

1 our brief, and I'll just briefly go over it.

2 The House Committee report, the
3 Committee actually stated its support for the
4 position that YUCCA Mountain application review
5 should continue --

6 >> : JUDGE MOORE: I know what the
7 Appropriation Act said. I just asked whether it
8 had been taken off the table by the Secretary?

9 >> : MR. ANDERSON: I'm not aware of
10 that, Your Honor.

11 And if he did, I would have to say that
12 it isn't based on what was -- what we call in
13 D.C., fiscal law principles.

14 You have to, when you have multiple
15 committee reports, you have to take a look at
16 them, see if there is anything, quote/unquote,
17 inconsistent. And if there are not, then the
18 conference report -- and to reiterate this
19 principle of fiscal law -- that you take
20 everybody's report and try to comply with it to
21 the extent possible.

22 So whether it considers Yucca mountain
23 or not, I wanted to make that point. I really
24 don't think that becomes the basis of what they do
25 and don't not say about preprocessing and other

1 options, is all speculation. It's for the future.
2 And DOE could have awaited those results, but they
3 decided not to.

4 Another avenue that they could have
5 proceeded, just so -- I don't think anybody has
6 said today what they think should have happened in
7 this case, if the President and the Secretary
8 decided that the Nuclear Waste Policy Act was
9 flawed, especially in its designation of a sole
10 repository and the process for determining whether
11 or not the license should be approved or
12 disapproved, it had the option of taking that
13 matter to the appropriate committees for an
14 authorization amendment. And they choose not to.

15 Why they choose not to, I won't
16 speculate. But that certainly was available to
17 them and is what I think, in fact, is what was
18 required by the law.

19 I wanted to make one reference to
20 something that was said by DOE's counsel regarding
21 our position on stay.

22 The appropriate way to look at what we
23 said both in our conclusion and in our brief, and
24 that is the following: we believe that this Board
25 should deny the motion. It could then impose or

1 continue a stay of the discovery until either the
2 appropriation process has run and/or the Court has
3 had a chance to review the pending litigation
4 that's on some or similar issues and/or anything
5 that the Commission then decides with respect to
6 these matters as it goes up the appeal or petition
7 process.

8 I just wanted to clarify that, Your
9 Honor, we're not advocating that you not decide,
10 as you were required to do from the Commission.
11 We're not advocating that you not come up with a
12 final decision. That is the Commission itself
13 come up with a final decision.

14 We're simply saying, as this Board has
15 done in the past, you make a stay for purposes of
16 awaiting other actions that could clarify and make
17 matters simpler and more efficient in the near
18 future. We're not asking for an indefinite
19 suspension, but a stay simply to await those
20 things that are near term.

21 I want to make one other statement, I
22 could not find anywhere in the literature of 107,
23 of a situation where NRC actually granted a motion
24 to dismiss with prejudice, and that includes a
25 case where applicant at least acquiesced into the

1 Defendant's request for a motion to dismiss with
2 prejudice, and that a Cincinnati Electric Company
3 Case, and the William Zimmer facility, and it's
4 cited in our brief and I won't belabor it any
5 further.

6 >> JUDGE WARDWELL: : Counsel, why do
7 you believe that this withdrawal is a major
8 federal action that requires NEPA review?

9 >>MR. ANDERSON: That's based on both the
10 fact that there's been over 20 years of activity
11 with respect to the designation of the site
12 characterization of the site, and, for now -- and
13 at this point, for DOE to suggest we are
14 abandoning that option in the teeth of the Nuclear
15 Waste Policy Act, it clearly is a major federal
16 action, regardless of what was thought about in
17 terms of no-action alternative. I do not consider
18 this action to be a no-action alternative.

19 It's to revert the position that's been
20 taken for many years on going forward. And so
21 that's DOE's obligation in the first instance, to
22 then prepare the appropriate supplement to the
23 EIS --

24 >> JUDGE WARDWELL: : But the,
25 quote/unquote, action, as it were, is merely

1 withdrawing an application of which there is --
2 the only physical action is really abandoning any
3 studies that have occurred. And how is that
4 something that requires DOE to review any impacts
5 associated.

6 >>MR. ANDERSON: Well, in spite of the fact
7 that Congress will have to act and many other
8 administrative actions must take place before it
9 can be built, we're all in agreement on that.

10 It really is more than that. If they
11 abandon at this point, it is going to push out
12 into the future, at least a determination of
13 whether or not any repository can be built safely
14 and environmentally sound -- in an environmentally
15 sound manner.

16 That's something that is of value. I
17 want to state that for the record. I don't think
18 it has been said. There would be value if this
19 application were processed through at least the
20 construction authorization phase. And if I'm not
21 mistaken, the Secretary said so not much more than
22 a year ago.

23 I want to make one point along that same
24 line. During the appropriation process that the
25 Blue Ribbon panel was appropriated, in the same

1 appropriation, DOE and the administration were
2 appropriated money to go forward with the
3 licensing application. The exact same
4 appropriation.

5 >> >>JUDGE MOORE: : Counsel, with
6 respect to Judge Wardwell's question regarding
7 NEPA, does the fact that even though there has not
8 been a construction permit as part of the -- I
9 guess you would call it the siting activity, the
10 main tunnel of Yucca Mountain was still excavated,
11 drilled, whatever the proper terminology is --
12 with enormous mountains removed from Yucca
13 Mountain, of material.

14 Now, normally, for a federal action --
15 under NEPA there has to be a major federal action.
16 Here, in -- while all of that was going on, in the
17 -- as all part of the site determination, which
18 was exempt from NEPA requirements, does that come
19 into place because there's a five-mile hole in
20 Yucca Mountain, sitting there with what was
21 excavated sitting next to it, that makes this
22 rather different from the normal NEPA activity
23 that nothing is done before the EIS is done?

24 >>MR. ANDERSON: I think it's another example
25 of this being a very unique situation, Your Honor.

1 And that activity has taken place in our County
2 that I represent. So we have concerns about how,
3 in the event it is abandoned, how that would be
4 remediated.

5 But I want to make -- the key point is,
6 the abandonment of this at the construction
7 authorization phase, at this point, will have
8 trickled down environmental and fiscal and other
9 social economic effects that have to be accounted
10 for as -- because they wouldn't have been
11 triggered by the abandonment at this point.

12 >> JUDGE MOORE: : You don't mean by
13 abandonment, you mean the continuation?

14 >>MR. ANDERSON: If they were allowed to
15 abandon, they would have to prepare, in our view,
16 an EIS that would like at the specific impacts
17 that would be triggered both environmental,
18 scioeconomic (phn) and other, of walking away from
19 something that's taken 25 or more years to get to.

20 >>JUDGE MOORE: Thank you, Counsel.

21 >>MR. ANDERSON: Your Honor, one other thing
22 that I don't think enough has been said about is,
23 assuming 107 does apply, and assuming,
24 hypothetically, we still want you to rule that the
25 Nuclear Waste Policy Act does not authorize

1 withdrawal of the application.

2 But in the event you do get to 107;
3 what's applicable about 107? Is it the entire
4 case law that has been rendered regarding nuclear
5 power plants or is it the 107 itself and the
6 principles of 107 that apply to every case, and
7 that is, who has the burden of proof on this? We
8 maintain DOE, as the entity that's requested the
9 withdrawal, has the burden of proof on that and
10 they --

11 >>JUDGE MOORE: Burden of proof on what
12 issue, the prejudice issue?

13 >>MR. ANDERSON: Burden of proof of showing
14 harm, okay.

15 Now, your case law, not just the Puerto
16 Rico case and others, I think uniformly hold that
17 you have to account for the harm to all the
18 parties, and that group may be expanding, but even
19 if we take the initial set of parties, you have to
20 take into account the impacts to NEI's and its
21 constituents, our host county, the Indian tribes
22 that are represented. And moreover, the harm of
23 abandoning a project funded by the taxpayers to
24 the tune of over \$10 billion and over a
25 20-some-year period.

1 We maintain in our brief, and I believe
2 it's legitimate, that even if we hadn't raised it
3 or another party hadn't raised it, you would be
4 authorized under 107 to say, here's how we balance
5 the harm to all the parties and, more importantly,
6 to the public.

7 And that, I think, is clear, what the
8 result is when you put it into a weighing
9 situation and weighing and balancing the harm, it
10 clearly falls towards denying the motion.

11 Your Honors, I don't think I have missed
12 anything of great consequences that I wanted -- I
13 want to thank you for the opportunity to speak
14 today and your indulgence at the late hour, and if
15 you have any other questions, I'll be glad to
16 answer them.

17 >>JUDGE MOORE: Thank you, counsel.

18 We will take a brief ten-minute recess
19 so that counsel can have a drink of water before
20 they present their rebuttal.

21 Thank you.

22 (Short recess taken.)

23 >> : JUDGE MOORE: We will now have
24 brief rebuttal.

25 DOE. You asked to reserve 15 minutes.

1 We were very generous this morning with your time,
2 please approach the podium. The lateness of the
3 hour impinges upon our generosity.

4 >>MR. LEV: Understood and understandable,
5 and I will be as terse as I can. Of course, I'm
6 happy to answer questions.

7 I think there is a fundamental issue
8 underlying a lot of discussion here, which is the
9 difference between the technical issues that this
10 Board has before it and the policy-making
11 discretion under both the Atomic Energy Act and
12 the Policy Act and the NWPA; that's the Department
13 of Energy, which goes beyond the technical issues
14 that are before their Board.

15 And I think that is a fundamental
16 distinction, that a lot of the argument that we
17 have heard today missed, because if you look at
18 what's preserved for the Secretary under the NWPA,
19 under Section 113 and 114, they talk about that.
20 It's not simply a technical judgment.

21 The Secretary, under 114(a), when he
22 recommends approval, there is certainly a
23 technical baseline. If it was his judgment that
24 this was technically inadequate, this should not
25 go forward. But he is also supposed to rely on G,

1 on subsection G, on such other information that
2 the Secretary considers important.

3 This is what the Secretary considers
4 appropriate as a reason to go forward. Not a
5 technical reason. Whatever the Secretary
6 determines in his judgment is a basis to go
7 forward.

8 >> : JUDGE MOORE: The Section you were
9 citing?

10 >> : MR. LEV: 114(a)(1)(G).

11 >> : JUDGE MOORE: Of the Nuclear Waste
12 Policy Act?

13 >> : MR. LEV: Yes. There is certainly
14 the case that the job of this Board is to decide
15 technical issues. But that's not the limit of the
16 Secretary's judgment.

17 The question is given that the Secretary
18 is given, allowed to consider other factors before
19 the license is submitted. What is the basis to
20 say that, now, Congress anticipated that, unlike
21 other parties, he doesn't have the policy
22 discretion to decide this is not a good idea to go
23 forward, this is counter to the public interest.

24 Now, I would say, and I think Congress
25 has answered that question. And it's answered the

1 question in a way that is very specific. It has
2 said the Secretary should be treated like other
3 parties.

4 We can talk about plain language and we
5 can talk about specific aspects of plain language,
6 but there is the plain language that actually
7 addresses what happens once the application is
8 filed.

9 And it says, in accordance with the law
10 applicable to such application, which means if
11 nothing else, that the Secretary should be treated
12 like another applicant, like the voluntary
13 applicant. That is Congress' judgment.

14 The Secretary isn't anointing himself in
15 any way. He is exercising the policy discretion
16 that he had under the Atomic Energy Act, and that
17 was preserved in the pre-submittal stage. And
18 that is entirely reasonable to say it is preserved
19 here, because every other applicant under the
20 precedent of this Commission does not get to
21 second-guess as to their judgment as to whether it
22 is sound to go forward.

23 That is the Commission's decision in
24 Stanislaus. So yes, there are controversial
25 policy and the Secretary understands that there

1 are others who may disagree with it. And there
2 are places who raise those, but not before this
3 technical Board.

4 The job of this technical Board, with
5 all respect, is to determine whether the
6 Secretary's judgment is consistent -- is
7 permissible under the law, full stop.

8 The Secretary can be required to defend,
9 in a variety of forms, his judgment. And the
10 Department can be required to do so. But it is
11 not, with all respect, the job of this Board to
12 second-guess policy. That's specifically resolved
13 by the language that the Secretary gets treated
14 like other applicants. And that's true whether
15 2.107 applies or not because as Judge Ryerson
16 said, 2.107 reflects principles in federal rules
17 of procedure. By the way, section 107 does apply
18 by term and I want to talk about that just a
19 little bit because I think there are some
20 important aspects that were missed in Mr. Bauser's
21 discussion.

22 First of all, the plain language of
23 2.107 says it applies when an applicant seeks to
24 withdraw an application. No limitation. In fact,
25 subpart A says it applies when 2.100 says it

1 prescribes procedures for issuance of a license,
2 doesn't limit in any other way. And if Mr. Bauser
3 were right, the specific parts of subpart A that
4 were cited were the only ones that were relevant.

5 The way the provision here relies upon
6 2.1000 would have been written is that subpart A
7 does not apply except for or subpart C and G apply
8 for accept for this subpart.

9 That's not what it says.

10 So throughout, and --

11 >>JUDGE MOORE: The provision you cited about
12 amendments since that is not cross-referenced and
13 lineally apply that is means that same part of A
14 applies. And so I want to clear that up.

15 So it then becomes, Congress has said we
16 should be treated like a normal applicant. If we
17 are treated like a normal applicant, the rule is
18 the Board does not second guess the judgment of an
19 applicant as to whether to go forward.

20 In this instance, already lots of other
21 body that is can do that but that is not the job
22 of this Board.

23 Second, what the Board does do is look
24 at whether someone else has shown that there is a
25 legal harm that requires an that is the judge job

1 of board, someone has shown a legal harm, that's
2 what the presidents requires I believe no one has
3 shown it but, regardless, the normal rule is that
4 applicant have a discretion to withdraw
5 application and Congress specifically adopted that
6 rule by saying we get treated like a normal
7 applicant.

8 I want to point one other thing out
9 here, is that we should actually have greater
10 deference than is given to a normal applicant
11 because under the precedent of this Commission,
12 when executive agencies active in their policy
13 making discretion the NRC which is an adjudicatory
14 licensing body does not second guess the judgments
15 of executive branch agencies so even beyond what
16 normal applicant have as discretion, I understand
17 people may disagree as technical or political
18 matter but this is not the way, if parties believe
19 what the Secretary is doing, that can be raised in
20 a variety of ways.

21 I want to take absolutely few of the
22 cases and other specific issues just very, very
23 briefly.

24 The NEI case was raised several times
25 and what is important to understand is that case

1 is what it said was specifically was determination
2 as to whether to previous suitability decision and
3 recommendations those were moot because Congress
4 permitted the Secretary to go forward, absolutely
5 correct.

6 We have no dispute with that holding but
7 that does not mean the question then is once its
8 goes forward, what is the rule that applies and
9 Congress in the very 2002 act that was that the
10 D.C. Circuit relied on in the NEI case said that
11 all we are doing is committed to Yucca, we are not
12 requiring anything beyond permitting the progress
13 forward, so far as licensing application, full
14 stop.

15 The EPA v. Massachusetts case was raised
16 and some other arguments and the executive often
17 is required to do things it doesn't want, by law.

18 That's obviously the case.

19 What's different here, Your Honor, and
20 where courts and agencies are normally very
21 hesitant to assume that Congress is required the
22 executive to act, is you would be requiring the
23 executive to act as an advocate.

24 What you would be saying is you have to
25 advocate for a position you don't believe in.

1 That -- having the Secretary advocate for the
2 approval of a licensing he does not believe in the
3 public interest, is not likely to break public
4 confidence.

5 I'm not saying Congress could not have
6 required it, not saying that at all but if
7 Congress want to require something so awkward, so
8 untenable to use the word with Nye County used,
9 then, it should have said so specifically, it said
10 shall not throughout the statute when it intended
11 to limit the Secretary's discretion, it did not do
12 so.

13 The problem here is that Congress is not
14 the -- Congress could not have done it but
15 Congress should not be understood to have done
16 something so awkward absent clear language and I
17 want to make one additional point there.

18 There's a series of cases under the
19 Assembled decision's Heckler v. Chaney, which is
20 somewhat like this, where the courts struggle very
21 hard to avoid the conclusion that legislation
22 requires administrative agencies to undertake
23 enforcement proceedings, for very -- for many of
24 the same reasons.

25 That you don't want to have someone do

1 and an enforcement proceeding that they don't
2 believe in, that they don't think is the right use
3 of their resources. So that's not 100 percent the
4 same cases that we have here, I don't dispute
5 that, but I think the underlying principle is
6 quite similar.

7 I did say I'd be short, and I'm going to
8 try and do so. Judge Ryerson, you -- excuse me,
9 Judge Moore, you said that 114(c) was the biggest
10 problem you had with my argument, so I want to
11 talk about that briefly, if I might.

12 I don't see any -- I want to be fair,
13 but I think that 114(c) can be complied with by
14 its terms very naturally if the motion to withdraw
15 is granted. In particular, I believe 114(c)(3)
16 was the provision you were interested in.

17 The Commission is required to include a
18 description of any actions regarding the granting
19 or denial of such authorization

20 well, the Commission should simply say,
21 if you treat a motion to withdraw as the granting
22 or the denial of an application, you can say that.
23 But if you don't treat it that way, you would
24 simply say the Commission is not granted or
25 denied.

1 The plain language of that can be
2 explained, and I would assume you would then have
3 an additional sentence that says that it's not
4 pending before the Board now, it's not docketed,
5 the time is not running, because it has been
6 withdrawn.

7 I have see no difficulty providing that
8 report. You can simply -- the Board and the
9 Commission can simply say, are there any such
10 Commission actions, yes or no. Depends on how you
11 construe our motion. But, in either event, a
12 straightforward and natural reading can be given
13 to that provision.

14 I want to -- there is a lot of things
15 before this Commission and we need to say some
16 things that are not or and that really should not
17 be part of the discussion here.

18 For instance, the nuclear waste fee, the
19 nuclear waste fee, the Secretary has an obligation
20 under the Nuclear waste Policy Act to make an
21 adequacy determination every year.

22 He will do so, parties -- that is then
23 reviewable if parties want to review it. Parties
24 have petitioned for review of prior decisions,
25 those are pending in the D.C. circuit, they are

1 perfectly adequate means to address those issues.
2 The Secretary will address them and they will then
3 be reviewable, but I don't believe they have any
4 relevance to the Secretary's authority to withdraw
5 this application.

6 Similarly, the Blue Ribbon Commission,
7 the Secretary has made very clear that it's not a
8 sitting Commission. And the Secretary -- it's
9 also -- it's not news that the Department of
10 Energy has said that it does not believe that
11 Yucca Mountain is within the scope of that
12 Commission as created by the statute, not by the
13 reports, which are not the binding statements, but
14 the statute.

15 And the statute says "all alternatives."
16 That's naturally read to reflect alternatives to
17 the current approach.

18 Now, you don't have to agree with me
19 here, I have to say, because my -- the sole point
20 we want to make there is that Congress understands
21 that there are still options other than Yucca
22 Mountain. There are still other ways to go
23 forward. And that's all we want to say.

24 You don't have to agree with the
25 Secretary's interpretation or disagree. But I

1 think that it's clear that the Secretary is
2 allowed to consider other options.

3 Your Honor, I have plenty more things I
4 can talk about, I'm going to -- I think those are
5 the core points that I want to make. You want me
6 to just wrap up in a few sentences, unless Your
7 Honors have questions. Okay. I'll wrap it up in
8 a few sentences.

9 Fundamentally, Your Honor, the Secretary
10 of Energy has made a decision not to go forward.
11 The question before this Board is whether the
12 statute requires the Secretary, nevertheless, to
13 go forward.

14 For the reasons we've stated, the
15 statute does not require that. It requires
16 instead that the Secretary be treated like other
17 applicants. What that means is that this Board
18 does not second guess the judgment as to whether
19 the application goes forward.

20 With all respect, this Board should not
21 be sitting to second guess the policy judgments of
22 the Secretary, or force him to go forward with a
23 license application he does not believe is
24 consistent with the public interest.

25 The job of this Board is, if the

1 Secretary chooses to go forward, to determine
2 whether the application is consistent with
3 relevant health and safety standards. That's what
4 this Board should be doing, not reviewing the
5 judgments of the Secretary as to whether this is
6 sound policy.

7 Thank you, Your Honor. I ask that the
8 motion be granted as requested.

9 >> >>JUDGE MOORE: : One two-second
10 question.

11 >>MR. LEV: Sure.

12 >>JUDGE MOORE: What was the vessel the
13 Secretary used to decide they wouldn't go forward
14 with Yucca Mountain?

15 >>MR. LEV: The --

16 >>JUDGE MOORE: Was an order issued under 161
17 of the Atomic Energy Act?

18 >>MR. LEV: Your Honor, the Secretary's
19 motion is before this Board.

20 >>JUDGE MOORE: I understand that. Was that
21 -- did the Secretary issue an order saying that
22 they would not go forward with Yucca --

23 >>MR. LEV: The Secretary has directed that
24 the --

25 >>JUDGE MOORE: Okay. He has direct -- did

1 he issue an order?

2 >>MR. LEV: I don't believe there is a
3 written.

4 >>JUDGE MOORE: Is there a written record of
5 what that official action by the Secretary is?

6 >>MR. LEV: The written record is what you
7 have before you.

8 >>JUDGE MOORE: So the motion is --

9 >>MR. LEV: Well, there is actually -- there
10 are other -- you know, there's an Administrative
11 Procedure Act record that's been submitted, but
12 that's not -- the secretary's determination -- not
13 just under the Atomic Energy Act. You have to
14 remember, the Secretary has specific authority
15 under the DOE --

16 >>JUDGE MOORE: I understand that. Where is
17 that memorialized?

18 >>MR. LEV: It's memorialized in the papers
19 that have been filed here, because it's, by
20 nature, a motion to withdraw.

21 >>JUDGE MOORE: Okay. so that's where the
22 Secretary's decision is memorialized and you want
23 me to withdraw the application --

24 >>MR. LEV: In his request to --

25 >>JUDGE MOORE: Okay, that's fine. You have

1 answered the question.

2 We will now hear from Mr. Malsch.

3 >>MR. MALSCH: Thank you, Judge Moore. We
4 have six brief points to make. We were originally
5 allocated five minutes for rebuttal, but my
6 understanding is that Clark County does not wish
7 any rebuttal time, so we would like, if possible,
8 to take their five minutes, although, frankly, I
9 think I will take no more than five minutes.

10 As I said, I have six brief points to
11 make.

12 First over all, if, as the opponents of
13 DOE's motion say, section 104(d) trumps the
14 application of 2.107. Then they have struggled
15 with how to address the situation that would arise
16 if DOE and, let's say, staff would agree if there
17 was an unresolvable safety problem.

18 And two suggestions have been made as to
19 how to address that situation. The first
20 suggestion, was, well, they can report it to
21 Congress. Well, that's all very nice, but as we
22 all know, reports to Congress don't ordinarily
23 result in any Congressional action, and that
24 doesn't really address what is supposed to happen
25 at the NRC proceeding.

1 So perhaps in recognition of that
2 difficulty, they have said well, then, obviously,
3 the only option would be for the agency to deny
4 the license application, that would be consistent
5 with Section 114(d).

6 The problem is there is no rule on the
7 NRC's rule books that apply to that situation.
8 True there is a rule that provides for the staff
9 to issue a notice of denial of a license
10 application, but that rule provides that in such
11 situations, the staff must offer the applicant an
12 opportunity for a hearing.

13 So, obviously, that provision only
14 applies in circumstances in which the staff wishes
15 to deny an application over the applicant's
16 objection. Not a situation in which both
17 applicant and staff agree the application should
18 not go forward.

19 In that circumstance, I would submit
20 that the only regulation that could conceivably
21 apply is 2.107, which allows DOE to withdraw.

22 Second point. Perhaps in recognition of
23 how awkward it would be if the motion were to be
24 denied and NRC would be put in a position of
25 trying to force DOE to prosecute diligently a

1 licensing application over its objection, several
2 opponents of DOE's motion have suggested that the
3 proceeding could be suspended.

4 well, I would submit that's very
5 interesting. This would be an indefinite
6 suspension, because we have no guarantee when
7 Congress would act, if Congress would act at all.

8 So they are caught in an inconsistent
9 position of saying that while a withdrawal of the
10 application would be -- would run afoul of some
11 statutory scheme that sets forth a time schedule
12 that will inevitability lead to some decision on
13 the merits, but it is perfectly okay to suspend
14 the proceeding indefinitely, which will also not
15 lead to any decision on the merits. So I would
16 submit that that position on their part is
17 inconsistent.

18 Third point. Staff in Washington have
19 objected to part of Nevada's argument for a
20 withdrawal with prejudice on the ground that we
21 have urged, in part, that the application be
22 withdrawn with prejudice because of the prospect
23 for future litigation expenses in a future
24 licensing proceeding. And they are quite right
25 that that is not a basis for prejudice and that is

1 why we made no such argument.

2 Instead, we argued on the basis of our
3 existing expenses to date. And that is a basis
4 for a withdrawal with prejudice, according to
5 federal case law.

6 Fourth point. 2.107, the observation
7 has been made that 2.107 is part of Subpart A,
8 which 2.100, on its face, says "applies to
9 proceedings such as this."

10 I just wanted to observe that the
11 Commission, in its notice of hearing in this
12 proceeding, also specifically applied a provision
13 in Subpart A, namely, 2.106-C.

14 At this point, DOE drew an analogy to
15 Heckler v. Chaney. I would like to draw an
16 analogy to another case which I think is an
17 interesting one, and that is Town of Castle Rock
18 v. Gonzalez, 543 U.S. 748. In this case the
19 Supreme case was confronted with a statute which
20 appeared to require on its face that a government
21 use all available means to prosecute and enforce a
22 certain statute.

23 And the Court said that despite what was
24 apparently mandatory language, it would not read
25 that language as mandatory in lieu -- in light of

1 the deep-rooted nature of law enforcement
2 discretion.

3 I think there is also a deep-rooted
4 assumption and principle here that license
5 applications and license applicants should not go
6 forward over their objections.

7 Finally, one last point. I would say on
8 behalf of the State of Nevada that we would
9 exercise and recognize some comedy with our sister
10 states of Washington and South Carolina, and
11 sympathize with and appreciate that they are
12 saddled with high level waste and spent fuel in --
13 stored in locations that were never intended as
14 permanent repositories.

15 I only would ask them to extend the same
16 comedy to the State of Nevada and recognize
17 Nevada's position that Yucca Mountain is not a
18 safe place for nuclear waste disposal and that
19 this application is not a solution to their
20 problem.

21 If you have no further questions, that's
22 the end of my rebuttal.

23 >>JUDGE MOORE: Thank you, counsel.

24 >>MR. MALSCH: Thank you.

25 >>JUDGE MOORE: I would like, on behalf of

1 the Board, to thank all counsel for their --
2 Staff, do you wish to expend any time on rebuttal?

3 >> : MS. SYLVIA: Two minutes, if you
4 will allow us.

5 >>JUDGE MOORE: I am sorry?

6 >>MS. SYLVIA: Two minutes, if you will allow
7 us.

8 Andrea Sylvia for the NRC staff. We
9 have three quick points. One is the Nuclear Waste
10 Policy Act Section 114(c), reporting requirement,
11 which has been discussed.

12 I just wanted to mention that the
13 reporting requirement has been repealed by Section
14 3003 of the Federal Reports Elimination and Sunset
15 Act of 1995.

16 Second, the NRC's NEPA responsibilities
17 are with respect to a proposed construction
18 authorization and license for a repository at
19 Yucca Mountain, not for withdrawal.

20 What their decision -- what the decision
21 not to pursue the repository is a major federal
22 action, is a DOE NEPA issue, not an NRC issue.

23 NRC's NEPA responsibilities under the
24 Nuclear Waste Policy Act and its regulations are
25 with respect to an NRC proposed action, which

1 would be a licensing action.

2 The NRC does not have the role in
3 enforcing DOE record of decision regulations or
4 other DOE regulations.

5 And, finally, with respect to the
6 applicability of 2.107, we would like to note that
7 the pre-2004 versions of part G did not say that
8 -- did not specifically say that 2.107 applied,
9 but it had been applied over the years.

10 If the Board does believe that Section
11 2.107 does not apply to this proceeding, the Staff
12 believes that it should refer its ruling to the
13 Commission under 2.1015-D.

14 NEI's reading would have Section 2.103
15 not apply either. And 2.103 specifically mentions
16 a construction authorization and directs the
17 Director of the Office of Nuclear Material Safety
18 and Safeguards to inform the state, tribal and
19 local officials specified in Section 2.104-E of
20 the issuance of a license, if it were to be
21 issued. Thank you.

22 >>JUDGE MOORE: Thank you, counsel.

23 Now, on behalf of the Board, I would
24 like to thank all counsel for their excellent
25 presentations and arguments today and their

1 patience in answering our questions and their
2 excellent answers to our questions.

3 We will now take the matter under
4 advisement and wrestle with it. And we stand
5 adjourned until tomorrow morning at 9:00 a.m, in
6 which we will convene a case management conference
7 to deal, hopefully quickly, with LSN document
8 collection matters that remain outstanding.

9 Thank you all again, and we stand
10 adjourned.

11 (Whereupon, the proceedings were
12 adjourned)

13 UNITED STATES OF AMERICA

14 NUCLEAR REGULATORY COMMISSION

15 ATOMIC SAFETY AND LICENSING BOARD

16
17 **Before Administrative Judges:**

18 Judge Thomas S. Moore, Chairman

19 Judge Paul S. Ryerson

20 Judge Richard E. Wardwell

21 *****

22 _____
23 In the Matter of
24 U.S. DEPARTMENT OF ENERGY

Docket No. 63-001-HLW

June 4, 2010

25 (High Level Waste Repository)

APPEARANCES:

Department of Energy

By: Ed Noonan, Esq.
Michael Shebelskie, Esq.

State of Nevada

By: Martin G. Malsch, Esq.
John Lawrence, Esq.
Charles Fitzpatrick, Esq.

CLARK COUNTY

By: Alan Robbins, Esq.
Debra Roby, Esq.

NUCLEAR ENERGY INSTITUTE

By: Michael A. Bauser, Esq.
Rod McCullum, Esq.

Four Nevada Counties

By: Jennifer Gores, Esq.

WHITE PINE COUNTY

By: Richard Sears, ESQ.

Nye County

By: Jeff VanNiel, Esq.

Robert Anderson, Esq.

Nuclear Regulatory Commission Staff

By: Jessica Bielecki, Esq --
Andrea Silvia, Esq.

California

By: Brian Hembacher, Esq.

Washington State

By: Andrew A. Fitz, Esq.

Lee Overton, Esq.

South Carolina

By: Kenneth P. Woodington, Esq.

Prairie Island Indian Community

By: Don L. Keskey, Esq.
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APPEARANCES (Continued)

Aiken County

By: Ross Shealy, Esq.
Tom Gottshall, Esq.

Inyo County

By: James Berger, Esq.
Greg James, Esq.

Joint Timbisha Shoshone Tribal Group

BY: Steve Heinzen, Esq.

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

2 >>JUDGE MOORE: Please be seated. Good
3 morning, I'm Judge Thomas Moore. On my left is
4 Judge Richard Wardwell, and on my right is Judge
5 Paul Ryerson.

6 The Construction Authorization Board 04
7 has convened this case management conference this
8 morning to address the Department of Energy's
9 plans for preserving the DOE licensing support
10 document collection, in the event that's
11 necessary.

12 And they have previously had two filings
13 setting forth their plans on February 4th and
14 February 19th. We'll also be addressing today,
15 DOE's May 24th answers to a long series of
16 questions that were attached to a Board order of
17 April 21st, as well as the Staff's May 24th
18 filing, and any party comments on DOE's previous
19 filings will all be the subject of this morning's
20 conference.

21 And the conference this morning is,
22 again, being reported on the DDMS and broadcast on
23 the agency's broadcast network, as well as being
24 web-streamed on the site's put in our April 18th
25 order.

1 And because we have several parties this
2 morning that are participating by telephone
3 conference, we'll have to follow some special
4 procedures so that the court reporter can create
5 an accurate record.

6 I would ask all counsel, when they
7 speak, to first identify themselves and the party
8 they represent so that those that are on the
9 telephone conference will be able to follow the
10 proceeding.

11 Also, I would remind all counsel in the
12 well that when you speak, you must push the button
13 on the microphone and it then becomes live, and
14 when you're finished speaking, to push it again so
15 that it is then muted and it will not interfere
16 with the proceeding.

17 We -- I guess the good place to start
18 this morning would be to have all counsel identify
19 themselves for the record, starting with those in
20 the well, and then we'll do the same thing for
21 those that are on the telephone conference. And,
22 please, first state your name, your affiliation,
23 and who you represent.

24 We'll start with DOE.

25 >>MR. SHEBELSKIE: Good morning, Judge Moore,

1 panel. Michael Shebelskie, Hunt & Williams,
2 counsel for the Department of Energy.

3 >>MR. NOONAN: Good morning, Ed Noonan, Hunt
4 and Williams, for the Department of Energy.

5 >>MR. FITZPATRICK: Charles Fitzpatrick,
6 State of Nevada.

7 >>MR. LAWRENCE: John Lawrence, State of
8 Nevada.

9 >>MR. MALSCH: Marty Malsch, also State of
10 Nevada.

11 >>MS. SILVIA: Andrea Silvia, NRC Staff.

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

13 >>MR. HEMBACHER: Brian Hembacher, State of
14 California.

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

16 >>MR. JAMES: Greg James, County of Inyo.

17 >>MR. BERGER: Michael Berger, County of
18 Inyo.

19 >>MS. ROBY: Debra Roby, Clark County.

20 >>MR. ROBBINS: Alan Robbins, Clark County.

21 >>MR. McCULLUM: Rob McCullum, Nuclear Energy
22 Institute.

23 >>MR. BAUSER: Mike Bauser, counsel for
24 Nuclear Energy Institute.

25 >>MS. GORES: Jennifer Gores with Armstrong,

1 Teasdale on behalf of the Four Nevada Counties.

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

3 >>MR. VanNIEL: Jeff VanNiel on behalf of Nye
4 County, Ackerman, Senterfitt on behalf of Nye
5 County.

6 >>MR. GOTTSBALL: Tom Gottshall for Aiken
7 County, South Carolina.

8 >>MR. SHEALY: Ross Shealy for Aiken County,
9 South Carolina.

10 >>MR. KESKEY: Don Keskey on behalf of the
11 Prairie Island Indian Community, from the Public
12 Law Resource Center.

13 >>MR. WOODINGTON: Ken Woodington for
14 South Carolina.

15 >>MR. OVERTON: Lee Overton, State of
16 Washington.

17 >>MR. FITZ: Andy Fitz, Washington Attorney
18 General's Office, State of Washington.

19 >>JUDGE MOORE: Thank you. If all counsel or
20 other representatives that are participating by
21 telephone conference would, at this time, identify
22 yourself.

23 >>MR. HEINZEN: Steve Heinzen of Godfrey &
24 Kahn on behalf of Joint Timbisha Shoshone Tribal
25 Group.

1 >>JUDGE MOORE: Are there any other telephone
2 participants this morning?

3 We will go ahead and proceed.

4 >>MR. BAUSER: Excuse me, Mr. Chairman, Mike
5 Bauser, NEI.

6 >>JUDGE MOORE: Yes, Mr. Bauser?

7 >>MR. McCULLUM: If I might, Mr. Chairman, I
8 would like to follow-up in response to a question
9 you raised towards the end of yesterday's session
10 concerning Senate language on the Senate report on
11 the appropriations concerning suspension of the
12 Nuclear Waste Fund Fee.

13 >>JUDGE MOORE: Before I allow you to do
14 that, I want to see if any counsel will object,
15 because the oral argument was precluded yesterday.

16 If nobody has any objection, it might
17 help the Board's -- since we're under a very tight
18 time deadline in tracking things down.

19 What is your brief answer, Mr. Bauser?

20 >>MR. BAUSER: I believe, in response to the
21 Chairman's observation concerning the Senate
22 Report, the correction is appropriate. The Senate
23 Report did express the Senate Appropriations
24 Committee expectation that the Secretary of Energy
25 suspend collection of the payments to the Waste

1 Fund. And that was the -- that was the total
2 expression in the Senate Report.

3 >>JUDGE MOORE: With two exceptions; plans
4 for the preservation of the current parties, LSN
5 collections were dealt with at that January 27th
6 case management conference, and then Lincoln
7 County's later May 14th filing.

8 Before we turn to the Staff and the DOE
9 LSN collections, I'd like to briefly address the
10 collections of the new petitioners.

11 South Carolina?

12 >>MR. GOTTSHALL: Your Honor, I'd like to
13 address but I can step up, if you'd like. Yes,
14 Sir.

15 >>JUDGE MOORE: I would like to preface my
16 questions of all the petitioners with what should
17 be obvious. The Board has -- is wrestling with
18 the problem you presented us with yesterday.

19 In the event that it's necessary is the
20 way these questions -- is the premise to all these
21 questions. So assume nothing; we're just trying
22 to do housekeeping in the event it needs to be
23 done.

24 Previously, counsel, all the other
25 petitioners -- I'm sorry, interveners, agreed to

1 these conditions.

2 If your intervention petition is
3 granted, will South Carolina commit to storing its
4 LSN document collection text and header materials
5 on a CD?

6 >>MR. GOTTSHALL: Yes, Your Honor. I
7 apologize for my attire here this morning, because
8 I didn't think I had any speaking role. But, yes,
9 no problem with committing to that.

10 >>JUDGE MOORE: Will South Carolina commit to
11 providing the LSN network administrator a CD copy
12 of its LSN document collection?

13 >>MR. GOTTSHALL: Yes, sir.

14 >>JUDGE MOORE: And would South Carolina
15 object to language in an order directing it to
16 provide its LSN document collection to the
17 licensing support network administrator in the
18 event -- in the data format as mutually agreed
19 upon by South Carolina and the Licensing Support
20 network administrator.

21 >>MR. GOTTSHALL: As I understand the
22 question we do not object to that.

23 >>JUDGE MOORE: Has Nye County joined us on
24 the telephone link?

25 All right. Aiken county?

1 >>MR. SHEALY: Yes, Your Honor.

2 >>JUDGE MOORE: If your intervention petition
3 is granted, will Aiken County commit to storing
4 its LSN document collection and header and text
5 material on a CD.

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

7 >>JUDGE MOORE: Will Aiken County commit to
8 providing the Licensing Support Network
9 Administrator a CD copy of its LSN document
10 collection on the CD?

11 >>MR. SHEALY: Yes, Your Honor.

12 >>JUDGE MOORE: And would Aiken County object
13 to language in an order directing it to provide
14 the LSN document collection to the LSNA in the
15 data format as mutually agreed upon by Aiken
16 County and the LSNA.

17 >>MR. SHEALY: No, Your Honor, Aiken county
18 would not object.

19 >>JUDGE MOORE: Thank you.

20 The State of Washington, instead of me
21 running through it, you've now heard the questions
22 twice, and you may well have read them from the
23 record of the previous May 27th conference.

24 Will Aiken County -- I'm sorry. Will
25 Washington agree to those same -- make the

1 commitment to those same three questions that I
2 just asked.

3 >>MR. FITZ: Yes, we can commit to all three
4 questions.

5 >>JUDGE MOORE: And Prairie Island Indian
6 Community.

7 >>MR. KESKEY: Yes, Your Honor, we will
8 commit to all three of those conditions.

9 >>JUDGE MOORE: And finally NARC -- NARUC?
10 They're not here? I'm sorry. I thought they
11 were here this morning.

12 Before tackling the answers to our
13 questions to DOE's answers to our questions, I
14 have a couple of questions for the Staff. At the
15 January 27th case management conference, the Staff
16 informed us that there would be a two-month
17 slippage in the SER schedule for Volumes 1 and 3
18 until November of this year.

19 In that regard, I'd like an update on
20 where the Staff's SER process on Volumes 1 and 3
21 stands at this point. In particular, is volume 1
22 already completely drafted?

23 >>MS. BIELECKI: Your Honor, Jessica Bielecki
24 for the NRC Staff. The schedule for Volume 3 has
25 not changed. Volume 1 is in final review and

1 concurrence.

2 >>JUDGE MOORE: I'm sorry. I can't -- slight
3 hearing problem, I can't --

4 >>MS. BIELECKI: No problem. Is this better?

5 >>JUDGE MOORE: Yes.

6 >>MS. BIELECKI: Volume 1 -- as I said
7 Volume 3, the schedule has not changed, Volume 1
8 is currently in final review and concurrence.

9 >>JUDGE MOORE: How long will that process
10 take?

11 >>MS. BIELECKI: It's hard to pick an exact
12 date, but it would be on or before the August 2010
13 deadline that we provided earlier.

14 >>JUDGE MOORE: Switching to Volume 3, is
15 Volume 3 already completely drafted?

16 >>MS. BIELECKI: I don't believe so,
17 Your Honor. That would be also on or before
18 August 2010.

19 >>JUDGE MOORE: No, I understand that, but
20 what percentage of it at this point is drafted?

21 >>MS. BIELECKI: I'm not aware of the
22 percentage, Your Honor.

23 >>JUDGE MOORE: Is it -- it's not awaiting
24 final sign-off and concurrence by the director of
25 NMSS and other appropriate officials that --

1 >>MS. BIELECKI: Not that I'm aware of, no.

2 >>JUDGE MOORE: But you still are planning to
3 issue it in November?

4 >>MS. BIELECKI: On or before November; yes,
5 Your Honor.

6 >>JUDGE MOORE: Is that a hell or high water
7 commitment, or no?

8 >>MS. BIELECKI: We'll do our best. If the
9 schedule changes, we'll inform the Board.

10 >>JUDGE MOORE: Let's turn to DOE's answers
11 to our questions.

12 A. Well, I guess, let's turn to the Staff's
13 answers to our questions first.

14 In your answer to our Question 1.5,
15 the question was whether you had plans to seek a
16 permanent designation for those records, and you
17 said that you -- the Staff was considering its
18 options.

19 Two questions: Is one of those
20 options whether to seek a permanent record des -- a
21 record designation as permanent?

22 >>MS. BIELECKI: Yes, that is one of the
23 options, Your Honor. The Staff --

24 >>JUDGE MOORE: And since you filed this on
25 May 24th, has that option been further fleshed

1 out?

2 >>MS. BIELECKI: No, Your Honor --

3 >>JUDGE MOORE: Okay.

4 >>MS. BIELECKI: The Staff has not completed
5 it.

6 >>JUDGE MOORE: Thank you.

7 Mr. Shebelskie, once again we return.

8 >>>JUDGE WARDWELL: I have some questions
9 for the Staff?

10 >>JUDGE MOORE: Oh, for the staff?

11 >>JUDGE WARDWELL: Yes.

12 >>JUDGE MOORE: Go ahead.

13 >>>JUDGE WARDWELL: In the affidavit of
14 Ms. Janni (phn), Item No. 5 says "An approved
15 disposition exists for the docket files for the
16 disposal of high-level radioactive waste in the
17 geologic repositories as permanent records in the
18 NRC comprehensive records Disposition Schedule New
19 Reg 0901.

20 Are these documents searchable and
21 retrievable?

22 >>MS. BIELECKI: These are the documents that
23 are in ADAMS. It specifies case files, and this
24 includes the licensed application site
25 characterization, environmental report, license

1 amendments and all other related documents that
2 are currently in ADAMS.

3 But I would note that this is limited to
4 these -- the schedule cannot be implemented until
5 ten years after exploration or termination of a
6 license, which is why in the affidavit Ms. Janni
7 went on to explain that there is not a current
8 schedule in the event the application is
9 withdrawn.

10 >>>JUDGE WARDWELL: But are these searchable
11 and retrievable through ADAMS?

12 >>MS. BIELECKI: Through ADAMS.

13 >>>JUDGE WARDWELL: Yes, they are.

14 Are you familiar with -- is it NARA or
15 NARA?

16 >>MS. BIELECKI: I pronounce it NARA. I'm
17 not sure if that's --

18 >>>JUDGE WARDWELL: That's the most
19 important question I'll probably ask today.

20 >>MS. BIELECKI: I'll defer.

21 >>>JUDGE WARDWELL: I'll probably ask it
22 both ways, so that will give everybody liberty to
23 say it whichever way they want to.

24 But, anyhow, what is -- and if you're
25 not familiar, that's fine, but I was curious on

1 what would any other person do for any other
2 collection that's under the auspices of NARA? How
3 would they determine whether a document is of
4 interest to them and then how would they be able
5 to retrieve it?

6 Do you have any idea of how that system
7 works for any other agency, not necessarily us?

8 >>MS. BIELECKI: No, Your Honor.

9 >>>>JUDGE WARDWELL: Okay. Thank you. I
10 don't either. That's all I have for Staff.

11 >>JUDGE MOORE: Now, Mr. Shebelskie. Once
12 again, all of this on the LSN started in June of
13 2004, if I remember correctly.

14 >>MR. SHEBELSKIE: Your observation,
15 Your Honor, de jevu all over again, it flies again
16 today.

17 >>JUDGE MOORE: In Mr. Malsch's response to
18 your comments, or Nevada's responses to your
19 comments, he indicated that Nevada had had
20 conversations with you, and that was informing
21 matters in his comments.

22 Your answers to our questions, I believe
23 left unclear whether the PDF documents that would
24 be created for each document file under your
25 preservation plans, one was PDF, but was that PDF

1 in searchable form?

2 >>MR. SHEBELSKIE: Yes, Your Honor, and that
3 was a question that counsel for Nevada and I
4 conferred about after they submitted their filing
5 to clarify, and we -- I explained the situation to
6 them and, obviously, they couldn't speak to this,
7 but Mr. Fitzpatrick indicated to me that what we
8 were planning to do was acceptable to the State of
9 Nevada.

10 The answer is what we outlined in our
11 proposal would be that the PDF images, the
12 compiled PDF images that are created and stored by
13 Legacy Management themselves would not be in a
14 searchable PDF format.

15 Those PDFs would be created through that
16 Get-Fetch document program that we have. As I
17 understand, it does not have OCR text as a
18 component of the PDF file.

19 We are, however, separately maintaining,
20 in a combined directory structure with the PDFs,
21 our existing text files that have the OCR optical
22 character recognition searchability.

23 The reason we were doing that,
24 Your Honor, was because our OCR text files that we
25 created for the LSN document collection actually

1 have a superior quality and searchability
2 standards than what are generated through a
3 standard PDF creation of a document.

4 So we had a higher fidelity OCR text
5 file that we can maintain along with the PDF image
6 that we will create. And what the State of Nevada
7 was -- wanted to verify was that if they, for
8 example, wanted to have a particular document
9 searched for or have a search terms done for a
10 group of documents, would that function continue
11 to exist?

12 And the answer is yes. We, through
13 Legacy Management, be able to conduct through a
14 search index, word searches or search for a
15 particular document by LSN session number, using
16 our OCR text files, identify the document, and
17 then produce, in electronic form, the
18 corresponding PDF image that we created.

19 >>JUDGE MOORE: And that will all be in
20 Morgantown, for purposes of my present question,
21 the indefinite future?

22 >>MR. SHEBELSKIE: Following -- yes,
23 following, though, the final termination of this
24 proceeding. As long as --

25 >>JUDGE MOORE: No, I understand that. Once

1 you go to Morgantown, so to speak.

2 >>MR. SHEBELSKIE: Yes, sir, with one
3 possible exception. Our plan is to recommend to
4 NARA that the LSN collection be retained for 100
5 years, and that would be maintained -- that would
6 be a temporary record under Noversbe (phn), and
7 that would be maintained at the Morgantown
8 facility.

9 And I can't tell you what will happen 95
10 years out from now, but I'm told there's no reason
11 to think that location will change.

12 >>JUDGE MOORE: I hope you and I are not here
13 in 3005 to have this discussion, Mr. Shebelskie.
14 3005.

15 Can you put in lay terms, before my
16 technical colleagues -- perhaps before -- so that
17 I freely admit the technological dinosaur that I
18 am, fossilizes in front of you, I will have judge
19 Wardwell ask these questions, so that they might
20 be more precise.

21 >>>JUDGE WARDWELL: Thank you for that
22 compliment. I'm not sure they'll be any more
23 precise at all. They may be more confusing, but I
24 had a series of them that were organized in the
25 same format that you answered, and I thought by

1 incrementally progressing along the whole system,
2 when that's a question that's down the pike, in my
3 iteration of it, and I think everyone might
4 understand better how it works now and then can
5 relate our questions to is that the same or is it
6 different in the future. And that's the only
7 reason I counseled with him and suggested we just
8 move along in the order that we had before.

9 So turning right to your submittal,
10 which in -- of May 24th, which was extremely
11 helpful. I mean, it was -- it really clarified
12 lots of points, but I do have some further
13 questions in my mind. And then, I think as part
14 of this, we will even go through an LSN search
15 just -- and you have in your response. And so
16 we're going to do it here also, because it helps
17 everyone understand how it works now, and then can
18 better interpret how it works in the future and
19 see what is really needed for Yucca, if it differs
20 for any other site, so that we are well aware of
21 what we're dealing with here.

22 A general one, before we begin your
23 first question, which really hasn't been touched
24 upon. And I was curious on how physical
25 materials, for instance, rock core, or something

1 like that, is going to be preserved and archived?

2 >>MR. SHEBELSKIE: Yes, sir. Physical items,
3 whether they be rock cores or the like, that
4 qualify as documentary material are represented in
5 the LSN by bibliographic header. So there'll be
6 an XML file, a bibliographic header for Rock
7 Sample X. Obviously, the rock sample can't
8 physically be produced in imageable format in the
9 LSN. So currently what happens if someone is
10 doing a search and sees they that, they have to
11 contact the LSN point of contact and make
12 arrangements to come inspect the rock sample,
13 which is stored at facilities here in the
14 Las Vegas, basically.

15 Our disposition plan for the LSN
16 collection, the SS-115 that we are preparing will
17 include as part of that -- well, in conjunction
18 with our archiving plan, we recognize that we
19 would need to preserve the physical specimens that
20 are represented by the headers in the LSN, and we
21 will retain those samples for the same duration as
22 the LSN collection has been archived.

23 And so, in the future, if someone wanted
24 access to those, if they were looking through the
25 Legacy Management database and saw the header for

1 a physical rock sample, they could make a request
2 for it and access would be arranged.

3 >>>JUDGE WARDWELL: If you can remember to
4 address that when we get to the part of talking
5 about the Legacy Management and any potential that
6 if NARA determines these to be permanent
7 collections, how that might change or not. But
8 don't answer it now, because we'll get -- again,
9 I'll get confused. That's probably really why I
10 stopped him, because I, you know, just --

11 >>MR. SHEBELSKIE: I'll take it
12 incrementally.

13 >>>JUDGE WARDWELL: Just a hard scrabble --
14 hard scrabble hick from upstate New York, so I
15 need to go slow on this.

16 The dismantling of the Las Vegas
17 facilities, how does that effect where this rock
18 core is being stored? Is that something that
19 isn't being dismantled? Is that going to be
20 something that's going to be here for a while, or
21 are there plans to ship any of -- any of the
22 physical specimens to other locations?

23 >>MR. SHEBELSKIE: Your Honor, I am not
24 aware -- what I am aware of is the closure
25 arrangements, in general terms, for the office

1 facilities out here in Las Vegas. The rock
2 samples and the like, as I understand them, are in
3 warehouse facilities. And I can check on a break.
4 I actually don't know what the current disposition
5 plans for those are. Obviously, they have to be
6 stored somewhere. So if they're not maintained in
7 the current location, an alternative storage place
8 will be obtained for them?

9 >>>>JUDGE WARDWELL: And you're committing to
10 store that so they are retrievable throughout this
11 whole process and into the archival --

12 >>MR. SHEBELSKIE: Yes, sir.

13 >>JUDGE WARDWELL: -- and beyond.

14 >>MR. SHEBELSKIE: Yes, sir.

15 >>>>JUDGE WARDWELL: Thanks.

16 The next one deals with Question 1.3.4.
17 I got a note from Judge Moore to put the mike in
18 front of me directly. He's getting even with me
19 for harassing him yesterday. I'm convinced my
20 mike was in perfect position, and he's just doing
21 that to harass me.

22 1.3.4 says "Discuss the current physical
23 location and explain the types of storage media
24 for each of the LSN components."

25 And your answer goes on and says "The

1 files that comprise the LSN are stored on the
2 servers in the computer room of the DOE Hillshire
3 facility in Las Vegas."

4 And I guess now, as any, good time to
5 just ask what's the status of that? Is that
6 completely disbanded by now or is it in the
7 process or hasn't it started or --

8 >>MR. SHEBELSKIE: It's currently still
9 there. Plans are in development, as we stated
10 generally in our filing, that I believe sometime
11 in July those facilities will be closed. So the
12 transition between -- from public access, will
13 happen between now and certainly by the end of
14 July, switching over to access to the facilities
15 in Virginia.

16 >>>JUDGE WARDWELL: Okay. Further on, at
17 the very end of that sentence it says that dealing
18 with CACI also maintains backup tapes that
19 contain -- you're talking about the facility in
20 Virginia and you mentioned that CACI was the
21 operator there, also maintains backup tapes that
22 contains a complete copy of the LSN at the Iron
23 Mountain offsite storage facility.

24 Is that the West Virginia site.

25 >>MR. SHEBELSKIE: Not the Morgantown site.

1 >>JUDGE WARDWELL: Okay.

2 >>MR. SHEBELSKIE: that's separate from
3 that.

4 >>JUDGE WARDELL: Where is Iron Mountain?

5 >>MR. SHEBELSKIE: It's in Nevada.

6 >>>JUDGE WARDWELL: Okay.

7 >>MR. SHEBELSKIE: Your Honor, Iron Mountain
8 is the name of a contractor, as opposed to a
9 physical site.

10 >>>JUDGE WARDWELL: Oh, okay. Silly me.
11 Iron Mountain offsite storage facility; I should
12 have known. Thank you.

13 And CACI is C-A-C-I; is that correct?

14 >>MR. SHEBELSKIE: That's correct.

15 >>>JUDGE WARDWELL: That was for our court
16 reporter. It's not the color of pants I'll surely
17 put on this afternoon, if we get through this.

18 On Question 1.4.1 I asked what was the
19 percentage of paper documents. 1.4 deals with
20 native documents that were used to form DOE's
21 collection. And the first one was what percentage
22 are paper documents, and the answer was
23 19 percent. I just want to clarify to make sure I
24 understand that correctly.

25 All of your, what is considered the

1 native documents are electronic; you have no hard
2 copies. Is that a fair assessment?

3 >>MR. SHEBELSKIE: CACI has a very small
4 percentage of paper documents that we collected
5 that they have kept, as opposed to returning to
6 the provider of the documents.

7 So we do have electronic copies of 100
8 percent of the documents in our LSN collection, of
9 the paper documents. We retained the originals of
10 a very small percentage.

11 >>>JUDGE WARDWELL: And this 19 percent
12 refers to the percentage of the total collection
13 that was part of this paper sweep that you went
14 through and were -- or other original paper
15 documents that were then converted to electronic
16 and are now basically stored electronically?

17 >>MR. SHEBELSKIE: I'm not sure that's quite
18 right, Your Honor. What the 19 percent represents
19 is that of all the documents in our LSN
20 collection, as it currently exists, 19 percent of
21 them, in their native format in which we collected
22 them, were in paper. And as I said --

23 >>>JUDGE WARDWELL: And that's the same
24 thing for the 81 percent dealing with the RIS
25 e-mail electronic files; is that correct?

1 >>MR. SHEBELSKIE: Yes. All of those
2 documents we collected and maintained in
3 electronic format, as their native format.

4 >>JUDGE MOORE: And, in general, your
5 intentions were to -- and your, not only
6 intentions, what you actually did was to return
7 the vast majority of any paper documents you did
8 have to their original owner and are only keeping
9 electronic copies as --

10 >>MR. SHEBELSKIE: Correct.

11 >>>JUDGE WARDWELL: -- being now native, if
12 you will, using the old speak that we had.

13 >>MR. SHEBELSKIE: Correct.

14 >>>JUDGE WARDWELL: In Question 1.4.4, I
15 queried whether there were any backups to the
16 paper documents, and you said, yes, that in
17 addition to the copy LSN maintains, a copy of the
18 LSN document collection is maintained at the COPS
19 facility, with CACI maintaining electronic copy of
20 the paper documents included in the LSN.

21 So all these backups are in electronic
22 format; is that correct?

23 >>MR. SHEBELSKIE: Yes, sir.

24 >>>JUDGE WARDWELL: And I think you also
25 stated that while the motion to withdraw process

1 continues onwards until there's a non-appealable
2 decision, this backup will be maintained in a
3 searchable, retrievable format.

4 >>MR. SHEBELSKIE: Correct. They will be
5 maintained without alteration of their current
6 format; yes, sir.

7 >>>JUDGE WARDWELL: Onto 1.5, talking about
8 the databases and the data within those databases.
9 1.5.1 lists a variety of databases. And in
10 response to that, you responded that six of these
11 databases remain currently active, and upon
12 termination of the program, they'll be preserved
13 in compliance with the requirements of the Federal
14 Records Act and DOE regulations.

15 And I assume that these six databases
16 are considered to be documentary material and can
17 be retrieved at any point; is that correct?

18 >>MR. SHEBELSKIE: Yes and no, Your Honor.
19 To the extent the information in any of these
20 databases or earlier databases, as we were
21 populating the LSN, qualified as documentary
22 material, that information from the database was
23 captured and copied and added to our LSN
24 collection.

25 So, in that sense, the data in the LSN

1 that qualifies as documentary material is
2 redundant of what's in the database. And so the
3 database itself, however, might have additional
4 information that may or may not qualify as
5 documentary material for some reason.

6 I'm not saying necessarily that's the
7 case for any of these six remaining databases, but
8 it's -- what we did, as we populated the LSN, is
9 we made an individual investigation of each
10 database, made an assessment of whether it's
11 content qualified as documentary material. If
12 it's entire content did, we replicated and made
13 available through the LSN the entire contents of
14 the database. If only part of the contents of the
15 database qualified as documentary material, that
16 portion of it became available in the LSN.

17 The -- so the databases do exist
18 separate and distinct from our LSN collection in
19 that sense, but they're overlapping, obviously.

20 Upon the termination -- well, each of
21 these databases is subject to the Federal Records
22 Act and existing DOE orders that require
23 preservation of the databases for a period of 25
24 years following termination of the project. So
25 these databases will be maintained, according to

1 that requirement, separate and distinct from our
2 LSN collection, which we're proposing to save for
3 100 years.

4 I hope that clarifies or helps answer
5 your question, Your Honor.

6 >>>JUDGE WARDWELL: Yeah, I think it does,
7 but let me explore it this way then:

8 Can you elaborate on why the data and
9 all the data in these databases is not considered
10 raw data under the meaning of 2.1018 (a)(1) (ii)
11 and 1018 (a)(1) (iii) and 1020(a)?

12 >>MR. SHEBELSKIE: As I stated, Your Honor, I
13 wasn't -- my comments were general in nature about
14 the way we approach databases, and does not
15 necessarily reflect the situation with these six
16 specific databases.

17 It may well be, upon investigation, that
18 all data in the entirety of these six databases
19 are, in fact, replicated and included in the LSN.
20 I can give you an example of something that might
21 be in a database that wouldn't be transposed,
22 necessarily, over to the LSN.

23 You might have a data set, the results,
24 say, of a chemical analysis or something. That,
25 obviously, would be captured from the database and

1 put in the LSN. There might be associated,
2 however, with data set, in our database, some
3 administrative information that might just record
4 when it was looked at by somebody or requested by
5 somebody and checked out.

6 Some housekeeping information like that
7 or the like, which would not necessarily be
8 transposed and carried over to the LSN. That's
9 just off the top of my head distinction of what
10 might exist.

11 But, again, any data, I think, in the
12 sense you're using it, be from experiments, test
13 data, analytical data and the like, that's in
14 these databases were transposed copied and
15 included in our LSN collection.

16 >>>JUDGE WARDWELL: How is that capturing
17 taking place in the LSN again? How do you capture
18 that data? And how do you -- how was the
19 discrimination made between data that should go in
20 and data that isn't? For instance, it might be
21 very critical to know when a person happened to
22 look at a set of data --

23 >>MR. SHEBELSKIE: Well, generally speaking,
24 Your Honor, our projects have record procedures
25 that require preservation of data information and

1 recordation through our Records Processing Center,
2 and we have a system of LATTFs in the technical
3 data forms and then that information gets put into
4 the Records Processing Center.

5 That was one way that we could identify
6 if it was subject to processing and capture
7 through our Records Processing Center. That data
8 was collected across the Board, and then,
9 additionally, we did an investigation into each
10 database separately just to see if there was
11 anything else that was not being captured by
12 project records that needed to be added.

13 I will assure you, we erred on the side
14 of over-inclusion, and so we felt very comfortable
15 that any information in these databases could
16 arguably qualify as documentary material was
17 represented in the LSN.

18 And through the course of, obviously, a
19 very contentious proceeding, where our LSN
20 compliance was heavily scrutinized by Nevada and
21 others, nobody ever questioned that.

22 >>>>JUDGE WARDWELL: Okay. And those
23 comments are limited strictly to the six databases
24 that you presented under this question for 151.

25 >>MR. SHEBELSKIE: Well, actually, no,

1 Your Honor, those comments I described apply to
2 all of our databases. The six that we listed are
3 the only one -- databases that are still active
4 and available.

5 For example, here's what happened: The
6 last database in the question of 1.5.1, the
7 viability assessment database, that was a database
8 that was established several years ago.

9 >>>>JUDGE WARDWELL: I'm sorry, what database
10 are you referring to?

11 >>MR. SHEBELSKIE: The Viability Assessment
12 Database. It's the last one listed in the
13 question. Not the answer, Your Honor.

14 >>>>JUDGE WARDWELL: Oh, I'm sorry. Oh,
15 gotcha, yes. There you are, yes.

16 >>MR. SHEBELSKIE: The Viability Assessment
17 Database.

18 >>>>JUDGE WARDWELL: Yes.

19 >>MR. SHEBELSKIE: That database was created
20 and used several years ago as part of the
21 Department of Energy's initial viability
22 assessment. And so, that was created and
23 maintained for that process, then we moved to site
24 characterization, then we moved to LA preparation,
25 and the Viability Assessment Database no longer

1 needed to exist at some point in time.

2 And when that happened, the data in that
3 was transferred over into a later database,
4 ultimately rolling up into this DDMS database
5 structure that we have.

6 So, at various points in time, as the
7 databases ceased to have functional needs for the
8 program, the data was captured, preserved and
9 transferred and incorporated into another
10 database. That's why, for example, the Viability
11 Assessment Database no longer exists.

12 When we were populating the LSN, going
13 back starting several years ago now, started
14 collecting database documents -- document --
15 information from databases that existed at that
16 time, so we would have captured some of these
17 databases, because they existed back in '04, for
18 example, before the database was discontinued and
19 it rolled up into something else.

20 >>>>JUDGE WARDWELL: So I'm an engineer 20
21 years from now, working on another option for high
22 level waste, and I happen to be looking over an
23 old document I happen to have from 2004, and it
24 references some information that's in this
25 Viability Assessment Database. I say, boy, I'd

1 like to see what that is. Would I eventually get
2 pointed to the roll-up of where that is?

3 >>MR. SHEBELSKIE: Your Honor, yes. I
4 believe the answer is the data set you're
5 referring to is going to have a data tracking
6 number associated with it, and that number
7 survives.

8 >>>JUDGE WARDWELL: It will point you to
9 where it gets -- so I could eventually follow the
10 path to look at that --

11 >>MR. SHEBELSKIE: Yes, sir.

12 >>JUDGE WARDWELL: -- information.

13 That may answer a lot -- some of the
14 questions I had in regards to other data -- many
15 of the other databases. And so I'll ask in
16 regards to a document entitled Concept of
17 Operations for the yucca Mountain Project
18 Technical Management System, July of '07, that was
19 prepared by SANDIA, I believe.

20 Yes, it is. At least all their e-mail
21 addresses are SANDIA, so I assume -- if it's not
22 by SANDIA, they have an office there in SANDIA,
23 because they have an e-mail address SANDIA, so I
24 assume it's prepared by them.

25 So it was a general review of document

1 handling process that was done as part of your
2 normal operations, I gather. But what's of
3 interest is a couple of statements that are made
4 in there. And one of them's on page XII, in the
5 executive summary.

6 The top paragraph -- and I'll just read
7 it out. It just says "The Technical Data
8 Management System interfaces with at least seven
9 under -- other applications to support the input
10 of technical data by the authors, the creation and
11 input of Metadata and the indexing information
12 associated with the technical data and the search
13 and access to the information by authorized users.
14 And these are seven other databases beyond the six
15 that you've talked about.

16 And then on XIII, recommendations for
17 moving forward. This report says "We recommend
18 that the current Technical Management Data System
19 be replaced, and its replacement system must
20 automatically track data items through the system
21 from end to end, conclusions developed and
22 published for the licensing system must be able to
23 automatically verify how data was developed
24 throughout the analysis and modeling process. And
25 referential integrity must be maintained by the

1 database system to ensure consistency of the
2 accuracy of the data.

3 That implied to me that there were seven
4 other databases, at a minimum beyond the six, that
5 should be captured and maintained. If this -- you
6 know, not that you have to adopt these
7 recommendations, but certainly it says that's
8 documentary material, seems to me, and would
9 qualify under 1018 and 1020 of Chapter 2.

10 Do you have any idea of whether or not
11 those seven databases are captured? And I don't
12 know what they are, I haven't -- I didn't happen
13 to capture them because I was -- didn't have
14 enough time, if you want to know the truth, to
15 explore it any further. And I was hoping you
16 would say, yes, you would know, or if you didn't
17 know, then you could get back to me and I wouldn't
18 have to do the work.

19 >>MR. SHEBELSKIE: All right. The specific
20 document you're referencing, I can't remember, but
21 I think I can answer the question this way --

22 >>>JUDGE WARDWELL: If you want to know what
23 it is, just -- I'll put it on the record, so if
24 you want to refer back to it for whatever reason.

25 >>MR. SHEBELSKIE: Please.

1 >>>JUDGE WARDWELL: It is -- the number I
2 have is DEN001592148.

3 >>MR. SHEBELSKIE: And the date of that,
4 Your Honor?

5 >>>JUDGE WARDWELL: It is July of '07.

6 >>MR. SHEBELSKIE: All right. Your Honor,
7 let me make a comment regarding that.
8 Particularly in SANDIA became, in essence, the
9 lead lab for the project. We worked very closely
10 with SANDIA to trace back through the technical
11 databases that we had, the technical data of
12 management system, to make sure that all the data
13 sets in the then extant technical data management
14 systems were reflected in the Record Processing
15 Center and correspondingly represented in the LSN.

16 So I can't, from memory, recall that
17 document and the specific databases they're
18 talking about, but I know we went through what was
19 a multiple-year process of internally conducting,
20 in essence, a review, maybe one could characterize
21 it even as audit, to trace down and do a
22 verification that data that is in the databases
23 and referenced in our technical scientific
24 reports, et cetera, were captured in the LSN.

25 And I remember going through cycles

1 where we get reports from SANDIA, where they would
2 find some that weren't, and then we would
3 supplement the LSN collection. So I have a
4 heightened rate of confidence sitting here today
5 that whatever form or not those recommendations
6 may have been implemented in, SANDIA went through
7 a very rigorous process to make sure all the data
8 in the databases were reflected in the LSN.

9 >>>>JUDGE WARDWELL: And for completeness,
10 we'll say again that the six databases that you
11 presented in your answer were merely the ones that
12 are active, not the universe of those databases
13 that have been captured by the LSN; is that
14 correct?

15 >>MR. SHEBELSKIE: Correct.

16 >>>>JUDGE WARDWELL: Lastly in this area,
17 could you explain what is DOE's Technical
18 Information Center; what it was set up for and
19 what its holdings are and how are those holdings
20 being archived, if there's a need to?

21 >>MR. SHEBELSKIE: Oh, my goodness.

22 >>>>JUDGE WARDWELL: What the heck is it?
23 And why does it seem to disappear recently, that
24 you don't seem to hear much about it anymore? Or
25 is it just because it's so big that you don't have

1 to hear about it?

2 >>MR. SHEBELSKIE: I think it's really the
3 latter, Your Honor.

4 It -- our database structures, the
5 technical information center, in conjunction with
6 our record processing center, is all part of the
7 giant infrastructure we had to maintain project
8 records during the course of the project, that the
9 integrity of our document management system,
10 through our Technical Information Center and the
11 Record Processing Center, is all maintained.

12 The Technical Information Center, if I
13 recall, was a compilation of materials, some of
14 which were created by DOE or its contractor, some
15 of which weren't, which could be publicly
16 available references that were collected at the
17 same time. Copies of handbooks or standards
18 manuals and things like that.

19 So basically think of it as a -- as a
20 library of materials. Now, as we went through --

21 >>>JUDGE WARDWELL: So a library of
22 copyrighted materials, things like that?

23 >>MR. SHEBELSKIE: It certainly did include
24 copyrighted materials, as I said, as well as
25 materials that DOE and its contractors developed.

1 As we went through and populated the LSN
2 to do our recertification and whether it was '07
3 or '08, I forget now, we went through a similar
4 exercise, like I said, with SANDIA to make sure
5 that everything that was in the Technical
6 Information Center that qualified as documentary
7 material was included in the record processing
8 center and made available to CACI for production
9 on the LSN.

10 So, for example, we could have a
11 technical report that DOE or its contractors
12 created, a hard copy sitting there in our
13 Technical Information Library. We wanted to
14 verify that that document was in the Record
15 Processing Center and, therefore, sent to CACI.

16 What we would not have included from the
17 Technical Information Center Library would be the
18 types of materials that the LSN regulations
19 specifically excluded from production, which would
20 not be report to studies prepared by DOE, but
21 would be journal articles, published materials
22 that are copyright protected and the like.

23 >>>JUDGE WARDWELL: Thank you.

24 >>MR. SHEBELSKIE: They would not be -- those
25 were not federal records because they're --

1 >>>JUDGE WARDWELL: Right. Thank you.

2 Nevada, would you like to comment on
3 anything so far, in regards to the physical
4 storage and the data and databases, as far as how
5 you interpret and -- your comfort level with
6 whether or not at least it's being captured
7 presently by the LSN.

8 >>MR. FITZPATRICK: Charles Fitzpatrick,
9 State of Nevada.

10 Well, first, in response to the very
11 last thing you've said; I think it's fair to say
12 we've done our best for the past six years, since
13 2004, to attempt to ensure that to the extent we
14 could scrutinize it, that the necessary
15 documentary material was being put on its LSN by
16 DOE.

17 From time to time we had battles about
18 it. And from time to time, those battles were
19 resolved one way or the other. And when it was
20 one way, additional materials were added. And
21 when it was the other way, they were not.

22 But I think, generally, we're satisfied
23 that, as it stands today, the LSN of DOE contains
24 that which is defined in 10 CFR 2.1001 as
25 documentary material, whether supportive of their

1 license application or the not supportive of the
2 license application, or studies and reports
3 without regard to whether they do or do not
4 support the license application, those are the
5 documentary materials.

6 And so, you know, as to your question,
7 as it stands now, I think we're as satisfied as we
8 could be, and with the additional discussion we've
9 had both off the record and on the record today
10 about the preservation of non-documentary, I guess
11 you could call it, materials such as core samples
12 and physical materials, but represented by a
13 header on the LSN, I think we're satisfied with
14 respect to that.

15 The going forward, however, obviously,
16 the question is what about the preservation
17 comments in the few hundred questions that DOE
18 answered on May 24? And I think the three
19 principle conclusions that we draw from the myriad
20 of questions are, number one -- and I like to
21 refer to it as like three epics.

22 The first epic is that in which we live
23 now, from now until termination of the licensing
24 proceeding. And no one can, you know, tell you a
25 date for that, but one way of guesstimating could

1 be, after appeals to the Commission and appeals to
2 the courts, it could be about 18 months from now.

3 But, in any event, DOE has promised and
4 committed to maintain intact and complete, with
5 the current functionality, its entire LSN
6 collection during that --

7 >>JUDGE WARDELL: Can I interrupt you
8 quickly?

9 >>MR. FITZPATRICK: Sure.

10 >>>JUDGE WARDWELL: Because I'd like to hold
11 off before you open up the big can of worms and
12 everything goes exploding around.

13 >>MR. FITZPATRICK: Okay.

14 >>>JUDGE WARDWELL: My question was a very
15 small subset of what you're talking about. All
16 very good to hear, and let's hear it in stages.

17 What I've heard you say now is the way
18 the current LSN is, you're comfortable, to the
19 best of your knowledge, that what's your -- what's
20 needed to be in there is as good as you're going
21 to get in what needs to be there?

22 >>MR. FITZPATRICK: That's correct, Your
23 Honor.

24 >>>JUDGE WARDWELL: And mine was even less
25 than that. I just wanted to make sure you're

1 comfortable with how the physical specimens are
2 handled within the current LSN and how the current
3 databases and the data associated with those
4 databases are, a very tiny subset of all the big
5 picture.

6 And I gather that's inclusive of your
7 answer today.

8 >>MR. FITZPATRICK: Right, Your Honor. To
9 the extent --

10 >>>JUDGE WARDWELL: And I'll get back to you
11 later when we get to that --

12 >>MR. FITZPATRICK: To the extent we've ever
13 not been satisfied during this entire period,
14 we've raised the issue until it finally resolved.

15 >>>JUDGE WARDWELL: Has been resolved --

16 >>MR. FITZPATRICK: And the answer is yes.

17 >>>JUDGE WARDWELL: And then that's your --

18 >>JUDGE MOORE: Mr. Shebelskie, in your
19 response to Judge Wardwell's question concerning
20 the question and your answer to 1.5.1, which is
21 the listing of the technical data management
22 systems subcomponents, you -- your answer was that
23 some of them never existed, some of them were
24 merged with other systems, and you list the six
25 that are -- six that are still active.

1 Out of the list that was asked in the
2 questions, can you tell us which ones never
3 existed.

4 >>MR. SHEBELSKIE: Not that they never
5 existed, Your Honor, but they ever never existed
6 as a subcomponent of the TDMS. They were
7 standalone databases.

8 >>JUDGE MOORE: Oh, thank you.

9 >>>>JUDGE WARDWELL: Staff, do you have any
10 comments or anything you'd like to offer,
11 specifically in regards to just the physical
12 specimens and the databases and data aspect of it
13 at this point?

14 >>MS. BIELECKI: No, Your Honor, we have no
15 comments.

16 >>>>JUDGE WARDWELL: Rather than go around
17 the room, why doesn't whoever's interested in --
18 of the other parties and interveners here, would
19 like to make a comment or raise an issue at this
20 point, kind of motion so that I know that you are
21 interested in doing such.

22 >>MR. VanNIEL: Jeff VanNiel on behalf of Nye
23 County, Your Honor.

24 We filed a comment with respect to DOE's
25 response to the questions, and we had limited our

1 comments exclusively to the physical sample
2 portion of what we had talked about this morning,
3 and just wanted to say on the record that based on
4 what I had had a conversation off the record with
5 Mr. Shebelskie this morning and his commitment to
6 me both off the record and what he has responded
7 to you on the record today with respect to how
8 they're going to handle the physical samples,
9 we're currently satisfied with the way they're
10 handling that.

11 >>>JUDGE WARDWELL: Thank you. I appreciate
12 that.

13 >>JUDGE MOORE: In that regard,
14 Mr. Shebelskie, and perhaps Nye County; Nye County
15 said some of the physical materials in DOE's
16 possession belong to Nye County and it indicated
17 others.

18 Is -- do you agree that that is the
19 case?

20 >>MR. SHEBELSKIE: Your Honor, I -- as I told
21 counsel, actually, I didn't know one way or the
22 other that. I offered, of course, to consult with
23 Nye County counsel about our plans and any request
24 that they would like to make. I even offered
25 perhaps they would like to store the physical

1 materials for 100 years.

2 But I don't know the answer to the
3 question. But I committed that we would consult
4 with them and if there was some issue in that
5 regard, obviously, I suspect the DOE and Nye
6 County will certainly work that out.

7 >>JUDGE MOORE: Nye County, what physical
8 materials -- were you speaking of core samples, or
9 are there other materials?

10 >>MR. VanNIEL: Jeff VanNiel on behalf of Nye
11 County, Your Honor. It's my understanding that
12 most of what we're discussing now are the physical
13 core samples, which Nye County would have actually
14 done the drilling and the pulling of the samples,
15 but that DOE QAed the materials and used them for
16 the basis of some of their LA and, therefore, they
17 were holding them in the warehouses currently.

18 >>>JUDGE WARDWELL: Are -- is it routine
19 procedures to take a photographic record of all
20 the core samples or any other -- any other
21 specimen for that matter?

22 >>MR. SHEBELSKIE: As part of a QA process
23 for the core sample?

24 >>>JUDGE WARDWELL: Yeah, I -- my past work,
25 I've always done that. I photographed core

1 samples, I photographed lab samples, just so
2 that -- because they aren't durable forever.
3 There's no guarantee. There's no --

4 >>MR. SHEBELSKIE: Sure.

5 >>JUDGE WARDWELL: You know, you're not
6 wrapping them in wax and preserving them forever.
7 They will deteriorate.

8 >>MR. SHEBELSKIE: I'd have to check,
9 Your Honor, to see, to be able to answer whether
10 it's routine. I know there are photographs, I've
11 seen photographs, I've seen them in the LSN
12 collection.

13 Whether it is routine to say across the
14 board in every instance a photograph exists of the
15 core sample, I'd have to check.

16 >>>JUDGE WARDWELL: Anyone else? Let's
17 trudge on this happy road of destiny. On 1.6 it
18 says "What percentage of the content of DOE's LSN
19 collection is site specific?"

20 And you basically dodge the question
21 saying you had no idea.

22 I understand you don't keep records to
23 do that, but you must have a feeling for what
24 might be in it. And by that I mean, there's -- a
25 lot of the information can be useful for other

1 people moving forward on other options. I would
2 think it might be a very high percentage, just to,
3 if nothing else, as a lesson is learned.

4 But even beyond that, anything dealing
5 with titanium corrosion, for instance, you got to
6 believe some type of metal like that might be used
7 in the future. You've got a wealth of information
8 there. You've got a wealth of information in my
9 area of matrix suction of rock porous materials
10 and how water flows through them, that would help
11 someone get started in regards to relative
12 diffusion coefficients and things like that.

13 Like any other scientist, I throw out
14 all these words and hope no one understands them,
15 because sometimes I don't either, but it sounds
16 impressive.

17 Anyhow, isn't it fair to say that
18 there's a very large percentage of information
19 there that is not useless, even if Yucca Mountain
20 never goes any further?

21 >>MR. SHEBELSKIE: Your Honor, I think the
22 Department would agree that even though a document
23 may have been created for the purposes of either
24 the site suitability or the license application,
25 in the context of the Yucca Mountain proceeding,

1 it has scientific value and that's why the
2 Secretary or the Department has said it's going to
3 preserve this information for scientific
4 endeavors.

5 And we understood your question here
6 about site specific to be addressing that very
7 concern, and that's why we did not try to
8 distinguish that we would only save part of the
9 LSN collection for the 100 years, but the entirety
10 of it for that very reason.

11 >>>JUDGE WARDWELL: Thank you.

12 >>JUDGE MOORE: Obviously, there was a wealth
13 of material that you determined was not within the
14 definition of documentary material as defined in
15 10 CFR 2.1001.

16 But if it relates to Yucca Mountain,
17 what's DOE's disposition of those materials? And
18 a number of other parties and petitioners have
19 specifically raised that question, either in their
20 responses to DOE's motion that we argued yesterday
21 or in comments at various stages.

22 >>MR. SHEBELSKIE: Yes, sir, Your Honor.

23 All of the project records -- put aside
24 for the moment the LSN collection. That will be
25 treated specially, but all the other project

1 records primarily are going to exist in one or two
2 databases now, through the Record Processing
3 Center, through our RIS collection, Record
4 Information System, and our e-mail warehouse,
5 where the OCROM e-mails, in their entirety, are
6 stored.

7 And those are systems that are governed,
8 as I said before, by the record retention
9 requirements. Generally speaking, they are 25
10 years from the termination of the project.

11 >>JUDGE MOORE: But they are in no way
12 labeled Yucca Mountain related, so no one would
13 ever know how to look at them or find anything in
14 them?

15 >>MR. SHEBELSKIE: Well, I don't know if I
16 quite agree with that, Judge Moore.

17 For example, the record process -- the
18 Record Information System for OCROM, I think that
19 title -- that's the current name. I think that's
20 how it's going to be preserved, and some people
21 who wanted access to the broader records through
22 the Record Information System can, through DOE,
23 make request for that. I'd also comment --

24 >>JUDGE MOORE: How large a collection is
25 that?

1 >>MR. SHEBELSKIE: Oh, in terms of either
2 document numbers or terabytes of information.
3 Recognizing that it includes the entirety of the
4 RIS component of our LSN collection, plus other
5 things. Now most of those other things are going
6 to be the types of documents that aren't
7 documentary material, so they'll have a lot of
8 administrative information and the like.

9 It's a large collection, for sure, but
10 we have produced on the LSN the lion's share of
11 the Record Information System.

12 >>JUDGE MOORE: So there's, speaking
13 generically, not very much information that is
14 directly relevant to Yucca Mountain that is not
15 already captured?

16 >>MR. SHEBELSKIE: I agree, Your Honor, and I
17 think anything of potential scientific interest is
18 certainly captured.

19 >>JUDGE MOORE: Okay. Thank you.

20 >>>JUDGE WARDWELL: What I think I'd like to
21 do now is go through a search so we can see how
22 this works.

23 >>MR. SHEBELSKIE: Online?

24 >>>JUDGE WARDWELL: Would you like to do it?

25 >>MR. SHEBELSKIE: Online?

1 >>>JUDGE WARDWELL: Yes.

2 >>MR. SHEBELSKIE: No, sir.

3 >>>JUDGE WARDWELL: Well, we're going to.

4 And hopefully this will show up on your screen or
5 screens. Yeah. Are you looking at something
6 besides me on your screen, I hope?

7 >>MR. SHEBELSKIE: I am.

8 >>>JUDGE WARDWELL: Good. Does that look
9 familiar?

10 >>MR. SHEBELSKIE: I'm afraid so.

11 >>>JUDGE WARDWELL: Well, you're probably --
12 you are a lot more of an expert at this than I am.
13 I think this would be helpful to step through one.
14 And you've done it on your reply, and that was
15 helpful a lot, and I want to kind of do the same
16 thing, because it does end up -- it helps me
17 generate the specific questions as we talk about
18 it.

19 So let's go ahead and we'll use your
20 same search example you did by refining your
21 search to a very isolated term called "nuclear"
22 and see what we come up with.

23 And that's what we come up with, is a
24 whole list of various documents. We'll scroll
25 down until we find a DOE one, just so that we can

1 harass you about it.

2 That's some information and now someone
3 looks at that abstract and says, oh, that's of
4 interest, I'd like to look at it more. There's
5 several ways to look at it, as you described.

6 If -- let's start at the very beginning,
7 one that you didn't do. I happened to click right
8 on the underlying title. And so I gather that's
9 the same as one of the other little clicks, little
10 icons up in the corner. Yeah, any of these icons
11 up in the corner do various functions. And I
12 assume that's the same as the view document one?

13 >>MR. SHEBELSKIE: Yes, sir.

14 >>>JUDGE WARDWELL: Correct?

15 And what do we have here? You want to
16 describe what we got here, and how this is
17 ultimately going to generate a document for us,
18 that we may ultimately want to get a hard copy of
19 for ourselves, for instance?

20 >>MR. SHEBELSKIE: All right. I will
21 endeavor to do my best, recognizing I'm a lawyer,
22 not an IT person. What I understand we're looking
23 at here is the OCR -- an OCR text generated --
24 from the OCR text of the document. That the
25 search results are coming back through the index

1 created on the LS -- the NRC's LSN portal. And
2 what you see here is the OCR text of the document
3 and the two icons that are on the first page
4 there.

5 The one on the left, I believe if you
6 click that you will get an image file, which will
7 either be in -- comes from our JPEG or TIFF file,
8 depending on what it is. Yes, there is an image.

9 And I believe you can scroll from page
10 to page in the image file. Yes. Click to go on
11 single page -- oh, you can click to go on a single
12 one.

13 >>>JUDGE WARDWELL: Yeah.

14 >>MR. SHEBELSKIE: If you want multiple
15 pages, you click on the next icon. And then you
16 have the options to view this document in
17 increments; in this application up to 20, but our
18 software can generate a 100-page batch at a single
19 time for printing.

20 >>JUDGE WARDWELL: And so the image -- what
21 we're looking at here now is that this particular
22 document has 2,156 images; is that correct?

23 >>MR. SHEBELSKIE: Yes, sir.

24 >>JUDGE WARDWELL: And that is the entire
25 document, as if a picture was taken of it from

1 front page to back page.

2 >>MR. SHEBELSKIE: Yes, sir.

3 >>JUDGE WARDWELL: Everything inclusive. And
4 all of these images are either TIFF and JPEG, is
5 that correct?

6 >>MR. SHEBELSKIE: Yes, sir.

7 >>JUDGE WARDWELL: And so none of this is
8 PDF?

9 >>MR. SHEBELSKIE: They're distorted, JPEG
10 and PDF. I think when you click on the multiple
11 images I think that converts it to a PDF.

12 >>JUDGE WARDWELL: I think it does also, and
13 that's when that Fetch-Doc program kicks in?

14 >>MR. SHEBELSKIE: Yes, sir.

15 >>JUDGE WARDWELL: Up to this point the LSN
16 did the search; is that correct? And where does
17 the search -- how does the search happen?

18 >>MR. SHEBELSKIE: As I understand it --

19 >>JUDGE WARDWELL: When we first did the
20 nuclear and said go find these documents, who was
21 responsible for making that -- of course, both
22 are, but where does the dividing line come?

23 >>MR. SHEBELSKIE: I believe, Your Honor,
24 that the searching, word searching, or by document
25 number, is done through an index that the NRC's

1 LSN side creates. You get your search results, as
2 you saw, when you then want to click on the image
3 file, or text files, through the icons, as I
4 understand it in laymen's terms, the LSN, the
5 NRC's LSN portal reaches back to our participant
6 server and retrieves it, makes it available to
7 you, the viewer.

8 >>JUDGE WARDWELL: Can we go back to the LSN
9 search.

10 Now, let's go back to that -- yeah,
11 click on the title again, that's the page that I
12 want, or that equivalent one. Yes, this is the
13 one.

14 It shows as a single sheet of images.
15 Where are those single -- where are those sheets
16 that you'll get as you click this single sheet
17 here?

18 >>MR. SHEBELSKIE: You click that single
19 sheet there, Your Honor, you are pulling up the
20 image file for that specific page, and that image
21 file is maintained on DOE's participant server.

22 >>JUDGE WARDWELL: Right. And the single
23 page we're looking at is everything above the
24 horizontal line there. This is the text that's in
25 there, and that image would come up with that in

1 there; is that correct?

2 >>MR. SHEBELSKIE: I believe so, yes, sir.
3 Plus -- well, I think we saw in this example, for
4 example, if there's a photograph or --

5 >>JUDGE WARDWELL: Right. Right. And any
6 other non-text type of stuff, because it would
7 be -- it is a picture of it.

8 >>MR. SHEBELSKIE: Yes, exactly.

9 >>JUDGE WARDWELL: And then we scroll down
10 here, and that next single image would be that.
11 Don't you see how someone thinks that what you've
12 got stored is a bunch of single pages sitting in a
13 drum somewhere, that the LSN is going after and
14 capturing these little puppies and bringing them
15 back, and that if you turn that over in some other
16 future endeavor, that all you're turning over is a
17 bucket of single pages?

18 >>MR. SHEBELSKIE: I hear what you're saying,
19 Your Honor, that someone looking at that might
20 perhaps come to that conclusion, but in talking at
21 great length with our IT personnel, to make sure I
22 understand this, I think I can, with confidence,
23 say that's not the case.

24 Image this, the directory structure for
25 our LSN collection, that's on our participant web

1 server, there is, in our server, we have a unique
2 document number for every document in our LSN
3 collection. We have a LSN participant number.
4 LSN number.

5 >>JUDGE WARDWELL: And that's all the images
6 that creates the entire document; is that correct?

7 >>MR. SHEBELSKIE: Under -- so we have a
8 unique sub-folder for that LSN session number.
9 Under that unique folder for that number is one
10 file, that's the header file; another sub-subfile,
11 that is the OCR text file; and then all the
12 individual page images of that document, all
13 stored together under that unique directory for
14 that document.

15 >>JUDGE WARDWELL: So the LSN, when it asks
16 for a document, will go out and find that header
17 and then go out to the -- where the location of
18 those particular sheets are and images, or --

19 >>MR. SHEBELSKIE: Well, they're all part of
20 the same subdirectory, associated with that unique
21 LSN session number for that document. So it
22 doesn't -- it's not like the 2100 pages here are
23 just scattered randomly throughout the LSN server
24 or collection, they are stored in a hierarchy,
25 where all the image files are together, with the

1 text file and the image file, and so, therefore,
2 if you wanted to know, I think, another question
3 asked, how would we know where one document starts
4 and another document ends; you just look at the
5 high directory structure, where you have a
6 separate LSN number for each document, and that's
7 your unique breakoff for each document.

8 >>JUDGE WARDWELL: I'm going to have to
9 control myself by not getting in too deep here,
10 because much of this is somewhat moot by the fact
11 that you have converted to PDF now.

12 >>MR. SHEBELSKIE: Well, we will convert to
13 PDF.

14 >>JUDGE WARDWELL: You have committed to. It
15 may not be completed.

16 >>MR. SHEBELSKIE: Yes.

17 >>JUDGE WARDWELL: But the idea that the LSN
18 search routine looks at your directory, and then
19 has to go out and spider up a bunch of these
20 various single sheets that may be scattered around
21 at various locations is not correct. It only has
22 to go to your one system -- one set of --

23 >>MR. SHEBELSKIE: One directory.

24 >>JUDGE WARDWELL: One directory,
25 subdirectory, probably, is the best word that I

1 would use, for the entire document, even as it
2 exists now, prior to any PDF.

3 >>MR. SHEBELSKIE: Yes, sir.

4 >>JUDGE WARDWELL: If we could go back to the
5 sheet again.

6 And then, if you click the -- let's go
7 ahead and click several pages. That allows you to
8 draw up more than the one by one that you have
9 here, and as such -- well, it shouldn't take --
10 it's probably just taking a little longer.

11 And let's go ahead and just take 20, but
12 you said you could go up to a hundred here, or so,
13 if you wanted to.

14 Now, it's been my experience that
15 sometimes I click this, get images, and nothing
16 happens. Has that been your experience or not?

17 >>MR. SHEBELSKIE: Oh, I found the system
18 highly functional, Your Honor.

19 >>JUDGE WARDWELL: Okay. And now, these are
20 the images converted to a PDF or certainly you can
21 save it as that?

22 >>MR. SHEBELSKIE: Yes, Your Honor.

23 >>JUDGE WARDWELL: Okay. Could we go ahead,
24 Andy, and try to save this and -- yeah, and it is
25 listed as a PDF file. And let's save it and then

1 pull it up in PDF and see what we get first,
2 whether it's -- and now see if that's searchable.

3 >>MR. SHEBELSKIE: I don't think that this
4 particular PDF format is searchable.

5 >>JUDGE WARDWELL: Try this, Andy. Try to
6 highlight it, because usually you get a notice
7 that you're -- yeah. Other times when I've tried
8 to do this, if I've tried to highlight it or
9 underline something, it will give me a notice
10 saying it can't be done, do you want to convert
11 it. We don't have to go through that again.

12 I was just going to show the relative
13 time it takes to convert it, if you want to,
14 because when I've gotten something like this with
15 Acrobat 9, it's been able to convert it to a
16 search for one, and I just wanted to give the
17 time, but you're saying that with your PDF files
18 that you have, it will be searchable, using a
19 parallel image of a text file, so that you'll know
20 where those words are in it, and pull those --
21 will it pull it up strictly by the page numbers on
22 a text file, or -- you've got a PDF file, as
23 you're saying, and the way it's going to be
24 searchable is, that isn't going to be a searchable
25 PDF file, but sitting right with it is going to be

1 the text file, that we'll look at just quickly,
2 and then we'll be done with this exercise. And
3 you're using that to do your search; because one,
4 I think you've already got that text file, and it
5 saves you the time of converting, I'm sure, may
6 have had something to do with it. But also,
7 you're claiming this has a better searching and
8 more definitive search capabilities.

9 But what do you get out of that search,
10 if you do that? Will it be -- what will be
11 retrieved, is probably what I'm interested in?
12 You won't get back the document showing where all
13 those -- where all the highlighting --

14 >>MR. SHEBELSKIE: The highlighting.

15 >>JUDGE WARDWELL: Yeah. And things like
16 that. It will just tell you that it's in there,
17 and I gather just pull up the text to talk about
18 it.

19 >>MR. SHEBELSKIE: I believe that's right,
20 Your Honor. I can verify whether that's the case
21 or not.

22 >>JUDGE WARDWELL: Yeah. I think that would
23 be worthwhile to verify that. We may try to show
24 something similar to that. I'm not sure this is
25 the way it will work when -- oh, you're going to

1 show how to make this -- yeah, how to convert this
2 to searchable. Okay. This will show how much
3 time it takes. Yeah. Good.

4 I've been counting here, it takes about
5 2 to 3 seconds a page to convert. And so that's
6 the way to convert it. But that isn't what you
7 were planning on doing, but that's the length of
8 time it would take to convert it to a searchable
9 PDF file. So now, yeah, now we're able to
10 highlight stuff.

11 And the way you're proposing it, you
12 will end up searching through that text file, and
13 then what does a -- the person whose been doing
14 this search get back and retrieve from that
15 process, or is that still to be defined?

16 >>MR. SHEBELSKIE: Well, I think in general
17 terms.

18 >>JUDGE WARDWELL: I think your mike's off.

19 >>MR. SHEBELSKIE: I'm sorry, Your Honor.

20 >>JUDGE WARDWELL: No problem.

21 >>MR. SHEBELSKIE: I think in general terms,
22 if someone were to make a request to Legacy
23 Management after this proceeding for a -- not for
24 a specific document, but for a group of documents
25 that responded to a search term, they would be

1 provided, in electronic format, with the OCR text
2 and the compiled PDF images, the documents that
3 are responsive to their search terms.

4 And then, if someone were to make such a
5 request they'd have the responsive documents, then
6 they could search them, or otherwise use them as
7 was meant for their purposes.

8 >>JUDGE WARDWELL: Yeah. And that -- and
9 just to clarify again, this would only come into
10 play after the non-appealable order?

11 >>MR. SHEBELSKIE: Yes, Your Honor.

12 >>JUDGE WARDWELL: Up to that point,
13 everything we've done in the searching, just as we
14 did here, we could get the PDF and you could
15 convert them to a searchable PDF, can be done.

16 >>MR. SHEBELSKIE: Yes, Your Honor.

17 >>JUDGE WARDWELL: Can we go back to the
18 search now, and just go ahead and call up a sample
19 text file, Andy. And show people how you're doing
20 it. The four icons off to the right, do you want
21 to explain what each one of those are rather than
22 have me do it?

23 >>MR. SHEBELSKIE: Well, one is a -- will
24 pull up the --

25 >>JUDGE WARDWELL: Don't do these, Andy, just

1 describe them for the record.

2 >>MR. SHEBELSKIE: One pulls up the
3 bibliographic header.

4 >>JUDGE WARDWELL: That would be a good one
5 to pull up. Let's pull that up right now.
6 Because we've talked about this header, and that's
7 the header that is the kingpin of this thing.
8 This is the way to get to it. And after this,
9 everything else is right in that same location of
10 the entire document, all the images and a separate
11 text file; is that correct?

12 >>MR. SHEBELSKIE: Yes, sir. All right. So
13 that's the information coded for this document in
14 the header format, as dictated by the subpart
15 general regulations.

16 >>JUDGE WARDWELL: And the LSN session number
17 is the one of interest?

18 >>MR. SHEBELSKIE: Yes, sir, that's how we
19 organize the documents on our directory. Whoops,
20 I'm sorry, I stand corrected. Ours are organized
21 by the participant session number.

22 >>JUDGE WARDWELL: Okay.

23 >>MR. SHEBELSKIE: Because we get that number
24 before we get the LSN session number. All right.
25 And that file will be maintained and archived as

1 part of the Legacy Management program.

2 Then another icon will pull up the OCR
3 text of that particular document, the one on the
4 right. And the OCR text is there with the
5 highlighted search terms.

6 >>JUDGE WARDWELL: And -- but that is one
7 page of it, correct?

8 >>MR. SHEBELSKIE: Well, no, no. It's the
9 full document. You'll see the -- on the right
10 hand, the cursor is in the middle of the column,
11 but the OCR text file, Your Honor, should be the
12 entire optical scan text of this entire document.

13 >>JUDGE WARDWELL: So rather than go one by
14 one we can scroll down and see these?

15 >>MR. SHEBELSKIE: You can scroll down or you
16 see up at the top, Your Honor, you're on page 209
17 of 215 and you click --

18 >>JUDGE WARDWELL: But as you do that -- go
19 ahead and do that, Andy. Yeah, take some time.

20 >>MR. SHEBELSKIE: Right. Or you can scroll.

21 >>JUDGE WARDWELL: Or not. The point is this
22 text file is of no real use -- is of limited use
23 if you're trying to read and understand what the
24 document is. It does give you a flavor for how
25 often your search terms were found, where they're

1 found, to give you an idea whether you want to do
2 something more to find the full document. Is that
3 a fair assessment of this text file?

4 >>MR. SHEBELSKIE: Yes. I think the text
5 file, obviously, is the tool for locating the
6 document, to help you pinpoint where the
7 document -- the search terms are, but if you're
8 going to do a read, particularly of a longer
9 document, I mean I find it obviously easier to
10 read the image file.

11 >>JUDGE WARDWELL: And plus there's liable to
12 be some other diagrams or photographs or pictures
13 or tables, or something, that aren't -- like
14 tables don't get converted very well here,
15 sometimes they end up with sets of numbers that
16 are scattered all over the place.

17 >>MR. SHEBELSKIE: Yes, sir.

18 >>JUDGE WARDWELL: So this is not where you
19 want to be to really understand the document.
20 It's a tool. Is that fair?

21 >>MR. SHEBELSKIE: Yes, sir, I agree with
22 that.

23 >>JUDGE WARDWELL: Is that a fair assumption?

24 >>MR. SHEBELSKIE: And that's why that we are
25 saving the image files as well.

1 >>JUDGE WARDWELL: Is there anything else you
2 want to bring up about the LSN and how it's run,
3 and which is doing which, and...

4 >>MR. SHEBELSKIE: No, Your Honor. I mean,
5 obviously, if there's a question that you have,
6 I'll be glad to try to answer it. Well, I would
7 make an observation, perhaps, looking towards the
8 future, because I think some of the Board's
9 questions concern whether or not the precise
10 functionality of the LSN should be preserved for a
11 hundred years, or whatever.

12 I think, as underscored by the LSN
13 administrator's answers to the Board's questions,
14 in the hypothetical of trying to resurrect an LSN
15 in the future, whether it be for another site, for
16 example, and you wanted to use these documents,
17 technology will change, platforms will change, and
18 probably what we have here on the LSN today will
19 be outdated, you know, 10 years, certainly 50
20 years from now.

21 And so, really trying to preserve
22 immediate functionality with LSN portal is
23 probably not, we think, necessary to preserve the
24 scientific data, as long as we are preserving the
25 directory structure, with the bibliographic

1 headers, text files, and our PDF files, as we
2 discussed, and then in the future, if it ever
3 needs to become available to the general public,
4 through an Internet source like we have now, that
5 will have to be adapted to whatever is the most
6 practical, efficient technology available is.

7 >>JUDGE WARDWELL: On page 13, below your
8 exhibit of a text file, with a highlighted nuclear
9 on there, you said this window displays a page of
10 the text from the NRC's LSN database.

11 Is it better to say it was generated by
12 the NRC's server or -- I don't understand that
13 statement, can you explain that more?

14 I had thought that text file was your --
15 came from your -- resides on your server somewhere
16 and the LSN merely pulled it out.

17 >>MR. SHEBELSKIE: Your Honor, it's more
18 accurate to say the text files are on our servers.

19 >>JUDGE WARDWELL: And not anything to do
20 with an LSN database. LSN meaning just the LSN
21 that the NRC's responsible for?

22 >>MR. SHEBELSKIE: Yeah.

23 >>JUDGE WARDWELL: That's the software
24 that --

25 >>MR. SHEBELSKIE: I think that's right,

1 Your Honor.

2 >>JUDGE WARDWELL: -- that drives the
3 searches.

4 >>JUDGE MOORE: Mr. Shebelskie, so your
5 response that Judge Wardwell just read, would you
6 amend that so it would be NRC's LSN database
7 and NR -- I'm sorry, DOE's LSN database, and NRC
8 would change to DOE as well, or no?

9 >>MR. SHEBELSKIE: Well, Your Honor, let me
10 check on a break with CACI, just to verify, so I
11 can be sure I'm technically precise. In fact, if
12 you'd give me a moment.

13 Okay, Your Honor, I have the
14 distinction. What we did write here is correct,
15 but looking at context -- what you see on page 13
16 are the search results. You input a search, you
17 get a search result. Those search -- this is
18 pulling up the data that's on the NRC's LSN portal
19 from the spidering or indexing process.

20 When you pull up the results, click on
21 the title of the document, like Judge Wardwell did
22 earlier, you have that OCR text that we were
23 looking at, that is pulling up the OCR index
24 files -- text files, from our server. That's
25 what's shown on page 16 of our answer.

1 >>JUDGE WARDWELL: So that isn't one page of
2 the text file?

3 >>MR. SHEBELSKIE: What you see on page 13?

4 >>JUDGE WARDWELL: Right. I mean, I don't --
5 I never -- that is a result of the search, but
6 that's the same thing we were looking at when we
7 clicked on the text file.

8 >>MR. SHEBELSKIE: It is a text -- it is a --
9 it is text of the document. It's been generated,
10 though, on the NRC side through the indexing
11 process. So this is come -- getting back to your
12 search results.

13 >>JUDGE WARDWELL: But it's pulling out all
14 the words from your server, is that correct? NRC
15 doesn't have a database with those words in it
16 anywhere.

17 >>MR. SHEBELSKIE: It does. It does,
18 Your Honor. When we provide the document for the
19 first time in the LSN, the NRC side of the house
20 creates the index from the OCR text, and it
21 preserves that on the NRC databases. So the NRC
22 system has this data here, the text of the
23 document, across which you do your searches and
24 get your search results. When you pull up the
25 icon for the text document, or click on the title

1 of the document to get the text, that then reaches
2 back and pulls up the text files from our server,
3 which is giving you the same information, but, in
4 essence, is coming from a different source.

5 So on the NRC system they do have, I
6 believe, the complete text spider, in text format,
7 all the text of our imageable documents.

8 >>JUDGE WARDWELL: Okay. I want to see how I
9 can get to the same page. I don't -- I don't --
10 this page we got to by clicking on the text --
11 yeah, the view content page.

12 You're welcome to get another chair, if
13 you want to, and introduce yourself. We're not at
14 an oral argument or anything. So feel free to
15 gather around. Sounds -- you look like you may
16 have a bit to offer in this discussion.

17 >>>MR. MARTIN: Your Honor, I'm Dan Martin
18 from CACI.

19 >>JUDGE WARDWELL: Pull the mike closer, and
20 you got to hear yourself echo a little bit and
21 then you know you're coming across.

22 >>>MR. MARTIN: Your Honor, I'm Dan Martin
23 from CACI.

24 >>JUDGE WARDWELL: Okay. Great. This page,
25 we got by clicking the view content, which is a

1 text file from your service; is that correct?

2 >>>MR. MARTIN: What you're looking at on
3 this page is a copy of the text that is contained
4 in the index that the NRC created when they spider
5 our collection. So what you're looking at is all
6 of the text that they captured during that
7 spidering process, so that when you do a search in
8 their index, you can find a document.

9 >>JUDGE WARDWELL: And did that spidering
10 take place once and permanently stored on the
11 database on the LSN index or does it take place
12 every time a new search is implemented?

13 >>>MR. MARTIN: No, it's a one time process
14 that they do when the documents are loaded.

15 >>JUDGE WARDWELL: So every time we click on
16 the view document icon, it's going into the view
17 content, that's going into the LSN database; is
18 what you're saying?

19 >>>MR. MARTIN: Yeah, the NRC's computer.

20 >>JUDGE MOORE: So you could have your system
21 completely off, and I'd still retrieve that; is
22 what you're saying?

23 >>MR. MARTIN: That's correct.

24 >>JUDGE MOORE: Is a hundred00 percent of
25 when it goes back to retrieve off the DOE server

1 maintained and retained on the LSN server?

2 It's less than a hundred00 percent; is
3 it not?

4 >>MR. MARTIN: What's on the NRC server, I
5 believe, is less than a hundred00 percent. It's a
6 result of the autonomy spidering process.

7 >>JUDGE WARDWELL: What the heck does that
8 mean. I watched my language, didn't I?

9 >>MR. MARTIN: Autonomy is a tool that the
10 NRC uses to create the index of our data. And the
11 spidering, or crawling process, is how that tool
12 creates an index that makes the data searchable.

13 >>JUDGE WARDWELL: And so it's done once and
14 then it's stored on our system. So we basically
15 have a text file of every one of your documents on
16 our servers, is that what you're saying, or close
17 to it?

18 >>MR. MARTIN: It's usually not described as
19 such. It's usually described as an index of the
20 data, and I think technically there's a difference
21 between the index and the text image, the text
22 that you see when you click on the -- when you
23 click on the button to view in browser and you're
24 looking at the actual text.

25 >>JUDGE WARDWELL: So it's the view in

1 browser that pulls up the text file?

2 >>MR. MARTIN: Correct. And that's where it
3 reaches back to the DOE server in order to pull
4 up...

5 >>JUDGE WARDWELL: And my assistant has been
6 preempted by other tasks, and where -- it's the
7 view browser button that pulls up the viewable
8 text, correct?

9 >>>MR. MARTIN: Correct.

10 >>JUDGE WARDWELL: Can we do that, Andy, the
11 view browser. Which one is that? It's that one.
12 It's view document. That's view images.

13 >>MR. MARTIN: Yeah, view document.

14 >>JUDGE WARDWELL: View document, okay.

15 Yeah. I see. Yeah.

16 >>MR. MARTIN: And there you're looking at
17 the text.

18 >>JUDGE WARDWELL: But, if your document
19 happened to be a PDF file, and I clicked view
20 document, it would come out as a PDF file, would
21 it not, not this system?

22 >>MR. MARTIN: No.

23 >>JUDGE WARDWELL: If you stored it on your
24 LSN as a PDF file.

25 >>MR. MARTIN: But the documents on the DOE's

1 LSN collection are all in the TIFF JPEG format.

2 >>JUDGE WARDWELL: None of them are in the
3 PDF format.

4 >>>MR. MARTIN: Correct.

5 >>JUDGE WARDWELL: I thought I had pulled out
6 one of yours but it must have been someone else's.

7 >>>MR. MARTIN: The other parties do have
8 documents.

9 >>JUDGE WARDWELL: So when you do it with
10 someone else's document, if you didn't realize it
11 was a DOE document, and you pushed view document,
12 you will see a PDF file.

13 >>MR. MARTIN: That's correct.

14 >>JUDGE WARDWELL: That's good to get that
15 clarified, maybe, I don't know if it was
16 important, but it might be later, on in regards to
17 something.

18 When we go to the process of using
19 Fetch-Doc to convert to a PDF file, as we've
20 already done, the software is recompiling the
21 document using whatever number of pages you have
22 and actually then converting it to a PDF file. It
23 is pulling out the various images and converting
24 it to a PDF file; is that correct?

25 >>MR. MARTIN: Yes.

1 >>JUDGE WARDWELL: And as we saw, it
2 generally isn't searchable, but you can convert it
3 to a searchable one. You can save it as a PDF
4 file and convert it to searchable --

5 >>MR. MARTIN: Yes.

6 >>JUDGE WARDWELL: If you wish, as it
7 currently stands.

8 On 2.4, in regards to DOE's custom
9 software required to locate and reformulate data,
10 you talk about the Fetch-Doc, and you mention at
11 the very bottom of that paragraph of the answer to
12 just the 2.4, question that Fetch-Doc does not
13 reformulate a document because the document is
14 already formulated, i.e, the pages of the document
15 are assembled in a proper sequence within that
16 particular document's directory. And you're
17 saying that document directory is really keyed by
18 that session number; is that correct, that's how
19 you get to that document directory?

20 >>MR. SHEBELSKIE: Yes, sir.

21 >>JUDGE WARDWELL: And the search -- do you,
22 as DOE, have a separate search engine that exists
23 exclusive and separate from the LSN search engine?
24 Because it was really the LSN search engine that's
25 doing the searching and finding these documents,

1 correct?.

2 >>MR. SHEBELSKIE: We don't. When I need to
3 find a document on the LSN, I do exactly what you
4 do?

5 >>JUDGE WARDWELL: So if we decommission our
6 LSN, you're out of luck also right now?

7 >>MR. SHEBELSKIE: Unless we create a
8 separate portal to replace it.

9 >>JUDGE WARDWELL: Right. But as it stands
10 right now.

11 >>MR. SHEBELSKIE: Well, CACI maintains our
12 servers, and so they can -- at LSN portal were
13 taken down, access the servers.

14 >>JUDGE WARDWELL: But you'd have to create
15 some and tie them together into some type of
16 search engine, but you have a -- and the database
17 or the directory structure that you would have
18 would still be under the same LSN session
19 number --

20 >>MR. SHEBELSKIE: Yes, sir.

21 >>JUDGE WARDWELL: -- and then you just
22 create some software mechanism to create the same
23 searchable efforts that is now presently on the
24 LSN?

25 >>MR. SHEBELSKIE: Yes, sir.

1 >>JUDGE WARDWELL: I got about 10 more
2 questions on this one section, and maybe it would
3 be a good time to break.

4 2.5, the question is, what is the status
5 of the project facilities of Nevada, what effect,
6 if any, do they have on the shut-down activities,
7 have on the retention of future archiving of DOE's
8 LSN; and I think I brought that up earlier, but,
9 July is what you said is the shut-down schedule
10 for the facilities out here.

11 >>MR. SHEBELSKIE: Yes, sir, and we will
12 transition public access to our LSN servers before
13 the shut down -- that shut down occurs.

14 >>JUDGE WARDWELL: And when that all gets
15 transferred, and I assume they'll be alive --
16 there'll be an overlap where they're alive for a
17 while as you transferred everything over to the
18 COPS, do you call it COPS or C-O-P-S?

19 >>MR. SHEBELSKIE: I do, yes.

20 >>JUDGE WARDWELL: COPS facility, to assure
21 that you didn't shut this off before it is
22 functioning off of COPS?

23 >>MR. SHEBELSKIE: I understand it is
24 instantaneous switch over. It is seamless to the
25 public. We've done it once or twice before, had

1 to do maintenance, and nobody could detect the
2 switch over?

3 >>JUDGE WARDWELL: And that retrieval system
4 will be the same one, because basically the
5 retrieval system is from the LSN.

6 >>MR. SHEBELSKIE: Yes, sir, it is a complete
7 replication of the services we have here in
8 Las Vegas.

9 >>JUDGE WARDWELL: On 2.6, in response to
10 that, you say the only consequence of the
11 shut-down procedures will be that DOE will not
12 have a standby set of servers with a duplicate of
13 the LSN document collection already loaded.

14 Does that mean that you don't have,
15 really, in essence, a hot backup system that you
16 now have, currently have? It'd be fair to say you
17 have a hot backup system now, and there are COPS,
18 and you got it here, you say you transparently do
19 it instantaneously, if the LSN facility -- if your
20 document collection here in Nevada pooches, or
21 there's a catastrophic electrical failure, boom,
22 you're off in Arlington.

23 >>MR. SHEBELSKIE: That's right, Your Honor.

24 >>JUDGE WARDWELL: So it is a hot backup
25 system.

1 >>MR. SHEBELSKIE: In that sense, yes.

2 >>JUDGE WARDWELL: And that won't exist once
3 this gets commissioned; is that fair to say?

4 >>MR. SHEBELSKIE: That is correct. As we go
5 on to state in our answer: "Given the extreme
6 unlikelihood of the catastrophic scenario,
7 obviously nothing like that has happened in the
8 several years we've been operating on the LSN, and
9 the duration of the time period we anticipate for
10 termination of this proceeding. And then, of
11 course, the availability of magnetic backup tape
12 stored at a secure, separate location. We could
13 reconstruct our LSN collection in fairly short
14 order, if there were a catastrophe at the COPS
15 center."

16 >>JUDGE WARDWELL: And what is that short
17 order?

18 >>MR. SHEBELSKIE: I was told as we were
19 working on this, in the order of the magnitude of
20 three weeks, or less than that CACI says, but
21 three weeks they gave me as an upper bound.

22 >>JUDGE WARDWELL: In response to 8.a hundred
23 yes, under -- in 2.8, Question 2.8 says "As long
24 as the LSN is operational and organization's
25 contractor will be available to resolve any

1 ongoing document integrity issues on the LSN. And
2 we have a person right here, a real live body.

3 Your response was, OCRWM will continue
4 to function until July of 2010. In response to
5 8.a hundred, I believe you said it was -- they
6 would be terminated in a fiscal year of 2010.I
7 just wanted to clarify -- have you clarify which
8 is correct.

9 >>MR. SHEBELSKIE: Yes. In answer to 2.8 we
10 were specifically referencing the function of
11 maintaining the LSN collection, as opposed, I
12 think, to the office, OCRWM office, in its
13 entirety, and all its different functions. That's
14 how I understood the distinction.

15 In other words, Your Honor, around the
16 time we're switching over to the COPS center, in
17 that time period, the Office of Legacy Management
18 will assume responsibility at DOE for the
19 maintenance of to the LSN collection, even if
20 OCRWM, all its functioning have not been worked
21 out.

22 >>JUDGE WARDWELL: So in July, Legacy
23 Management will take over from OCRWM those
24 functions associated with LSN. That's why I use
25 July here, but, in essence, there will still be

1 some residuals of OCRWM in existence through to
2 the end of the fiscal year.

3 >>MR. SHEBELSKIE: That was my understanding,
4 and that was the distinction we were drawing with
5 this answer.

6 >>JUDGE WARDWELL: Now, let's get to the --
7 sort out a little bit of where -- who is this
8 Office of Legacy Management? Where do they
9 reside? What type of expertise do they have to do
10 the functions that OCRWM was doing? How does it
11 relate to the Office of Nuclear Energy? How does
12 it relate to what OGC is going to do in all of
13 this, because I get confused. What gets what out
14 of this. Because it seems like you have different
15 players involved in taking over functions that
16 were originally handled by OCRWM are now divided
17 up between the Legacy Management, the OGC, and the
18 Office of Nuclear Energy? Can you clarify the
19 whole interactions?

20 >>MR. SHEBELSKIE: I will try, Your Honor.
21 The current situation, I think I would depict as
22 follows:

23 You have the Office of Civilian
24 Radioactive Waste Management or OCRWM, that is the
25 project office for the Yucca Mountain project, and

1 the Department's LSN responsible official is
2 within OCRWM. He doesn't work in isolation, the
3 Department currently uses the services of CACI as
4 the automated litigation support contractor, and
5 that's through a contract that CACI has with The
6 Department of Justice, and The Department of
7 Justice, a representative is assigned and works
8 with OCRWM.

9 You also have DOE's in-house lawyers at
10 the Office of General Counsel, who, amongst other
11 responsibilities, is a group that's assigned to
12 work on the LSN issues, along with the OCRWM
13 official and CACI and the Justice Department
14 official.

15 I think, in simplest terms, all we're
16 really doing is keeping intact the Office of
17 General Counsel participation, the participation
18 of CACI, the litigation support contractor, in
19 conjunction with The Department of Justice, and
20 taking the LSN responsible official function from
21 OCRWM and assigning that to an official within the
22 Office of Legacy Management.

23 >>JUDGE WARDWELL: Where's the Office of
24 Legacy Management?

25 >>MR. SHEBELSKIE: Where is it? I believe it

1 is headquartered in Washington, D.C. along with --
2 same place where the Office of Civilian
3 Radioactive Waste Management is headquartered, or
4 in the D.C. Metro area. Might actually be outside
5 of Maryland.

6 They have facility, storage facilities,
7 the principal one we're concerned with is here is
8 in Morgantown, West Virginia, but the
9 administrative offices, I believe, are in the D.C.
10 Metro area.

11 Office of Legacy Management, their
12 expertise, their mission is, of course, the
13 maintenance and preservation of archived records,
14 exactly the mission that is the primary one we're
15 concerned with here, which is the maintenance of
16 DOE's LSN collection, its preservation, and its
17 public availability through the a hundred00 year
18 term.

19 >>JUDGE WARDWELL: And that expertise is in
20 D.C., not in Morgantown, just more of the hardware
21 is in Morgantown, when it goes there?

22 >>MR. SHEBELSKIE: Well, expertise, I believe
23 the administrative headquarter -- off the
24 administrative headquarters, if that's the right
25 term for the office, is in the D.C. Metro area, in

1 the records center in West Virginia. I mean,
2 obviously the people who work there are -- have
3 expertise in IT management and preservation of
4 documents. So the -- I think expertise, as you're
5 using it, is in both locations.

6 >>JUDGE WARDWELL: Where's does the Office of
7 Nuclear Energy come into effect? That was
8 mentioned in regards to some -- picking up some of
9 the load, I thought, in some of the responses.

10 >>MR. SHEBELSKIE: Yes, Your Honor, back in
11 January, February, when we were beginning this
12 phase of the process, that was obviously very
13 preliminary. The budget request had just been
14 announced, and DOE, as we stated at the time, we
15 were still in the very beginning processes of
16 developing a transition plan, for want of a better
17 term.

18 And as we stated there, that
19 additionally the expectation was the Office of
20 Nuclear Energy would maintain this responsibility,
21 but we said that it might go to someone else, and
22 as we worked the issues over the ensuing months, I
23 think the Department's come to work through and
24 realize that the Office of Legacy Management, that
25 really does preserve document collections over the

1 long term for DOE, is really the office best
2 suited to maintain the LSN collection -- because,
3 essentially, we'll be going into a largely static
4 state, I think, on the LSN, in the foreseeable
5 future, and, then, of course in the a hundred00
6 year period, that's where it would go, in any
7 event, so it makes sense to go ahead and
8 transition that responsibility now to the Office
9 of Legacy Management, so that they can be involved
10 from the get-go with this.

11 >>JUDGE WARDWELL: Are you able to represent
12 now that the expertise that was originally
13 available through OCRWM, in overseeing a function
14 of the LSN, and providing service when there are
15 problems associated, will be achieved and
16 available in the Office of Legacy Management?

17 >>MR. SHEBELSKIE: In the Office of Legacy
18 Management?

19 >>JUDGE WARDWELL: Right.

20 >>MR. SHEBELSKIE: Yes, sir, I can.

21 >>JUDGE WARDWELL: Okay. I think we're up to
22 three, and this is probably a good time to break.
23 I thought I would let them collect their ideas and
24 start with that.

25 >>JUDGE MOORE: I just have one question. In

1 my reading of the Nuclear Waste Policy Act,
2 there's a chapter that creates the Office of
3 Civilian Radioactive Waste Management,
4 specifically. It didn't exist prior to the
5 Nuclear Waste Policy Act. How can it be
6 disemboweled if it is created by Congress in the
7 act. What's the process one goes through at DOE
8 to make it disappear and divide all its functions
9 elsewhere?

10 >>MR. SHEBELSKIE: Your Honor, I'm not trying
11 to evade your question. I honestly can't answer
12 the question because that's not something that I'm
13 involved with.

14 >>JUDGE MOORE: Okay. Was there any
15 congressional litigation that specifically undid
16 what Congress originally did?

17 >>MR. SHEBELSKIE: Your Honor, I'm really not
18 in a position to address that. I would say that
19 the responsibility for the LSN collection, I don't
20 think, is addressed in the Nuclear Waste Policy
21 Act, so I would believe that -- a transfer of that
22 function within DOE to the Office of Legacy
23 Management, I don't think, implicates the concern
24 that you have.

25 >>JUDGE MOORE: But OCRWM is going away, is

1 it not?

2 >>MR. SHEBELSKIE: That is my understanding,
3 Your Honor.

4 >>JUDGE MOORE: Okay. Thank you. We'll take
5 a brief 10 minute recess.

6 (Recess taken)

7 >>JUDGE MOORE: Please be seated.

8 >>JUDGE WARDWELL: Judge Moore, do you have
9 something or do you want me to charge ahead? I'm
10 over here. You all set to go?

11 What about classified documents, how are
12 those handled?

13 >>MR. SHEBELSKIE: Classified documents are
14 not part of the LSN.

15 >>JUDGE WARDWELL: Got it.

16 >>MR. SHEBELSKIE: So our LSN collection does
17 not contain any classified documents.

18 >>JUDGE WARDWELL: How will they be
19 preserved?

20 >>MR. SHEBELSKIE: The classified information
21 that pertains to the proceeding has been --

22 >>MR. HEINZEN: Can I ask you a
23 very quick question, can you tell me --

24 >>JUDGE MOORE: Excuse me, who's speaking,
25 please?

1 >>MR. FITZ: It is somebody on the telephone.

2 >>JUDGE MOORE: On the telephone. Who's on
3 the telephone conference, please?

4 >>MR. HEINZEN: Hello, this is Steve
5 Heinzen of Godfrey & Kahn, on behalf of the joint
6 Timbisha Shoshone.

7 >>JUDGE MOORE: Okay. We were apparently
8 picking up a side conversation, if you would mute
9 the telephone, except when you're speaking, it
10 would be helpful.

11 MR. HEINZEN: Absolutely. I'm sorry about
12 that. Thank you.

13 >>JUDGE MOORE: Thank you.

14 Mr. Shebelskie, you were in the midst of
15 telling us about classified documents. Now, there
16 is one whole volume of the application that is the
17 classified material.

18 >>MR. SHEBELSKIE: Yes, sir.

19 >>JUDGE MOORE: And, of course, the
20 regulations require that application to have been,
21 not only filed with the NRC, it is specifically
22 enumerated in the LSN sections, as one of the
23 documents that is a foundational document.

24 So those documents that are part --
25 actually part of the application, have to exist in

1 some form, I would think, as part of all of this.

2 And secondly, as I understand it,
3 there's -- may well be others that, because of the
4 defense -- I'm trying to think of the name of the
5 Office of Nuclear -- the Navy --

6 >>MR. SHEBELSKIE: Office of Nuclear
7 Propulsion.

8 >>JUDGE MOORE: Naval Nuclear Propulsion.
9 There's a -- as I've understood it, some subset of
10 documents from them, in addition to, perhaps,
11 what's already in the application itself, that may
12 be in play. Those, I guess, are what we're
13 talking about.

14 >>MR. SHEBELSKIE: And that's what I
15 understood, Your Honor. That in -- with the
16 benefit of that, that classified information will
17 be maintained consistent with Department of
18 Defense and Department of Energy Regulations and
19 Requirements. I was able to consult with counsel
20 for the Navy Nuclear Propulsion Program, who
21 advises me what those requirements are something
22 that we're not authorized to address in this
23 forum. But if the Board has some concern about
24 that --

25 >>JUDGE MOORE: Well --

1 >>MR. SHEBELSKIE: We're all trying to --

2 >>JUDGE MOORE: They all have a bibliographic
3 header, and they're privileged. So that's the
4 identification of them in the LSN; is it not?

5 >>MR. SHEBELSKIE: There might be some
6 reference to the volume of the LA in the LSN,
7 Your Honor but I believe all the classified
8 information is not part of the LSN, even in header
9 format. I think what you're referring to is that
10 subset of documents maintained by the Navy Nuclear
11 Propulsion Program might be the reference
12 materials in the classified chapter of the LA.

13 >>JUDGE MOORE: But -- well, I will leave it
14 to Judge Wardwell to figure it out.

15 >>JUDGE WARDWELL: How are we to assure that
16 those will be available in the future, for anyone
17 who has the appropriate clearance to review those
18 documents? Is there --

19 >>MR. SHEBELSKIE: Your Honor, I think all I
20 can say at this time is that there are Department
21 of Defense and DOE regulations requirements that
22 direct the retention for such information, and
23 those materials will be maintained, obviously,
24 consistent with those obligations.

25 >>JUDGE WARDWELL: Let's move on, then. I'm

1 up to section 4, starting with your archiving
2 plans. Kind of covered where we're at today and
3 where we'll go over the next couple of years,
4 while this motion to withdraw is sorted out.

5 And now moving on to the future, and in
6 response to Question 4.a hundred, you say that the
7 individual pages that make up the documents in the
8 collection are not unnumbered, but rather they are
9 stored in a directory and will be so maintained in
10 this directory.

11 And I understand that, but there is
12 currently no search engine for that directory,
13 outside of the LSN; is that correct, or not?

14 >>MR. SHEBELSKIE: That is correct.

15 >>JUDGE WARDWELL: And will -- are there
16 plans to develop such a search engine for that,
17 when it is now being archived, either as a
18 permanent or temporary file, really doesn't
19 matter?

20 >>MR. SHEBELSKIE: That will be done -- yes,
21 sir, that will be done through the Office of
22 Legacy Management, loading the data onto servers,
23 basically, and creating a search engine for that
24 collection.

25 >>JUDGE WARDWELL: And are you able to

1 represent now that it will function in a manner
2 consistent to the way the LSN is managed in
3 regards to being able to search and then retrieve
4 documents?

5 >>MR. SHEBELSKIE: I can tell you that that
6 is our plan and intent, yes, sir.

7 >>JUDGE WARDWELL: And right now, of course,
8 there's a -- it is -- it is fair to say it is
9 early to speculate what software would be used or
10 how that would be achieved, that's future stuff?

11 >>MR. SHEBELSKIE: Yes, sir.

12 >>JUDGE WARDWELL: And the answer to Question
13 4.2.2, the requirements for converting the
14 documents to a searchable format, you respond "The
15 header and text files in the LSNDNC are currently
16 in a searchable format. The Legacy Management
17 will use its replacement index utility to search
18 for documents using those same files, no files
19 will be needed to be converted for that purpose.

20 What is this replacement index utility?

21 >>MR. SHEBELSKIE: Your Honor, that is the
22 replacement search index function that we were
23 just talking about.

24 >>JUDGE WARDWELL: That's just another word
25 for that, but it currently doesn't exist, or

1 hasn't been selected, is a better way to say it,
2 or defined, or whatever else.

3 >>MR. SHEBELSKIE: Correct. What we're
4 conveying here is that the header files, the
5 existing header files and our existing text files
6 are in a searchable format, just as they are
7 searchable now in the LSN, and the Office of
8 Legacy Management will create a index or
9 spidering-type function to replace what the NRC's
10 LSN portal now does.

11 >>JUDGE WARDWELL: In the event the
12 collection is deemed as permanent, and it does get
13 transferred to NARA, will this same search engine
14 exist? Will that go with it?

15 >>MR. SHEBELSKIE: It is my understanding
16 that it will. And in addition, let me confirm
17 something, Your Honor.

18 It is our understanding that even in
19 that scenario, Legacy Management will also
20 maintain a copy itself for the a hundred00 year
21 period.

22 >>JUDGE WARDWELL: With that searchable
23 engine.

24 How will an individual get access to the
25 searchable engine, do you anticipate? Will it be

1 a web-based type of thing?

2 >>MR. SHEBELSKIE: Not over the Internet, is
3 my understanding, but through the process that is
4 available now to anyone who is requesting a
5 document from the Office of Legacy Management.
6 They can contact the Office of Legacy Management,
7 including through the records center in Morgantown
8 and make the request.

9 >>JUDGE WARDWELL: And that's fine if you
10 know the document you want, but you may not even
11 know the document exists that you want. How will
12 you be able to search and find and determine that,
13 yes, this is the document you want?

14 >>MR. SHEBELSKIE: Well, as I said, you can
15 either make a request for a specific document or
16 you could make a request for documents responsive
17 to search terms.

18 >>JUDGE WARDWELL: I see. Is that how NARA
19 works, or can you fill me in on how that process
20 might be different, if or when it gets
21 transferred, if it was deemed a permanent
22 collection?

23 >>MR. SHEBELSKIE: I don't -- no, I can't
24 answer that, Your Honor. And that's why I
25 believe, and I will double-check to confirm this,

1 that that's why legacy management was going to
2 create a system and maintain it, a search
3 function.

4 >>JUDGE WARDWELL: For this a hundred00 year
5 period?

6 >>MR. SHEBELSKIE: For this a hundred00 year
7 period.

8 >>JUDGE WARDWELL: Regardless of whether it
9 is temporary or permanent?

10 >>MR. SHEBELSKIE: Certainly, if it is
11 temporary, they will do it.

12 >>JUDGE WARDWELL: But you're still going to
13 do it, even if it is permanent?

14 >>MR. SHEBELSKIE: That's my understanding.
15 But we will double-check that and report back to
16 the Board, if it is different.

17 >>JUDGE WARDWELL: Do that.

18 >>MR. SHEBELSKIE: All right.

19 >>JUDGE WARDWELL: I think that's of
20 interest. Section 4 -- Question 4.11, what would
21 be the difference in the steps, cost, and schedule
22 if NARA decision was reached in a hundred, 2, 5,
23 or 10 years after DOE's collection had been taken
24 off line. You mentioned earlier on that you were
25 going to take your collection off line. And when

1 would you anticipate doing that?

2 >>MR. SHEBELSKIE: Taking DOE's collection
3 off line?

4 >>JUDGE WARDWELL: Yes. After -- as soon as
5 the non-appealable order -- I mean, as soon as,
6 but well you can't do it instantaneous, I know,
7 but your goal would really basically be to take it
8 off as soon as non-appealable orders.

9 >>MR. SHEBELSKIE: Well, not before then
10 obviously and in an ordinarily fashion thereafter.

11 >>JUDGE WARDWELL: But no one could expect it
12 to exist online --

13 >>MR. SHEBELSKIE: That's correct.

14 >>JUDGE WARDWELL: -- after the
15 non-appealable order is finally reached.

16 >>MR. SHEBELSKIE: That's right. The actual
17 length of time to transition away will depend on
18 when it happens, what circumstances, where we are
19 in the budget cycle, things like that.

20 >>JUDGE WARDWELL: So here we are offline,
21 and it is now being handled by Legacy Management,
22 and anyone who wants some information will have to
23 either request a search through them or a specific
24 document through them, to be able to retrieve
25 this; is that correct.

1 >>MR. SHEBELSKIE: Yes, sir, Your Honor.

2 >>JUDGE WARDWELL: How will they get that,
3 then; will it basically be transferred
4 electronically from them or --

5 >>MR. SHEBELSKIE: I would, generally
6 speaking, think that the -- since the documents
7 exist in electronic format, the copies requested
8 would be provided in electronic format as well,
9 subject to agreement by the requester to pay for
10 the copy.

11 >>JUDGE WARDWELL: Does Legacy Management
12 have a regular process by which they dust off the
13 documents and make sure every -- the retrieval
14 system still works, and you can get something?
15 Because in your response to this question you
16 state that DOE would not expect there to be any
17 differences in the stated scenarios because of the
18 preservation steps Legacy Management will take, as
19 discussed above.

20 And that answer was in response to the
21 question that said, "Do you anticipate any
22 difficulties associated with whether or not, all
23 of a sudden, Yucca Mountain came back to life
24 again, and you had to reinstitute this, and it
25 took place a hundred, 2, 5, or 10 years after the

1 collection had been taken off line, and I know the
2 model I have in my mind is just my history in
3 dealing with trying to retrieve my own records of
4 things that are less than 10 years old.

5 I have difficulties with the current
6 software reading the things. It is a real
7 challenge, sometimes, to pull out an old document
8 that I've made in a relatively short period of
9 time, oftentimes as short as five years. If I've
10 got a five-year-old disk of something, it is a
11 challenge to get that report back out again.

12 Why wouldn't the same scenario take
13 place with you in your collection?

14 >>MR. SHEBELSKIE: Well, speaking in just
15 general terms, first, as I understand Question 4.a
16 hundred.a hundred, it related to the transition
17 between LM and NARA.

18 >>JUDGE WARDWELL: Right. Correct.

19 >>MR. SHEBELSKIE: In the event NARA were to
20 make a determination these are permanent records.
21 Again, that backdrop, and as we understand NARA's
22 current -- I don't know if I would say
23 requirement, but standards, or whatever, for the
24 document retention for permanent records, the
25 formats that we have, the existing LSN collection

1 are compatible with the exception of possibly
2 compressed TIFFs and the JPEG files, and, again,
3 speaking only in the general way, without
4 intending to give specifics about what LM might
5 do, and I would have to caveat that, and I would
6 have to supplement that, Your Honor, if you want
7 some more details about the regular maintenance
8 that LM would do.

9 Obviously, there would be some degree of
10 periodic maintenance of the Office of Legacy
11 Management does to maintain these records, to make
12 sure they are available for the time period, for
13 their retention period.

14 No, I can't tell you whether it is every
15 six months, or things like that, but obviously
16 there's something that's done in that respect.

17 >>JUDGE WARDWELL: And where this is leading
18 to is just what you're saying in this transfer to
19 NARA. You know, you weren't able to comment on
20 how -- well, maybe you are. Maybe I didn't ask
21 the question correctly, so I'll ask it again.

22 Do you have any familiarity with how a
23 person would go about retrieving any document from
24 NARA, exclusive of DOE's collection? Just there's
25 a -- they're interested in a document and how

1 would they go about getting it from NARA?

2 >>MR. SHEBELSKIE: No, sir, I really can't
3 comment on that, just because I have a lack of
4 information on that. And, of course, if the
5 record were deemed permanent and transferred to
6 NARA, as part of the legal title, they, then,
7 legally control the means to that.

8 And so I don't think anything I could
9 say in any event would be dispositive of how NARA
10 would proceed in the future.

11 >>JUDGE WARDWELL: Under the image I have of
12 this, I can see why a TIFF format might be
13 acceptable to NARA, and why NARA may not be
14 particularly interested in how the documents are
15 received. They're more custodians of the
16 documents. And when anyone's interested in
17 retrieving one, they say, fine, they're in all
18 those boxes, go find it.

19 That seems to be what might be the case,
20 as I piece things together, and if it isn't, fine.
21 But if it is that, I mean, they're not -- I don't
22 believe they're a library, are they? They don't
23 have a card catalog of things, and issues like
24 that, do they?

25 >>MR. SHEBELSKIE: Your Honor, we stated in

1 our response that, based on discussions, to date,
2 with NARA, we understand that NARA could use and
3 maintain the search -- replacement search index
4 that LM is going to be creating.

5 Now, again, this is based upon
6 consultation at this point in time, which we can
7 all have available to us.

8 So our indications aren't the dire
9 situation I think you're concerned about.

10 >>JUDGE WARDWELL: And you're able to
11 represent that you would be as concerned about the
12 dire representation that I made of what NARA may
13 do -- have done with previous documents, in
14 regards to this particular collection, and the
15 need to potentially retrieve some of this valuable
16 information, and your commitment to be able to
17 have this scientific information available to the
18 public for future endeavors associated with high
19 level waste disposal options?

20 >>MR. SHEBELSKIE: As I said, DOE has
21 expressed the view to make this information
22 available, that's why we have outlined what we're
23 planning to do for the Office of Legacy
24 Management. We think the a hundred00 year time
25 period right now is an appropriate period for

1 that, and that's why our contemplation was that
2 the Office of Legacy Management would maintain
3 these documents for the a hundred00 years, with
4 that search capability.

5 Our indications and our consultations,
6 in discussion with NARA, to date, leads us to
7 believe that in the event there were permanent --
8 the records were classified as permanent records,
9 that comparable function could be maintained.

10 But as I said we -- I've made a note
11 here to double-check whether Office of Legacy
12 Management was planning on keeping a parallel
13 collection, in any event, but I will follow up
14 with the Board on that.

15 >>JUDGE WARDWELL: Yes. Do that. I think
16 that would be important to know.

17 Under 4.15, explain how DOE archiving
18 plans meet DOE's objective of preserving the core
19 scientific knowledge from the Yucca project.

20 And in your second paragraph you say
21 OCRWM personnel and contract staff, as well as
22 those of other agencies that support the OCRWM
23 program, have also been directed that they must
24 continue to preserve documents that relate to
25 Yucca Mountain, including documents concerning

1 science of -- the science of storage or the
2 disposal of high level waste and spent nuclear
3 fuel, even if they are permitted to dispose of
4 such documents under applicable retention
5 schedules.

6 Who did this direction? They have also
7 been directed that they must continue to preserve
8 the documents? Who was telling you this and under
9 what authority, and what's the result of that?

10 >>MR. SHEBELSKIE: Oh, well, that was a
11 direction from OCRWM to its personnel and
12 contractors to preserve all the documents.

13 >>JUDGE WARDWELL: I see.

14 >>MR. SHEBELSKIE: Litigation speaks for like
15 a document freeze, until we could make sure that
16 we had identified, and had proper disposition
17 plans for all documents and federal records. So
18 we didn't want here, in the immediate term,
19 anything to be lost, until we could get considered
20 analysis to what needs to be saved. So that's an
21 ongoing process. You asked what the result of it;
22 it is in progress now.

23 >>JUDGE WARDWELL: Gotcha. Now, later on in
24 that paragraph you talk about the potential use of
25 the Waste Technical Review Board. Any updates on

1 that, or could you explain that more in detail of
2 what your interactions with them are?

3 >>MR. SHEBELSKIE: No, not much further. We
4 have been in communication -- the Department has
5 been in communication with the Board, as reflected
6 here. It is my understanding as of to date the
7 Board has not committed to provide the oversight,
8 but that's an ongoing discussion.

9 >>JUDGE WARDWELL: Sorry, as I go through
10 these I'm reading my questions, so most of them
11 we've answered. Most of them deal with how does
12 NARA behave now. How do you get a document from
13 them. I'm up to now 7.6 on page 47. And I think
14 the first question was, in 7.5, you're stating
15 that Legacy Management hasn't finalized an
16 estimate of the cost to archive the LSN in order
17 to preserve it, after there is a final
18 non-appealable order terminating the
19 proceeding.and it says that DOE will ensure that
20 they have the necessary funds.

21 Don't you have an order of magnitude
22 estimate of the cost? I mean, you must -- give us
23 some perspective here, if you can.

24 >>MR. SHEBELSKIE: I really can't,
25 Your Honor, because it's my understanding when we

1 prepared these answers, and it hasn't changed,
2 that Office of Legacy Management is still working
3 up plans and projections like that. But DOE's
4 made this commitment, and it intends to honor it.

5 Obviously funds have to be appropriated
6 by Congress, but requests can be made, and
7 Congress will have to give them money.

8 >>JUDGE WARDWELL: Is there a budget item for
9 this in the physical year 11 budget currently
10 being reviewed?

11 >>MR. SHEBELSKIE: I don't know, Your Honor.
12 I don't -- I don't know, but I'll check on that.

13 >>JUDGE WARDWELL: Yes, please do.

14 Moving on to 8.7, dealing with Freedom
15 of Information Act matters. Question 8.7.2 --
16 8.7.a hundred said who was the FOYA officer for
17 Nuclear Energy, and that's John Montgomery, and I
18 gather he'll really be in -- as you say, he's
19 Legacy Management's point of contact, and that's
20 where this is really residing now as opposed to
21 Nuclear Energy, correct?

22 >>MR. SHEBELSKIE: Correct.

23 >>JUDGE WARDWELL: And 872 says, "What steps
24 have been taken to transfer institutional
25 knowledge of the program activities, its records,

1 its issues, and historical to FOYA requests on
2 high level waste issues?"

3 And your answer was "This will be
4 facilitated by the continuing involvement of OGC
5 in the FOYA office. I guess I'd like the answer
6 addressed a little bit more than that. It didn't
7 seem like it was answering the question. It just
8 said, well, it is facilitated by this.

9 Is there a way to transfer -- is that
10 all that exists now under the current situation is
11 all -- are all FOYA requests strictly handled out
12 of DOE's OGC office, and will that continue in the
13 future the same way it is now.

14 Is that what you're saying by that
15 answer?

16 >>MR. SHEBELSKIE: In essence, yes.

17 >>JUDGE WARDWELL: Thank you.

18 And likewise, with 8.8, you mention
19 Mr. Montgomery, again, will serve as a point of
20 contact for any privileged documents, et cetera.
21 And is it fair -- will you be able to represent
22 that he will interact with the same personnel at
23 OGC, or any other associated offices, that now
24 currently takes place for any privileged
25 documents?

1 >>MR. SHEBELSKIE: The same offices and
2 functions, yes. Obviously, personnel come and go.

3 >>JUDGE WARDWELL: Those are -- those are the
4 questions I have. Would any of the parties like
5 to respond, and I'll start with the State of
6 Nevada, to see if they would like to add any
7 comments, or raise some issues that still reside
8 in their concerns.

9 >>>MR. FITZPATRICK: Your Honor, Charles
10 Fitzpatrick for the State of Nevada. As Mr.
11 Shebelskie mentioned, we've not only gotten their
12 answers, but had several interchanges to clarify
13 things for us. And we're satisfied on three
14 points: They'll maintain their LSN functionality
15 intact for the 18 months, or whatever it is, until
16 the termination of this; at some future date,
17 should there ever be a need to do so, they'll work
18 with NRC staff in reconstructing an LSN type
19 situation, environment, by keeping all of the
20 documents intact that are presently in their LSN.
21 And in the interim, between those two potential
22 dates, a party seeking documents from DOE will be
23 in the same position a party would expect to be,
24 where there's no licensing proceeding in place,
25 and when the relationship between, say, Nevada and

1 DOE is that of private citizen and federal agency,
2 in other words, they can ask by FOYA request, and
3 we will.

4 >>JUDGE WARDWELL: Do you think that's
5 sufficient in regards to addressing the wealth of
6 information that's available and applicable for
7 other endeavors, other options associated with
8 high level waste? You've got an credible
9 scientific body of information, and is that -- why
10 do you feel that's sufficient in regards to the
11 ability to easily retrieve this information and
12 apply it to other options, that this information
13 would very likely apply directly?

14 >>>MR. FITZPATRICK: If you're speaking of
15 the first time frame, we have the full access.
16 We've always had. If you're talking about the
17 third hypothetical time frame, we'd have the same
18 access we've always had. If you're talking about
19 the interim, where there's no licensing proceeding
20 in place, I don't see where we would be entitled
21 to access information, other than by whatever
22 device; currently an example is the FOYA request,
23 to obtain documents in the possession of DOE.

24 Without the existence of a licensing
25 proceeding, there's no reason for an LSN database.

1 There's no such thing as documentary material a
2 hundred, 2, and 3. Those terms have become
3 meaningless. And so, what's in existence is DOE's
4 document collection, which its promised to keep
5 for a hundred00 years, and which Nevada can ask
6 for by document name, or by category, or by
7 subject matter.

8 And if you're speaking about documents
9 not on the LSN, I certainly don't think that we,
10 or the Board, has the authority to demand that DOE
11 do anything -- I mean, the laws governing this
12 proceeding define documentary material as the
13 documents that must be accounted for by DOE. We
14 believe they are doing that. And so I would think
15 that there's no basis for demanding accountability
16 for other documents, beyond those that are
17 documentary material.

18 >>JUDGE WARDWELL: Let's not worry about the
19 basis for now, let's instead explore the abilities
20 to practically retrieve this wealth of
21 information, should this license be withdrawn, or
22 the proceeding terminated, in any fashion, for
23 future applications.

24 >>MR. FITZPATRICK: For example --

25 >>JUDGE WARDWELL: For example, it is five

1 years from now, and I happen to be working on
2 this. Let's say it takes five, ten years before
3 any real effort is made to start to specifically
4 implement a designated option for high level waste
5 disposal, and things are cranking up and I now
6 want to retrieve some of these documents, don't
7 you think there's an obligation to provide a
8 system that makes it somewhat reasonable in
9 regards to achieving this, short of FOYA requests?

10 Do you find that very workable?

11 >>MR. FITZPATRICK: Well, I'm not going to
12 say FOYA requests are easy, because I've been
13 involved with FOYA requests for the last several
14 years, and they are certainly fraught with
15 difficulty, exemptions from production, delays in
16 production.

17 However, that's why, in our comments, we
18 did propose, and I think DOE is agreeable, that
19 just as you asked each of the other parties, and
20 the remaining parties you asked today, and the
21 previous ones on January 27th, if they would make
22 their complete LSN collections available on CDs or
23 other electronic media, on request to the LSN and
24 other parties.

25 And our suggestion and our filing was

1 that, since those documents are all available to
2 them, the ones on the LSN -- I mean, they're
3 available on the worldwide web. They don't suffer
4 from the FOYA restrictions of nine exemptions or
5 time delays in response.

6 And so our proposal was that, since
7 they're all available to everyone today, that they
8 be made electronically available to any party who
9 requests that they -- the complete collection, the
10 complete LSN collection be made available to any
11 party who requests it, and indicates their
12 willingness to pay for it.

13 And, you know, we've looked up the --
14 this gentleman knows a lot more about it, I'm
15 sure, but the electronic media that would be
16 available, and today it turns out that there's
17 media as small as a novel in size that could hold
18 four terabytes in information, so that I think it
19 is fair to say that each of the parties could
20 provide its LSN collections to the LSN
21 administrator, which they've already been asked to
22 do and agreed to do, or to any of the other
23 parties, upon request, and upon commitment to pay
24 for the cost of so doing. That would put it in
25 the hands of, arguably, you, Nevada, everything

1 that's on their LSN database today, during this
2 interim. So that's the proposal that we've made
3 to answer the question about this availability
4 during this interim.

5 >>JUDGE RYERSON: Yes. Is that -- I mean,
6 that is not a commitment that is in DOE's May 24
7 filing.

8 >>>MR. FITZPATRICK: No. That wasn't raised
9 in the questions at all.

10 >>JUDGE RYERSON: That's not raised in your
11 June a hundred response.

12 >>>MR. FITZPATRICK: Right. The general
13 question of -- was raised on January 27th to every
14 party --

15 >>JUDGE RYERSON: Right.

16 >>>MR. FITZPATRICK: -- and then to the
17 remaining ones today of, would you put it on
18 electronic media and make it available to the LSN
19 administrator, and you know what the responses
20 have been.

21 Our proposal over and about that was,
22 since it is available on the worldwide web,
23 without FOYA restrictions now, and since it is
24 going to be put on electronic media and made
25 available to the LSN administrator, it could

1 easily be ordered that DOE, or any party, make
2 available to any other party who requests it and
3 offers to pay for it, a complete copy of their LSN
4 documentation.

5 >>JUDGE RYERSON: And you discussed this with
6 DOE, and maybe I should be asking Mr. Shebelskie,
7 but what is the status of that issue?

8 >>MR. SHEBELSKIE: Yes, Your Honor, Mike
9 Shebelskie for DOE. We did confer about that
10 issue after Nevada filed its comments that
11 Mr. Fitzpatrick is referring to, and we are
12 agreeable to that. We think it makes sense to do
13 it once the transition occurs to LM, and they
14 create their replacement search index and compile
15 PDF files. At that point, if Nevada, or anybody
16 else, wants a complete copy, is willing to pay for
17 it, we'll provide it.

18 >>JUDGE MOORE: Has there been any estimate
19 made on what the cost would be and what the media
20 would be, or medium?

21 >>>MR. FITZPATRICK: We've taken a look at
22 the media, mediums, and the cost of that portion
23 of it and determined that it is very inexpensive,
24 probably less than \$1,000 total for DOE's entire
25 collection. That would leave the issue of the

1 labor cost involved in making the transfer from
2 the present to the new, and, no, we haven't gotten
3 any estimates from DOE, but our IT people tell us
4 that that's something that can be done where you
5 hook up A and B, and you don't have to, you know,
6 be there for every minute of the transfer, you
7 know, you go back eight hours later and it is full
8 or something.

9 >>JUDGE MOORE: Mr. Shebelskie, if DOE is
10 willing to do that, what would be the search
11 engine that would make that database work?

12 >>MR. SHEBELSKIE: Well, that's the thing,
13 Your Honor, whoever's requesting these documents,
14 this complete collection on electronic media, my
15 understanding, CDs would not be the most efficient
16 way?

17 >>JUDGE MOORE: Well, unless it is a large
18 truck.

19 >>MR. SHEBELSKIE: Right, exactly. That the
20 requester would have to have hardware to separate
21 the tapes, and --

22 >>JUDGE MOORE: -- as well as software.

23 >>MR. SHEBELSKIE: As well as software. But,
24 again, the files from LM would be maintained in
25 the formats of -- existing formats of the HDML,

1 XML, TIFF, JPEG and PDF. And so it would require,
2 as I understand it, you need proprietary software
3 to operate.

4 LM is not yet --

5 >>JUDGE MOORE: In other words, off the shelf
6 software, Microsoft products would work,
7 presumably?

8 >>MR. SHEBELSKIE: No unique proprietary
9 software by DOE. LM has not yet created a search
10 engine --

11 >>JUDGE MOORE: I understand that.

12 >>MR. SHEBELSKIE: -- subject to that. But
13 the basic premise, basic request from Nevada was,
14 once you set that all up in LM, and they wanted to
15 pay for a complete copy of the four terra bites of
16 data would you provide it and they pay for the
17 cost of it, the answer is yes.

18 >>JUDGE MOORE: And that would include your
19 Legacy Management's index of that material?

20 >>MR. SHEBELSKIE: That's my understanding,
21 Your Honor.

22 And, Your Honor, just to be clear, this
23 is for the non-privileged, non-restricted access
24 to the documents.

25 >>JUDGE MOORE: If not, we wasted an awful

1 lot of time.

2 >>JUDGE WARDWELL: Any other parties or
3 intervenors like to comment? Staff, would you
4 like to?

5 >>JUDGE MOORE: Do all parties here concur
6 that that is an acceptable approach to DOE's LSN
7 document collection?

8 MS. BIELECKI: Your Honor, I'd comment on
9 another topic. Earlier Nevada had indicated
10 that --

11 >>JUDGE WARDWELL: Can you hold off for just
12 a minute, make sure we finish this point.

13 >>JUDGE MOORE: This is another. It is a
14 non-LSN DOE document collection topic.

15 MS. BIELECKI: It was pertaining to a comment
16 about all parties committing to putting their
17 collections on a CD. I just wanted to point
18 out --

19 >>JUDGE MOORE: The Staff has ADAMS.

20 MS. BIELECKI: Right. I just wanted to
21 clarify. Thanks.

22 >>JUDGE MOORE: No problem. And that's a
23 little bit like, for those in the audience doing
24 the New York Times Sunday crossword puzzle, but it
25 nevertheless is there.

1 Counsel.

2 MR. ROBBINS: Alan Robbins on behalf of Clark
3 County. This was touched on briefly in response
4 to 7.5 and 7.6. DOE basically states that it is
5 funded through 2010 and says it will do -- what
6 are the exact words -- will ensure that the LM has
7 the necessary funds to maintain the LSN
8 functionality until all appeals are exhausted.

9 But the question is -- or questions are,
10 one, how can DOE do that? The most they can do, I
11 think, is ask or recommend. They can't guarantee
12 that they get funding. Or if they can, we'd like
13 to know how they would do that.

14 And second, we need to consider, then,
15 what are the consequences if they're not
16 successful in their efforts to ensure funding,
17 because you then have an unfunded and presumably
18 unexecuted plan that was agreeable in concept, but
19 now is not working.

20 >>JUDGE MOORE: Anytime you're dealing with a
21 government department, doesn't that problem always
22 exist?

23 MR. ROBBINS: Yes, sir, except --

24 >>JUDGE MOORE: I mean, even if you get a
25 judgment against the United States under the

1 Federal Torts Claim Act, it is only if Congress
2 has funded the Justice Department -- well, it is
3 administered by the Justice Department's fund for
4 paying such judgments. If Congress doesn't pay
5 the judgments, they go unpaid.

6 Is that not essentially the same
7 situation that every government department is in,
8 as far as the future goes?

9 MR. ROBBINS: I think in this context,
10 Your Honor, only in part. And what I mean by that
11 is, to the extent that the desire is to maintain
12 the science, for example, for public access down
13 the road, for other purposes beyond the Yucca
14 Mountain licensing application, then I would say
15 the answer is yes. That's just life.

16 However, of course, yesterday was spent
17 discussing DOE's motion to dismiss, not only
18 whether that should be granted, but if so, whether
19 it should be granted with prejudice or not, and
20 what are the consequences to parties in various
21 contexts.

22 And so here we have a different
23 situation than the norm, and is that to the extent
24 that decisions relative to that motion are made
25 that presume a continuation of access to the

1 documents, then, you know, to the extent a ruling
2 is based on that assumption and that assumption
3 later fails to materialize, now, potentially, an
4 underpinning of such a ruling -- or the ruling --
5 a foundational peg of the ruling, potentially, has
6 been taken away by lack of funding, and,
7 therefore, the paradigm on which that ruling was
8 premised may no longer exist, the question of
9 whether you would have issued the same ruling, had
10 you known that. So one way to do that is to
11 anticipate that possibility in the ruling.

12 Now, I'm speaking a little bit in
13 generalities because I don't want to overstep
14 bounds of today, which are talking about
15 documentary matters, and reopen yesterday's
16 argument. But at the same time, I have to allude
17 to it because I think that's very much a reason
18 why in this context it is not just the normal risk
19 of life, we're dealing with the Federal
20 Government.

21 >>JUDGE MOORE: Thank you.

22 Any other comments? We will take a ten
23 minute recess. And we need to put our heads
24 together and reconvene at 12:10 to proceed.

25 >>MR. SHEBELSKIE: Your Honor, Mike

1 Shebelskie.

2 >>JUDGE MOORE: Yes, Mr. Shebelskie.

3 >>MR. SHEBELSKIE: I wanted to raise this
4 before you broke in case it prompted any further
5 follow-up.

6 >>JUDGE MOORE: Well, I'm already broken but
7 go ahead.

8 >>MR. SHEBELSKIE: I did during the last --

9 >>JUDGE WARDWELL: You're about ten years
10 late, at least.

11 >>MR. SHEBELSKIE: I had some follow-up
12 information about core samples, physical samples
13 that we discussed earlier.

14 >>JUDGE MOORE: Please.

15 >>MR. SHEBELSKIE: And it may not be that
16 every core sample is represented by a separate
17 header in the LSN, as opposed to photographs, data
18 from the core sample, strip charts, and the like.
19 I didn't want to have anything taken out of
20 context, and I was assuring that every core sample
21 was represented by a bibliographic header, and,
22 therefore, what the disposition plan would be, but
23 I've made a record to do further inquiry and
24 report back to the Board promptly on that, and
25 what our plans would be -- if there are other core

1 samples, where they are, and what DOE is planning
2 to do with them. And I consulted with Nye County
3 about this.

4 >>JUDGE MOORE: And these would be material
5 that are not physical manifestations of things
6 that are not already in the LSN, through a
7 bibliographic header, or a bibliographic header of
8 a collection of something?

9 >>MR. SHEBELSKIE: Well, I think any data
10 generated, using the core samples, as I understand
11 it, is in the LSN. It is just a question of
12 whether there's a separate bibliographic header
13 for the physical items.

14 >>JUDGE MOORE: But the physical item itself
15 sits on a shelf somewhere and is locatable through
16 that bibliographic header of the documentary
17 material, at least as I understand the LSN
18 regulations, if some party made a request, DOE
19 would have to make arrangements to find it in the
20 dust bin?

21 >>MR. SHEBELSKIE: The regulations require
22 access as means of discovery to physical things.
23 I just wanted to say -- I wanted to inquire
24 further about the status of that.

25 >>>MR. FITZPATRICK: Your Honor, one last --

1 Charles Fitzpatrick, State of Nevada. We somewhat
2 addressed Mr. Robbins concerns for Clark County in
3 our comments, which you have probably seen, but
4 they ended with the suggestion that, if for any
5 reason DOE failed to meet the commitments that it
6 has made in its May 24 -- and that probably would
7 include a failure of funding, that in the -- you
8 know, long shot event of a new LA for an exact
9 same Yucca Mountain repository, that it not be
10 docketed or be rejected if the commitments have
11 not been lived up to and the documents have been
12 destroyed. So that's a partial answer, perhaps,
13 to Clark County's question.

14 >>JUDGE MOORE: Okay. Does any other party
15 have anything? We will recess until 12:10.

16 (Short recess taken.)

17 >>JUDGE MOORE: Please be seated.

18 If counsel has nothing further for us
19 regarding DOE's LSN document collection.

20 Mr. Shebelskie.

21 >>MR. SHEBELSKIE: Your Honor, Mike
22 Shebelskie. I have a statement to read regarding
23 the classified information. I was authorized by
24 counsel for the Navy Nuclear Propulsion Program to
25 make the following statement.

1 The Navy Nuclear Propulsion Program
2 commits to maintaining all LA related classified
3 material for the same time period that DOE will
4 preserve its LSN document collection.

5 The Navy nuclear Propulsion Program will
6 continue to store that material in the same manner
7 as it has been to support the LA to date. If the
8 Board seeks further information, we can answer
9 that in a more appropriate form.

10 >>JUDGE MOORE: Thank you.

11 I want to make this very clear.
12 Absolutely no inference should be read into the
13 fact that we are about to order the parties to
14 take an action. We, as you may know from the
15 orders that have been issued, are on a very tight
16 timeline to decide the matter that you all have
17 placed in front of us. Therefore, no inference,
18 one way or another, in any way, shape, or form
19 should be read into the fact that we're
20 instructing the parties to take this action.

21 The parties and petitioners and DOE
22 shall confer and agree upon a complete set of
23 proposed conditions regarding DOE's LSN document
24 collection.

25 It appears, through the process of DOE's

1 representations and answers to the Board's
2 questions from the January 27th case management
3 conference, DOE's written filings of February 4th,
4 February 19th, and February 24th, 2010, along with
5 DOE's responses at today's conference, there
6 remain no significant disagreements among the
7 parties, interested government participants, and
8 petitioners, regarding DOE's representations and
9 commitments, regarding DOE's LSN document
10 collection.

11 The agreed upon proposed conditions,
12 therefore, should spell out those representations
13 and commitments and avoid incorporation by
14 reference to preclude, or at least minimize, the
15 likelihood of future misunderstandings or
16 misapprehensions of the various representations
17 and commitments that have been made to date by
18 DOE, regarding DOE's actions, and plans, to
19 preserve its LSN collection.

20 Nevada should take the lead in this
21 undertaking, and such proposed conditions shall be
22 filed by June 18th, 2010. If there are any
23 disagreements between DOE and the parties, IBGs
24 and petitioners, alternative conditions, that
25 include DOE's proposed conditions and the proposed

1 conditions of the parties, IPGs and petitioners
2 should be included.

3 It is so ordered.

4 Do any parties have any questions about
5 that?

6 >>MR. LAWRENCE: John Lawrence, State of
7 Nevada. When you said alternate or disagreements
8 that may arise with regard to these terms and
9 conditions should be filed at the same time,
10 you're saying they should be filed --

11 >>JUDGE MOORE: Alternative conditions that
12 recognize the two sides of the disagreement. DOE
13 will -- we expect none because there appear to be
14 none. And we would hope that there are none. But
15 in an abundance of caution, we want DOE to lay out
16 its view, and the parties, petitioners, IPGs --
17 IGPs, to lay out their view in what would be a
18 proposed condition about any area of disagreement,
19 of which there should be none. Mr. Lawrence?

20 >>MR. LAWRENCE: On June 18th?

21 >>JUDGE MOORE: Correct.

22 >>MR. LAWRENCE: Same date.

23 >>JUDGE MOORE: If there are no further
24 questions, I would like to thank you for all your
25 cooperation and participation in this endeavor.

1 As I say, please do not read anything into it, but
2 if the eventuality arise, the conditions are
3 necessary under the timeline we've been instructed
4 to operate, very frankly, it is questionable
5 whether we can sort it all out and go back and
6 forth with the parties and the things that we
7 would only be comfortable with in doing. So
8 unless someone else has further issues to bring
9 before us, we will stand adjourned.

10 And if -- again, please don't read any
11 inference into this. This is the last time this
12 Board convenes and meets here in Las Vegas. It
13 has been our pleasure, and my pleasure, having
14 gone back way too many years in this matter, to
15 have the privilege of presiding over this with
16 your help and cooperation. So, thank you very
17 much and we stand adjourned.

18 (Proceedings adjourned)

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CERTIFICATE OF REPORTER

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of U. S. Department of Energy High-Level Waste Repository, Docket No. 63-001, ASLBP No. 09-892-HLW CAB04 on June 3, 4, 2010, Las Vegas, Nevada, was held as herein appears and that this is the original Transcript thereof for the file at the U.S. Nuclear Regulatory Commission taken by Caption Reporters Inc., and that the transcript is a true and accurate record of the foregoing proceedings.

Lorraine Carter, RPR
Official Court Reporter