IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60191

In Re: State of Texas

THE STATE OF NEVADA'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO INTERVENE AS A RESPONDENT AND RESPONSE TO TEXAS'S INCORPORATED MOTION TO STAY ACTION ON NEVADA'S MOTION TO INTERVENE

ADAM PAUL LAXALT
Attorney General of Nevada
JOSEPH TARTAKOVSKY
Deputy Solicitor General
JORDAN T. SMITH
Assistant Solicitor General
BELINDA SUWE
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, NV 89701
(775) 684-1100
JSmith@ag.nv.gov

CHARLES J. FITZPATRICK
MARTIN G. MALSCH
JOHN W. LAWRENCE
EGAN, FITZPATRICK, MALSCH & LAWRENCE, PLLC
7500 Rialto Blvd., Building 1, Suite 250
Austin, TX 78735

ANTONIO ROSSMANN
ROGER B. MOORE
ROSSMANN AND MOORE, LLP
2014 Shattuck Ave.
Berkeley, CA 94704

MARTA ADAMS
ADAMS NATURAL RESOURCE CONSULTING SERVICES, LLC
1238 Buzzys Ranch Road
Carson City, NV 89701

I. INTRODUCTION

Texas's sports analogy is incomplete. Nevada and the Federal Respondents are in the middle innings of a contest over Yucca Mountain, but Texas fails to acknowledge that it has been a disinterested spectator for over three decades. Conveniently now that its former governor has been confirmed as the Secretary of Energy, Texas takes its first swing to transplant the long-running "baseball game" onto its proverbial "football field."

Contrary to Texas's assertion that "this case has nothing to do with Nevada or whether Yucca Mountain is an appropriate nuclear repository," Opp'n 1, its Petition contains sweeping remedial requests that engulf all of NWPA, the suitability determination, and the licensing proceeding. At minimum, Texas concedes that "Nevada has a protectable interest in the fairness of those proceedings, and due process following those proceedings." Opp'n 11. Therefore, any order to fund, start, truncate, complete, impose this Court's supervision, or otherwise shape the adjudicatory hearing impacts Nevada's rights with respect to the licensing process.

The entire purpose of the adjudicatory hearing is to determine whether Yucca Mountain is an "appropriate nuclear repository." Thus, Texas's Petition squarely involves, not only the hearing, but every aspect of the nuclear waste dump and Nevada's sovereign interests. If Texas prevails, this Court will usurp the functions of Executive Branch agencies and preside over—and render a verdict on—Nevada's contentions and objections to the project.

Unlike Texas's funding complaints which "should be addressed to Congress, not this Court," *cf.* Opp'n 1, Nevada's interests are real and tangible; not merely political or policy driven. Those interests cannot be entrusted to the Federal Respondents, some of whom are also the opposing team in the adjudicatory hearing and often take action on Yucca Mountain against the interests of Nevada. Consequently, Nevada possesses otherwise-unrepresented interests in the property and transaction that is the subject of this action, Nevada's ability to protect its interests will be impaired without intervention, and Nevada must be allowed to intervene as of right. Alternatively, Nevada should be allowed to permissively intervene as Texas does not dispute that Nevada has a claim or defense that shares a common question of law or fact.

II. ARGUMENT

A. Texas Does Not Seriously Deny That NWPA's Statutory Design Weighs In Favor Of Nevada's Intervention.

Texas agrees that "when resolving a motion to intervene in an action filed under the [NWPA], the Court considers (1) the statutory design of the act, and (2) the policies underlying intervention in the trial courts pursuant to Fed. R. Civ. P. 24." Opp'n 2 (quotations omitted). No doubt recognizing that the first prong is an easy home run for Nevada, Texas does not seriously address the Act's statutory design. In one sentence, Texas contends that "Congress's refusal to provide for repository states a permanent seat in the courthouse at NWPA proceedings is telling." Opp'n 5. Texas fails to appreciate the difference between Federal Rule of Civil Procedure 24(a)(1),

which applies to unconditional statutory rights to intervene, and the significance of the overall "statutory design of the act," which governs the inquiry at issue here.

As explained in the Motion for Leave to Intervene, the design of NWPA supports Nevada's intervention. The Act provides Nevada special "rights of participation and consultation" as the unwilling host of the proposed repository. 42 U.S.C. §10121(b); 42 U.S.C. §10121(a) ("[T]he Secretary shall notify the Governor and legislature of the State in which such repository is proposed to be located…."). The Act also expressly facilitates Nevada's participation in ways that are unavailable to other states. *See* 42 U.S.C. §10136(c)(1)(A) ("The Secretary shall make grants to the State of Nevada and any affected unit of local government for the purpose of participating in activities required by this section and section 10137 of this title or authorized by written agreement entered into pursuant to section 10137(c) of this title."); 42 U.S.C. §10136(c)(1)(B)(i) ("The Secretary shall make grants to the State of Nevada…for purposes of enabling such State…to review activities taken under this part with respect to the Yucca Mountain site for purposes of determining any potential economic, social, public health and safety, and environmental impacts of a repository on such State…."); 42 U.S.C. §10136(c)(2)(A)(i) ("The Secretary shall provide financial and technical assistance to the State of Nevada, and any affected unit of local government requesting such assistance.").

Additionally, NRC Rules of Practice allow Nevada, as the host state, the right to intervene because it has proffered "admissible contention[s]" against the project. *See* 10

C.F.R. §2.309(a), (d). As a result, NWPA's statutory framework and related regulatory scheme demonstrate that the repository's target state is accorded unique participation rights and this factor justifies Nevada's intervention as of right. *Cf. Texas*, 754 F.2d at 552 (NWPA's statutory design did not warrant utilities' intervention where their only participation was funding).

B. Nevada Possesses Legally Protectable Interests—Not Political Or Policy Concerns—That Will Be Impaired.

Texas accuses Nevada of advancing merely political concerns rather than legally protectable interests. To possess an "interest relating to the property or transaction that is the subject of the action," Fed. R. Civ. P. 24(a)(2), justifying intervention as of right, "an applicant must point to an interest that is direct, substantial, [and] legally protectable" and this interest "must be one which the substantive law recognizes as belonging to or being owned by the applicant." *Ross v. Marshall*, 426 F.3d 745, 757 (5th Cir. 2005) (internal quotations omitted).

But "property or transaction" within the meaning of Rule 24(a)(2) is not defined narrowly. *See Ceres Gulf v. Cooper*, 957 F.2d 1199, 1203 (5th Cir. 1992). Rather, the "interest test" serves as "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process[.]" *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (quotations omitted). This practical approach is consistent with this Court's generally liberal view of intervention as of right, where all doubts are resolved in favor of the proposed intervenor. *Entergy Gulf States*

La., L.L.C. v. E.P.A., 817 F.3d 198, 203 (5th Cir. 2016).

For purposes of intervention as of right, states unquestionably have a legally protectable property interest in the safety, environmental health, and use of state land adjacent to federal projects. *See Forest Conservation Council v. U.S.F.S.*, 66 F.3d 1489, 1497 (9th Cir. 1995) abrogated on other grounds by *Wilderness Soc. v. U.S.F.S.*., 630 F.3d 1173 (9th Cir. 2011) (allowing a state to intervene due to its "significantly protectable interests" in "the environmental health of, and wildfire threats to, state lands adjacent to national forests, which appellants have a legal duty to maintain."); *see also Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992) (recognizing the "State has property interests at stake, inasmuch as it owns state parks within and adjacent to the Ouachita National Forest."). And courts have recognized that states have protectable interests in the water and property held in trust for their citizens, preserving recreational opportunities, fostering their tourism industry, and protecting tax revenue. *Robertson*, 960 F.2d at 84, 86. These are the same sovereign interests asserted by Nevada in its Motion. Mot. 10-12. The Declaration of Robert Halsted, the Director of the Nevada Agency for Nuclear Projects, explains Nevada's interests in great detail. (Ex. 2).

Texas does not dispute Nevada's sovereign interests but instead tries to side-step those interests by proclaiming that "[t]his case has nothing to do with Nevada or whether Yucca Mountain is an appropriate repository." Opp'n 1. Texas endeavors to convince the Court that this case "raises the issue of Yucca Mountain on the periphery…." *Id.* at 4. But Texas's Petition—and, in particular, its catch-all eighteenth

request for relief—directly threatens Nevada's sovereign prerogatives because it implicates the assessment of site suitability within the licensing process. Texas asks for "[a]n order appointing a special master to assume statutory authority and duties of DOE, the Secretary of Energy, and the NRC with respect to completion of Yucca Mountain as a permanent repository." Pet. 27 ¶18. This request literally encompasses the entire project and every imaginable aspect of NWPA, the site suitability assessment, the licensing mechanism, and the adjudicatory hearing. It is hard to conceive of any part of NWPA or the subject of nuclear waste storage that Texas's own request wouldn't touch.

Most obviously, DOE, the Secretary of Energy, and NRC have statutory authority and duties regarding every facet of the Yucca Mountain project, including the final word on the validity of Nevada's contentions that the location is not safe or feasible. After the adjudicatory hearing, NRC will rule on whether Yucca Mountain is a suitable location. If Texas prevails on this request, a special master appointed by this Court (violating the separation-of-powers) will decide if the Nation's nuclear repository will be sited at Yucca Mountain. As a consequence, Nevada's sovereign interests are inescapably intertwined with this remedial request.

Texas's citation to *LeBoeuf, Lamb, Greene & MacRae, LLP v. Abraham*, 205 F.R.D. 13 (D. D.C. 2001) illustrates the point. There, intervention was denied because the litigation involved a law firm's conflicts of interest and did not "deal with the suitability of burying nuclear waste in Yucca Mountain per se." *Id.* at 15. By contrast, Texas's

Petition, including its eighteenth remedy, will necessarily involve the eventual decision on "the suitability of burying nuclear waste in Yucca Mountain."

Aside from Nevada's interest in the siting of the nuclear repository, Texas admits that "Nevada has a protectable interest in the fairness of those [NRC] proceedings, and due process following those proceedings." Opp'n 11. It recognizes that Nevada has a "true identifiable interest…in the proceedings over which NRC presides…." *Id.* at 10; *id.* at 6 ("At best, Nevada's argument is that it has an interest in the NRC proceedings."). These concessions are consistent with the holdings of other courts which allow states to intervene in another state's action if that action might adversely affect future litigation involving the intervening state. *See, e.g., Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1255 (11th Cir. 2002).

Nonetheless, Texas minimizes the extent to which its Petition will affect the licensing proceedings. Texas characterizes the adjudicatory proceedings as only "one portion of Texas's twelfth enumerated remedial request." Opp'n 12. But out of the twenty-four requested remedies the adjudicatory hearing is directly or indirectly involved in thirteen of them.[1] When opposing NEI's Motion to Intervene, Texas described "[t]he thrust of Texas's Petition [as] equitable relief…ordering Respondents to finish the Yucca licensure proceedings." Opp'n NEI 1 (quotations omitted). If the licensing proceeding is part of the "thrust" of Texas's action, and Nevada undeniably

[1] Pet. 25-28 ¶¶3-8, 11-16, 18.

has an interest in the licensing proceeding, then Nevada must be allowed to intervene and intervene now without any sort of stay.

It is not enough that Nevada is a *participant* in the licensing hearing. Nevada's 218 contentions will be rendered effectively meaningless if, through this action, the Court or a special master unduly shortens the hearing and deprives Nevada of a full and fair opportunity to litigate each of its objections. This Court has held that engaging in other arenas of litigation or participating in other administrative processes are not adequate substitutes for intervention. *See Espy*, 18 F.3d at 1207. Nevada's protectable interests in the licensing process and disputing site suitability will be irreparably impaired without intervention.

A word on politics. To the extent any party has injected non-redressable political considerations into this original action, it is Texas, through its requests that this Court circumvent the democratic budgetary process currently pending in Congress. Instead of "engag[ing] in that great First Amendment exercise of lobbying Members of Congress," Opp'n 5, for more funding or the expenditure of designated funds, Texas implores this Court to usurp Congress's power of the purse and violate Article One, Section Nine of the Constitution. That provision forbids drawing of money "from the treasury, but in consequence of appropriation made by law…." U.S. Const. art. I, §9. This Court cannot, consistent with the Constitution, order the Executive Branch to request more funds or compel Congress or "the Treasury to release all necessary Nuclear Waste Fund money to DOE and the NRC to complete the Yucca Mountain

licensure and adjudicatory process."[2] Texas's *own* objections to funding "should be addressed to Congress, not this Court." *Cf.* Opp'n 1.

C. NRC Does Not Adequately Represent Nevada's Interests Or Share Nevada's Ultimate Objective.

Texas asserts that Nevada cannot overcome the twin "presumptions" of adequacy stemming from NRC's participation and its supposed shared ultimate objective in this case. Regarding the former, Texas relies heavily on *Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994), to suggest that the presumption applies to a federal agency. Opp'n 6, 9. But this Court recently clarified in *Entergy Gulf States Louisiana, LLC* that *Hopwood*'s relevant language only applies to a *state* insofar as that *state* is involved in a matter of sovereign interest on behalf of its citizens. 817 F.3d at 204 n.2. "[T]his Court has not required a stronger showing of inadequacy in other cases where a [federal] governmental agency is a party." *Id.* (presumption did not apply to EPA).

Even if the governmental presumption applies, there may be whiffs of collusion. Suspiciously, Texas's first interest in Yucca Mountain litigation sprang after its former governor became the Secretary of Energy. Before then Texas stood idly by for decades, even as other states intervened before NRC to support continuation of the licensing proceeding. Informed observers have questioned the "optics" of this lawsuit given that there is a pending application for a temporary storage facility in western Texas. Dale Klein, a former NRC chairman, told the Houston *Chronicle*: "The optics are the fact that

[2] Pet. 25-26 ¶¶3-4, 6-8, 11.

this was filed by a Texas Attorney General and there is an active application from Texas; *it has the appearance of being coupled*. Whether it is or not, only Paxton could answer."[3] The same article reported on the prospects of what it called a "sweetheart settlement" between Texas and DOE. *Id.*[4]

Finally, Nevada and NRC do not share the same ultimate objective. Texas characterizes the purported overlapping objective as a "symbiotic interest[] in fair and adequate proceedings…." Opp'n 11. But this is akin to arguing that, because the Rangers and Astros both want a fair baseball game, the Rangers will look out for the Astros' best interests. If the Court can entrust NRC to watch out for the interests of *all* states, one wonders why Texas even brought this suit.

The parties' views about what constitutes a "fair" licensing process will inevitably diverge. There will likely be critical differences on discovery, expediting (or not) the proceeding, imposing a deadline to complete the licensing process and, if so, what deadline is possible and consistent with due process and NRC's regulations. Past history strongly suggests that NRC and Nevada will clash over the conduct of the process. *See, e.g.,* 68 NRC 246 (2008) (denying Nevada's request for an additional 150 days to petition to intervene and file contentions in the licensing proceeding); 68 NRC 497 (2008)

[3] Jim Drew, *Paxton Sues Feds to Force Vote on Yucca Mountain Nuclear Waste Storage* (March 17, 2017), http://www.houstonchronicle.com/news/houston-texas/houston/article/Paxton-sues-feds-to-force-vote-on-Yucca-Mountain-11010645.php (emphasis added).

[4] Nevada has sent a FOIA request for any communications between DOE, NRC, and Texas related to this litigation or Yucca Mountain.

(denying Nevada's request to extend the deadline for filing certain contentions until after the applicable NRC standards were in place). This is sufficient to demonstrate divergent interests. *Entergy*, 817 F.3d at 204 (divergent interests regarding case bifurcation and stay).

III. CONCLUSION

For these reasons, Nevada respectfully requests that it be allowed to intervene.

Dated: May 1, 2017.

By: /s/ Jordan T. Smith

ADAM PAUL LAXALT
Attorney General of Nevada
JOSEPH TARTAKOVSKY
Deputy Solicitor General
JORDAN T. SMITH
Assistant Solicitor General
BELINDA SUWE
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, NV 89701
(775) 684-1100
JSmith@ag.nv.gov

Counsel for Nevada

CHARLES J. FITZPATRICK
MARTIN G. MALSCH
JOHN W. LAWRENCE
EGAN, FITZPATRICK, MALSCH & LAWRENCE, PLLC
7500 Rialto Blvd., Building 1, Suite 250
Austin, TX 78735

ANTONIO ROSSMANN
ROGER B. MOORE
ROSSMANN AND MOORE, LLP
2014 Shattuck Ave.
Berkeley, CA 94704

MARTA ADAMS
ADAMS NATURAL RESOURCE CONSULTING SERVICES, LLC
1238 Buzzys Ranch Road
Carson City, NV 89701

Counsel for Nevada

CERTIFICATE OF COMPLIANCE

1. This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) and Fifth Circuit Rule 27.4 because it contains 2,592 words, except for the items excluded from the word count pursuant to Federal Rule of Appellate Procedure 32(f), as determined by the word count function on Microsoft Word 2013.

2. This Motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2013 Garamond 14-point font.

/s/ Jordan T. Smith

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2017 an electronic copy of the foregoing motion was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Sandra Geyer