IN THE UNITED STATES

COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 84-7846

STATE of NEVADA, ex. rel., ROBERT R. LOUX, DIRECTOR OF THE NEVADA NUCLEAR WASTE PROJECT OFFICE,

Petitioner,

v.

JOHN HERRINGTON, SECRETARY OF THE UNITED STATES DEPARTMENT OF ENERGY.

Respondent.

On Petition for Review under the Original Jurisdiction of the Court of Appeals

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PETITIONER'S REPLY BRIEF

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II. THE LIMITED SCOPE OF THE ISSUES IN THIS CASE

We believe that at the outset it is necessary to restate for the Court the true scope of this case, what Nevada is actually challenging.

The Secretary's Brief overstates the scope of the case and the issues presented to the Court. The Brief identifies as an issue presented to the Court whether the NWPA requires federal funding for the cost of litigation against the government in judicial review under the NWPA. The Brief also, in Section IV, beginning at page 35, asserts that Nevada complains of a condition requiring DOE's prior approval of any subcontract exceeding $50,000 to be awarded by the State. The Brief recognizes at page 35, that we have not briefed these objections. We have not done so simply because they are not issues in this case.

Nevada's FY 85 grant was finally awarded by DOE on February 1, 1985. The Petition in this action was filed on December 14, 1984. No similar conditions were included in Nevada's FY 84 grant. Although aware that a similiar condition with respect to the costs of litigation had been included in the State of Washington's FY 85 grant, Nevada had no indication from DOE, formally or informally, that such a condition would be imposed on the use of FY 85 grant funds. Thus, on the date the Petition for Review was filed in this case, no grant conditions of any kind existed, and there was thus no action of the Secretary from which to seek review.

Furthermore, the Secretary's Brief demonstrates a misunderstanding of Nevada's so-called "protest letter" of February 12, 1985, attached to the Brief as Attachment A. The Secretary's Brief, at page 35, suggests that Nevada objects to the requirement for submission for concurrence of <u>any</u> subcontract exceeding $50,000. This is not the case. The Notice of Financial Assistance Award, (Ad. R. 53, Attachment G, page G-2, n.1) specifically referred to legal and quality assurance consultant agreements as required to be submitted for concurrence. The February 12, 1985 letter merely points out that with respect to legal services,

hydrology contractor, geology contractor, support to the Nevada Legislature and support to local governments, Nevada's subcontracts were exempt from the requirement for submission for concurrence by 10 CFR 600.119 because they were contracts with other governmental entities. That letter contained no suggestion, and Nevada has made none, that all subcontracts exceeding $50,000 need not be submitted for concurrence by DOE. See Secretary's Brief, page 37, note 17.

The Secretary's assumption that the issues in this case were broader than stated in the Petition for Review is perhaps understandable. Although not included in the Statement Of Issues Presented in Petitioner's Opening Brief, Nevada did, on page 3 of that Brief, in the Statement Of The Case, include the fact that the grant authorization, which did not exist when the Petition was filed, contained two provisions to which objection had been made. We did so only to fully inform the Court as to the status of Nevada's financial assistance under the NWPA, and did not intend to inject those issues into this litigation.

Secondly, it is also true that, at page 25 of Petitioner's Opening Brief, we pointed out that "financial compensation was to be so extensive that even attorney fees for lawsuits seeking remedies under the Act were compensable." Again, we did so only as part of and in support of Nevada's argument as to the breadth of the financial assistance available to states under the NWPA, and not in any way as an attempt to bring that issue into this litigation.

Finally, of course, the State of Utah, in its Amicus Brief, argues that the Secretary's refusal to fund the cost of litigation arising under the NWPA violates the Act.

The Secretary has not required Nevada to submit any intragovernmental subcontracts or subgrants for his concurrence, nor has he taken any steps to apply the grant condition with respect to litigation costs. Furthermore, Nevada is informed that another state or states will probably shortly file, in this circuit, a

petition for review directly and squarely raising the issue of the allowability of financial assistance to states for the costs of litigation arising under the NWPA. It is more appropriate that the Court consider and determine that issue in a case in which it is squarely presented and fully briefed. At this point the issue is not even justiciable.

III. ARGUMENT

A. The Secretary Misunderstands What Nevada Proposes To Do.

The Secretary's Brief also demonstrates a misunderstanding of just what it is Nevada proposes to do, and thus the activities for which funding was denied. Throughout the Brief, references are made only to "on-site" drilling activities proposed by Nevada (Secretary's Brief pages 2, 16, 24 and 26.) The Secretary states the first issue presented, for example, as whether the NWPA requires him to provide financial assistance to Nevada for "on-site studies involving test drilling to collect primary data from the Yucca Mountain site." That statement is inaccurate for two reasons.

First, no test drilling is proposed to be conducted on-site. The nearest bore hole which Nevada will drill is located some 2 1/2 miles from the outer boundary of the proposed repository. Secondly, test drilling is not the only activity proposed by Nevada. Other activities include an independent examination of DOE trenches, located both on and off the repository site itself, to determine potential for fault movement, and the use of low sun-angle photography as a method to reveal faults, and sampling of groundwater, both on and off the site for chemical analysis, to model groundwater movement.

Nor is it accurate to state that all of Nevada's proposed activities involve

the collection of primary data.[1] To the contrary, while much of what the state intends would involve the collection of new data, its purpose is to verify DOE's primary data, the methods used to gather that data, and the results and conclusions drawn therefrom.

The Secretary's Brief also is inaccurate in representing to the Court that the State intends its own site characterization program. Nevada does not propose a program of site characterization. The supporting material accompanying Nevada's grant application (Ad. R. 31, Attachment A, and 38, Attachments B and C), explains in great detail, and the technical evaluation of Nevada's proposed activities by Donald L. Vieth, Director of DOE's Waste Management Project Office in Nevada, found at Attachment B to the Secretary's Brief, explains in less detail precisely what those proposed activities are. Review of those documents will indicate clearly that what Nevada proposes is selective research to verify DOE methodology, existing data, and the results and conclusions based on that data. That is not a program of site characterization, which is defined by the Act as:

> "activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of the repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a canditate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken." Section 2(21)(B), 42 USC 10101(21)(B))

1. The Secretary's position regarding the State's ability to gather "primary data" is inconsistent. On page 31 note 14 of the Secretary's Brief the Court will find the statement "for example, Nevada may obtain grant funds to engage in studies, potentially involving primary data collection, as necessary to develop its impact report under § 116(c)(2)(A) on any economic, social, public health and safety, and environmental impacts which may result from the development of a repository in the state." [Emphasis supplied] How the Secretary can find Congressional support for primary data collection in § 116(c)(2)(A), but no Congressional support for primary data collection in the remaining portions of § 116, or in all of § 117, is curious to say the least. It may be significant that the former primary data collection occurs after sites are selected and licensed, whereas primary data collection at this time may uncover defects in DOE's site selection decision.

Merely because certain activities may be "duplicative" of DOE activities does not mean that the state intends to conduct an independent characterization program.[2]

Nevada's program, rather than characterization, is more accurately described as in the nature of quality assurance. If, for example, a state proposed to conduct certain activities identical or similar to activities already conducted by DOE, in order to attempt to "replicate" DOE's results, no reasonable scientist in the world would consider that anything but appropriate, for replication is a classic component of any quality assurance program. Nor is it accurate to state that all of Nevada's proposed activities duplicate ongoing or planned DOE activies. In many instances Nevada's proposal involves using different methods to attempt to arrive at the same result as DOE. The use of low sun-angle photography as a method to reveal faults, for example, is simply a different method than that used by the Department, which considered vertical photography and classic field studies more effective methods. (See Secretary's Brief, Attachment B, page 10.)

Finally, because something is duplicative it is not necessarily wrong, unnecessary, or wasteful. Duplicating DOE's efforts under these circumstances to verify its results is no more unnecessary or wasteful than a second proofreading of this brief, an independent verification of a computation, or rerunning any physical experiment to determine if the same result obtains. To suggest that Congress made the states virtual partners with the federal government in the planning and development of repositories (§ 111(a)(6), § 116(c), § 117(c), 42 USC 10131(a)(6), 10136(c), 10137(c)), and granted the states widespread and significant rights of

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2. The significance of the State's duplication of certain DOE efforts will be discussed further in connection with the Secretary's alternative argument that funding would be required for Nevada's activities only after site characterization has begun. (See Section III E. infra).

independent study, testing, monitoring, and evaluation, and at the same time prohibited the states from duplicating any DOE efforts in order to verify its results, simply defies logic.[3]

B. Deference To The Secretary's Interpretation Is Not Appropriate In This Case

The Secretary's Brief, at pages 21-23 and 31-32, relies heavily on the argument that great deference must be given to the Secretary's interpretation of his responsibilities under the NWPA, as evidenced in the challenged grant guidelines (Ad. R. 34, Attachment A). That is hardly surprising since deference to the statute, rather than the Secretary's interpretation, will not produce the result which he desires.

The Secretary's Brief cites numerous cases for the proposition that the Secretary's interpretation should be deferred to, that it is not the role of the federal courts to "rewrite statutes" and that the Secretary's intrepretation must be sustained unless unreasonable and plainly inconsistent with the Act.[4] Of course,

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3. The Utilities Amicus Brief, at page 9, suggests that an additional reason why Nevada's activities were disallowed was "because of potential risk to the site", citing Ad. R. 41, Attachment A, at page 2. That statement is obviously based on a misunderstanding of the record itself. The letter dated November 7, 1984, found at Ad. R. 41, was never transmitted to the State of Nevada. Rather, it was attached as an enclosure to a memorandum of the same date to William J. Purcell in the Office of Civilian Radioactive Management, in which Mr. Vieth is seeking "definitive guidance" on grant allowability. See Ad. R. 45, Attachment B, page 3. The "strawman" letter of November 7, 1984, was replaced by the letter of November 27, 1984, appearing at Ad. R. 45. The activities within the guidelines significantly increased between November 7 and November 27, with "legal consultants" and quality assurance being included within the guidelines. Likewise, no suggestion similar to that found in Ad. R. 41, Attachment A, at page 2, that "DOE policy with regard to risk to the site," made the activities unallowable. Indeed, DOE has never suggested that Nevada's proposed activities constitute a risk to the site, nor that they would unreasonably interfere with or delay onsite activities.

4. It is not Nevada which wants the statute rewritten, but the Secretary who would have this Court narrow §§ 116 and 117 of the Act, 42 USC 10136 and 10137, as well as to completely expunge from the statute § 117(c)(1), 42 USC 10137(c)(1) (See argument in section III C, infra.

deference to an agency is not always appropriate or even permitted. "Although an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear meaning of the statute, as revealed by its language, purposes and history.' Teamsters v. Daniel, 439 U.S. 551, 566 n. 20, 58 L. Ed. 2d 808, 99 S. Ct. 710 (1979)." Southeastern Community College v. Davies, 442 US 397, 411, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979). See also Alcaraz v. Block, 746 F. 2d 593, 606 (9th Cir. 1984).

We will not discuss each of the cases cited by the Secretary here. However, an analysis of Chevron USA, Inc. v. Natural Resources Defense Counsel, Inc., ____ US ____, 81 L. Ed. 2nd 694, 104 S. Ct. 2778 (1984), the most recent expression of the Supreme Court on that question, and the case on which the Secretary appears to principally rely, shows that even that case does not support the Secretary's position. The five principal factors relied on the Chevron are not found here, and thus Southeastern Community College, supra, should control.

In Chevron the Supreme Court upheld EPA regulations allowing states to treat each pollution-emitting device in the same industrial grouping as though incased within a single "bubble". The Court found that Congress did not have any specific intention with respect to the applicability of the bubble concept, the agency's regulations were thus based on a reasonable construction of the term "stationary source" found in the Clean Air Act Amendments of 1977 and EPA's use of the bubble concept was a reasonable policy choice for the agency to make. The Court stated that EPA's interpretation representated a reasonable accommodation of manifestly competing interests and was therefore entitled to deference. We

submit that a reading of the entire opinion in Chevron makes clear that such deference is not appropriate in this case.

The opinion restates many rules or virtual blackletter law, with which we certainly take no exception, but which we submit do not support the Secretary's position here. A close reading of the opinion will demonstrate this.

The Court deferred because: "[t]he Administrator's interpretion represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." [Footnotes omitted]. 81 L. Ed. 2nd, 694, 716. The factors which prompted deference in Chevron are not present here.

First, not only did Congress have a specific intent but it is, we submit, clear. Sections 116 and 117 of the Act, 42 USC 10136 and 10137, grant the states extremely broad rights to participate, in an independent and informed manner, in the entire process of planning and developing the nation's first repository for high-level nuclear waste and spent nuclear fuel. This, of course, flows directly from the Congressional finding, that "[s]tate and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel;" § 111(a)(6), 42 USC 10131(a)(6). Coupled with the rights to notice, review, and comment found in §§ 112 and 113, 42 USC 10132 and 10133, those sections demonstrate Congress' intent to form a virtual partnership between the states and federal government, with the Department of Energy being responsible for the administration of the technical program itself, the siting, construction, and operation of a repository, and the states providing the independent, detached and objective review, oversite and verification of the Department's program necessary to achieve the desired

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states and affected Indian tribes be awarded full participation in and oversought of that program, funded by the same source (see § 111(a)(6), 42 USC 10131(a)(6)). Indeed, Congress stated that the statute itself resolved these policies (see § 111(b)(1)-(4), 42 USC 10131(b)(1)-(4)). This precludes the Secretary from superimposing his own policy on that which Congress has clearly stated. If the particular "accommodation" at which the Secretary arrived results in the denial of funding for Nevada's proposed activities, it is an accomodation which Congress would not have sanctioned.

There are further reasons why deference to the Secretary's interpretation is not appropriate in this case. There is no technical or complex regulatory scheme in this case. Indeed the statute does not create any authority in DOE to "regulate" the State in the sense that EPA regulates in the Clean Air Act context. Furthermore, there is nothing complex about funding the State's proposed activities.

Neither did the Secretary consider the matter in a detailed and reasoned fashion. The original internal grant guidelines were "issued" in June 1983 and revised in September of 1984 (Ad. R. 34). No notice to or consultation with the affected states or Indian tribes occurred. The guidelines were adopted, and later revised to exclude the collection of so-called "primary data", without any input whatsoever from the parties affected. Whether or not that constitutes a detailed and reasoned consideration on the part of the Secretary of the issue at hand should be carefully considered by the Court. It may indeed thus be the "contemporaneous construction" of the statue by some of the persons charged with the responsibility for its implementation, but it does not, we submit, meet the requirements for agency consideration of the matter in a detailed and reasoned fashion, in view of the consultation requirements of the NWPA.

C. Whether Or Not The Proposed Yucca Mountain Site Is Undergoing Formal Site Characterization Does Not Affect The State's Right To Funding For The Studies It Proposes To Undertake

1. The "phases" in the Secretary's internal grant guidelines should not control, since the Department is already engaged in site characterization activities at Yucca Mountain.

The Secretary's Internal General Guidelines For Implementing Financial Assistance (Grants) For Repository Programs Under § 116 and 118 of the Nuclear Waste Policy Act of 1982, revised September 7, 1984, (Ad. R. 34, E.R. 34), which we ask the Court to declare invalid, set out four phases when different levels of state activity will be eligible for funding, in the Secretary's view, under the Nuclear Waste Policy Act. Phase I begins with the Department's exploratory screening work. Phase II begins when states or affected Indian tribes have been notified that potentially acceptable sites are located within their borders. In the Secretary's view Phase II now applies to Nevada, as well as the five other potential first repository host states. Phase III would begin when candidate sites have been approved for site characterization by the President. Phase IV begins only when a site has been authorized by the NRC for construction of a repository. These guidelines, developed without any notice to or comment from the affected states and Indian tribes whatsoever, are discussed at length in both Petitioner's Opening Brief, at pages 15-17, and the Secretary's Brief, at pages 13-15 and 22-23, and need not be further elaborated upon here. Suffice it to say that the guidelines find no basis or support in the Nuclear Waste Policy Act.

These so called phases are also essentially irrelevant to either the Department's or the State's participation in the repository siting and development process, for they assume the Department's activities, and thus the State's

commensurate activities, are neatly packaged in square boxes consistent with the statute's time frame. But that is simply not the case. The level of Departmental activity in the States of Nevada and Washington, where the potential sites are either on DOE or other federally owned property, has been significantly greater than the level of DOE activity in the States of Utah, Texas, Mississippi c Louisiana. Indeed, since the late 1970's extensive technical studies in the nature of site characterization have taken place in both Nevada and Washington. [5]

That site characterization activities are already underway at the Yucca Mountain site in Nevada is admitted by the Department of Energy. In the Nevada Nuclear Waste Storage Investigations (NNWSI) Project Director's technical evaluation of the activities proposed in Nevada's FY 85 grant application, reproduced as Attachment B to the Secretary's Brief, the Project Director, Donald Vieth, makes the following statement:

> "Based on the guidelines developed by OCRWM, the tasks identified below are not recommended. They fall outside the guidelines since they represent primary site characterization data collection and are duplicative of work being conducted by the NNWSI project participants." [Emphasis supplied] Secretary's Brief, Attachment B, page 6.

Mr. Vieth then sets forth in some detail each of the proposed Nevada studies and activities, which he describes as "primary site characterization data collection" followed by an explanation of the work which the NNWSI project has done and will continue to do which the Department views the proposed state

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5. At the reference repository location on the Hanford Reservation in Washington, for example, DOE planned to actually sink an exploratory shaft shortly after thepassage of the NWPA, in early 1983. The Department changed that plan only after being threatened with litigation by the state, the Yakima Indian Nation and certain environmental groups.

activity to duplicate. Even a cursory examination of the work described by Mr. Vieth, which NNWSI has either completed or is currently involved in, should leave no doubt that extensive and detailed technical studies and evaluations have been and are now taking place on or near the proposed Yucca Mountain site, in the nature of site characterization. It is difficult to understand how the Secretary can, on the one hand, say that Nevada's proposed activities are untimely since the Yucca Mountain site is not now undergoing formal site characterization, and on the other hand deny funding for those state activities because they constitute site characterization data collection duplicative of site characterization currently being conducted by the Department.

The simple truth is, at least in the States of Nevada and Washington, that the Secretary's so-called "phases" are completely blurred and blended together. The level of the State's funded activity should be geared to the level of DOE's activity in any state, regardless of any arbitrary label attached to the particular "phase" which the Department says that state is in. Thus, the level of funding for each state's activity would not be equal, but related to DOE's actual activity. There would be comparatively little activity in many states, and the suggestion on pages 33 and 34 of the Secretary's Brief that funding Nevada's proposed activities would impair the integrity of the waste fund is nonsense.[6]

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6. The total Nuclear Waste Fund appropriation for FY 85 is $327,669,000. The Secretary's budget request for the Nuclear Waste Fund for FY 86 is $571,460,000. The disallowed portion of Nevada's grant application constitutes less than 0.5% of the FY 85 appropriation, and less than 0.3% of the FY 86 request. We also note that the generators and owners of the waste are contributing to the nuclear waste fund in the average rate of about $1,000,000 per day. See Utilities Amicus Brief, page 5. The utilities can thus pay for all of Nevada's disallowed activities in a day and a half.

2. Nevada is entitled to funding for its proposed activities either before or after the site has been approved for characterization.

The Secretary's Brief suggests, at pages 24-27, that even during formal site characterization the State should not be permitted to conduct its proposed activities because funding would be limited by the provisions of § 116(c)(1)(B) of the Act, 42 USC 10136(c)(1)(B). That is simply not the correct construction of that section.

We have explained our view of the appropriate interpretation of the NWPA, and particularily § 116 thereof, at length in our Opening Brief. See Petitioner's Opening Brief, pages 17-32. The argument need not be repeated here. Two simple points will suffice.

First, if the Secretary's phasing has any validity, putting Nevada in Phase II for funding purposes, then § 116(c)(1)(A), 42 USC 10136(c)(1)(A), controls. That section, of course, clearly encompasses any activity required or authorized in both §§ 116 and 117, 42 USC 10136 and 10137, and as we will explain, clearly supports funding of Nevada's proposed studies.

Section 116(c)(1)(B), 42 USC 10136(c)(1)(B), on the other hand, applies with respect to grants to a state in which a candidate site for a repository is approved by the President. The Secretary suggests that language of that subsection "limits" a state's participation, even after formal characterization is underway. Great reliance is placed on the word "only," and then only subsections (iii) and (v) are set forth in the Secretary's Brief, at page 25. But that is not what that subsection says, nor is it all that the Congress required the Secretary to fund.[7] Subsection (B)(i) requires the Secretary to make grants for the purposes of enabling a state "to

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7. We suggest that the five subsections of § 116(c)(1)(B) are merely a shorthand way which Congress chose to list essentially the same activities set forth at much greater length in § 117(c)(1) through (11) of the Act, 42 USC 10137(c)(1)-(11)

review activities taken under this subtitle with respect to such site for purposes of determining any potential economic, social, public health and safety, and environmental impacts of such repository on the State and its residents". Subsection (B)(iii), set forth in the Secretary's Brief at page 25, of course, requires the Secretary to fund state activities designed to "engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such site. . . ." [Emphasis supplied.]

The Secretary suggests that Nevada and the amicus states "would have this Court rewrite the act by rendering its qualifying languange mere surplusage or adding text not included by Congress." (Secretary's Brief page 26). Not only is that not true, but the converse is actually the case. It is difficult to find "qualifying language" (and the Secretary's Brief curiously cites none) in Congress' use of such broad language as "review activities taken under this subtitle with respect to such site" and "engage in any monitoring, testing, or evaluation activities with respect to site characterization programs." [Emphasis supplied.][8] The Secretary would, on the other hand, have this Court rewrite the Act by including his qualifying language so that subsection (iii) would read:

> "to engage in any monitoring, independent testing on DOE data where the need for such independent testing can be justified, or evaluation activities with respect to site characterization programs with regard to such site."

That is not what Congress said and, to use the language of the Secretary's Brief, "no such modification of the Act can possibly be appropriate." (Secretary's Brief page 27.)

8. Where, also, can the Secretary find qualifying language in Congress' declared purpose: "To establish a nuclear waste fund, composed of payments made by the generators and owners of such waste and spent fuel, that will insure that the costs of carrying on activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel." [Emphasis supplied.] Sec. 111(b)(4), 42 USC 10131(b)(4).

To accept the Secretary's interpretation would mean that a state with a potential repository site approved for characterization by the President, and undergoing full characterization, including the mining of exploratory shafts and break-out rooms at the prospective repository horizon, would be permitted less activity, and provided less funding, than a state with only a potentially acceptable site which was not undergoing formal site characterization, where DOE's activity, if any, is at a substantially lower level. DOE's construction of § 116(b)(1)(B) would lead to the absurd conclusion that a state could not continue to be funded for any activity authorized by a consultation and cooperation agreement had one been executed prior to site characterization. To suggest that Congress intended such a result in the language of §§ 116 and 117 of the Act, 42 USC 10136 and 10137, is to compound its absurdity.

D. The Proper Reading Of § 117, 42 USC 10137, Clearly Supports Nevada's Right To Funding For Its Proposed Studies

1. The Secretary's interpretation completely ignores § 117(c)(1), 42 USC 10137(c)(1).

Perhaps the most startling aspect of the Secretary's Brief is its complete disregard for the provisions of § 117(c)(1), 42 USC 10137(c)(1). At page 27 the Secretary suggests that Congress "repeated" its intention expressed in the quoted language from § 116(c)(1)(B), 42 USC 10136(c)(1)(b), in § 117(c)(8), 42 USC 10137(c)(8). But that is not the only place where Congress "repeated" its intention, and where Congress clearly demonstrated the breadth of permissible state activities which the Secretary is required to fund under the NWPA.

Section 117(c) addresses the contents of a written consultation and cooperation agreement, which the Secretary is required to seek to negotiate, after characterization begins, or upon request from a state. Such agreement is to

"specify procedures" by which the states and the Secretary shall exercise their rights and carry out his obligations under the statute. The minimum state rights, and Secretarial obligations, are recognized in subsections (1) through (11) of § 117(c), 42 USC 10137(c)(1)-(11). The first state right recognized, and totally ignored in the Secretary's Brief, is expressed by Congress as follows: "(1) by which such state or governing body of an effected Indian tribe, as the case may be, may study, determine, comment on, and make recommendations with regard to the possible public health and safety, environmental, social, and economic impacts of any such repository," [Emphasis supplied] § 117(c)(1), 42 USC 10137(c)(1). Not only is that section not set forth in the Secretary's Brief, it is nowhere even cited.

That oversight is suprising, for two reasons. First, the principal issues in this case were phrased in terms of the language found in § 117(c)(1), 42 USC 10137(c)(1). See Issues Presented, numbers 1 and 3, at Petitioner's Opening Brief, page iii. Secondly, it does not appear to comport with the views of two succeeding directors of the Office Of Civilian Radioactive Waste Management of the Department of Energy, the federal official principally responsible for the administration of the repository program. On February 22, 1984, Mr. Michael J. Lawrence, the Acting Director of OCRWM, in explaining DOE's proposed FY-85 repository related expenditures, said that the Department would:

> "Continue Federal/State assistance to States and Indian tribes so that they can participate in the repository plans and activities. These funds are provided to allow States and Indian tribes to study, determine, comment on and make recommendations on possible health, safety, environmental, social and economic impacts of a repository." Hearings before the Subcommittee on Energy Conservation and Power and the Subcommittee on Fossil and Synthetic Fuels of the Committee on Energy and Commerce, House of Representatives, Serial no. 98-127.

That, as even the casual reader can see, is a virtual quote from § 117(c)(1) and demonstrates what the officer principally responsible to the Secretary for

carrying out the repository program viewed to be the most significant Congressional language governing the State's rights to funding of its studies and other activities. Relevant portions of Mr. Lawrence's statement are excerpted and reproduced at Attachment A to this Brief.

This view has apparently not changed. On May 13, 1985, (the next business day after the filing of the Secretary's Brief) Ben C. Rusche, the permanent Director of OCRWM, in explaining the office's FY-86 proposed budget and expenditure programs, said that the office would coordinate activities with appropriate state agencies and Indian tribes, and went on:

> "These funds also provide the resources to conduct the program under an open information policy and afford the State and local governments and Indian tribes the opportunity to participate in the decisionmaking process. Provide financial assistance to affected States and Indian tribes. These funds would be used to allow the States and Indian tribes to study, determine, comment on and make recommendations regarding possible health, safety, environmental, social and economic impacts of a repository." [Emphasis supplied] Statement by Ben C. Rusche before the Subcommittee on Energy Research and Development of the Committee on Energy and Natural Resources of the U.S. Senate.

The relevant excerpt of Mr. Rusche's statement is also reproduced as Attachment B to this Brief.

Mr. Rusche obviously believes his responsibilities to fund state studies and other activities to be principally controlled by § 117(c)(1), 42 USC 10137(c)(1) (even though formal characterization has not yet begun) and recognizes that such financial assistance is intended not only to allow States and affected Indian tribes to conduct independent testing of DOE generated data, when such independent testing can be justified, but is meant to afford state, local governments and Indian tribes "the opportunity to participate in the decision making process." The restrictive internal grant guidelines hinder, rather than afford, that opportunity.

2. The plain meaning of Congress' language supports Nevada's right to the funds denied.

The Secretary argues that the plain meaning of the language which Congress chose to use supports his position. Nevada, obviously, does not agree.

We do agree, of course, that the rule of statutory construction referred to by the Secretary correctly states the law. Congress expresses its purposes through the ordinary, common meaning of the words it uses. Escondido Mutual Water Company v. LaJolla Band of Indians, ____ U.S. ___, 104 S. Ct. 2105 (1984); Perrin v. United States, 444 U.S. 37, 62 L. 2d 119, 100 S. Ct. 311 (1979).

We submit that the language of § 117(c)(1) is perfectly clear and needs no further explication. But, since the Secretary focuses on § 117(c)(8), 42 U.S.C. 10137(c)(8), we will do so here as well. That subsection recognizes a state right to conduct "reasonable independent monitoring and testing of activities on the repository site," qualified only by the condition that such monitoring and testing shall not "unreasonably interfere with or delay onsite activities." But what is the Secretary's view of the plain meaning of the word "independent"? It is that the state is entitled to receive funding "to run independent tests on DOE data, where the need for such independent testing can be justified." Secretary's Brief, page 26, Ad. R. 34, Attachment A, page 8. That is not, however, the ordinary and common meaning of the word independent. As defined in Webster's New Twentieth Century Dictionary of the English Language, Unabridged, (2nd Ed., 1979), "independent" means: "not dependent, not subject to the control, influence or determination of another or others; not subordinate;" and "free from the rule of another; controlling or governing oneself; self-governing."

Congress' intent is clear, and the restrictive language of the Secretary's internal general grant guidelines violates that intent.[9]

3. No consultation and cooperation agreement need be executed before Nevada is entitled to funding for its proposed studies.

The Secretary's Brief, on page 33, suggests that even the restricted monitoring and testing envisioned in the internal grant guidelines are permissible only after a written consultation and coordination agreement is entered into between the state and DOE. That issue is addressed at pages 33-35 of Petitioner's Opening Brief. We revisit it here only to quote, for the convenience of the Court, a portion of that argument:

> "It would be most illogical to assume that Congress intended that only states which had negotiated such agreements would be entitled to engage in such conduct with funding from the Nuclear Waste Fund. If that were the case, then the Secretary could, of course, completely frustrate the State's rights, and Congress' intent, simply by refusing to agree to a consultation and cooperation agreement, or by negotiating in such bad faith as to make it impossible for the state to accept the agreement. That Congress did not intend to endorse such a result is patently obvious." Petitioners Opening Brief, page 34.

We do not mean to suggest to the Court that the Secretary intends to do that. We do not believe that he, or any future Secretary of Energy, would do so. We merely point out that Congress could not have intended to endorse or sanction even the possiblity of such a result.

---

9. The Secretary's brief also suggests Nevada's activities are not permissible because they would involve independent monitoring and testing of the site itself, and not the activities on the site. That is, of course, wrong. As pointed out earlier, what Nevada proposes to do is to conduct several studies, the vast majority of activities associated with which will be conducted off the site, in order to attempt to duplicate, or replicate, results arrived at by DOE activites on the site.

E. The Joint Federal/State Protocol Contemplated The Very State Activities For Which Funding Was Denied.

In referring to the Joint Federal/State Protocol executed on December 4, 1984 (Ad. R. 52) the Secretary's brief argues that not only does the protocol fail to support Nevada's position, "but Nevada could not have reasonably so understood it." The Secretary points out that the same federal and state officials who executed the protocol "had already met and corresponded concerning the basis for DOE's likely denial of funding for such studies well before the protocol was executed." That is certainly true. It is also true that the Protocol was actually negotiated by DOE and the State of Nevada in August, and first executed in September of 1984. The Department misplaced the executed copy of the Protocol. When Mr. Loux asked later for a copy of the executed agreement, DOE reconstituted the identical agreement. It was again executed by Mr. Loux in Mr. Vieth's office in Las Vegas, subsequently reexecuted by Mr. Vieth, and then transmitted to the State of Nevada. Compare, for example, Ad. R. 30, Attachment A, to Ad. R. 52. Both parties negotiated the original Protocol in August of 1984 on the understanding that independent state field activities, even for the purpose of gathering primary data, were allowable. Furthermore, as the Secretary's Brief admits on page 16, note 8, on November 27, DOE's project manager had informed Nevada that primary data gathering "seemed to be" outside the grant guidelines, but that he had sought "definitive guidance" from DOE headquarters and that he had received "draft policy guidance" on DOE's "developing policy." (Ad. R. 45, p.1). Mr. Vieth, seven days later, reexecuted the protocol, agreed to in September, which states, in its preamble, that Nevada:

> "desires to review hydrologic studies of NNWSI project and to conduct independent confirmation research on the hydrologic conditions at Yucca Mountain. Such review and research requires the coordination

and cooperation of DOE and its contractors. The purpose of this memorandum is to document the objectives of the State of Nevada assigned to DRI and to identify the responsibilities to facilitate achievement of the objetives of the program." [Emphasis supplied] (Ad. R. 52, page 1.)

The Protocol was reexecuted and transmitted to Nevada nine days before the Secretary's final action in denying funding for Nevada's proposed studies and other activities. Nevada thus could, and reasonably did, even then understand that the developing policy would ultimately allow for the funding of the very activity which the Department had agreed to facilitate in executing the Protocol.

CONCLUSION

The NWPA represents a significant experiment in federalism, embodying what the Congressional Office of Technology Assesment refers to as Shared Powers see Amicus Utilities Brief, page 16. In enacting the law Congress clearly understood that full state participation in decisionmaking in the repository siting program was essential, if that program were to succeed. It clearly intended and provided for the greatest possible state participation in that program, supported by the generators and owners of the waste to be disposed of, through the Nuclear Waste Fund. We can not improve on the comment of Donald Vieth, the Director of DOE's Waste Management Project Office in Nevada, in the last sentence of his technical evaluation of Nevada's FY-85 grant application: "[w]e also must remain cognizant of the fact that Congress has taken a major step to involve the State and many of the activities will be breaking new ground in the Federal Government-State relationship." Secretary's Brief Attachment B, page 10.

The Secretary's internal grant guidelines, at least to the extent that they support the denial of funding for Nevada's proposed studies and other activities, are violative of the provisions of the Nuclear Waste Policy Act, and thus invalid. The relief sought in Nevada's Petition for Review should be granted.

Respectfully submitted this 21st day of May, 1985.

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Excerpts From

DOE'S FISCAL YEAR 1985 BUDGET

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
ENERGY CONSERVATION AND POWER

AND THE

SUBCOMMITTEE ON FOSSIL AND SYNTHETIC FUELS

OF THE

COMMITTEE ON
ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

FEBRUARY 9, 22, AND 28, 1984

Serial No. 98-127

Printed for the use of the
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Attachment "A"

The FY 1985 budget request for activities associated with the first repository is $247.1 million. The FY 1986 estimated is $427.1 million; and the FY 1987 estimated is $483.2 million.

The FY 1985 activities included in the $247.1 million are as follows:

- Recommend three sites for site characterization for the first repository and begin detailed geologic, environmental and socio-economic studies and evaluations of those sites. Activities would include drilling and coring operations to better understand site stratigraphy and tectonics; comprehensive evaluation of site and regional geohydrology; other geotechnical analyses, such as seismicity, geochemistry and volcanism. ($58.2 million)

- Begin construction of and preparation for exploratory shafts at up to two of the three candidate sites and begin planning for performance of in-situ tests. ($56.2 million)

- Conduct site-specific engineering studies at the three recommended candidate sites consisting of evaluations of rock mechanics, shaft and tunnel excavation methods, equipment development, waste emplacement alternative methods and repository design studies. ($37.4 million)

37-044 O—84——27

- Conduct other engineering studies and analyses to determine the behavior of materials being considered for waste packages, develop test facilities for testing the performance of component materials and designs, and develop models and computer codes to ensure the engineered systems and the site will perform individually as well as collectively for overall repository performance. These studies will assist in the development of the necessary planning and licensing documents required by the NWPA and the Nuclear Regulatory Commission. ($85.7 million)

- Continue Federal/State assistance to States and Indian tribes so that they can participate in the repository plans and activities. These funds are provided to allow States and Indian tribes to study, determine, comment on and make recommendations on possible health, safety, environmental, social and economic impacts of a repository. ($9.6 million)

The FY 1986 and FY 1987 estimates of $427.1 million and $481.2 million, respectively, will support concurrent full site characterization efforts at all three recommended repository sites, shaft procurement and construction at those sites and enhanced site-specific waste package and repository engineering and design efforts.

Excerpts From

STATEMENT BY

BEN C. RUSCHE
DIRECTOR
OFFICE OF CIVILIAN RADIOACTIVE WASTE MANAGEMENT
U.S. DEPARTMENT OF ENERGY

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES
SUBCOMMITTEE ON ENERGY RESEARCH AND DEVELOPMENT
UNITED STATES SENATE

MAY 13, 1985

Attachment "B"

TABLE 3

NUCLEAR WASTE FUND REVENUE PROJECTIONSa/
(In Thousands)

FY 1983	FY 1984	FY 1985	FY 1986	FY 1987	FY 1988
$73,580 (actual)	$329,539 (actual)	$1,120,300	$401,100	$454,300	$504,300

a/. Includes one-time fee payments in FY 1985 and FY 1988.

REPOSITORY PROGRAM

(1) First Repository:

The FY 1986 budget request for activities associated with the first repository is $436.8 million. The FY 1987 estimate is $641.7 million; and the FY 1988 estimate is $486.7 million.

The funding for the first repository is mainly required for extensive site characterization drilling and testing, start of exploratory shaft construction and intensive engineering tests and analyses to support waste package and repository designs.

The major programmatic milestones associated with the schedule for the first repository are as follows:

Milestone	Calendar Year
o Nominate at least five sites and recommend three candidate sites to President for characterization	1985
o Issue Site Characterization Plans (SCP) for the three candidate sites	1985-1986
o Begin construction of first exploratory shaft	1986
o Issue Final Environmental Impact Statement	1990
o Recommend first repository site to President	1990
o Recommend first repository site to Congress	1991
o Submit construction application to NRC	1991
o Receive from NRC Construction Authorization	1993-1994
o Begin Phase I Operations	1998

The FY 1986 activities included in the $436.8 million are as follows:

o Begin site characterization activities at each of the three candidate sites. Conduct tests and analyze data to resolve issues for waste isolation most pertinent for the site or sites being investigated. Conduct drilling and testing of surface-based boreholes, logging, geologic field studies, geophysical surveys, long-term monitoring in wells to resolve site suitability issues and to incorporate into updated Site Characterization Plans (SCP). Analyze site and regional hydrology in more detail using data obtained from tests of hydrologic boreholes along assumed flow paths. Continue site environmental characterization and socioeconomic evaluations. ($122 million)

o Begin construction of exploratory shafts in basalt and tuff. (Construction of exploratory shaft in salt to begin the following year.) Two shafts are planned for each site. Two shafts are required to provide an access to the repository horizon for site characterization and to meet ventilation, safety and emergency egress requirements. ($106.8 million)

o Conduct site-specific engineering tests at the three candidate sites including evaluations of rock mechanics, sealing concepts, shaft and tunnel excavation methods and waste emplacement alternative methods. Conduct repository conceptual design studies. ($59.8 million)

o Conduct regulatory and institutional activities. Issue initial basalt and tuff SCP's. Coordinate activities with the NRC, the U.S. Geological Survey (USGS), the Environmental Protection Agency (EPA) and appropriate State agencies and Indian tribes. These funds also provide the resources to conduct the program under an open information policy and afford the State and local governments and Indian tribes the opportunity to participate in the decisionmaking process. Provide financial assistance to affected States and Indian tribes. These funds would be used to allow the States and Indian tribes to study, determine, comment on, and make recommendations regarding possible health, safety, environmental, social and economic impacts of a repository. Conduct public meetings, public hearings, tours and briefings; prepare publications; etc. ($41.9 million)

IN THE

United States Court of Appeals

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Petitioner,

v.

JOHN S. HERRINGTON, SECRETARY OF THE UNITED STATES DEPARTMENT OF ENERGY,
Respondent.

On Petition for Review of
Final Action by the
Secretary of Energy

BRIEF FOR UTILITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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(Names of Utilities appear on inside front cover)

1. Arizona Nuclear Power Project
2. Baltimore Gas & Electric Company
3. Boston Edison Company
4. Carolina Power & Light Company
5. The Cleveland Electric Illuminating Company
6. Commonwealth Edison Company
7. Consolidated Edison Co. of New York, Inc.
8. Duke Power Company
9. Florida Power & Light Company
10. Georgia Power Company
11. Gulf States Utilities Company
12. Houston Lighting & Power Company
13. Iowa Electric Light & Power Company
14. Kansas City Power & Light Company
15. Kansas Electric Power Cooperative, Inc.
16. Kansas Gas & Electric Company
17. Middle South Services, Inc.
18. New York Power Authority
19. Niagara Mohawk Power Corporation
20. Northeast Utilities
21. Omaha Public Power District
22. Pacific Gas & Electric Company
23. Pennsylvania Power & Light Company
24. Philadelphia Electric Company
25. Public Service Company of Colorado
26. Rochester Gas & Electric Corporation
27. Sacramento Municipal Utility District
28. Southern California Edison Company
29. Texas Utilities Company
30. Toledo Edison Company
31. Union Electric Company
32. Virginia Electric & Power Company
33. Wisconsin Electric Power Company
34. Wisconsin Public Service Corporation

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BRIEF FOR UTILITIES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF ISSUES PRESENTED

1. Does the U.S. Department of Energy - as the agency charged with implementing the Nuclear Waste Policy Act of 1982 - have the authority to actively administer the waste disposal

program under the Act, including the Nuclear Waste Fund, or are all state requests for grants to participate in the program to be automatically financed from the Fund?

2. Was the Department of Energy reasonable in denying Nevada funds for "site characterization" activities at a point [redacted]

INTRODUCTION

This case concerns the State of Nevada's right to funding under the Nuclear Waste Policy Act of 1982 ("NWPA" or "Act"), 42 U.S.C. §§ 10101-10226 (1982), for certain activities Nevada desires to conduct at Yucca Mountain, a site the U.S. Department of Energy ("DOE") has selected under the NWPA as one of nine "potentially acceptable sites" for a high-level radioactive waste repository. See NWPA § 116(a), 42 U.S.C. § 10136(a). 1/

The NWPA was enacted to provide for geologic repositories for the disposal of high-level radioactive waste and spent nuclear fuel. 2/ The Act establishes "the Federal responsi-

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1/ For the convenience of the court, relevant portions of the NWPA together with certain other papers not included in the record are set fortn in the addendum to this brief, hereafter referred to as "Add. ___."

2/ The term "high-level radioactive waste," as pertinent to this proceeding, means "the highly radioactive material resulting from the reprocessing of spent nuclear fuel." NWPA § 2(12), 42 U.S.C. § 10101(12). "Spent nuclear fuel" (footnote continued)

bility, and a definite Federal policy, for the disposal of such waste and spent fuel." Section 111(b)(2), 42 U.S.C. § 10131(b)(2). At the same time, it acknowledges that "[s]tate and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel." Section 111(a)(6). The Act further provides that, "while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and . . . spent nuclear fuel . . ., the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel." Section 111(a)(4).

Essentially, under the overall program established by the Act, DOE is to select the sites for and construct the repositories. 3/ As part of the site selection process, however, DOE is to consult with states and affected Indian tribes, and any site DOE selects is, in effect, subject to the approval of the President, the host state or affected Indian tribe, and Congress (which may override the disapproval of a state or Indian tribe). The entire repository program is financed by the Nuclear Waste Fund ("Waste Fund" or "Fund"), a fund administered by DOE and

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(footnote continued from previous page)
is "fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing." NWPA § 2(23).

3/ The relevant provisions of the Act are in Title I, Subtitle A.

currently consisting of payments from electric utilities owning and operating nuclear power reactors. Section 302, 42 U.S.C. § 10222. 4/

The 34 electric utilities identified as amici on the inside cover of this brief ("Utilities") all are involved in the generation of electricity through the use of commercial nuclear power plants. As a result, and pursuant to the terms of contractual agreements with DOE, Utilities will be using the repositories established under the NWPA. See 10 C.F.R. Part 961 (1984). Utilities currently are or will be storing high-level radioactive waste - as contained in spent reactor fuel - on an interim basis at their own, individual facilities. The availability of a permanent repository for high-level radioactive waste thus has a direct effect on their nuclear power programs. [redacted] In addition, Utilities, as "generators and owners" of high-level radioactive waste, are currently among that group of electric utilities that constitutes the sole financers of the Waste Fund. They are making regular payments into the Fund, pursuant to both the Act and specific contractual agreements with DOE, at a rate of 1 mil per Kw-hr of nuclear-generated

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4/ Should waste material from entities other than electric utilities come to be placed in repositories developed under the NPWA (e.g., high-level radioactive waste resulting from atomic energy defense activities), then appropriate payments will be made into the Fund by the entity responsible for such material. See, e.g., Section 8(b), 42 U.S.C. § 10107(b).

electricity. See NWPA Section 302(a)(2); 10 C.F.R. § 961.11 (1984). This currently amounts to continuing contributions at an average rate of about $1 million per day.

Utilities thus have special and substantial interests in the NWPA program. In particular, Utilities have a significant interest in issues raised in this proceeding. As is clear from the foregoing, the success of the DOE program under the NWPA is of vital importance to Utilities. Utilities therefore are concerned that DOE be allowed to carry out its responsibilities and exercise its authority under the Act. In addition, however, the success of the waste disposal program will likely depend on effective state participation in the repository siting process.5/ This participation is, of course, to be conducted according to the provisions of the [redacted]. Utilities are especially concerned with the degree of state participation provided for at this particular stage of the siting process in Nevada, an issue raised directly by Nevada's petition in this case.

In addition, as part of their concern for a successful waste disposal program, Utilities have an interest in effective and efficient program management. Any delay in the program will

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5/ The NWPA provides for the involvement of both states and affected Indian tribes. Since no Indian tribes are parties or amici in this proceeding, however, the discussion of these provisions will refer only to states, for the sake of simplicity.

affect Utilities as generators and storers of high-level radioactive waste. Moreover, Utilities, as the funders of the program, have an interest that the program be implemented efficiently to minimize unnecessary costs. Utilities also have an interest that the Nuclear Waste Fund itself be administered efficiently, consistent with the requirements of the Act and the legitimate needs of the program.

It is in light of these significant interests in the NWPA program and in the issues raised by Nevada's petition that Utilities wish to participate as amici curiae in this proceeding.

STATEMENT OF THE CASE

To avoid unnecessary duplication and burden on the court, Utilities adopt the statement of facts set forth in the government's brief. Utilities wish to emphasize certain points, however, that have a special bearing on Utilities' interests.

As noted above, the site selection and development process under the NWPA is divided into different stages. Under section 116(a) of the Act, 42 U.S.C. § 10136(a), DOE must notify states containing "potentially acceptable sites" for the first repository. Under section 112(b)(1)(A), 42 U.S.C. § 10132(b)(1)(A), DOE then is to officially nominate at least five of these sites as suitable for "site characterization." Nomination must be accompanied by environmental assessments ("EAs") for each site, and also involves consultation with the states. Section 112(b)(1)(A), (E). DOE next is to narrow the

slate of at least five sites down to three, which are recommended to the President for detailed site characterization as "candidate sites." Section 112(b)(1)(B). The President may then either approve or disapprove each candidate site recommendation. Section 112(c).

After Presidential approval of a site as a candidate site, DOE may proceed with detailed site characterization activities under section 113, 42 U.S.C. § 10133. A site characterization plan must be prepared and submitted to the states for review. Section 113(b)(1). Full-scale site characterization activities are more extensive than previous activities under the Act: for example, during the detailed site characterization stage DOE may sink large diameter shafts for in situ exploration and testing purposes, an activity that is generally prohibited at earlier points in the siting process. See, e.g., sections 112(b)(3), 112(f), 113(a), 113(b); 10 C.F.R. § 60.10 (1985).

DOE also must attempt to enter into written agreements with the states. Section 117(c), 42 U.S.C. § 10137(c). These "consultation and cooperation" agreements are to specify procedures for the purposes enumerated in section 117(c), including procedures for state comments on environmental concerns and state monitoring and testing of activities on site.

Upon completion of site characterization activities, DOE is to recommend a site to the President for construction of a repository. Section 114(a)(1), 42 U.S.C. § 10134(a)(1). The

President in turn is to recommend one site to Congress for final approval before construction activities may begin. Section 114(a)(2)(A). The site is, in effect, automatically approved unless a state submits a notice of disapproval to Congress under section 116(b), 42 U.S.C. § 10136(b), and Congress does not override this disapproval under section 115, 42 U.S.C. § 10135.

The NWPA provides for funding of state participation in the site selection and development program in section 116(c). See also section 302(d)(6). Nevada, as a state notified by DOE under section 116(a) that it contains one of the nine sites identified by DOE as "potentially acceptable sites," submitted requests for funding for certain activities related to the site selection process in Nevada. 6/ Among the activities included in the grant requests were certain hydrologic and geologic studies involving independent drilling work by the state in order to gather primary site [redacted] data.

For the most part, DOE granted Nevada's requests for funding. See R. 25, 37, 46, 53. 7/ With regard to Nevada's FY 1985 request, however, DOE, stated that, although it would finance some portions of the grant request, the studies could not be funded since they did not come within activities of the type

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6/ The grant requests were made for fiscal years ("FYs") 1984 and 1985. The details of these requests are discussed in the government's brief.

7/ References to the record refer to item numbers rather than page numbers, and are abbreviated as "R. __." Page references to individual items in the record are supplied where appropriate.

to be covered by grants under the NWPA and [redacted] e. R. 41, Attachment A at 2. 8/ DOE further indicated that the studies could not be funded because they involved [redacted], i.e. primary data gathering" [redacted] R. 45 at 1. In addition, attached as a standard provision of the grant award was a proviso that the funds not be used for litigation against the government. R. 53 at H-3. See also R. 53 at F-1.

On December 7, 1984, Nevada informed DOE by telephone that unless DOE agreed to fund Nevada's entire FY 1985 grant proposal Nevada would seek an injunction against issuance of the EAs. R. 49. DOE then officially set forth its position on the grant request in a letter to Nevada dated December 13, 1984, which continued to deny funding for the hydrologic and geologic studies. R. 51. The letter noted:

> If a State identifies a concern which in its view requires additional primary data collection and DOE agrees that the data is needed, DOE will do the primary data collection itself, which could involve contracting with the State, if the State has the capability. Pursuant to DOE's responsibilities under the NWPA to consult and cooperate with the States, a concern by a State over the need for primary data collection for the purpose of site characterization will be reviewed with the objective of satisfying that concern by all reasonable means.

8/ The November 7, 1984 letter included at R. 41 enclosed a copy of internal DOE guidelines concerning DOE policy as to activities covered by the NWPA. In spite of implications to the contrary, see, e.g., Amicus Brief of Minnesota and Texas at 6, it is the propriety of DOE's action under the NWPA regarding Nevada's grant request, and not the validity of the internal DOE grant guidelines, that is at issue here.

Id. at 1. Nevada filed its petition for review on December 14, 1984, under section 119(a) of the NWPA, 42 U.S.C. § 10139(a). This was within the 180 days allowed by the Act. 9/

ARGUMENT

Utilities submit at the outset that, Petitioner's brief to the contrary, the issue presented here is not the broad theoretical question of states' entitlement to funding under the NWPA in general. Rather, the only matter that need and should be addressed is the narrower question of [redacted]. Specifically, Nevada has been notified under section 116(a) of the NWPA that it contains a "potentially acceptable site" for a geologic waste repository. The site has not even been nominated by DOE under section 112(b)(1)(A), let alone recommended to the President for characterization as a candidate site under section 112(b)(1)(B) or approved by the President for site characterization under section 112(c). 10/ The scope of the questions raised in this proceeding is thus properly limited to

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9/ On the same date, Nevada also filed a motion for a preliminary injunction; the court denied the motion on December 19, 1984.

10/ DOE has issued draft EAs indicating that the Yucca Mountain site in Nevada was one of the five sites proposed to be nominated and one of the three sites preferred for recommendation for detailed site characterization. The EAs will not be finalized, however, until later in 1985, and nomination, recommendation and Presidential approval will not occur until after that.

the reasonableness of DOE's denial of funding in the case of Nevada, a state containing a site which has not yet been, and may never be, approved for characterization under section 112(c).

Put differently, DOE has yet to take any final action with regard to determining which activities are appropriate for funding during site characterization after section 112(c) approval, because that point in the site selection process has not yet been reached. Any views as to what DOE might do when such a context arises, therefore, can only be speculative. In addition, the site in Nevada may never be approved as a candidate site for characterization. There is no need, nor is it desirable as a general principle, for the court to address questions which may never be in actual dispute. See, e.g., New York Stock Exchange v. Bloom, 562 F.2d 736 (D.C. Cir. 1977), cert. denied, 435 U.S. 942 (1978). Moreover, when sensitive matters of federal agency-state relationships under a complicated statute are involved, it is particularly important not to reach and decide any unnecessary legal questions prematurely.

I. NEVADA'S RIGHT TO FUNDING UNDER THE NWPA IS NOT UNLIMITED, AND DEPENDS ON THE STAGE OF THE PROGRAM AND DOE'S ADMINISTRATION OF THE PROGRAM AND THE FUND.

The State of Nevada maintains that it is entitled to a grant from the Nuclear Waste Fund covering its full request, even though the request included studies involving primary data collection. Nevada also objects to two of the standard provisions attached to the grant award, namely, that the grant money

may not be used to fund litigation against the United States and that any subcontract that Nevada awards in excess of $50,000 must first be reviewed and approved by DOE. Petitioner's Brief at 3 (hereafter "Pet. Br. at ____"). These objections are grounded on Nevada's basic position concerning its entitlement under the NWPA to money from the Nuclear Waste Fund: Nevada maintains that it is entitled to funding virtually without limit and without condition.

In its brief, Nevada clearly and unequivocally adopts the position "that Nevada's entitlement to funding for any activity which it proposes to undertake is subject to only three limitations." Pet. Br. at 14 (emphasis added). Nevada also states that, subject to these three limitations, "Nevada's use of the Nuclear Waste Fund [i]s a right, an entitlement, of the state, with which the Department may not interfere." Id. at 19.

The three limitations specified by Petitioner are:

> First . . . the activity must be relevant to the proposed repository's planning, siting and development. Second, Nevada's activities cannot unreasonably interfere with or delay the Department's onsite activities . . . . Third, Nevada's right to funding is . . . limited by the amount of the Nuclear Waste Fund available to address competing demands, if any. No state, for example, would be entitled to a grant amount so large that it would leave insufficient money available for DOE to conduct the activities required under the Act.

Id. at 14-15. These "limitations" do not, however, impose any real constraints on Nevada's claimed entitlement to funding.

First, that an activity must be relevant to the

repository program is not a limitation, but merely reflects the undisputed fact that the Fund is to be used for the development of geologic facilities for waste disposal. The number and type of possible geologic, chemical, physical, nuclear and other studies pertinent to such facilities is virtually infinite.

Similarly, the second limitation, that Nevada's activities not "unreasonably interfere with or delay the Department's onsite activities," is more of a recognition that DOE does, at bottom, have a role to play in carrying out the repository program than any sort of stricture. Further, the inherent latitude available in interpreting this limitation is aptly illustrated by Petitioner's own discussion. Nevada states that under this standard, "it would not be entitled to sink its own exploratory shaft and mine its own breakout rooms at the repository horizon." Pet. Br. at 14. Such activities and associated site characterization work would almost certainly interfere with DOE's work as a consequence of their necessarily having to be performed on-site, at the repository horizon. Further, based on estimates, such work may be expected to take on the order of three years and cost more than $100 million. See Office of Civilian Radioactive Waste Management, U.S. Department of Energy, Project Decision Schedule (DOE/RW-0018 Jan. 1985); Office of Civilian Radioactive Waste Management, U.S. Department of Energy, 2 Draft Mission Plan for the Civilian Radioactive Waste Management Program DOE/RW-0005 Draft, Apr. 1984) at 10-4n.* Nevada thus leaves itself considerable leeway as to the range of

activities that might be appropriate under this standard. For example, Nevade may contend that any less intrusive work - such as, perhaps, the construction of an exploratory shaft and breakout rooms at other than the repository horizon - would not "unreasonably" interfere with the waste program, even though it may have significant potential for program disruption and delay.

Finally, with respect to the third limitation, the NWPA establishes a scheme whereby it is impossible for the Fund to become insolvent. Under section 302 of the Act, 42 U.S.C. § 10222, if the money in the Fund is "insufficient to enable the Secretary [of Energy] to discharge his responsibilities," the Secretary, in effect, borrows the necessary amount from the United States Treasury. See section 302(e)(5). The waste disposal fee charged to electric utilities would then be adjusted upward to ensure full cost recovery, and the money borrowed from the Treasury would be repaid to it from the Fund, with interest. Section 302(a)(4). It is, of course, far preferable that financing requirements for the waste program be kept within the existing amount flowing into the Fund from the 1 mil per kw-hr fee, and this was in fact the intent of Congress. See Part B, below. Nevertheless, the NWPA provides for upward adjustment of the fees paid into the Fund to meet needs, so that a "right to funding . . . limited by the amount of the Nuclear Waste Fund available to address competing demands" appears to be only a theoretical constraint.

Nevada's position with respect to funding rights under the NWPA simply can not be correct. [redacted] Moreover, this position can not be squared with the language, structure or legislative history of the Act and is also inconsistent with case law.

A. The Language and Structure of the NWPA Indicate that Financing from the Waste Fund Is To Be Limited.

The NWPA provides for direct and close administration of the Fund by DOE, exclusively. Section 302 provides that "the Secretary [of DOE]," and none other, "may make expenditures from the Waste Fund." Section 302(d), (e)(2). The Secretary of DOE also enters into the contracts with utilities imposing the fees to be paid into the Fund, section 302(a), (b); adjusts the amounts of the fees as needed and establishes procedures for their collection, section 302(a)(4); budgets the Fund, section 302(e)(2); directs the investment of money in the Fund, section 302(e)(3); and borrows for the Fund, as necessary, section 302(e)(5). Section 302(d)(6), read together with section 116(c), provides that the Secretary is to make expenditures from the Fund to assist states in their consul'ing role. However, nowhere does the Act provide that states are to have control over such expenditures from the Fund.

Moreover, the specific language of these sections of the Act, directly at issue here, reflects DOE's discretion in financing state activities. Section 116(c) provides that DOE "shall make grants to each State notified under subsection (a) [as possessing a potentially acceptable site] for the purpose of participating in activities required by sections 116 and 117 or authorized by written [consultation and cooperation] agreement entered into pursuant to subsection 117(c)." Thus, a DOE grants program is required. Funding simply upon request, however, is not. Section 302(d), governing use of the Waste Fund, provides that DOE "may make expenditures from the Waste Fund, . . . for purposes . . . including . . . the provision of assistance to States . . . under . . . [section] 116." (Emphasis added). 11/ The word "may" is clearly indicative of DOE's authority to administer the Fund with regard to particular requests. Had Congress intended that there be mandatory financing for all requests, the section could have so provided by stating that DOE "shall make expenditures . . . for purposes . . . including . . . the provision of any review assistance requested by States under section 116," or utilizing words of similar effect. That Congress did not so state reflects its intent not to provide funding to states for whatever might be requested, but to allow DOE authority to reasonably administer the Fund.

11/ Section 116 references section 117.

Aside from sections 116 and 302, the language and structure of the Act, as a whole, are also indicative of DOE's supervisory role. In the opening section of Subtitle A of Title I of the NWPA, Congress declares that the accumulation of radioactive waste is a "national problem." Section 111(a)(2). Further, Congress states that "the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and . . . spent nuclear fuel." Section 111(a)(4). The stated purpose of the NWPA, moreover, is "to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel." Section 111(b)(2).

The Act thus places the federal government, and specifically DOE, in charge of developing and administering a national high-level radioactive waste disposal program. See, e.g., sections 112-114. As outlined briefly at pages 6-8, supra, DOE is responsible for every stage in the repository development process. DOE selects the sites for the repositories, performs tests and evaluates the sites, and develops the waste repositories required by the Act. Since all of the financing for these activities comes from the Nuclear Waste Fund established by the Act, sections 111(b)(4), 302(d), it is only logical that DOE, as the federal agency primarily responsible for carrying out the waste disposal program under the NWPA, should also have the authority to administer the Fund that is intended to finance that

program. This authority must necessarily extend to all expenditures by DOE specifically directed at repository development, including grants to states for review activities.

That DOE should have authority to determine the expenditures to be made from the Fund, [redacted] is particularly clear at the present stage of the site selection process. At this time, the site in Nevada has not even been nominated as one of the five sites suitable for site characterization, let alone recommended and approved as one of the three candidate sites. To deprive DOE of its discretion, and thereby allow Nevada virtually unlimited use of the Fund now, before sites are finally selected for site characterization activities, would be to permit what may prove to be an unnecessary use of the Fund, for one state, at the expense of electric utilities - and, ultimately, their ratepayers - across the country.

Nevada also appears to rely on the concept of DOE "consultation and concurrence" with the states, as embodied in some early bills considered prior to passage of the NWPA, to support its argument that it is entitled to full funding of virtually all grant requests. See, e.g., Pet. Br. at 22-24. In the NWPA as adopted, however, there is no such general "consultation and concurrence" provision. There is provision for consultation and cooperation during detailed site characterization activities, under section 117(b), 42 U.S.C. § 10137(b), but neither the Nevada site nor any other has yet reached this stage.

There is also provision in the Act for states to enter into specific consultation and cooperation agreements with DOE, under section 117(c), but Nevada has not entered into such an agreement. Moreover, the concept of "consultation and concurrence" was never intended to provide states with final decision-making authority as to any aspect of the waste program. Rather, it simply implied that there should be an ongoing dialogue and generally cooperative relationship between states and federal agencies. See, e.g., Office of Technology Assessment, Managing the Nation's Commercial High-Level Radioactive Waste (OTA-0-171 March 1985) at 181-82 (Add. 16-17).

B. The Legislative History of Section 302 Supports the Concept of Controlled Management of the Fund.

As indicated above, section 302 of the NWPA provides for financing of the Waste Fund through the payment by electric utilities of a 1.0 mil ($0.001) per kw-hr fee on nuclear-generated electricity. Establishment of the 1.0 mil fee stems directly from Senate bill S. 1662, which was passed in April 1982. S. 1662, 97th Cong., 2d Sess., 128 Cong. Rec. S4325-35 (daily ed. Apr. 29, 1982). S. 1662 was the first high-level radioactive waste legislation adopted by either the House or the Senate during the 97th Congress and led directly to enactment of the NWPA, as Pub. L. No. 97-425, 96 Stat. 2201 (1983). 12/

12/ Following the passage of S. 1662 in April of 1982, the House passed companion legislation, H.R. 3809, in December. H.R. 3809, 97th Cong., 2d Sess., 128 Cong. Rec. H8800 (daily ed. Dec. 2, 1982). S. 1662 and H.R. 3809 were thereafter

(footnote continued)

The fee was set at 1 mil per kilowatt-hour on the basis that such an amount should be adequate to cover all costs of disposal. See, e.g., 128 Cong. Rec. S4156, S4163-64 (daily ed. Apr. 28, 1982) (statements of Senator McClure). Certain questions were raised during floor debate of S. 1662 concerning the long-term adequacy of the fee in view of the potential impact of such things as inflation, waste program schedules, and the future amount of electrical energy to be produced from nuclear power. See, e.g., id. at S4164, S4166-67 (statements of and material submitted for record by Senator Bumpers). However, the bill was sponsored based on a judgment that the 1 mil fee would be adequate to cover the costs of the program, including DOE expenditures related directly to repository development and those in support of state and related activities. In the words of Senator McClure, the floor-manager of S. 1662 in the Senate:

> The total cost of the program will depend upon future actions, which we can only anticipate and estimate.
>
> It is our expectation that the financing provided for within the bill will be adequate to pay the costs of the program and that, therefore, there would be no direct cost to the taxpayer.

Id. at S4177 (emphasis added). The establishment of the 1 mil fee, a fee subject to adjustment but based on an initial determination by legislative sponsors that it should be adequate to

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(footnote continued from previous page)
combined in one common piece of legislation which was passed by both the House and Senate. See 128 Cong. Rec. S15,621-70, H10,516-44 (daily ed. Dec. 20, 1982).

cover all program costs, 13/ is simply not consistent with an argument that the Act contemplates essentially open-ended funding for independent state monitoring and testing activities. 14/

That the NWPA is not intended to require the funding of all waste-related monitoring and testing activities requested by states is also made clear in the recent report issued by the Congressional Office of Technology Assessment, entitled: Managing the Nation's Commercial High-level Radioactive Waste (OTA-O-171 Mar. 1985) ("OTA Report"). The OTA is an analytical arm of the U.S. Congress whose basic function is to help legislators anticipate and plan for the impacts of technology. See OTA Report at inside back cover. In its report, the OTA considers the matter at issue here: the funding of state activities pertinent to review of DOE waste program work being performed within their borders. The OTA Report states:

13/ Even the Congressional Budget Office, which had raised some questions concerning the long-term adequacy of the 1 mil fee under certain scenarios, agreed that "[A] one-mill fee is indeed adequate as a point of departure," although "increases in this fee are likely to be necessary in the 1990s." Letter from Alice M. Rivlin, Director, Congressional Budget Office, to Senator Pete V. Domenici (April 23, 1982), reprinted in 128 Cong. Rec. S4169 (daily ed. Apr. 28, 1982) (emphasis added).

14/ The Senate had an opportunity to reconsider the 1 mil fee when, after passage of S. 1662 in April of 1982, it undertook consideration of a modified version of H.R. 3809, the companion legislation passed by the House in December 1982. The House bill lacked the 1 mil provision but, in adopting H.R. 3809, the Senate reinserted it. See, e.g., 128 Cong. Rec. S15,654, S15,670 (daily ed. Dec. 20, 1982). The Senate version of H.R. 3809, containing the 1 mil per kilowatt-hour provision, was adopted later the same day by the House and became the Nuclear Waste Policy Act. See id. at H10,516-25, H10,542-44.

> NWPA provides States and affected Indian tribes with funding for such independent technical reviews. The Environmental Evalulation Group in New Mexico provides a good example of how such review might be accomplished. This group, which is supported by funds from DOE, provides the State of New Mexico with independent technical review of DOE activities in developing the Waste Isolation Pilot Plant near Carlsbad.

OTA Report at 185 (Add. 18).

Under established procedures, however, the New Mexico Environmental Evaluation Group ("EEG") neither has a right to funding by DOE for whatever it requests, nor receives such funding. Rather, EEG involvement is pursuant to specific contractual terms negotiated with DOE. Thus, the interpretation of the Act being urged by Petitioner with respect to independent state review activities is [redacted] OTA's reference to Environmental Evaluation Group arrangements in New Mexico as "a good example of how . . . [state activities pertinent to independent] review might be accomplished" constitutes clear recognition of the fact that the NWPA does not require funding of all such activities for which financing is sought.

C. DOE's Position that It is Required to Use Reasonable Judgment in Determining Appropriate Expenditures from the Fund is Consistent with General Administrative Law.

It is a general proposition of administrative case law that administrative agencies have the authority to construe and apply the provisions of the statutes under which they act. See,

e.g., Unemployment Compensation Comm'n of Territory of Alaska v. Aragan, 329 U.S. 143, 153-55 (1946); Udall v. Tallman, 380 U.S. 1, 16 (1965), reh'g. denied, 380 U.S. 989; L'Enfant Plaza North, Inc. v. District of Columbia Redevelopment Land Agency, 300 F. Supp. 426, 428 (D.D.C. 1969), aff'd in part, rev'd in part on other grounds, 437 F.2d 698 (D.C. Cir. 1970), on remand 345 F. Supp. 508 (1972), aff'd 486 F.2d 1314 (1973). Thus, as the agency responsible for the entire high-level waste disposal program, including the Waste Fund, DOE has the authority - and, indeed, the responsibility - to interpret and apply the Act.

In addition, DOE's interpretation of the Act, assuming it is reasonable, is entitled to great deference. E.g., Udall, 380 U.S. at 16; Ollestad v. Kelley, 573 F.2d 1109, 1111 (9th Cir. 1978). Moreover, "[p]articularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.'" Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396, 408 (1961), citing Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933). It is clear that DOE's interpretation of the NWPA as providing it with authority to actively administer the Fund is reasonable.

II. DOE ACTED REASONABLY IN DENYING FUNDS UNDER THE NWPA FOR PORTIONS OF NEVADA'S GRANT REQUEST.

In construing provisions of the NWPA for purposes of administering the Waste Fund, DOE must meet a test of reasonableness. See, e.g., Unemployment Compensation Commission, 329 U.S. at 153-54. Or, as the State of Washington formulates the issue, DOE must determine "that the state activities for which funding is sought be 'reasonable' in view of the policies of the Act," before granting requests for funding. Amicus Brief of Washington at 2, 10. In this instance, DOE found that, based on the agency's construction of the NWPA, most of Nevada's request was reasonable. However, [redacted]. These findings should be upheld by the court. See, e.g., Udall, 380 U.S. at 16.

A. DOE Acted Reasonably in Denying Funds for Primary Data Collection by Nevada Prior to Approval of the Nevada Site for Characterization.

Section 116(c) provides that DOE "shall make grants to each State notified under subsection (a) for the purpose of participating in activities required by sections 116 and 117 or authorized by written agreement entered into pursuant to subsection 117(c)." 15/ Section 116(a) requires DOE to identify states containing "potentially acceptable sites" for repositories and to notify those states of the sites; these activities have been

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15/ Section 302(d)(6) simply refers to section 116.

completed for some time with respect to Nevada and thus funding for them is no longer in issue. Otherwise, the "activities required by sections 116 and 117" all are activities which occur at the site characterization stage or afterwards. Since the site in Nevada has not yet even been nominated as a candidate site for site characterization, Nevada can not base its grant request on any of these provisions.

Similarly, Nevada can not base its grant request on section 117(c). Although this provision can apply before site characterization to states that simply have been notified under section 116(a), [redacted]

As DOE indicates in its brief, primary data-gathering activities, for which Nevada has been denied funding, are the Department's responsibility alone. This question need not, however, be addressed here. See pages 10-11, supra. Indeed, the issue may never have to be judicially addressed. The site in Nevada may not be selected for detailed characterization, or Nevada may change its request. On the other hand, DOE may expand its own program in a way that satisfies Nevada, or the Department and the state may enter into a mutually satisfactory consultation and cooperation agreement. The court thus need go no farther than to decide the propriety of DOE's action in light of the current situation, where no sites have been approved as candidate sites for full characterization, either in Nevada or elsewhere.

B. DOE Acted Reasonably in Denying Funds to Nevada for Attorney's Fees for Litigation Against DOE.

As the government demonstrates in its brief, DOE is fully within the law in its denial of funds to Nevada for attorney's fees for litigation against DOE. See, e.g., OMB Circular No. A-87, 46 Fed. Reg. 9548 (1981) (R. 53); Hamilton v. Northeast Kansas Health Systems Agency, Inc., 701 F.2d 860 (10th Cir. 1983). Utilities support this position.

Further, there is no provision in the NWPA requiring DOE to award funds for attorney's fees. The portion of S. 1662 discussed in Nevada's brief was not adopted in the final form of the NWPA. See Pet. Br. at 24-25. Moreover, the referenced part of S. 1662 pertained to the content of a cooperative agreement, which does not exist here. Finally, it may be an enormous drain on the Fund for monies to be distributed to cover attorney's fees for all states challenging, under section 119 of the NWPA, some action of DOE, and may even encourage legal disputes. Nothing in the Act indicates that Congress intended the Fund to bear such extensive liability or to encourage litigation.

CONCLUSION

For the reasons set forth above, the court should uphold DOE's denial of funds to Nevada for state-conducted site characterization activities and for attorney's fees for litigation against DOE.

Respectfully submitted,

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"ADDENDUM"

ADDENDUM

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NUCLEAR WASTE POLICY ACT OF 1982

TITLE I—DISPOSAL AND STORAGE OF HIGH-LEVEL RADIOACTIVE WASTE, SPENT NUCLEAR FUEL, AND LOW-LEVEL RADIOACTIVE WASTE

. . . .

SUBTITLE A—REPOSITORIES FOR DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTE AND SPENT NUCLEAR FUEL

FINDINGS AND PURPOSES

SEC. 111. (a) FINDINGS.—The Congress finds that— 42 USC 10131.

(1) radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;

(3) Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;

(4) while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

(5) the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this Act;

(6) State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel; and

(7) high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.

(b) PURPOSES.—The purposes of this subtitle are—

(1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

42 USC 10132. SEC. 112.

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(b) RECOMMENDATION BY SECRETARY TO THE PRESIDENT.—(1)(A) Following the issuance of guidelines under subsection (a) and consultation with the Governors of affected States, the Secretary shall nominate at least 5 sites that he determines suitable for site characterization for selection of the first repository site.

(B) Subsequent to such nomination, the Secretary shall recommend to the President 3 of the nominated sites not later than January 1, 1985 for characterization as candidate sites.

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(E) Each nomination of a site under this subsection shall be accompanied by an environmental assessment, which shall include a detailed statement of the basis for such recommendation and of the probable impacts of the site characterization activities planned for such site, and a discussion of alternative activities relating to site characterization that may be undertaken to avoid such impacts. Such environmental assessment shall include—

(I) an evaluation by the Secretary as to whether such site is suitable for site characterization under the guidelines established under subsection (a);

(II) an evaluation by the Secretary as to whether such site is suitable for development as a repository under each such guideline that does not require site characterization as a prerequisite for application of such guideline;

(III) an evaluation by the Secretary of the effects of the site characterization activities at such site on the public health and safety and the environment;

(IV) a reasonable comparative evaluation by the Secretary of such site with other sites and locations that have been considered;

(V) a description of the decision process by which such site was recommended; and

(VI) an assessment of the regional and local impacts of locating the proposed repository at such site.

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(3) In evaluating the sites nominated under this section prior to any decision to recommend a site as a candidate site, the Secretary shall use available geophysical, geologic, geochemical and hydrologic, and other information and shall not conduct any preliminary borings or excavations at a site unless (i) such preliminary boring or excavation activities were in progress upon the date of enactment of this Act or (ii) the Secretary certifies that such available information from other sources, in the absence of preliminary borings or excavations, will not be adequate to satisfy applicable requirements of this Act or any other law: *Provided*, That preliminary borings or excavations under this section shall not exceed a diameter of 6 inches.

(c) PRESIDENTIAL REVIEW OF RECOMMENDED CANDIDATE SITES.—(1) The President shall review each candidate site recommendation made by the Secretary under subsection (b). Not later than 60 days after the submission by the Secretary of a recommendation of a candidate site, the President, in his discretion, may either approve or disapprove such candidate site, and shall transmit any such decision to the Secretary and to either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe where such candidate site is located, as the case may be. If, during such 60-day period, the President fails to approve or disapprove such candidate site, or fails to invoke his authority under paragraph (2) to delay his decision, such candidate site shall be considered to be approved, and the Secretary shall notify such Governor and legislature, or governing body of the affected Indian tribe, of the approval of such candidate site by reason of the inaction of the President.

(2) The President may delay for not more than 6 months his decision under paragraph (1) to approve or disapprove a candidate site, upon determining that the information provided with the recommendation of the Secretary is insufficient to permit a decision within the 60-day period referred to in paragraph (1). The President may invoke his authority under this paragraph by submitting written notice to the Congress, within such 60-day period, of his intent to invoke such authority. If the President invokes such authority, but fails to approve or disapprove the candidate site involved by the end of such 6-month period, such candidate site shall be considered to be approved, and the Secretary shall notify such Governor and legislature, or governing body of the affected Indian tribe, of the approval of such candidate site by reason of the inaction of the President.

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(f) TIMELY SITE CHARACTERIZATION.—Nothing in this section may be construed as prohibiting the Secretary from continuing ongoing or presently planned site characterization at any site on Department of Energy land for which the location of the principal borehole has been approved by the Secretary by August 1, 1982, except that (1) the environmental assessment described in subsection (b)(1) shall be prepared and made available to the public before proceeding to sink shafts at any such site; and (2) the Secretary shall not continue site characterization at any such site unless such site is among the candidate sites recommended by the Secretary under the first sentence of subsection (b) for site characterization and approved by the President under subsection (c); and (3) the Secretary shall conduct public hearings under 113(b)(2) and comply with requirements under section 117 of this Act within one year of the date of enactment.

SITE CHARACTERIZATION

42 USC 10133.

SEC. 113. (a) IN GENERAL.—The Secretary shall carry out, in accordance with the provisions of this section, appropriate site characterization activities beginning with the candidate sites that have been approved under section 112 and are located in various geologic media. The Secretary shall consider fully the comments received under subsection (b)(2) and section 112(b)(2) and shall, to the maximum extent practicable and in consultation with the Governor of the State involved or the governing body of the affected Indian tribe involved, conduct site characterization activities in a manner that minimizes any significant adverse environmental impacts identified in such comments or in the environmental assessment submitted under subsection (b)(1).

(b) COMMISSION AND STATES.—(1) Before proceeding to sink shafts at any candidate site, the Secretary shall submit for such candidate site to the Commission and to either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe on whose reservation such candidate site is located, as the case may be, for their review and comment—

(A) a general plan for site characterization activities to be conducted at such candidate site, which plan shall include—

(i) a description of such candidate site;

(ii) a description of such site characterization activities, including the following: the extent of planned excavations, plans for any onsite testing with radioactive or nonradioactive material, plans for any investigation activities that may affect the capability of such candidate site to isolate high-level radioactive waste and spent nuclear fuel, and plans to control any adverse, safety-related impacts from such site characterization activities;

(iii) plans for the decontamination and decommissioning of such candidate site, and for the mitigation of any significant adverse environmental impacts caused by site characterization activities if it is determined unsuitable for application for a construction authorization for a repository;

(iv) criteria to be used to determine the suitability of such candidate site for the location of a repository, developed pursuant to section 112(a); and

(v) any other information required by the Commission;

(B) a description of the possible form or packaging for the high-level radioactive waste and spent nuclear fuel to be emplaced in such repository, a description, to the extent practicable, of the relationship between such waste form or packaging and the geologic medium of such site, and a description of the activities being conducted by the Secretary with respect to such possible waste form or packaging or such relationship; and

(C) a conceptual repository design that takes into account likely site-specific requirements.

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SITE APPROVAL AND CONSTRUCTION AUTHORIZATION

42 USC 10134.

SEC. 114. (a) HEARINGS AND PRESIDENTIAL RECOMMENDATION.—(1) The Secretary shall hold public hearings in the vicinity of each site under consideration for recommendation to the President under this paragraph as a site for the development of a repository, for the purposes of informing the residents of the area in which such site is located of such consideration and receiving their comments regarding the possible recommendation of such site. If, upon completion of such hearings and completion of site characterization activities at not less than 3 candidate sites for the first proposed repository, or from all of the characterized sites for the development of subsequent repositories, under section 113, the Secretary decides to recommend approval of such site to the President, the Secretary shall notify the Governor and legislature of the State in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be, of such decision. No sooner than the expiration of the 30-day period following such notification, the Secretary shall submit to the President a recommendation that the President approve such site for the development of a repository. Any such recommendation by the Secretary shall be based on the record of information developed by the Secretary under section 113 and this section, including the information described in subparagraph (A) through subparagraph (G). In making site recommendations and approvals subsequent to the first site recommendation, the Secretary and the President, respectively, shall also consider the need for regional distribution of repositories and the need to minimize, to the extent practicable, the impacts and cost of transporting spent fuel and solidified high-level radioactive waste. Together with any recommendation of a site under this paragraph, the Secretary shall make available to the public, and submit to the President, a comprehensive statement of the basis of such recommendation, including the following:

(A) a description of the proposed repository, including preliminary engineering specifications for the facility;

(B) a description of the waste form or packaging proposed for use at such repository, and an explanation of the relationship between such waste form or packaging and the geologic medium of such site;

(C) a discussion of data, obtained in site characterization activities, relating to the safety of such site;

(D) a final environmental impact statement prepared pursuant to subsection (f) and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), including an analysis of the consideration given by the Secretary to not less than 3 candidate sites for the first proposed repository or to all of the characterized sites for the development of subsequent repositories, with respect to which site characterization is completed under section 113, together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on Environmental Quality, the Administrator, and the Commission, except that any such environmental impact statement concerning the first repository to be developed under this Act shall not be required to consider the need for a repository or the alternatives to geologic disposal;

(E) preliminary comments of the Commission concerning the extent to which the at-depth site characterization analysis and the waste form proposal for such site seem to be sufficient for inclusion in any application to be submitted by the Secretary for licensing of such site as a repository;

(F) the views and comments of the Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views;

(G) such other information as the Secretary considers appropriate; and

(H) any impact report submitted under section 116(c)(2)(B) by the State in which such site is located, or under section 118(b)(3)(B) by the affected Indian tribe where such site is located, as the case may be.

(2)(A) Not later than March 31, 1987, the President shall submit to the Congress a recommendation of one site from the three sites initially characterized that the President considers qualified for application for a construction authorization for a repository. Not later than March 31, 1990, the President shall submit to the Congress a recommendation of a second site from any sites already characterized that the President considers qualified for a construction authorization for a second repository. The President shall submit with such recommendation a copy of the report for such site prepared by the Secretary under paragraph (1). After submission of the second such recommendation, the President may submit to the Congress recommendations for other sites, in accorance with the provisions of this subtitle.

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REVIEW OF REPOSITORY SITE SELECTION

42 USC 10135.

SEC. 115. (a) DEFINITION.—For purposes of this section, the term "resolution of repository siting approval" means a joint resolution of the Congress, the matter after the resolving clause of which is as follows: "That there hereby is approved the site at ..... for a repository, with respect to which a notice of disapproval was submitted by ..... on .....". The first blank space in such resolution shall be filled with the name of the geographic location of the proposed site of the repository to which such resolution pertains; the second blank space in such resolution shall be filled with the designation of the State Governor and legislature or Indian tribe governing body submitting the notice of disapproval to which such resolution pertains; and the last blank space in such resolution shall be filled with the date of such submission.

(b) STATE OR INDIAN TRIBE PETITIONS.—The designation of a site as suitable for application for a construction authorization for a repository shall be effective at the end of the 60-day period beginning on the date that the President recommends such site to the Congress under section 114, unless the Governor and legislature of the State in which such site is located, or the governing body of an Indian tribe on whose reservation such site is located, as the case may be, has submitted to the Congress a notice of disapproval under section 116 or 118. If any such notice of disapproval has been submitted, the designation of such site shall not be effective except as provided under subsection (c).

(c) CONGRESSIONAL REVIEW OF PETITIONS.—If any notice of disapproval of a repository site designation has been submitted to the Congress under section 116 or 118 after a recommendation for approval of such site is made by the President under section 114, such site shall be disapproved unless, during the first period of 90 calendar days of continuous session of the Congress after the date of the receipt by the Congress of such notice of disapproval, the Congress passes a resolution of repository siting approval in accordance with this subsection approving such site, and such resolution thereafter becomes law.

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42 USC 10136.

SEC. 116. (a) NOTIFICATION OF STATES AND AFFECTED TRIBES.—The Secretary shall identify the States with one or more potentially acceptable sites for a repository within 90 days after the date of enactment of this Act. Within 90 days of such identification, the Secretary shall notify the Governor, the State legislature, and the tribal council of any affected Indian tribe in any State of the potentially acceptable sites within such State. For the purposes of this title, the term "potentially acceptable site" means any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the Department undertakes preliminary drilling and geophysical testing for the definition of site location.

(b) STATE PARTICIPATION IN REPOSITORY SITING DECISIONS.—(1) Unless otherwise provided by State law, the Governor or legislature of each State shall have authority to submit a notice of disapproval to the Congress under paragraph (2). In any case in which State law provides for submission of any such notice of disapproval by any other person or entity, any reference in this subtitle to the Governor or legislature of such State shall be considered to refer instead to such other person or entity.

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

(3) The authority of the Governor or legislature of each State under this subsection shall not be applicable with respect to any site located on a reservation.

(c) FINANCIAL ASSISTANCE.—(1)(A) The Secretary shall make grants to each State notified under subsection (a) for the purpose of participating in activities required by sections 116 and 117 or authorized by written agreement entered into pursuant to subsection 117(c). Any salary or travel expense that would ordinarily be incurred by such State, or by any political subdivision of such State, may not be considered eligible for funding under this paragraph.

(B) The Secretary shall make grants to each State in which a candidate site for a repository is approved under section 112(c). Such grants may be made to each such State only for purposes of enabling such State—

(i) to review activities taken under this subtitle with respect to such site for purposes of determining any potential economic, social, public health and safety, and environmental impacts of such repository on the State and its residents;

(ii) to develop a request for impact assistance under paragraph (2);

(iii) to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such site;

(iv) to provide information to its residents regarding any activities of such State, the Secretary, or the Commission with respect to such site; and

(v) to request information from, and make comments and recommendations to, the Secretary regarding any activities taken under this subtitle with respect to such site.

(C) Any salary or travel expense that would ordinarily be incurred by such State, or by any political subdivision of such State, may not be considered eligible for funding under this paragraph.

(2)(A) The Secretary shall provide financial and technical assistance to any State requesting such assistance in which there is a site with respect to which the Commission has authorized construction of a repository. Such assistance shall be designed to mitigate the impact on such State of the development of such repository. Such assistance to such State shall commence within 6 months following the granting by the Commission of a construction authorization for such repository and following the initiation of construction activities at such site.

(B) Any State desiring assistance under this paragraph shall prepare and submit to the Secretary a report on any economic, social, public health and safety, and environmental impacts that are likely as a result of the development of a repository at a site in such State. Such report shall be submitted to the Secretary following the completion of site characterization activities at such site and before the recommendation of such site to the President by the Secretary for application for a construction authorization for a repository. As soon as practicable following the granting of a construction authorization for such repository, the Secretary shall seek to enter into a binding agreement with the State involved setting forth the amount of assistance to be provided to such State under this paragraph and the procedures to be followed in providing such assistance.

(3) The Secretary shall also grant to each State and unit of general local government in which a site for a repository is approved under section 112(c) an amount each fiscal year equal to the amount such State and unit of general local government, respectively, would receive were they authorized to tax site characterization activities at such site, and the development and operation of such repository, as such State and unit of general local government tax the other real property and industrial activities occurring within such State and unit of general local government. Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

(4)(A) A State may not receive any grant under paragraph (1) after the expiration of the 1-year period following—

(i) the date on which the Secretary notifies the Governor and legislature of the State involved of the termination of site characterization activities at the candidate site involved in such State;

(ii) the date on which the site in such State is disapproved under section 115; or

(iii) the date on which the Commission disapproves an application for a construction authorization for a repository at such site;

whichever occurs first, unless there is another candidate site in the State approved under section 112(c) with respect to which the actions described in clauses (i), (ii), and (iii) have not been taken.

(B) A State may not receive any further assistance under paragraph (2) with respect to a site if repository construction activities at such site are terminated by the Secretary or if such activities are permanently enjoined by any court.

(C) At the end of the 2-year period beginning on the effective date of any license to receive and possess for a repository in a State, no Federal funds shall be made available to such State under paragraph (1) or (2), except for—

(i) such funds as may be necessary to support State activities related to any other repository located in, or proposed to be located in, such State, and for which a license to receive and possess has not been in effect for more than 1 year; and

(ii) such funds as may be necessary to support State activities pursuant to agreements or contracts for impact assistance entered into, under paragraph (2), by such State with the Secretary during such 2-year period.

(5) Financial assistance authorized in this subsection shall be made out of amounts held in the Nuclear Waste Fund established in section 302.

(d) ADDITIONAL NOTIFICATION AND CONSULTATION.—Whenever the Secretary is required under any provision of this Act to notify or consult with the governing body of an affected Indian tribe where a site is located, the Secretary shall also notify or consult with, as the case may be, the Governor of the State in which such reservation is located.

CONSULTATION WITH STATES AND AFFECTED INDIAN TRIBES

42 USC 10137.

SEC. 117. (a) PROVISION OF INFORMATION.—(1) The Secretary, the Commission, and other agencies involved in the construction, operation, or regulation of any aspect of a repository in a State shall provide to the Governor and legislature of such State, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made with respect to the site characterization siting, development, design, licensing, construction, operation, regulation, or decommissioning of such repository.

(2) Upon written request for such information by the Governor or legislature of such State, or by the governing body of any affected Indian tribe, as the case may be, the Secretary shall provide a written response to such request within 30 days of the receipt of such request. Such response shall provide the information requested or, in the alternative, the reasons why the information cannot be so provided. If the Secretary fails to so respond within such 30 days, the Governor or legislature of such State, or the governing body of any affected Indian tribe, as the case may be, may transmit a formal written objection to such failure to respond to the President. If the President or Secretary fails to respond to such written request within 30 days of the receipt by the President of such formal written objection, the Secretary shall immediately suspend all activities in such State authorized by this subtitle, and shall not renew such activities until the Governor or legislature of such State, or the governing body of any affected Indian tribe, as the case may be, has received the written response to such written request required by this subsection.

(b) CONSULTATION AND COOPERATION.—In performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 112(c), and in subsequently developing and loading any repository within such State, the Secretary shall consult and cooperate with the Governor and legislature of such State and the governing body of any affected Indian tribe in an effort to resolve the concerns of such State and any affected Indian tribe regarding the public health and safety, environmental, and economic impacts of any such repository. In carrying out his duties under this subtitle, the Secretary shall take such concerns into account to the maximum extent feasible and as specified in written agreements entered into under subsection (c).

(c) WRITTEN AGREEMENT.—Not later than 60 days after (1) the approval of a site for site characterization for such a repository under section 112(c), or (2) the written request of the State or Indian tribe in any affected State notified under section 116(a) to the Secretary, whichever, first occurs, the Secretary shall seek to enter into a binding written agreement, and shall begin negotiations, with such State and, where appropriate, to enter into a separate binding agreement with the governing body of any affected Indian tribe, setting forth (but not limited to) the procedures under which the requirements of subsections (a) and (b), and the provisions of such written agreement, shall be carried out. Any such written agreement shall not affect the authority of the Commission under existing law. Each such written agreement shall, to the maximum extent feasible, be completed not later than 6 months after such notification. If such written agreement is not completed within such period, the Secretary shall report to the Congress in writing within 30 days on the status of negotiations to develop such agreement and the reasons why such agreement has not been completed. Prior to submission of such report to the Congress, the Secretary shall transmit such report to the Governor of such State or the governing body of such affected Indian tribe, as the case may be, for their review and comments. Such comments shall be included in such

report prior to submission to the Congress. Such written agreement shall specify procedures—

(1) by which such State or governing body of an affected Indian tribe, as the case may be, may study, determine, comment on, and make recommendations with regard to the possible public health and safety, environmental, social, and economic impacts of any such repository;

(2) by which the Secretary shall consider and respond to comments and recommendations made by such State or governing body of an affected Indian tribe, including the period in which the Secretary shall so respond;

(3) by which the Secretary and such State or governing body of an affected Indian tribe may review or modify the agreement periodically;

(4) by which such State or governing body of an affected Indian tribe is to submit an impact report and request for impact assistance under section 116(c) or section 118(b), as the case may be;

(5) by which the Secretary shall assist such State, and the units of general local government in the vicinity of the repository site, in resolving the offsite concerns of such State and units of general local government, including, but not limited to, questions of State liability arising from accidents, necessary road upgrading and access to the site, ongoing emergency preparedness and emergency response, monitoring of transportation of high-level radioactive waste and spent nuclear fuel through such State, conduct of baseline health studies of inhabitants in neighboring communities near the repository site and reasonable periodic monitoring thereafter, and monitoring of the repository site upon any decommissioning and decontamination;

(6) by which the Secretary shall consult and cooperate with such State on a regular, ongoing basis and provide for an orderly process and timely schedule for State review and evaluation, including identification in the agreement of key events, milestones, and decision points in the activities of the Secretary at the potential repository site;

(7) by which the Secretary shall notify such State prior to the transportation of any high-level radioactive waste and spent nuclear fuel into such State for disposal at the repository site;

(8) by which such State may conduct reasonable independent monitoring and testing of activities on the repository site, except that such monitoring and testing shall not unreasonably interfere with or delay onsite activities;

(9) for sharing, in accordance with applicable law, of all technical and licensing information, the utilization of available expertise, the facilitating of permit procedures, joint project review, and the formulation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws;

(10) for public notification of the procedures specified under the preceding paragraphs; and

(11) for resolving objections of a State and affected Indian tribes at any stage of the planning, siting, development, construction, operation, or closure of such a facility within such State through negotiation, arbitration, or other appropriate mechanisms.

TITLE III—OTHER PROVISIONS RELATING TO RADIOACTIVE WASTE

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NUCLEAR WASTE FUND

42 USC 10222.

Sec. 302. (a) CONTRACTS.—(1) In the performance of his functions under this Act, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d).

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after the date of enactment of this Act, the fee under paragraph (1) shall be equal to 1.0 mill per kilowatt-hour.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after the date of enactment of this Act, establish a 1 time fee per kilogram of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mill per kilowatt-hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section 123, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c) 126(b). In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

(4) Not later than 180 days after the date of enactment of this Act, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) herein. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d), the Secretary shall propose an adjustment to the fee to insure full cost recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90 day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 551 of the Energy Policy and Conservation Act.

(5) Contracts entered into under this section shall provide that—

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subtitle.

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(b) ADVANCE CONTRACTING REQUIREMENT.—(1)(A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134) unless—

(i) such person has entered into a contract with the Secretary under this section; or

(ii) the Secretary affirms in writing that such person is actively and in good faith negotiating with the Secretary for a contract under this section.

(B) The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance or renewal of a license under section 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134) that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

(2) Except as provided in paragraph (1), no spent nuclear fuel or high-level radioactive waste generated or owned by any person (other than a department of the United States referred to in section 101 or 102 of title 5, United States Code) may be disposed of by the Secretary in any repository constructed under this Act unless the generator or owner of such spent fuel or waste has entered into a contract with the Secretary under this section by not later than—

(A) June 30, 1983; or

(B) the date on which such generator or owner commences generation of, or takes title to, such spent fuel or waste;

whichever occurs later.

(3) The rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.

(4) No high-level radioactive waste or spent nuclear fuel generated or owned by any department of the United States referred to in section 101 or 102 of title 5, United States Code, may be disposed of by the Secretary in any repository constructed under this Act unless such department transfers to the Secretary, for deposit in the Nuclear Waste Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such waste or spent fuel were generated by any other person.

(c) ESTABLISHMENT OF NUCLEAR WASTE FUND.—There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. The Waste Fund shall consist of—

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e), which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on the date of the enactment of this Act for functions or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

(d) USE OF WASTE FUND.—The Secretary may make expenditures from the Waste Fund, subject to subsection (e), only for purposes of radioactive waste disposal activities under titles I and [illegible], including—

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored, retrievable storage facility or test and evaluation facility constructed under this Act;

(2) the conducting of nongeneric research, development, and demonstration activities under this Act;

(3) the administrative cost of the radioactive waste disposal program;

(4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored, retrievable storage site or to be used in a test and evaluation facility;

(5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored, retrievable storage site or a test and evaluation facility site and necessary or incident to such repository, monitored, retrievable storage facility or test and evaluation facility; and

(6) the provision of assistance to States, units of general local government, and Indian tribes under sections 116, 118, and 219.

No amount may be expended by the Secretary under this subtitle for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

(e) ADMINISTRATION OF WASTE FUND.—(1) The Secretary of the Treasury shall hold the Waste Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Waste Fund during the preceding fiscal year.

(2) The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of title 31, United States Code. The budget of the Waste Fund shall consist of the estimates made by the Secretary of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Waste Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.

(3) If the Secretary determines that the Waste Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States—

(A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Waste Fund; and

(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of amounts from the Waste Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of title 31, United States Code.

(5) If at any time the moneys available in the Waste Fund are insufficient to enable the Secretary to discharge his responsibilities under this subtitle, the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the Waste Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, United States Code, and the purposes for which securities may be issued under such Act are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(6) Any appropriations made available to the Waste Fund for any purpose described in subsection (d) shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations available to the Waste Fund, less the average undisbursed cash balance in the Waste Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

Managing the Nation's Commercial High-Level Radioactive Waste

Chapter 8

Addressing State and Public Concerns

. . . .

STATE INVOLVEMENT IN WASTE MANAGEMENT DECISIONS

. . . .

Page 181: **Shared Powers**

Between preemption and veto, a broad spectrum of possible approaches to Federal/State sharing of power in radioactive waste management were considered in the debate leading up to passage of NWPA. This report will use the term *shared powers* to characterize this middle ground.

Basic features of most proposals for shared powers that were considered included: 1) extensive consultation between States and the Federal Government, often including procedures for resolving some types of State objections (e.g., by arbitration); and 2) the formal ability of States to halt some Federal siting activities, under some circumstances, balanced by Federal power to override State objections, given certain conditions. Shared powers thus represented a compromise between veto and preemption, with limitations placed on the powers of both sides.

Limitations on State power, especially override provisions, are objected to by some defenders of States' rights because of the perceived chilling effect such limitations might have on a State's ability to influence Federal actions and to protect State interests. Conversely, even with such limitations, some observers are troubled by the formal ability of States to halt Federal projects. These disadvantages to each side are mitigated by several factors. From the State perspective, limitations on veto power may be acceptable even to strong defenders of

States' rights. At the same time, defenders of Federal preeminence may find satisfaction even in a process that gives States nonconcurrence powers under some circumstances.

The Carter administration policy of consultation and concurrence, while intended as a compromise between the extremes of preemption and veto, was

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vague in its definition of concurrence, particularly in distinguishing between nonconcurrence—the ability of a State to prevent the continuance of Federal siting activities—and State veto.[13] Not surprisingly, much of the debate about the State role in radioactive waste management during the 96th and 97th Congresses focused on the precise specification of the balance between Federal and State authority.

In response to those who were concerned about giving States any formal authority to halt Federal activities, it was noted that adoption of explicit procedures for shared powers would in some ways be simply a formalization of powers States already possessed to delay Federal actions, plus formalization of procedures for resolving disputes at several levels. It was argued that these formalizations would make the use of State power more predictable and contained. Federal plans, State objections, Federal responses, mediation between parties, and final judgments could all be expressed within specified areas with prescribed procedures and time limitations. Adoption of a formal structure in law might enable the Federal Government to avoid the slow, graduated appeal procedures likely in various courts if restrictive State actions were challenged and defended.[14]

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[13]The Interagency Review Group stated that consultation and concurrence implies "an on-going dialogue participation and the development of a cooperative relationship between States and all relevant Federal agencies during program planning and the site identification and characterization programs on a regional basis using the systems approach, through the identification of specific sites, the joint decision on a facility, any subsequent licensing process and through the entire period of operation and decommissioning. Under this approach the State effectively has a continuing ability to participate in activities at all points throughout the course of the activity and, if it deems appropriate, to prevent the continuance of Federal activities." (*Report to the President by the Interagency Review Group on Nuclear Waste Management*, TID-29442, March 1979, Washington, D.C., p. 95.) For further discussion of the concept of consultation and concurrence, see *Consultation and Concurrence*, proceedings of a workshop held at Eastsound, Mich. on Sept. 23-26, 1979, published by the Office of Nuclear Waste Isolation, Battelle Memorial Institute, January 1980, ONWI-87.

14 [Footnote omitted.]

PREVENTION AND MITIGATION OF IMPACTS

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Independent Reviews of Radioactive Waste Management Plans and Activities

Confidence in the safety of waste management activities will be increased by independent reviews of Federal plans for radioactive waste management before such activities take place. At present, there are three main levels planned for such review—internal review by DOE, licensing proceedings by NRC, and reviews by individual States of applicable parts of the plan. Additional levels of review (e.g., by bodies of independent scientific experts) might increase the confidence of observers that sites, technologies, and management systems will meet necessary levels of safety and reliability.

NWPA provides States and affected Indian tribes with funding for such independent technical reviews. The Environmental Evaluation Group in New Mexico provides a good example of how such review might be accomplished. This group, which is supported by funds from DOE, provides the State of New Mexico with independent technical review of DOE activities in developing the Waste Isolation Pilot Plant near Carlsbad.

As discussed in chapter 3, the first repository could well become an international waste disposal research center. In that event, opening the repository to independent scientific investigations could give the affected State and locality additional confidence that potential problems with the site would not be overlooked.

No. 84-7846

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PROJECT OFFICE

Petitioner

v.

JOHN HERRINGTON, SECRETARY OF THE
UNITED STATES DEPARTMENT OF ENERGY

Respondent

ON PETITION FOR REVIEW OF FINAL ACTION BY THE
SECRETARY OF ENERGY

BRIEF FOR THE SECRETARY OF ENERGY

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BRIEF FOR THE SECRETARY OF ENERGY

INTRODUCTION

This case arises under the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 42 U.S.C. 10101 et seq. ("NWPA" or "Act"). By petition for review filed pursuant to Section 119 of the Act, 42 U.S.C. 10139, Nevada seeks review of a final decision of the Secretary of the Department of Energy ("Secretary" or "DOE") denying, in part, its grant application submitted for financial assistance in fiscal year ("FY") 1985 pursuant to Section 116(c) of the Act, 42 U.S.C. 10136(c). Of the approximately $3.5 million

Nevada sought, DOE disapproved approximately $1.5 million that the State proposed to use for independent on-site data collection (by, e.g., preliminary boring and geophysical testing) at the Yucca Mountain site which the Secretary may nominate as a possible candidate site for ultimate construction of a nuclear waste repository pursuant to Section 112(b)(1)(A) of the Act, 42 U.S.C. 10132(b)(1)(A). Nevada's petition seeks to have the policy underlying DOE's decision set aside as contrary to the Act's requirements and to have the Secretary ordered to approve the State's FY 1985 grant request in full (Petition at 6). Nevada also seeks to have this Court declare its entitlement to federal funding of "any activity which [the State] feels is reasonably necessary in its participation in the planning, siting, and development of a potential repository at Yucca Mountain" (Nevada Br. 14), including attorneys' fees for litigation against the Secretary under the Act (id. at 3, 25).

ISSUES PRESENTED

1. Whether the NWPA requires the Secretary to provide federal funding of Nevada's proposal to participate in site characterization by doing its own independent, on-site studies involving test drilling to collect primary data from the Yucca Mountain site.

2. If so, whether the Secretary nevertheless properly denied such funding because the Yucca Mountain site has not yet been approved under the NWPA as a candidate site for site characterization.

3. Whether the NWPA requires the Secretary to provide federal funding to cover litigation costs, including attorneys' fees, incurred by a state in its suits against the government for judicial review under the NWPA.

STATUTE AND DEPARTMENT GUIDELINES INVOLVED

The key provisions of the NWPA here involved are set forth in full in the Addendum to Nevada's brief. Other provisions of the Act are quoted in pertinent part herein.

The DOE "Internal General Guidelines for Implementing Financial Assistance (Grants) For Repository Programs Under Sections 116 and 118 of the Nuclear Waste Policy Act of 1982, Revised September 7, 1984" are set forth at Tab 34 of the Administrative Record ("Ad.R. 34"), and have also been reproduced at Tab 34 of the Excerpts of Record ("E.R. 34").

STATEMENT OF THE CASE

Nevada petitions for review of the Secretary's partial denial of its FY 1985 grant request dated September 17, 1984 (Ad.R. 31). The Secretary's denial of funds for the proposed studies became final and effective on December 13, 1984 (Ad.R. 51). Following this Court's denial on December 19, 1984, of Nevada's emergency motion for an injunction requiring, inter alia, full and immediate funding of Nevada's FY 1985 grant request, Nevada received its Notice of Financial Assistance Award covering the remainder of its FY 1985 grant request on February 1, 1985 (Nevada Br. 2; Ad.R. 53).

Nevada now seeks review of two conditions contained in that grant

authorization, one requiring DOE's prior approval of any subcontract exceeding $50,000 to be awarded by the State (Ad.R. 53; Attachment H, para. H-2), and the second prohibiting Nevada's expenditure of grant funds to cover costs in litigation against the United States (id., para. H-6).[1/]

A. Jurisdiction of this Court -- Section 119(a)(1) of the NWPA, 42 U.S.C. 10139(a)(1)(A), provides this Court with original jurisdiction to review "any final decision or action" of the Secretary; and no other provision of the Act precludes review of the actions challenged here at this time (cf., 42 U.S.C. 10132(e) ("preliminary decisionmaking activity")). DOE's partial denial of Nevada's FY 1985 grant request, as well as its imposition of the two conditions contained in the States' grant award, are "final action[s]" subject to review in this Court.

B. Timeliness. -- Section 119(c) of the NWPA, 42 U.S.C. 10139(c), requires that judicial review be sought within 180 days after the final action placed in issue. DOE's partial denial of Nevada's grant request became final on December 13, 1984 (Ad.R. 51). The petition for review was filed on December 14, 1984, and is therefore timely as to the funding denied.

1/ With Nevada's acceptance of the award, it sent DOE notice that the State does not intend to be bound by these conditions (see Attachment A to this brief). So far as we know, no concrete dispute involving the first condition has yet arisen with respect to DOE's approval or disapproval of any particular subcontract under Nevada's grant.

Although the petition for review was filed before the two conditions in the grant award became final upon its acceptance in February 1985 (Ad.R. 53), DOE does not urge that the prematurity of Nevada's petition should, in the context of this case, preclude this Court's consideration of whether those conditions are contrary to the NWPA.

C. Attorneys' fees. -- Nevada gives no indication that it seeks from this Court a direct award of attorneys' fees incurred in this litigation. Instead, the State seeks to establish here that the NWPA requires the Secretary to fund such attorneys' fees as part of the grants made pursuant to Section 116(c) of the Act. See our response to the State's position, infra, at 36-39.

D. The NWPA's statutory scheme. -- In enacting the Nuclear Waste Policy Act, Congress found that the accumulation of radioactive waste and spent nuclear fuel, primarily from nuclear power reactors, had created a national problem of great public concern, and that previous efforts to solve this problem had been inadequate. 42 U.S.C. 10131(a). In particular, the House Committee on Interior and Insular Affairs found that while there appeared to be technical solutions to the problem of a growing inventory of radioactive waste, social and political forces hindered the development of a repository development program. H.R. Rep. No. 491 (Part 1), 97th Cong., 2d Sess. 26-29 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 3792-3796. The federal government and the states proceeded to conduct a thorough review of the institutional, technical,

political, and social problems that had interferec
opment of a repository. As a result, Congress cor
the process of siting, constructing, and operating
required special legislation to solidify a federal
keep it on track. Id. at 28. The legislative ef:
in the Nuclear Waste Policy Act, effective January
the stated purposes of establishing a schedule fo:
construction, and operation of repositories, assu:
protection from the hazards of radioactive waste,
federal responsibility for the disposal of such w:
the relationship between the federal and state go\
establishing the Nuclear Waste Fund to cover the c
posal program. 42 U.S.C. 10131(b).

The Act requires t: U.S. Department of
alia, to site, construct, and operate by January :
pository for the disposal of high-level radioacti
nuclear fuel. 42 U.S.C. 10131(b)(1). It require.
to perform certain actions within set time frames
public and state participation, with congressiona
and judicial review at specific points in the sta
as well as licensing by the Nuclear Regulatory Co
Commission). The initial steps in implementing t
the Secretary to identify states that have one or
acceptable sites for the first repository and to
and the state legislatures, and the tribal counci

Indian tribes, of the potentially acceptable sites within these states. 42 U.S.C. 10136(a). [2/] Six states, including Nevada, have been identified by the Secretary as having at least one potentially acceptable site. When a state is notified that it contains a potential site, it becomes eligible for grant funds under Section 116(c)(1)(A) "for the purpose of participating in activities required by Section 116 and 117 or authorized by written agreement entered into pursuant to subsection 117(c)." 42 U.S.C. 10136(c)(1)(A). It is on this basis that Nevada is eligible for, and has received, grant funds since 1983 (Ad.R. 8).

The Act then requires the Secretary to nominate at least five sites as suitable for site characterization, i.e., suitable for further detailed study. 42 U.S.C. 10132(b)(1)(A). [3/] The

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2/ A potentially acceptable site is:

> any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the Department undertakes preliminary drilling and geophysical testing for the definition of site location.

42 U.S.C. 10136(a).

3/ The term "site characterization" means --

> (a) siting research activities with respect to a test and evaluation facility at a candidate site; and
>
> (b) activities, whether in the laboratory or in the field, undertaken to establish

[Footnote continued on following page.]

nomination of each site must be accompanied by an environmental assessment that includes an evaluation of the suitability of the site under general siting guidelines, 4/ as well as an evaluation of the effects of site characterization activities, a comparative evaluation with other sites, a description of the decision process leading to the site's nomination, and an assessment of the impacts of locating a repository at such a site. This environmental assessment is final agency action subject to judicial review. 42 U.S.C. 10132(b)(1)(E). The Secretary is then required to recommend three of the nominated sites to the President as candidate sites for site characterization. 42 U.S.C. 10132(b)(1)(B).

[Footnote continued from previous page.]

> the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken. 42 U.S.C. 10101(21).

4/ General guidelines that serve as the primary criteria for the selection of sites in various geologic media were published on December 6, 1984 pursuant to Section 112(a) of the Act, 42 U.S.C. 10132(a). Petitions for review of those guidelines are now pending before this Court. Environmental Policy Institute, et al. v. Herrington, 9th Cir. No. 84-7854; State of Washington, et al. v. Herrington, 9th Cir. No. 85-7128.

The President has 60 days to approve or disapprove the recommendations. 42 U.S.C. 10132(c)(1).

No sites have yet been nominated by the Secretary as suitable for the site characterization stage of the process. The Secretary has taken the discretionary step of issuing nine draft environmental assessments on potentially acceptable sites in six states for public review and comment. 49 Fed. Reg. 49540 (Dec. 20, 1984). Later this year, the final environmental assessments will issue and accompany the Secretary's nomination of sites as required by 42 U.S.C. 10132(b)(1)(E).

When three candidate sites have been approved by the President, the Secretary "shall carry out" on those sites the "appropriate site characterization activities," with consideration given to public comments received and in consultation with the Governor of the states involved or the governing body of the affected Indian tribe. 42 U.S.C. 10133(a). A primary activity in site characterization work is the sinking of exploratory shafts to determine the technical suitability of the site. However, before this may be started, for each candidate site the Secretary must submit to the NRC and the state, for their review and comment, a general plan for site characterization, [5/] a description of the

---

5/ The plan must include:

(i) a description of such candidate site;

[Footnote continued on following page.]

possible form or packaging of the waste, and a conceptual repository design. 42 U.S.C. 10133(b). The site characterization plan must be made available to the public and hearings held in the vicinity of each site. Once the Secretary undertakes site characterization, he must report the nature and extent of site characterization activities, as well as the information developed, to the NRC and the affected state every six months. Id. The Secretary is permitted

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[Footnote continued from previous page.]

> (ii) a description of such site characterization activities, including the following: the extent of planned excavations, plans for any onsite testing with radioactive or nonradioactive material, plans for any investigation activities that may affect the capability of such candidate site to isolate high-level radioactive waste and spent nuclear fuel, and plans to control any adverse, safety-related impacts from such site characterization activities;
>
> (iii) plans for the decontamination and decommissioning of such candidate site, and for the mitigation of any significant adverse environmental impacts caused by site characterization activities if it is determined unsuitable for application for a construction authorization for a repository;
>
> (iv) criteria to be used to determine the suitability of such candidate site for the location of a repository, developed pursuant to section 10132(a) of this title; and
>
> (v) any other information required by the Commission.

42 U.S.C. 10133(b)(1)(A).

only to conduct such activities as he considers necessary to provide the data required for evaluation of site suitability for a construction application to the NRC, and for compliance with the National Environmental Policy Act. 42 U.S.C. 10133(c). If site characterization activities are terminated at a site, the Secretary must notify Congress and the states, providing the reasons for such termination, and must reclaim the site if it is determined to be unsuitable for application to the NRC for a construction authorization. Id.

At this site characterization stage, the Act specifically provides in Section 116(c)(1)(B) that a state with an approved candidate site is eligible for grant funds only for the purposes of enabling the state

> (i) review activities taken under this subtitle with respect to such site for purposes of determining any potential economic, social, public health and safety, and environmental impacts of such repository on the State and its residents;
> (ii) to develop a request for impact assistance under paragraph (2);
> (iii) to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such sites;
> (iv) to provide information to its residents regarding any activities of such State, the Secretary, or the Commission with respect to such site; and
> (v) to request information from, and make comments and recommendations to, the Secretary regarding any activities taken under this subtitle with respect to such site.

42 U.S.C. 10136(c)(1)(B).

After completing site characterization, which is expected to take several years, the Secretary is required to hold an additional

set of public hearings in the vicinity of each site which is under consideration for recommendation as a repository. After these hearings, and the consideration of comments, the Secretary may recommend approval of one site to the President. 42 U.S.C. 10134(a)(1). The Secretary's recommendation must be accompanied by a comprehensive statement of the basis of such recommendation, including an environmental impact statement prepared pursuant to Section 114(f) of the Act and the National Environmental Policy Act. Ibid. The EIS is expressly made subject to judicial review by Section 119(a)(1)(D), 42 U.S.C. 10139(a)(1)(D).

If the President, pursuant to Section 114(a)(2), 42 U.S.C. 10134(a)(2), recommends approval of the site to Congress for development as a repository, the state in which the site is located or the affected Indian tribe on whose reservation the site is located, may submit, within 60 days, a notice of disapproval to Congress under Section 116(b)(2). 42 U.S.C. 10136(b)(2). This disapproval prevents the use of the site for a repository unless Congress passes a joint resolution approving the President's recommendation. 42 U.S.C. 10135. If the President's recommendation becomes effective, the Secretary must then submit a construction application to the NRC for authorization to construct the repository. When that authorization is granted, the Act in Section 116(c)(2)(A) sets out another point at which a state becomes eligible to receive funds, in order to "mitigate the impact on such State of the development of a repository." 42 U.S.C. 10136(c)(2)(A).

To pay the costs incurred in development and operation of the nuclear waste repository, Congress established the Nuclear Waste Fund,

> composed of payments made by the generators and owners of such waste and spent fuel, [to] ensure that the costs of carrying out activities relating to the disposal of such waste and fuel will be borne by the persons responsible for generating such waste and spent fuel.

42 U.S.C. 10131(b)(4). The Nuclear Waste Fund ("Fund") is created in 42 U.S.C. 10222(c); and the Secretary is charged with its administration and use for the purposes specified by Congress, 42 U.S.C. 10222(d) and (e). One such use is the provision of federal assistance to the states under Section 116 of the Act, 42 U.S.C. 10136. See 42 U.S.C. 10222(d)(6); 42 U.S.C. 10136(c)(5).

E. DOE's General Grants Guidelines. -- DOE first developed and circulated general internal guidelines concerning NWPA grants in mid-1983 (Ad.R. 9). They were intended to aid DOE's field offices by serving "as the general policy basis for close headquarters/field consultation" concerning financial assistance to the states under the Act, and were "distributed widely" to interested states and others (Ad.R. 9, cover memo). The guidelines covered only the first two of four phases in repository development: "(I) prenotification; (II) notification/nomination; (III) characterization; and (IV) construction" (id., Guidelines at 2-3). As Nevada acknowledges (Br. 16), this case arises in "Phase II," i.e., Nevada and other states have been notified that

they contain potentially acceptable sites but no site has yet been recommended by the Secretary or approved by the President as a candidate for full site characterization. The original guidelines provide in pertinent part that the grant-eligible Phase II activities of a state "should focus on the analyses and studies necessary to provide appropriate monitoring and evaluation of DOE activities," with examples of eligible activities (Ad.R. 9, Guidelines at 6) (emphasis added).

The original guidelines were revised in September 1984; and the revision, too, was distributed not only to DOE field offices but to interested states (Ad.R. 34, cover memo). The revision added guidelines to cover the Phase III site characterization stage of repository development, which will not be reached until later this year. In all pertinent respects, the Phase II guidelines remained unchanged. (Compare Ad.R. 34, Revised Guidelines at 5-7 with Ad.R. 9, Guidelines at 5-6.) The new Phase III guidelines provide in pertinent part that grant-eligible Phase III activities

> should focus on the monitoring and evaluation of DOE site characterization activities. The grantee [state] may also receive funding to run independent tests on DOE data, where the need for such independent testing can be justified.

(Ad.R. 34, Revised Guidelines at 8) (emphasis added.) The revised guidelines also advised that

> duplication of data collection efforts and associated activities should be mimimized to the maximum extent practicable and avoided if at all possible.

(Id., at 7.)

Nevada correctly states (Br. 15) that neither set of guidelines were formally "adopted" by DOE under the Administrative Procedure Act. But DOE did not keep them internal and secret; and neither Nevada nor the states participating here as amici curiae complain that they lacked actual and timely notice of the guidelines, 5 U.S.C. 552(a)(1), which express the administrative construction of the NWPA that subsequently formed the basis for DOE's partial denial of Nevada's grant request. Accordingly, Nevada's petition presents a substantive, not a procedural, challenge to DOE's interpretation of the NWPA.

F. The Challenged Agency Action. -- On February 2, 1983, the Secretary notified the Governor and legislature of the State of Nevada that a potentially acceptable site for a repository existed in the tuff rock medium at Yucca Mountain, a federally-owned area in Nye County, which is on and adjacent to DOE's Nevada Test Site ("NTS"). 6/ That notification, made pursuant to 42 U.S.C. 10136(a), triggered Nevada's eligibility for federal financial assistance under 42 U.S.C. 10136(c). Nevada received grants for fiscal years

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6/ Yucca Mountain is located about 100 miles northwest of Las Vegas in southern Nevada.

A portion of the Yucca Mountain site is adjacent to the NTS on the Nellis Air Force Range. Another portion is on a third federal parcel -- controlled by the Bureau of Land Management -- adjacent to the NTS.

1983 (Ad.R. 8) and 1984 (Ad.R. 27).[7] On September 17, 1984, Nevada's Nuclear Waste Project Office requested funds for FY 1985, including a request for funding through FY 1987 for on-site hydrogeologic field work which the State desires to conduct at the Yucca Mountain site (Ad.R. 31, 32). On December 13, 1984, DOE's Nevada project manager informed Nevada by letter that the primary data gathering activities proposed by the State would not qualify for grant funds.[8] He informed the State that the work proposed in its grant application was duplicative of the work already being conducted by DOE, but that if the State identified a need for additional primary data collection for purposes of site characterization, DOE would review that concern with the objective of satisfying the State by all

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7/ Nevada states (Br. 2) that it is also seeking here "the unexpended balance of the FY 84 grant," totalling $541,000, "which was also rejected as contemplating primary data gathering." Nevada's FY 84 grant request included an estimate of proposed expenditures for both FY 84 and FY 85 activities (Ad.R. 17, and Attachment A). Pursuant to 10 C.F.R. 600.106, DOE considered only the request for funding of activities to be conducted in FY 84, not those activities likely to occur in future fiscal years. In fact, Nevada's FY 84 grant request of $937,083, including $275,000 for hydrologic verification activities, was fully funded by DOE, less a $16,000 adjustment for an overstatement of proposed costs (Ad.R. 22 at 5-6; 24, 27). Therefore, there is no basis for Nevada's claim (Br. 2) that it is due $541,000 as the "unexpended balance of the FY 84 grant" or that DOE "rejected" for funding a portion of Nevada's FY 84 grant request as "contemplating primary data gathering."

8/ Nevada had earlier been informed that its independent hydrogeologic field would probably not be funded, based on the project manager's reading of the guidelines which served to provide general policy direction in his grant negotiations. By letter dated November 27, 1984, the project manager had summarized his position at a November 20, 1984, meeting with Nevada officials. He stated then that the State's request to perform site characterization work, i.e., primary data gathering, seemed to be outside the DOE guidelines (Ad.R. 45), and explained that he had sought "definitive guidance" from DOE headquarters (ibid.; see also Attachment B to the letter).

reasonable means, including a possible contract perform the work itself. (Ad.R. 51.)

The project director's decision was b 1984, guidance memorandum directive from DOE he 50). The project director had preliminarily de interpretation of the NWPA set forth in the gui template primary data gathering activities by t monitoring and evaluation of DOE's work. The h dum provided to the project director describes view of activities which may be funded with res testing and evaluation activities" that a state conduct under Section 116(c) of the Act, 42 U.S The memorandum states (Ad.R. 50):

> With respect to monitoring, testing, evaluation activities that may be fur through a grant, the following appli A State may be funded to conduct ind pendent monitoring, testing, or evalu tion of DOE generated data, but such activities shall not unreasonably in- terfere with or delay DOE site chara terization activities. A State may r be funded through a grant to conduct primary data collection activities (r drilling onsite) for the purposes of site characterization, since these a vities are beyond the scope of monit testing or evaluation. If a State i fies a concern which in its view req

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9/ In light of the fact that Nevada described characterization study anticipated to take to complete, DOE evaluated the State's proposa III site characterization guidelines even thou Mountain nor any other site is likely to reach stage until later this year (see supra, at 9).

> additional primary data collection, and DOE agrees that the data is needed, DOE will do the primary data collection itself, which could involve contracting with the State, if the State has the capability.
>
> Pursuant to DOE's responsibilities under the NWPA to consult and cooperate with the States, a concern by a State over the need for primary data collection for the purpose of site characterization will be reviewed with the objective of satisfying that concern by all reasonable means. Any decision regarding such data collection will be closely coordinated with the State and any disagreements will be resolved.
>
> Our primary concern in articulating this policy is to ensure that DOE maintains its clear responsibility for site characterization activities which includes primary data collection, to maintain the integrity of the controlled area, and to avoid duplicative or interfering activities.

The project manager's decision based on the headquarters directive was final for the Department. Following this Court's denial of Nevada's emergency motion for injunctive relief pending review, [redacted] 10/ R. 53).

ARGUMENT

I

INTRODUCTION

Nevada's petition presents this Court with narrow -- but nevertheless quite important -- issues of first impression under

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10/ The project director's full Technical Evaluation of Nevada's FY 1985 grant proposal, dated December 27, 1984, gives detailed explanation of those line items of the State's proposal which were and were not funded by DOE (Attachment B, hereto).

the recently-enacted Nuclear Waste Policy Act. The Act embodies a comprehensive and complex scheme to solve the "national problem" created by the accumulation of radioactive wastes, 42 U.S.C. 10131(a)(1), by establishing federal responsibility for the siting, construction, and operation of safe and permanent nuclear waste repositories, 42 U.S.C. 10131(b)(1) and (2). The Secretary fully recognizes that Congress deemed "essential" the participation of the states and general public in the planning and development of these repositories, 42 U.S.C. 10131(a)(6). But Congress was also fully aware that, as Nevada so aptly states (Br. 35),

> [t]he politics of repository siting are essentially defensive. As with any waste facility siting, prospective neighbors, or "hosts," interpose any objection in hopes that the proposal will go elsewhere.

Accordingly, in keeping with the Act's purpose "to define the relationship between the Federal Government and the State governments" with respect to nuclear waste disposal, 42 U.S.C. 10131(b)(3), Congress has detailed with considerable specificity exactly when and how the states are to participate in the statutory process.

Most importantly to the issues presented here, Congress has determined that the states are to receive federal financial assistance -- in the form of grants from the Nuclear Waste Fund -- to pay for the costs they incur in voluntarily undertaking the defined roles allowed them under the Act. 42 U.S.C. 10136(c)(1)(A). The Secretary fully acknowledges his duty to make such grants to the states, but here must submit that neither of Nevada's claims to

funding -- for its proposed site characterization studies and its attorneys' fees in litigation such as this -- finds any real support in the Act or its legislative history.

This Court has the obligation to determine whether DOE's action here is based upon a reasonable, permissible construction of the NWPA. E.g., Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 104 S.Ct. 2778, 2782 (1984). Especially in light of the states' strong institutional opposition to location of a repository within their borders (see supra, at 19), this Court should be most wary of accepting Nevada's notion that Congress intended mandatory funding of "any activity [the State] feels is reasonably necessary to its participation * * *" (Nevada Br. 14). DOE relies on no "internal inconsistency" or "scrivenor's [sic] error[]" (id. at 15) in the Act to support its position here. Congress simply did not give the states so much discretion -- and DOE so little -- in a complex program for which the federal government has primary responsibility.

The NWPA fully sustains the Secretary's action in this case. And Nevada is not without the ability to present its views as to what the law should be in the appropriate forum -- the Congress (See Ad.R. 47). See Chevron U.S.A. v. NRDC, supra, 104 S. Ct. at 2793. As this Court well recognizes, it is not the role of the federal courts "to rewrite statutes" at the behest of parties urging that a law is "'susceptible of improvement'." R. Jay Kidd v. U.S. Department of the Interior, 756 F.2d 1410, ___ (9th Cir. 1985), quoting Badarraco v. Commissioner of Internal Revenue, 104 S.Ct. 756, 764 (1984).

II

STANDARD OF REVIEW

Nevada argues that the challenged actions of the Secretary are foreclosed by the requirements of the NWPA, i.e., that DOE lacked any discretion either to deny the State funding for its proposed study or to impose the two conditions Nevada finds objectionable in the grant it has received for FY 1985. The appropriate standard of review is that provided by the Administrative Procedure Act, 5 U.S.C. 706(2)(C), i.e., the Secretary's actions here may be set aside only if this Court concludes they were taken "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

This case involves issues of statutory construction, and requires the Court to determine whether DOE's challenged actions are consistent with a reasoned, permissible interpretation of the NWPA. See generally Chevron U.S.A. v. NRDC, supra, 104 S.Ct. at 2781-2783. If Congress "has directly spoken to the precise question at issue," its clear intent is controlling. Id. at 2781. If not, the views of the agency charged with administration of the statute are entitled to "considerable weight." Id. at 2782. See Alcaraz v. Block, 746 F.2d 593, 606 (9th Cir. 1984).

In the event this Court finds the NWPA less than unambiguous on the points at issue, deference to DOE's construction of the Act is particularly appropriate here. Congress has carefully crafted a "legislated schedule for Federal decisions and actions for repository development." H.R. Rep. No. 97-491, supra, at 30. While

the states are accorded a defined participatory role in this process, it is the federal government, in particular DOE, to which Congress gave the primary responsibility for implementing the program and administering the statute. Acting on its responsibility to administer the Nuclear Waste Fund created pursuant to Section 302 of the Act, 42 U.S.C. 10222, the Department drew up internal general guidelines to provide policy guidance to aid the DOE field offices in carrying out the financial assistance awards to the eligible states, and to serve as a policy base for DOE headquarters and field offices in resolving specific issues relating to such grants. (See Ad.R. 9, 34, 50.) The affected states, too, were provided with the guidelines so that they would be aware of DOE's policies (see supra, at 13-15).

On the central points at issue in this case, the guidelines constitute DOE's interpretation of what state activities the NWPA requires to be funded and are entitled to "great deference." Udall v. Tallman, 380 U.S. 1, 16 (1965). While the guidelines "are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress," they are nevertheless entitled to that degree of deference. Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (guidelines issued by the Equal Employment Opportunity Commission); California v. United States, 547 F.2d 1388, 1390 (9th Cir.), cert. denied 434 U.S. 824 (1977) (policy and procedure memorandum issued by Federal Highway Administration).

Moreover, the original Guidelines were issued in June 1983, soon after the NWPA became effective; and the Revised Guidelines

issued in September 1984 added Phase III provisions well in advance of the program's likely entry into the site characterization phase later this year (see supra, at 9). The guidelines therefore constitute the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Udall v. Tallman, supra, 380 U.S. at 801, quoting Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 396, 408 (1961). And

> [t]he deference owed the meaning placed on an act by the administrative body is heightened when the case involves the construction of a new statute by its implementing agency.

Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 706 (D.C. Cir. 1974) (emphasis added). See also General Electric Uranium Mgmt. Co. v. DOE, 584 F. Supp. 234, 237 (D.D.C. 1984) (NWPA case).

In sum, DOE's interpretation "must be sustained unless unreasonable and plainly inconsistent with the [Act]." Fulman v. United States, 434 U.S. 528, 533 (1978). This Court "need not find that [DOE's] construction is the only reasonable one, or even that it is the result [the Court] would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Compensation Commission v Aragon, 329 U.S. 143, 153 (1946). It need only satisfy itself that DOE's construction of this "complex statute" is "sufficiently reasonable to preclude the [Court] from substituting its judgment for that of the [Department]." Train v. NRDC, 421 U.S. 60, 87 (1975). See generally, Chevron U.S.A. v. NRDC, supra, 104 S.Ct. at 2792-2793.

III.

NOTHING IN THE NWPA REQUIRED THE SECRETARY TO GRANT NEVADA FUNDS FOR THE GEOHYDROLOGIC STUDY IT PROPOSED TO BEGIN IN FY 1985

The language of the NWPA clearly belies Nevada's claim (Br. 15) to an "absolute statutory right" to federal funding of its proposed geohydrologic study to gather primary site characterization data by on-site drilling at the Yucca Mountain site. Nothing in the legislative history suggests that the NWPA was intended to give the states such a right. DOE's position -- that the NWPA's provisions for state participation by independent "monitoring and testing," 42 U.S.C 10136(c)(1)(B)(iii) and 10137(c)(8), do not require funding of such a study -- is fully consistent with the Act.

Moreover, even if, arguendo, the Act would later require funding of Nevada's study, it is clear that the NWPA does not require such funding before the Yucca Mountain site has been approved by the President as a candidate for full site characterization studies.

A. The NWPA gives the states no right to federal funding to conduct their own independent site characterization studies involving on-site collection of primary data. -- As in any case involving statutory construction, the starting point must be the statute itself. Watt v. Alaska, 451 U.S. 259, 265 (1981). Section 116(c) is the basic source for federal financing of the affected states' participation activities under the Act:

> The Secretary shall make grants to each [eligible] State * * * for the purpose of participating in activities

> required by sections 10136 and 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)(A). Site characterization is a function required of the Secretary under another section of the Act, 42 U.S.C. 10133. Nevertheless, the Act makes clear that Congress intended to authorize the states to participate in specified ways in the site characterization process, and to receive federal funding of such participation. Section 116(c) of the Act goes on to provide:

> The Secretary shall make grants to each State in which a candidate site for a repository is approved under section 10132(c) of this title. Such grants may be made to each such State only for purposes of enabling such State --
>
> * * * * *
>
> (iii) to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such site;
>
> * * * * *
>
> (v) to request information from, and make comments and recommendations to, the Secretary regarding any activities taken under this subtitle with respect to such site. [11/]

42 U.S.C. 10136(c)(1)(B) (emphasis added). The key issue here plainly involves the scope of the grant-eligible activities in

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11/ This latter provision, 42 U.S.C. 101369(c)(1)(B)(v), is not directly involved here. We note merely that it serves, inter alia, to provide federal funding for the states' review and comment upon DOE's site characterization program and the information developed in the course of DOE's site characterization activities. See 42 U.S.C. 10133(c).

which the states may engage under the phrase highlighted above. Subsection (B)(iii) makes clear that Nevada may not receive funding for activities which constitute site characterization itself (see supra, at 7 n.3), but only for monitoring and testing activities "with respect to site characterization programs * * *." The "programs" referred to are, of course, DOE's; for Congress has assigned the responsibility for actual site characterization to DOE, rather than to the State. 42 U.S.C. 10133(a). The states' role is to provide comment to and consult with DOE. Ibid. Thus, the plain language of subsection 116(c)(1)(B)(iii), as well as the overall division of responsibility in the Act between DOE and the states, strongly support the Secretary's construction:

> [A]ctivities in this category should focus on the monitoring and evaluation of DOE site characterization activities. The grantee [state] may also receive funding to run independent tests on DOE data, where the need for such independent testing can be justified.

(Ad.R. 34, Revised Guidelines at 8.) The Act simply does not authorize the states to undertake their own independent programs of site characterization using on-site drilling to collect primary data for studies like that proposed by Nevada.

Nevada and the amicus states would have this Court rewrite the Act by rendering its qualifying language mere surplusage or adding text not included by Congress. Nevada seems to submit that Section 116(c)(1) should be read to require grants "for purposes of enabling such State --

> (iii) to engage in any monitoring, testing or evaluation activities [ ] with regard to such site;
>
> or
>
> (iii) to engage in any monitoring, testing or evaluation activities the State feels reasonably necessary with regard to such site."

No such modification of the Act can possibly be appropriate, especially since Congress specified that grants can be made "only" for the purposes actually specified. 42 U.S.C. 10136(c)(1)(B).

Lest it be suggested that the foregoing is a crabbed construction of the Act or is supported only by "scrivenor's [sic] error" (Nevada Br. 15), we note that Congress repeated its intention in the language of the Act's provision specifying the content of the written "consultation and cooperation" agreements between DOE and an affected state:

> Such written agreement shall specify procedures --
>
> * * * * *
>
> (8) by which such State may conduct reasonable independent monitoring and testing of activities on the repository site, except that such monitoring and testing shall not unreasonably interfere with or delay onsite activities[.]

42 U.S.C. 10137(c)(8) (emphasis added). Although state activities pursuant to such a consultation and coordination agreement are also

federally funded, 42 U.S.C. 10136(c)(1)(A), [12] Congress has once again specified that the states' independent monitoring and testing is to be "of activities" on the site, not of the site itself. [13]

If neither the foregoing provision nor that in 42 U.S.C. 10136(c)(1)(B)(iii) (supra, at 25) contained language specifying the intended scope of the states' grant-eligible monitoring and testing activities, Nevada might have some colorable basis for its position. But Congress surely cannot have twice failed to make its meaning clear, especially since the Act was intended to define the respective federal and state roles in the program it created. 42 U.S.C. 10131(b)(3). If Congress had intended the states to conduct their own federally-funded site investigation programs, it surely would have said so.

12/ Nevada acknowledges (Br. 33-34) that it has not requested, much less entered into, a consultation and coordination agreement. But the above-quoted provision has clear relevance to the issue of statutory construction.

13/ As stated in DOE headquarters' grants guidance memorandum (Ad.R. 50):

> A State may be funded to conduct independent monitoring, testing or evaluation of DOE generated data, but such activities shall not unreasonably interfere with or delay DOE site characterization activities. A State may not be funded through a grant to conduct primary data collection activities (e.g. drilling on-site) for the purpose of site characterization, since those activities are beyond the scope of monitoring, testing, or evaluation. If a State identifies a concern which in its view requires additional primary data collection, and DOE agrees that the data is needed, DOE will do the primary data collection itself, which could involve contracting with the State, if the State has the capability.

As the foregoing discussion shows, the language of the Act itself is plain enough not only to foreclose the interpretation urged by Nevada and the amicus states, but to support as fully reasonable DOE's construction and implementation of the Act's requirements for federal funding of state participation. "Absent a clearly expressed [congressional] intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980).

Nevada seems to suggest (Br. 30) that this Court find a contrary intention in the Act's directive that the Secretary "shall take" a state's concerns "into account to the maximum extent feasible * * *," 42 U.S.C. 10137(b), and argues that "[g]rant feasibility is limited only by the fiscal limits of the Nuclear Waste Fund" (Nevada Br. 30). But nothing in 42 U.S.C. 10137(b) can remotely be taken to enlarge the extent of the states' opportunity to conduct the independent monitoring and testing activities specified in 42 U.S.C. 10136(c)(1)(B)(iii) and 10137(c)(8). DOE has informed Nevada that it will endeavor to resolve the State's specific concerns in this matter (Ad.R. 51):

> If a State identifies a concern which in its view requires additional primary data collection and DOE agrees that the data is needed, DOE will do the primary data collection itself, which could involve contracting with the State, if the State has the capability. Pursuant to DOE's responsibilities under the NWPA to consult and cooperate with the States, a concern by a State over the need for primary data collection for the purpose of site characterization will be reviewed with the objective

> of satisfying that concern by all reasonable means. Any decision regarding such data collection will be closely coordinated with the State and any disagreement will be resolved.

Nevada nonetheless insists here that the Secretary has no discretion whatsoever, and must fund the State's proposed study as a matter of "absolute statutory right" (Nevada Br. at 15). The State's position, as we have shown, finds no support in the NWPA.

Nevada also relies (Br. 35-37) upon another form of state participation at the later stage of final site approval, i.e., the State's right to send to Congress a notice of disapproval "accompanied by a statement of reasons" for its disapproval of the repository site, 42 U.S.C. 10136(c). The State argues that unless independent site characterization studies like the one it proposed are granted federal funding, the states will lack the ability to give adequate reasons for disapproving a site. But the Act's provisions for financial assistance to the states follow right on the heels of its provisions giving the states authority to submit their disapproval. Congress must have intended that the extent of state monitoring and testing it took care to specify in the Act would serve the states' needs in noting their disapproval. Accordingly, the notice-of-disapproval provisions contained in 42 U.S.C. 10136(b) do not give Nevada the broad mandate it seeks for reading into the Act the requirement -- contained

nowhere else in the NWPA -- that the Secretary must fund its proposed study. 14/

Finally, Nevada quotes extensively from the legislative history of the NWPA in an apparent effort to show that Congress intended to give the states rights to federally-funded participation more extensive then those conferred by the express language of the Act. To be sure, that legislative history demonstrates that Congress deemed the states' participation quite important, and considered extensively how to define their role in the statutory scheme. But that much is not part of this dispute. For present purposes, it is enough to point out that Nevada has presented this Court with absolutely no legislative history which suggests that Congress actually intended to accomplish a result different than that expressed in the language of the NWPA. As the Supreme Court very recently said:

> [D]eference to the supremacy of the legislature, as well as recognition that congressmen typically vote on the language of

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14/ Nevada has received, and will likely receive in the future, substantial federal grants to fund the sorts of state participation Congress has actually provided in the NWPA. The State is free to use the information it develops in the course of its funded activities in support of the "statement of reasons" it submits with any notice of disapproval concerning the Yucca Mountain site. For example, Nevada may obtain grant funds to engage in studies, potentially involving primary data collection, as necessary to develop its impact report under Section 116(c)(2)(A) on any economic, social, public health and safety, and environmental impacts which may result from the development of a repository in the State. 42 U.S.C. 10136(c)(2)(A). Both the revised Grants Guidelines and the DOE headquarders guidance memorandum explicitly state that funding is available for such purposes (Ad. R. 34, 50).

> a bill, generally require us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used." Richards v. United States, 369 U.S. 1, 9 (1962). "Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." American Tobacco Co. v. Patterson, 456 U.S. 63, 75 (1982) (quoting Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 26 (1977)). When even after taking this step nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words, and neither [Nevada nor the amicus states] have pointed to anything that so suggests, any further steps take the courts out of the realm of interpretation and place them in the domain of legislation.

United States v. Locke, 105 S.Ct. 1785, 1793 (1985).

This Court should therefore sustain DOE's position in denying funds for Nevada's proposed study.

B. Even if the NWPA were to require funding of Nevada's proposed study, such funding would be required only if and when the Yucca Mountain site is approved for site characterization. -- Although DOE denied Nevada funding for its proposed study for the reasons already discussed (see supra, at 17 n.9), there is another reason why the Act did not require such funding: the Yucca Mountain site has not yet been approved by the President for site characterization pursuant to 42 U.S.C. 10132(c).

As we have shown, the only explicit statutory language arguably supporting Nevada's claim that its study must be funded is found in the "monitoring and testing" provisions, 42 U.S.C. 10136(c)(1)(B)(iii) and 10137(c)(8). The former provision, however,

explicity requires the Secretary to make grants only to a state "in which a candidate site for a repository has been approved under Section 10132(c)" for site characterization. 42 U.S.C. 10136(c)(1)(B). Nevada is not yet such a state. The latter "monitoring and testing" provision similarly comes into play only in connection with a written consultation and coordination agreement between the state and DOE negotiated after approval of the site for characterization or after a state has requested such an agreement. 42 U.S.C. 10137(c). Nevada has not requested such an agreement with DOE.

So nothing in the Act created in Nevada any "statutory right" to funding of its proposed study before the Yucca Mountain site has even been nominated by the Secretary as a possible repository site. The short answer to Nevada's query (Br. 30) why it should not be "entitled" to perform its study "now" is that Congress plainly did not see fit to provide funding at this stage -- even if, arguendo, the State would be entitled to such funding at the later site characterization stage. Indeed, there is a sound practical reason why Congress did not mandate present federal funding of a state's "monitoring and testing" activities: some of the sites under consideration at this stage of the statutory scheme will not become candidates for full site characterization. To authorize the states containing potentially acceptable sites to begin federally-funded site characterization activites now -- under the rubric of "monitoring and testing" -- would clearly divert moneys from the Nuclear Waste Fund to premature site characterization activities on sites which might not become candidates at all. That would

reduce the money available to perform not only site characterization of the sites later selected as candidates but the several other purposes of the Fund. 42 U.S.C. 10222(d).[15/] See Utah's brief, at 4-5.

In sum, whatever this Court may determine to be the proper scope of the states' statutory right to federal funding "to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs * * *," 42 U.S.C. 10136(c)(1)(B)(iii), Congress did not mandate the economic waste of the Fund which would result from a state's premature characterization of a site which might never be approved as a candidate site for characterization. That is evident not only in the language of 42 U.S.C. 10136(c)(1)(B) (grants to states in which a candidate site for repository has been approved), but in the provision that federal funding shall cease to a state which no longer has a site which remains a possible candidate for construction of the nuclear waste repository, 42 U.S.C. 10136(c)(4).

15/ See Report by the Comptroller General to the Congress, "Department of Energy's Initial Efforts to Implement the Nuclear Waste Policy Act of 1982," GAO/RCED-85-27 (Jan. 10, 1985) at 38:

> In its July 1984 report and in its comments on a draft of this report, DOE acknowledges the need to exercise maximum cost control over the program. The report's updated estimate of total program cost was $20.9 billion to $23.3 billion (in 1983 dollars). DOE views cost uncertainty as the dominant financial hazard confronting the program and is, according to the report, introducing rigorous measures to assure fiduciary responsibility and accountability.

While this Court could sustain DOE's action here on the sole ground that Nevada's proposal was premature for funding under the Act, we submit that the principal issue of statutory construction presented here by Nevada deserves resolution. 16/

IV

NOTHING IN THE NWPA PREVENTS DOE FROM IMPOSING ROUTINE FEDERAL FUNDING CONDITIONS IN THE GRANTS IT MAKES, INCLUDING THE CONDITION THAT GRANTS NOT BE USED FOR LITIGATING AGAINST THE GOVERNMENT

Nevada complains (Br. 8) that two conditions imposed by DOE in the State's grant authorization violate unspecified provisions of the Act: a condition requiring DOE's prior approval of any subcontract exceeding $50,000 to be awarded by the State (Ad.R. 53, Attachment H, para. H-2); and a condition prohibiting Nevada's expenditure of grant funds to cover costs of litigation against the United States (id., para. H-6). The State has not briefed these objections, but we offer this short response.

In directing that the Secretary "shall make grants" to states which have been notified that they contain a potentially acceptable repository site, 42 U.S.C. 10136(c), the Act called upon DOE to create a federal grants program with which to implement the statute's requirements and purposes. Certainly nothing in the NWPA

16/ The question whether Nevada's study is one of a sort the Act will require the Secretary to fund is concretely presented in an obviously adversarial context and involves purely statutory construction. Since the NWPA program is likely to reach the site characterization phase later this year, the issue will certainly recur.

remotely suggests that DOE may not follow its general financial assistance rules, 10 C.F.R. Part 600, which implement the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 95-224, 41 U.S.C. 501 et seq., and "establish uniform policies and procedures for the award and administration of DOE grants and cooperative agreements." 10 C.F.R. 600.1 (1984). In challenging only two of the many federal conditions and requirements incorporated into its grant (see Ad.R. 53), Nevada concedes this much. The NWPA does not create a state entitlement to totally unfettered use of the federal money awarded under its provisions.

As to the first of Nevada's two specific objections, the State's "protest" letter of February 12, 1985 (Attachment A hereto), challenges that the Procurement Review provision in its grant is overbroad insofar as it may be applied to intragovernmental contracts and subgrants. The State's objection is based on an inconsistency with one of DOE's general grants regulations, 10 C.F.R. 600.119, and not upon any provision of the Act itself. Under 10 C.F.R. 600.105, however, DOE may impose, at the time of award, "special" conditions more restrictive than those found elsewhere in that regulatory subpart (i.e., 10 C.F.R. 600.119). The Court need not resolve this issue -- which Nevada has not even briefed -- because DOE agrees not to take steps to require Nevada's compliance with that condition as to any intragovernmental contracts or subgrants until such time

as DOE submits to Nevada a formal explanation of the necessity for its inclusion and application.[17/]

However, Nevada's second objection -- to the grant condition barring use of grant funds to pay costs of litigation against the United States -- does require present resolution. It does involve an issue of statutory construction, and applies concretely to the very litigation costs Nevada is incurring in this case. Nevada's brief (at 25) argues only that Congress intended that "financial compensation" to states under the Act "was to be so extensive that even attorney fees for lawsuits seeking remedies under the Act were [to be] compensable." Utah's amicus brief (at 10-16) develops the argument that judicial review under 42 U.S.C. 10139 of the Act is an integral element of the states' participation in the repository program created by the Act, and that the statute should therefore be construed to require federal funding of a state's litigating costs.

The glaring problem with Utah's argument is that there exists absolutely no explicit support in the Act itself for the

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17/ It should be noted that the State was aware that a condition of this nature might be incorporated into the FY 85 grant and expressed its willingness to comply with it. In his cover letter submitting Nevada's FY 1985 grant request, the Director of the State's Nuclear Waste Project Office wrote (Ad. R. 31):

> I anticipate that DOE review of subcontracts, subgrants, and purchases beyond an established level will be necessary. Details of the subcontracts, subgrants, and purchases will be submitted to DOE prior to final execution or acquisition.

notion that Congress intended a state's litigation costs to be funded with NWPA grants. As we have shown, Congress took care to specify how and when the states' funded participation was invited. If Congress had intended to fund their litigation as well, one would expect to find some language to that effect in the financial assistance provisions of 42 U.S.C. 10136(c). Such language might also have been included within the judicial review provision, 42 U.S.C. 10139. But Congress did not include in the latter section even the common provision authorizing the reviewing court to award costs of litigation including attorneys' fees "whenever it determines that such an award is appropriate." See Ruckelshaus v. Sierra Club, 103 S.Ct. 3274, 3276 and n.1 (1983) (construing "where appropriate" provision of Clean Air Act and sixteen other federal statutes).

Nevada and amicus Utah seem to ask this Court to presume that any and all state litigation against DOE under the Act would further the statute's purposes -- regardless of the suits' merits and outcome -- and that Congress must therefore have intended to sponsor such suits. But even if Congress had seen fit to make a "where appropriate" provision for attorneys' fees, the states would have recovered their litigation costs only if they prevailed to some degree on the merits and made a substantial contribution to the goals of the underlying statute. Carson-Truckee Water Conservancy District v. Secretary of the Interior, 748 F.2d 523, 525-526 (9th Cir. 1984) (applying Ruckelshaus v. Sierra Club to "where appropriate" provision of Endangered Species Act). Surely there

can be no merit to the states' argument that Congress nevertheless intended, in the face of the Act's total silence on this issue, to grant them full and unrestricted funding of litigation costs.[18/]

In sum, the condition barring the use of Nevada's grants funds for costs incurred in litigation against the United States is not inconsistent with any provision of the NWPA. Indeed, it is a routine provision generally included in federal grants to states and local governments. See Office of Management and Budget Circular No. A-87, Attachment B, at B.16 ("Legal expenses for the prosecution of claims against the Federal Government are unallowable.") (Ad.R. 53, Attachment D to Nevada's grant); see also, Hamilton v. Northeast Kansas Health Systems Agency, Inc., 701 F.2d 860, 863 (10th Cir. 1983) (holding that an identical provision precludes payment of attorneys' fees from grant funds).[19/]

This Court should therefore sustain the condition in Nevada's grant precluding expenditures for litigation costs.

18/ Both Nevada (Br. 24) and Utah (Br. 14) rely upon a single reference to attorneys' fees in the legislative history of the NWPA. As Nevada's quotation shows, the discussion was of "new elements to be included in the [C & C] agreement governing financial compensation" for the state's participation. No such "element" found its way into the Act's provisions regarding C & C agreements, 42 U.S.C. 10137(c), or any other part of the Act.

This Court should recognize "that congressmen typically vote on the language of a bill," United States v. Locke, supra, 105 S. Ct. at 1793, and decline to write into the Act a provision Congress left out.

19/ For general reference, see R. Cappalli, Federal Grants and Cooperative Agreements §4:24 (1982).

V

THE JOINT FEDERAL/STATE PROTOCOL DID NOT APPROVE THOSE STATE ACTIVITIES FOR WHICH DOE DENIED FUNDING

Nevada's final argument (Br. 37-39) is that the joint federal/state protocol agreed to by the parties on December 4, 1984 (Ad.R. 52) constituted DOE's approval of the very State studies for which funding was denied on December 13, 1984. Not only does the content of the protocol itself fail to support the State's interpretation, but Nevada could not reasonably have so understood it. Indeed, the same federal and state officials who later signed the protocol had already met and corresponded concerning the basis for DOE's likely denial of funding for such studies well before the protocol was executed. (See Ad.R. 41, 44, 45.) The very suggestion that the protocol "gave away the candy store" is totally untenable.

As this Court can see for itself, the content of the protocol merely serves to emphasize here the large extent to which the State and DOE have been able to agree upon cooperative principles under which the State may, inter alia, exercise its statutory right to participate in independent "monitoring and testing" of DOE's onsite activities at the Yucca Mountain site in the future. The protocol is fully consistent with DOE's foregoing position on the appropriate scope of Nevada's acitivities (supra, at 24-31), and Nevada's contention to the contrary should be rejected.

CONCLUSION

For the foregoing reasons, the State's petition for review should be dismissed.

Respectfully submitted,

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MAY 1985

90-1-4-2800

STATEMENT OF RELATED CASES

Two other cases arising under the NWPA are presently pending before this Court: Environmental Policy Institute, et al. v. Herrington, 9th Cir. No. 84-7854; and State of Washington v. Herrington, 9th Cir. No. 85-7128. Both involve petitions for review of DOE's general siting guidelines issued pursuant to 42 U.S.C. 10132(a). To the best of our knowledge, neither involves the DOE grants policy and guidelines at issue in the instant case.

RICHARD H. BRYAN
Governor

STATE OF NEVADA

ROBERT R. LOUX
Director

NUCLEAR WASTE PROJECT OFFICE

OFFICE OF THE GOVERNOR
Capitol Complex
Carson City, Nevada 89710
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February 12, 1985

ACTION C+P
INFO
R.F.
AMA ✓
AME&S
AMO

Daryl B. Morse, Director
Contracts & Property Division
United States Dept. of Energy
Nevada Operations Office
P.O. Box 14100
Las Vegas, NV 89114

RE: Grant No. DE-FG08-85NV10461

Dear Mr. Morse:

The State of Nevada accepts the enclosed notice of financial assistance award, which I have executed subject to several specific exceptions with respect to certain conditions placed on the award. We hereby officially except from and protest those conditions.

First, Nevada takes exception with the amount of financial assisance awarded. Condition H-7 on page H-3 denying financial assistance for hydrologic and geologic services is beyond the authority of the Department of Energy to impose. When the amount for those services is incorporated into Nevada's request for financial assistance, the total amount of award should be $3,496,307.

Second, note 1 on page G-2 reads as follows: "Legal and quality assurance consultant agreements are anticipated to exceed $50,000.00 each and require submission for concurrence as described in Procurement Review section of Other Provisions Attachment H." With respect to legal services, hydrology contractor, geology contractor, support to Nevada Legislature, and support to local governments, that statement is inconsistent with 10 CFR subsection 600.119, which reads, in pertinent part as follows, "(1) this section does not apply to such procurement by one government from another government, or by one agency of instrumentality of a government from another agency or instrumentality of the same or another government." Therefore, I

ATTACHMENT A

formally protest the requirement for submission for concurrence to the Department for contractual services and subgrants in the areas identified.

Third, I do not agree with and thus do not intend to adhere to paragraph H-6 on page H-3, which reads as follows: "Any costs incurred by the State of Nevada for litigation against the United States Government, are unallowable under this grant." That language violates section 116, 117, and 302 of the Nuclear Waste Policy Act of 1982, which clearly contemplate that all costs incurred by potential host states for any activities involving the planning, siting, and development, construction, operation, or closure of a repository will be borne by the generators of the waste and spent fuel, through financial assistance to such states from the Nuclear Waste Fund. Judicial review of agency action under the NWPA, is a necessary and appropriate cost chargeable to the program. It is thus my position that any attempt by the Department to apply the language of paragraph H-6 would constitute a violation of the NWPA.

There is one last matter about which we are perplexed. The Notice of Financial Assistance Award states that the authority under which the award is made is Public Law 95-91, 42 USC 7101. Clearly, however, the authority under which the Department of Energy must make grants to states for nuclear waste activities is referenced to sections 302 and 116 of the Nuclear Waste Policy Act. To the extent that the Department of Energy relies upon its general administrative authority under Public Law 95-91, 42 USC 7101, et. seq., for its authority to impose conditions upon Nevada's entitlement to the use of monies from the Nuclear Waste Fund, the State of Nevada protests.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

ROBERT R. LOUX
Director

RRL*jm

cc: Dr. Donald Vieth

Encls.

cc:
WMPO (R)
WMPO (RF)
M&R

DEC 27 1984

D. B. Morse, Director, CPD

TECHNICAL EVALUATION OF COST PROPOSAL FOR THE STATE OF NEVADA FOR FY 1985 ACTIVITIES ASSOCIATED WITH GRANT DE-FG08-83NV10319

As the Technical Representative to the Contracting Officer, I am in receipt of the Nevada Nuclear Waste Policy Office Grant request for FY 1985. I have reviewed the two documents submitted to the Nevada Operations Office noted below. The proposals have been evaluated against several criteria which include (1) authority and scope established in the Nuclear Waste Policy Act (NWPA), (2) policy established by the Office of Civilian Radioactive Waste Management (OCRWM), and (3) the utility of the work that is being proposed. Based on this review I believe that we are prepared to enter into negotiations with the Nuclear Waste Project Office. I have suggested the same to Robert Loux in my letter of December 13, 1984 (see Enclosure 1). The following portion of this memorandum outlines the rationale for approving the work that is within the Office of Civilian Radioactive Waste Management Guidelines.

I. GENERAL

The subject Grant was established March 3, 1983, to allow the State of Nevada to (a) coordinate an effective review of both technical and administrative materials developed as a result of the national effort to develop a nuclear waste repository; (b) develop a resource staff accessible to State administration, State legislature, and citizens, which can provide knowledge regarding relevant policy, plans, activities, and impacts of a high-level radioactive waste repository in Nevada; and (c) organize and provide a mechanism for State legislators, State and local government officials and citizens to express their views regarding the potential location of a repository in Nevada.

This Grant was prepared pursuant to the authority given to the State under the NWPA. The Department has finalized its guidelines regarding what can be covered under such a grant in a memorandum to H. Rauch et al., from Ben Rusche dated September 21, 1984.

The Grant request for FY 1985 was submitted on September 17, 1984. Details of the technical activities were submitted on October 17, 1984. A meeting was held with Robert Loux on November 20, 1984, to discuss the policy position established by OCRWM and the potential impact that would have on our recommendation as to what should be funded under the grants in FY 1985. Enclosure 2 to this memo is a summary of the meeting. Enclosures 3, 4, and 5 are copies of the OCRWM policy position on activities that can be funded under the Grant.

ATTACHMENT R

In FY 1984 the Nuclear Waste Project Office was transferred from the Nevada Department of Minerals to the Governor's Office. A proposed expansion of the Office was approved by the State Legislature. The number of staff was increased from four to nine.

The Grant request for FY 1985 is for $3,496,307. Review of the technical effort showed that $1,571,863 of the work was outside the guidelines by the Office of Civilian Radioactive Waste Management. It is recommended that negotiations be undertaken for work specified under the tasks that have a total value of $1,924,441.

II. Analysis of Specific Cost Elements

A. Salary Administration ($327,939)

The September 17, 1984, submission proposes the following salary profile for employees of the Nuclear Waste Project Office.

Director	41,172
Management Assistant II	20,218
Chief/Technical Program	40,117
Chief/Planning	38,005
Planner	16,618
Deputy Attorney General	38,592
Sr. Legal Secretary	15,507
Health Physicist	22,500
Nuclear Engineer	33,750
Fringes	49,191
Contingency (COLA)	12,209
	327,939

This estimate anticipates State employees occupying the identified positions. Enclosure 6 to this memorandum is an outline showing the organizational structure of the Nuclear Waste Policy Office and its relation to the rest of the state government. This structure and site have been approved by the State Legislature based on our understanding of the organizational structure and the technical program to be conducted by the State, the nature of the positions established by the State are appropriate. These talents, combined with the consultants the state proposes to involve, should provide them with adequate resources to oversee the NNWSI Project in FY 1985.

B. Travel ($53,092)

The September 17, 1984, submission proposed the following breakout for travel outside the state and within the state.

Out-of-State (from Reno)	$27,280
East Coast	
12-14 day trips	
Midwest/Southern U. S.	
10-14 day trips	
Western U. S.	
8-4 day trips	
In-State	$25,812
Las Vegas	
6-4 day trips	
24-1 day trips	
Rural Counties	
6-4 day trips	
12-1 day trips	
Reno/Northern Nevada	
6 trips per month	

The cost for travel in FY 1985 is approximately double for that in FY 1984. This increase is consistent with the increase of staff for FY 1985. It is a conservative request in view of the increasing requirements for meetings and participation promoted by the OCRWM especially with the requirements for the review of the Environmental Assessment with its concomitant briefings and hearings, not only in Nevada, but in the other six states involved in the review.

C. Equipment ($13,316)

The equipment request covers word processing equipment ($4166) and office furniture. The State will give up their two leased word processors which they claim rent at a rate of $6000 per year per machine. They plan to purchase the equipment on a lease purchase arrangement. Also tied to this is a $2000/year service contract covered under "Operations". The office furniture request is consistent with the increase in staff. It appears that this is a reasonable request.

D. Office Supplies ($6,000)

The proposed cost of office supplies represents a 300 percent increase over FY 1984. This level of funding represents about $55 per month per person which, in the context of the volume of paper that must be handled and the general level of activity, does not appear to be unreasonable.

E. Operations ($63,010)

The September 17, 1984, submission requested $63,010. The items included in the list are as follows:

Space Rent	$18,819
Telephone	16,500
Printing and Copying	10,500
Postage	7,500
Publication Subscriptions	5,500
Miscellaneous	4,191
	$63,010

The proposed funding for Operations in FY 1985 represents an increase of 277 percent over the request for FY 1984.

The Nuclear Waste Project Office will expand from four people (three professionals and one secretary) to nine people (seven professionals and two secretaries). The increase in office space from 1000 sq. ft. to 2500 sq. ft. is reasonable. While the site of office space increased by 150 percent to accommodate 125 percent increase in staff, the increase in cost was only 102 percent.

The increase in telephone cost for FY 1985 represents an increase of 560 percent. A major characteristic of the situation is a large distance between the Nevada State's office, the Department of Energy's Nevada office, the other states, Washington, Utah, Texas, Mississippi, and Louisiana, and Nevada counties involved. Further, the program has significant requirements for communication and coordination. While the cost increase is significant over FY 1984, the estimate appears to be within the requirements established by the program.

Printing and copying costs for FY 1985 have increased 250 percent over the FY 1984 request. This is a reasonable cost considering that the Nuclear Waste Project Office is the central point of contact for the State and they have taken on the responsibility for coordination and distribution of the information and correspondence the OCRWM and the Waste Management Project Office (WMPO) provide to the State.

Once material has been copied, it must be distributed to people in the state. There is substantial requirement for distribution of material to the other states involved. The postage cost for FY 1985 will increase 733 percent over FY 1984. While the OCRWM does not want to inhibit the state from full and proper communication, the basis for this cost increase needs to be better justified. However, the volume of material generated by the Department is extremely large and the postage bill specified may be an accurate reflection of the cost of distributing all the paper.

Publication and subscription cost increased from $1000 to $5500, an increase of 450 percent. An estimated amount of $1000 is considered a generous allocation; it is not clear how the cost could increase by the amount specified. While the OCRWM does not want to impede the State's ability to have access to knowledge, it is not clear that increasing the size of the office from three to seven professionals (an increase of 133 percent) could justify the increase in periodical subscriptions. The breakdown of these costs need to be further explained, evaluated and considered.

Miscellaneous expenses cover primarily the service contracts for the two word processors the office will purchase. While the cost is expensive, it represents a valid cost of doing business.

F. Contractor and Sub-Grant Services

1. General Consultants ($302,000)

The State, following the lead of the Federal Government, has chosen to keep its staff to a minimum. However, there is need for expert guidance in several areas and the State is choosing to provide this expertise through the consultant approach. This approach represents a significant savings to the government. The State has identified six areas where they want to include consultants and they are in the areas of hydrology ($12,000), transportation ($10,000), socioeconomic ($15,000), planning ($15,000), quality assurance ($100,000), and legal support ($150,000). The areas of technical expertise are appropriate and the level of funding does not appear to be out of line with normal consulting fees and costs.

2. Hydrology Contractor ($576,938)

The Nuclear Waste Project Office has contracted with the Desert Research Institute to monitor and evaluate the technical program being conducted by the NNWSI Project. Three major tasks have been identified which include (a) participation in DOE/NRC workshops, (b) reviewing all documents and data developed by the participants in the NNWSI Project, and (c) conduct on-site visitations to where technical work is being conducted to review the process. All of these activities are specifically outlined in the NWPA. While the funding request is somewhat greater than expected, the Department is not really in a position to tell the State how much effort it should place on being prepared to react to the Department's program. The funding request represents the efforts of about five full time people to monitor and evaluate the work conducted by over 500 people.

3. Geology Contractor ($83,146)

The primary effort of the Nevada Bureau of Mines will focus on the evaluation of the mineral resources at Yucca Mountain. This is an important point that is critical to the ability to show that there is no real threat with regard to inadverent reentry of a potential repository by man searching for minerals. The funding level to evaluate this threat is

considered a conservative cost estimate. However, the State should be requested to clarify the expected product of this study.

4. Legislative Support ($99,000)

The interim Legislative Commission Subcommittee that was established to over-view the NNWSI Project will be dissolved with the new session of the State Legislature. However, it has been recommended that a committee of five members (as opposed to three) be established on a permanent basis to follow and oversee the NNWSI Project. As the Yucca Mountain site is nominated as one of the five sites for site characterization, and recommended as one of the three to be a candidate site, the Legislature can be expected to establish the committee and can be expected to be involved heavily over the next year. The proposed funding level is sufficient to give the committee the necessary resources to follow the project. It will also provide resources to support the staff of the Nevada Legislative Commission that must do the leg work for the committee.

5. Support to Local Communities ($400,000)

Three counties will be potentially impacted by the repository and they include Nye, Clark and Lincoln. The NWPA is clear that support is supposed to be provided to the local communities for the purpose of review of activities and to undertake planning necessary to deal with the repository. Such funds will be used by the counties to review the Environmental Assessment, participate in out-of-state meetings and provide information to the Department on a cooperative basis. The funding request for the counties is modest in that it will provide support for about two full time people in each county to follow the NNWSI Project. This level is well within the intent of the NWPA.

III. TASKS NOT RECOMMENDED

Based on the Guidelines developed by OCRWM, the tasks identified below are not recommended. They fall outside of the guidelines since they represent primary site characterization data collection and are duplicative of work being conducted by the NNWSI Project participants. The six tasks so specified are the following:

A. Unsaturated Zone Monitoring and Data Development (Research Project I--Phase II--Year 1) - $651,190

B. Regional Groundwater Flow and Hydraulic Conductivity Between the Repository Block and Adjacent Areas (Research Project II--Year 2) - $280,806

C. Distribution and Amount of Pluvial Climate Groundwater Discharge (Recharge) in the NTS Region (Research Project III--Year __) - $143,894

D. Analysis of Short Term Climate and Weather Influence on Surface Water Hydrology and Potential Recharge (Research Project IV--Year__) - $106,658

E. Assessment of Carbon-14 Age Data Corrosion for Water Sampled in the Yucca Mountain Area (Research Project V--Year__) - $162,461

F. Tectonic and Seismic Analysis of Yucca Mountain - $226,854

The dollar value of these six tasks is $1,571,863. We may be required to enter into negotiations on these tasks if the OCRWM policy is changed.

The following description of the six areas is my understanding of the proposed work and the statement as to why they are duplicative of work being conducted by NNWSI Project participants.

A. Unsaturated Zone Monitoring and Data Development - The State proposes to do the following:

1. Drill two holes at several locations in the unsaturated zone using a "dry" drilling technique with a hammer drill.

2. Instrument the bore hole and measure moisture content with neutron scatter, thermocouple psychrometers and other methods.

3. Develop method for extracting water from samples from the unsaturated zone and perform chemical analysis of the water.

4. Compare hydrological environment conditions from site to site.

5. Develop an understanding of ground water migration mechanisms in the unsaturated zone.

The NNWSI Project has done and will continue to do the following activities:

1. Drilled two deep holes "dry" in the unsaturated zone, UZ-1 (1200 ft.) and UZ-6 (2000 ft.), by a dual-wall, reverse circulation, vacuum-assisted method in air as the circulating fluid using a rotary drill. In coming years the NNWSI Project will drill two to three additional holes by this method. The NNWSI Project has also drilled two additional holes of intermediate depth (280 ft. and 350 ft.).

2. The NNWSI Project has emplaced access tubes for measurement of moisture content by neutron scatter, thermocouple psychrometers, heat dissipation probes (for moisture sensing), pressure transducers, and gases/water vapor sampling in UZ-1 and UZ-6.

3. Using the above instrumentation, the NNWSI Project made measurements that allowed for the understanding of the moisture movements in the unsaturated zone.

4. The NNWSI Project is currently testing several methods for extracting ground water samples from rocks in the unsaturated zone by mechanical compression, centrigue technique, nitrogen driving and a crush/flush technique. Methods for chemically analyzing the water samples are well developed and done routinely.

5. The NNWSI Project is comparing data taken from UZ-1 and UZ-6 and will compare it with data obtained at the other sites to be drilled in the future.

B. Regional Ground-Water Flow and Hydraulic Conductivity Between the Repository Block and Adjacent Areas. The State proposed to do the following:

1. Collect samples of precipitation at the Yucca Mountain site.

2. Collect water samples from the saturated zone on a periodic basis (once a month) from various wells and springs.

3. Perform chemical analysis of samples.

4. Do statistical analyses of data.

5. Develop a model that explains variation of groundwater chemistry.

The NNWSI Project has done and will continue to do the following activities:

1. Collection of precipitation at 11 stations in the Yucca Mountain region.

2. Collection of groundwater samples from the saturated zone and from springs.

3. Performs chemical and isotopic analysis of the water samples. Sampling has not been done in a repeated and periodic basis since changes over time at a given well has not exceeded the precision limit of the analytical methods.

4. The data has been evaluated for temporal and spatial trends with regard to the chemical compositions.

5. Regional and local ground water flow models have been developed that account for change in groundwater chemistry.

C. Distribution and Amount of Pluvial Climate Groundwater Drainage (Recharge) in the NTS Region:

The State proposes to conduct field work and make measurements that will establish the nature of the pluvial climate (the level of rainfall) as

a function of history. They also propose the study of spring deposits. From this they propose to derive the flux through the unsaturated zone and the level of the water table as a function of time.

The NNWSI Project is primarily concerned about two characteristics of the unsaturated zone, the level of the water table and the flux of water through the unsaturated zone. The Project has conducted numerous studies on paleoclimatology and paleohydrology to establish the historic variation of rainfall, the location at historic spring deposits and the evaluation of the variation of the water table level.

D. Analysis of Short Term Climate and Weather influence on Surface Water Hydrology and Potential Recharge. The State proposes to do the following:

1. Describe the climate and its variation at the site based on historic data.

2. Develop a description of the extreme climatic events and wet periods and the probability of their occurrence.

3. Provide estimates of the levels of infiltration for various soil covers.

4. Provide estimates of recharge.

The NNWSI Project has underway the following activities:

1. A study to evaluate the paleoclimate of the site that should provide estimate of the variation of the climate. In addition, a meteorlogical monitoring program will be started in this fiscal year to get site specific climate data. The Project has the historical climatic data from stations that surround the site; this latter data is considered of marginal value in establishing the historical climate at the site.

2. A study of water run off and flooding characteristics have been completed.

3. The estimation of the infiltration and recharge is a major part of the effort in the measurement of moisture movement in the unsaturated zone bore holes.

E. Assessment of Carbon-14 Data Corrections for Water Samples in Unsaturated and Saturated Tuff sequences in Yucca Mountain Area. The State proposes to do the following:

1. Measure the carbon-13 content of samples of carbonate mineral, soil carbon dioxide and carbonate content of water samples.

2. Establish the equilibrium between carbon-14 in the ground water and the carbon-14 in the environment.

The last item above is a necessary understanding if the quantity of carbon-14 in a sample is to be used to indicate the age of the water.

The NNWSI Project uses carbon-14 data to indicate the ages of ground water on a routine basis. If the correction factors that are being used are somehow inappropriate, then the Project is prepared to make whatever changes are necessary to fix the correction factor.

F. Tectonic and Seismic Analysis. The State proposes to do the following:

1. Use low sun-angle photography as a method to reveal faults.

2. Compare their findings with the Department's fault maps.

3. Field check results.

The NNWSI Project has done an extensive mapping of faults at the Yucca Mountain site using classical field mapping techniques. The fault maps have been published by the U. S. Geological Survey. The NNWSI Project considered low sun-angle photogdraphy; vertical photography and classical field studies were considered more effective methods as a primary exploration tool.

IV. SUMMARY

The State estimates, based on the September 17, 1984 proposal, to spend 3,496,307 in FY 1985. Based on current guidelines only 1,924,441 is considered to be appropriate. After evaluation of the individual cost elements that fall within the Department's Guidelines, it is deemed that these costs are justifiable. The size of the Grant request for FY 1985 is significantly greater than FY 1984. This increase represents a growing realization of the role the State will play in the active review of the Project and in the National program. We also must remain cognizant of the fact that Congress has taken a major step to involve the State and many of the activities will be breaking new ground in the Federal Government-State relationship.

Original Signed By
Donald L. Vieth

Donald L. Vieth, Director
Waste Management Project Office

WMPO:DLV-506

Enclosures:
As stated

cc w/encls:
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