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STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

**MEMORANDUM**

**Date:** February 6, 2003  
**To:** Brian Sandoval, Attorney General  
**From:** Marta Adams, Senior Deputy Attorney General *MA*  
**Subject:** Nevada's Cases Against the Yucca Mountain Repository

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Pursuant to your request, the following summary identifies pending cases and administrative actions concerning the Yucca Mountain matter.

**COURT OF APPEALS FOR THE D.C. CIRCUIT, WASHINGTON**

1. **Nevada v. EPA** (U.S. Court of Appeals for the District of Columbia Circuit, No. 01-71096) challenges the radiation protection standard set by the U.S. Environmental Protection Agency for the proposed high level nuclear waste repository at Yucca Mountain. The suit challenges EPA's radiation standard as not being protective enough of Nevada's groundwater and less stringent than the standard in place at Waste Isolation Pilot Plant (WIPP) in New Mexico. Nevada contends that the 10,000-year regulatory time period is contrary to the recommendation of the National Academy of Sciences, which is one million years. The NAS recommendation was required by the Energy Policy Act of 1992 to be adopted by EPA. Also, argues that EPA grossly gerrymandered the site boundary for measuring doses to the public so radionuclides could first be diluted in regional groundwater prior to measurement. Briefing is complete and oral argument on the merits is scheduled for September 2003 *in tandem* with cases 2 and 3 below.

2. **Nevada, Clark County, and the City of Las Vegas v. U.S. Nuclear Regulatory Commission** (U.S. Court of Appeals for the District of Columbia Circuit, No. 02-1116).

Challenge to the U.S. Nuclear Regulatory Commission Revised Licensing Rule for a Yucca Mountain Repository set by NRC in 10 C.F.R. Part 63. Claims that the rule departs from the Nuclear Waste Policy Act by (a) allowing the project to be licensed even though geology is not the primary isolation barrier, (b) allows the project to be licensed without DOE ever having to propound an affirmative safety case for the repository, and (c) fails to establish disqualifying criteria for the repository and its isolation barriers. The Petitioners' opening brief is due to be filed January 27, 2003, with final briefs to be filed April 28, 2003. This case will be argued in tandem in September 2003 with cases 1 and 3.

3. **Nevada v. DOE** (the "Guidelines Case") (U.S. Court of Appeals for the District of Columbia Circuit, No. 01-1516). Challenges the Yucca Mountain site suitability rules

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set by DOE in 10 C.F.R. Part 963. Argues that DOE changed the siting rules at the 11th hour because it could not meet the original suitability rules in Part 960. The new rule allows the "site" to be declared suitable on the basis solely of engineered barriers. The rule fails to require that the primary isolation barrier is geologic, as is mandated by the Nuclear Waste Policy Act. Also, argues that DOE failed to report to Congress and Nevada when it discovered in 1998-99 that the site was geologically unfit. This case has been consolidated with **State of Nevada, Clark County and the City of Las Vegas v. President Bush and Secretary Abraham** (D.C. Court of Appeals No. 01-1077), which challenges the Yucca Mountain site recommendations made by the President and the Secretary, claiming that they relied on the unlawful rules of DOE and failed to follow procedures specified in the Nuclear Waste Policy Act. This case has also been consolidated with **State of Nevada, Clark County and the City of Las Vegas v. DOE** ("NEPA Case") (D.C. Court of Appeals 02-1179), which challenges many aspects of DOE's Final Environmental Impact Statement for Yucca Mountain as being in violation of the National Environmental Policy Act and closely related provisions of the Nuclear Waste Policy Act. Among other things, argues that DOE's repository design, which includes an above-ground storage facility, is contrary to statutory provisions saying that any such facility cannot be located in Nevada. Also argues that the EIS was released with no Record of Decision, a statutory requirement that has apparently never before been violated. The Petitioners' opening brief was filed on December 2, 2002. Respondents' brief is due February 14, 2003, and Petitioners' reply brief is due April 29, 2003. This case will be argued *in tandem* with cases 1 and 2 in September 2003.

4. **State of Nevada, Clark County and City of Las Vegas v. United States, et al.** (D.C. Court of Appeals, Case No. 03-1009), challenges the constitutionality of the Yucca Mountain site selection without reliance on neutral geologic criteria.

**FEDERAL DISTRICT COURT IN LAS VEGAS AND STATE DISTRICT COURT IN TONOPAH**

5. **United States v. State Engineer** (5th Judicial District Court, Nye County, No. 15722). Filed by the United States on behalf of DOE following the State Engineer's denial of its applications for permanent water rights as a protective measure while the United States pursues its constitutional claims in federal court. Case is pending.

6. **United States v. State of Nevada** (U.S. District Court, No. CV-S-00-0168-DWH-LRL). Challenges the Nevada State Engineer's decision that DOE is not entitled to permanent water rights to construct and operate the repository based on the State Engineer's finding that the proposed use threatens to be detrimental to the public interest. The federal government has also amended its complaint to include the State Engineer's denial of extensions of certain temporary permits used by DOE for site characterization. On December 19, 2002, a stipulated agreement was reached

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between the State Engineer and DOE concerning DOE's water use for site maintenance and public safety. DOE has also filed a motion for summary judgment relying, inter alia, on the alleged preemptive effect of the congressional Joint Resolution overriding Nevada's notice of disapproval of the Yucca Mountain site. At this writing, the State's opposition is scheduled to be filed on December 27, 2002, although we are seeking a stay of the "permanent water rights" part of the case pending the outcome of the Yucca Mountain cases currently lodged in the D.C. Court of Appeals. (See items 1, 2, and 3 above.)

#### **PENDING ADMINISTRATIVE PETITIONS**

**Petition for Rulemaking with NRC:** Nevada has filed a petition requesting that the NRC conduct rulemaking on its safeguards against terrorism as applied to shipments of nuclear waste.

**Petition for Rulemaking with NRC:** Petition requests that NRC amend its repository licensing rules to demand (1) that NRC assure that geology is the primary isolation barrier, (2) that DOE must propound an affirmative safety case for the repository, and (3) that DOE must demonstrate the absence of technical disqualifying features of the site.

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