

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

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4
5 IN RE: AIKEN COUNTY,
6 Petitioner

7 No. 10-1050, et al.

8
9 Tuesday, March 22, 2011
10 Washington, D.C.

11 The above-entitled matter came on for oral
12 argument pursuant to notice.

13 BEFORE:

14 CHIEF JUDGE SENTELLE AND CIRCUIT
15 JUDGES BROWN AND KAVANAUGH

16 APPEARANCES:

17 ON BEHALF OF THE PETITIONERS:

18 ANDREW A. FITZ, ESQ.

19 ON BEHALF OF THE PETITIONERS:

20 BARRY M. HARTMAN, ESQ.

21 ON BEHALF OF THE RESPONDENTS:

22 ELLEN J. DURKEE, ESQ.

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1
2 THE CLERK: Case number 10-1050, et al., In Re:
3 Aiken County, Petitioner. For the petitioner, Mr. Fitz and
4 Mr. Hartman, for the respondent, Ms. Durkee.

5 ORAL ARGUMENT OF ANDREW A. FITZ, ESQ.

6 ON BEHALF OF THE PETITIONERS

7 MR. FITZ: Good morning, Your Honors, may it please
8 the Court, I'm Andrew Fitz on behalf of the State of
9 Washington, appearing today on behalf of all petitioners.
10 I'm going to speak on the NWPA merits for 10 minutes.
11 Mr. Hartman will take five minutes of the opening argument.
12 And I'd like to reserve five minutes for rebuttal.

13 Your Honors, on January 29th last year the
14 administration announced, quote, "the administration's
15 decision not to proceed with the Yucca Mountain Nuclear Waste
16 Repository." Starting the next business day, a Monday, the
17 respondents began terminating or abandoning every aspect of
18 the Yucca Mountain project.

19 But the NWPA is a unique statute in response to a
20 very unique problem, and the January 29th decision conflicts
21 with the NWPA on two levels. First, on a broader level, the
22 NWPA does not give the respondents authority or discretion to
23 terminate the only repository site they are authorized by law
24 to work on.

25 Second, on a more specific level, the specific

1 licensing provisions of the NWPA prevent license withdrawal.
2 They commit both the Department of Energy and the NRC to
3 reach a decision on the merits of DOE's license application.

4 JUDGE SENTELLE: Now, you named the NRC as a party
5 in this case. What have they done that we could find
6 erroneous and take action against that would right some wrong
7 that gives you standing?

8 MR. FITZ: Your Honors, we named the NRC in an
9 abundance of caution because it was clear on January 29th
10 that this process, which was going to involve the NRC at some
11 level, was going to implicate them.

12 JUDGE SENTELLE: But you understand we have to have
13 standing. We have to have rightness. For standing, you have
14 to have causation of a wrong to your party by the respondent
15 that we can remedy in this proceeding. Now, what is it that
16 NRC has done that you allege caused harm to your parties that
17 we can remedy in this proceeding?

18 MR. FITZ: Your Honor, my best answer to that is
19 that in our seeking of declaratory relief, and for the
20 mandamus petitioner's mandamus, it was clear at that point
21 that an action was going to be put before the NRC. And we
22 wanted, as we believe we have a provision in the Nuclear
23 Waste Policy Act allowing us to come to this Court directly,
24 and we wanted to shortcut that process in advance.

25 JUDGE SENTELLE: Does that sound like the sort of

1 thing that gives us article III jurisdiction under the
2 standing and ripeness doctrines, counsel?

3 MR. FITZ: Well, Your Honor, based on some of the
4 colloquies this morning, I think you've already formed an
5 opinion in that regard.

6 The bottom line is that the administration doesn't
7 like the choices Congress has made in law. It's solution is
8 to go to Congress. But the NWPA does not provide an avenue
9 to simply opt out of the entire statutory process.

10 I'm going to turn first to the broader merits of
11 the NWPA.

12 JUDGE KAVANAUGH: Can I ask one question before
13 that which is, the NRC could tomorrow or next week reject the
14 withdrawal motion application. And then your problem would
15 be solved --

16 MR. FITZ: We don't think --

17 JUDGE KAVANAUGH: -- at least temporarily, and
18 therefore, why shouldn't we wait for the NRC to act. And I
19 recognize your frustration and maybe your concern that they
20 won't act promptly, but they could act at any time on this.

21 MR. FITZ: I think the key to your question is that
22 first of all we have two different claims, and on the broader
23 claim, which suggests that there simply is not discretion to
24 terminate the entire process, the Department of Energy's
25 position on the merits here --

1 JUDGE KAVANAUGH: That's what the --

2 JUDGE SENTELLE: Yes.

3 JUDGE KAVANAUGH: That's what the Commission could
4 say.

5 JUDGE SENTELLE: Yes, the NRC could say that.

6 MR. FITZ: But the --

7 JUDGE SENTELLE: And we're back to why the NRC
8 should even be, why you have any kind of case against NRC.
9 They haven't done anything that I can find in your brief that
10 shows causation of harm, remedial in this action. And when I
11 asked you about it a while ago, your best answer seemed to
12 be, Your Honor, Your Honor's made your mind up about that.
13 That's not really an answer, counsel.

14 MR. FITZ: Your Honor, with respect to finality and
15 the NRC, the respondent's position is that this is the
16 secretary's prerogative to make this decision, and it's the
17 secretary's prerogative to withdraw from the process. And
18 the NRC cannot second guess that decision, that the only role
19 for the NRC is to decide --

20 JUDGE KAVANAUGH: I don't think they said that --

21 JUDGE BROWN: I'm sorry --

22 JUDGE KAVANAUGH: -- actually, but we'll ask them.
23 I didn't think that was the position. Obviously we have two
24 agencies involved here, one independent and one executive, so
25 it gets confusing. But I didn't understand it to be your

1 position that the NRC had no ability to reject the license
2 withdrawal application.

3 MR. FITZ: If you go back to the announcement on
4 January 29th, it announced the administration's decision to
5 not proceed with Yucca Mountain. The next day, they filed a
6 motion for stay before the NRC in which they said, we will
7 withdraw from the process. We will separately provide a
8 motion in which we will ask for the terms of the with
9 withdrawal, which I think by their argument is the only realm
10 in which the NRC can exercise authority on the withdrawal on
11 that.

12 JUDGE SENTELLE: That said, and I'm being a bit
13 narrower than the questioning of my colleague, why should we
14 not dismiss at least as to NRC? Because I've given you every
15 chance in the world beyond briefing now to tell us what it is
16 that you say is an action by this respondent causing harm to
17 your client that is remedial in this action? And I have not
18 yet received any kind of answer to that.

19 MR. FITZ: Your Honor, we looked at the process as
20 a whole, and although we think the decision is the decision
21 made on January 29th, which is final both with respect to --

22 JUDGE SENTELLE: Who made that decision?

23 MR. FITZ: It appears that it is the Secretary of
24 Energy at the direction of --

25 JUDGE SENTELLE: Did NRC make any decision on that

1 day?

2 MR. FITZ: I do not believe NRC had a role in that
3 decision.

4 MR. FITZ: Okay. Why shouldn't we dismiss as to
5 NRC? I'm not asking you to throw out your whole lawsuit, but
6 I've read your brief more than once. I've questioned you on
7 this subject more than once. And I have yet to come across
8 what it is you are saying NRC has done to you that we didn't
9 do anything about, in this action?

10 MR. FITZ: Your Honor, I will concede that under
11 the public citizen case where we filed petitions that named
12 the NRC, but the NRC has not yet acted, that may have been
13 premature.

14 JUDGE SENTELLE: Okay.

15 MR. FITZ: Thank you.

16 JUDGE BROWN: Well, could I ask you, because the
17 Board did make a decision, I think, on this motion to
18 withdraw. They denied it, correct? So doesn't that leave a
19 decision pending before the NRC?

20 MR. FITZ: The matter of whether or not to grant
21 DOE's motion to withdraw, whatever that may entail, is still
22 pending before the Commission. But our position is that the
23 Agency action that's relevant for coming to this Court under
24 the specific provision of section 119, was the decision made
25 by the Secretary at the direction of the President on January

1 29th. That every step after that, telling Nevada, we don't
2 intend to pursue water rights, eliminating an administrative
3 program, and going to the NRC and requesting withdrawal was
4 merely the execution of that final decision being on January
5 29th.

6 JUDGE SENTELLE: But wouldn't --

7 JUDGE BROWN: But that -- I'm sorry.

8 JUDGE SENTELLE: Go ahead.

9 JUDGE BROWN: But that decision, you know, is
10 buttressed on the withdrawal of their licensing application,
11 correct?

12 MR. FITZ: I think actually that decision goes far
13 beyond just the license application.

14 JUDGE BROWN: No, I understand that you are saying
15 they have done more than that, but whether they can continue
16 down that road depends on whether or not their attempt to
17 withdraw their license application is granted. Isn't that
18 true?

19 MR. FITZ: I think -- pardon me. In terms of
20 practice, that's certainly not the way they have acted.
21 They've been a one way track ever since January 29th. And I
22 think their position on the merits, again, the implication,
23 when you look at their merits argument versus the finality
24 argument, is that this is the secretary's decision.

25 And under the framework of section 114, there are

1 separate commands on the Department of Energy and NRC. DOE
2 is required to submit a license application. We argue that
3 is nondiscretionary.

4 JUDGE BROWN: Which they did.

5 MR. FITZ: Which they did. The NRC is commanded to
6 reach a final decision approving or disapproving issuance of
7 construction authorization, but nothing in the statute tells
8 NRC it has the authority to enforce against DOE, DOE's
9 obligations under the statute. And that's the job of this
10 Court.

11 JUDGE KAVANAUGH: We don't know yet, we don't know
12 yet that DOE would ignore a decision of the NRC. They may,
13 in which case I'm sure we would be back here. But we don't
14 know yet that they will do that, do we?

15 MR. FITZ: We have seen every action in practice
16 indicating that. The ASOP decision on June 29th --

17 JUDGE KAVANAUGH: It gets different --

18 MR. FITZ: -- was not even a speed bump for DOE.

19 JUDGE KAVANAUGH: Right, but chest pumping gets a
20 little different after you have an order from an independent
21 Agency ordering you to do something. Ignoring that seems a
22 little bit different than some of the statements you've
23 included in your filings from DOE.

24 MR. FITZ: But again, Your Honor, I think the key
25 is looking at what is the relevant action for this Court's

1 review. The relevant action is the decision made by the
2 Secretary. And the Secretary's perspective on this is that
3 it's my decision on whether I maintain a license application.
4 Their position on the merits is that they are the same as a
5 voluntary applicant.

6 JUDGE SENTELLE: Where is the best --

7 JUDGE BROWN: That's the merits argument. And what
8 we're trying to get at here is the ripeness and finality part
9 of this.

10 JUDGE SENTELLE: Yes.

11 JUDGE BROWN: When you get to the merits, that's a
12 different argument. But the question is, what action by this
13 department is the final action that we're supposed to review?

14 MR. FITZ: It's the decision made on January 29th
15 that Yucca Mountain is no longer a workable option and will
16 no longer be pursued.

17 JUDGE SENTELLE: What is the means of existence of
18 that decision? Is there an order or an opinion that we can
19 review on that?

20 MR. FITZ: There are two things on January 29th.
21 There was a press release in which the quota began.

22 JUDGE SENTELLE: Do you think we can review a press
23 release?

24 MR. FITZ: I think it can constitute Agency action
25 if it's final.

1 JUDGE SENTELLE: You do?

2 MR. FITZ: I do, under the CropLife case
3 specifically.

4 JUDGE SENTELLE: What's your best authority that we
5 can review a press release as final Agency action?

6 MR. FITZ: I would rely on the CropLife case, where
7 it's the totality of the circumstances. We had that
8 announcement.

9 JUDGE SENTELLE: Was that a press release?

10 MR. FITZ: It was a press release. It was, yes,
11 followed by -- and in that case, we actually didn't have
12 concrete --

13 JUDGE SENTELLE: Keep going. Keep going. Followed
14 by?

15 MR. FITZ: Well, in our case we have a press
16 release followed the next business day by filing a motion to
17 stay the ASLB proceeding.

18 JUDGE SENTELLE: Okay, now that's involving the
19 proceedings that lead to the point that is still ongoing for
20 NRC, right?

21 MR. FITZ: And then, Your Honor --

22 JUDGE SENTELLE: Correct. So that's not final
23 Agency action. That is, in effect, the filing of a motion, I
24 question whether that could ever be final Agency action until
25 it's ruled on by somebody.

1 MR. FITZ: Your Honor, we're not saying that the
2 motion itself is final Agency action. We're saying that
3 that's evidence that the announcement made on the --

4 JUDGE SENTELLE: I may be evidence of where they
5 are going, but we're not supposed to review things until they
6 get there. And saying that they have got there is going to
7 require some kind of final Agency decision. We have to have
8 finality. We have to have ripeness. We have to have
9 standing. We're an article III court. And it may be
10 difficult to find those things here.

11 MR. FITZ: I do believe they exist. I think that
12 it's not a matter of them waiting for the NRC. They've
13 already gone there. And the NRC process --

14 JUDGE KAVANAUGH: They've lost there, so far.

15 MR. FITZ: They've lost there so far, and they've
16 shown no adherence to that decision.

17 JUDGE KAVANAUGH: Well, because it's not final.

18 MR. FITZ: Well, and I question whether the process
19 before the NRC will ever become final because they're
20 terminating their own withdrawal.

21 JUDGE KAVANAUGH: Okay, but I'm not --

22 JUDGE BROWN: Well, now, there is a -- I'm sorry.

23 JUDGE KAVANAUGH: True enough, but then you can
24 file a mandamus petition compelling the NRC to act if it
25 delays unreasonably. We grant those on occasion, and

1 agencies usually act pretty quickly.

2 MR. FITZ: Your Honors --

3 JUDGE KAVANAUGH: Sometimes they act just when it's
4 filed and we ask for a response, then the Agency action
5 appears, and that could happen in this case.

6 MR. FITZ: Well, Your Honors, I would ask that you
7 review this issue in the unique context of section 119.
8 There is a 180-day period for us to file, based on an action
9 or a final decision of the Secretary. And I have a high
10 degree of confidence that if we wait until the NRC does
11 something, if it does anything, that when we file at that
12 point, the respondents may come back and say, actually, that
13 decision was made back in January 29th of 2010.

14 JUDGE SENTELLE: Wouldn't you think they'd have a
15 rather hard time convincing that that was a final decision if
16 the ruling authority had not ruled yet at that point?

17 MR. FITZ: I don't think that their premise on
18 January 29th was that they needed the NRC's permission.
19 That's the key. And they proceeded on that assumption.

20 JUDGE SENTELLE: Did they make a motion to withdraw
21 their application?

22 MR. FITZ: They did.

23 JUDGE SENTELLE: Yes.

24 MR. FITZ: But in that decision, they maintained
25 that the only matter --

1 JUDGE SENTELLE: Did they make a motion to withdraw
2 the application?

3 MR. FITZ: -- before the NRC was whether to
4 condition their withdrawal with prejudice, which doesn't go
5 to the issue of whether they can withdraw. And that's the
6 key here. What is before the NRC is only a small slice of
7 the issue. And the actual decision and everything set in
8 course was made back on January 29th.

9 JUDGE BROWN: You said at one point, maybe the NRC
10 will not decide. If they fail to decide, I mean, one
11 argument that you make a little bit in your brief, but don't
12 really follow through is that inaction might, in fact, be a
13 final Agency action. So if the NRC, in fact, does not rule
14 on this pending decision, could you make the argument that
15 that, in fact, is final Agency action?

16 MR. FITZ: I think we could. I think it would be a
17 separate final Agency action, in effect. But I don't think
18 that that takes away from the fact that we already have a
19 final Agency action that is ripe for review by this Court
20 under section 119.

21 Your Honors, I'm close to running out of time on my
22 opening. I just want to make the following points on the
23 merits.

24 The NWPA is a comprehensive scheme that directs the
25 Secretary on a step-by-step process to look at only one

1 repository site. To the extent that the statute has told the
2 Secretary to have an orderly close out or review of any other
3 site. It's the only site the Secretary has authorized by law
4 to consider and work on that's the very repository being
5 rejected. There simply isn't room for the secretary to
6 exercise that discretion.

7 The respondents argue that the Secretary has
8 unfettered termination discretion at this point in the
9 process. That doesn't jive with the very specific grant of
10 termination authority in section 113(c)(3) which has limits.
11 It was only to characterization activities, and didn't
12 finally foreclose the site.

13 JUDGE KAVANAUGH: Is there any basis on which DOE
14 could ever withdraw?

15 MR. FITZ: I don't believe there is. I think that
16 DOE could go to the NRC through whatever procedural mechanism
17 might be available in that proceeding and say to the NRC,
18 this issue reaches the merits of our application. We think
19 you should disapprove the application based on this
20 information. But the key is, it's the NRC's decision under
21 the statute.

22 JUDGE SENTELLE: Okay. Thank you, counsel.

23 MR. FITZ: Thank you, Your Honor.

24 JUDGE SENTELLE: We'll hear from the other counsel
25 for petitioners.

1 ORAL ARGUMENT OF BARRY M. HARTMAN, ESQ.
2 ON BEHALF OF THE PETITIONERS

3 MR. HARTMAN: May it please the Court, my name is
4 Barry Hartman. I'm counsel for the individual petitioners
5 beginning with Robert Ferguson, but again am also speaking
6 for the other petitioners as well.

7 Your Honor, I'm going to address three issues very,
8 very quickly. And I'm going to assume for the moment that
9 the Court does find that there is final Agency action as to
10 the Secretary.

11 But the first point I would like to address is
12 this, we sued the President. It's a very unusual thing. We
13 submit that it was proper to sue the President, whether or
14 not we also sued DOE or anybody else, because the President
15 also made a final decision here under the Nuclear Waste
16 Policy Act. And that evidence of that decision is not only
17 in the press release, but in our supplemental appendix we
18 have the recording of the announcement by his aide.

19 JUDGE SENTELLE: About the President, going back to
20 Youngstown Steel and Tube --

21 MR. HARTMAN: Yes.

22 JUDGE SENTELLE: -- and before, the general rule
23 has been, we have not granted relief against a President if
24 there are subordinate officials against whom relief could
25 run.

1 MR. HARTMAN: That's yes.

2 JUDGE SENTELLE: Are you saying here there is no
3 subordinate official against whom somebody occupying the role
4 of the Secretary of Treasury in Youngstown or the various
5 cabinet positions who have been the subject of relief before?

6 MR. HARTMAN: Not based on the facts of this case,
7 Your Honor.

8 JUDGE SENTELLE: Pardon me?

9 MR. HARTMAN: Not based on the facts of this case,
10 and I'll tell you why. If you look at the press announcement
11 that was made on January 29th, and we've provided in the
12 record at SJ, in the supplemental appendix at 261, the actual
13 tape recording. And here's what was said.

14 A question was asked, I was wondering, what's the
15 reason Yucca Mountain is not an option for this
16 administration and what scientific reviews were done by the
17 administration to reach that judgment.

18 And here is what the President's representative,
19 his czar, Carol Browner, said on behalf of the President. We
20 work for the President. We take our directions from the
21 President. The President has been clear that Yucca Mountain
22 is not an option now. It's the President who made this
23 decision.

24 JUDGE SENTELLE: Well, that's the case generally.
25 The buck stops there. Whether you want to use the term

1 unitary executive or not, Youngstown is the classic case on
2 this. Harry Truman was the man who said, seize the steel
3 mills. But the Secretary of the Treasury, I believe it was,
4 anyhow, his cabinet secretary was the defendant.

5 Why is this different than the ordinary, if there
6 is such a thing as ordinary, than the historic kinds of cases
7 where we have, we as courts in general have withheld our hand
8 from the President in the past?

9 MR. HARTMAN: Because unlike Youngstown Steel, the
10 buck didn't stop at the President. The buck started with the
11 President. He directed the Secretary to act. We're not
12 suing him simply because he's his boss. All the evidence
13 that we have is that the President directed this to happen.
14 The President said it's off the table.

15 JUDGE SENTELLE: I don't see how that takes this
16 out of the ordinary around a Presidential case, if there is
17 such a thing as ordinary. The President is always the final
18 decision maker for cabinet level officials. If he says no,
19 then it's no. Lyndon Johnson said, and I'll clean it up a
20 little, but Lyndon Johnson said, there are elephants and
21 insects on this cabinet, and there's one elephant.

22 MR. HARTMAN: And our --

23 JUDGE SENTELLE: I don't see how or why you think
24 you have a lawsuit against the President here as opposed to
25 the functionaries below the President.

1 MR. HARTMAN: And again, Your Honor, the only way I
2 can answer that question is by the facts which indicate the
3 President ordered the Secretary to shut down Yucca Mountain.

4 JUDGE SENTELLE: And again I've got to say, how is
5 that different than Youngstown or any other Presidential
6 authority case? There is a unitary executive, whether we
7 like to use that term or not. It all comes back up to one
8 buck stop.

9 MR. HARTMAN: I understand that, Your Honor. All I
10 can say is, these are what the facts are, and I think it
11 differs in that the President didn't -- the government cited
12 no authority for the President to issue that order.
13 Absolutely none.

14 And there have been cases such as Chambers and the
15 Swann cases where the President may be sued, where the
16 President acts ultra vires or in an unconstitutional fashion.
17 And we argue that he acted ultra vires, because he was acting
18 outside any authority he might have under the Nuclear Waste
19 Policy Act, and is acting unconstitutionally under the
20 separation of powers doctrine, because he doesn't have the
21 authority to change a statute that Congress passed that told
22 the secretary and he to take certain actions, which he has
23 now basically reversed.

24 Under that statute, he was required to make
25 recommendations as to a site. He made a recommendation as to

1 the site. He's now reversed it. He had no authority to
2 reverse it. And that's him. The President is specifically
3 named in this statute as opposed to other circumstances where
4 it's simply, the President is the boss. He's named. He was
5 to make a recommendation. He made a recommendation. And now
6 he's saying, never mind, take it off the table. That's why
7 this case is different and why it's appropriate --

8 JUDGE KAVANAUGH: It was a different President.

9 MR. HARTMAN: I'm sorry.

10 JUDGE KAVANAUGH: It was a different President.

11 MR. HARTMAN: The statute says, the President,
12 whoever is saving in that office.

13 JUDGE KAVANAUGH: I take the point. You were
14 implying that it was one and the same person.

15 MR. HARTMAN: No, I apologize. I don't mean to
16 imply that. It says, the President, whoever the President
17 is, is obligated to follow those same laws.

18 Beyond that, Your Honor, assuming that this is a
19 final decision for the moment, even if the government is
20 correct that the Nuclear Waste Policy Act somehow gives the
21 Secretary authority to dismantle this entire process, the
22 decision that was made here is clearly arbitrary and
23 capricious under the administrative procedures act.

24 When that decision was made, it was made according
25 to the Secretary and Carol Browner because the President told

1 us to do so. In the government's brief they said, we're
2 making this decision because it's not a workable option. But
3 we submit to you, if you look at the record that they cite,
4 there is nothing there that supports the notion that it's not
5 a workable option, assuming that's even a standard that's
6 recognized on the statute.

7 They say, times have changed, but if you look at
8 the record on page 769, for example, they cite to their own
9 brief before the NRC which cites 1990 technology issues. Yet
10 now they say, science has changed. There is no basis for
11 this decision that can be recognized in any statute that
12 wouldn't make it arbitrary and capricious. There's no
13 standards that they can cite to that wouldn't make it
14 arbitrary and capricious.

15 JUDGE SENTELLE: And we're past your allotted time.
16 Unless my colleagues have further questions, we'll hear from
17 the respond.

18 MR. HARTMAN: Thank you very much.

19 JUDGE SENTELLE: Thank you, counsel.

20 ORAL ARGUMENT OF ELLEN J. DURKEE, ESQ.

21 ON BEHALF OF THE RESPONDENTS

22 MS. DURKEE: May it please the Court, my name is
23 Ellen Durkee. I'm with U.S. Department of Justice for
24 respondents.

25 The petition should be dismissed because judicial

1 review in the present posture is neither appropriate nor
2 available. If it were available, then the petition should be
3 not denied on the merits. But this case seems rather simple
4 from our perspective because it's so obviously there is no
5 Agency action for this Court to review. It's neither --

6 JUDGE SENTELLE: What if the NRC never acts? Is
7 there never a remedy? There's a motion pending for NRC.
8 It's been pending quite a while. Suppose it's pending 20
9 years from now. Has there been no remedy in the meantime?

10 MS. DURKEE: Your Honor, I think this is a very odd
11 posture because the relief that they are seeking from this
12 Court they have already gotten from the licensing board.

13 JUDGE KAVANAUGH: It's a pretty direct question,
14 which is, does it ever become final if NRC doesn't act? And
15 I'll add a subpart which is, by when must they act?

16 MS. DURKEE: Let's see. It does not become final
17 -- well, okay. If NRC's Commission does not overturn the
18 licensing board's denial of the motion, then it does not
19 become final.

20 JUDGE SENTELLE: Ever?

21 MS. DURKEE: And if it never acts to --

22 JUDGE SENTELLE: They never get remedy if NRC sits
23 on this motion for the next 20 years, they can't get any
24 remedy?

25 MS. DURKEE: But they have the remedy from the

1 licensing board. It's DOE that's trying to get a Commission
2 review. And that's what's the odd thing to me about why they
3 are pursuing the petitions, because they have gotten their
4 remedy.

5 JUDGE SENTELLE: Yes. We're still at the
6 jurisdiction stage now. But you're boring over into motions,
7 into merits now. And our question is, one of the things that
8 makes it look as if we don't have jurisdiction is that there
9 isn't finality.

10 Now, they're saying NRC, I'm putting words in their
11 mouth, they're not actually saying, but suppose they say, the
12 NRC is never going to act, therefore, we can never get the
13 Court to review what's gone before.

14 Now, you would say it doesn't matter because they
15 wouldn't win on the merits anyway. But that's a different
16 question. Right now, we're wanting to know, what happens if
17 the NRC never acts? By when does the NRC have to act. What
18 can we do about it if they don't act?

19 MS. DURKEE: Well, there's no particular deadline
20 for the NRC to act. But I think that if delay, if the
21 Commission acting is what these folks need in order to get
22 relief, I'll accept that as the premise, then the means to
23 get the Commission to act would be to bring a new petition
24 that alleges unreasonable delay. And then they would have to
25 show through the track factors whether there has, you know,

1 been unreasonable delay. And the Court, you know, then would
2 evaluate whether it's unreasonable and then could make an
3 order in the context of that petition about whether the
4 Commission should act.

5 JUDGE BROWN: But doesn't, NRC has actually a
6 deadline under the statute for approving or disapproving this
7 license.

8 JUDGE SENTELLE: Yes.

9 JUDGE BROWN: And what's happening now is, because
10 they have never said whether or not they agree with the
11 Board's decision, they never have to go on to their
12 obligation under the statute to actually look at the license.

13 MS. DURKEE: Your Honor, I think it's, the premise
14 that they never have to go on to look at the license is
15 incorrect. The licensing board denied the motion. The
16 license application is pending. The licensing proceeding is
17 going forward.

18 Now, at this, you know, in the past few months,
19 there has not been much activity that DOE has had to do,
20 because there is no discovery deadline.

21 JUDGE KAVANAUGH: Because it's not really going
22 forward.

23 JUDGE BROWN: How is it going forward?

24 JUDGE SENTELLE: Right.

25 MS. DURKEE: No, Your Honor, I want to make it

1 clear. NRC recognizes --

2 JUDGE SENTELLE: It's going forward by standing in
3 place.

4 MS. DURKEE: NRC recognizes that when the licensing
5 board is denied their motion, that they must continue to
6 participate in the licensing proceeding. And they are doing
7 so. It's not as though we don't have representatives
8 participating in the proceeding.

9 JUDGE KAVANAUGH: If the NRC rejects DOE's effort
10 to withdraw the license, will DOE comply?

11 MS. DURKEE: If the NRC rejects the motion to
12 withdraw?

13 JUDGE KAVANAUGH: Yes.

14 JUDGE SENTELLE: Yes. What happens next?

15 JUDGE KAVANAUGH: Will DOE comply?

16 JUDGE SENTELLE: Well, I think that we would
17 evaluate whether that could be appealed and at the same time
18 we would be sort of in the same position we are, too. I think
19 the DOE and Department of Justice recognize that when you
20 have an order, you comply with that order until you can get
21 it overturned. And, you know, I think DOE would be well
22 within it's rights --

23 JUDGE KAVANAUGH: If it's not --

24 MS. DURKEE: -- to see if it could appeal that,
25 but --

1 JUDGE KAVANAUGH: Yes. If it's not overturned on
2 appeal will DOE comply?

3 MS. DURKEE: Yes. They have been clear throughout
4 this process that if they were required in a non-appealable
5 order and subject to funding, that they will comply and go
6 forward with the license application process.

7 JUDGE BROWN: But if that's the case, why wouldn't
8 they wait to see how the issue is resolved before they
9 dismantle --

10 JUDGE SENTELLE: Yes.

11 JUDGE BROWN: -- all of these units that are
12 working on this, which they are doing. You submitted an
13 affidavit saying that's exactly what they are doing.

14 MS. DURKEE: Well, first of all, the office that
15 was closed was working on things that go beyond the licensing
16 application in prior years. And there has really been no
17 argument that they have to build a railroad or do any of
18 those activities under the Nuclear Waste Policy Act at this
19 time.

20 Now, in terms of licensing support, the DOE was
21 trying to act very responsibly because they understood that
22 there was proposal to end funding for license approach, and
23 that what they were doing was a very responsible approach, to
24 put the documents in a preserved state under the licensing
25 application, so that it can be restarted without losing that

1 information because of a sudden close down.

2 JUDGE KAVANAUGH: You dismantle government programs
3 just because there has been a proposal to end funding?

4 MS. DURKEE: Well, I think all government --

5 JUDGE KAVANAUGH: There are lots of proposals to
6 end funding.

7 JUDGE SENTELLE: Yes, it happens all the time.
8 Capitol Hill is full of them right now.

9 MS. DURKEE: Two points. Yes, I think government
10 agencies are prudent to make plans if they know that there is
11 going to be a --

12 JUDGE KAVANAUGH: Plans is different from what's
13 going on here.

14 MS. DURKEE: Okay. The second point that I'd like
15 to make about that is that the Secretary of Energy has non-
16 reviewable discretion to change the organization of his
17 office. Now, to say that the Office of Civil Radiation Waste
18 Management has closed is not to say that there is no one at
19 the Department who can support the license application
20 proceeding.

21 In the closure it was also specified that the
22 obligation, the kinds of responsibilities that office had
23 were being moved to other sections within the Department of
24 Energy. And that is, you know, this Court does not sit to
25 superintend departments about what they have to call their

1 offices or who they have to staff in particular. I mean,
2 there's no cause of action for that kind of thing.

3 So, you know, the -- I do just want to reassure the
4 Court that if, and so I'll say it again, if there is a non-
5 appealable order that the licensing proceeding must proceed,
6 the DOE will abide, you know, by that requirement and
7 proceed. And DOE will find people to support the licensing
8 proceeding in that.

9 It does not, it is not required for those people to
10 be employed at a particular office. And it has its own
11 discretion about how he wants to staff that.

12 JUDGE KAVANAUGH: You represent NRC here as well,
13 correct?

14 MS. DURKEE: Yes.

15 JUDGE KAVANAUGH: When do they expect to act?

16 MS. DURKEE: That I am not privy to because, you
17 know, I'm representing them --

18 JUDGE KAVANAUGH: So you can't, even with this
19 case --

20 JUDGE SENTELLE: You're not inside counsel. You're
21 outside counsel. Right?

22 JUDGE KAVANAUGH: Even with this case coming up
23 there was no effort to be able to represent the Court by when
24 NRC might act?

25 MS. DURKEE: Well, I -- no.

1 JUDGE SENTELLE: Try another one.

2 MS. DURKEE: I have asked NRC that. The NRC
3 counsel is not in a position to know when NRC is going to
4 act. I mean, I apologize but --

5 JUDGE KAVANAUGH: That's fine.

6 MS. DURKEE: You know, I think there is nothing
7 more I can say about that. It's a little bit like asking a
8 Court when they are going to make a decision. That's
9 something that generally people are not privy to.

10 JUDGE KAVANAUGH: Well, you're representing them,
11 though. It's a little different. You're not representing
12 the Court. They're your client, judging by the brief.

13 MS. DURKEE: Then I'll just stay with that. I
14 don't know when they are going to act.

15 Your Honors, I think that given the focus today on
16 whether there is a reviewable action, I'm not going to turn
17 to the merits unless the Court has specific questions about
18 that. But you know I think the Court understands, a motion
19 to withdraw is not a final Agency action. If so, every
20 motion anyone files in a Court by the government would be
21 final Agency action.

22 Until the NRC makes a decision that is adverse to,
23 you know, that actually grants the motion to withdraw, we do
24 not see how these people have a final Agency action that
25 adversely affects them, and how they can seek relief from

1 this Court for just the mere filing of that motion.

2 JUDGE BROWN: What if the NRC just doesn't make
3 that decision? I mean, I think this question has been asked
4 before, but it seems to me that if, by their inaction, they
5 have effectively decided, that is to say they don't go ahead
6 with the license review, can't that be challenged?

7 MS. DURKEE: Again, I think it can be challenged
8 perhaps by either party and whether there is unreasonable
9 delay if they can show that they are injured by it in not
10 deciding. But again, the licensing board decision is the
11 operative decision now. It's, you know, it's DOE that's
12 injured by the decision. But DOE understands there is a
13 process, and far from abandoning the process, we are trying
14 to follow regular administrative review processes.

15 So if the, you know, Commission -- I mean, the
16 other thing I would like to say is, you know, at this point,
17 I don't think it's been that lengthy a period of time. I
18 mean, the Commission is a deliberative body. It has to, you
19 know, it would right an opinion, ordinarily, in this kind of
20 situation, and so, you know, I don't think we're too the
21 point of unreasonable delay.

22 But if it continued and it really did injure some
23 party by not having it, then those parties would have to come
24 to Court and bring an unreasonable delay claim.

25 JUDGE KAVANAUGH: There's some indication -- keep

1 going.

2 MS. DURKEE: In the meantime, the licensing
3 proceeding is not abandoned. It is pending. It is ongoing.
4 Now, petitioners may not like how it is going, but that's not
5 something that they, you know, going back to, Congress gave
6 the NRC, you know, an amount of time to decide the license
7 application. We're not anywhere near the end of that time
8 period.

9 JUDGE KAVANAUGH: We're close.

10 JUDGE BROWN: Well, we are, actually, near it.
11 It's June of this year, isn't it?

12 MS. DURKEE: No, actually, the three-year period
13 would be up in September, because it's from when it's
14 docketed. And there is a mechanism to get additional time in
15 the statute.

16 JUDGE BROWN: Well, let me ask you something
17 slightly different. If the NRC did the same thing while this
18 decision is pending, that the DOE has done, what I mean is,
19 if they started to remove staff from the review of this
20 license, started to close down units that would be working on
21 the Yucca Mountain licensing application, would that be the
22 sort of decision which the petitioners here could challenge
23 as inaction that amounts to a final agency action?

24 MS. DURKEE: Well, I don't know if they have a
25 valid, you know, could put together a valid claim on that

1 score. But I do know this, there is a lot of case law in
2 this Court about being curably premature doctrine. So if
3 they, you know, they filed their petitions back in February
4 and March of last year. All the things that they are
5 alluding to are, you know, criticizing, have occurred much
6 later than that.

7 So, you know, the incurably premature doctrine
8 says, you can't then sort of be -- a claim can't become ripe
9 later. You know, if it becomes ripe later, you can't just
10 add it to your petition. You have to file a new petition.

11 So I think that in terms of whether there would be
12 relief, I really can't speculate, because I don't know what
13 action, and whether, you know, it would be considered a final
14 Agency action, or whether it's an order that's, you know,
15 reviewable, or whether they could put together an inaction
16 claim. But what I do know is that they would have to bring
17 it in a new petition.

18 And the last comment I would like to make is, there
19 is a lot of reliance on this January 29th press conference.
20 And I just, I think the Court understands that decisions are
21 implemented through actions, and the action of implementing
22 here would be the motion to dismiss.

23 But I also sort of reacted when you said it was
24 very clear, you know, there was no indication from the press
25 conference that they would be filing a motion to withdraw.

1 This was a press conference announcing the members of the
2 Blue Ribbon Commission. This was, the focus of this was not
3 on what would have to be done to terminate, you know, Yucca
4 Mountain.

5 And they pulled one, you know, comment by some
6 staff person, out of context of, you know, why did you do
7 this. I mean, other people in the press conference then
8 proceeded, you know, to answer the question, and so on. So
9 it just, they are trying to build too much on very, very
10 little. And it will all suffice.

11 JUDGE KAVANAUGH: Well, since you put it out there,
12 it does seem the DOE has made a considered decision not to
13 comply with the law passed by Congress.

14 MS. DURKEE: No. DOE takes the position that they
15 are complying with the law passed by Congress.

16 JUDGE SENTELLE: Okay.

17 JUDGE KAVANAUGH: Let's see what NRC says.

18 JUDGE SENTELLE: Okay. Thank you, counsel. Let me
19 give you a minute to decide which one of you -- how do you
20 all want to divide up three minutes for rebuttal? Okay. You
21 don't want to get back up here, do you?

22 MR. HARTMAN: I'd be happy to, Your Honor.

23 REBUTTAL ARGUMENT OF ANDREW A. FITZ, ESQ.

24 ON BEHALF OF THE PETITIONERS

25 MR. FITZ: Your Honors, I'm going to cover three

1 points. The first is, that I heard counsel say that aspects
2 of the Yucca Mountain project beyond the license application
3 have been dismantled. And that's our point.

4 The NRC process is one subpart of a larger whole.
5 And the decision made on January 29th, which if you go to JA-
6 685 you'll see it's not in the context of spoken press
7 conference comments, it's actually in a release, was a
8 decision --

9 JUDGE SENTELLE: But again, counsel, it's not our
10 habit to consider press releases to be a final Agency action.

11 MR. FITZ: It may not be your habit, Your Honor,
12 but --

13 JUDGE SENTELLE: You cited a case that I am
14 misplacing for the moment, where you said that was done, but
15 that's --

16 MR. FITZ: Specifically, it's the CropLife case.
17 And the key thing about CropLife was that the EPA announced
18 it was no longer going to use third party human testing for
19 pesticide issues. The finality didn't depend on EPA then
20 rejecting the next time someone said, you know, we want you
21 to utilize this testing.

22 At that point there was an unequivocal statement of
23 agency intent that didn't go through APA rulemaking, but had
24 the same effect. And it was challengeable as a final action
25 under the APA.

1 And in this case we had an unequivocal decision on
2 January 29th, followed by events beginning the next business
3 day, all of which are to execute that decision.

4 JUDGE SENTELLE: Did you cite that case in your
5 reply brief?

6 MR. FITZ: The case is in both the opening brief --

7 JUDGE SENTELLE: Okay. Thank you.

8 MR. FITZ: -- and it's cited by reference back to
9 the opening brief in the reply brief, when you said that the
10 respondents hadn't addressed that authority.

11 Your Honor, the broader challenge, and I will note
12 that the Ferguson plaintiffs are not even before the NRC,
13 because their beef, you know, was crystalized on January
14 29th. They said, at that point, you have made a decision
15 that everything touching the Yucca Mountain project is going
16 to be dismantled, not just licensing process, but everything
17 having to do with it. And you are in error of law in that
18 decision. You do not have the legal authority to move
19 forward with anything that would effectuate that decision.

20 That is the key here. And that is exactly what has
21 happened here. The license --

22 JUDGE KAVANAUGH: But if the NRC rejects, agrees
23 with the board and rejects DOE's motion to withdraw, and as
24 has been represented here today, DOE complies, and then there
25 is a final decision that soon, in the next few months, or if

1 there is an extension by NRC on the license application, then
2 things will be moving forward as you would have anticipated,
3 even absent the January 29th press statements?

4 In other words, DOE might have been stating an
5 intent, but if, as represented here, they are going to comply
6 with what the NRC says, subject to judicial review, it seems
7 that solves the problem.

8 MR. FITZ: But again, within the framework of the
9 NWPA, the NRC's role is limited right now to judging the
10 merits about license application. And our broader challenge
11 goes beyond the license application. The NRC does not have
12 authority to compel DOE to reconstruct its program or to work
13 on those elements beyond the license application that have
14 now been dismantled, and that we maintain were dismantled in
15 error of law.

16 JUDGE KAVANAUGH: Like I said, yes, that raises
17 what they are going to do if the NRC rules against them. And
18 I think it's unclear, at least as represented today, it
19 sounds like they are going to comply. Now, maybe they will,
20 maybe we have different definitions of comply, or you and the
21 government would have different definitions of comply. At
22 least that was what was told to us here today.

23 MR. FITZ: Well, Your Honors, I know I went into
24 the merits, and their merits position, but I really think
25 that the key here, as I see it, and it's incredibly

1 frustrating for us, is that the finality issue is used as a
2 smoke screen. When their decision, in terms of what they
3 thought their authority was on January 29th, was an authority
4 to put the brakes and terminate the entire project.

5 JUDGE KAVANAUGH: Right. But how is the smoke
6 screen when maybe they thought they were the final word, but
7 as it turns out, there is an independent agency that also has
8 a role here, not just the executive agency, and the
9 independent, the executive agency has to comply, or at least
10 it said it would comply? There has been no indication, for
11 example, that the president would direct the NRC what to do.

12 MR. FITZ: Again, I would go back to the nature of
13 the decision made on January 29th, and the fact that they
14 have taken every action to effectuate that decision. I mean,
15 right now the license application in front of the NRC is in
16 the care of an attorney's name.

17 There is not a single staff person at DOE to
18 actually work on that license application if the NRC revives
19 this proceeding. And the NRC itself has told NRC staff to
20 stop working on that license application.

21 JUDGE SENTELLE: How do we know --

22 MR. FITZ: The unique thing about this law is that
23 section 119 gives us the ability to come to this Court after
24 a final decision, final decision or action within 180 days.
25 And it's part of --

1 JUDGE KAVANAUGH: I think Chief Judge Sentelle ask
2 you how, and you didn't hear it.

3 JUDGE SENTELLE: How do we know that they've quit
4 working on that, and what's the significance of us knowing it
5 if we do?

6 MR. FITZ: There are several pieces that we put in
7 the supplemental authorities, Your Honor. Some, I
8 acknowledge, were impressed, but others were --

9 JUDGE SENTELLE: Are they in the record?

10 MR. FITZ: They are not in the record for purposes
11 of the Agency decision, but there are precedents from this
12 Court, and I can provide a citation where the Court can take
13 notice of those when it comes to issues of whether an Agency
14 action has been taken or finality. Specifically, Nebraska v.
15 EPA, 331 F.3d 995, pinpoint is 998, footnote 3. I have some
16 other citations as well.

17 Your Honors, just to summarize, the license
18 application is only one part of this decision. The decision
19 is larger than just the license application and the decision
20 under the rubric of the CropLife case unquestionably has been
21 made.

22 Under the unique review provision of the NWPA, we
23 are afforded the right to come to this Court and challenge
24 that decision within 180 days. That's why we are here. This
25 process is vital to our constituents in Washington,

1 constituents in South Carolina, in Aiken County, and for
2 people situated near stored, indefinitely stored, high level
3 waste. And what we are seeking here is redress for that, as
4 provided by Congress in the statute. Thank you.

5 JUDGE SENTELLE: Thank you, counsel. The case is
6 submitted. Give us a recess.

7 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Teresa S. Hinds

Date

DEPOSITION SERVICES, INC.