Federalism in the Context of Yucca Mountain: Nevada v. Department of Energy

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Nuclear waste policymaking evokes heated debate. The 1990 designation of Yucca Mountain, Nevada as the sole site to be considered for a nuclear waste repository instigated a fierce and continuing political war between the state of Nevada and the Department of Energy. In the most recent battle, Nevada v. Department of Energy, the Ninth Circuit Court of Appeals found for the Department of Energy on a funding issue. This case is significant, not simply because of the issue that it decided, but because it represents the latest in a long line of decisions testing the constitutional viability of federal nuclear waste policies.

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The United States must develop a long-term nuclear waste plan. Regardless of who the interested parties are, almost everyone "believe[s] that nuclear waste is an undesirable consequence of a delicate enterprise, that something must be done about it, that the entire nuclear community has waited too long to deal with the problem, that waste management is expensive, and that virtually no one wants it." The critical issue therefore is not whether nuclear waste repositories should be constructed but rather when and where such repositories should be built and who should be responsible for disposing of high-level nuclear waste.

The Ninth Circuit recently refereed the latest round in the on-going battle over nuclear waste disposal. In *Nevada v. United States Department of Energy,* the state of Nevada challenged a Department of Energy ("DOE") funding decision relating to the DOE's ongoing repository site characterization activities at Yucca Mountain, Nevada. This Note discusses the specific

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2. See generally *Nevada v. United States,* 133 F.3d 1201 (9th Cir. 1997) (*Nevada*).
3. *Id.*
4. See 42 U.S.C. § 10101(21) (1997) (providing that the DOE is allowed to conduct "site characterization" activities at Yucca Mountain including on-site evaluating and testing that will enable the DOE to determine whether Yucca Mountain is an appropriate location for a nuclear waste repository).
5. See *Nevada,* 133 F.3d at 1204.
implications of the Ninth Circuit’s decision in Nevada, as well as the more general and far-reaching ramifications of nuclear waste disposal policy as implemented by Congress and interpreted by the judiciary.

I

BACKGROUND FEDERAL NUCLEAR WASTE POLICY

A. The Atomic Energy Act

Fifty-six years ago, Congress passed the Atomic Energy Act of 1954 intending the Act to encourage private-sector participation in the development of the nuclear energy industry. Initially, participants in the private nuclear industry were “led to believe that spent nuclear fuel would be reprocessed and recycled” and that the federal government would build high-level nuclear waste repositories if the need arose. Nevertheless, by the 1970’s, it became apparent that reprocessing and recycling the bulk of spent nuclear fuel was not a viable option. As waste accumulated in on-site disposal facilities, industry organizations began insisting that the federal government intervene, take title to, and dispose of the spent fuel. Finally, on October 18, 1977, the DOE announced its new policy of taking title to and responsibility for the storage and long-term disposal of spent nuclear fuel.

6. Id. at 1207-08.
7. 42 U.S.C. §§ 1101 et seq.
8. See, e.g., Nevada v. United States Dept’t of Energy, 993 F.2d 1442 (9th Cir. 1993); Nevada v. Watkins, 943 F.2d 1080 (9th Cir. 1991) [Watkins II]; Nevada v. Watkins, 939 F.2d 710 (9th Cir. 1991) [Watkins II]; County of Esmerelda v. United States Dept’t of Energy, 925 F.2d 1216 (9th Cir. 1991) [Esmerelda]; Nevada v. Burford, 918 F.2d 854 (9th Cir. 1990) cert. denied, 500 U.S. 932 (1991) [Burford I]; Nevada v. Watkins, 914 F.2d 1545 (9th Cir. 1990), cert. denied, 499 U.S. 906 (1991) [Watkins I]; Nevada v. Herrington, 827 F.2d 1394 (9th Cir. 1987) [Herrington I]; Nevada ex rel. Loux v. Herrington, 777 F.2d 529 (9th Cir. 1985) [Herrington II].
11. Id. at 11.
12. See id.
15. See DOE Press Release R-77-017, DOE Announces New Spent Fuel Policy (Oct. 18, 1977) (stating that the DOE would accept and take title to spent fuel discharged from commercial nuclear reactors and that the DOE would be responsible for both the storage and the ultimate disposal of that spent fuel).
In 1982, Congress passed the Nuclear Waste Policy Act ("NWPA"), to advance the DOE's 1977 position. The NWPA required the DOE to site, construct, and operate a repository for the disposal of high-level nuclear waste. The NWPA also laid the foundation for the complicated process of identifying an appropriate location for the repository.

For almost thirty years, the private actors in the nuclear industry operated with the intention of creating a competitive private market in waste disposal. The DOE's decision to take title to spent nuclear fuel and the subsequent enactment of the NWPA resulted in the federal government subsidizing, and thus encouraging, the continued existence of the nuclear industry. These federal subsidies led nuclear producers to "improperly underprice nuclear electricity ... [and] as a result, more waste than optimum was created." Consequently, after years of promising to take title to the waste but failing to do so, the federal government had to rush to develop a nuclear waste repository as the industry was creating an abundance of nuclear waste.

Because nuclear waste disposal involves serious health and safety issues and evokes deeply charged public responses, the NWPA included provisions endeavoring to insure equity in the site selection process. Congress sought to create a fair process.

17. See id. at § 10131(b)(1).
18. See Davenport, supra note 10, at 11. Key provisions of the NWPA authorized site characterization activities, eased relevant requirements of the National Environmental Policy Act, and addressed state and public participation in the process of site selection. See 42 U.S.C. §§ 10133(a), 10134(d), 10136(b).
19. See Silberg, supra note 13, at 791-98. Silberg describes the uncertainties nuclear utilities faced in the early years when they were attempting to arrange for the disposal or reprocessing of spent fuels. Until 1977, the utilities were under the impression that nuclear fuel would be reprocessed and recycled in commercial reprocessing plants such as the Nuclear Fuel Services plant in West Valley, New York. See id. at 791. During the 1970's, other companies such as General Electric, Allied-General Nuclear Services, and Exxon were also planning to construct reprocessing plants. See id. As a result of licensing problems and then the DOE's subsequent decision to take title to the spent fuel, all construction and plans for construction of these facilities ceased. See id. at 791-92. Because of the DOE's decision to accept responsibility for the spent fuel, and thus to subsidize the industry, the incentives necessary for private companies to invest in the construction of reprocessing facilities ceased to exist. See id.
20. Tomain, supra note 1, at 103.
by requiring the Secretary of the DOE ("Secretary") to identify multiple sites in diverse geographical regions. Additionally, the NWPA contains a critical notice of disapproval provision. This provision allows a state to object to being designated as a potential repository site. However, this provision also includes an option allowing Congress to override a state's notice of disapproval.

As part of the original NWPA, Congress established the Nuclear Waste Fund, intending to ensure that the parties responsible for generating nuclear waste and spent fuel would absorb the costs of the state oversight and site characterization activities that are associated with the creation of a nuclear waste repository. The Secretary manages the Nuclear Waste Fund and supervises the formation of contracts, the issuance of licenses, the collection of fees and the allocation of funds. Every fiscal year, Congress appropriates money from the Nuclear Waste Fund; the Secretary then assumes responsibility for administering this money to promote the goals of the NWPA.

22. See id.
24. See Davenport, supra note 21, at 549.
25. The provision specifies that after a state issues a notice of disapproval, the site will be disapproved unless, within the first period of 90 calendar days of continuous session, Congress passes a resolution approving of the site. See 42 U.S.C. §§ 10134, 10136, 10138. By including a provision allowing states the opportunity to reject the federal program, Congress may have intended this provision to resolve questions of federalism and state sovereignty. Congress may have viewed this provision as adding an element of choice to the NWPA, thus a way to avoid directly commandeering the governmental powers of the state. See New York v. United States, 505 U.S. 144 (1992) for an example of the federal government commandeering the legislative authority of states.
27. See id.
28. See id. § 10222. "[T]he Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, or domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel." Id. § 10222(a)(1). The Secretary is also responsible for "establishing procedures for the collection and payment of the fees" established by this section. Id. § 10222(a)(4).
29. See id. The State of Nevada, and any affected local governments, may request financial assistance for site characterization activities by "preparing and submitting to the Secretary a report on the economic, social, public health and safety, and environmental impacts that are likely to result from site characterization activities at the Yucca Mountain site." Id. Nevada is entitled to request funds from the DOE according to 42 U.S.C. § 10136(c)(3)(B) because of the 1987 Amendments to the NWPA designating Yucca Mountain, Nevada as the sole site where the DOE would be conducting site characterization activities.
C. The 1987 Amendments to the Nuclear Waste Policy Act

In 1983, Congress designated Yucca Mountain, Nevada, Deaf Smith County, Texas, and Hanford Reservation, Washington as three potential repository sites. Controversy and political uproar accompanied the designation of these three sites. After a joint Congressional investigation discovered a "pattern of concealment and deception in DOE's site selection processes," Congress decided to re-focus the nuclear waste program by concentrating on one site. Subsequently, the 1987 Amendments to the NWPA ("Amendments") specified Yucca Mountain as the favored site for the nuclear waste repository and initiated a phase-out of investigative activities at all other candidate sites.

Nevada's political problems began immediately upon its designation as a potential repository host state. When Congress first designated Nevada, Texas, and Washington as potential sites for the nuclear waste repository, it pitted these three states against one another in a "not in my backyard" argument. Unfortunately for Nevada, the Speaker of the House of Representatives, Jim Wright, and the President of the Senate, Lloyd Bensen, were from Texas and the House Whip, Thomas Foley, was from Washington.

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30. See Davenport, supra note 10, at 11.
32. See Davenport, supra note 10, at 12.
34. From the outset, Nevada faced daunting political foes. Nevada adversaries included the political representatives of Washington and Texas as well as the representatives of other states who intended to avoid becoming a host state for nuclear waste disposal. As Davenport observed, "The 1987 Amendments to the NWPA were thus a political power play in which the representatives of strong, populous states, i.e., states with competitive potential to become repository hosts themselves, acted abusively against their weakest member." Davenport, supra note 21, at 550; see also Davenport, supra note 10, at 12 (discussing the political, rather than scientific nature of this decision and quoting Washington State Representative Al Swift who declared that, "I am participating in a nonscientific process—sticking it to Nevada. This is as bad a case as I have seen in 10 years in Congress.") ; Robert R. Loux, Nuclear Waste: Will the Nation's Nuclear Waste Policy Succeed at Yucca Mountain?, 126 No. 11 PUB. UTIL. FOR. 27, 51 (Nov. 22, 1990) (stating that with the NWPA Amendments in 1987, "the Congress, with little basis other than political fortitude, abandoned multi-site screening and declared that Yucca Mountain ... was the only site suited to be studied as a potential repository site).
36. See Davenport, supra note 21, at 550; see also Michael Barone & Grant
Unlike its two competitors, Nevada lacked political clout in both the House and the Senate. As a result of its political weakness and the remaining 49 states' desire to avoid becoming a host state, Nevada found itself on the losing side of an inequitable political power game. Despite the tenets of federalism mandating that states should not be able to isolate themselves from a problem with interstate implications, Nevada found itself standing alone.

Even before Congress passed the Amendments, the State of Nevada initiated litigation against the United States. Nevada not only sued on various provisions of the Amendments but also challenged subsequent decisions made by the DOE and the Secretary. In fact, Nevada recently brought a funding disagreement before the Ninth Circuit that raises critical, unresolved questions of federalism and state sovereignty.

II

STATE OF NEVADA V. UNITED STATES DEPARTMENT OF ENERGY

A. Nevada Sues for Funding under the Nuclear Waste Fund

In Nevada, the State petitioned the Ninth Circuit for review of the Secretary's decision to deny Nevada's request for funds from the DOE's 1996 fiscal year appropriations. Nevada


37. See Davenport, supra note 10, at 11. Members of the House of Representatives and the Senate met on December 15, 1997, and made the decision to alter the nuclear waste program and focus solely on Yucca Mountain. None of these Representatives or Senators was from Nevada. See id. Additionally, no Nevada representatives were included in any of the relevant conference committee meetings. See id.


39. See Nevada v. United States Dept of Energy, 993 F.2d 1442 (9th Cir. 1993); Watkins v. United States, 943 F.2d 1080 (9th Cir. 1991) ("Watkins III"); Watkins II, 939 F.2d 710 (9th Cir. 1991), County of Esmerelda v. United States Dept of Energy, 925 F.2d 1216 (9th Cir. 1991); Nevada v. Burford, 918 F.2d 854 (9th Cir. 1990) cert. denied, 500 U.S. 932 (1991): Watkins I, 914 F.2d 1545 (9th Cir. 1990), cert. denied, 499 U.S. 906 (1991); Herrington I, 827 F.2d 1394 (9th Cir. 1987); Herrington II, 777 F.2d 529 (9th Cir. 1985).

40. Among other things, Nevada has challenged: (1) the environmental assessment prepared by the Secretary, see Watkins, 943 F.2d 1080; (2) the site recommendation guidelines promulgated by the Secretary, see Watkins II, 939 F.2d 710; and (3) numerous funding decisions made by the Secretary, see, e.g., Herrington I, 827 F.2d 1394.


42. Id.

43. See id. at 1203. Under 42 U.S.C. § 10136(c) (1997), Nevada and locally affected governments are entitled to federal funds for the purpose of carrying out site
asserted that Congress, in compliance with Section 116(c)(10) of the NWPA, must grant Nevada funds from the Nuclear Waste Fund appropriations from fiscal year 1996 "for the purpose of reviewing, monitoring, and evaluating the Department of Energy’s site characterization activities at Yucca Mountain." Judge D.W. Nelson, writing for the Ninth Circuit Court, denied Nevada's petition for review.

Since 1989, Congress had consistently allocated Nevada funds for performing oversight activities. In 1995, contrary to previous years, Congress failed to appropriate any Nuclear Waste Fund payments to Nevada from its FY 1996 budget. In August 1995, despite not having an earmark, Nevada followed the pattern set in previous years and submitted a request to the Secretary for five and one-half million dollars in oversight funds from DOE's FY 1996 budget. The DOE responded by volunteering to provide Nevada with funds. Nevertheless, after the DOE announced its funding decision, the Chairman and Ranking Minority Member of the Subcommittee on Energy and Water Development sent the DOE a letter discouraging it from allocating funds to Nevada, insisting that Congress

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44. 42 U.S.C. § 10131(b)(4).
45. Nevada, 133 F.3d at 1203.
46. See id.
47. See id.
48. Beginning in 1989, Congress clearly delineated the amount of Nuclear Waste Fund money that the Secretary could grant to Nevada for oversight activities. See id. Although Nevada has requested up to $26 million per year in oversight funds, Congress has allocated Nevada only an average of $5 million per fiscal year. See id. However, in 1990, in addition to granting Nevada $5 million, Congress adopted the Energy and Water Development Appropriation Act. This Act earmarked an additional $6 million for Nevada "to be available at the discretion of the Secretary of Energy based upon his certification to Congress of good faith efforts and cooperation on the part of the State in allowing technical field work ... to proceed at Yucca Mountain." Id. (quoting the 1990 Energy and Water Development Appropriation Act, Pub. L. No. 101-101).
49. See Nevada, 133 F.3d at 1203.
50. See id. at 1204.
51. See id. at 1203. Earlier that same year, Congress passed the FY 1996 Energy and Water Appropriations Act, which did not appropriate money for Nevada or for affected units of local government. The Chairman of the committee responsible for
intentionally declined to grant Nevada any Nuclear Waste Funds. Consequently, the DOE reversed its initial position (of March 1996) and announced that it would not provide Nevada with any payments from its FY 1996 budget for NWPA oversight activities.

In seeking federal funds, Nevada based its petition on five main arguments. First, Nevada claimed that the Secretary’s denial of funds for FY 1996 violated the NWPA. Second, Nevada maintained that it could not conduct oversight activities using the money allocated to Nevada by the Energy and Water Development Appropriations Act of 1996. Third, Nevada argued that between the time of its letter to Nevada and the inception of litigation, the DOE changed its rationale for denying Nevada funds. Fourth, Nevada asserted that the DOE’s refusal to provide the funds violated the Unfunded Mandates Reform Act of 1995. Fifth, Nevada alleged that the DOE’s failure to provide Nevada with FY 1996 funds resulted in the federal government commandeering Nevada’s governmental processes in violation of the Tenth Amendment.

B. The Ninth Circuit Decides Nevada’s Fate

1. Funding Nevada’s Oversight Activities is not a Responsibility of the DOE

The Ninth Circuit, in addressing Nevada’s first argument that the DOE violated its obligations under the NWPA by not providing Nevada funds from its FY 1996 budget, found that the NWPA required the DOE to allow the State of Nevada and
affected local governments to conduct independent oversight activities. Nevertheless, the court held that while the statute requires the DOE to provide Nevada with adequate funds for oversight, nothing in the language of the statute indicates that these funds must be appropriated annually.

The court then rejected Nevada's second argument that money allocated to Nevada by the 1990 Energy and Water Development Appropriations Act was limited to specific uses and therefore unavailable for oversight activities. The court emphasized that Congress released the money to Nevada for basic oversight activities in January 1995 and that Nevada had returned the funds to the federal government for safekeeping because the state had no present need for the money. The court also indicated that for FY 1996, Nevada had access to the earmarked $6 million plus an additional $800,000 remaining from the FY 1995 budget. Thus, the court found that the DOE's decision complied with statutory language and that Nevada's FY 1996 budget adequately satisfied the state's financial needs.

2. The Ninth Circuit Rejects Nevada's Post Hoc Rationalization and Statutory Arguments

The Ninth Circuit proceeded to reject Nevada's third argument that the DOE's rationale for denying the FY 1996 funds must be overturned as "post hoc rationalization." To substantiate this claim, Nevada argued that, prior to litigation, the DOE's rationale for denying the state FY 1996 funds differed from the reasons the DOE offered the court during litigation. Nevada maintained that originally, the DOE justified its actions by claiming that it was complying with the will of Congress. During litigation, DOE cited the $6.8 million available to Nevada as its reason for denying the state FY 1996 funds. Nevada asserted that this rationale differed from the DOE's original explanation. In rejecting Nevada's argument, the Ninth

60. See Herrington II, 777 F.2d 529.
61. See Nevada, 133 F.3d at 1206.
62. See id.
63. See id.
64. See id.
65. See id.
66. See id.
67. See id.
Circuit held that, prior to litigation, the DOE had not offered any explanation for their actions. Thus, the DOE's current rationale was its first and only explanation and did not constitute post hoc rationalization.69

The court also rejected Nevada's fourth argument that the DOE's decision constituted a violation of the Unfunded Mandates Reform Act of 1995.70 The court held that because the NWPA does not clearly impose a federally enforceable duty on Nevada, the Unfunded Mandates Reform Act of 1995 did not apply under the circumstances present in this case.71

3. The DOE Did Not Violate Nevada's Sovereignty by Not Allocating Funds

Finally, the Ninth Circuit rejected Nevada's fifth claim that the DOE's refusal to allocate funds resulted in an unconstitutional commandeering of Nevada's governmental processes.72 Nevada analogized the present circumstances to the situation in New York v. United States where the United States Supreme Court found that the federal government directly compelled the states to establish and enforce a federal regulatory program.73 The Ninth Circuit found this argument to be flawed because the NWPA is a federally enacted and enforced program.74 The court emphasized that Nevada's legislature is not commandeered because it plays no part in enacting or overseeing the DOE's activities.75

Thus, the Ninth Circuit held for the DOE on all five claims and denied Nevada's petition for review of the DOE's decision not to grant Nevada funds from its FY 1996 budget.76

69. See id.
70. See id. at 1207; see also 2 U.S.C. § 1501 (1997).
71. See id. at 1207. The Unfunded Mandates Reform Act applies to "federal intergovernmental mandates," that either "impose an enforceable duty on a state or reduce appropriations for federal financial assistance that are provided to the state for the purpose of complying with an imposed enforceable plan." Id. (quoting 2 U.S.C. § 658(5)(A) (1997)). In Nevada, the federal government is neither imposing a duty nor withdrawing assistance. Additionally, even if state oversight activities are interpreted as a duty, the fact remains that it was not unfunded since Nevada had a budget of $6.8 million for FY 1996.
72. See id.
73. See id.; see also New York, 505 U.S. at 144.
74. See Nevada, 133 F.3d at 1207.
75. See id.
76. See id. at 1208.
A. Constitutional Challenges

Congress designed the NWPA to promote public participation in the political decisionmaking process. Nevertheless, as the site selection process progressed, public and even state participation declined in importance relative to power politics at the federal level.

Although Nevada focuses on the specific question of how to determine the appropriate use of the Nuclear Waste Fund, it raises general questions concerning the roles of federalism, state sovereignty, and the political process in selecting a repository site. These issues have consistently plagued the NWPA and the progression of the Yucca Mountain project. Ultimately, Nevada, and the entire sequence of cases between Nevada and the DOE, raises Tenth Amendment issues and tests the viability of America's system of dual sovereignty.

In response to the 1987 Amendments, Nevada passed "two resolutions to Congress and a state law prohibiting any person or governmental entity from storing any high-level radioactive waste in the state of Nevada." Nevada eventually relied on these state laws as notice of its disapproval of Congress' selection of Yucca Mountain as the single site to be considered for the high-level nuclear waste repository. In response, the Secretary of


78. Generating, permitting, and disposing of nuclear energy and waste raises various constitutional dilemmas. Decisions of the Nuclear Regulatory Commission (FRC) came under fire even before the passage of the NWPA. In Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87 (1983), and Minnesota v. United States, 602 F.2d 412 (1979), the Supreme Court and the Court of Appeals for the District of Columbia respectively considered whether the NRC had acted arbitrarily and capriciously in deciding two key issues. In Baltimore, the Court upheld the NRC's decision that the long-term storage of nuclear waste would have "no significant environmental impact," in Minnesota, the court upheld (and partially remanded) the NRC's decision to grant permits extending and expanding the ability of two power plants to store spent nuclear fuel on-site. See generally Baltimore Gas & Electric Co., 462 U.S. 87; Minnesota v. United States, 602 F.2d 412. These two cases foreshadowed the bitter battles between the federal government and states and independent actors that would follow the enactment of the NWPA.

79. Davenport, supra note 21, at 551; see also Nev. Rev. Stat. Ann. § 459.910 (2000) stating that: "1) It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada," and "2) As used in this section, unless the context otherwise requires, 'high-level radioactive waste' has the meaning ascribed to that term in 10 C.F.R. § 60.2." Davenport, supra note 10, at 12. It is important to recognize that NRS § 459.910 does not discriminate against interstate commerce.

80. See id.; see also 42 U.S.C. § 10136(b)(2).
Energy, James D. Watkins, sent a memo to Congress in which he rejected Nevada’s disapproval and voiced his intention to continue site characterization activities at Yucca Mountain.\textsuperscript{81} Additionally, the Secretary refused to recognize Nevada’s state legislation as a valid form of official notice of disapproval.\textsuperscript{82} Eventually, this disagreement culminated in Watkins I.\textsuperscript{83} In Watkins I, the Ninth Circuit Court found that Nevada’s attempt to veto the Secretary’s site selection and site characterization activities was preempted by the NWPA because the veto thwarted the purpose of the Act.\textsuperscript{84} In addition, because Yucca Mountain is located on federally owned land, the court held that Congress’ plenary powers\textsuperscript{85} empowered it to enact the Amendments.\textsuperscript{86}

B. Judicial Standing Hurdles

After the 1987 NWPA Amendments designated Yucca Mountain as the sole site to be considered, Nevada, recognizing its political weakness, shifted its battle to the judicial arena. Nevada initiated legal proceedings alleging that actions and decisions of the DOE were unconstitutional under the Tenth Amendment.\textsuperscript{87} In Burford I,\textsuperscript{88} Nevada alleged that the Bureau of Land Management had improperly granted the DOE a right-of-way to conduct site characterization activities at Yucca

\begin{footnotes}
\footnotetext[81]{See Davenport, supra note 10, at 12.}
\footnotetext[82]{See id.}
\footnotetext[83]{914 F.2d 1545 (9th Cir. 1990).}
\footnotetext[84]{Id. However, Nevada’s legal crusade against the DOE actually began even before Watkins I. Nevada challenged the DOE immediately upon the Secretary’s designation of Yucca Mountain as one of three potential sites for a high-level nuclear waste repository. In Nevada ex rel. Loux v. Herrington, 777 F.2d 529 (1985), the Ninth Circuit reviewed the DOE’s refusal to grant funds to Nevada for the purpose of pre-site characterization technical studies. Here, the court first dealt with the key issue of whether Nevada had standing. Finding that Nevada had suffered an injury-in-fact when the DOE denied the state funding, the court held that the DOE had acted arbitrarily and capriciously in denying Nevada funding. The court emphasized that the current trend favors reviewing policy statements and informal positions. This case represented a slap on the hand of the DOE and a victory for Nevada, but it was not indicative of the decisions to follow.}
\footnotetext[85]{See U.S. Const. art. IV, § 3, cl. 2. The Property Clause provides that, "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." Id. Precedent holds that "the power over the public land thus entrusted to Congress is without limitations." Id; see also California Coastal Comm’n v. Granite Rock Co., 480 U.S. 572, 580 (1987) (quoting Kleppe v. New Mexico, 426 U.S. 529, 539 (1976); United States v. San Francisco, 310 U.S. 16, 29 (1940)).}
\footnotetext[86]{Watkins I, 914 F.2d at 1553.}
\footnotetext[87]{See generally Burford I, 918 F.2d 854; Watkins I, 914 F.2d at 1553; Nevada v. Burford, 706 F. Supp. 289 (D. Nev. 1989) (Burford II).}
\footnotetext[88]{918 F.2d 854.}
\end{footnotes}
Mountain, thus violating Nevada’s constitutional rights to object to its designation as a waste repository site. Because Nevada failed to allege or substantiate any injury in fact, the court found that Nevada lacked standing. In Watkins I, Nevada challenged the Amendments on numerous grounds; however, the court denied Nevada standing because the state was unable to specify any redressable defect in the political process and because the Administrative Procedure Act precluded judicial review. Finally, in Burford II, a district court rejected Nevada’s constitutional claims, finding that Nevada failed to prove an injury in fact and lacked standing.

In County of Esmerelda v. United States Department Of Energy, Nevada re-emerged as the victor. In Esmerelda, Nevada successfully challenged the Secretary’s decision denying “locally affected government” status to two Nevada counties. Here, the Ninth Circuit appeared to change its course. In Esmerelda, the court found that it had jurisdiction, the counties had standing, and the DOE had acted arbitrarily and capriciously. Despite the fact that the court remanded the case to the DOE, a powerful

89. Id. at 856.
90. 914 F.2d at 1552.
91. Nevada challenged the Secretary’s refusal to acknowledge the state’s veto of the site selection process and questioned Congress’ general constitutional authority to enact the 1987 Amendments. Specifically, Nevada claimed that the Amendments violated the Federal Enclave Clause, the Equal Footing Doctrine, the Privileges and Immunities Clause, the Tenth Amendment, and the Port Preference Clause. See id. at 1554-57.
92. Watkins I, 914 F.2d at 1563; see also Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-706 (1988). The APA prevented judicial review in this case because the decision was committed to the agency’s discretion. See Watkins I, 914 F.2d at 1563. The court in Watkins I also emphasized that the NWPA did not violate Nevada’s Tenth Amendment rights because “state sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” Id. at 1556 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985)).
93. Burford II, 918 F.2d at 858. Nevada claimed that, in addition to violating requirements in the Land Act and the National Environmental Policy Act, the Bureau’s actions violated Nevada’s constitutional rights. According to Nevada, “the right-of-way rendered meaningless Nevada’s political right to object to its selection as a waste repository site.” Id. at 857. The specific nature of the constitutional claims raised in Burford II and Watkins I varied. In Watkins I, Nevada based its claims on the argument that the selection of Yucca Mountain was unconstitutional and that its legislative veto prohibiting Congress from locating the repository in Nevada was not preempted by federal law. Watkins I, 914 F.2d at 1552.
94. See Burford II, 918 F.2d at 858.
96. 42 U.S.C. § 10136(c)(1)(A). Section 10136 provides that “[t]he Secretary shall make grants to the State of Nevada and any affected unit of local government for the purpose of participating in activities required by this section . . . .” Id.
97. Esmerelda, 925 F.2d at 1221.
dissent tempered Nevada's optimism for future victories. Additionally, the court may have been more lenient in Esmeralda, because, unlike previous (and future) cases where Nevada lost its appeal, this case did not threaten to interfere with or frustrate the DOE's already lagging site characterization schedule. The tenuous nature of the Esmeralda victory was revealed after Nevada lost three subsequent challenges.

Nevada has only prevailed in two of the numerous claims it has brought against the DOE. The first was a case concerning pre-Amendment funding and the second was an issue that did not affect the progress of the Yucca Mountain project. In all other situations, the courts have interpreted the NWPA and the Amendments so narrowly that Nevada has had an exceedingly difficult time establishing standing and showing injury-in-fact. These difficulties mirror Nevada's political situation. Judicially, Nevada's challenges are consistently denied by the courts due to its inability to establish standing or to satisfy other procedural requirements; politically, Nevada's interests are inevitably overridden by the agendas of states with more political influence. Thus, politics and procedures constantly frustrate Nevada's communication and resolution of its substantive complaints.

98. See id. at 1221-25. The dissent emphasized that the court could not consider this claim because 42 U.S.C. § 10101(31) "does not provide any meaningful criteria for evaluating the Secretary's decision to deny affected unit status . . . ." Id. at 1221. Additionally, the dissent claims that the court "overcomes the absence of a meaningful standard by inventing one," and that using this judicially created standard, the court eliminates any meaningful limits or requirements in the statute. See id. at 1223-24.

99. Following Esmeralda and prior to Nevada v. United States Department of Energy, 133 F.3d 1201 (1998), Nevada lost two more cases. In Watkins III, 943 F.2d 1080, Nevada alleged that the DOE's environmental assessment of Yucca Mountain inadequately addressed numerous critical issues and required revision before being used in the site characterization process. Because the 1987 Amendments required continuation of site characterization activities regardless of the state of the environmental assessment, the court declared the issue to be moot. Finally, in Nevada v. United States Department of Energy, 993 F.2d 1442 (9th Cir. 1993) (DOE I), the Ninth Circuit upheld the DOE's interpretation of a NWPA funding provision over protests from Nevada.

100. See generally Nevada, 133 F.3d 1201; DOE I, 993 F.2d 1442; Watkins II, 939 F.2d 710 (9th Cir. 1991).


102. Esmeralda, 925 F.2d 1216.
IV

FEDERALISM

A. Federal Preemption

Since the 1970's, the federal government has shaped and controlled much of the nation's environmental policy. Many critics claim that this federal preemption is "unnecessary, excessive, inefficient, and poorly prioritized." In response to these claims, Congress cut funding for programs that set federal standards and repealed federally mandated environmental laws that required state funding. The Supreme Court has acknowledged federalism concerns by "rediscovering limits on powers vested in the federal government by the U.S. Constitution."

B. Federalism and Environmental Law

Before considering the specific federalism implications of the NWPA and the Amendments, it is worth examining basic arguments for and against a strong federal presence in the domain of environmental law. Traditional justifications for federally governed environmental policy include:

1. [federally governed environmental policy] is more efficient than state regulation at achieving specific goals;
2. it regulates pollution across state borders;
3. it prevents states from reducing social welfare in response to competition for industry;
4. it more properly takes environmental interests into account than state political processes; and
5. it codifies moral rights.

These arguments apply primarily to statutes, such as the Clean Air Act and the Clean Water Act that govern the

104. Sarnoff, supra note 103, at 228.
production of pollution in all fifty states. These statutes address the disparities between various states' environmental policies and the distribution of uncontained pollution across state lines whereas the majority of provisions in the NWPA and its Amendments only apply to one state and deal with a generally contained pollutant. Additionally, unlike industries producing air and water pollution, the nuclear industry is not growing; thus, there is little economic tension between attracting nuclear industry to a state and protecting the welfare of the citizenry of that state. Also, in light of the numerous failures and delays that have plagued the federal government's attempts to develop a solution to the nuclear waste problem, it is questionable whether the federal government can more efficiently resolve the problem. Finally, it is debatable whether requiring one state to bear the brunt of 50 states' pollution correctly codifies a moral right. Thus, arguments such as those mentioned above fail to convincingly justify federal jurisdiction in the nuclear waste arena.

Arguments affirming the importance of federalism and a system of dual sovereignty include ensuring that there is a "healthy balance of power between the States and the Federal Government [that] will reduce the risk of tyranny and abuse from either front." In addition, dual sovereignty arguably encourages political participation and political accountability. Policies implemented and enforced by the federal government hinder the ability of state officials to shape policy in accordance with the views of the local citizenry. Thus, there is little room or incentive for state and local citizen participation, which in turn means that the policies fail to adequately reflect the diverse interests and preferences of state and local citizens. In addition, constituencies often hold their state and local officials accountable for problems and failures when federal officials, who often designed and obligated the local officials to administer the programs, remain insulated from the brunt of public dissatisfaction.

Another argument supporting a federal structure in nuclear waste policy emphasizes that the role of the federal government,

110. Here, federalism means a strong state and federal government presence, versus a regime of environmental laws primarily dominated by the federal government.
112. See Davenport, supra note 21, at 545.
113. See id.
114. See id.
as defined by the United States Constitution, "confers upon Congress the power to regulate individuals, not States."\textsuperscript{115} According to this line of reasoning, Congress should design federal policy and regulatory programs to directly address the national citizenry as a whole, not policies that single out and directly compel multiple or individual states to enact, participate in, or enforce federal programs.\textsuperscript{116}

Critical to determining the purpose and capacity of federalism is defining the appropriate roles of the political processes and the judiciary. In previous years, the Court deferred to the political process to resolve questions of state sovereignty.\textsuperscript{117} The Court determined that the structure of the federal government afforded states adequate opportunity to influence the shape of federal policy.\textsuperscript{118} Critics challenge the Court's assumption that the political process "resolve[s] conflicts in which the citizens of different states attempt to impose their values on each other."\textsuperscript{119} Relevant commentary suggests that, in the course of the federal political process, legislators "imperfectly aggregate and weigh these values."\textsuperscript{120} Unequal state representation and disproportionate political power may aggravate this flaw in the political process.

C. Federalism & Nuclear Waste Policy

Controversy enveloped the NWPA site characterization process even before Congress passed the Amendments. Consequently, Congress, seeking to address the controversial situation, chose to redirect the process by focusing solely on Yucca Mountain.\textsuperscript{121} Following the passage of the Amendments, Washington state representative Al Swift commented on the

\begin{footnotes}
\footnotetext[115]{Id. Even where Congress has constitutional authority to "pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." Id. at 561 (quoting Justice O'Connor from \textit{New York}, 505 U.S. at 161 (quoting Hodel v. \textit{Virginia Surface Mining & Reclamation Ass'n}, 452 U.S. 264, 288 (1981))).}
\footnotetext[116]{See \textit{Davenport}, \textit{supra} note 21, at 561. Additionally, critical to determining the purpose and capacity of federalism is defining the appropriate relative roles of the political and judicial processes. Historically, the Court deferred to the political process to resolve questions of state sovereignty. See, \textit{e.g.}, \textit{South Carolina v. Baker}, 485 U.S. 505 (1998); \textit{Garcia}, 469 U.S. 528. The Court determined that the structure of the federal government afforded states adequate opportunity to influence the shape of federal policy. See \textit{Garcia}, 469 U.S. at 552.}
\footnotetext[117]{\textit{Garcia}, 469 U.S. at 552.}
\footnotetext[118]{\textit{Garcia}, 469 U.S. at 528.}
\footnotetext[119]{\textit{Sarnoff}, \textit{supra} note 103, at 233.}
\footnotetext[120]{Id.}
\footnotetext[121]{\textit{See 42 U.S.C.} § 10134.}
\end{footnotes}
Amendments, saying that they were the result of "pure politics" and that:

constitutional federalism requires that no state may isolate itself from a problem common to all by raising barriers which discriminate against the interstate transfer of radioactive waste. The Amendments Act changed the federal repository program from one characterized by regional equity and scientific objectivity to one driven by power politics and political expedience. Forty-nine states, using the Congress' putative power under the Commerce Clause, found a way to isolate themselves from a problem common to them by victimizing a single state that, without a single nuclear power plant, had no part in creating the problem.122

Swift's comments epitomize the political system's failure to protect and uphold the Tenth Amendment and the federal structure in the context of nuclear waste policy.

The Amendments changed the nature of the NWPA. While theoretically equitable, the statute, by eliminating opportunities for comparative scientific evaluation and meaningful state and local participation, assumed a coercive character creating what one critic called one of the "worst case[s] of majority tyranny, either real or potential, against under-represented minor constituencies."123

122. Davenport, supra note 10, at 12.
123. Davenport, supra note 21, at 562; see also infra Part I.C. (discussing Nevada's political problems). By limiting site characterization activities to one site, Yucca Mountain, the NWPA Amendments necessarily limit any opportunities for comparative scientific analysis between sites. 42 U.S.C. § 10172. Additionally, because the DOE is only studying one site and because they have spent numerous years and billions of dollars on their analysis, there is, inevitably, profound pressure for Yucca Mountain to be found suitable so as to avoid further delay and expenditure. See William J. Broad, A Mountain of Trouble, N.Y. TIMES, Nov. 18, 1990, section 6, at 37. Finally, with the passage of time and the accumulation of spent fuel at reactors across the nation, the DOE faces increased time and political pressure to speed up the site-selection process. See id. As the analysis at Yucca Mountain has progressed, significant disagreements over the adequacy of the site have arisen among leading scientists. See id.; see also Loux, supra note 34, at 52. Despite the seriousness of these concerns, the DOE has neither disqualified the site nor initiated site characterization activities elsewhere. In fact, as early as 1987, when site characterization activities were still in their infancy, the DOE defensively responded to criticisms of the Yucca Mountain site by saying that it was inconceivable that the site is not an appropriate location for a repository. See Loux, supra note 34, at 52. The time pressures and the political debates coupled with the narrow focus of the NWPA Amendments increase the likelihood that any decision regarding the suitability of the Yucca Mountain site will be shaped by non-scientific factors.
1. Federal Commandeering of State Resources

In Nevada, the Ninth Circuit found that denying Nevada’s request for funds from DOE’s budget for the fiscal year of 1996 did not commandeer Nevada’s governmental processes in violation of the Tenth Amendment. Nevada alleged, as one of its five arguments, that the DOE’s decision denying funds to Nevada replicated the situation in New York v. United States, where the federal government compelled the state of New York to “take title” to low-level radioactive waste.

In New York, the Court ruled that the “take title” provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, requiring states to either accept ownership of low-level radioactive waste or regulate that waste according to the direction of Congress, was unconstitutional. The Court held that, standing alone, each option was unconstitutional and therefore the provision “commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”

In Nevada, the court rejected a New York analogy, emphasizing that “Nevada has not been directly compelled to enact or enforce a federal regulatory program.” The court stressed that the federal government enacts and funds the NWPA site characterization program and that “the DOE is not forcing Nevada to pay its own costs of participating in the disposal program.”

The Ninth Circuit’s decision appears to violate the principle of the Court’s decision in New York. In the New York oral arguments, Justice O’Connor posited that she “[could not] believe that the state of Washington . . . would be in here arguing that Congress would have the right to shift off part of the national debt or shift off all medical costs by congressional fiat to the states or any other of the potential schemes that this would open up.” Despite O’Connor’s disbelief that Congress could pass a law shifting the responsibilities of a federal program onto the states, Congress passed such a law. The NWPA shifted a substantial portion of the social and economic burden of nuclear

124. Nevada, 133 F.3d at 1207.
125. New York, 505 U.S. at 144.
126. See id. at 144.
127. Id. at 176.
128. Nevada, 133 F.2d at 1207.
129. Id.
waste disposal onto the shoulders of one state. If Yucca Mountain is indeed designated as the future location of a nuclear waste repository, it will indirectly subsidize the nuclear industry and nuclear energy consumers. The state will provide not only a disposal site for previously produced waste but will also facilitate the continuing existence of a market for nuclear energy. The decisions of Congress and the judiciary, as codified in the Amendments and in the ruling in Nevada, therefore, threaten substantive constitutional principles of federalism.

Both Nevada and the Ninth Circuit court fail to explore the federalism issue with the depth it deserves. Nevada’s current request for funding is symptomatic of a larger question concerning the constitutionality of the NWPA and the federalization of nuclear waste policy. The key question is not whether Congress has directly compelled a specific action by a state legislature, as in New York: the question is whether Congress can commandeer the legislative and executive powers of a state by directly compelling it to accept the burdens of a federal industrial program.131

In Prinz v. United States,132 the Court affirmed the existence of an area of state “residuary and inviolable sovereignty.”133 In Prinz, a Montana sheriff questioned the constitutionality of a provision of the Brady Handgun Violence Prevention Act requiring state chief law enforcement officers to conduct background checks on all potential gun buyers.134 Determining that this requirement imposed unconstitutional obligations on state executive officers, the Court decided the case based on general principals of dual sovereignty, particularly stressing that the federal government “may not compel the States to implement, by legislation or executive action, federal regulatory programs.”135

The NWPA represents a hybrid of previous federal programs that the Court has struck down as unconstitutional.136 After the decisions in New York and Prinz, Congress recognized that it could not directly compel state legislatures and executives to enact and fund federal programs. By providing that Nevada will

131. See Davenport, supra note 21, at 561. See generally New York, 505 U.S. at 144; Prinz, 521 U.S. at 898.
133. Id. at 919 (quoting THE FEDERALIST No. 39, at 245 (J. Madison)).
134. See id. at 902.
135. Id. at 925.
receive federal funding to pay for site characterization activities.\textsuperscript{137} Congress headed off a \textit{New York}-style legislative commandeering argument. Similarly, by cloaking the participation of the state’s executive branch in terms of “\textit{may},”\textsuperscript{138} rather than explicitly requiring participation, Congress evaded a \textit{Prinz}-type executive commandeering claim. Thus, Congress structured the Amendments in a manner directly and unequivocally requiring Nevada to accept and assist in the implementation of the NWPA program without expressly commandeering the state’s governmental processes.

2. \textit{Thinly Veiled Constitutional Violations}

While Congress may have complied with the letter of the law when it enacted the NWPA and the Amendments, it is not clear that it upheld the principles of state sovereignty as adopted by the Court in \textit{New York} and \textit{Prinz}.\textsuperscript{139} To illustrate this, section 10131 asserts that, “state and public participation in the planning and development of repositories is \textit{essential},”\textsuperscript{140} while section 10136 authorizes “grants to Nevada and affected units of local government for participation in activities \textit{required} by this section and section 10137.”\textsuperscript{141} Notice the use of suggestive language in section 10131—“\textit{public participation},” but the use of directive language in section 10136—“\textit{required}”. The use of commandeering language in section 10136 is puzzling because, elsewhere, Congress is careful to frame state participation in terms of voluntary compliance. However, perhaps section 10136’s use of the word “\textit{required}” should not be surprising.\textsuperscript{142} While most of the language in the Amendments carefully avoids compelling state participation, the practical necessity of state participation is clear. The Amendments simply codify Nevada’s essential role in the federal program.

The Amendments effectuate a forced transfer of the external costs of the federal nuclear waste program and compel Nevada to participate in the implementation of a federal industrial program. The Amendments force Nevada’s executive branch to accept and accommodate the enforcement of the program, and they require Nevada’s state legislature to assume responsibility for developing

\begin{itemize}
\item \textsuperscript{137} 42 U.S.C. § 10136.
\item \textsuperscript{138} \textit{See}, e.g., id. §§ 10136(b)(2), 10136(c)(2)(B).
\item \textsuperscript{139} \textit{See generally New York}, 504 U.S. at 144; \textit{Prinz}, 521 U.S. at 898.
\item \textsuperscript{140} 42 U.S.C. § 10131(a)(6) (emphasis added).
\item \textsuperscript{141} \textit{Id.} § 10136(c)(1)(A) (emphasis added).
\item \textsuperscript{142} \textit{Id.}
\end{itemize}
and implementing non-federally funded state programs that ensure the continuing health and safety of Nevada citizens. Traditionally, health and safety issues are reserved to states.\textsuperscript{143} Thus, if Nevada intends to remain faithful to its constitutional duty to protect the health and safety of Nevada citizens, the Amendments force the state to at least partially fund and participate in the development of site characterization programs that test the adequacy of Yucca Mountain as a repository site.

Sharply conflicting scientific opinions exist concerning the adequacy of Yucca Mountain as a nuclear waste repository site. The DOE has consistently disregarded scientific opinion criticizing the site. Critics of the Yucca Mountain site assert that uncertainties concerning geologic faulting, nearby young volcanism, and an elusive and poorly understood groundwater system in the Yucca Mountain vicinity necessitate extensive studies.\textsuperscript{144} Despite these substantive scientific questions, the DOE maintains that problems at the site are political rather than technical.\textsuperscript{145} Thus, if Nevada intends to secure protection for its citizenry, it is up to the state's government to perform the necessary site characterization activities.

In addition, by emphasizing financial costs, the Amendments ignore the realities of nuclear waste disposal. The ultimate commodity at issue is a safe, healthy, and aesthetically pleasing environment.\textsuperscript{146} The citizens of Nevada are concerned about ensuring the continued existence of a clean, uncontaminated living space that provides an ecologically safe place to live as well as an attractive place to vacation and locate business and industry. Therefore, although the Amendments purport to assign Nevada's financial burden to the federal government,\textsuperscript{147} by failing to account for externalities such as environmental, social, economic, and health and safety costs, the Amendments necessarily commandeer the resources of the state government—by default, Nevada absorbs all of the unaccounted-for expenses.

CONCLUSION

Amidst the controversy surrounding Yucca Mountain, many politicians and other interested parties have lost sight of

\textsuperscript{143} See Davenport, supra note 21, at 555.
\textsuperscript{144} See Loux, supra note 34, at 51.
\textsuperscript{146} See Davenport, supra note 21, at 567.
\textsuperscript{147} See id.
important related issues. Although Congress established a skeletal structure for disposing of nuclear waste, there are many unresolved issues. Leading the list of questions is whether there are alternatives to establishing one or two large nuclear waste repositories.

Currently, industrial producers store nuclear waste on-site.\textsuperscript{148} Although many critics claim that on-site storage is only a temporary solution,\textsuperscript{149} distributing nuclear waste over a large area rather than concentrating it in one locality provides many benefits.\textsuperscript{150} In addition to spreading the risk and eliminating the possibility of one enormous disaster, maintaining on-site storage units reflects a more accurate allocation of costs and benefits. If Congress adapts its policy to require nuclear producers to accept responsibility for their waste, the producers will be forced to recalculate their production costs. Subsequently, the producers may pass on any additional costs to consumers; the new sums would reflect the true internal and external costs of nuclear energy. After experiencing the increased energy costs and developing a better understanding of the storage risks, consumers will be able to make a better-informed decision concerning whether the full costs of nuclear energy outweigh the benefits.

Nevertheless, while on-site storage will distribute the costs and the risks, it will also pose new and different problems.\textsuperscript{151} For example, on-site storage sites will fill up, waste will be stored near citizens who do not use nuclear energy, and government officials will have more sites to inspect. There are no easy answers or obvious solutions to the nuclear waste disposal and storage problem. Congress' decisions thus far have failed to adequately deal with many crucial technical and political issues.

The NWPA, the Amendments, and the decision in Nevada threaten not only Nevada's sovereignty and the viability of the Tenth Amendment, but also the structural integrity of the nuclear repository itself. While the courts, Nevada, and Congress debate the politics of Yucca Mountain, the scientific analysis surrounding the safety and reliability of the site should not be


\textsuperscript{149} See generally Denise Renee Foster, Utilities: De Facto Repositories for High Level Radioactive Waste?, 5 DICK. J. ENV. L. POL. 375 (1996).

\textsuperscript{150} See generally Hardin, supra note 148.

\textsuperscript{151} Id.
neglected. Blindly ignoring substantive questions regarding the safety of geologic conditions around Yucca Mountain,\textsuperscript{152} the DOE maintains that the majority of site selection problems are political rather than technical.\textsuperscript{153} If Congress and the courts persist in discounting the necessity of state and local participation, the DOE will continue making decisions motivated by political pressure and an increasing sense of urgency, rather than by utilizing objective data. This type of decisionmaking will result in heightened health and social dangers and higher-than-optimal financial costs for developing a nuclear waste repository.

\textsuperscript{152} See Loux, supra note 34, at 51.
\textsuperscript{153} See Frishman, supra note 145, at 531.