

IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 11-1271

IN RE AIKEN COUNTY, *ET AL.*

On Petition for Writ of Mandamus

**RESPONSE BY INTERVENOR THE STATE OF NEVADA TO
PETITIONERS' STATUS REPORT DATED SEPTEMBER 28, 2012**

On August 3, 2012, this Court issued an order holding this case in abeyance and directing “that the parties file, no later than December 14, 2012, updates on the status of Fiscal Year 2013 appropriations with respect to the issues presented.” *See* Order of August 3, 2012, at 1. On September 28, 2012, Petitioners filed a status report stating that Congress has enacted and the President has signed into law a Continuing Resolution (CR) that funds the federal government until March 27, 2013. *See* Petitioners’ Status Report.

The State of Nevada (“Nevada”) believes that the Court should continue to hold this case in abeyance as contemplated in the August 3 Order. Petitioners in their status report have offered their views on the meaning of the CR. Nevada respectfully disagrees with Petitioners’ characterizations and responds below. In addition, Nevada requests that it be allowed to file a further status report on or

before December 14, 2012, if necessary.

As the Petitioners point out in their status report, the Congress passed H.J. Res. 117, providing appropriations for FY-2013 through March 27, 2013, and the President signed the continuing resolution into law on September 28, 2012.

It is noteworthy that in enacting H.J. Res 117 the Congress has rejected, for the second straight fiscal year, the chance to provide the Nuclear Regulatory Commission (“NRC”) with money to continue the Yucca Mountain licensing proceeding. In addition, the Congress has rejected, for the third straight fiscal year, the chance to provide the Department of Energy (“DOE”) with money to prosecute its license application for Yucca Mountain. This is the clear and necessary effect of subsection 101(a) of the CR. The applicable language in this subsection (including paragraph (4)) provides money to NRC and DOE only for continuing projects or activities “for which appropriations, funds, or other authority *were made available in . . . the Energy and Water Development Appropriations Act, 2012 (division B of Public Law 112-74)*” [emphasis added]. The referenced 2012 Appropriations Act made no “appropriations, funds, or other authority” available for Yucca Mountain in FY2012, and therefore Subsection 101(b) of the CR provides no (zero) appropriations for FY2013 as well.

Section 104 of the CR is not to the contrary. With some exceptions not relevant here, Section 104 provides that “no appropriation or funds made available

or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2012.” Although funds for Yucca Mountain were in fact available to NRC and DOE *during* fiscal year 2012, this was *only* by virtue of carry-over money left from prior years’ appropriations; as a consequence, the restriction in Section 104 does not apply to Yucca Mountain. This leaves untouched (still at zero) the appropriations amount in Subsection 101(b).

Finally, Section 110 of the CR provides in effect that if, notwithstanding subsection 101(b), some other section of the joint resolution is somehow construed to provide funding for Yucca Mountain, Section 101(b) would prevail as it would be “the most limited funding action of that permitted in the joint resolution,” namely zero.

Accordingly, Nevada may file an additional status report on or before December 14, 2012, if necessary to address any other related developments that

CERTIFICATE OF SERVICE

I certify that on October 9, 2012, the *Response by Intervenor The State of Nevada to Petitioners' Status Report Dated September 28, 2012* was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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