

IN THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 11-1271

In re AIKEN COUNTY, et al., Petitioners

ON PETITION FOR WRIT OF MANDAMUS

**RESPONDENTS' INITIAL STATUS REPORT IN
RESPONSE TO COURT'S ORDER OF AUGUST 3, 2012**

On August 3, 2012, this Court issued an order (1) holding this case in abeyance and (2) directing the parties to “file, by no later than December 14, 2012, updates on the status of Fiscal Year 2013 appropriations with respect to the issues presented [in this case].” On December 12, 2012, this Court granted Respondents’ motion for an extension of time until January 4, 2013 to file a status report. Respondents U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) and the Chairman of the Commission¹ hereby file their initial status report. In the event of material changes concerning or affecting the information set forth below, Respondents will file additional status reports.

¹ Gregory B. Jaczko, who was named in as a respondent in this matter in his official capacity, is no longer Chairman of the NRC; he was replaced on July 9, 2012 by Allison M. Macfarlane.

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As an initial matter, Congress has not passed full-year appropriations legislation for Fiscal Year 2013. Instead, Congress has only enacted the continuing resolution reported by Petitioners in their status report of September 28, 2012. The continuing resolution does not contain any statutory text specific to the issues in this case. It does not, for example, provide Nuclear Waste Fund appropriations for either the NRC or the Department of Energy (“DOE”). Nor does the continuing resolution rescind any existing Nuclear Waste Fund money from either NRC or DOE. And the recent compromise enacted to avert the so-called “fiscal cliff” did not contain a provision addressing these issues.

Recent events do, however, bear on the appropriateness of mandamus relief. At oral argument, Respondents invoked a football analogy to support our assertion that such extraordinary relief was not warranted. Specifically, we asserted that compelling the Commission to expend the limited carryover funds currently available to it² would not result in sufficiently substantial progress on the Yucca

² At oral argument, Respondents’ counsel advised the Court that the NRC had approximately \$10.4 million in Nuclear Waste Fund unobligated carryover money, after approximately \$400,000 was recouped from the close out of contracts associated with the Yucca Mountain proceeding. *See* Tr. at 30. Since that time, the NRC has continued to audit and close out contracts and has recouped additional funds so that the total unobligated carryover balance is approximately \$10.5 million.

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Mountain license application to warrant mandamus relief. To this end, counsel asked rhetorically “how meaningful would it be to advance the ball three yards down the field.” Tr. at 43-44. Judge Kavanaugh responded by suggesting that our analogy might not be appropriate:

We’re going around and around, but you’re assuming it’ll stop three yards down. If I knew three yards is it, okay, that’s a different case. But I don’t know that[;] I don’t know what Congress is going to do. There’s going to be a CR, and then there’s going to be a big appropriations show down, and there’s going to be an election before that, right?

Id. at 44 (emphasis added).

The events of the last several months confirm that the current situation is precisely the “different case” that Judge Kavanaugh postulated. Indeed, it appears far more likely than not that neither NRC nor DOE will receive additional funds from the Nuclear Waste Fund for Yucca Mountain-related activities in the foreseeable future, and Petitioners have not carried their burden of proving otherwise. Although, as Judge Kavanaugh suggested, the recent 2012 election and “fiscal cliff” negotiations could have changed the existing dynamic, they did not and the status quo remains in place. The election returned to office an Executive Branch administration that has stated that it does not intend to seek a license for Yucca Mountain. And the election left the political balance of power unchanged in the Legislative Branch, which has repeatedly indicated through its recent funding

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decisions that it does not intend to appropriate additional Nuclear Waste Fund money for this project.

Petitioners readily concede that the current amount available to the Commission in carryover funding is insufficient to resolve the matter. *See* Tr. at 70. Although the Commission could expend its current carryover balance, it is clear that this expenditure will not result in the completion of the numerous activities associated with the Commission's review of the application, as described on pages 43-44 of our brief – which is precisely the “different case” postulated by Judge Kavanaugh at oral argument. Under these circumstances, the Commission believes that it would be far more appropriate to conserve the limited amounts appropriated from the Nuclear Waste Fund so that they would be available if and when Congress decides to fund the project to allow for completion of the Yucca Mountain-related activities (or to direct their use towards an alternative high-level waste solution). Thus, for the reasons we articulated in our briefs and at oral argument, and as the events of the last several months confirm, the Court should withhold issuing mandamus relief in this case.

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Respectfully submitted,

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January 4, 2013