

WHERE TO PUT IT ALL? OPENING THE JUDICIAL ROAD FOR A LONG-TERM SOLUTION TO THE NATION'S NUCLEAR WASTE PROBLEM

*Tom Kenny**

INTRODUCTION

In 1983, Congress passed and the President signed into law the Nuclear Waste Policy Act (NWPA),¹ which directed the Department of Energy (DOE) to enter into contracts with generators of nuclear waste to collect that waste in return for payment of fees.² The DOE would use the fees to construct a permanent geologic repository for long-term storage of the nuclear waste.³ Unfortunately for all parties involved, the government, despite collecting billions of dollars in fees, has never been able to build the repository.⁴

In 1997, nuclear power plant operators asked for and received a writ of mandamus from the D.C. Circuit that barred the government from resorting to an unavoidable delays clause in its contract with the utilities that would have freed the government from liability for breach of its contracts.⁵ This Note will argue that the D.C. Circuit exceeded its jurisdiction in issuing this writ and infringed on the exclusive jurisdiction of the Court of Federal Claims to interpret the federal government's contractual obligations. The writ has contributed to stifling efforts to come up with a workable long-term solution to the nation's nuclear waste problem.

Part I will examine the history of the search to find a long-term storage option for nuclear waste, why efforts to build a permanent

* Candidate for Juris Doctor, Notre Dame Law School, 2011; B.A., Georgetown University, 2005.

1 Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10101–10270 (2006)).

2 42 U.S.C. § 10136.

3 *Id.* § 10131.

4 See Matthew L. Wald, *U.S. Decides One Nuclear Dump Is Enough*, N.Y. TIMES, Nov. 7, 2008, at A21.

5 See *N. States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 756 (D.C. Cir. 1997).

geologic repository failed, and what led to the D.C. Circuit's issuing an extraordinary writ of mandamus. Part II discusses the effects of the writ on the ongoing nuclear waste litigation in the Court of Federal Claims. Parts III and IV then discuss how the government finally decided to mount a collateral attack against the writ of mandamus and why the Court of Federal Claims correctly found the writ to be void for want of jurisdiction. Part V will address how the Federal Circuit reversed the Court of Federal Claims and reinstated the writ, which once again greatly reduced the possibilities of the interested parties working toward an effective, efficient, and long-term solution to the nation's nuclear waste problem.

I. BACKGROUND: WHERE TO PUT IT ALL?

Since Enrico Fermi produced the first controlled atomic chain reaction at the University of Chicago during World War Two, the federal government and the states have struggled with how to safely dispose of the waste generated from the production of nuclear power.⁶ As of 2007, there were over 100 commercial nuclear reactors operating in the United States, which produced some 2,000 metric tons of waste annually.⁷ In 1998, the Office of Civilian Radioactive Waste Management calculated that "commercial reactors had produced 38,400 metric tons of spent nuclear fuel and radioactive waste."⁸ That same office determined that if each of the nation's licensed reactors "finishes out its 40-year license, the [amount of] waste will reach 100,000 metric tons by the year 2035."⁹ Additionally, these estimates "reflect only civilian nuclear waste, and do not consider the spent fuel from defense-related activities, including nuclear weapons, research, and nuclear-powered submarines, which will account for 2,500 additional metric tons of waste needing permanent disposal."¹⁰ With some of the waste containing materials that will be lethal for more than 200,000 years,¹¹ the necessity of a stable, long-term solution is obvious.

6 See Judith Miller, *Planning Safe Half-Life of Radioactive Wastes*, N.Y. TIMES, May 2, 1982, at E22.

7 Annemarie Wall, *Going Nowhere in the Nuke of Time: Breach of the Yucca Contract, Nuclear Waste Policy Act Fallout and Shelter in Private Interim Storage*, 12 ALB. L. ENVTL. OUTLOOK J. 138, 149 (2007).

8 *Id.*

9 *Id.*

10 *Id.* at 149-50.

11 See Miller, *supra* note 6.

A. *Options Discarded*

Since the 1950s, the National Academy of Sciences and other agencies in the federal government have studied a number of different options for the containment, storage, and disposal of nuclear waste.¹² In 1959, Nobel Prize-winning physicist Pyotr Kapitsa of Russia proposed sending nuclear waste to outer space, and scientists in the United States discussed transporting nuclear waste on the space shuttle, an idea that lost support after the explosion of the *Challenger* in 1986.¹³ Scientists have discussed the idea of disposing of nuclear waste at the polar ice sheets by placing it in corrosion-resistant containers and allowing it to melt through the ice down to the bedrock below.¹⁴ However, fears of the waste seeping into the ocean led to an international agreement which prohibited this proposal from coming to fruition.¹⁵ “Scientists have also considered the disposal of nuclear waste in holes drilled approximately six miles beneath the Earth’s surface. However, scientists currently do not know enough about the effects the extreme pressure and extreme temperature would have on the waste, which effectively negated this option.”¹⁶ Scientists both in the United States and abroad have considered other options, such as ocean dumping, subseabed disposal,¹⁷ and reprocessing the spent nuclear fuel to recover uranium and plutonium, but for a variety of reasons, these proposals have never gained much traction.¹⁸

In the absence of an alternative, the solution that has emerged is on-site storage at the nuclear power plant facilities.¹⁹ The Nuclear Regulatory Commission (NRC) determined it had “reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of that reactor’s operating licenses at that reactor’s spent fuel storage basin.”²⁰ The NRC also decided to allow for storage “at either onsite or offsite independent

12 See Wall, *supra* note 7, at 150.

13 See Robin Dusek, Note, *Lost in Space?: The Legal Feasibility of Nuclear Waste Disposal in Outer Space*, 22 WM. & MARY ENVTL. L. & POL’Y REV. 181, 195 (1997).

14 See David P. Ross, Note, *Yucca Mountain and Reversing the Irreversible: The Need for Monitored Retrievable Storage in a Permanent Repository*, 25 VT. L. REV. 815, 818–19 (2001).

15 See Wall, *supra* note 7, at 153–54.

16 *Id.* at 154 (footnote omitted).

17 See *id.* at 151.

18 See *id.* at 154.

19 See *id.* at 155.

20 Waste Confidence Decision, 49 Fed. Reg. 34,658, 34,658 (Aug. 31, 1984) (to be codified at 10 C.F.R. pts. 50–51).

spent fuel storage installations.”²¹ Still, storing spent nuclear fuel at the power plants themselves was never the NRC’s preference, possibly because so many of the nation’s nuclear power facilities are located near populous areas as well as rivers and sea coasts.²² The recent disaster at the Fukushima Daiichi facility in northeast Japan following an earthquake in March 2011 focused new attention on the risks involved in storing spent nuclear fuel on site.²³ The earthquake damaged seven of the cooling pools that stored spent fuel rods at the facility and six weeks after the earthquake, three of those seven cooling pools were still emitting radiation.²⁴ In a later rulemaking, the NRC noted that while it only allowed for a thirty year on-site storage period, it did not dispute that “dry spent fuel storage is safe and environmentally acceptable for a period of 100 years.”²⁵ However, the NRC rulemaking went on to declare that despite this long potential period of safe, on-site storage, it “supports timely disposal of spent fuel and high-level waste in a geologic repository, and by this Decision does not intend to support storage of spent fuel for an indefinitely long period.”²⁶

B. An Answer in the Desert: A Permanent Geologic Repository

Disposing nuclear waste in a permanent geologic repository involves “placing contained and packaged waste into tunnels which are surrounded by several levels of barriers, and that are engineered to contain the waste for several thousands of years.”²⁷ With the goal of establishing just such a repository and with it a long-term solution to the nation’s spent nuclear fuel storage problems, Congress enacted and President Reagan signed the NWPA on January 7, 1983.²⁸ The NWPA declared that “[f]ederal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate.”²⁹ The NWPA’s purpose was

21 *Id.*

22 *See* Wall, *supra* note 7, at 155.

23 Matthew L. Wald, *Japan Nuclear Crisis Revives Long U.S. Fight on Spent Nuclear Fuel*, N.Y. TIMES, Mar. 23, 2011, at A1

24 Polly Kreisman, *Special Report: Indian Point and “Undue Risk”?*, THELOOP (APR. 23, 2011), <http://theloopny.com/2011/04/23/special-report-indian-point-and-undue-risk>.

25 Waste Confidence Decision Review, 55 Fed. Reg. 38,474, 38,482 (Sept. 18, 1990) (to be codified at 10 C.F.R. pt. 51).

26 *Id.*

27 Wall, *supra* note 7, at 156.

28 Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10101–10270 (2006)).

29 42 U.S.C. § 10131(a)(3).

“to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository.”³⁰

While the NWPA contemplated that the DOE would manage the disposal of nuclear waste, it also contemplated that the nuclear power plant operators would foot the bill through the establishment of a Nuclear Waste Fund.³¹ The NWPA authorized the Secretary of Energy to enter into contracts with nuclear power plant operators for the payment of fees in exchange for accepting nuclear waste.³² Critically, the NWPA effectively made it mandatory for nuclear power plant operators to enter into the contracts by prohibiting the NRC from issuing or renewing an operating license unless the plant had entered into or was negotiating with the DOE to enter into such a contract.³³ Just as critically, the NWPA mandated that in return for the payment of fees, the DOE would begin to dispose of the nuclear waste “not later than January 31, 1998.”³⁴

Pursuant to its authority under this section of the NWPA, “[t]he DOE engaged in an administrative hearing process to create a single contract with identical terms”³⁵ and promulgated its Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste (the “Standard Contract”).³⁶ The Standard Contract sets out a schedule of associated fees³⁷ and, as the NWPA mandates, provides for the DOE to begin performing under the contract “not later than January 31, 1998 and shall continue until such time as all [spent nuclear fuel] . . . has been disposed of.”³⁸

But even before the President signed the NWPA into law, legislators began to raise concerns about the method the NWPA established

30 *Id.* § 10131(b)(1).

31 *See id.* § 10131(b)(4) (mandating the establishment of a “Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating [it]”).

32 *Id.* § 10222(a)(1).

33 *See id.* § 10222(b)(1)(A).

34 *Id.* § 10222(a)(5)(B).

35 *PSEG Nuclear, L.L.C. v. United States*, 465 F.3d 1343, 1344 (Fed. Cir. 2006).

36 10 C.F.R. § 961.11 (2010).

37 *Id.* § 961.11, art. VIII.

38 *Id.* § 961.11, art. II.

for choosing the site of the permanent geologic repository.³⁹ The Act directed the Secretary of Energy, in consultation with interested parties including the Administrator of the Environmental Protection Agency, the Council on Environmental Quality, the Director of the U.S. Geological Survey, the NRC, and the governors of potentially affected states, to issue guidelines for the recommendation of sites.⁴⁰ The Act mandated that the guidelines specify, among other factors, “population factors that will disqualify any site from development as a repository if any surface facility of such repository would be located . . . in a highly populated area.”⁴¹ The Secretary would then nominate five potentially suitable sites and recommend three to the President⁴² who would then, “in his discretion,” approve or disapprove within 60 days of a particular candidate site.⁴³

While the Senate approved the NWPA by an overwhelming 69-9 vote,⁴⁴ even legislators who were supportive of the bill quickly lined up to explain why the federal government could not place the permanent repository in their own respective home states.⁴⁵ Many felt that Congress was unnecessarily locking itself into an inadequate long-term solution.⁴⁶

One site, though, that emerged as a favorite and seemingly logical choice was an outcropping of volcanic ash at Yucca Mountain in the Nevada desert.⁴⁷ The Yucca Mountain site was such a natural choice for the repository because it was adjacent to the Nevada test site, where the Department of Defense had detonated more than 600 nuclear weapons in the previous three decades.⁴⁸ The site covered an area the size of Rhode Island and since 1962 the military had conducted all nuclear tests at the site in underground shafts and tun-

39 See Mary McGrory, Op-Ed., *Nuclear Waste: Problem No One Wants, and It Won't Go Away*, WASH. POST, Sept. 30, 1982, at A3.

40 See 42 U.S.C. § 10132(a) (2006).

41 *Id.*

42 *Id.* § 10132(b)(1).

43 *Id.* § 10132(c)(1).

44 See Miller, *supra* note 6.

45 See McGrory, *supra* note 37 (“Rep. Trent Lott (R-Miss.), who has never been known as an enemy of nuclear power plants, nonetheless has been at considerable pains to see that Mississippi is outlawed as the home of an interim waste depository.”).

46 See *id.* (“That’s why the rush to judgment strikes [Rep. Shirley] Chisholm [(D.-N.Y.)] and many others as unseemly. Having waited this long, Congress might well take a little more time to decide a question for the ages.”).

47 See Milton R. Benjamin, *Radioactive Waste May Be Interred Beneath a Site of Its Birth*, WASH. POST, May 26, 1983, at A2.

48 See *id.*

nels.⁴⁹ The shafts and tunnels were strong enough to survive the nuclear detonations and many of them were already twice the size envisaged for the underground waste repository.⁵⁰

The DOE had begun exploratory efforts at Yucca Mountain in 1979, more than three years before the President signed the NWPA into law.⁵¹ At the time, the director of the Energy Department's Waste Management Project Office in Las Vegas stated that, "[b]asically, the view was that [Yucca Mountain] already [was] contaminated with radioactive material and there was very little chance this land mass would be turned back to the public domain in an uncontrolled way."⁵² Additionally, geologists and hydrologists discovered a feature of Yucca Mountain that made it particularly attractive among locations under consideration for the permanent repository.⁵³ The water table at Yucca Mountain was 1,800 feet below the surface, which allowed for the construction of a repository in an unsaturated zone above standing water.⁵⁴ So at the time, Yucca Mountain had the dual advantage of the DOE being familiar with building underground structures there and it being technically suitable for a nuclear waste repository.⁵⁵

C. *Moving Toward Breach of Contract*

Thus, to the surprise of probably no one, in 1987 Congress amended the NWPA to mandate that the Secretary of Energy limit his consideration of site feasibility to Yucca Mountain.⁵⁶ However, even at this early date, the DOE's plan to build a permanent, underground geologic repository appeared to be going off track. Power plant operators have alleged that even then, "[the] DOE was already more than ten years behind schedule, and had not developed any contingency plans for meeting the January 31, 1998, deadline" established both in the NWPA and the Standard Contract.⁵⁷ In 1993, several states and

49 *Id.*

50 *See id.*

51 *See id.*

52 *Id.* (quoting Donald R. Vieth, Director, Energy Department's Waste Management Project Office in Las Vegas).

53 *See id.*

54 *See id.*

55 *See id.*

56 *See* 42 U.S.C. § 10133(a) (2006) ("The Secretary shall carry out, in accordance with the provisions of this section, appropriate site characterization activities at the Yucca Mountain site.").

57 *Neb. Pub. Power Dist. v. United States*, 73 Fed. Cl. 650, 653 (2006), *rev'd*, 590 F.3d 1357 (Fed. Cir. 2010).

utilities asked the DOE to address its ability to meet the 1998 deadline.⁵⁸ The DOE responded that it did not have a clear statutory obligation to accept spent nuclear fuel if it had not yet constructed an operational repository.⁵⁹

In 1994, the DOE published a Notice of Inquiry (NOI)⁶⁰ reaffirming this opinion.⁶¹ It acknowledged that “the earliest possible date for acceptance of waste for disposal at a repository is 2010,”⁶² more than a decade after the 1998 date in both the NWPA and the Standard Contract. In the NOI, the DOE explained how the Standard Contract used the term “facility” as opposed to the term “repository” used in the NWPA.⁶³ It explained that the Standard Contract used a different term in recognition of the possibility “that a Monitored Retrievable Storage (MRS) Facility may be available before a repository and could meet the intent of [the NWPA].”⁶⁴ However, according to the DOE, the 1987 amendments to the NWPA which identified Yucca Mountain as the site for the permanent geologic repository also precluded the DOE from beginning construction on an MRS facility until the NRC had authorized construction on a repository.⁶⁵ In essence, the DOE was claiming that Congress had tied its hands and thus relieved it from any legal obligation under the Standard Contract. The DOE urged that the “federal government . . . take immediate action to establish centralized interim storage capability by 1998, including the commencement of an effort to develop such capability at one or more federal sites.”⁶⁶

Not surprisingly, states and nuclear power plant operators were less than satisfied with this response and shortly thereafter, twenty of the thirty three states that have nuclear facilities along with fourteen utilities filed suit against the DOE.⁶⁷ Pursuant to the judicial review provision of the NWPA,⁶⁸ they brought their suit in the U.S. Court of Appeals for the D.C. Circuit, which dismissed their claim on the

58 See *Ind. Mich. Power Co. v. U.S. Dep't of Energy*, 88 F.3d 1272, 1274 (D.C. Cir. 1996); *Neb. Pub. Power Dist.*, 73 Fed. Cl. at 653.

59 See *Ind. Mich. Power Co.*, 88 F.3d at 1274; *Neb. Pub. Power Dist.*, 73 Fed. Cl. at 653.

60 Notice of Inquiry: Waste Acceptance Issues, 59 Fed. Reg. 27,007 (May 25, 1994).

61 See *id.* at 27,007.

62 *Id.* at 27,008.

63 See *id.*

64 *Id.*

65 See *id.*

66 *Id.*

67 See Editorial, *Forcing a Decision on Nuclear Waste*, CHI. TRIB., July 24, 1994, § 4, at 2.

68 42 U.S.C. § 10139(a)(2) (2006).

ground that the NOI did not constitute final agency action.⁶⁹ However, one year later the DOE did issue a final interpretation basically restating what it had said in the NOI a year earlier—that it did not have “an unconditional statutory or contractual obligation to accept high level waste and spent nuclear fuel [by] January 31, 1998 in the absence of a repository or interim storage facility.”⁷⁰ It also held that it lacked statutory authority under the NWPA to provide interim storage.⁷¹ Finally, the DOE held that even if it did have an unconditional obligation, the “Delays” clause in “the Standard Contract provides that neither party shall be liable for damages in the case of unavoidable delay” while providing that in the event of an avoidable delay, the charges and schedules should be “‘equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.’”⁷² It noted that the Standard Contract provided for a factual determination of whether the delay was unavoidable or not by the designated contracting officer with a right of appeal to the DOE Board of Contract Appeals.⁷³

With a final decision from the DOE in hand, the states and utilities again sought review in the D.C. Circuit. This time, the D.C. Circuit found in their favor, holding that the NWPA did not presuppose the availability of a repository when it set the 1998 deadline and that DOE had an unconditional obligation to meet its obligations under the contract whether or not a facility was available.⁷⁴ Since 1998 had not yet come and the DOE had not yet breached, the court found it unnecessary to determine the validity of the DOE’s interpretation of the unavoidable delays clause.⁷⁵

In response to the D.C. Circuit’s *Indiana Michigan Power Co. v. Unoted States Department of Energy*⁷⁶ decision, the DOE informed the power plant operators and the states that it would still not be able to comply with the statutory deadline that the *Indiana Michigan* court had reaffirmed.⁷⁷ In response to comments from contract holders

69 See *Ind. Mich. Power Co. v. U.S. Dep’t of Energy*, 88 F.3d 1272, 1274 (D.C. Cir. 1996).

70 Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21,793, 21,793–94 (May 3, 1995).

71 See *id.*

72 *Id.* at 21,797 (quoting 10 C.F.R. § 961.11, art. IX (1995)) (internal quotation marks omitted).

73 See *id.*

74 See *Ind. Mich. Power Co.*, 88 F.3d at 1277.

75 See *id.*

76 88 F.3d 1272.

77 See *N. States Power Co. v. U.S. Dep’t of Energy*, 128 F.3d 754, 757 (D.C. Cir. 1997).

regarding the anticipated delay, the DOE held that the Standard Contract did not obligate it to provide a remedy, because the delay was unavoidable.⁷⁸ Article IX of the Standard Contract defines unavoidable delays as “acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather.”⁷⁹ The DOE’s contracting officer identified six factors that, when taken together, support the conclusion that the DOE had encountered an unavoidable delay due to acts of government in establishing a permanent repository at Yucca Mountain.⁸⁰ The factors included “technical problems; regulatory delays; roadblocks to implementation of [an interim facility]; funding restrictions; litigation delays; and consultation requirements.”⁸¹

The D.C. Circuit was less than pleased with the DOE’s response to its decision in *Indiana Michigan*.⁸² When the states and utilities returned to the court to ask for a writ of mandamus to force the DOE to comply with *Indiana Michigan* and begin accepting spent nuclear fuel by the 1998 deadline, the court granted it, at least so far as it precluded the DOE from excusing itself from its obligations under the Standard Contract on the grounds that an unavoidable delay had prevented it from establishing a permanent repository or an interim storage program.⁸³

Congress has codified the common law writ of mandamus and by statute federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”⁸⁴ Still, despite its presence in the U.S. Code, the D.C. Circuit recognized that “[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.”⁸⁵ However, the court found that the states and the utilities had met the rigorous burden for obtaining a writ.⁸⁶

78 *See id.*

79 10 C.F.R. § 961.11, art. IX (2010).

80 *See N. States Power Co.*, 128 F.3d at 760.

81 *Id.*

82 *See id.* at 757 (“After issuing our decision in *Indiana Michigan*, we would have expected that the Department would proceed as if it had just been told that it had an unconditional obligation to take the nuclear materials by the January 31, 1998, deadline. Not so.”).

83 *See id.* at 756.

84 28 U.S.C. § 1651(a) (2006).

85 *N. States Power Co.*, 128 F.3d at 758 (alteration in original) (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)).

86 *See id.*

The Supreme Court has developed over the years a three-part test for determining whether to issue a writ of mandamus. First, the party seeking issuance of the writ should “have no other adequate means to attain the relief he desires.”⁸⁷ Second, the petitioner must show that his “right to issuance of the writ is clear and indisputable.”⁸⁸ Third, the issuing court must be satisfied that the writ is appropriate under the circumstances.⁸⁹

In this case, the D.C. Circuit felt that the utilities had met this burden by establishing that they had a clear right to relief, that the DOE had a clear duty to act,⁹⁰ and a writ was appropriate in these circumstances to prevent the DOE from recycling the losing arguments in *Indiana Michigan* as to why it would not be able to perform by the deadline mandated in both the statute and the contract.⁹¹ Whether or not the DOE had a permanent repository or interim facility ready by January 31, 1998, it could not free itself of the costs caused by its delay in performing its contractual obligations.⁹² The D.C. Circuit thus barred the DOE from implementing any interpretation of the Standard Contract that excused its failure to perform by the deadline on the grounds of an unavoidable delay due to an act of Government.⁹³ It held that this could not possibly be a valid interpretation of the contract, as “it would allow the Executive Branch to void an unequivocal obligation imposed by Congress” in the NWPA to begin performing by January 31, 1998.⁹⁴ The “DOE has no authority to adopt a contract that violates [a statute].”⁹⁵

II. THE POSTBREACH WORLD

Several months after the D.C. Circuit issued its writ of mandamus in *Northern States*, the January 31, 1998, deadline came and went and the federal government was officially in breach of its Standard Contract with nuclear power plant operators.⁹⁶ In the previous fifteen

87 *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (citing *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943)).

88 *Id.* (alterations omitted) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)) (internal quotation marks omitted).

89 *See id.*

90 *See N. States Power Co.*, 128 F.3d at 758.

91 *See id.* at 760.

92 *See id.*

93 *See id.*

94 *Id.*

95 *Id.*

96 *See Greg Gordon, Missing a Deadline: Government Isn’t Set to Accept Nuclear Waste*, STAR TRIB. (Minneapolis), Jan. 31, 1998, at A4.

years since the enacting of the NWPA, nuclear power plants—and by extension the consumers who get their electricity from them—had dumped more than twelve billion dollars into a fund for the construction of a repository that was still at least twelve years from completion.⁹⁷ The plants were left with more than 37,000 tons of highly radioactive spent fuel on their grounds, and since they were running out of room in the reactors, the plants had to begin constructing steel-lined cement casks on site for longer term storage.⁹⁸

The casks, which look like giant concrete barrels and weigh about 130 tons when full,⁹⁹ are costly to construct, and the nuclear power plant operators were intent on having the DOE foot the bill. After the 1998 deadline passed and the government was officially in breach, several utilities filed suit against the government in the U.S. Court of Federal Claims, which under the Tucker Act¹⁰⁰ has exclusive jurisdiction over breach of contract claims against the federal government for a value exceeding \$10,000.¹⁰¹ With no unavoidable delays clause available to the DOE due to the D.C. Circuit's writ of mandamus, the Court of Appeals for the Federal Circuit, which has jurisdiction over appeals from the Court of Federal Claims,¹⁰² held that the avoidable delay clause remedies in the Standard Contract itself were no longer sufficient.¹⁰³ By not limiting remedies to those contemplated in the avoidable delays clause of the Standard Contract, these decisions had the effect of opening "the DOE up to unlimited liability until such obligation was met."¹⁰⁴

Since both the unavoidable delays clause of the Standard Contract, which relieved it of any liability, and the avoidable delays clause, which at least limited the remedies, were now unavailable to the government, it had to proceed to trial against the utilities on damages

97 See Kathryn Winiarski & Paul Overberg, *With Nowhere to Go, Nuclear Waste Piles Up*, USA TODAY, Dec. 31, 1998, at 6A.

98 See *id.*

99 See *id.*

100 28 U.S.C. § 1491(a)(1) (2006).

101 See *id.* § 1346(a)(2) (mandating that the district courts shall have concurrent jurisdiction with the Court of Federal Claims for contract claims against the United States not exceeding \$10,000); *Clinton v. Goldsmith*, 526 U.S. 529, 539 n.13 (1938) ("Under the Tucker Act, the Court of Federal Claims has exclusive jurisdiction over nontort claims against the Government for greater than \$10,000.").

102 See 28 U.S.C. § 1295(a)(3).

103 See Wall, *supra* note 7, at 171 (citing *Me. Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1342 (Fed. Cir. 2000); *N. States Power Co. v. United States*, 224 F.3d 1361, 1367 (Fed. Cir. 2000)).

104 *Id.* at 172.

issues.¹⁰⁵ Thus, at the beginning of this decade, with dozens of other utilities lined up to sue the DOE, it appeared likely that unless it reached some sort of conclusive settlement, the government was likely to spend much of the ensuing years litigating breach of contract suits brought by the utilities.¹⁰⁶

And litigate it did. By 2007, the Office of Civilian Radioactive Waste Management estimated that the government would owe at least seven billion dollars in damages for delays in opening a permanent geologic repository, with further delays increasing damage costs by approximately half a billion dollars per year.¹⁰⁷ At the time, the DOE said the earliest possible date for the opening of a repository was 2017,¹⁰⁸ and by November 2008, it had pushed that date back even further to 2020.¹⁰⁹ The Nuclear Waste Technical Review Board, which for the last two decades had been studying the proposed permanent repository at Yucca Mountain, began, in September 2009, to discuss ways of reusing the spent nuclear fuel instead.¹¹⁰ Some nuclear power plant operators have urged that the DOE divert some of the twenty-two billion dollars still sitting in the Nuclear Waste Fund to developing new waste processing technologies.¹¹¹

Both the Obama administration and Congress have given indications that they would like to abandon the Yucca Mountain project entirely. In 2009, Congress slashed the proposed financing for it at the behest of Senator Harry Reid of Nevada.¹¹² The Office of Civilian Radioactive Waste Management had cut its staff by about 2,000 people in the eighteen months leading up to September 2009, leaving doubt that it would have enough staff to answer questions from the NRC during the ongoing licensing process.¹¹³ In March 2010, the DOE went so far as to file with the NRC a motion to withdraw with prejudice its license application for the Yucca Mountain project.¹¹⁴ But a three-judge panel of the NRC's Atomic Safety and Licensing

105 See *Federal Circuit "Green Lights" Utilities' Breach Suits in Spent Fuel Cases*, GOV'T CONTRACTOR, Sept. 13, 2000, at ¶ 355.

106 See *id.*

107 See Matthew L. Wald, *U.S. to Owe Billions for Delays in Nuclear Dump, Official Says*, N.Y. TIMES, Mar. 7, 2007, at C4.

108 See *id.*

109 See Wald, *supra* note 4.

110 See Matthew L. Wald, *U.S. Panel Shifts Focus to Reusing Nuclear Fuel*, N.Y. TIMES, Sept. 24, 2009, at A24.

111 See *id.*

112 See *id.*

113 See *id.*

114 See *Department of Energy Files Motion to Withdraw Yucca Mountain License Application*, U.S. DEP'T ENERGY (Mar. 3, 2010), <http://www.energy.gov/news/8721.htm>.

Board rejected the motion, finding that the NWPA does not permit the DOE to withdraw the application because it would contradict the congressional policy that the NWPA embodies.¹¹⁵ Still, the Yucca Mountain project received no funding in fiscal year 2011 budget passed by Congress in April 2011.¹¹⁶ After working to eliminate any funding for the project, Senator Reid declared, “Yucca Mountain is dead. And I think it’s time for opponents to move on.”¹¹⁷

III. REVISITING THE VALIDITY OF THE WRIT

So with the future of a permanent repository at Yucca Mountain—or any other site—seriously in doubt, and in the absence of any other clear long-term solution, it is fair to ask how the DOE and other relevant parties in the federal government propose to address this critical issue of national significance going forward. Surely the government cannot be content to simply litigate ongoing damages issues as power plant operators continue to incur costs for storing the nuclear waste the government was supposed to begin collecting more than a decade ago, spending billions of taxpayer dollars in the process. But with no repository or other long-term solution likely in the foreseeable future, and with the D.C. Circuit and the Federal Circuit having precluded the government from any defenses under the unavoidable and avoidable delays clauses, does the government really have any other option?

The remainder of this Note will argue that it should have another option, and it is one that the government finally attempted to avail itself of after a somewhat inexplicable and costly delay. When the D.C. Circuit issued its writ of mandamus in *Northern States* in 1997 precluding the DOE from using the unavoidable delays clause as an excuse for breaching the standard contract,¹¹⁸ it was doing so under the jurisdiction granted to it by the judicial review section of the NWPA.¹¹⁹ In issuing the writ, the D.C. Circuit was essentially interpreting the DOE’s obligations under the Standard Contract. However, the D.C. Circuit has no statutory authority to interpret the federal government’s contractual obligations. The Tucker Act stipu-

115 See U.S. Dep’t of Energy (High Level Waste Repository), LBP-10-11, slip op. at 3 (Nuclear Regulatory Comm’n June 29, 2010).

116 Karoun Demirjian, *Despite House GOP Push, Harry Reid Declares ‘Yucca Is Dead,’* LAS VEGAS SUN (Apr. 12, 2011), <http://www.lasvegassun.com/news/2011/apr/12/despite-house-gop-push-harry-reid-declares-yucca-d>.

117 *Id.*

118 See *N. States Power Co. v. U.S. Dep’t of Energy*, 128 F.3d 754, 760 (D.C. Cir. 1997).

119 See 42 U.S.C. § 10139(a)(2) (2006).

lates that plaintiffs find their remedy for breach of contract by the federal government in the Court of Federal Claims,¹²⁰ with the narrow exception that plaintiffs can bring breach of contract claims for less than \$10,000 in the district courts of the United States.¹²¹ Thus, the D.C. Circuit's writ of mandamus was void for want of jurisdiction and the government should again have the opportunity to raise the unavoidable delays clause defense when defending suits in the Court of Federal Claims for breach of the Standard Contract.

Even when it was issuing the writ of mandamus in *Northern States*, the D.C. Circuit seemed to realize it was at least approaching the limits of its jurisdiction under the NWSA.¹²² After the D.C. Circuit issued the writ, the DOE petitioned for rehearing, suggesting that the D.C. Circuit had "erroneously designated itself as the proper forum for adjudication of disputes arising under the Standard Contract."¹²³ The court responded, though, that it was not adjudicating under the Standard Contract.¹²⁴ It was "merely prohibit[ing] the DOE from implementing an interpretation that would place it in violation of its duty under the NWSA to assume an unconditional obligation to begin disposal by January 31, 1998."¹²⁵ The D.C. Circuit believed that "[t]he statutory duty to include an unconditional obligation in the contract is independent of any rights under the contract. The Tucker Act does not prevent us from exercising jurisdiction over an action to enforce compliance with the NWSA."¹²⁶

The D.C. Circuit seemed to further self-restrict its jurisdiction two years later in *Wisconsin Electric Power Co. v. United States Department of Energy*.¹²⁷ The plaintiff requested the court grant a writ of mandamus ordering the DOE to "provide both monetary and non-monetary relief for having failed to begin disposing of Wisconsin Electric's spent nuclear fuel . . . on January 31, 1998."¹²⁸ The DOE had taken the position that it only needed to provide monetary relief, and the utility felt that this violated the *Northern States* writ of mandamus, so it asked the D.C. Circuit for another one.¹²⁹ The court disagreed, holding

120 See 28 U.S.C. § 1491(a)(1) (2006).

121 See *id.* § 1346(a)(2).

122 See *N. States Power Co.*, 128 F.3d at 761 (noting that the court retains jurisdiction over the case pending compliance with the mandate).

123 *N. States Power Co. v. U.S. Dep't of Energy*, Nos. 97-1064, 98-1069, 98-1070, 97-1065, 97-1370, 97-1398, 1998 WL 276581, at *2 (D.C. Cir. May 5, 1998) (per curiam).

124 See *id.*

125 *Id.*

126 *Id.*

127 211 F.3d 646 (D.C. Cir. 2000) (per curiam).

128 *Id.* at 647.

129 See *id.* at 647-48.

that although the writ “prohibit[ed] the DOE from interpreting the NWPA and its contracts with utilities in a manner that would relieve [it] of its unconditional obligation to begin disposing”¹³⁰ nuclear waste, the court “expressed no opinion about the relief the DOE would have to provide for breach of that obligation.”¹³¹

Additionally, the utility had petitioned for relief on the alternative grounds that the D.C. Circuit had jurisdiction to do so under the judicial review section of the NWPA.¹³² The court held though that, aside from the scope of the *Northern States* writ, the NWPA itself did not grant it the authority to provide the second sought-after writ because a breach of contract by the DOE does not violate a statutory duty and the judicial review section of the NWPA only covers actions inconsistent with statutory duties.¹³³ The D.C. Circuit further held that “[t]he Court of Federal Claims, not this court, is the proper forum for adjudicating contract disputes. Indeed, [the utility’s] petition raises issues that are currently being litigated before the Court of Federal Claims and the Federal Circuit.”¹³⁴ The D.C. Circuit recognized that its jurisdiction did not extend to any of the DOE’s contractual obligations. However, it did not see the inconsistency in issuing a writ of mandamus that made it all but inevitable that another federal court would have to find the DOE in breach of its contract.

IV. MOUNTING A COLLATERAL ATTACK

Given the D.C. Circuit’s own seeming awareness that it was coming very close to the limits of its jurisdiction, it is surprising that the government did not quickly launch a collateral attack on the *Northern States* writ of mandamus when it began litigating against the utilities for breach of the Standard Contract in the Court of Federal Claims. However, seven years passed before Department of Justice (DOJ) lawyers finally raised the issue in 2005 in *Nebraska Public Power District v. United States*.¹³⁵ Why did the government wait so long to collaterally attack the writ of mandamus while incurring costly judgments against it and the taxpayers in the Court of Federal Claims? The answer is not entirely clear. When posed this question in a recent oral argument before the Federal Circuit, the lawyer for the DOJ explained that while there was the possibility to collaterally attack the *Northern States*

130 *Id.* at 648.

131 *Id.*

132 *See id.* at 647.

133 *See id.* at 648.

134 *Id.* (citations omitted).

135 73 Fed. Cl. 650, 655 (2006), *rev’d*, 590 F.3d 1357 (Fed. Cir. 2010).

writ in earlier cases, the government was concerned about its compliance with the writ and possible contempt sanctions if it did not do so.¹³⁶ However, when the magnitude and stifling impact of the writ came to light over the years, the government felt it had to finally challenge it.¹³⁷ When questioned as to why the Federal Circuit should not, on grounds of equitable estoppel, prevent the government from challenging the writ now more than a decade after the D.C. Circuit finally issued it, the DOJ lawyer pointed out that the issue here was one of federal subject matter jurisdiction, which can never be waived and which any party or the court can raise at any time.¹³⁸ Additionally, he noted that since utilities continue to bring breach of contract suits in the Court of Federal Claims, the *Northern States* writ continues to have a tremendous impact on the ongoing litigation.¹³⁹

A. *Can the Government Collaterally Attack the Writ?*

So while the DOJ's explanation of why it waited so long to raise the collateral attack is not tremendously convincing, when it finally raised it in the Court of Federal Claims in *Nebraska Public Power District*, it was initially successful in getting the writ struck down as void for want of jurisdiction.¹⁴⁰ In a comprehensive decision, the Court of Federal Claims considered several issues relating to the validity of the writ. The first question was whether the government could even raise a collateral attack to the D.C. Circuit's writ in the Court of Federal Claims.¹⁴¹ The court stated that precedent from the Federal Circuit indicates that "a party generally cannot avoid *res judicata* on the grounds that a prior judgment was rendered by a court that lacked subject matter jurisdiction, even if the jurisdictional issue was not litigated in the first action."¹⁴² However, the court noted important exceptions to the rule such as when allowing the judgment to stand "would substantially infringe the authority of another tribunal or

136 See Oral Argument at 56:00, *Neb. Pub. Power Dist.*, 590 F.3d 1357 (No. 2007-5083), available at <http://oralarguments.cafc.uscourts.gov/audiomp3/2007-5083.mp3>.

137 See *id.*

138 See *id.* at 57:00–59:00; see also FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.")

139 See Oral Argument, *supra* note 136, at 58:00.

140 *Neb. Pub. Power Dist.*, 73 Fed. Cl. at 651–52.

141 See *id.* at 655.

142 *Id.* at 657.

agency of government”¹⁴³ or “improperly trench[ed] on sovereign immunity.”¹⁴⁴

How the D.C. Circuit’s *Northern States* writ of mandamus “substantially infringed on the authority of another tribunal” should be fairly clear. The writ stripped the government of one of its principle defenses in claims involving the Standard Contract, forcing the government to basically concede liability and preventing the Court of Federal Claims, which is the statutorily appropriate forum adjudicating contract claims, from properly evaluating the validity of the unavoidable delays clause.

Regarding the assertion that the *Northern States* writ “improperly trench[ed] on sovereign immunity,” the court explained that “[a] cadre of Supreme Court cases has particularly emphasized the importance of preserving sovereign immunity in allowing judgments issued against the United States to be attacked collaterally.”¹⁴⁵ The court did not doubt that the judicial review section of the NWPA “affords the D.C. Circuit (and other courts of appeals) jurisdiction over certain issues,”¹⁴⁶ but the court did not believe that it contained a waiver of sovereign immunity.¹⁴⁷ The Supreme Court has held that “[a] waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text and will not be implied.”¹⁴⁸ The Supreme Court has emphasized that “[t]he fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim.”¹⁴⁹

The Court of Federal Claims in *Nebraska Public Power District* asserted that the judicial review section of the NWPA bears a strong resemblance to other jurisdictional statutes because it “lacks any . . . specification of the remedy or relief that may be awarded against the United States.”¹⁵⁰ The court rejected the plaintiff’s contention that the NWPA derived its waiver of sovereign immunity from certain sections of the Administrative Procedure Act (APA).¹⁵¹ The plaintiff

143 *Id.* at 657 n.7 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 12(2) (1982)).

144 *Id.* at 657 (quoting *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104 (D.C. Cir. 1988)).

145 *Id.*

146 *Id.* at 666.

147 *See id.*

148 *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citation omitted) (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33–34, 37 (1992); *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

149 *See Nordic Vill., Inc.*, 503 U.S. at 38 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786 (1991)).

150 *Neb. Pub. Power Dist.*, 73 Fed. Cl. at 667.

151 *See id.* at 667–68.

claimed the waiver was located in § 702 of the APA,¹⁵² which provides for judicial review for persons aggrieved by agency actions.¹⁵³ However, the court persuasively reasoned that § 704¹⁵⁴ of the APA controls § 702, because § 704 limits review of agency action to cases where there is no other adequate remedy.¹⁵⁵ In this instance of course, there is an adequate remedy. The Tucker Act provides that persons injured by the government's breach of a contract can find relief in the Court of Federal Claims.¹⁵⁶ Thus, as the court in *Nebraska Public Power District* wrote, "section 704 functions as a useful stoplight at the crossroads of the NWPA and the Tucker Act, directing when a particular court in a given case should proceed *vel non*."¹⁵⁷ The waiver of sovereign immunity in this case, and where the utilities should have proceeded for their relief, was in the Court of Federal Claims under the Tucker Act, not in the D.C. Circuit under the NWPA.

B. *Is the Writ Void?*

Once it established that a collateral attack was valid, the court moved on to examine the crux of the matter—"whether the [*Northern States*] writ [of mandamus] is void because it exceeds the jurisdiction of the D.C. Circuit and correspondingly infringes upon the jurisdiction of [the Court of Federal Claims]."¹⁵⁸ The court stated that "in deciding contract interpretation issues, the D.C. Circuit plainly exceeded the scope of [the judicial provision of the NWPA]."¹⁵⁹

A decision the Federal Circuit had published just weeks before the Court of Federal Claims published *Nebraska Public Power District* no doubt helped the court along on the road to this decision. In *PSEG Nuclear L.L.C. v. United States*,¹⁶⁰ the Federal Circuit reversed a decision of the Court of Federal Claims and held that the NWPA did not strip the Court of Federal Claims of its Tucker Act jurisdiction over claims for breach of the Standard Contract.¹⁶¹ The Federal Circuit there noted that only a specific jurisdictional statute granting exclusive jurisdiction to another court can supplant the Tucker Act's juris-

152 *See id.* at 667.

153 *See* 5 U.S.C. § 702 (2006).

154 *Id.* § 704.

155 *See Neb. Pub. Power Dist.*, 73 Fed. Cl. at 667–72.

156 *See* 28 U.S.C. § 1491(a)(1) (2006).

157 *Neb. Pub. Power Dist.*, 73 Fed. Cl. at 672.

158 *Id.* at 655.

159 *Id.* at 664.

160 465 F.3d 1343 (Fed. Cir. 2006).

161 *See id.* at 1351.

diction over contract disputes involving the federal government.¹⁶² The NWPA however, contains only one jurisdictional provision, the judicial review section which provides for review of agency actions taken while developing the permanent geologic repository for spent nuclear fuel.¹⁶³

The Federal Circuit held that while the NWPA clearly mandated that the DOE enter into contracts for the removal of spent nuclear fuel and that it begin collecting that fuel by January 31, 1998, the statute did not cover the performance of or damages resulting from a failure to meet its obligations.¹⁶⁴ Since the claims at issue in these cases involve only whether the DOE breached the Standard Contract and what remedies to provide if it did, they do not fall within the DOE's statutory obligations under the NWPA, which in turn does not strip the Court of Federal Claims's Tucker Act jurisdiction over contract disputes.¹⁶⁵

Building on the Federal Circuit's opinion in *PSEG Nuclear*, the court in *Nebraska Public Power District* asserted that "[c]ritically, the actions that were the subject of *Indiana Michigan* and the *Northern States* decisions are not covered by the Federal Circuit's somewhat forgiving construction of [the judicial review section of the NWPA.]"¹⁶⁶ The provisions of the Standard Contract do not relate to agency actions involving the creation of the permanent geologic repository, which the *PSEG Nuclear* court declared would fall under the D.C. Circuit's NWPA jurisdiction.¹⁶⁷ The Standard Contract's provisions assume the existence of a repository to facilitate the DOE's performance.¹⁶⁸ The court points out how the language in the Standard Contract contains nothing about the particulars of establishing the permanent geologic repository, but instead speaks of a world where the repository is up and operational.¹⁶⁹ For example, Article II of the Standard Contract states that "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998."¹⁷⁰ Article IV, which describes

162 See *id.* at 1349.

163 See *id.*; see also 42 U.S.C. § 10139 (2006) (granting judicial review of agency actions to the U.S. Court of Appeals).

164 See *PSEG Nuclear*, 465 F.3d at 1350.

165 See *id.*

166 *Neb. Pub. Power Dist. v. United States*, 73 Fed. Cl. 650, 664 (2006), *rev'd*, 590 F.3d 1357 (Fed. Cir. 2010).

167 See *id.*; see generally 10 C.F.R. § 961.11 (2010) (provisions of the Standard Contract).

168 See *Neb. Pub. Power Dist.*, 73 Fed. Cl. at 664.

169 See *id.*

170 10 C.F.R. § 961.11, art. II.

each party's responsibilities under the Standard Contract, uses language like the "DOE shall accept title to all [spent nuclear fuel] and/or [high-level waste], of domestic origin, generated by the civilian nuclear power reactor(s) . . . [and] provide subsequent transportation for such material to the *DOE facility*."¹⁷¹

Since the provisions of the Standard Contract have nothing to do with the DOE's obligations to construct a facility for the disposal of spent nuclear fuel, the judicial review section of the NWPA provides no jurisdiction for the D.C. Circuit to interpret the DOE's obligations under the Standard Contract. The Court of Federal Claims summarized its holding in *Nebraska Public Power District* as follows:

The foregoing amply illustrates yet another reason why, in describing where this court's jurisdiction begins, the Federal Circuit *sub silentio* described where the D.C. Circuit's jurisdiction ends, *to wit*, that the latter court's jurisdiction does not extend beyond reviewing agency actions under Title III [of the NWPA] that relate to the creation of the repository. The decisions in *Indiana Michigan* and *Northern States* bounded across the latter line, thereby intruding on this court's jurisdiction.¹⁷²

C. *The Christopher Village Decision*

In deciding *Nebraska Public Power District*, the Court of Federal Claims was able to draw on a recent Federal Circuit decision where that court directly examined the jurisdictional capacity of federal district courts and courts of appeals to infringe on the Court of Federal Claims's Tucker Act jurisdiction. In *Christopher Village, L.P. v. United States*,¹⁷³ the court held that "the United States District Court for the Southern District of Texas, and on appeal the United States Court of Appeals for the Fifth Circuit, lacked jurisdiction to issue . . . a 'predicate' judgment" as to the government's liability for a breach of contract.¹⁷⁴ In *Christopher Village* the plaintiff-appellants had entered into a contract with the U.S. Department of Housing and Urban Development (HUD) pursuant to a statute, the United States Housing Act,¹⁷⁵ which "authorized HUD to enter into contracts with landlords to subsidize rental payments of tenants living in private, low-income housing."¹⁷⁶

171 *Id.* § 961.11, art. IV (emphasis added).

172 *Neb. Pub. Power Dist.*, 73 Fed. Cl. at 664.

173 360 F.3d 1319 (Fed. Cir. 2004).

174 *Id.* at 1321.

175 42 U.S.C. §§ 1437-1437bbb-9 (2006 & Supp. IV 2010).

176 *Christopher Vill.*, 360 F.3d at 1322 (citing 42 U.S.C. § 1437(f) (2000); *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 12 (1993)).

In this particular case, HUD took over the property of the plaintiff-appellants after it determined that they had failed to adequately maintain the property.¹⁷⁷ In response, the plaintiff-appellants filed suit against HUD in the Southern District of Texas seeking a writ of mandamus to prevent HUD from foreclosing on their property.¹⁷⁸ They “also sought a declaratory judgment that their obligation to maintain the property was contingent upon receiving adequate rent revenue [through the United States Housing Act contracts].”¹⁷⁹ After the district court granted summary judgment for HUD on the grounds that HUD’s decisions to grant rent increases were unreviewable, the plaintiffs appealed to the Fifth Circuit, which held that HUD had violated its contractual and regulatory duties by failing to consider the plaintiff-appellants’ request for rent increases.¹⁸⁰ It reversed the district court’s grant of summary of judgment and ordered the district court on remand to issue the plaintiff-appellants’ sought-after declaratory judgment.¹⁸¹

Armed with that declaratory judgment, the plaintiff-appellants then filed suit in the Court of Federal Claims for breach of contract, claiming that *res judicata* prevented the government from attempting to relitigate the issue and “entitled [them] to a finding of liability against HUD as a matter of law.”¹⁸² The court rejected this assertion, holding that “[*r*]es *judicata* presumes that the first court had jurisdiction over the claim As such, *res judicata* does not bar the government from raising defenses to plaintiffs’ breach of contract claim in this instance.”¹⁸³

On appeal, the Federal Circuit, in upholding the Court of Federal Claims, explained that “[i]n order for a district court [in this case, the District Court for the Southern District of Texas,] to have properly had jurisdiction, the government must have waived sovereign immunity to suit.”¹⁸⁴ Similar to its statement in *PSEG Nuclear*, here the court held that a clear statement from the government is necessary to find a waiver of sovereign immunity.¹⁸⁵ Since under the Tucker Act, the plaintiff-appellants in this case had an adequate remedy for the

177 *See id.* at 1323.

178 *See id.*

179 *Id.*

180 *See id.* at 1324.

181 *See id.*

182 *Id.*

183 *Christopher Vill., L.P. v. United States*, 53 Fed. Cl. 182, 188 (2002), *aff'd*, 360 F.3d 1319 (Fed. Cir. 2004).

184 *Christopher Vill.*, 360 F.3d at 1327.

185 *See id.*

government's alleged breach of contract in the Court of Federal Claims, § 704 of the APA, with its "no adequate remedy" provision, did not grant jurisdiction to the District Court for the Southern District of Texas, or by extension the Fifth Circuit.¹⁸⁶ Referencing a previous decision, the court stated that "[a] party may not circumvent the Claims Court's exclusive jurisdiction by framing a complaint . . . as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States."¹⁸⁷ The court went on to cite ample precedent from other circuits, including the D.C. Circuit, which recognizes this construction of the APA and the Court of Federal Claims's exclusive jurisdiction under the Tucker Act over contract claims.¹⁸⁸

As the Court of Federal Claims would do two years later in *Nebraska Public Power District*, the Federal Circuit here considered the issue that although the Fifth Circuit lacked subject matter jurisdiction, lack of subject matter jurisdiction does not usually strip a decision of its preclusive effect.¹⁸⁹ However, drawing on the Supreme Court's decision in *United States v. United States Fidelity & Guaranty Co.*,¹⁹⁰ the court concluded that an affirmative decision by Congress to grant exclusive jurisdiction to one court "render[s] void a judgment [by another court] that treads upon that exclusive jurisdiction."¹⁹¹

In *United States Fidelity & Guaranty Co.*, the Court found void a decision by a federal district court in Missouri against an Indian Nation because "Indian Nations [were] exempt from suit without Congressional authorization," as their sovereign immunity had passed

186 See *id.* at 1327–29.

187 *Id.* at 1328 (first alteration in original) (quoting *Consol. Edison Co. v. U.S. Dep't of Energy*, 247 F.3d 1378, 1385 (Fed. Cir. 2001)).

188 See *id.* ("[T]he Tucker Act—which waives sovereign immunity and provides the United States Court of Federal Claims (Claims Court) with jurisdiction over certain claims for monetary relief from the federal Government—provides an adequate remedy in the Claims Court, which would preclude district court jurisdiction under § 704 of the APA." (alteration in original) (citation omitted) (quoting *Deaf Smith Cnty. Grain Processors, Inc. v. Glickman*, 162 F.3d 1206, 1210–11 (D.C. Cir. 1998)) (internal quotation mark omitted)); *id.* ("[R]eview under the APA is available only for 'final agency action for which there is no other adequate remedy in a court' . . ." (first alteration in original) (quoting *Randall v. United States*, 95 F.3d 339, 346 (4th Cir. 1996))); *id.* ("A party may not avoid the [Court of Federal Claims'] jurisdiction by framing an action against the federal government that appears to seek only equitable relief when the party's real effort is to obtain damages in excess of \$10,000." (alteration in original) (quoting *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1099 (9th Cir. 1990))).

189 See *id.* at 1329–30.

190 309 U.S. 506 (1940).

191 *Christopher Vill.*, 360 F.3d at 1331.

to Congress.¹⁹² Congress had only authorized suits against Indian Nations in U.S. courts in Indian Territories.¹⁹³ Since the judgment of the federal court in Missouri was void, the Supreme Court reversed a decision by a federal court in Oklahoma giving that judgment preclusive effect.¹⁹⁴ The Federal Circuit in *Christopher Village*, thus held that “[r]espect for the exclusive jurisdiction of the Court of Federal Claims is no less important than respect for the exclusive jurisdiction of . . . the Indian Territory courts”¹⁹⁵ or any other federal court to which Congress has granted exclusive jurisdiction of any subject matter.¹⁹⁶ The Fifth Circuit’s decision “did not merely exceed the court’s jurisdiction, it ‘directly implicat[ed] issues of sovereign immunity,’ and is therefore void [and] not entitled to preclusive effect, despite the fact that the court’s jurisdiction was not challenged on direct review.”¹⁹⁷ As it was with the Fifth Circuit in *Christopher Village*, so it is with the D.C. Circuit in *Nebraska Public Power District*. The D.C. Circuit’s writ of mandamus in *Northern States* infringed on the jurisdiction of another federal court and subjected the government to judgment in a matter in which it had not waived its sovereign immunity in that particular court. The writ is thus void and not entitled to preclusive effect in other federal courts.

D. *The Megapulse Decision*

After the court in *Nebraska Public Power District* declared the D.C. Circuit’s writ of mandamus void and lacking preclusive effect in regards to the unavoidable delays clause in the Standard Contract,¹⁹⁸ the plaintiffs asked the court to certify the decision to the Federal Circuit for interlocutory appeal.¹⁹⁹ By statute, a court may grant an interlocutory appeal when “a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation.”²⁰⁰ While the court acknowledged that it traditionally reserves interlocutory appeals

192 See *U.S. Fid. & Guar. Co.*, 309 U.S. at 512.

193 See *id.* at 513.

194 See *id.* at 514–15.

195 *Christopher Vill.*, 360 F.3d at 1332.

196 See *id.*

197 *Id.* at 1333 (first alteration in original) (quoting *Int’l Air Response v. United States*, 324 F.3d 1376, 1380 (Fed. Cir. 2003)).

198 See *Neb. Pub. Power Dist. v. United States*, 73 Fed. Cl. 650, 674 (2006), *rev’d*, 590 F.3d 1357 (Fed. Cir. 2010).

199 See *Neb. Pub. Power Dist. v. United States*, 74 Fed. Cl. 762, 763 (2006).

200 28 U.S.C. § 1292(d)(2) (2006).

for only exceptional or rare cases, given the tremendous impact of the *Northern States* writ in this case and all cases involving breach of the Standard Contract, interlocutory appeal was appropriate in this instance.²⁰¹ Notably, the government did not oppose the court's certifying the issue for interlocutory appeal, logically not wanting to litigate on the basis of having the unavoidable delays clause defense available if the Federal Circuit was merely going to reinstate the D.C. Circuit's *Northern States* writ.²⁰²

After a three-judge panel of the Federal Circuit initially heard oral arguments on December 3, 2007, the court, without coming to a decision on the merits, voted on its own accord to rehear the case en banc.²⁰³ The en banc panel finally heard oral arguments on September 18, 2009.²⁰⁴

On appeal, the utilities attempted to draw support for the validity of the *Northern States* writ from a decision by the D.C. Circuit in *Megapulse, Inc. v. Lewis*.²⁰⁵ In *Megapulse*, a government contractor brought suit in the United States District Court for the District of Columbia and sought to enjoin the Coast Guard from releasing certain proprietary data on the grounds that it violated the Trade Secrets Act.²⁰⁶ The D.C. Circuit framed the issue as "whether a government contractor can step outside the Tucker Act and seek an injunction in the district court to prevent an alleged violation of the Trade Secrets Act when the data involved were originally provided to the government pursuant to the terms of various contracts."²⁰⁷ The district court found that it had no jurisdiction.²⁰⁸

The D.C. Circuit reversed, finding that "agency action" existed in the Coast Guard's decision to release the propriety data.²⁰⁹ It held that the petitioner's claim in this instance was not "at its essence" a contract action,²¹⁰ stating that "the mere fact that a court may have to rule on a contract issue does not, by triggering some mystical metamorphosis, automatically transform an action based on trespass or conversion into one on the contract and deprive the court of jurisdic-

201 See *Neb. Pub. Power Dist.*, 74 Fed. Cl. at 763–64.

202 See *id.* at 763.

203 See *Neb. Pub. Power Dist. v. United States*, 335 F. App'x 42, 43 (Fed. Cir. 2009) (per curiam).

204 See Oral Argument, *supra* note 136, at 56:00.

205 672 F.2d 959 (D.C. Cir. 1982); see Brief of Plaintiff-Appellant at 50–55, *Neb. Pub. Power Dist.*, 335 F. App'x 42 (No. 2007-5083) .

206 See *Megapulse*, 672 F.2d at 962–63.

207 *Id.* at 963–64.

208 See *id.* at 964.

209 See *id.* at 966, 971.

210 See *id.* at 968–71.

tion it might otherwise have.”²¹¹ It went on to explain that “[i]t is not at all unusual for a court to . . . decide [a secondary] issue which would be outside its jurisdiction if raised directly.”²¹² And although the Court of Claims has exclusive jurisdiction over contract disputes over \$10,000, it does not have exclusive jurisdiction over contract-related issues arising in other actions.²¹³

The D.C. Circuit emphasized that the petitioner’s claims against the government are not merely contract claims in disguise.²¹⁴ The petitioner did not claim breach of contract and it did not seek any monetary damages.²¹⁵ The court found that the petitioner was not relying on the contract at all.²¹⁶ Rather, it was “the Government, and not Megapulse, which [was] relying on the contract, attempting to show that the Coast Guard lawfully came into possession of the property and [was] empowered by the contract to put the entrusted information out for commercial use.”²¹⁷ The government should not be able to avoid injunctions against activities that violate statutory duties, in this case its duty not to disclose confidential information under the Trade Secrets Act, “simply by *contracting* not to engage in those activities.”²¹⁸

The petitioners in *Nebraska Public Power District* argued that the *Megapulse* standard should apply here because the sources of the plaintiffs’ claims in *Indiana Michigan* and *Northern States* were statutory, not contractual.²¹⁹ They asserted that the D.C. Circuit restricted its limited writ of mandamus from *Northern States* to ordering DOE to honor its statutory obligations under the NWPA.²²⁰ The *Northern States* writ did not force the DOE to begin collecting the spent nuclear fuel by the January 31, 1998, deadline, as the Standard Contract stipulated. It only ordered the DOE to recognize that it had an unconditional obligation and could not use the unavoidable delays clause of the Standard Contract to escape that obligation.²²¹ In other words, as in *Megapulse*, the fact that the relief granted by the D.C. Circuit’s writ of mandamus had spillover consequences for the DOE under the

211 *Id.* at 968.

212 *Id.* (quoting *De Magno v. United States*, 636 F.2d 714, 724 (D.C. Cir. 1980)).

213 *See id.*

214 *See id.* at 969.

215 *See id.*

216 *See id.*

217 *See id.*

218 *Id.* at 971.

219 *See* Brief of Plaintiff-Appellant, *supra* note 205, at 53.

220 *See id.*

221 *See id.*

Standard Contract did not mean that the D.C. Circuit had infringed on the Court of Federal Claims's exclusive Tucker Act jurisdiction in issuing the writ.²²²

The Court of Federal Claims in *Nebraska Public Power District* specifically considered the *Megapulse* factors in its decision but still reached the conclusion that the D.C. Circuit exceeded its jurisdiction in this case.²²³ It pointed out that unlike the petitioners in *Megapulse*, who were not relying on the contract at all in their claim, the plaintiffs before the D.C. Circuit in *Indiana Michigan* and *Northern States* sought monetary damages and other relief that was basically the equivalent of specific performance of a contract.²²⁴

The court's reasoning is sound as the facts of the two cases are readily distinguishable. In *Megapulse*, the fact that the government came into possession of the plaintiff's proprietary data, which it then sought to share more widely, through a contract, is incidental to the plaintiff's claim under the Trade Secrets Act. The plaintiff would likely have had the same Trade Secrets Act claim if the government had acquired its proprietary data through any number of other methods. The plaintiffs in *Megapulse* did not follow up their victory in the D.C. Circuit with a breach of contract claim in the Court of Federal Claims. They had no reason to do so as they only needed injunctive relief based on a statute. The *Northern States* writ, however, altered completely how the government would be able to defend itself in breach of contract claims involving the Standard Contract. By holding that a section of the Standard Contract, the unavoidable delays clause, was invalid, the D.C. Circuit was interpreting a contract and when the utilities proceeded directly to the Court of Federal Claims with their breach of contract claims, the government had little choice but to admit liability and litigate solely on the issue of damages.

V. THE FEDERAL CIRCUIT'S REVERSAL

Unfortunately for those hoping that the Court of Federal Claims's decision in *Nebraska Public Power District* would open the road to a long-term solution to the nation's nuclear waste problem, in January 2010, a majority of the *en banc* panel of the Federal Circuit reversed the Court of Federal Claims, finding that the D.C. Circuit did not improperly infringe on the Court of Federal Claims's Tucker Act

222 See *id.* at 53–54.

223 See *Neb. Pub. Power Dist. v. United States*, 73 Fed. Cl. 650, 665 (2006), *rev'd*, 590 F.3d 1357 (Fed. Cir. 2010).

224 See *id.*

jurisdiction by issuing the *Northern States* writ.²²⁵ The court's analysis on this main point was notably brief. It held that "[o]nce the D.C. Circuit construed the NWPA to require DOE to begin accepting nuclear waste by 1998, it was not a significant further step to conclude that Congress did not intend for DOE to avoid that statutory obligation by adopting a contrary interpretation of the Standard Contract."²²⁶

A lengthy dissent found fault with this proposition, pointing out that "the D.C. Circuit actually forbids the United States from defending itself in a contract action in the Court of Federal Claims."²²⁷ The dissent then went on to argue that "the issue of remedy, and specifically, whether there should be no remedy because of 'unavoidable delay,' only applies if a party has failed to perform its obligations under the contract."²²⁸ Thus, the dissent points out that contrary to the premise of the D.C. Circuit's writ, "whether the DOE uses the Unavoidable Delays clause to minimize or prevent having to pay damages for failing to meet the 'unconditional obligation' to begin disposing of [spent nuclear fuel] . . . is a separate inquiry from whether the contract properly incorporates the statutorily mandated unconditional deadline into its terms."²²⁹ The dissent concluded that the NWPA "is entirely silent on the issue of contractual remedies (or even whether the contract has to provide any monetary damages at all). Therefore, there is no reasonable argument here that the D.C. Circuit's jurisdiction could extend to any reliance by the DOE on the Standard Contract's Unavoidable Delays clause."²³⁰ So despite there being no mandate in the NWPA for the DOE's provision of contractual remedies, the D.C. Circuit's writ, now unfortunately affirmed by the Federal Circuit, has basically locked the DOE, and by extension the American taxpayer, into litigating damages against nuclear power plant operators in one law suit after another.

CONCLUSION: OPENING THE ROAD TO A NEW SOLUTION

In its now-reversed decision in *Nebraska Public Power District*, the Court of Federal Claims explained how the *Northern States* writ of mandamus has hindered the orderly progression of nuclear waste litiga-

225 *Neb. Pub. Power Dist. v. United States*, 590 F.3d 1357, 1359 (Fed. Cir. 2010).

226 *Id.* at 1375.

227 *Id.* at 1377 (Gajarsa, J., dissenting).

228 *See id.* at 1382.

229 *Id.*

230 *Id.*

tion in a number of different areas.²³¹ First, while the court issued the writ in response to an administrative position taken by the DOE, it tied the hands of the DOJ, which is responsible for defending the government in litigation before the Court of Federal Claims.²³² Second, the *Northern States* writ has prevented so far the Court of Federal Claims “from resolving an important liability issue on the merits, a contract issue that this court manifestly has jurisdiction to decide and whose resolution potentially impacts at least sixty pending cases, involving tens of billions of dollars in claims.”²³³

Lifting the *Northern States* writ of mandamus would have been some sort of elixir that solved the nation’s six-decade-old nuclear waste problem. But as it stands now, with the *Northern States* writ in force, neither side has much of an incentive to look for new solutions. The utilities know that they can continue to build costly dry casks for on-site storage and bring suits for damages in the Court of Federal Claims, where the government has no defense to liability. The two sides will haggle over the damages, but the utilities can be confident that the government will end up picking up most of the tab. In oral arguments before the en banc panel of the Federal Circuit in *Nebraska Public Power District*, the utilities’ lawyer acknowledged, “we are in trial almost all the time. We have one starting next Tuesday. We will be talking about acceptance rate. We will be talking about damages. We will be talking about offsets We’ve been through this many times. We know their expert witnesses. They know ours.”²³⁴

From the government’s perspective, since it is locked into its obligations under the Standard Contract, it has reduced incentive to look for other solutions besides a permanent geologic repository. Under these circumstances, it makes sense to keep plugging away at Yucca Mountain, even though that project is now twenty-two years behind schedule.²³⁵ Even if it ever is able to abandon the construction of a permanent geologic repository at Yucca Mountain, with the *Northern States* writ of mandamus still in force, the government will still be liable for breach of the Standard Contract for an indeterminate period into the future.

How the government should proceed if it is again able to invoke the unavoidable delays clause of the Standard Contract is beyond the scope of this Note. The hope is that the ability to invoke the unavoid-

231 See 73 Fed. Cl. 650, 673 (2006), *rev’d*, 590 F. 3d 1357.

232 See *id.*

233 *Id.*

234 Oral Argument, *supra* note 136, at 18:04.

235 Wald, *supra* note 4 (reporting that the federal government now projects that Yucca Mountain will not be operational until the year 2020 at the earliest).

able delays clause will at least change the nature of this litigation enough to encourage both the DOE and the nuclear power plant operators to look for a new long-term solution to this critical public policy problem.