

2012

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Recommended Citation

Mark D. Godfrey, *The Continuing Burden of Short-Sighted Nuclear Waste Policy. Dominion Res., Inc. v. United States*, 19 J. Envtl. & Sustainability L. 151 (2012)

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The Continuing Burden of Short-Sighted Nuclear Waste Policy

Dominion Res., Inc. v. United States, 641 F.3d 1359 (Fed. Cir. 2011)

I. INTRODUCTION

Little more than a decade after the bombing of Hiroshima, the first full-scale commercial nuclear power plant opened in Sellafield, United Kingdom on October 17, 1956.¹ Nuclear engineers proved that the advent of nuclear power heralded not only the possibility of the total destruction of mankind through nuclear war, but also the possibility of producing electricity through a safe, economical, and plentiful power source.

In the past fifty-six years, governmental acceptance and advocacy of nuclear power has varied widely across the globe. France remains the world's leading implementer of nuclear power.² As a result of the 1973 OPEC oil embargo and France's relative lack of fossil fuels, then-Prime Minister Pierre Messmer instituted an ambitious plan to further French energy independence through nuclear plant construction.³ The Messmer

¹ *BBC On This Day: Queen Switches on Nuclear Power*, BRITISH BROADCASTING COMPANY, http://news.bbc.co.uk/onthisday/hi/dates/stories/october/17/newsid_3147000/3147145.stm (last visited Nov. 20, 2011).

² *World Nuclear Power Reactors & Uranium Requirements*, WORLD NUCLEAR ASSOCIATION (Oct. 21, 2011) <http://www.world-nuclear.org/info/reactors.html>.

³ *Electricite de France*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/Electriciteacute;-de-France-Company-History.html> (last visited Mar. 13, 2012).

plan launched thirteen new nuclear power plants within two years and helped France produce three-quarters of its electricity through nuclear power by 1990.⁴ France has maintained that percentage into the present.⁵

Additionally, France maintained a policy of recycling its spent nuclear fuel (“SNF”), a highly radioactive byproduct that comes from nuclear power generation.⁶ SNF recycling allows for more energy to be extracted from the initial uranium fuel and drastically decreases the amount of waste produced by nuclear power generation.⁷ Approximately one-fifth of French nuclear power generation comes from recycled nuclear waste.⁸

American nuclear history stands in stark contrast to the record of the French Republic. During the implementation of the Messmer plan, the French nuclear industry remained relatively free from costly nuclear accidents.⁹ American nuclear plants have not been so fortunate. Much

As a response to the United States’ support of Israel during the Yom Kippur war of 1973, the Arab dominated Organization of Petroleum Exporting Countries drastically curtailed oil exports to the United States and its allies, quadrupling the price of oil. *OPEC Oil Embargo*, U.S. DEPARTMENT OF STATE, <http://history.state.gov/milestones/1969-1976/OPEC> (last visited Apr. 6, 2012).

⁴ *Id.*

⁵ *Id.*

⁶ *Nuclear Power in France*, WORLD NUCLEAR ASSOCIATION, (Sept. 2011) <http://www.world-nuclear.org/info/inf40.html>.

⁷ *Id.*

⁸ *Id.*

⁹ *Electricite de France*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/Electriciteacute;-de-France-Company-History.html> (last visited Mar. 13, 2012).

like the SNF that comes from its nuclear power plants, American nuclear policy is highly reactive. Often taking its cue from volatile public reaction to nuclear disasters, American nuclear policy lurches from one decision to the next, oblivious to the sum of its effects. Construction began on each of the currently operating American nuclear power plants before the nuclear meltdown on Three Mile Island¹⁰ in 1979.¹¹ Since 1979, construction has begun on only two additional nuclear plants, and both are still under construction.¹² More pressing than the future construction of nuclear power plants, the government has been unable to find a long-term storage solution for American SNF. Swayed by the nuclear meltdowns at Three Mile Island and Chernobyl and the continuing apprehension of transporting or storing nuclear waste in the vicinity of their constituents, government policymakers have developed an unsustainable and costly solution to the storage of American SNF.

¹⁰ On March 28, 1979, a coolant failure in Mile Island Unit 2, a nuclear power plant near Middleton, Pennsylvania, led to a meltdown of the Unit's reactor. *NRC: Backgrounder on the Three Mile Island Accident*, U.S. NUCLEAR REGULATORY COMMISSION, <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html> (last visited Mar. 3, 2012). Though the meltdown released radiation into the surrounding area, later studies showed that the release had a negligible effect on the local population. *Id.*

¹¹ Matthew L. Wald, *Nuclear 'Renaissance' Is Short on Largess*, N.Y. TIMES (Dec. 7, 2010, 5:53 PM), <http://green.blogs.nytimes.com/2010/12/07/nuclear-renaissance-is-short-on-largess/>.

¹² *Id.*

II. FACTS AND HOLDING

In 2001, Dominion Nuclear Connecticut (“Dominion”), a utility company, bought three nuclear power plants at the Millstone Power Station¹³ from Northeast Utilities.¹⁴ As part of the agreement, Northeast Utilities assigned three Standard Contracts¹⁵ to Dominion, thereby transferring title of Northeast Utilities’ SNF and “all rights of the Sellers...under [the Department of Energy]’s Standard Contracts (including all rights to any claims of Sellers related to [the Department]’s defaults thereunder).”¹⁶ Dominion then sued the federal government for costs stemming from the storage of its SNF, including \$12.1 million in costs incurred by Northeast Utilities before Dominion purchased Millstone.¹⁷ The Court of Federal Claims awarded Dominion \$10.9 million in pre-acquisition damages.¹⁸

¹³ The Millstone Power Station is located near New London, Connecticut. *Dominion Res., Inc. v. United States*, 641 F.3d 1359, 1361 (Fed. Cir. 2011).

¹⁴ *Id.*

¹⁵ 10 C.F.R. § 961.11 (2012).

¹⁶ *Dominion*, 641 F.3d at 1361.

¹⁷ *Id.* (citing *Dominion Res., Inc. v. United States*, 84 Fed. Cl. 259, 263, 285 (Fed. Cl. 2008)).

¹⁸ *Id.* (citing *Dominion Res., Inc. v. United States*, 84 Fed. Cl. 259, 263 (Fed. Cl. 2008)). The Court of Federal Claims served as the trial court.

The government appealed on two grounds.¹⁹ First, it claimed that the Assignment of Claims Act, (“Claims Act”)²⁰ prohibited Northeast Utilities from transferring its claim for SNF storage costs to Dominion.²¹ Second, the government claimed that the trial court incorrectly denied the government’s request for discovery into Dominion’s deferral of the one-time fee payment, which stemmed from the government’s failure to execute the Standard Contract.²² The Court of Appeals for the Federal Circuit affirmed both issues, holding that the Assignment of Claims Act does not bar a party to a Standard Contract from transferring a damages claim for breach of contract along with the transfer of the contract itself; additionally, the Court of Appeals for the Federal Circuit held that no discovery may be made into the transferee’s economic benefit from the deferral of the one-time fee owed to the government.²³

III. LEGAL BACKGROUND

Nuclear power uses the heat from an atomic reaction in uranium fuel rods to boil water into steam, which then turns the turbines of electricity generators.²⁴ Uranium fuel rods eventually decay, producing a

¹⁹ *Dominion Res., Inc. v. United States*, 641 F.3d 1359, 1360 (Fed. Cir. 2011).

²⁰ Pub.L. No. 97-258, § 1, 96 Stat. 976 (codified at 31 U.S.C. § 3727 (2006)).

²¹ *Dominion*, 641 F.3d at 1361.

²² *Id.* at 1360.

²³ *Id.*

²⁴ Scott R. Helton, *The Legal Problems of Spent Nuclear Fuel Disposal*, 23 ENERGY L.J. 179, 180 (2002).

radioactive byproduct, SNF.²⁵ SNF can be recycled.²⁶ The reprocessing procedure, currently employed by nations such as the United Kingdom and Japan, separates the SNF into 95% reusable uranium, 1% plutonium, and 4% highly radioactive waste product.²⁷ However, in 1977, the Carter administration saw SNF recycling as a nuclear weapons proliferation risk because the recycling process produces weapons grade plutonium.²⁸ In an unsuccessful effort to curtail nuclear weapons proliferation by example, the United States ended its SNF reprocessing, thus increasing the amount of nuclear waste produced by nuclear power.

A. *The Nuclear Waste Policy Act*

The Federal Court of Appeal's decision in *Dominion Resources v. United States* stems from the Federal Government's twenty-eight year old promise to safely store the nation's SNF. Unfortunately, the Federal Government made the promise without the ability to deliver. After

²⁵ *Id.* at 180.

²⁶ *Id.* at 181.

²⁷ *Id.* at n.23 (citing Mark Holt, Civilian Nuclear Spent Fuel Temporary Storage Options, Congressional Report for Congress, 96-212, at P 50 (Mar. 27, 1998), available at <http://www.cnle.org/nle/waste-20.html>).

²⁸ Tanya Mortensen, *An Unattainable Wedge: Four Limiting Effects on the Expansion of Nuclear Power*, 5 ENVTL. & ENERGY L. & POL'Y J. 60, 74 (2010) (citing Richard B. Stewart, *Nuclear Waste Law and Policy: Fixing a Bankrupt System*, 17 N.Y.U. ENVTL. L.J. 784, 789 (2008)).

banning SNF recycling in 1978,²⁹ the United States still needed a place to store its SNF. Two instances of public fear compelled political action. First, in the wake of the Three Mile Island meltdown that forced 140,000 people to leave their homes in central Pennsylvania in fear of nuclear radiation, legislators felt political pressure to ship SNF out of their states and into a permanent repository.³⁰ In 1983, President Reagan signed the Nuclear Waste Policy Act (“NWSA”) into law.³¹ The NWSA required the U.S. Department of Energy (“The Department”) to refuse to issue or renew an operation license with any plant that did not enter into a Standard Contract for the Disposal of Spent Nuclear Fuel (“Standard Contract”) with the Department.³² The Standard Contract stated that the government would begin collecting SNF no later than January 31, 1998.³³ The NWSA placed the cost of transporting SNF and building the repository directly on energy producers.³⁴ Energy producers would pay the government for the cost of transporting and storing their SNF.³⁵ Energy producers’ payment would go into the government run Nuclear Waste Fund.³⁶ The NWSA also authorized the Secretary of Energy to

²⁹ Nuclear Non-Proliferation Act of 1978, Pub. L. 95-242 [H.R. 8638], 92 Stat. 120. Section 105.

³⁰ Mortensen, *supra* note 288, at 74.

³¹ Tom Kenny, *Where to Put It All? Opening the Judicial Road for A Long-Term Solution to the Nation's Nuclear Waste Problem*, 86 NOTRE DAME L. Rev. 1319, 1322 (2011).

³² Kenny, *supra* note 31, at 1323 (citing § 10222(b)(1)(A)).

³³ Helton, *supra* note 24, at 184 (citing 42 U.S.C. § 10222(a)(5)(B) (2006)).

³⁴ Kenny, *supra* note 31, at 1323 (citing 42 U.S.C. § 10131(b)(1) (2006)).

³⁵ Helton, *supra* note 24, at 184 (citing 42 U.S.C. § 10222 (2006)).

³⁶ *Id.*

nominate five sites at which to build the single nuclear depository, from which the President would choose the final location.³⁷

However, legislative action after the passage of the NWSA presaged the current SNF impasse. Erstwhile, pro-nuclear legislators went to great lengths to keep their states and districts

from becoming permanent recipients of the nation's SNF.³⁸ Under the apt headline "Nuclear Waste: Problem No One Wants and It Won't Go Away", *The Washington Post* reported that Representative Trent Lott, "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."³⁹

Congressional foot-dragging on the selection of the permanent repository continued until another nuclear incident shook the nation's nerves. Unlike the Three Mile Island incident, which cost no lives and incurred limited physical damage, the complete meltdown in Chernobyl killed thirty Soviet citizens,⁴⁰ caused acute radiation syndrome in 134 others,⁴¹ and led to the permanent resettlement of 220,000 people.⁴² The

³⁷ Kenny, *supra* note 31, at 1324 (citing 42 U.S.C. § 10132(b)(1) (2006), 42 U.S.C. § 10132(c)(1) (2006)).

³⁸ *Id.* at 1324 (citing Mary McGrory, Op-Ed., *Nuclear Waste: Problem No One Wants, and It Won't Go Away*, WASH. POST, Sept. 30, 1982, at A3).

³⁹ *Id.* at n.45

⁴⁰ *Chernobyl Accident 1986*, WORLD NUCLEAR ASSOCIATION, (Sept. 2011) <http://www.world-nuclear.org/info/chernobyl/inf07.html>.

⁴¹ *Id.*

⁴² *Id.*

Chernobyl incident compelled Congress to amend the NWPA in 1987.⁴³ The amended NWPA authorized the Secretary of Energy to only consider the feasibility of Yucca Mountain in Nevada as a permanent depository.⁴⁴ By targeting Yucca Mountain in Nevada as the only possible depository, the hasty action of the amended NWPA galvanized public opinion in the Silver State and spurred its Congressional representatives to use their legislative resources to delay both funding and construction of the Yucca Mountain repository. In 2011, Senate Majority Leader Harry Reid (D-NV) declared, after nearly two decades of obstruction, “Yucca Mountain is dead. And I think it’s time for opponents to move on.”⁴⁵

B. *Redefining the NWPA*

By the early 1990’s, the Department of Energy saw it had a problem—the January 31, 1998 deadline to begin collecting SNF approached. All utilities had to sign Standard Contracts in order to renew their operating licenses. The 1987 amendment prevented the Secretary of Energy from exploring alternatives to Yucca Mountain. Legislators obstructed the bills that would authorize funds to build the repository in

⁴³ Kenny, *supra* note 311, at 1325.

⁴⁴ *Id.* at 1325 (citing 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.”)).

⁴⁵ Kenny, *supra* note 311, at 1348 (quoting 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/despote-house-gop-push-harry-reid-declares-yucca-d>).

Nevada. With no repository, no alternative site, and obligations foisted upon it by the words in NWPA, the Department attempted the most cost effective solution: reinterpreting the words in the statute. In February 1994, Secretary of Energy Hazel O'Leary stated that the Department had no "clear legal obligation under the [NWPA] to accept [SNF] absent an operational repository."⁴⁶ One year later, the Secretary's comments became part of the Department of Energy's *Final Interpretation of Nuclear Waste Acceptance Issues*.⁴⁷ In its interpretation of the regulation, the Department disavowed statutory or contractual obligations to collect SNF by January 31, 1998.⁴⁸ Without a repository, the Department claimed it had no obligation to provide interim storage in a facility that was not licensed or authorized under the NWPA.⁴⁹

C. *The Litigation*

Eager to have a court judgment, utilities began their litigation against the Department of Energy even before the Department issued its final interpretation. In 1994, the Court of Appeals for the D.C. Circuit dismissed a suit brought by utilities against the Department for lack of a

⁴⁶ *Indiana Michigan Power Co. v. U.S. Dept. of Energy*, 88 F.3d 1272, 1274 (D.C. Cir. 1996).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

final agency action.⁵⁰ Utilities found mixed results when they brought suit again in 1996.⁵¹ In a positive development for the utilities, the D.C. Court of Appeals found that the Department had an obligation to take the SNF by January 31, 1998 regardless of the repository's status.⁵² However, the Appellate Court handed down a less than positive holding in that the utilities could not receive any damages since the deadline had not yet passed and the Department had not yet breached.⁵³

With a court order saying they were in the right, but without any immediate remedy, the utilities made their case for a writ of mandamus in *Northern States Power Co. v United States Department of Energy* (“*Northern I*”).⁵⁴ The writ would abrogate the Standard Contract's dispute resolution clause and force the Department to begin to collect the utilities' SNF.⁵⁵ Since the utilities in *Northern I* had complied with their duty to pay the one-time fee into the Nuclear Waste Fund for SNF disposal, the D.C. Court of Appeals found that the utilities were entitled to relief.⁵⁶

⁵⁰ 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, 166-67 (2007) (citing *N. States Power Co. v. Dep't of Energy*, No. 94-1457, 94-1458, 94-1574, 1995 U.S. App. LEXIS 22422, at *1 (D.C. Cir. 1995) (granting DOE's motion to dismiss)).

⁵¹ Helton, *supra* note 244, at 188 (citing *Indiana Michigan*, 88 F.3d at 1272).

⁵² *Id.* (citing *Indiana Michigan Power Co. v. U.S. Dept. of Energy*, 88 F.3d 1272, 1277 (D.C. Cir. 1996)).

⁵³ *Id.* at 189.

⁵⁴ Wall, *supra* note 50 at 168-69 (citing *N. States Power Co. v. U.S. Dept. of Energy*, 128 F.3d 754 (D.C. Cir. 1997)).

⁵⁵ Helton, *supra* note 244, at 189-90.

⁵⁶ *Id.* at 189.

Moreover, the D.C. Court of Appeals found that the government could not escape liability even though it styled its failure to build a repository as “unavoidable.”⁵⁷ However, because of the possibility of an alternative remedy—the deadline had not yet passed—the D.C. Court of Appeals declined to issue its writ of mandamus in full.⁵⁸

Once the January 31, 1998 deadline passed, the D.C. Court of Appeals changed its tune. Northern States again filed suit.⁵⁹ The utility claimed that the alternative remedy no longer existed as of February 1, 1998 because the Department was then in breach of its contract with the utilities.⁶⁰ The D.C. Court of Appeals agreed.⁶¹ In a similar case heard at the same time, Yankee Atomic Electric Company successfully sued to reclaim a one-time fee paid to the Department of Energy.⁶² Yankee had already paid the one-time fee because its electricity production ceased before the NWPA went into effect.⁶³ Later, in the 2000 cases of *Northern States Power Co. v. United States (Northern II)* and *Maine Yankee Atomic Power Co. v. United States*, the Court of Appeals for the Federal Circuit

⁵⁷ *Id.* at 190.

⁵⁸ *Id.*

⁵⁹ Wall, *supra* note 50, at 171.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Helton, *supra* note 264, at 193.

⁶³ *Id.*

ruled that utilities need not resort to the remedies in the Standard Contract and could instead seek a judicial remedy.⁶⁴

The litigation green light from the *Northern II* decision ensured that the taxpayer would pay for the government's failure to fulfill its promise in the NWPA. In 2007, the Office of Civilian Radioactive Waste Management estimated that the government would owe utilities seven billion dollars for the delay in collecting SNF.⁶⁵ The sum owed would increase by half a billion dollars each year that passed without a permanent repository in place.⁶⁶

D. *Assignment of Rights*

The NWPA states, “[t]he rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.”⁶⁷ Congress foresaw that nuclear power plants and SNF might change hands over time. It wanted to ensure its contracts with nuclear power plants were honored.

⁶⁴ *Id.* at 197 (citing *Me. Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1343 (Fed. Cir. 2000); *N. States Power Co v. United States*, 224 F.3d 1362, 1367 (Fed. Cir. 2000)).

⁶⁵ Kenny, *supra* note 311, at 1331 (citing Matthew L. Wald, *U.S. to Owe Billions for Delays in Nuclear Dump*, *Official Says*, N.Y. TIMES, Mar. 7, 2007, at C4).

⁶⁶ *Id.*

⁶⁷ 42 U.S.C. § 10222(b)(3) (2006).

However, Congress also anticipated bad actors. Before Congress passed the NWPA, it had enacted anti-assignment statutes to “prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government.”⁶⁸ Anti-assignment statutes include the Claims Act, which Congress first enacted at the beginning of the Mexican-American War.⁶⁹ In the Claims Act, Congress attempted to simplify recovery procedures by allowing the government “to deal exclusively with the original claimant instead of several parties.”⁷⁰ The court in *Tuftco v. United States* identified the Claims Act as pertaining to claims for work already done.⁷¹ The court in *Tuftco* also identified the “Contract Act,” 41 U.S.C. § 15, which involves executory contracts and focuses on continuing obligations.⁷² However, the *Tuftco* court concluded, “[i]n general terms, however, the concerns of the two statutes and the legal concepts involved in their applicability are the same.”⁷³

⁶⁸ *Tuftco Corp. v. United States*, 614 F.2d 740, 744 (Ct. Cl. 1980) (citing *Spofford v. Kirk*, 97 U.S. 484, 490 (1878)).

⁶⁹ *Dominion Res., Inc. v. United States*, 641 F.3d 1359, 1366 (Fed. Cir. 2011)(Gajarsa, J., dissenting) (citing *An Act in Relation to the Payment of Claims*, ch. 66, 9 Stat. 41 (1846)).

⁷⁰ *Tuftco*, 614 F.2d at 744 (citing *Patterson v. United States*, 354 F.2d 327, 173 Ct.Cl. 819 (Cl. Ct. 1965)).

⁷¹ *Id.* at n.4.

⁷² *Id.*

⁷³ *Id.*

E. *One-Time Fee*

The Department of Energy laid out three payment plans for SNF transportation and storage in article VIII.B.2 of the Standard Contract.⁷⁴ Only one option was relevant for the case at hand. Option 2 of the payment plan allowed utilities to opt for a one-time payment into the Nuclear Waste Fund prior to delivery.⁷⁵ Should utilities defer payment of the one-time fee until the government collected the SNF, the government would charge utilities interest.⁷⁶ Utilities found the interest quite expensive after they had to wait for the construction of the permanent SNF depository. In *Yankee Atomic Electric v. United States*, Maine Electric owed \$159 million in 2008 on an original bill of approximately \$50 million.⁷⁷ In *Yankee Atomic*, the D.C. Court of Appeals found, in that partial breach of contract case, the government's performance obligations survived a partial breach of contract, and that as the non-breaching party, Maine Electric owed no obligation to the government until the government performed.⁷⁸

⁷⁴ *Dominion*, 641 F.3d at 1364 (Fed. Cir. 2011).

⁷⁵ *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268, 1279 (Fed. Cir. 2008) (citing 10 C.F.R. § 961.11 at Art. VIII(B)(2)(b)).

⁷⁶ *Id.*

⁷⁷ *Id.* at 1279-81.

⁷⁸ *Id.* at 1280-81.

IV. INSTANT DECISION

In *Dominion Resources v. United States*, the Court of Appeals for the Federal Circuit had to resolve two issues.⁷⁹ First, it would determine whether the similar language in the NWPA and language of the Standard Contract prevailed over the language of the Claims Act.⁸⁰ Second, the court would decide whether the government could use discovery to investigate whether Dominion experienced an economic benefit from not having to pay the one-time fee, which was not yet due because the government's breached of the Standard Contract and could not yet collect the SNF from the utility.⁸¹

A. Which Law Trumps

The Federal Circuit Court of Appeals stated the first issue in the instant case was whether the language that “permits assignment of ‘the rights and duties of a party to a contract’” also allowed a party to “transfer the damages claim for breach along with the transfer of the contract.”⁸²

⁷⁹ *Dominion Res., Inc. v. United States*, 641 F.3d 1359, 1360 (Fed. Cir. 2011).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 1362.

The court first examined the statutory language.⁸³ The court found that the language in both the NWPA and the Standard Contract stated that a party may assign its rights and duties when it transfers title of its SNF.⁸⁴ The court also noted that the Department made the decision to incorporate the language of the NWPA into its Standard Contract.⁸⁵

Next, the court noted that the government sought to modify its own plain language by either permitting assignment of only the *continuing* rights and duties of the contract, or by stating that only a contract may be assigned—not the rights and duties of a party.⁸⁶ The court saw that the government’s attempt to restyle its own plain language would prevent Dominion from recovering damages inflicted on Northeast Utilities.⁸⁷ The court rejected the government’s approach as contrary to the broad and plain language of the NWPA and the Standard Contract.⁸⁸ The broad and plain language of the NWPA and the Standard Contract allowed Northwest Utilities to transfer claims of breach to Dominion, even though those claims of breach occurred before the transfer.⁸⁹

⁸³ *Id.*

⁸⁴ *Id.* (citing NWPA 42 U.S.C. § 10222(b)(3) (2006) and Standard Contract 10 C.F.R. §961.11, Art. XIV (2011)).

⁸⁵ *Dominion Res., Inc. v. United States*, 641 F.3d 1359, 1362 (Fed. Cir. 2011) (citing 10 C.F.R. § 961.11, Art. XIV (2011)).

⁸⁶ *Id.* at 1363.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

Additionally, the Court of Appeals for the Federal Circuit rejected the government's assertion that the policy considerations of the Claims Act trumped the plain language of the NWPA and the Standard Contract.⁹⁰ Congress designed the Claims Act to allow the government to only deal with the original contractor in hopes of streamlining evidence accumulation and preventing multiple payments of claims.⁹¹ The court found the plain language of the NWPA and the Standard Contract trumped the policy considerations of the Claims Act.⁹² The court went even further, stating that the current scenario did not implicate the policy considerations of the Claims Act.⁹³ The court presented several reasons. First, no issue existed as to whether the parties intended to transfer the right to sue for interim storage of the SNF.⁹⁴ Second, Dominion sued for all storage fees, mitigating the risk of multiple payments of claims.⁹⁵ Third, the burden rested on the plaintiff to prove damages.⁹⁶ Fourth, the government did not assert that it needed discovery to disprove the existence of the claim and therefore had no need to streamline evidence accumulation.⁹⁷

⁹⁰ *Id.*

⁹¹ *Dominion Res., Inc. v. United States*, 641 F.3d 1359, 1363 (Fed. Cir. 2011).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1363-64.

⁹⁷ *Dominion Res., Inc. v. United States*, 641 F.3d 1359, 1364 (Fed. Cir. 2011).

B. *Bills Still Owed*

After the Court found the plain and broad language of the NWPA and the Standard Contract trumped the policy considerations of the Claims Act, it then turned to the issue of whether the possibility of Dominion's economic benefit from the government's breach warranted discovery.⁹⁸ Northeast Utilities had chosen to pay a one-time fee for SNF collection, which would come due prior to the collection.⁹⁹ Before the fee came due, Northeast Utilities transferred that duty to Dominion.¹⁰⁰ The government posited that, because of the government's breach, Dominion benefited from not having to pay the one-time fee, which, by 2010, totaled \$82,100,000.¹⁰¹ In an attempt to offset the damages, the government sued for discovery rights as to whether Dominion received a windfall from not yet having to pay the one-time fee.¹⁰²

The Court of Appeals for the Federal Circuit compared the government's argument in the instant case with the argument it made in the 2008 case of *Yankee Atomic Elec. Co. v. United States*.¹⁰³ In *Yankee*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1364.

¹⁰² *Id.*

¹⁰³ *Dominion Res., Inc. v. United States*, 641 F.3d 1359, 1365 (Fed. Cir. 2011) (citing *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268, 1280 (Fed. Cir. 2008)).

Atomic, the Court of Appeals for the Federal Circuit found the government's partial breach of contract did not relieve the injured utility of its obligation to pay the storage fee with interest.¹⁰⁴ Therefore, the government could not receive an offset for damages awarded.¹⁰⁵

Here, Dominion did not receive a windfall, because it had to bear the cost of continued storage of spent nuclear fuel.¹⁰⁶ Dominion would have to pay the one-time fee once the government fulfills its contractual obligation.¹⁰⁷ The one-time fee was not waived and would still need to be accounted for once the government fulfills its obligation and collects the SNF belonging to Dominion.¹⁰⁸

C. Dissenting Opinion

Judge Arthur Gajarsa filed an opinion concurring-in-part and dissenting-in-part.¹⁰⁹ After reviewing the history of the Claims Act dating back to the Mexican-American war, Judge Gajarsa highlighted the language of the current Claims Act which states, with his emphasis, “[a]n assignment may be made *only after a claim is allowed, the amount of*

¹⁰⁴ *Id.* (citing *Yankee Atomic*, 536 F.3d at 1280).

¹⁰⁵ *Yankee Atomic*, 536 F.3d at 1280.

¹⁰⁶ *Dominion*, 641 F.3d at 1365.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Dominion Res., Inc. v. United States*, 641 F.3d 1359, 1366 (Fed. Cir. 2011) (Gajarsa, J., dissenting).

the claim is decided, and a warrant for payment of the claim has been issued.”¹¹⁰ (*alteration in original*). Judge Gajarsa interpreted the statute to read that assignments can “only be made after allowance and ascertainment remains.”¹¹¹ Furthermore, he emphasized the Supreme Court generally precludes voluntary assignments.¹¹²

By applying the law to the facts of the case, Judge Gajarsa determined Northeast Utilities’ assignment to Dominion violated the Claims Act.¹¹³ He suggested that the assignment of the Standard Contract was neither “ascertained nor allowed” when Northeast Utilities assigned it in 2001.¹¹⁴ Judge Gajarsa found Northeast’s assignment to Dominion violated the main purpose of the Claims Act: to prevent the government from dealing with multiple parties.¹¹⁵ Because Congress normally uses explicit language to waive a right to the Claims Act, Judge Gajarsa refused to adopt the majority’s broad interpretation of the NWPA.¹¹⁶ Judge Gajarsa concluded the “rights and duties” of the NWPA and the Standard

¹¹⁰ *Id.* at 1366 (quoting 31 U.S.C. § 3727(b) (2006) (alteration in original)).

¹¹¹ *Id.*

¹¹² *Id.* at 1367 (e.g., *United States v. Dow*, 357 U.S. 17, 20 (1958); *United States v. Shannon*, 342 U.S. 288, 292 (1952); *Spofford v. Kirk*, 97 U.S. 484, 489 (1878); *see also United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 375 (1949)).

¹¹³ *Dominion*, 641 F.3d at 1367

¹¹⁴ *Id.*

¹¹⁵ *Dominion Res., Inc. v. United States*, 641 F.3d 1359, 1367 (Fed. Cir. 2011).

¹¹⁶ *Id.* at 1367-68.

Contract applied only to the immediate rights and duties of the contract and not a claim for damages.¹¹⁷

V. COMMENT

The string of lawsuits and counter-lawsuits pertaining to SNF resulted in decades of delay and failed to produce as solution to the SNF disposal issue. The decision made by the Court of Appeals for the Federal Circuit in the instant case provides another victory for the utilities in their effort to make the government fulfill its promises. However, the decision fails to offer a long-term solution to the nuclear waste disposal question.

A. *The Good News*

Dominion illustrates the government's most recent failure to maneuver out of the thirty-three year old problem that it created. For decades, both the American public and their elected representatives have misunderstood nuclear power and nuclear waste. When safely produced and disposed of, nuclear power can become a valuable component of clean, local and economic energy production. However, incidents like Three Mile Island, Chernobyl, and Fukushima Dai-ichi¹¹⁸ engendered

¹¹⁷ *Id.* at 1368.

¹¹⁸ On March 11, 2011, a 9.0 magnitude earthquake rocked Japan and led to explosions and radiation release in four units of the Fukushima Dai-ichi nuclear power plant. See CHARLES MILLER, ET AL., RECOMMENDATIONS FOR EXCHANGING REACTOR SAFETY IN

public distrust of nuclear power, while years of safe generation have done little to assuage fears. Well-founded or not, American anxiety toward nuclear power generation became evident in the aftermath of the 1979 Three Mile Island incident. A mere four years later, Congress and President Reagan ignored the delicate political situation and passed the NWPA into law. The NWPA forced nuclear utilities into Standard Contracts and promised to collect SNF within fifteen years.

The utilities relied on the government's promise. Ideally, the utilities would have foreseen the problems with the Standard Contract. They could have constructed medium- and long-term SNF storage facilities on their sites. Such a course of action would have been particularly prudent after the January 31, 1998 deadline passed and the government was in partial breach of the contract. However, as seen in *Yankee Atomic*, the government's obligations to perform survived its partial breach of the Standard Contract, leaving the utilities with no obligation to mitigate.

The courts have correctly pinned the duty to perform on the breaching party: the United States government. The government has employed a number of arguments in an attempt to avoid liability. Such efforts in the 1990's led to delay of litigation, until the Department issued a final ruling or until the January 31, 1998 deadline passed. Since the decision in *Northern II*, held utilities need not pursue alternative dispute resolution but may instead seek judicial remedies, the government's efforts have consistently led to its defeat in litigation.

In the case at hand, the utilities built yet another bulwark against the government's efforts to shirk its obligations. In *Dominion*, the

government tried to use a separate legislative act, the Claims Act, to prove that the NWPA's assignment clause went against public policy. However, the court saw the broad and precise language of the NWPA as clear evidence that Congress meant to permit utilities to assign their rights to SNF storage. The government must honor the obligations it made in the NWPA, which pertained to the matter in question. Specific legislation and clear intent trump unspecific and removed statutes.

Not only did the court establish precedent that the government could not use the Claims Act to dodge its contractual obligations, it also established precedent which indicates the government would likely fail at other attempts to use the "against public policy" end-run around the plain and clear language of the statute. The precedential framework of *Dominion* forecloses an array of sources the government could use in citing from the multitudinous volumes of United States statutes in an attempt to dart from the terms it agreed to when it foisted the Standard Contract upon all nuclear utilities.

Additionally, *Dominion* emerged victorious on the government's claim that the government needed to use discovery to see if the utility benefited from not having to pay the one-time fee until the government performed. After a string of split decisions and outright setbacks, the government's arsenal of arguments appears empty. In fact, the Court of Appeals for the Federal Circuit chastised the government for reusing an unsuccessful argument it first employed in *Yankee Atomic*.¹¹⁹ *Dominion* builds upon the court's decision in *Yankee Atomic*, in which the court allowed the utility to recover a one-time fee. Moreover, *Dominion* forecloses on another theory of recovery for the government: the possibility that utilities benefited from not yet having to pay the one-time

¹¹⁹ *Dominion Resources, Inc. v. United States*, 641 F.3d 1359, 1365 (Fed. Cir. 2011) (citing *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268, 1280 (Fed. Cir. 2008)).

fee. The decision in the instant case prevented the perverse possibility of the government wronging the utilities and then asking the utilities to compensate the government for the harm that the government caused.

B. *The Bad News*

However, the positive gains of the instant case fail to mask the greater problems of nuclear waste disposal. There remains no long term, sustainable solution to SNF storage. Though utilities may still assign claims for damages, the political problems surrounding SNF and the swelling cost to the taxpayer still remain.

American nuclear power policy remains mired in short term solutions. The thirty-year struggle over Yucca Mountain illustrates the political intransigence that surrounds SNF disposal. No long-term political solution appears likely. Public opposition to SNF storage or transportation that comes near their property makes Congressional action on long-term storage difficult. Without any long-term storage facility, SNF will remain in short term storage at nuclear plants themselves, and the instant case does nothing to persuade the government to fulfill its obligations.

Additionally, the government's defeat led to a higher bill for the taxpayer. Not only must the taxpayer foot the bill for ongoing studies into a permanent SNF storage facility—the ultimate cost of transporting SNF across the country and into one depository—she must also pay for the government's legal bills. Indeed, according to the estimate of the Office of Civilian Radioactive Waste Management, the cost to the taxpayer of the

government's broken promise exceeds nine billion dollars.¹²⁰ With no permanent depository site in the foreseeable future, the taxpayer's bill will only increase without a solution.

VI. CONCLUSION

Dominion demonstrates utilities' prowess at placing liability on the government for failing to dispose of SNF. Certainly, the government deserves its share of the blame for failing to fulfill its part of the bargain. The utilities need recourse for storing their SNF for a much longer period than initially anticipated. However, by succeeding in this manner, the court offers the utilities yet another stopgap solution to an endemic problem.

The policies of a republic move with public opinion. Though not without tragedy, nations like France that moved most of their energy production to nuclear plants have not experienced the realigning terror of a domestic nuclear disaster like Three Mile Island. Not only did Three Mile Island put a halt to nuclear plant construction for three decades, it also made the phrase "nearby nuclear waste storage or transportation" a radioactive term in the political arena. Fear produced an unstable and shortsighted policy byproduct. Especially following Chernobyl, the American public saw SNF as a public evil that should be safely transported and stored—elsewhere. However, in a nation of over 300,000,000 citizens, it is inevitable that elsewhere for one is another's nearby.

¹²⁰ Kenny, *supra* note 311, at 1331 (citing Matthew L. Wald, *U.S. to Owe Billions for Delays in Nuclear Dump*, *Official Says*, N.Y. TIMES, Mar. 7, 2007, at C4).

The government allowed itself to become trapped in a prison of its own making. It overpromised when it guaranteed collection of SNF. Public opposition to a national depository blocked the government's only way out of its obligation. Over the past decade, the utilities have used the courts to reinforce the government's duty. With the help of solid bricks labeled *stare decisis*, the government's duty to collect SNF appears immovable.

However, the turbulent events of the last three years point to an escape through legislation. The Republican wave in the 2010 midterm elections hinged in part on an increased opposition to the deficit spending of the current administration. Austerity reemerged as part of the acceptable political lexicon of the United Kingdom and nations in the Eurozone. With Greece and other southern European countries teetering on the brink of collapse due to years of unsustainable and irresponsible promises of public spending, American legislators may take another look at the half-a-billion dollars a year the nation wastes on delays in the opening of a national nuclear repository.

Additionally, policy makers may see that our failed thirty-four year attempt to lead by example in nuclear proliferation warrants another strategy. The Carter Administration abandoned American SNF recycling in an attempt to demonstrate the country's commitment to non-proliferation of nuclear weapons, because of the weapons-grade plutonium byproduct of SNF reprocessing. One could hardly argue that Mahmoud Ahmadinejad and Ali Khamenei would have already succeeded in facilitating the production of an operational Iranian nuclear bomb were it not for the meddlesome moralistic stance the United States takes on SNF recycling. SNF recycling would solve neither the immediate nor the long-term SNF storage issues. However, it would help to decrease future SNF transportation and storage costs while making nuclear power more efficient and sustainable.

Dominion Resources v. United States demonstrates that courts will not provide the government with a way out of its costly SNF storage predicament. The answer lies with the legislature. Congress created the mess and, as this decision demonstrates, the courts continue to insist that Congress clean it up.

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