



1 SAN DIEGO, CALIFORNIA; NOVEMBER, 25 2019; 2:04 p.m.

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3 THE CLERK: Matter No. 1. 19-cv-1635. Public  
4 Watchdogs v. Southern California Edison Company, et al., for  
5 motion hearing.

6 THE COURT: Appearance, please.

7 MR. BESTE: Good afternoon, Your Honor.

8 Eric Beste from Barnes & Thornburg on behalf of Public  
9 Watchdogs.

10 with me here at counsel table is the Executive  
11 Director of Public Watchdogs, Charles Langley, and Zach Heller,  
12 who is an associate in my office, whose admission before the  
13 California Bar is pending. He will not be representing my  
14 client today, but I would ask that he be allowed to be at table  
15 today.

16 THE COURT: Certainly. He may be at table with you.  
17 Thank you.

18 MR. BESTE: Thank you.

19 THE COURT: Good afternoon.

20 On behalf of defendants. Yes, sir.

21 MR. AKERMAN: Yes, Your Honor. All defendants except  
22 for the NRC, James Evans and Alex Akerman of Alston & Bird.

23 THE COURT: Okay. Thank you.

24 MS. TORRES: Good afternoon, Your Honor.

25 Valerie Torres on behalf of the NRC. And with me the

1 solicitor of NRC, Andrew Averbach.

2 THE COURT: Okay. Thank you.

3 Let me tell you what we're going to do this afternoon,  
4 counsel.

5 The Court has prepared a brief tentative. I will read  
6 it slowly, and you can listen. Then I have some questions for  
7 both sides, and then I will briefly permit you to address the  
8 Court, hopefully without interruption, and tell the Court  
9 whatever you would like to tell me.

10 So I would tell you, in going through this, I have a  
11 whole list of abbreviations. And when you address the Court, I  
12 would urge you not to speak in the abbreviation. It's -- I've  
13 become accustomed to it, but it does slow me down because it's  
14 not second nature to me, so please don't use these. But I have  
15 it here, in the event that you slip into it. And I know you  
16 all understand, based on the looks I'm getting, that you  
17 understand why I'm saying that.

18 We are here today on Plaintiff Public Watchdogs'  
19 request for a preliminary injunction which seeks to enjoin  
20 further decommissioning efforts at the San Onofre Nuclear  
21 Generating Station pending a full hearing on the  
22 decommissioning plan, and Defendant Southern California Edison  
23 Company, San Diego Gas and Electric Company, Sempra Energy,  
24 Holtec International, and the United States Nuclear Regulatory  
25 Commission's motions to dismiss plaintiff's first amended

1 complaint for lack of subject matter jurisdiction pursuant to  
2 Federal Rule of Civil Procedure 12(b)(1), and for failure to  
3 state a claim pursuant to Federal Rule of Civil Procedure  
4 12(b)(6).

5 The Court scheduled these matters to be heard together  
6 because both require the Court to evaluate the merits of  
7 plaintiff's allegations.

8 Taken as true, as the Court must at this stage in the  
9 proceedings, plaintiff's allegations are alarming. Be that as  
10 it may, the Court is powerless to act on plaintiff's  
11 allegations no matter how serious unless this Court is assured,  
12 both that it has jurisdiction over this matter, and that  
13 plaintiff has pleaded a viable cause of action.

14 The Court is tentatively inclined to conclude that  
15 neither of those requirements are met here. Accordingly, the  
16 Court is tentatively inclined to grant defendants' motions to  
17 dismiss and to deny plaintiff's request for a preliminary  
18 injunction.

19 Beginning with the jurisdictional issues.

20 Defendants challenge both plaintiff's standing and the  
21 Court's subject matter jurisdiction. Because the Court is  
22 inclined to conclude that each of plaintiff's claims against  
23 defendants relates, in essence, to the granting or amending of  
24 a license from the Nuclear Regulatory Commission or issues  
25 ancillary thereto, the Court tentatively concludes that

1 pursuant to the Hobbs Act, the proper forum for plaintiff's  
2 challenges is ultimately the Ninth Circuit.

3 The plaintiff appears to have conceded as much by  
4 filing petitions before both the Nuclear Regulatory Commission  
5 and the Ninth Circuit following defendants' assertion of these  
6 jurisdictional issues.

7 Hobbs Act aside, the Court is troubled by plaintiff's  
8 attempt to litigate essentially the same issues in three  
9 separate jurisdictions. The Court is hard-pressed to see how  
10 it could move forward on plaintiff's claims while plaintiff  
11 proceeds in the congressionally mandated forum.

12 Defendants also challenge plaintiff's Article 3  
13 standing to sue, contending that plaintiff has failed  
14 adequately to allege injury-in-fact given the speculative  
15 nature of the claimed future harm.

16 Defendants rely heavily on the Court's 2018 dismissal  
17 of plaintiff's 2017 complaint for lack of standing.

18 However, the present complaint contains additional  
19 allegations that present a much closer question.

20 The Court is tentatively inclined to conclude that  
21 plaintiff has Article 3 standing as to the majority of its  
22 claims, although there are certain exemptions issued by the  
23 Nuclear Regulatory Commission pertaining to the use of the  
24 Decommissioning Trust Fund related to which the Court is  
25 tentatively inclined to conclude that plaintiff has failed to

1 allege any injury-in-fact.

2 Turning to the adequacy of plaintiff's allegations on  
3 the merits, the Court is tentatively inclined to dismiss  
4 plaintiff's causes of action under the Price Anderson Act for  
5 public nuisance and for strict products liability for failure  
6 to state a claim.

7 As for the Price Anderson Act cause of action, Ninth  
8 Circuit precedent is clear that physical harm to persons or  
9 property is a jurisdictional prerequisite, and every Court of  
10 Appeals that has decided the duty or standard of care issue has  
11 held that the plaintiff must prove a dose in excess of the  
12 federal permissible dose limits.

13 Given the prospective nature of the relief plaintiff  
14 seeks, plaintiff's first amended complaint contains no such  
15 allegations. The Court is therefore tentatively inclined to  
16 dismiss plaintiff's second cause of action for failure to state  
17 a claim.

18 As for the public nuisance and strict products  
19 liability causes of action, defendants contend that these  
20 causes of action are preempted by the Atomic Energy Act.  
21 Because the Atomic Energy Act occupies the field for protection  
22 against hazards of radiation and the disposal of radioactive  
23 materials, the Court is inclined to agree.

24 In any event, the Court is tentatively inclined to  
25 dismiss both the public nuisance and strict products liability

1 causes of action for failure to state a claim.

2           Regarding the public nuisance cause of action,  
3 defendants challenge both plaintiff's standing and whether the  
4 actions of which plaintiff complains can be deemed a nuisance  
5 under California Civil Code Section 3482 which provides that,  
6 "Nothing which is done or maintained under the express  
7 authority of a statute can be deemed a nuisance."

8           Regarding standing, a private individual, such as  
9 plaintiff, must allege facts showing a special injury to  
10 themselves in person or property of a character different in kind  
11 from that suffered by the general public.

12           Because plaintiff has identified no authority in  
13 support of its proposition that injury to its organizational  
14 mission suffices as a special injury for purposes of  
15 plaintiff's public nuisance law, the Court is tentatively  
16 inclined to conclude that plaintiff has failed to allege  
17 standing to maintain such an action.

18           Additionally, the Court is tentatively inclined to  
19 conclude that plaintiff has failed to state a claim because the  
20 complained-of actions are being taken pursuant to licenses and  
21 certificates issued by the Nuclear Regulatory Commission.  
22 Because those licenses and certificates were issued pursuant to  
23 the Atomic Energy Act and the Nuclear Regulatory Commission's  
24 regulations, the Court is tentatively inclined to find that  
25 plaintiff's public nuisance cause of action is barred by Civil

1 Code Section 3482. Accordingly, the Court is tentatively  
2 inclined to dismiss plaintiff's third cause of action.

3 As for plaintiff's strict products liability cause of  
4 action against Holtec, the Court is tentatively inclined to  
5 conclude that plaintiff has failed to state a claim.

6 Under the product liability law of California, injury  
7 to the plaintiff from a defective product is an essential  
8 element of a cause of action. Here, plaintiff alleges no  
9 injury to itself or its members; rather, it alleges only an  
10 imminent threat of harm. The Court therefore is inclined to  
11 dismiss the fourth cause of action.

12 Finally, Sempra contends that it must be dismissed  
13 from this action because plaintiff has failed to allege any  
14 basis for its liability, apart from its ownership of SDG&E.

15 The Court is inclined to agree. As a general rule, a  
16 parent corporation is not liable for the actions of its  
17 subsidiaries under the parent corporation -- unless the parent  
18 corporation directly participated in the complained-of actions  
19 or the parent company has abused the corporate forum such that  
20 the veil between the parent and the subsidiary may be pierced.

21 Plaintiff's amended complaint contains no allegations  
22 supporting Sempra's liability either directly or vicariously.  
23 Accordingly, the Court is tentatively inclined to conclude that  
24 plaintiff has failed to state a claim against Sempra.

25 Because the Court is tentatively inclined to dismiss

1 plaintiff's amended complaint in its entirety, the Court is  
2 also tentatively inclined to conclude that plaintiff is  
3 unlikely to succeed on the merits, a necessary prerequisite to  
4 plaintiff's request for a preliminary injunction. The Court  
5 therefore is tentatively inclined to deny plaintiff's motion.

6 I have some questions for both sides this afternoon,  
7 and I'd like to start with plaintiff.

8 So Mr. Beste, thank you for coming to the podium, sir.

9 MR. BESTE: Thank you, Your Honor.

10 THE COURT: It's very concerning to the Court that we  
11 have multiple forum involved in this.

12 Is your filing of the 2.206 petition with the Nuclear  
13 Regulatory Commission a concession that this Court lacks  
14 jurisdiction over this matter?

15 And what about your filing of the emergency petition  
16 for a writ of mandamus in the Ninth Circuit?

17 I think, Mr. Beste, you can certainly understand this  
18 Court's position. You're at the Nuclear Regulatory Commission,  
19 and you're one step up above me at the Ninth Circuit.

20 You know, what's a district court judge to do? I  
21 mean -- and I'm saying this kindly, but I'm saying this very  
22 seriously. I spent a lot of time reading everything. This  
23 was -- this is fascinating, it's interesting, but how could I  
24 possibly make a decision today or at this current state of the  
25 case with matters pending all around me at the Nuclear

1 Regulatory Commission and at the Ninth Circuit?

2 MR. BESTE: To answer your question directly, Your  
3 Honor, it is not a concession that this case should not have  
4 been brought here. It is entirely consistent. And I  
5 appreciate Your Honor's concern that, on first blush, it looks  
6 like three different venues for the same exact cause of action,  
7 but that's not the case.

8 There are similar facts, overlapping facts, indeed,  
9 but our -- my client, Public Watchdogs, is attempting to  
10 prevent the burial of nuclear waste at the beach in San Onofre,  
11 and it is going to pursue every legal avenue available for  
12 whatever opportunity present itself, but only --

13 THE COURT: Isn't that what you're asking NRC to do  
14 right now?

15 MR. BESTE: In terms of the relief requested?

16 THE COURT: The writ that you -- the petition -- I  
17 strike that language --

18 MR. BESTE: Sure.

19 THE COURT: The petition. The 2.206 petition.

20 MR. BESTE: If I could -- in terms of the relief  
21 that's being requested, the relief from the NRC is slightly  
22 different, but it does overlap. And if I could --

23 THE COURT: Okay. What if it overlaps? Why are you  
24 here? Why are we doing anything today?

25 Maybe they're going to grant your relief. So why

1 should I act? That's what I don't understand, and why we're  
2 here.

3 Quite honestly, we might not be here today if I had  
4 known, working this up and setting this date, that I was going  
5 to have the NRC -- and I said we wouldn't use those -- the  
6 Nuclear Regulatory Commission doing something and the Ninth  
7 Circuit looking at this from an emergency standpoint.

8 MR. BESTE: If I could perhaps --

9 THE COURT: Yes. Go ahead.

10 MR. BESTE: -- explain the --

11 THE COURT: Sure.

12 MR. BESTE: -- the procedural posture and where we  
13 are.

14 THE COURT: Go ahead.

15 MR. BESTE: In this Court, Your Honor, as Your Honor  
16 well knows, because you've read all the pleadings, four causes  
17 of action; the Administrative Procedure Act, the Price  
18 Anderson, the strict product liability, and the public nuisance  
19 based on the facts that are outlined in the complaint.

20 Separate is that, in front of the Nuclear Regulatory  
21 Commission, there is a challenge to how the decommissioning  
22 plan -- what it was based on. That is, it was based on an  
23 assumption that the costs of operating this site for  
24 maintaining spent nuclear fuel and burying it in the ground was  
25 going to be based on certain assumptions, factual assumptions

1 that my client posits are not true, and that we believe we have  
2 evidence showing that those assumptions are not true, that go  
3 to the cost that the NRC looked at and decided that this plan  
4 should be approved because it meets certain requirements.

5 That's not part of this lawsuit at all, Your Honor.  
6 We're not alleging that --

7 THE COURT: what could happen as a result of their  
8 action in the petition? You've asked them to do what?

9 MR. BESTE: We've asked them to --

10 THE COURT: Re-evaluate.

11 MR. BESTE: -- Re-evaluate the petition, and in the  
12 meantime, stop the burial so that if there is a remedy to be  
13 sought, it can actually be effectuated.

14 The concern, Your Honor -- and this is --

15 THE COURT: And that's what you're asking me to do.

16 MR. BESTE: Absolutely, Your Honor. I mean,  
17 absolutely. Because once this nuclear fuel is buried --

18 THE COURT: Mr. Beste, I know you know the problem  
19 with having multiple forum involved in doing the same action.

20 MR. BESTE: Absolutely, Your Honor. But this Court  
21 has the authority to pause what's going on at San Onofre.

22 We're not asking for a permanent injunction. We're  
23 not asking you to order the NRC to do anything with regard to  
24 the decommissioning plan. What we're asking is for a time-out  
25 so that if the claims in the complaint are -- and again, Your

1 Honor, I realize I'm starting from -- I have nowhere to go but  
2 up here because you've tentatively indicated that you would  
3 dismiss the complaint -- but our basis for relief is that, if  
4 this Court finds merit to the causes of action, and yet -- and  
5 then grants our -- a judgment later on, and all the fuel's been  
6 buried, then -- then that's -- then that is a shame, and that  
7 would be a waste of everybody's time because this Court would  
8 have been prevented from issuing a judgment to actually  
9 effectuate the plaintiff's claim for relief. The fuel would  
10 have been buried, and that's the end of that.

11           whereas, if we file this claim now and we ask the  
12 Court to pause and stop --

13           THE COURT: which is what you're asking the Nuclear  
14 Regulatory Commission to do.

15           MR. BESTE: Absolutely. Because --

16           THE COURT: That's what you're asking the Ninth  
17 Circuit to do.

18           MR. BESTE: well, and in the Ninth Circuit context,  
19 yes, and that's because the Nuclear Regulatory Commission has  
20 given no indication that they're going to act on the petition.  
21 They've assessed it, they've said, "we're not going to grant  
22 your emergency claim for relief, and we are initially assessing  
23 the petition."

24           And so, Your Honor, same problem.

25           THE COURT: And they've asked for a response by

1 December 2nd from somebody, I think.

2 MR. BESTE: Well, that's in the Ninth Circuit.

3 THE COURT: In the Ninth Circuit.

4 MR. BESTE: But not in the Nuclear Regulatory  
5 Commission.

6 THE COURT: No, I know.

7 MR. BESTE: And so that body has all the information  
8 and has given no indication and has no timetable for reaching a  
9 resolution. And so it is entirely possible -- in fact,  
10 plaintiff believes it will be the case, Your Honor -- that the  
11 Nuclear Regulatory Commission will not act on this petition  
12 before all the spent fuel is buried.

13 And in 10 years, or whenever -- however long it  
14 takes -- again, remember, Your Honor, the NRC has never granted  
15 a 2.206 petition. So this administrative process that we're  
16 pursuing has -- to my knowledge, and I don't believe any of the  
17 defendants can test this -- the NRC has never granted the  
18 relief that we're seeking in front of it in the 2.206.

19 So there's an element of catch 22, Your Honor. If  
20 we -- if we didn't pursue our action in this Court, but simply  
21 went to the NRC and waited for them to finally get around to  
22 ruling on our petition, the relief we seek would have been lost  
23 because the fuel would have been buried.

24 In the Ninth Circuit, we're asking for a very limited  
25 form of relief. We essentially filed a mandamus petition.

1           And I appreciate, Your Honor, your place in the  
2 judicial hierarchy, I acknowledge that, but we're simply asking  
3 the Ninth Circuit to issue a mandamus petition to the Nuclear  
4 Regulatory Commission, not to this Court. Just simply to say  
5 that --

6           THE COURT: No, I didn't think you were doing that,  
7 but doesn't that put me in a change position. What if I  
8 granted this -- I'm going to call it the stay or the hold in  
9 abeyance that you're requesting by virtue of this action, and  
10 the Ninth Circuit says, "No."

11           I mean, we could --

12           MR. BESTE: I think there would be no inconsistency at  
13 all, Your Honor, because the issue in front of the Ninth  
14 Circuit is not whether this lawsuit has established a basis for  
15 preliminary injunction, the issue in the Ninth Circuit -- and  
16 again, you're --

17           THE COURT: Okay, so go ahead. The issue in the Ninth  
18 Circuit is...

19           MR. BESTE: The issue in the Ninth Circuit is that the  
20 Nuclear Regulatory Commission has not taken any action on our  
21 petition, has given no indication when it will ever act on its  
22 petition, and therefore, is essentially going to run out the  
23 clock on -- on what plaintiff's claim for relief is before the  
24 Ninth Circuit.

25           So we're simply asking the Ninth Circuit to order the

1 Nuclear Regulatory Commission to do its job. In order to do  
2 its job on a timely basis, it has to move or stop the burial  
3 while it considers our petition. One of those two things has  
4 to happen.

5 And as of now, the Nuclear Regulatory Commission has  
6 simply said, "we're not going to grant emergency relief, and  
7 we'll -- we'll take an initial consideration of your petition."

8 I would submit, Your Honor, if this Court granted a  
9 preliminary injunction, and the Ninth Circuit said, "No, you  
10 haven't established that the NRC is not following its -- the  
11 requirements of law under this regulation," there's no  
12 inconsistency because the Ninth Circuit wouldn't be passing on  
13 what this Court is presented with.

14 The facts -- yes, clearly, overlapping facts. But the  
15 question before the Ninth Circuit is simply: Is that agency  
16 acting with appropriate speed in adjudicating this 2.206  
17 petition? And if it is not, then it is subject to a mandamus  
18 petition by the Ninth Circuit, and that's where we are today.

19 THE COURT: why is the 2.206 petition filed so late,  
20 so recently?

21 MR. BESTE: well, all of these matters only become  
22 ripe in -- on July 15th of this year. why? Because before  
23 July 15th of this year, there was an 11-month stay --

24 THE COURT: Right.

25 MR. BESTE: -- of the burial voluntarily agreed to by

1 the defendants. So they stopped all burial operations. And on  
2 July 15th, that's when it started again.

3 If the -- if we had brought this lawsuit a year  
4 earlier, it would have been --

5 THE COURT: Okay.

6 MR. BESTE: -- not ripe. There's nothing going on.

7 And now, once the burial starts, Public Watchdogs  
8 begins to research and figure out, are there any bases to  
9 challenge it -- to challenge what's really going on here, which  
10 is, under the guise of a temporary burial, it's effectively a  
11 long-term burial at San Onofre, and that's what my client wants  
12 both the Nuclear Regulatory Commission and the private  
13 defendants to evaluate the real risks associated with that.

14 So I would submit, Your Honor, that while at first  
15 blush it looks as if that would create some inconsistency  
16 because the questions are different being asked of Your Honor  
17 and the questions being asked of the NRC and the Ninth Circuit,  
18 they're different, and they're not inconsistent.

19 THE COURT: Let me ask you this: What harm or future  
20 harm do you or your members face as a result of the exemptions  
21 issued by the Nuclear Regulatory Commission concerning the use  
22 of the Decommissioning Trust Fund?

23 MR. BESTE: So with regard to the use of the trust  
24 fund, Your Honor, essentially, that fund is made up of rate  
25 payer -- largely, ratepayer money. Not taxpayer money --

1 THE COURT: Ratepayer.

2 MR. BESTE: Ratepayer. So people who are covered in  
3 that area, which many of our members are within the area that's  
4 covered by the ratepayers for the defendants, the private  
5 defendants.

6 so they would have a financial interest in not having  
7 their rate -- the rates that they've had to contribute be  
8 squandered and used to cover up for negligent burial of nuclear  
9 waste that then has to be pulled out at some point, who knows  
10 when, under circumstances that -- and technology that doesn't  
11 even exist today for doing -- for doing the removal of that.

12 So their -- it's a financial interest in the trust  
13 fund, and that is not having it wasted and being able -- and  
14 having it available for the decommissioning activities that are  
15 appropriate.

16 It's as if, Your Honor, it was theft or loss of the  
17 trust fund monies --

18 (Phone rings)

19 THE COURT: Please step outside or turn that off.

20 MR. BESTE: -- it's a financial interest, and that's  
21 the interest of my client in the trust funds. But that's one  
22 small part of the case.

23 THE COURT: No, I know. Okay.

24 MR. BESTE: It plays into the -- into the complaint,  
25 Your Honor, because we believe it's part of the financial

1 motive. But frankly, that exemption is just one piece of many  
2 of the other exemptions that are at issue here.

3 THE COURT: Okay. Let me ask you if you know of any  
4 cases, Mr. Beste, in which a court allowed a plaintiff to seek  
5 prospective relief from a public liability action under Price  
6 Anderson.

7 MR. BESTE: I believe that there was a case cited in  
8 our brief. And I apologize, Your Honor.

9 THE COURT: Okay.

10 MR. BESTE: I was looking for it when you gave the  
11 tentative.

12 And let me start out, Your Honor, by saying I so very  
13 much appreciate the tentative ruling. As I was preparing to  
14 come to this hearing today, as you can imagine, I was unclear  
15 as to where the Court was going to be going, so it very much  
16 assisted me and all the parties, I'm sure, in evaluating where  
17 the Court's thinking.

18 And I believe that there are cases --

19 THE COURT: You can provide that to me later if you  
20 need to --

21 MR. BESTE: I would appreciate that, Your Honor.

22 THE COURT: -- look that up. But that would be  
23 helpful to me. It may be in here, and I just didn't catch it.

24 MR. BESTE: And I apologize. I don't have it at my  
25 fingertips.

1 I believe there are cases in which there are Price  
2 Anderson causes of action. Which, again, we call them "Price  
3 Anderson", they're tort claims.

4 THE COURT: No, I understand.

5 MR. BESTE: That's all they are are tort claims.

6 And certain tort claims, as Your Honor is aware, have  
7 as a component -- may have as a component certain prospective  
8 injunctive relief such as medical monitoring, let's say. So  
9 there may be tort claims in which, as part of the relief that's  
10 ordered by the Court --

11 Sorry. I hear some feedback.

12 THE COURT: I do, too. I hear something.

13 That's okay. Sounds like --

14 Go ahead, Mr. Beste.

15 MR. BESTE: Okay. I'm sorry.

16 THE COURT: It's okay.

17 MR. BESTE: The medical monitoring, for example.

18 THE COURT: Okay.

19 MR. BESTE: So certain tort claims --

20 THE COURT: Sure.

21 MR. BESTE: -- product liability, the claim would be  
22 that this product is causing damage to me and to the class of  
23 plaintiffs, and we are entitled to monitoring our medical  
24 conditions going forward prospectively.

25 I can also point Your Honor to -- while this is not

1 exactly -- does not exactly answer your question, the *Natural*  
2 *Resources Defense Counsel v. the EPA*, which I believe was cited  
3 in our -- I know it was cited in our brief, which is 735 F.3d  
4 873 at 878 and 879. The facts of that case are that the  
5 National -- Natural Resources Defense Counsel was suing the EPA  
6 over its approval of something called AGS-20. It doesn't  
7 really matter what it is. AGS-20, though, is something that,  
8 according to the plaintiff, increased the threat of future harm  
9 to NRDC's members.

10 And so what the Ninth Circuit held in that case is  
11 that the NRDC carried its burden to demonstrate that there is a  
12 credible threat that the members' children would be exposed to  
13 AGS-20 as a consequence of the EPA's decision to conditionally  
14 register the product.

15 So again, it hasn't even happened, the product isn't  
16 even actually in use, but the EPA has approved it to be used by  
17 a manufacturer, it's going to end up in products, and these  
18 members' children will be exposed.

19 The Ninth Circuit held that that was a plausible  
20 basis -- that that was a plausible for Article 3 standing and  
21 to -- a proper cause of action.

22 So not exactly in the Price Anderson context, but if  
23 you -- if I could have leave to submit either by letter or  
24 notice brief any other cases on that --

25 THE COURT: Okay. Let me ask you this: Are there any

1 cases you can cite me to in which a court allowed plaintiff to  
2 seek prospective relief for strict product liability?

3 MR. BESTE: I don't believe we cited a case on that  
4 one, Your Honor. And I apologize, I don't know the answer to  
5 that question. And so if there is any authority for that  
6 proposition, we would ask leave to submit that, as well.

7 THE COURT: Let me go back to where I started,  
8 Mr. Beste, for a minute.

9 Let's suppose -- and I wouldn't waste everybody's  
10 time. I really have questions that I need answered, and it's  
11 very helpful to the Court to have you all here today.

12 But if I adopted the tentative, Mr. Beste, and decide  
13 that I don't have jurisdiction over this action, where do we go  
14 from here? Do I dismiss the action? Do I do so with or  
15 without prejudice? Do I transfer the case somewhere? To like  
16 the Ninth Circuit? If so, does the pendency of the 2.206  
17 petition deprive the Ninth Circuit of jurisdiction?

18 MR. BESTE: So I really hope that you won't get to  
19 this question.

20 THE COURT: No, no. I'm just thinking this through.

21 MR. BESTE: Sure.

22 THE COURT: I kind of wondered --

23 MR. BESTE: Where we go.

24 THE COURT: -- you know, you go this way, you go that  
25 way. I was just wondering, sir.

1 MR. BESTE: So our position would be, Your Honor, that  
2 if this Court dismisses the complaint, we would want it to be  
3 without prejudice, but frankly, we would want it to be sooner  
4 rather than later because we would have to evaluate our  
5 appellate remedies.

6 we believe that we would have to seek any -- if there  
7 is any relief to be had, we would have to go to the Ninth  
8 Circuit from here and bring up to the Ninth Circuit the  
9 questions raised in this complaint.

10 which, again, Your Honor, I apologize. You don't have  
11 the 2.206 petition --

12 THE COURT: No, I understand.

13 MR. BESTE: -- in front of you, so you can't, and nor  
14 should you have to, read it, but I can represent to Your  
15 Honor that -- and we point it out in our footnote in our  
16 response to the motion to dismiss, I believe it's Footnote 5 --  
17 that that 2.206 petition deals with the funding -- excuse me --  
18 the claimed costs for how much it's going to -- how much money  
19 it's going to take to decommission this power plant, and it's  
20 based on certain assumptions that we believe we can prove are  
21 false.

22 THE COURT: But it's premised on a financial  
23 determination. A financial -- it's premise -- the way you  
24 describe it -- and I don't know what's up there.

25 MR. BESTE: Right.

1 THE COURT: -- but it's premised on the financing of  
2 the decommissioning --

3 MR. BESTE: No --

4 THE COURT: Or the cost of the decommissioning --

5 MR. BESTE: -- the cost.

6 THE COURT: -- the cost.

7 MR. BESTE: The cost -- what cost assumptions are  
8 used. So in the beginning --

9 THE COURT: That's sort of the back door into your  
10 issue, isn't it?

11 MR. BESTE: It's another avenue, Your Honor. I don't  
12 know if it's the back door or front door, but it's --

13 THE COURT: But, I mean, it's not confronting your  
14 main concern, which, as I understand it, is the safety and the  
15 issues that are quite attention getting --

16 MR. BESTE: Yes.

17 THE COURT: -- when one reads them. But so now,  
18 because that, I guess, is having issues being reviewed, you're  
19 now talking about the financing of the decommissioning.

20 MR. BESTE: And specifically, what assumptions were  
21 made on how much it would cost to store spent nuclear fuel at  
22 San Onofre and for how long.

23 And the underlying assumption is that the -- that was  
24 made in 2015 is that the fuel will be moved out fairly quickly.  
25 And I think even defendants maintain in their papers that the

1 fuel could be moved as soon as 2020.

2 I'd ask Your Honor to pose the question to them, where  
3 is this fuel going? There is no place on this planet that will  
4 accept spent -- this spent nuclear fuel. There is no -- there  
5 is no application pending before the NRC to authorize a place  
6 to accept the spent nuclear fuel. There is no permits in place  
7 to allow the transportation of this fuel anywhere.

8 I submit, Your Honor, that, based on the factual  
9 record, this is -- this is not plausible that this fuel is  
10 going anywhere anytime soon. And so --

11 THE COURT: Has it ever happened at other places?

12 MR. BESTE: That there's nowhere -- there's no  
13 permanent repository for spent nuclear fuel.

14 THE COURT: No. But what I'm saying is, this isn't  
15 the first plant to be decommissioned.

16 MR. BESTE: It's interesting, Your Honor, that as  
17 we're going through this, this is -- this is the moment in time  
18 when all these issues are coming to fruition.

19 By that, I mean many nuclear power plants around  
20 throughout the country are going through decommissioning --

21 THE COURT: Right.

22 MR. BESTE: -- right now.

23 Up until now, they've been able to store the nuclear  
24 fuel on site to wait for the long-term storage. But now  
25 they're all going offline right around the same time, and it's

1 a very difficult problem. So, so stipulated. But there is no  
2 place to put this spent nuclear fuel.

3 THE COURT: No. I understand what you're saying, but  
4 my question is this: Have any of these plants that have been  
5 decommissioned, are they ahead of San Onofre in timeline, and  
6 did they give us any insights into the ability to relocate?

7 MR. BESTE: I submit, Your Honor, based on what I  
8 know, it is a bleak picture because these plants have the spent  
9 nuclear fuel sitting on their sites and have had it  
10 there for --

11 THE COURT: And not had it moved.

12 MR. BESTE: And not had it moved. There's no place to  
13 send it.

14 THE COURT: Okay.

15 MR. BESTE: So back to your question.

16 The issue before the -- if this Court dismisses this  
17 complaint, we would request that it be done without prejudice,  
18 because obviously, we would take a look at the final order --

19 THE COURT: But you'd want to take it up --

20 MR. BESTE: Well, I --

21 THE COURT: -- so you'd want it with prejudice.

22 MR. BESTE: -- I want it without prejudice, frankly,  
23 because I'd want to read the order carefully and figure out if  
24 there's a way that I could amend the complaint --

25 THE COURT: Okay.

1 MR. BESTE: -- to meet the Court's --

2 THE COURT: Then you might ask for some relief to take  
3 it up. Okay.

4 MR. BESTE: But let's assume it was dismissed without  
5 prejudice.

6 THE COURT: Okay.

7 MR. BESTE: We would then evaluate whether we can take  
8 an appeal to the Ninth Circuit. Because frank -- respectfully,  
9 Your Honor, I believe that this Court has been -- misled is too  
10 strong a word. I believe that the authority cited by the  
11 defense on -- that the preemption in the field is just wrong.  
12 And the only way you would be able to tell that, Your Honor, is  
13 you have to go back to the cases that the defense cites and  
14 read those cases.

15 For example, Silkwood is the seminal case from the  
16 United States Supreme Court on whether a tort claim can be  
17 brought against somebody for a nuclear injury -- suffering  
18 injury from a nuclear -- not a nuclear accident in a power  
19 plant, but suffering injury from nuclear radiation.

20 And it was a tort claim in Oklahoma. She received --  
21 Karen Silkwood received punitive damage -- punitive damages.  
22 It was brought up in front of the United States Supreme Court.  
23 The argument was the same argument that's raised here.

24 This field is preempted. The safety and nuclear  
25 facilities is off limits to the State. You cannot go there.

1 And the United States Supreme Court soundly rejected that.

2 I'll read -- I'll quote -- this is from *Silkwood v.*  
3 *Kerr-McGee*, 464, 238 at 256.

4 "In sum, it is clear that in enacting and amending the  
5 Price Anderson Act, Congress assumed that state law remedies in  
6 whatever form they might take were available to those injured  
7 by nuclear incidents. This was so, even though it was well  
8 aware of the NRC's exclusive authority to regulate safety  
9 matters. No doubt there is tension between the conclusion that  
10 safety regulation is the exclusive concern of the federal law  
11 and the conclusion that a state may nevertheless award damages  
12 based on its own law of liability. But as we understand what  
13 was done over the years in the legislation concerning nuclear  
14 energy, Congress intended to stand by both concepts and to  
15 tolerate whatever tension there was between them."

16 That's *Silkwood*. That continues through all of the  
17 subsequent decisions. *Pacific Gas & Electric* case the  
18 defendants cite. That case held that the State of California  
19 could, in fact, pass a law that restricted the construction of  
20 nuclear power plants. Why? Because it dealt with economic  
21 issues, not safety issues, and specifically rejected the notion  
22 that they've preempted the field.

23 And I would also point Your Honor to the brief that  
24 we -- the case that we cited in our brief extensively, *Cook v.*  
25 *Rockwell International*. It's from the Tenth Circuit.

1 Then-Judge Neil Gorsuch explained very clearly how that  
2 statute, Price Anderson Act, as an amendment of the Atomic  
3 Energy Act, does not contain field preemption and does not  
4 purport to contain field preemption.

5           what it does do is it says, "If there is a question  
6 about the regulation of a nuclear -- a power plant."

7           so who is going to decide what regulations apply for  
8 safety? There's only one place to go for that, and that's the  
9 Nuclear Regulatory Commission.

10           And that makes sense. You couldn't have a Maryland  
11 Regulatory Commission --

12           THE COURT: Right.

13           MR. BESTE: Right? All that makes sense.

14           But what is also clear is that plaintiffs, in this  
15 case and in other cases, can bring state law torts, whether  
16 under Price Anderson or under underlying state law. Those  
17 survive, and they have not been preempted.

18           And so I would -- I would -- I would implore Your  
19 Honor to go back to those cases, because I believe that the law  
20 is settled, from the Supreme Court down, that the field of  
21 nuclear energy is not preempted. It is only a small subset of  
22 the regulation -- regulatory structure of nuclear power plants  
23 that has been preempted, and that's not our case. Our case is  
24 simply, we believe that we have established both an  
25 Administrative Procedure Act claim and tort claims that

1 survive.

2 THE COURT: Let me ask you one last question,  
3 Mr. Beste.

4 what is the proper standard for this Court to apply in  
5 determining whether plaintiff has established standing for  
6 future harm? And does that standard differ whether the  
7 underlying action is for future environmental harm?

8 MR. BESTE: So the standard analysis, Your Honor -- as  
9 Your Honor pointed out comes down to two main points; it's the  
10 Article 3 standing, and then for some of the state law claims,  
11 there is an injury-in-fact component.

12 For the Article 3 standing -- and I will get the exact  
13 quote because we said it here in our papers, and it's been  
14 reaffirmed several times by the Supreme Court and by the Ninth  
15 Circuit.

16 That is, A -- I apologize. I had -- I have it at the  
17 tip of my tongue. I don't want to get it wrong here.

18 Mr. Heller over here is passing out because he knows  
19 exactly what the quote is.

20 THE COURT: He's got it for you.

21 MR. BESTE: He's got it. Thank you.

22 "A credible threat that a probabilistic harm will  
23 materialize."

24 "Credible threat that a probabilistic harm will  
25 materialize."

1           So you can't just simply say, "I'm afraid of nuclear  
2 power. Nuclear power could hurt me. And I think I could die  
3 from nuclear power." That's not, obviously, sufficient.

4           But that's not this case. Our case is that because  
5 they -- the defendants have moved spent nuclear fuel from the  
6 wet pools -- which, I think there's no disagreement, the wet  
7 pools have provided a safe method of storing spent nuclear fuel  
8 since the plant was operational. There's never -- I'm not  
9 aware of any instance in which anyone has said the wet pools  
10 are dangerous. They certainly haven't come out publicly and  
11 said that.

12           Now they're moving the fuel from the wet pools,  
13 putting them into these new canisters, burying them in the  
14 silos. And it is that process that is causing a prob -- that  
15 has created a probable -- a credible threat that a  
16 probabilistic harm will materialize.

17           And what could that harm be? It's not very hard to  
18 imagine. It's, in fact, already -- it's already presented  
19 itself in two instances. The canister is being lowered into  
20 the silo, it got stuck on a flange -- a very narrow flange in  
21 the ring. All the cables were lowered so nothing is holding  
22 this --

23           THE COURT: That's what caused the suspension,  
24 correct?

25           MR. BESTE: well --

1 THE COURT: Or, in part.

2 MR. BESTE: -- yes. Those -- those two times that the  
3 canister is sitting there, 20 feet above the floor, with cables  
4 down, nothing holding it, just wedged in. And what could have  
5 happened if it just slipped and crashed down 20 feet?

6 well, fortunately, we don't have to experience what  
7 would have happened, but this canister would have smashed into  
8 the bottom of a concrete silo, potentially releasing a cloud of  
9 radioactive waste more dangerous than the -- at least more  
10 caesium than was in the Chernobyl accident.

11 Extraordinarily dangerous situation. Didn't happen  
12 once, happened twice.

13 And the only reason -- if I could, Your Honor -- the  
14 only reason that it became known to the public -- and we  
15 reference this in our complaint -- is because an individual  
16 attended a public meeting in August of 2018.

17 So first canister gets stuck, it goes in -- they don't  
18 take it out and inspect it, they just put it in after it's been  
19 sitting there for some amount of time. Who knows what damage  
20 is on the bottom of the canister. We still don't know. That  
21 canister goes in.

22 The next time a canister gets stuck for almost an  
23 hour, finally they get it dislodged, again, don't look at the  
24 bottom, don't inspect the bottom, just put it in and bury it.

25 They have a public meeting where they're saying -- and

1 again "they", this is the Southern California Edison Company's  
2 Director of Nuclear Safety says, "we've stopped operations.  
3 This is a regularly scheduled work stoppage. We're giving  
4 people rest. We're evaluating the operation."

5 And an individual by the name of David Fritch stands  
6 up in this public meeting -- and I'm just going to read from  
7 this short transcript to give you a sense of this. "Thank you.  
8 My name is David Fritch. I am a worker on the ISFSI Project.  
9 I do field work. I'm industrial safety, so OSHA stuff, not  
10 nuclear stuff, but I'm out there. And I may not have a job  
11 after tomorrow for what I'm about to say, but that's fine  
12 because I made a promise to my daughter that if no one else  
13 talked about what happened on Friday, that I would."

14 "At about 12:30, August 3rd, we were downloading, and  
15 the canister didn't download, but the rigging came all the way  
16 down. It was gross errors on the part of two individuals." He  
17 went on to describe the errors.

18 But for that brave individual, Your Honor, who knows  
19 if we ever would have found out about this incident.

20 In response to that public disclosure, the defendants  
21 voluntarily -- private defendants voluntarily ceased the  
22 movement of spent nuclear fuel for 11 months.

23 We're asking for not a great change to what they  
24 agreed to for 11 months. A simple pause in the movement of  
25 spent nuclear fuel to give time for, exactly what? An

1 objective assessment of what the risks are for moving this fuel  
2 from the wet pools, to the dry storage, to the burial.

3 And we're not asking Your Honor to do this assessment  
4 because, as the defendants point out, courts are not in a  
5 specialized position of knowledge of nuclear safety.

6 THE COURT: who are you suggesting would do that?

7 MR. BESTE: well, Your Honor, there could be any  
8 number of experts in the field of nuclear safety who could be  
9 hired as a monitor -- simply as a monitor to say they don't  
10 work for Southern California Edison Company, they're not trying  
11 to get a job with them, they are not beholden to them in any  
12 way. They simply are saying, "Here are the risks, and here are  
13 the ways that you're doing this that could be improved or  
14 potentially exercised in a way to reduce the risk."

15 That's what we're asking for, Your Honor. Because up  
16 until now, it's been cloaked in obscurity, what the risks are,  
17 how they're being assessed. It's simply, "Don't worry. We've  
18 got this." That's exactly what Southern California Edison said  
19 in January of 2018 when they started burying it. "We've tested  
20 it. We know how this is going to work. It's safe."

21 Twice, they almost released a catastrophic amount of  
22 radiation.

23 So our position is that we shouldn't have to trust the  
24 private defendants in this one, we should -- the Court should  
25 be -- in order to protect the plaintiffs, the Court is

1 authorized and entitled to ask for a monitor to simply evaluate  
2 this objectively.

3 THE COURT: Well, weren't there some corrective  
4 actions taken during that 11-month period?

5 MR. BESTE: There certainly were some --

6 THE COURT: You're saying you don't trust the private  
7 defendants, but you don't trust the NRC, either. You don't  
8 trust anybody on that side -- you are. You're saying that.

9 MR. BESTE: Sure.

10 THE COURT: You're saying you don't trust the Nuclear  
11 Regulatory Commission because they are not doing their job, and  
12 you don't trust the private defendants. And while you don't  
13 want to put me in the position of making these very super  
14 technical decisions on nuclear safety, that's exactly what  
15 you're asking the Court to do, because you're saying hire  
16 somebody, or let the defendants hire somebody, and then when  
17 nobody can agree, it'll come to me to decide what's going to be  
18 safe as far as dealing with the spent nuclear fuel. That's  
19 kind of the way I would see it possibly going.

20 MR. BESTE: And if it turned out that -- that a  
21 decision couldn't -- you know, was difficult, and the parties  
22 couldn't agree, well, I would submit, Your Honor, you would  
23 have an objective third party presenting to you information as  
24 to what the -- what are the risks and the safety -- measure of  
25 safety that's been employed.

1           And if it turns out -- I guess I'd say, Your Honor, if  
2 your question is weren't remedial measures taken? They have  
3 represented that remedial measures were taken. We don't have  
4 clarity as to exactly what they are.

5           We know what they don't include. They don't include  
6 the ability to check the bottom of the canisters that were  
7 damaged when they were sitting there, 50 tons was compressed on  
8 a small piece of metal. We don't have any way to check that.  
9 That has been disclosed.

10           We don't know if there's any way to check the four  
11 canisters that have already been buried that have the broken  
12 shims. If you recall in the complaint, initially, the  
13 canister's designed in a certain way.

14           THE COURT: Right.

15           MR. BESTE: Holtec modified that design without  
16 seeking approval from the NRC, buried four of those canisters  
17 in the ground, and only after Southern California Edison  
18 discovered, wait, these canisters have broken shim bolts, did  
19 Holtec go back and then go back to the original plans.

20           So we have four canisters in there that we have no  
21 insight into what the risk is associated with those being  
22 buried there.

23           THE COURT: If -- I hesitate to say this. If any.

24           MR. BESTE: And so --

25           THE COURT: I have to say that.

1 MR. BESTE: Absolutely, Your Honor.

2 THE COURT: what risk, if any, to all of this.

3 I mean, you have the Court's attention, sir. It's  
4 compelling to read both sides' papers.

5 MR. BESTE: So -- and submitted, Your Honor, that it  
6 could turn out that a third party could come to the conclusion  
7 exactly the same as the defendants have.

8 But we would submit, Your Honor, that that's -- at  
9 that point, we would -- we would have --

10 That's the relief we're asking for. We're not asking  
11 for monetary damages.

12 THE COURT: I understand.

13 MR. BESTE: We're not asking for this to stop forever,  
14 we're asking for it to be done safely.

15 I would say, Your Honor, if I could just address a  
16 couple of the points in your tentative, or should I allow --

17 THE COURT: why don't you have a seat, because I've  
18 got some questions for the other side, and then I'll give you  
19 some time, uninterrupted, Mr. Beste --

20 MR. BESTE: Thank you, Your Honor.

21 THE COURT: -- to tell me whatever you would like.

22 Now, who on behalf of defendants wants to go first?

23 Do all the defendants accept the Nuclear Regulatory  
24 Commission want to go first, or does the Nuclear Regulatory  
25 Commission want to go first?

1 I have a couple of questions. You've basically heard  
2 all my questions, I'd just like to hear your answers.

3 who wants to go?

4 MS. TORRES: Your Honor, if the Nuclear Regulatory  
5 Commission can go first?

6 THE COURT: Okay. Why don't you come to the podium,  
7 ma'am, because I can hear you better.

8 You've heard the Court's concern as I've questioned  
9 Mr. Beste about everything that's pending all at one time.

10 I've got something at the Ninth Circuit, I've got  
11 something at the NRC, a 2.206 petition, and I've got this  
12 action.

13 And so he's explained to the Court that everything can  
14 go forward at the same time. He doesn't expect there to be --

15 Ma'am, I don't know who you are, but we can't take  
16 questions. What's the matter?

17 UNIDENTIFIED FEMALE SPEAKER: I just wanted to know,  
18 is it possible to have public --

19 THE COURT: No.

20 UNIDENTIFIED FEMALE SPEAKER: -- comment?

21 THE COURT: No. It's not public, ma'am.

22 I don't know if she's with you, counsel, but --

23 MR. BESTE: No, no.

24 THE COURT: Okay. No, no. This is not public  
25 testimony, ma'am.

1           So the question becomes, can all of these three things  
2 go forward?

3           I mean, I've got the Ninth Circuit looking at an  
4 emergency petition, I've got the NRC looking at a petition  
5 which now is basically focusing on the financing of the  
6 activities going on, and then I've got this cause of action.  
7 It seems that there are a lot of moving pieces. What's your  
8 view of it?

9           You heard Mr. Beste. Mr. Beste says it can all go on  
10 because the NRC is not going to act, then maybe the Ninth  
11 Circuit will, but I'm the only one with the merits here, so go  
12 ahead.

13           MS. TORRES: Your Honor, I don't see how all these  
14 venues can have concurrent jurisdiction. Because I look at  
15 this as where is the jurisdiction here for the Court?

16           You've already addressed it, Your Honor, in your  
17 tentative. There is -- our position is, there is no basis for  
18 jurisdiction for the conduct that they are challenging here.

19           Now they're at the Ninth Circuit and trying -- and  
20 I -- as I understand Mr. Beste, he's trying to characterize it  
21 as a financing issue.

22           You know, I'm not counsel at the Ninth Circuit, but I  
23 have briefly looked at their petition, and all of the facts are  
24 essentially the same issues we're talking about here.

25           They're talking about the fundamentally flawed

1 decommissioning plan --

2 THE COURT: Slow down. Slow down so --

3 MS. TORRES: Sorry.

4 THE COURT: -- we get a good record.

5 MS. TORRES: -- discussing the defective storage  
6 system. Discussing the license amendments. So --

7 THE COURT: But he says what's pending at the Ninth  
8 Circuit is an attempt to get the Nuclear Regulatory Commission  
9 to take action on the petition, which he tells me the Nuclear  
10 Regulatory Commission has never taken action on the 2.206,  
11 which isn't to say that this might not be the first one, but  
12 that's -- that's what Mr. Beste is telling me.

13 So --

14 MS. TORRES: Well, Your Honor, first on the issue  
15 just -- that you just raised relating to the 2.206 petition.

16 The NRC -- that's inaccurate that there has never been  
17 a petition granted.

18 The NRC has, in fact, granted petitions in the past,  
19 and we're happy to provide -- I don't have a list here at my  
20 disposal, but we're happy to provide the Court with those  
21 petitions that have been granted in the past.

22 Now, in terms of the Ninth Circuit, they are asking  
23 for an immediate halt to the movement and burial of spent  
24 nuclear fuel at SONGS. That is straight out of the issue  
25 presented. They have filed -- and I'll read straight from

1 their mandamus petition.

2 THE COURT: slowly.

3 MS. TORRES: "Issue presented. Public watchdogs has  
4 filed a 2.206 petition with the NRC seeking an immediate halt  
5 to the movement and burial of spent nuclear fuel at SONGS."

6 And I think therein lies the problem. We have  
7 essentially the same relief being sought in three different  
8 venues. And I just don't know how those three different venues  
9 have concurrent jurisdiction, and how you don't create a  
10 potential conflict in the various rulings that might come out  
11 of those processes.

12 So I don't have an answer for Your Honor in the sense  
13 that I don't know a basis for the concurrent jurisdiction from  
14 the three venues.

15 THE COURT: Counsel, if I adopted my tentative -- and  
16 I may not have said this, but when this hearing is over this  
17 afternoon, I'm going to take the matter under submission, look  
18 at the transcript, you know, think about this whole thing, and  
19 you'll get something from the Court.

20 But suppose I adopt the tentative, that I lack  
21 jurisdiction over this action. What would happen from this  
22 point? Would I dismiss the action? Would I dismiss it with or  
23 without prejudice? Would I send it to the Ninth Circuit?  
24 Probably not. Somebody might appeal it, though. If so, does  
25 the pendency of the 2.206 petition do anything?

1 MS. TORRES: From our perspective, again, the Nuclear  
2 Regulatory Commission, I can't speak on behalf of private  
3 defendants, from -- but from the agency's perspective, we think  
4 that a dismissal with prejudice would be appropriate because  
5 there is no jurisdiction as far as we can see relating to the  
6 specific conduct that is at issue.

7 we're talking about a license amendment from July 2015  
8 that would -- that if any -- assuming it weren't untimely,  
9 which it is, the Ninth Circuit would have exclusive  
10 jurisdiction.

11 Any challenges to the certificate of -- the  
12 certification for the Holtech storage system. Same thing.  
13 Those were issued in 2015. Those would be subject to review  
14 under the Hobbs Act.

15 Now, they've talked about exemptions, and Your Honor  
16 has identified one relating to the decommissioning fund.

17 Again, we don't think there's standing for the -- you  
18 know, for the Court to consider that exemption. In part,  
19 because we don't believe there's an injury-in-fact.

20 Mr. Beste addressed ratepayers, but that's a generally  
21 available grievance, and Article 3 requires more than that. It  
22 requires more specific injury-in-fact.

23 But even setting that to the side, looking at one of  
24 the other elements of Article 3 standing. If the Court were to  
25 take jurisdiction over that exemption, for example. The injury

1 that they are alleging here wouldn't be redressed (sic) by any  
2 relief the Court might provide on that exemption.

3 Let's say it tells the NRC or the agency, okay, the  
4 exemption was wrong. They have to have a certain amount. They  
5 can't use the Decommissioning Trust Fund for other purposes.

6 Okay. That doesn't stop the injury that they're  
7 alleging here. That doesn't stop the fuel loading operations.

8 And so this case is not about that exemption, it's  
9 about the fuel loading operations, and that's where we come  
10 into, well, what's the agency conduct that's at issue?

11 Really, it's enforcement and oversight, which I think,  
12 as we argued in our brief, we don't believe there's, you know,  
13 an opportunity for review here.

14 THE COURT: Okay. You heard my questions to  
15 Mr. Beste. Anything you want to tell me in response to those  
16 questions?

17 Otherwise, you'll get some time in a little bit, but  
18 those are basically the questions that I have for you.

19 I guess I would ask you about the same thing I asked  
20 Mr. Beste about, the proper standard for the Court in  
21 determining whether they've established standing for future  
22 harm and whether or not that's different for future  
23 environmental harm.

24 MS. TORRES: Your Honor, I would defer to the private  
25 defendants on that --

1 THE COURT: Okay, sure.

2 MS. TORRES: -- because that was an issue raised in  
3 their briefing --

4 THE COURT: In their brief.

5 MS. TORRES: -- but I'm happy to answer any other  
6 questions that they -- Your Honor may have for the agency.

7 THE COURT: Not at this time. That's all I have right  
8 now, Mr. Torres. Thank you so much.

9 MS. TORRES: Thank you.

10 THE COURT: So we're going to now hear from -- tell me  
11 your name again sir.

12 MR. EVANS: James Evans, Your Honor.

13 THE COURT: Mr. Evans on behalf of all the other  
14 private defendants.

15 MR. EVANS: Yes, Your Honor.

16 THE COURT: Okay. Thank you.

17 So --

18 MR. EVANS: So I --

19 THE COURT: -- start with the one that's so  
20 troublesome to the Court. And that is, I understand totally  
21 what Mr. Beste is doing trying to distinguish what I've got in  
22 front of me today, what the Ninth Circuit has, and what the NRC  
23 has.

24 what's your view of all of that going on at the same  
25 time, sir?

1 MR. EVANS: Sure. Those are distinctions without a  
2 difference, Your Honor.

3 And let me read -- I think it's always more useful to  
4 hear it come from the petitioner's mouth in this case in the  
5 Ninth Circuit petition. This is starting at page 36 of their  
6 petition.

7 "In sum, licensees have swerved onto a dangerous  
8 course without adequately considering the grave risks or  
9 reasonable alternatives." And here's the important part, Your  
10 Honor. "Because their movement and storage of dangerous  
11 nuclear waste could irreparably harm Southern California for  
12 decades, their current course of action must be stopped cold,  
13 lest they turn SONGS into a proverbial ticking time bomb,  
14 extraordinary mandamus relief is necessary to avoid this  
15 quickly materializing disaster."

16 They are seeking the very same relief in the Ninth  
17 Circuit that they're seeking here. They are seeking the very  
18 same relief in their 2.206 petition.

19 And you can dress it up any way you like. You can say  
20 it's really about the fees -- the exception for the amounts  
21 that Edison would like to use in connection with the  
22 decommissioning, but the relief sought, I think, is what's  
23 critical there.

24 Your Honor, the overlap between the three different  
25 proceedings is remarkable. It really is.

1           The 2.206 petition challenges -- uses some of the very  
2 same language I just read from the Ninth Circuit petition.

3           It says, at paragraphs 47 and 55 -- and I understand  
4 that the Court may not have that 2.206 petition -- but the  
5 petitioners say, "Licensees are burying hundreds of tons of  
6 deadly spent nuclear fuel in thin-wall canisters that cannot be  
7 loaded into the storage system without being critically damaged  
8 and cannot be monitored, inspected, repaired, or safely removed  
9 once they are loaded."

10           The relief that's being sought, again -- and you can  
11 dress it up as an attack on the exemption, or you can dress it  
12 up as a petition for writ of mandate, or you can dress it up as  
13 a request for preliminary injunction. The effect is the same.  
14 They want to stop all loading of spent nuclear fuel at the San  
15 Onofre plant.

16           I think -- the Court asked some questions regarding  
17 what the authority is. I would direct the Court to a number of  
18 cases that stand for the proposition that, "Courts will not  
19 entertain a petition where pending administrative proceedings  
20 or further agency action might render the case moot and  
21 judicial review completely unnecessary."

22           That was the holding of the Ninth Circuit in the  
23 *Sierra Club v. United States Nuclear Regulatory Commission*  
24 case.

25           *Bakersfield City School District v. Boyer*, another

1 Ninth Circuit case. And I quote "Judicial intervention in  
2 uncompleted administrative proceedings absent statutory mandate  
3 is strongly disfavored."

4           The *Florida Power & Light Company v. Lorion*. That's a  
5 U.S. Supreme Court case where the U.S. Supreme Court said that,  
6 "The focal point for judicial review should be the  
7 administrative record already in existence, not some new record  
8 made initially in the reviewing court."

9           And the Supreme Court's point there is an important  
10 one. There is no administrative remedy -- or administrative  
11 record that's yet been created in connection with the 2.206  
12 petition. And the cases are clear. Even the Circuit Courts of  
13 Appeal, which have original jurisdiction, they should not  
14 intervene until those administrative proceedings are complete.

15           THE COURT: Am I correct in recalling that the Ninth  
16 Circuit asked you and the NRC to file responses?

17           MR. EVANS: It's true that the Ninth Circuit has  
18 ordered the Nuclear Regulatory Commission to file a response by  
19 December 2nd. The U.S. Nuclear Regulatory Commission -- and  
20 I'm avoiding the acronyms on purpose -- it has requested  
21 additional time to file its answer.

22           The Southern California Edison Company had requested  
23 leave to intervene in that proceeding, and that motion has not  
24 been acted upon yet --

25           THE COURT: Okay.

1           MR. EVANS: -- so we have no right to file anything in  
2 the Ninth Circuit.

3           THE COURT: So you don't -- you may share the concern  
4 of the Court in having things proceeding in these different  
5 forums at this time.

6           If I adopted my tentative, what should happen here? A  
7 dismissal? With or without prejudice? I mean, what happens  
8 here?

9           As I said earlier, I'm even wondering -- and this is  
10 sort of just an academic thought on my part -- if I would have  
11 even had an oral argument or had you here if I had known  
12 everything was pending, because just a tremendous amount of  
13 time has been spent my -- by myself, my staff, and a lot of  
14 time for all of you coming here today when I do have such  
15 serious concerns.

16           So comment, if you would, sir.

17           MR. EVANS: Sure, Your Honor. I checked my email  
18 about every hour over the weekend, and again this morning, with  
19 the anticipation that the Court might vacate this hearing for  
20 the reasons that the Court has stated. There's just nothing  
21 here for the Court to adjudicate and no jurisdiction to  
22 adjudicate it.

23           THE COURT: Because action by either the Ninth Circuit  
24 or the Nuclear Regulatory Commission somewhat moots out  
25 anything I would do, doesn't it?

1           MR. EVANS: Well, exactly. And I think the Ninth  
2 Circuit is likely to defer any action until there's a  
3 well-developed administrative record before the Nuclear  
4 Regulatory Commission that would permit the Ninth Circuit some  
5 meaningful opportunity for review.

6           I would also -- the Court asked some questions about  
7 the law relative to a requirement of physical harm --

8           THE COURT: Mm-hmm.

9           MR. EVANS: -- and plaintiff's counsel referenced the  
10 Cook case, which is the Tenth Circuit case.

11           And let me assure the Court, this issue is decided --  
12 finally decided in this Circuit Court. And I would point the  
13 Court to *Berg v. Dupont De Nemours Company* case, *In Re: Berg*  
14 *Litigation*, it's referred to. That's found at 293 F.3d 1127.

15           And in that case, the Court -- the Ninth Circuit  
16 ruled, and I'll quote, "Physical harm to persons or property is  
17 thus a jurisdictional prerequisite."

18           And in that case, the Ninth Circuit found that neither  
19 claims for emotional distress nor for medical monitoring  
20 because of excessive exposure to -- or exposure to doses in  
21 excess of federal limits, none of that gives rise to a claim  
22 under the Price Anderson Act.

23           And the Court found that neither claims for emotional  
24 distress nor for medical monitoring because of a future risk of  
25 disease without present physical injury was compensable under

1 the Price Anderson Act.

2 And in that case, that finding was despite the  
3 plaintiffs alleging that they had been exposed to more than the  
4 double dose -- more than double the federal dose limit.

5 Here, the plaintiffs haven't even made that  
6 allegation, that they've been exposed to any radiation, or that  
7 there's been specific damage to persons or property.

8 I would also point the Court to *O'Connor v. Boeing*.  
9 That's a Central District of California case. And in that  
10 case, the Central District found that the plaintiffs had  
11 adequately alleged injury to their person and the value of  
12 their property. The Court also ruled that the plaintiffs had  
13 no right, even despite that, no right to future medical  
14 monitoring.

15 And I would also point the Court to the Dumontier  
16 case. *Dumontier v. Schlumberger*. Another Ninth Circuit found  
17 at 543 F.2d 567. And the Court there ruled that the Price  
18 Anderson Act prohibited recovery when plaintiffs did not suffer  
19 bodily injury, even if a state cause of action did not have  
20 such a limitation.

21 So the plaintiffs are in search of a remedy without a  
22 harm. And to the extent that they have concerns at all that  
23 are actionable, those concerns have to be pressed before the  
24 NRC, and then ultimately before the Ninth Circuit.

25 THE COURT: Okay. Let me see if I have any -- I think

1 those are the only questions -- well, let me ask you this: If  
2 I hold up the tentative, I dismiss with or without prejudice,  
3 sir?

4 MR. EVANS: I think it's without -- with prejudice --

5 THE COURT: with prejudice.

6 MR. EVANS: -- excuse me -- it's with prejudice for  
7 this reason: I don't think the plaintiffs could ever allege  
8 claims under the Price Anderson Act for strict product  
9 liability, for public nuisance, for the reasons that are stated  
10 in our papers and that the Court alluded to in its tentative.

11 It's incapable, because there's been no nuclear event  
12 which requires the release of radioactivity in excess of the  
13 federal limits that cause specific damage to persons or  
14 property. Those are the prerequisites. The jurisdictional  
15 prerequisites.

16 And unless something happens between now and the time  
17 that the Court issues its final ruling, there would be no way  
18 to amend the complaint in any meaningful way that would  
19 withstand scrutiny. So I say with prejudice, I would urge the  
20 Court to dismiss.

21 THE COURT: So if the Nuclear Regulatory Commission  
22 took any action on the 2.206 petition, or if the Ninth Circuit  
23 did, it could potentially conflict with anything this Court  
24 would do.

25 MR. EVANS: Absolutely. I think there's great -- the

1 risk of folly is tremendous here.

2 And I'll point this out. Before the defendants filed  
3 their motions to dismiss, there was no 2.26 petition that had  
4 been filed.

5 THE COURT: No.

6 MR. EVANS: Before the defendants filed their motions  
7 to dismiss pointing out that original jurisdiction lies with  
8 the Ninth Circuit, there was no pending before the Ninth  
9 Circuit.

10 So I understand the plaintiff's unwillingness to  
11 acknowledge that that was an admission, but it was an  
12 admission. And they're really trying to hedge their bets.  
13 Let's go to all three and we'll see which one we wind up with.

14 And I don't think that's appropriate. I don't think  
15 it's appropriate to put this Court into the position of having  
16 to make a Hobson's choice. Do I grant relief and have the  
17 Ninth Circuit do something different? What happens if the NRC  
18 does something different than this Court rules?

19 That's the whole reason you have the exhaustion of  
20 administrative remedy requirement and the whole reason you have  
21 jurisdiction vested exclusively in the Ninth Circuit.

22 THE COURT: Are you handling the matter for your  
23 clients? You're trying to get into the Ninth Circuit petition?

24 MR. EVANS: We have. We filed -- Edison, I should  
25 point out --

1 THE COURT: Edison.

2 MR. EVANS: -- Southern California Edison filed a  
3 motion for leave to intervene in the Ninth Circuit, and the  
4 Ninth Circuit has not yet acted on that motion.

5 THE COURT: well, this is all happening very recently.

6 MR. EVANS: I'll say.

7 THE COURT: Very recently.

8 Okay. Anything else you'd like to tell me on behalf  
9 of the --

10 MR. EVANS: Not on the issues that the Court raised.  
11 There is one thing I would point out.

12 Mr. Beste alluded to these almost catastrophes. And I  
13 would just urge the Court to take a look at the Bowder  
14 declaration, which is really the only competent evidence that's  
15 before the Court, and I would urge the Court to look -- it  
16 commences at paragraph 63 of the Bowder declaration which  
17 describes this misalignment of the canister event, that  
18 August 3rd event.

19 I would say that there's been a lot of hyperbole with  
20 regard to that incident. But I think it's also important to  
21 underscore what the Court noted, and that was, that incident  
22 was reported, the NRC came in, and it increased its oversight,  
23 steps were taken, as outlined in Mr. Bowder's declaration, to  
24 address the issue.

25 There was never a risk. A reasonable likelihood of a

1 release of nuclear materials, even if that canister had been  
2 dropped.

3 And the only evidence that the Court has before it is  
4 the Bowder declaration, and Mr. Bowder speaks in detail to that  
5 at paragraphs 63 to 68.

6 THE COURT: Mr. Beste is basically saying, because  
7 things were suspended voluntarily after those two events of  
8 misalignment, that he would like some greater assurances  
9 because he doesn't believe that the NRC is doing its job.  
10 That's -- put in basic terms, that's what -- that's what  
11 plaintiffs are saying.

12 So tell me your comment, because Mr. Beste would like  
13 some third-party neutral who has greater expertise than our own  
14 Nuclear Regulatory Commission to review and see if what you're  
15 doing is all right.

16 MR. EVANS: This is exactly why Congress has preempted  
17 the field, so that we don't have folks coming in and  
18 second-guessing the experts at the Nuclear Regulatory  
19 Commission.

20 There's a remedy if the plaintiff has an issue with  
21 the actions of the NRC. There's a remedy, it's just not here.

22 And by the way, I think it's noteworthy. Ms. Torres  
23 pointed out that these decisions that were made concerning the  
24 safety at the San Onofre event, and specifically the amendment  
25 to -- the 2015 amendment, these were years ago. And the

1 plaintiff took no issue with the actions of the NRC, filed no  
2 2.206 petition in response to that final action. Instead, they  
3 wait almost four years, I think was the time delay from then  
4 until the time that they filed their complaint.

5           There really -- I think what's most striking about the  
6 request for injunction, putting aside the procedural issues,  
7 what's most striking about the request for the injunction is  
8 the absence of any credible evidence that there's an imminent  
9 risk of a nuclear incident. There just isn't.

10           And I think it's important to point out that there has  
11 been storage of spent nuclear fuel at San Onofre in dry  
12 canisters since 2004. 2004. Think about that. That's 16  
13 years, almost. And if you bought plaintiff's argument, we  
14 would have seen some --

15           THE COURT: Mm-hmm.

16           MR. EVANS: -- or at least there was a great potential  
17 for catastrophic event.

18           Instead, plaintiff waits 16 years to come into now  
19 three tribunals seeking the very same relief, and we just don't  
20 think that the Court has authority to grant the relief in this  
21 tribunal.

22           THE COURT: Okay. Thank you, sir. I appreciate that.

23           Mr. Beste, there were some things you wanted to tell  
24 me. So go ahead, Mr. Beste. Tell me whatever you'd like to  
25 tell me.

1 MR. BESTE: I appreciate it, Your Honor. Thank you.

2 THE COURT: Certainly.

3 MR. BESTE: If I understand the defendant's argument,  
4 it's that Public Watchdogs should have foreseen the future.  
5 Should have foreseen in 2015 that four years later, or three  
6 years later, that canisters were almost dropped into a silo. I  
7 think that's their argument is that we should have somehow  
8 known that this was going to happen and not trusted what was  
9 said back in 2015.

10 That's not a realistic position, and that's not our  
11 position. Our position is that when the threat was  
12 materialized, when the probabilistic threat came to light, that  
13 is, beginning in 2018 when the actual implementation of this  
14 plan was put into place, no longer just pieces of paper and  
15 proposals, but simply now we're actually moving the fuel and  
16 we're putting it in the canister, into what turned out to be  
17 defective canisters, wasn't what the NRC approved, and it  
18 wasn't what Southern California Edison wanted, different  
19 canisters, and they were actually inserted into the silos, that  
20 that process was negligent.

21 And our position, Your Honor, is not that this Court  
22 needs to be an expert in nuclear safety, but that this Court  
23 needs to be an expert in the concept of negligence, which Your  
24 Honor can adjudicate cases of negligence

25 THE COURT: Sure.

1 MR. BESTE: Has done it for years --

2 THE COURT: Sure.

3 MR. BESTE: -- and courts will do that routinely, and  
4 that's all we're asking for is a venue in which to litigate the  
5 issue of the negligence that's been carried out at this  
6 facility.

7 And again, the complaint goes into a lot of context  
8 and history, but we believe it's important because we -- if you  
9 just take in isolation one day, one event, there may be a  
10 plausible explanation. It may not appear to be negligent.

11 THE COURT: No. You think the defendants -- the  
12 private defendants have been negligent over a long period of  
13 time.

14 MR. BESTE: Correct, Your Honor. And that -- and  
15 that --

16 THE COURT: And you think that the Nuclear Regulatory  
17 Commission has been looking the other way for a long period of  
18 time.

19 MR. BESTE: And that's what renders its decisions in  
20 this -- in this context, with this factual record, arbitrary  
21 and capricious.

22 Because given that they've already had the release of,  
23 you know, nuclear -- of radiated steam at this facility, that  
24 they installed the generator backwards, all of these problems  
25 that they've had at this facility for years, to then say, "But

1 don't worry. Trust us. It will be safe."

2 Not to be -- you know, not to draw analogies out of  
3 thin air, but you only have to look at what happened at the FAA  
4 recently with the 737. It's a very similar problem. The  
5 Federal Aviation Administration sort of off-loaded to Boeing  
6 the idea of, can you show proof to us that this is safe? That  
7 this 737 is safe? And now come to find out that the FAA didn't  
8 understand the technology that was being put into that plane,  
9 and two planes fell from the sky, and now there's no question  
10 that Boeing and the FAA have a lot to answer for.

11 We're trying to stop a dangerous situation from  
12 happening before it takes place. And we'd submit, Your Honor,  
13 that there's cases that we cited in our brief that go back 100  
14 years where the Supreme Court has acknowledged that, in order  
15 to prevent a harm from happening in the first place, the Court  
16 can take injunctive -- can order injunctive relief. And  
17 that's, we think, the proper avenue to be viewing both our tort  
18 claims in this case.

19 The very -- I think Your Honor hit on the good point,  
20 and I believe the defendants have echoed this, the very same  
21 relief is being sought in several venues. And I appreciate  
22 that that creates -- could create some tension.

23 But I would submit to Your Honor that the causes of  
24 action, the claims are separate.

25 So, Your Honor, if you dismiss this case, we can't go

1 to the NRC. The NRC doesn't have jurisdiction over a  
2 negligence claim or an administrative --

3 THE COURT: No, but you can go to the circuit.

4 MR. BESTE: I could appeal to the Ninth Circuit here,  
5 but I can't go to the NRC, and I can't go with a --

6 THE COURT: You're already at the NRC with your 2.206.

7 MR. BESTE: On a separate theory that I couldn't bring  
8 here.

9 THE COURT: Of course not. Of course not. You're not  
10 going to go to the NRC based on legal causes of action, you're  
11 going to go to the NRC for technical relief and supervision.

12 MR. BESTE: So should the plaintiff be forced to pick?  
13 Pick one, and you stick with it, and that's all the way, even  
14 if you have multiple causes of action.

15 And I think the answer is, no, the law doesn't  
16 require -- it could put the Court in a difficult situation --

17 THE COURT: What do you really want? You just want  
18 this to stop.

19 MR. BESTE: We want it to be done safely.

20 THE COURT: You're asking everybody to stop it.

21 MR. BESTE: To make it done safely.

22 THE COURT: You're asking everybody to stop it, and  
23 you're asking somebody other than NRC to come in and take a  
24 look at everything.

25 MR. BESTE: Our goal is to prevent the harm that is

1 being suffered by the plaintiff, and to make sure it's done  
2 safely.

3 we don't think that's a dramatic request, Your Honor,  
4 simply to make sure that, to the extent fuel is being buried at  
5 San Onofre, that it's being done safely.

6 And we believe that --

7 THE COURT: I'm smiling because there's really nothing  
8 safe about nuclear operating plants, is there? And we're  
9 talking about degrees of safety.

10 MR. BESTE: Fair point.

11 THE COURT: But that plant has been there since 1963.

12 Maybe Southern California would have been safer  
13 without it. But it's there. And it's been there. And to the  
14 best of my knowledge, because I've been here all that time, no  
15 major mishap has happened.

16 I understand it's different now because it's been  
17 decommissioned and there's large amounts of spent nuclear fuel.  
18 But I don't really know the likelihood of harm based on the  
19 decommissioning efforts.

20 I understand what you're saying. There was this  
21 container, and it had spent nuclear fuel. And oh, my goodness,  
22 it almost fell.

23 MR. BESTE: And that -- that process --

24 THE COURT: That may have created a risk, or it may  
25 not have, I don't know.

1           MR. BESTE: And we believe we've at least established  
2 a basis to -- to get to the discovery -- we've -- we've  
3 alleged -- this is a complaint. We're at the motion to dismiss  
4 stage, we're not at summary judgment. Right?

5           THE COURT: Right. Right.

6           MR. BESTE: So if we are unable to sustain our claims  
7 at summary judgment because the evidence doesn't bear it out,  
8 that's -- there's a procedure for that.

9           But at this point, we've alleged it's being done  
10 negligently, that it is in violation of state law, and that the  
11 Nuclear Regulatory Commission is arbitrary and capriciously  
12 allowing this activity to continue.

13          THE COURT: But, you know, as I said in my tentative,  
14 no matter how serious the allegations, I have to have  
15 jurisdiction, and you have to have pled viable causes of  
16 action.

17          And so what I'm going to do at the end of this is go  
18 back through everything. But you heard my concerns.

19          MR. BESTE: Yes, Your Honor. And the only other point  
20 I would make is, to the extent the Hobbs Act is a concern of  
21 the Court, and it is -- the Hobbs Act is an exclusive grant of  
22 jurisdiction to the Court of Appeals for certain matters only.

23          And I understand that the defendant says it's really  
24 just all about the amendment of the petition -- of the license,  
25 and that's just not the case.

1           In fact, it's all the decisions made by the NRC  
2 throughout. And I would submit, Your Honor, they can't just  
3 simply wave their hand and say, "well, these are Hobbs Act  
4 claims."

5           Broadsky, for example, is the Second Circuit case that  
6 we cited. The NRC did the same thing there. They said, "Oh,  
7 these are" -- you know, "These are amend -- license amendments.  
8 You don't have jurisdiction over" -- or, "you have  
9 jurisdiction" -- or, excuse me. I'm misstating it.

10           Broadsky was, "You have jurisdiction because these are  
11 license amendments." And the Second Circuit says, "No, they're  
12 not. These are exemptions. They don't fit."

13           The Hobbs Act is to be narrowly construed for what it  
14 does, which is it pulls from other venues and puts in the Ninth  
15 Circuit specifically only this issue of a license amendment.  
16 And we believe that we've pled something that falls outside of  
17 it.

18           The only -- the two other points, Your Honor.

19           with regard to the 2.206 petitions, I would say the  
20 authority for the proposition that the NRC has not granted one  
21 is on page 16 of document 52. And we cite to an Inspector  
22 General report. And I would need to clarify, because I  
23 actually am looking at it, it's for fiscal years '13 -- 2013  
24 through 2016. None of those petitions were granted. So I --

25           THE COURT: So it's a period in time.

1 MR. BESTE: Yes. And I apologize, Your Honor.

2 THE COURT: That's okay.

3 MR. BESTE: None of those had been granted, but is it  
4 possible that there's ones before 2013? I don't know. I don't  
5 have any authority for that one way or another. I can't --

6 THE COURT: So that's why we have statistics because  
7 you could prove anything.

8 MR. BESTE: But this is the authority for that  
9 proposition.

10 THE COURT: I don't think you misled the Court, but I  
11 do believe what counsel for the NRC was saying, that they have  
12 been granted. They would have to have been.

13 MR. BESTE: One would hope, but I'm unaware of any.  
14 And it may be that --

15 THE COURT: Well, there's a reason that there's years  
16 there, sir.

17 MR. BESTE: In those years, none were granted.

18 THE COURT: Right. And that was the point of -- okay.

19 MR. BESTE: Right. And so -- and then --

20 THE COURT: They defined it to make their point, I  
21 would submit to you.

22 MR. BESTE: Well, it was the Inspector General for the  
23 NRC reviewing it.

24 THE COURT: Right.

25 MR. BESTE: And then simply saying that this is a

1 process that the NRC does not actually use because it doesn't  
2 grant any of these petitions.

3           Lastly, Your Honor, the 2.206 petition is a  
4 separate -- as I explained, and perhaps not clearly enough --  
5 it is addressing a different cause of action, different bases  
6 for seeking the same relief, and essentially, it is --

7           THE COURT: I mean, you could attack every decision  
8 based on the financing of it, or the funding of it, whatever  
9 you want -- I guess, the financing.

10           Because you can have a program, and you could not be  
11 happy with the program, and maybe you didn't prevail in arguing  
12 the issues. Take any environmental matter. And so then you go  
13 in after the funding, and you stop the develop -- I'm going to  
14 say the developer. I'm thinking of land use matters for a  
15 moment. You could stop somebody that way.

16           I mean, totally different. It doesn't really apply.  
17 But I'm just kind of making that point.

18           So you're talking about the funding, the financing of  
19 it, but counsel raises the point that the end result is the  
20 same. It's putting things on a hiatus while further review is  
21 accomplished. That's what you're asking.

22           MR. BESTE: And in the NRC, yes. But -- and the  
23 reason is because if we wait for, you know, the proceedings to  
24 carry their normal course, it will be too late for any  
25 realistic remedy, other than extracting the fuel out -- if

1 something was wrong, for example, with the way the -- the way  
2 the financing was calculated, but the fuel's already in the  
3 ground, we can't take it out at that point. I don't think  
4 there's any realistic way of taking it out, at least now, and  
5 that the costs will be substantially higher at that point.

6 And so why not get the NRC now to address this issue  
7 of, was the financing plan credible? Was it done under  
8 accurate information or incorrect information? And if we can  
9 fix it now, shouldn't we? And that's what we're asking.

10 THE COURT: And when you say was it done under  
11 accurate information, that's going to the merits of the -- of  
12 what's -- how it's being handled? would that be a fair  
13 statement?

14 MR. BESTE: Actually, it goes to what assumptions were  
15 made about how much it's going to cost, and are those  
16 assumptions borne out, and that's what's going on in the NRC  
17 proceeding, which as I -- just by explaining to Your Honor,  
18 it's clear to me, it's different from our case. This case --

19 THE COURT: No. I understand that it's different, but  
20 it's -- it's two sides of the same coin.

21 I mean, if you don't like the canisters and you don't  
22 like this and you don't like that about it, it probably goes to  
23 the funding and the amount of money. That's what I'm thinking.

24 So in attacking the financing -- I'm just trying to  
25 understand this, Mr. Beste.

1 MR. BESTE: Sure.

2 THE COURT: Does the assumptions that were made that  
3 led to the financing plan basically go to the underlying merits  
4 of the whole --

5 MR. BESTE: I guess I'd say this, Your Honor.

6 THE COURT: -- mechanism for storing these in the dry  
7 context.

8 MR. BESTE: It could be the case, Your Honor, that  
9 here, in this court, that this Court could find that we could  
10 not prove that there was negligent handling or negligent  
11 operation, and yet we could prevail in front of the NRC and  
12 prove that the underlying assumptions made about how much its  
13 going to cost to keep the spent fuel here were so grossly  
14 inaccurate that the NRC has to redo the license.

15 we could -- you could have -- one does not necessarily  
16 flow from the other.

17 And vice versa. We could go in front of the NRC, and  
18 the NRC could say, "No, you have not demonstrated this, that  
19 the underlying assumptions were grossly wrong," and then over  
20 here we could prevail and demonstrate, Your Honor, that there  
21 was negligent handling and storage of this nuclear fuel.

22 And so in our view, they are separate. Yes, the  
23 relief overlaps. But we don't have an instance here where  
24 we're asking the Court to issue an injunction to do something  
25 and another injunction is going to come and say, no, don't do

1 it. Right? It's simply we're seeking the affirmative relief  
2 in multiple venues because we believe we have multiple causes  
3 of action.

4 Unless Your Honor has any other further questions,  
5 thank you.

6 THE COURT: No. Thank you, Mr. Beste.

7 Ms. Torres, do you want to tell me anything from the  
8 NRC's position that you haven't already told me, ma'am? It's  
9 up to you.

10 MS. TORRES: No, your Honor. The NRC will submit on  
11 the tentative --

12 THE COURT: Okay.

13 MS. TORRES: -- and argument.

14 THE COURT: Mr. Evans has something to share.

15 MR. EVANS: Thank you, Your Honor. Briefly, I  
16 promise.

17 I think it's important to point out here that the  
18 plaintiffs claim that there was -- this is really a negligence  
19 cause of action. That's the assertion. What we're bringing  
20 here, it's negligence cause of action.

21 I would just point the Court back to the cases under  
22 the Price Anderson Act that are very specific requirements.

23 They've got to plead and prove that there was a  
24 nuclear incident that resulted in the release of more than  
25 double the federally approved dose and that it caused specific

1 injury to persons or property.

2 You don't have a negligence claim in the absence of  
3 those allegations.

4 You don't have -- this Court doesn't have jurisdiction  
5 in the absence of a claim to that effect.

6 But I think I'd like to take it a step further, and I  
7 would point out that what they're really complaining about --  
8 the gravamen of the complaint is all about nuclear safety. The  
9 handling of spent nuclear fuel. The transfer of spent nuclear  
10 fuel. How and where it's stored on-site. Those are all  
11 matters vested to the expertise of the Nuclear Regulatory  
12 Commission.

13 I find it difficult to imagine how the Court would  
14 fashion a remedy to appoint some independent examiner to  
15 examine the decisions and approvals of the NRC.

16 That's not what Congress had in mind when it passed  
17 the Atomic Energy Act. It provided for a very specific  
18 legislative and regulatory scheme by which, ultimately, the NRC  
19 was commanded with the responsibility of overseeing those  
20 activities.

21 *Sierra Club v. Whitman*, that's found at 268 F.3d 898,  
22 903. That case stands for the proposition that a decision of a  
23 regulatory agency like the NRC, its decision not take  
24 enforcement measures for the negligent conduct that Mr. Beste  
25 points to that results in no harm, its decision to take action

1 or no action in response to that is vested to the absolute  
2 discretion of the agency. There's no judicial review capable  
3 of that type of thing.

4 what the Court said in Sierra Club was that, "The  
5 decision not to take enforcement measures, like a prosecutor's  
6 decision not to indict, is one that is typically committed to  
7 the agency's absolute discretion."

8 So even if there was a claim that the materials were  
9 negligently handled -- and I don't think there's any dispute  
10 that it didn't result in a nuclear incident, as defined by the  
11 Price Anderson Act -- even if they had a quibble with that,  
12 that's up to the NRC. They can take action or not take action  
13 as they see fit. And they don't have a remedy to complain of  
14 that. That's -- if they complain that some Certificate of  
15 Compliance, the Holtec Certificates of Compliance, that the  
16 agency's actions of approving of those was unsound, their  
17 remedy is to go to the Ninth Circuit and complain there.

18 But this all comes down to the handling of nuclear  
19 materials, and that's something that's vested best in the  
20 Nuclear Regulatory Commission.

21 There's one other point that I would point out to the  
22 Court, and that is that the Ninth Circuit, in numerous cases --  
23 and I cited the Court to the Berg case. I'd also point out the  
24 *Hanford v. Dupont* case -- those all stand for the proposition  
25 that you don't apply state standards, negligence standards in

1 the context -- in this context. You have to look to the  
2 federal standards to determine that there is an actionable  
3 claim.

4 And that's all I have.

5 THE COURT: Okay. Thank you.

6 All right.

7 MR. BESTE: I don't -- I just want to ask the Court --  
8 I know -- we don't want to burden you with any more paper, but  
9 if we could have an opportunity to submit supplemental  
10 authority on the questions that you asked, how much time would  
11 I have to do that?

12 THE COURT: well, let me see. Because I -- okay. Is  
13 there going to be an objection to that? He wants to submit  
14 supplemental authority. If he submits, then you all would want  
15 to submit?

16 MS. TORRES: Yes, Your Honor. We'd object. We've had  
17 so much briefing now. Multiple opportunities for -- on the  
18 motions to dismiss, on the preliminary -- they've amended their  
19 preliminary injunction, TRO motion, at least once. We have an  
20 amended complaint on file. I think there's been plenty of  
21 opportunities, particularly now with oral argument, to brief  
22 and discuss these issues.

23 But certainly, if the Court is inclined to grant an  
24 opportunity for further briefing, we would like an opportunity  
25 to respond.

1 THE COURT: Do you have a position on that, counsel?

2 MR. EVANS: Everything that Ms. Torres just said.

3 THE COURT: Okay.

4 MR. BESTE: And I'm simply envisioning the responses  
5 to the specific questions you asked about cases in which  
6 injunctive relief -- or cases in which you require physical --  
7 you require physical injury. Do you have a case that has  
8 injunctive relief as part of a Price Anderson. I think those  
9 are the two particular areas. I'm not envisioning a whole line  
10 of -- we've already presented our arguments --

11 THE COURT: No. And what I'd like to do -- let me  
12 think on that, Mr. Beste.

13 I want to take a break. I want to go back through my  
14 notes, and then I'll decide whether I want those additional  
15 authorities.

16 I mean, I asked those questions -- you know, I wasn't  
17 attempting to solicit further authority. So --

18 MR. BESTE: Understood.

19 THE COURT: -- by way of written authority.

20 So let me take a look at what I have here, look at my  
21 notes from today, and let's take 10 minutes, we'll come back,  
22 and then I'll deem the matter submitted.

23 MR. BESTE: Thank you, Your Honor.

24 THE COURT: I'll let you know. Thank you.

25 (Court in recess)

1 THE COURT: Counsel, the Court went through  
2 everything, and I have reference to most of the cases that were  
3 cited. I want to limit the record to what's in the record  
4 right now.

5 We've got the argument of counsel, we've got the  
6 written documents, and so I'm not going to entertain further  
7 briefing. I think I have more than enough to render a  
8 decision.

9 And I appreciate the comments, the answers to my  
10 questions this afternoon. I'm going to deem the matter  
11 submitted, take it under submission, and you'll hear from the  
12 Court.

13 MR. BESTE: Thank you very much, Your Honor.

14 THE COURT: You're welcome.

15 Thank you, Mr. Beste.

16 MS. TORRES: Thank you, Your Honor.

17 THE COURT: Thank you, Ms. Torres.

18 Thank you, sir.

19 MR. EVANS: My thanks to the Court.

20 THE COURT: Thank you.

21 We're in recess.

22 (End of proceedings at 3:51 p.m.)

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## C-E-R-T-I-F-I-C-A-T-I-O-N

I hereby certify that I am a duly appointed, qualified and acting official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with rules and requirements of the United States Judicial Conference.

Dated: November 29, 2019, at San Diego, California.

/s/ Ellen L. Simone

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Ellen L. Simone, RMR, CRR  
Official Court Reporter