

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

March 27, 2024

Lyle W. Cayce
Clerk

No. 23-60377
Summary Calendar

FASKEN LAND AND MINERALS, LIMITED; PERMIAN BASIN LAND
AND ROYALTY OWNERS,

Petitioners,

versus

NUCLEAR REGULATORY COMMISSION; UNITED STATES OF
AMERICA,

Respondents.

Appeal from the Nuclear Regulatory Commission
Agency No. 72-1051

Before JONES, ELROD, and WILSON, *Circuit Judges*.

PER CURIAM:*

In September 2021 the Nuclear Regulatory Commission (NRC) issued a license to Interim Storage Partners, LLC, to establish a facility to store nuclear waste temporarily in Andrews County, Texas. *See Texas v. Nuclear Regul. Comm'n*, 78 F.4th 827, 833–35 (5th Cir. 2023) [hereinafter *Texas v. NRC*], *reh'g en banc denied*, 2024 WL 1108700 (5th Cir. Mar. 14,

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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2024). Texas, Fasken Land and Minerals, Ltd., (Fasken), and Permian Basin Land and Royalty Owners (PBLRO) petitioned this court to set aside that license. *Id.* at 834–35. In that appeal, a panel of this court first held that Fasken and PBLRO had standing under the Constitution and the Hobbs Act to challenge the NRC’s actions. *Id.* at 835–40. It then held that the NRC lacked statutory authority to issue the license. *Id.* at 840–44. Accordingly, this court granted the petitions for review and vacated the license. *Id.* at 844. The NRC filed a petition for rehearing *en banc* on October 24, 2023, which this court denied on March 14, 2024. See *Texas v. Nuclear Regul. Comm’n*, No. 21-60743, --- F.4th ----, 2024 WL 1108700 (5th Cir. Mar. 14, 2024).

Shortly before the panel issued its opinion in *Texas v. NRC*, Fasken and PBLRO filed the petition for review at issue in this case. They challenge a different license issued by the NRC in May 2023 to Holtec International to establish a facility to store nuclear waste in Lea County, New Mexico. The parties, correctly, agree that *Texas v. NRC* involved a “materially identical license in a materially identical procedural posture” and that “absent the [c]ourt granting rehearing *en banc* in *Texas [v. NRC]* . . . , the panel’s consideration of this case will be controlled by [*Texas v. NRC*].” Because this court’s holding in *Texas v. NRC* dictates the outcome here, we GRANT Fasken’s and PBLRO’s petition for review and VACATE the Holtec license. The NRC’s motion to transfer the petition for review to the United States Court of Appeals for the District of Columbia Circuit is DENIED AS MOOT.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 27, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 23-60377 Fasken Land and Minerals v. NRC
USDC No. 72-1051

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that respondents pay to petitioners the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in black ink, appearing to read "W M Jett", written over a horizontal line.

By: _____
Whitney M. Jett, Deputy Clerk

Enclosure(s)

Mr. Andrew Paul Averbach
Mr. Benjamin L. Bernell
Mr. Paul D. Clement
Mr. Merrick Garland, U.S. Attorney General
Mr. Justin Heminger
Mr. Allan L. Kanner
Ms. Annemieke Monique Tennis