

October 14, 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PRIVATE FUEL STORAGE, LLC

(Independent Spent  
Fuel Storage Installation)

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Docket No. 72-22-ISFSI

NRC STAFF'S RESPONSE TO STATE OF UTAH'S  
CONTENTIONS RELATING TO THE LOW RAIL  
TRANSPORTATION LICENSE AMENDMENT

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's "Order (Schedules for Contentions Responses and Discovery Status Report)," dated October 1, 1998 (Order), and 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission ("Staff") hereby files its response to the "State of Utah's Contentions Relating to the Low Rail Transportation License Amendment" ("Low Rail Contentions"), filed September 29, 1998. For the reasons set forth below, the State's Low Rail Contentions should be admitted in part, and rejected in part, in the manner and to the extent set forth below.

BACKGROUND

In its "Memorandum and Order (Ruling on Motions to Suspend Proceeding and for Extension of Time to File Contentions)" ("Extension Order"), dated October 17, 1997, the Licensing Board ordered that contentions be filed by November 24, 1997. On or about November 24, 1997, contentions were filed by the State and other petitioners for leave to

intervene in this proceeding. Thereafter, the State filed three late-filed contentions: Utah EE, which was dismissed as untimely; Utah FF, which was withdrawn; and Utah GG, which was admitted in part and denied in part. *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 206-211 (1998).

On August 28, 1998, the Applicant submitted a license application revision that, among other things, proposed a new rail spur corridor as well as a new location for the Intermodal Transfer Point.<sup>1</sup> On September 28, 1998, the State of Utah filed its Low Rail Contentions.<sup>2</sup> By Order dated October 1, 1998, the Board directed other parties to respond to the State's Low Rail Contentions on or before October 14, 1998.

### DISCUSSION

#### A. Legal Standards for Late-Filed Contentions.

The criteria to be considered when determining the admissibility of a late-filed contention are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). *Sacramento Municipal Utility Dist. (Rancho Seco Nuclear Generating Station)*, CLI-93-12, 37 NRC 355, 363 (1993). The five factors are:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

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<sup>1</sup> Letter to Director, Office of Nuclear Material Safety and Safeguards, NRC, from John D. Parkyn, Chairman, PFS, dated August 28, 1998.

<sup>2</sup> On September 28, 1998, the State filed "State of Utah's Motion for Leave to Exceed the Ten Page Limitation for the State's Contentions Relating to the Low Rail Transportation License Amendment." The Board permitted the State to have up to twenty pages for its contentions and accorded the same page extension for responses thereto. *See Order (Granting Motion to Exceed Page Limit)*, dated September 29, 1998.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1). Although the regulations call for a balancing of these factors, it has long been held that where a petitioner fails to show good cause for filing its contention late, the other four factors must weigh heavily in its favor in order for its late contentions to be admitted (or for its late petition to be granted). *See, e.g., Virginia Elec. Power Co.* (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395, 398 (1975); *Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 34 (1990), *aff'd on other grounds*, ALAB-938, 32 NRC 75 (1990); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 629 (1985). In addition to the showing that a balancing of the five factors favors intervention, a petitioner must also meet the requirements for setting forth a valid contention. 10 C.F.R. § 2.714(d)(2).

B. The State Has Failed to Establish Good Cause  
For the Late Filing of Contention HH.<sup>3</sup>

In its Extension Order, the Licensing Board established November 24, 1997, as the due date for filing contentions. Therefore, any contentions submitted after this date -- such as the State's Low Rail Contentions, submitted on September 28, 1998 -- are deemed to be late filed.

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<sup>3</sup> For the reasons set forth in the following discussion, portions of Contention II that are based on Contention HH should also be deemed to have failed to satisfy the standards for late-filed contentions. *See* Low Rail Contentions at 9 ¶ 1 (increased risk of fire).

The State contends that it has good cause for the late filing of these contentions because it did not receive the Applicant's license application revision until August 31, 1998. Low Rail Contentions at 19-20. The State further asserts that following its receipt of the revision to the application, it has worked with State agencies and experts in reviewing the information and framing contentions and, at the same time, has been engaging in informal discovery associated with this proceeding. *Id.* at 20. For these reasons, the State asserts that it is reasonable for it to submit these contentions within thirty days of its receipt of the revision to the application. *Id.*

Notwithstanding these assertions, the Staff submits that the State's filing of Contention HH is untimely, in that the State has not identified any information contained in the revision to the application that it needed in order to formulate Contention HH. This contention pertains to the potential for fire hazards and the alleged impediment to firefighting associated with the rail spur transportation option. This is not new information, however. The original application alerted parties that the Applicant may construct a new railroad spur to connect the ISFSI to the Union Pacific railroad mainline. *See* Environmental Report (ER) § 4.4 (original application). While the change made by the revision to the application provides new information relative to the location of the rail spur, it does not raise any issue that does not appear to apply as well to the rail spur alternative contained in the original application. *Compare* original ER § 4.4 (indicating that a rail spur is to be installed "parallel to the existing Skull Valley Road" and "adjacent" thereto, with a feasibility study to be performed to determine "on which side of [the] Road the track will be located"), *with* revised ER § 4.4 (indicating that the rail spur is to be installed "from the mainline on the south side of Interstate 80 at Low" to the ISFSI). While the revised application describes a new location for the rail spur, that location does not differ materially from the original

proposal, in that both locations are in Skull Valley and thus share the same fire hazard siting characteristics. Inasmuch as the State has been aware of the Applicant's proposed option to construct a rail spur in Skull Valley since its receipt of the original application, well before the November 24, 1997 date for filing contentions, good cause has not been shown for the late filing of this contention.

This conclusion is buttressed by an examination of the affidavit of David C. Schen, submitted by the State in support of Contention HH.<sup>4</sup> In his affidavit, Mr. Schen describes the pertinent vegetation and irrigation characteristics of Skull Valley in general, rather than any characteristics that are unique to the revised rail spur location. See Schen Affidavit at ¶¶ 8 and 9. While Mr. Schen points out that some areas near Skull Valley Road (*i.e.*, close to the rail spur's original proposed location) are irrigated, he states that even the irrigated areas are "not sufficient to interrupt a wildfire occurring in Skull Valley." *Id.* at ¶ 9. Thus, this issue applies as well to the original application. Likewise, Mr. Schen discusses potential fire hazards associated with the construction and maintenance of the rail spur, without particularizing any hazards that are unique to the western location of the rail spur within Skull Valley. See *id.* at ¶¶ 10-11. While Mr. Schen articulates two firefighting concerns that relate to the rail spur option (potential for collisions between firefighting vehicles and trains, and a potential fear of nuclear material), *Id.* at ¶¶ 14-15, these allegations would apply equally (if at all) to any site, and are not unique to the new rail spur location. Similarly, Mr. Schen's concerns with respect to the potential for increased occurrence

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<sup>4</sup> See "Affidavit of David C. Schen," Ecosystem Management Coordinator, Division of Forestry, Fire, and State Lands, Utah Department of Natural Resources, dated September 29, 1998 ("Schen Affidavit").

of human-caused fires in the west side of Skull Valley, and potential vehicle access difficulties there (*Id.* at ¶¶ 7, 12, and 13), would also appear to apply to the original rail spur location. In this regard, the Skull Valley Road provides easy access for humans, raising the risk of human-induced fires adjacent to the road; and Mr. Schen's statement that "responders typically use four-wheel drive vehicles and drive cross country to fight wild land fires" in the west side of Skull Valley (*Id.* at ¶ 13), does not suggest that such vehicles would not be used, as well, to respond to wild fires occurring elsewhere in Skull Valley (such as near Skull Valley Road), to prevent such fires from spreading to other areas.

The State has been aware of specific information provided by Mr. Schen pertaining to the danger of wildfires in Skull Valley at least since the Spring of 1997. Indeed, the State even filed such information in this proceeding a year ago, prior to filing its initial set of contentions.<sup>5</sup> Nonetheless, the State has not raised a fire-related contention concerning the construction of a rail spur until now. Inasmuch as these matters could have been raised with respect to the rail spur location described in the original application, the Staff submits that good cause has not been shown for the late filing of this contention now.

With respect to the four other factors specified in 10 C.F.R. § 2.714(a)(1), the Staff believes that those factors weigh against the admission of Contention HH. Regarding factors two and four, other means do not appear to be available to protect the State's interest with respect to the issues raised in Contention HH; and the State's interest may not be represented by existing

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<sup>5</sup> See Memorandum from Dave Schen, Forestry, Fire & State Lands to Jamie Dalton, Energy & Resource Planning, dated May 27, 1997, attached to Exhibit 2 to "State of Utah's Motion to Suspend Licensing Proceedings . . . ," dated October 1, 1997.

parties with respect to these issues. Factors two and four, however, carry less weight than the three other factors specified in the regulation. See *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986); *Private Fuel Storage*, LBP-98-7, 47 NRC at 208.

With respect to factor three, whether the State's participation may be expected to assist in developing a sound record, the State has merely identified the affiant who supported its contention and has referenced unnamed "experts from State agencies." Low Rail Contentions at 20. Without further identification of these experts, or a summary of what they would say in support of this contention, this factor must be viewed as weighing against the contention's admission. See *Braidwood*, CLI-86-8, 23 NRC at 246; *Private Fuel Storage*, LBP-98-7, 47 NRC at 208-09.

With respect to the fifth factor, the admission of this contention will broaden the issues and will commensurately delay the proceeding. Contention HH raises certain matters that have not been previously alleged.<sup>6</sup> Informal discovery is now in progress, formal discovery is scheduled to commence in about two months, and hearings are scheduled to commence in 10 months. The admission of this contention now will likely require some adjustment of the hearing schedule, will broaden the issues to be heard, and will cause delay in the completion of hearings. Accordingly, this factor weighs against the admission of this contention.

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<sup>6</sup> The State asserts that Contention HH is similar to the fire issues admitted in Contention R. However, the fire issues admitted in Contention R pertain to on-site water availability and equipment maintenance for the purpose of extinguishing a fire at the ISFSI itself, whereas Contention HH pertains to wildfire concerns in the Low rail corridor. Further, Contention R relates to Emergency Plan deficiencies, whereas Contention HH pertains to alleged deficiencies in the Environmental Report. Admission of Contention HH, therefore, would involve issues different from those already admitted and would broaden the scope of the proceeding.

In sum, the Staff submits that the State has failed to establish good cause for the late filing of Contention HH, given the State's awareness that a rail spur in Skull Valley had been proposed in the original application and the fact that its concerns regarding the fire hazards associated with construction and operation of a rail spur could have been raised a year ago (*i.e.*, by November 24, 1997). Further, the Staff submits that the State's lack of good cause for filing this contention late has not been overcome by a balancing of the factors specified in 10 C.F.R. § 2.714(a)(1). For these reasons, Contention HH should be rejected.

C. **Contentions HH and II Generally Fail to Satisfy the  
Requirements Governing the Admissibility of Contentions.**

In the following discussion, the Staff addresses the admissibility of Utah Contentions HH and II, apart from the factors governing late-filed contentions discussed above. For the reasons set forth below, the Staff submits that, except in certain limited respects, these contentions fail to satisfy the Commission's requirements governing the admissibility of contentions.

**Utah Contention HH. The Low Rail Corridor and Fire Hazards**

The Applicant's Environmental Report fails to give adequate consideration to the potential for fire hazards and the impediment to response to wild fires associated with constructing and operating the Applicant's proposed rail line in the Low corridor.

**Staff Response:**

Contention HH is comprised of three overall assertions: (1) various activities associated with the construction and operation of the new rail spur will introduce a new source of igniting wildfires; (2) the increase in human activity near the railroad may increase the risk of wildfires; and (3) the rail spur will impede firefighting activities. The Staff opposes the admission of these assertions, except in certain limited respects, as failing to meet the standards of 10 C.F.R.



§ 2.714(b), in that they are not supported by the requisite facts or expert opinion and/or do not show that a genuine dispute exists with the Applicant on a material issue of fact, and/or do not refer to any allegedly deficient portion of the application. See 10 C.F.R. § 2.714(b)(ii) and (iii).

As recognized by the State (Low Rail Contentions at 5), the Applicant's ER contains the following provision concerning the increased risk of fire posed by the rail spur:

To reduce the potential for increased range fires that may be caused by rail transport, the 40 ft wide rail corridor will be cleared of vegetation to provide a buffer zone in preventing fires.

ER Rev. 1 § 4.4.8. Notwithstanding the State's recognition of this provision concerning the creation of a fire buffer zone, the State fails to indicate any reason to believe that the buffer zone is inadequate to eliminate or substantially reduce the potential for fires. At best, the State discounts the Applicant's discussion based on its wholly speculative assertion that the Bureau of Land Management may not grant the Applicant the width of right-of-way it requests, and that the 40 foot wide corridor "may not be sufficient to prevent sparks from being thrown beyond the cleared corridor." Low Rail Contention at 5. Significantly, these assertions are absolutely unsupported by any facts or expert opinion, and do not sufficiently show with specificity that a genuine dispute of material fact exists with the Applicant. Indeed, Mr. Schen's affidavit, while describing the potential for a train to generate sparks, nowhere addresses the Applicant's description of the 40 foot buffer zone proposed to prevent fires, and fails to provide any indication that he is aware of that buffer zone or considers it to be inadequate. Similarly, the State's concern with respect to the fire hazards posed by construction activities such as rail welding and grinding (Low Rail Contentions at 4; Schen Affidavit at ¶ 10), provides no facts or expert opinion to challenge the adequacy of the 40-foot wide fire buffer zone -- which is to be established by the

Applicant prior to rail construction activities. *See Revised ER § 3.2.1.5.* Accordingly, these portions of Contention HH, pertaining to the potential introduction of a new source of wildfire ignition the construction and use of the Low rail spur, should not be admitted. *See Private Fuel Storage*, LBP-98-7, 47 NRC at 178.

The State's second issue, concerning the potential for human activity near the railroad to increase the risk of wildfires, should also be rejected. In support of this issue, the State cites Mr. Schen's Affidavit at 12 (*see* Contention HH at 5). However, no facts or expert opinion are provided in the Schen affidavit to support this concern -- and at best, the State appears to rest this concern upon the unsupported speculation that increased human use of the area "may" result following construction of the rail spur. *Id.* Such a speculative concern is insufficient to support a contention under 10 C.F.R. § 2.714(b). *Private Fuel Storage*, LBP-98-7, 47 NRC at 180-81.

The State's third issue, the potential for the rail spur to impede firefighting activities due to the inability of four-wheel drive vehicles to cross such a spur even if it is built "close to existing grade" is supported by statements contained in Mr. Schen's affidavit (at ¶ 13). Although no supporting documentation or specific facts are provided in support of this assertion, Mr. Schen's affidavit appears to afford sufficient support for this concern, given his experience and apparent expertise in forest fire management. Accordingly, the Staff does not oppose the admission of this aspect of Contention HH.<sup>7</sup>

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<sup>7</sup> Notwithstanding this conclusion, the Staff notes that this concern would appear to apply, as well, to the rail spur proposed in the original application, thus rendering this a late-filed issue. *See discussion supra*, at 6.

In its third basis statement, the State also alleges that fire fighters may hesitate to respond to a fire near spent nuclear fuel, and that "the presence of hazardous material such as spent nuclear fuel may further endanger responders." Low Rail Contentions at 7. These statements are not supported by any showing of credible fact or expert opinion, and do not provide an adequate basis for the admission of this issue. The only support for these assertions is the unsupported personal opinion of Mr. Schen, who states as follows:

In my opinion, if fire fighters were aware that high level nuclear waste was within the perimeter of the fire, they would err on the side of caution and personal safety. Firefighters will be reluctant to pursue a wildfire in the vicinity of a train load of spent nuclear fuel casks. They may very likely back off until a subject area specialist ascertained that the hazardous cargo was contained and fire fighter safety was guaranteed.

Schen Affidavit at ¶ 15. No showing has been made that Mr. Schen has any expertise in fire management involving hazardous cargos generally, or nuclear materials in particular, or that he is aware of any facts to support this assertion; further, his opinion conflicts with the Commission's generic determination, in its emergency preparedness regulations, that offsite authorities and organizations may be relied upon in the event of an emergency involving nuclear materials. See 10 C.F.R. § 72.32; *see generally*, 10 C.F.R. § 50.47. Mr. Schen's inclusion of this unsupported personal opinion in his affidavit does not afford it any more weight than it would otherwise be entitled to receive; and it fails to satisfy the requirements of 10 C.F.R. § 2.714(b)(ii) and (iii). Accordingly, this issue should be rejected.

In sum, the Staff does not oppose the admission of the State's concern regarding the potential inability of four-wheel drive vehicles to cross the Low rail spur; in all other respects, however, the issues raised in this contention should be rejected.

**Utah Contention II. Costs and Effects Associated with the Low Rail Corridor**  
The Low Corridor License Amendment does not comply with 10 CFR § 72.100(b) or NEPA, including 10 CFR § 51.45(c), and 40 CFR § 1508.25 because it fails to evaluate, quantify and analyze the costs and cumulative impacts associated with constructing and operating the rail line on the regional environment.

**Staff Response:**

The Staff objects to the admission of this contention on the grounds that it does not set forth with specificity a genuine dispute of material fact with the Applicant, and fails to set forth facts to support the underlying assumptions of the assertions contained in the basis statements. *See* 10 C.F.R. § 2.714(b)(iii).

The State asserts that the amendment to the license application is "wholly without discussion of the direct and indirect costs or cumulative impacts associated with the construction and operation of the rail line." Low Rail Contentions at 9. The State further claims that the Applicant describes "only the indirect benefits of the rail line," *Id.* at 9-10; and it asserts that the Applicant has failed to evaluate and "quantify the costs" associated with six enumerated impacts associated with the Low rail corridor. *Id.* at 10-11.

Notwithstanding these assertions, Contention II fails to identify or demonstrate that the Applicant is required by law to quantify the costs associated with the six impacts it recites. *See* 10 C.F.R. § 2.714(b)(2)(iii). Section 72.100(b), to which the State cites, provides that in evaluating the site with respect to regional environmental effects, "usual and unusual regional and site characteristics must be taken into account." This regulation does not require a quantitative evaluation. Further, 10 C.F.R. § 51.45(c), to which the State also cites, states that environmental analyses shall "to the fullest extent practicable" quantify the various factors; however, it further

provides that if there are important qualitative considerations or factors that cannot be quantified, those considerations or factors shall be discussed "in qualitative terms." The State has failed to show, with respect to the six environmental costs it particularizes, that they are amenable to quantification or that the Applicant's discussion of these effects is not sufficient. The State has also failed to identify any reasonably foreseeable cumulative impacts that it contends the Applicant has failed to evaluate with respect to the revised application.

The State quotes from Council on Environmental Quality (CEQ) regulations at 40 C.F.R. § 1508.7, which states that cumulative impacts should be evaluated, and defines these as "the incremental impact" of the proposed action on the environment when added to other "past, present, and reasonably foreseeable future actions." Low Rail Contentions at 9. The State, however, does not identify with particularity any other actions that it contends must be cumulatively studied along with the Low rail corridor. Therefore, the State's assertion regarding the purported failure of the Applicant to address cumulative impacts does not comport with the requirements of 10 C.F.R. § 2.714(b) and should be rejected.

Turning to the State's six enumerated impacts, the State's discussion in each of these areas does not remedy the overall deficiencies of this contention. In its first listed impact, the State asserts that the Applicant has failed to quantify the costs associated with the increased risk of fire ignited as a result of activities occurring in the rail corridor. Low Rail Contentions at 10. This basis statement should not be admitted because the State has not demonstrated that this impact is subject to quantification as contemplated by 10 C.F.R. § 51.45(c). Even if portions of State Contention HH are admitted for litigation (*see* discussion above) the State has not shown why the Applicant is required to frame its analysis in quantitative terms. *See Consumers Power Co.*

(Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 350-351 (1973) (intervenors failed to show environmental factors could be quantified). Further, the State has not shown any reason to believe that the Applicant's qualitative evaluation of these matters is deficient.

Regarding its second asserted impact, the State asserts that the Application is deficient because none of the costs associated with impacts to certain "endangered, threatened and candidate endangered" species and their food base by construction activities, noise levels and operation of the railroad have been quantified. Low Rail Contentions at 10-11. The State has not demonstrated that these effects are amenable to quantification. In fact, the Commission itself has recognized that many environmental factors "are difficult of articulation, much less quantification." *Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503 (1977). Environmental effects on species is one such factor. See *Houston Lighting and Power Co.* (South Texas Project Nuclear Generating Station, Units 1 and 2), LBP-75-46, 2 NRC 271, 280 (1975) (quantification of the effects on plant and animal species was "difficult to determine"). The State has not shown that the Applicant's description of the effects of the rail spur on ecological resources is incorrect or otherwise deficient. In fact, much of the State's discussion of the costs associated with the new rail spur is based on the Applicant's discussion in ER Section 4.4.2, "Effects on Ecological Resources" or ER Section 2.3.3, "Ecological Resources Along the Low Corridor," suggesting that the State finds those discussions to be sound. Moreover, the State makes certain assertions that are without adequate support. For example, the State claims that the railroad "may act as an artificial barrier" to wildlife, that it "will probably cut off winter feeding range of some wildlife," that it may disrupt other established wildlife patterns," and that noise of construction and operation "may disrupt mating and breeding activities." Low Rail Contentions

at 10. Significantly, the State does not provide any factual basis or expert opinion with respect to these speculative assertions, and they may not be admitted. *Private Fuel Storage*, LBP-98-7, 47 NRC at 180-81.

With respect to its third asserted impact, the State asserts that (a) the Applicant has not accounted for the visual impact of the railroad on the BLM Cedar Mountains Wilderness Study Area or other locations in Skull Valley (*Id.* at 11-12); and (b) the Applicant has failed to quantify costs associated with noise levels from construction and operation of the railroad on wilderness and recreation areas. *Id.* at 12.

Regarding visual impacts, the State does not address the Applicant's discussion of the "visual element" that the new rail spur will add to Skull Valley. *See* ER Rev. 1 § 4.4.8. The Applicant states, among other things, that the rail line will be an "apparent change in the visual landscape only in the developed areas near I-80 and from high elevations in the Cedar Mountains," although it will be consistent with BLM standards consistent with other developments in the area. ER Rev. 1 § 4.4.8. The State does not explain why the impact on Cedar Mountains does not embrace the BLM Cedar Mountains Wilderness Study Area. Further, the State does not show that the Applicant's description is inaccurate or insufficient. Indeed, it has been recognized that some questions of esthetics do not lend themselves under NEPA to a detailed evaluation, and are "not readily translatable into concrete measuring rods." *Maryland Nat'l Capital Park and Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029, 1038 (D.C. Cir. 1973), quoting *Hanly v. Kleindienst*, 471 F.2d 823, 833 n. 01 (2d Cir. 1972).

Regarding noise impacts, the State does not address the Applicant's discussion of the effects of noise and traffic from the new rail spur. *See* ER Rev. 1 § 4.4.7. In its discussion, the

Applicant quantifies the noise level of the train based upon methodologies outlined in C.M. Harris's *Handbook of Noise Control*. The State does not challenge the Applicant's evaluation that "[t]he maximum locomotive and rail car noise would be 31 dBA at Skull Valley Road, which may occasionally be just audible if the ambient sound level drops into the 20s dBA," and that at another specified location the noise may at times reach 45 dBA and be audible. *Id.* Inasmuch as the Applicant has addressed and quantified the effect of noise resulting from train traffic and rail construction, which the State does not contest, this basis statement should be rejected.<sup>8</sup>

The State, in its fourth listed impact, asserts that the Environmental Report is inadequate because it fails to demonstrate how the Applicant plans to revegetate 621 acres in a sensitive and slow-growing environment and does not state where and how the Applicant will obtain water for such efforts. Low Rail Contentions at 12. First, the State claims that the vegetation slated for removal "provides habitat for a variety of wildlife species." *Id.* at 11. The State also asserts that the area of habitat destruction is located in a "sensitive, slow growing, xeric environment" and that such areas are "difficult to restore." *Id.* The State provides no support for these assertions, or any reason to believe that any potential impacts would be significant. In addition, the State does not point to any requirement that the Applicant must set forth the details of its revegetation plan as part of its Environmental Report. Further, to the extent that the State is claiming that the Applicant has failed to quantitatively assess this impact, the State does not demonstrate that this cost is amenable to quantification. For these reasons, this basis statement should be rejected.

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<sup>8</sup> To the extent that the State is claiming that the Applicant has failed to calculate this factor in terms of monetary costs, the Staff notes that CEQ regulations provide that a cost-benefit analysis is optional and that, in any event, monetary cost-benefit analyses should not be used when there are "important qualitative decisions." See 40 C.F.R. § 1502.23.



In its fifth listed impact, the State asserts that the Environmental Report does not quantify or otherwise evaluate the potential loss of portions of the Hastings Trail and Donner-Reed Trail where the rail line crosses these trails. *Id.* at 11-12. The State, however, does not provide any support for its assertion that these trails "may be lost where the rail line crosses" them, and does not demonstrate that the impact on the two trails is subject to quantification. *See Midland, ALAB-123, 6 AEC at 350-351.* Further, the State does not address the Applicant's evaluation in Section 2.9.1 of its Environmental Report, which provides that although both trails are eligible to be on the National Register of Historic Places, "given the proximity to Interstate 80, the Hastings Trail has already been severely impacted in the area of the proposed rail spur corridor," and "the Donner-Reed Trail may have been less impacted in the area where it crosses the corridor." ER Rev. 1 § 2.9.1. Likewise, the State fails to address the Applicant's statement that "[a] Comprehensive Management Plan (CMP) for Historic Trails is currently being prepared by the National Park Service" and that the Low Rail Corridor will be reviewed against the CMP, including the manner by which the rail spur would fit into the limits of acceptable change for the trails, and the implementation of possible mitigation measures. ER Rev. 1 § 4.4.8. For these reasons, this basis statement should be rejected.

The State, in its sixth listed impact, asserts that the Environmental Report fails to quantify the costs of the railroad on recreational activities (such as off-road vehicle use and hunting) and ranching. Low Rail Contentions at 14. In addition, the State claims that the rail spur will "impede recreational users and ranchers from their established ability to cross Skull Valley . . . ." *Id.* at 13. These statements, however, are wholly unsupported by any facts or expert opinion -- as is the State's assertion that the existence of the rail spur "disrupts recreational activities . . .

and ranching activities," despite the State's citation to the Applicant's ER. *Id.* In fact, the Applicant states that traffic on east-west roads – including dirt jeep trails – "is not expected to be affected" by the proposed rail spur. ER Rev. 1§ 4.4.7. The State has failed to provide any reason to believe that this statement is deficient, and it fails to provide any support for its assertions with respect to the impacted use of the roads crossing the rail spur. Finally, the State has not demonstrated that these effects are amenable to quantification. *See Midland*, ALAB-123, 6 AEC at 350-51. Therefore, this basis statement should be rejected.

Inasmuch as the State has not set forth any matter in Contention II that meets the requirements of 10 C.F.R. § 2.714(b), this contention should be rejected.

**D. Contention B-1 Should Be Admitted Subject to Certain Limitations.**

In its Low Rail Contentions, the State revised the bases for its previously admitted Contention B, which it now designates "Contention B-1," but made no changes to the wording of the contention as admitted by the Board. *See Low Rail Contentions* at 13 n.2. The State indicates that "[f]or all intents and purposes, the factual and legal issues raised by the State and admitted by the Board in Contention B remain unchanged." *Id.* at 13-14. As set forth below, the Staff does not oppose admission of the revised bases for this contention, subject to certain limitations.

First, the Staff does not object to factual clarifications presented in the revised bases for this contention, insofar as the revised basis: (a) states that the new location of the proposed Rowley Junction Intermodal Transfer Point (ITP) is "1.8 miles to the west of the initial site" (*Id.* at 13); (b) states that "the vitality of the Rowley Junction ITP as an integral [part] of the Applicant's ISFSI operation still remains, at least until completion of the [Bureau of Land

Management] approval process" for a right of way for the Low rail spur (*Id.* at 13 n.3); and (c) provides a revised description of the Rowley Junction facility, equipment and expected shipping volume, based on the Applicant's revisions (*Id.* at 14-15). These revisions are factual or narrative in nature, and merely serve to clarify the factual context for the issue presented.

Second, the Staff notes that if any portions of the revised bases are admitted, they should be subject to the Licensing Board's previous rulings concerning the permissible scope of this contention. Thus, in its original formulation of Contention B, the State raised numerous concerns regarding the operation of the Rowley Junction ITP and whether an NRC license is required for that location. *See* Utah Contentions of November 24, 1997, at 10-15. The Licensing Board rejected most of those issues, and admitted Contention B with the following limitation:

In this instance, there is a genuine legal/factual issue that merits further inquiry as to whether the PFS scheme for operation of the Rowley Junction ITP will cause the materials delivered there to remain within the possession and control of an entity or entities that comply with the terms of the general license issued under section 71.12 or will be handled in such a way as to require specific licensing under Part 72. *See* State Contentions at 11 (PFS will be receiving and handling spent fuel at ITP using PFS owned and operated equipment); Tr. at 144-62.

LBP-98-07, 47 NRC at 185. In denying the Applicant's and Staff's motions for reconsideration of the admission of this contention, the Licensing Board further stated that it found no reason to dismiss "what appears to be essentially a legal contention" at this nonmerits stage of the proceeding." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 291 (emphasis added). These same rulings should apply to the State's revised bases for this contention. Thus, in light of the Licensing Board's prior consideration and rejection of most of the factual issues raised by the State in this contention, and the Licensing

Board's construction of the contention as fundamentally raising a legal issue, the State's reassertion of many of those factual issues in its revised bases (*see, e.g.*, Low Rail Contentions at 16-17) should be excluded or limited in a manner consistent with the Board's prior rulings.

Finally, the Staff opposes the admission of certain statements contained in the revised bases for this contention, as speculative and unsupported. The State asserts that "it should be assumed that the Applicant will only have one unit available to transport the casks," and that "a queuing of casks at the [ITP] awaiting heavy haul transport is apparent" (*Id.* at 16; emphasis added). These assertions constitute speculation on the part of the State (and its expert, Dr. Resnikoff), and are unsupported by sufficient facts to demonstrate the existence of a material dispute with the Applicant as required by 10 C.F.R. § 2.714(b)(iii). Accordingly, these assertions do not support the admission of the contention. *Private Fuel Storage*, LBP-98-7, 47 NRC at 180-81.

#### CONCLUSION

For the reasons set forth above, the State's Low Rail Contentions should be admitted to the extent and in the manner set forth above.

Respectfully submitted,

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Dated at Rockville, Maryland  
this 14<sup>th</sup> day of October 1998

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of

PRIVATE FUEL STORAGE L.L.C.

(Independent Spent  
Fuel Storage Installation)

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Docket No. 72-22-ISFSI

**CERTIFICATE OF SERVICE**

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF UTAH'S CONTENTIONS RELATING TO THE LOW RAIL TRANSPORTATION LICENSE AMENDMENT" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, with copies by electronic mail as indicated, this 14th day of October, 1998:

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