

July 22, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
PRIVATE FUEL STORAGE, LLC) Docket No. 72-22-ISFSI
)
(Independent Spent)
Fuel Storage Installation))

NRC STAFF'S RESPONSE TO STATE OF UTAH'S
MOTION FOR RECONSIDERATION OF THE BOARD'S RULING
ON STATE OF UTAH PHYSICAL SECURITY PLAN CONTENTIONS

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's June 29, 1998, "Memorandum and Order (Ruling on State of Utah Physical Security Plan Contentions)" (Board Order), the staff of the Nuclear Regulatory Commission (Staff) hereby files its response to the July 10, 1998, "State of Utah's Motion for Reconsideration of the Board's Ruling on State of Utah Physical Security Plan Contentions" (Motion). For the reasons set forth below, the State of Utah's Motion should be granted to the extent set forth below.¹

BACKGROUND

On January 3, 1998, the State of Utah filed "State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan." The Staff and Applicant filed responses to the State's nine security plan contentions on January 20, 1998. See NRC Staff's

¹ The Staff's instant response to the State's Motion contains no safeguards protected information and is being served to all parties.

Response to State of Utah's Security Plan Contentions, dated January 20, 1998; Applicant's Answer to the State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan, dated January 20, 1998. The State of Utah filed a reply to the Staff and Applicant on February 11, 1998. See State of Utah's Reply to NRC Staff and Applicant's Responses to Utah's Security Plan Contentions Security-A Through Security-I, dated February 11, 1998.

Following an ~~in-camera~~ prehearing conference on June 17, 1998, the Board issued its June 29, 1998 Order. The Board, in its Order, admitted one contention, Security-C, in part, and rejected the remaining eight contentions. Order at 15-17. The Board ruled that Security-C is inadmissible relative to, among other things, its basis (3) which alleges "[l]ack of jurisdiction and law enforcement authority by the LLEA on the Skull Valley Band's reservation." Order at 16. On July 10, 1998, the State filed the instant Motion in which it requests that the Board find basis 3 of Security-C admissible. Motion at 4. The State also requested that the Board find Security-A and Security-B admissible "to the extent that the Board rejected any and all of the bases for those two contentions based on the perceived existence of a valid law enforcement agreement among the Band, the BIA and the County." Motion at 4. For the reasons set forth herein, the State's request should be granted in part.

DISCUSSION

A motion for reconsideration is appropriate to point out errors or deficiencies in the prior decision, and may elaborate upon or refine arguments previously advanced; it may not rely upon an entirely new thesis or include new arguments, unless they relate to a Board concern that could not reasonably have been anticipated. *Central Elec. Power Cooperative, Inc.* (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981); *Tennessee Valley Authority* (Hartsville

Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-418, 6 NRC 1, 2 (1977); *Texas Utilities Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984).

At the same time, a motion which constitutes nothing more than a repetition of arguments previously presented does not present a basis for reconsideration. *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980). Rather, the motion should show that there is some decision or some principle of law that would have a controlling effect and that has been overlooked, or that there has been a misapprehension or overlooking of the facts. *Georgia Power Co.* (Vogtle Elec. Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994). Cf. *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 686 n.5, 687 (1983) (a motion for reconsideration should cast new light on information which has been previously presented, or point out facts that were overlooked or misunderstood).

The State in its Motion contends that the cooperative agreement among the Skull Valley Band, the Bureau of Indian Affairs and Tooele County is not valid and, therefore, Tooele County is not authorized under the cooperative agreement to conduct law enforcement activities on the Skull Valley Goshute reservation. Motion at 3-4. The State asserts that the cooperative agreement, which the Applicant presented for the first time at the prehearing conference, and on which the Board relies in its ruling to find basis 3 of Security-C inadmissible, recites that it had been entered into pursuant to Utah Code Ann. § 11-13-5.² That statute provides that "[a]doption of appropriate resolutions by the governing bodies of the participating public agencies are necessary before any such agreement may enter into force." Motion at 2. The State attested that it has contacted the Tooele County

² The agreement actually cites to section II-13-5, but it appears to be a typographical error.

Clerk's Office, the office responsible for keeping track of all resolutions adopted by the Tooele County Commission, and that the Clerk's Office could not locate on its computer any resolution adopted by the Tooele County Commission authorizing the cooperative law enforcement agreement. Motion at 2-3; "Affidavit of Jean Braxton," at ¶¶ 3, 4. On that basis the State argues that Tooele County is not authorized to conduct law enforcement activities on the Skull Valley Goshute reservation. Motion at 3-4.

In its Order, the Board ruled that the contention was inadmissible regarding the issue pertaining to the lack of jurisdiction and law enforcement authority. Order at 16. The Board based its ruling on the existence of a cooperative law enforcement agreement that had been shown to exist between the LLEA, the BIA, and the Skull Valley Band. The Board found that the agreement had not been subjected to an adequate factual or legal challenge by the State. Order at 16. Further, the Board declared, "nothing on the face of the cooperative agreement gives us cause to question its validity as it provides such jurisdiction on the Skull Valley Band's reservation for the designated LLEA." Order at 16 n.9.

The Commission's regulations require that an ISFSI licensee establish and maintain a physical protection system which provides, among other things, that "documented liaison" with a LLEA or designated response force "be established to permit timely response to unauthorized penetration or activities." 10 C.F.R. § 73.51(d)(6). The cooperative agreement appears to satisfy the underlying issue regarding Tooele County's jurisdiction on the Skull Valley reservation. It was executed on June 3, 1997 between Tooele County, the BIA, and the Skull Valley Band of Goshutes and contains provisions for patrols, detention, and investigation, among other things. Moreover, a 1991 resolution is on file with the Tooele County Clerk's office approving a cooperative agreement

between Tooele County, the State of Utah, and the BIA "for the purpose of providing an adequate law enforcement program for the protection of the residents of the Skull Valley Reservation." See Resolution No. 91-2, attached hereto. The resolution approves a 1991 cooperative agreement, which became effective April 1, 1991, and contained a provision for annual review. It is in many respects similar to the 1997 agreement.

The Staff does not have enough information to determine whether the 1991 resolution applies to the 1997 agreement. It may be that the 1997 agreement is a different agreement and would require a separate resolution. Even if so, the issue is further complicated by the fact that the 1991 agreement runs for fifty years unless canceled. Thus, even if the 1997 agreement is not valid, the 1991 agreement may be in effect--provided it has not been canceled. Further, there may be other State and county laws and ordinances that shed light on the effect of the 1991 resolution as applied to the 1997 agreement. Finally, the Staff is unaware of whether a resolution is pending or will be proposed in the future.

The Staff believes that the State has shown that a material dispute exists with PFS regarding the limited issue of whether the 1997 agreement is valid and thus sufficient to satisfy the Commission's requirements of 10 C.F.R. 73.51(d)(6). PFS has offered the 1997 agreement to show that Tooele County does have law enforcement jurisdiction at Skull Valley, and the State has raised a material dispute regarding the sufficiency of this document to demonstrate jurisdiction. Therefore, the State, in its Motion, has provided an adequate basis for the Board to admit basis 3 of Security-C as an issue in this proceeding to the extent that it is limited to whether the 1997 agreement is valid.³

³ The Staff opposes the State's Motion as it relates to Security-A and Security-B. The Board rejected these two contentions primarily on other grounds, which the State did not challenge in its Motion. See Board Order at 12-14.

CONCLUSION

For the reasons set forth above, the State's Motion should be granted as described herein.

Respectfully submitted,

Catherine Marco

Catherine Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of July 1998

RESOLUTION NO. 91-2

A RESOLUTION BY THE TOOELE COUNTY BOARD OF COUNTY COMMISSIONERS, TOOELE COUNTY, STATE OF UTAH, APPROVING A COOPERATIVE AGREEMENT WITH THE BUREAU OF INDIAN AFFAIRS FOR THE PURPOSE OF PROVIDING AN ADEQUATE LAW ENFORCEMENT PROGRAM FOR THE PROTECTION OF THE RESIDENTS OF THE SKULL VALLEY RESERVATION, TOOELE COUNTY, STATE OF UTAH, AND AUTHORIZING THE CHAIRMAN OF THE TOOELE COUNTY COMMISSION TO EXECUTE SAID COOPERATIVE AGREEMENT

WHEREAS, the Bureau of Indian Affairs is in need of a law enforcement program for the protection of the residents of the Skull Valley Reservation, located in Tooele County, State of Utah; and

WHEREAS, the Bureau of Indian Affairs has requested the aid of the Tooele County Sheriff's Department to provide law enforcement services for the Skull Valley Reservation; and

WHEREAS, Tooele County is willing to provide the necessary service pursuant to the terms and conditions outlined in a Cooperative Agreement proposed by the Bureau of Indian Affairs.

NOW, THEREFORE, BE IT RESOLVED by the Tooele County Board of Commissioners, Tooele County, State of Utah, that the Cooperative Agreement between Tooele County, State of Utah, and the Bureau of Indian Affairs to provide a law enforcement program for the residents of the Skull Valley Reservation, Utah, which is attached hereto as Exhibit "A", is hereby approved and the Chairman of

the Tooele County Commission is hereby authorized to execute the same for and in behalf of Tooele County.

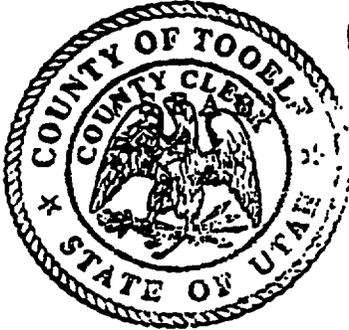
APPROVED AND ADOPTED by the Board of County Commissioners of Tooele County, State of Utah, this _____ day of March, 1991.

BOARD OF COUNTY COMMISSIONERS OF TOOELE COUNTY:

ATTEST:

Dennis D. Ewing
DENNIS D. EWING, Clerk

BY *Leland J. Hogan*
LELAND J. HOGAN, Chairman



Commissioner Hogan voted _____
Commissioner Hunsaker voted _____
Commissioner St. Clair voted _____

APPROVED AS TO FORM:

Ronald L. Elton
RONALD L. ELTON
Tooele County Attorney

EXHIBIT "A"

**COOPERATIVE AGREEMENT BETWEEN
COUNTY OF TOOELE, UTAH
AND THE
BUREAU OF INDIAN AFFAIRS**

This agreement made and executed the 19th day of March, 1991 to be effective on the 1st day of April, 1991, by and between the County of Tooele, Utah, hereinafter called the COUNTY, the Bureau of Indian Affairs, hereinafter called the BUREAU and the Skull Valley Band of Goshute Indians, hereinafter called the SKULL VALLEY TRIBE.

WITNESSETH

WHEREAS, the Skull Valley Band of Goshute Indians do not have all of the required resources and facilities to provide an adequate Law Enforcement Program for the protection of the residents of the Skull Valley Reservation, Utah, and its resources, and,

WHEREAS, the Bureau of Indian Affairs and the Skull Valley Band of Goshute Indians desires to utilize the service of the Tooele County Sheriff's Department to provide Law Enforcement and Detention for the Skull Valley Reservation, Utah, pursuant to Title 25, Code of Federal Regulations, Part II, and,

WHEREAS, the COUNTY is willing to provide the necessary services under certain terms and conditions.

NOW, THEREFORE, the BUREAU, pursuant to its authority to provide for the maintenance of Law Enforcement Services in Indian Country and the COUNTY pursuant to Section 11-13-5 Utah Code Annotated 1953 and in consideration of mutual promises contained herein, and for other good and valuable considerations, hereby agree as follows:

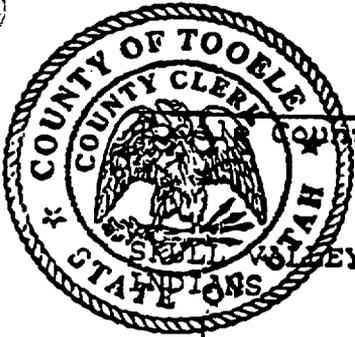
1. The COUNTY hereby agrees to provide all necessary qualified personnel for Law Enforcement and Detention Services covered in this agreement. The COUNTY recognizes that many non-Indians work or travel through the Skull Valley Indian Reservation requiring police patrols.
2. The COUNTY is designated as the party to administer this agreement by and through the Tooele County Sheriff.
3. The COUNTY will provide all equipment, materials and facilities required for the conduct of the enforcement and Detention Services, set forth in this agreement and be responsible for the repair, and maintenance of the same, and in the event of the termination of this

agreement for any cause, all equipment, materials and facilities shall remain in the possession and ownership of the COUNTY.

4. The COUNTY will be responsible for enforcement and incarceration of persons sentenced for all offenses enumerated under Title 25, Code of Federal Regulations, and related SKULL VALLEY TRIBE ordinances, if any, committed within the exterior boundaries of the Skull Valley Indian Reservation, Utah, as established by Executive Order 1465, dated January 17, 1912; Executive Order 2699, dated September 7, 1917; and Executive Order 2809, dated February 15, 1918, and such other lands without such Reservation boundaries as may hereafter be added there to under any law of the United States, except as otherwise provided by law.
5. The COUNTY or its Deputy will immediately notify the Criminal Investigator of the Uintah and Ouray Agency, Fort Duchesne, Utah, of all Federal Offenses that occur within the exterior boundaries of the Skull Valley Indian Reservation as set forth in item 4 above and assist Federal Law Enforcement officials in the investigation of Federal Offenses.
6. The COUNTY will provide the following reports and records to assist the BUREAU and SKULL VALLEY TRIBE in the preparation of its quarterly and annual statistical report.
 - A. Full investigation reports of all misdemeanors occurring on the Reservation involving Indians.
 - B. A Booking Log of all arrests made on the Reservation indicating (1) Date of Birth, (2) Age, (3) Charges, and (4) Disposition for each Indian offender.
 - C. A report on each incident responded to by the County Sheriff's Department of the RESERVATION.
7. The COUNTY and the SKULL VALLEY TRIBE agree that the County shall be notified by telephone on all matters including emergencies.
8. The SKULL VALLEY TRIBE agrees to pay the COUNTY, the sum of \$30.00 per day per SKULL VALLEY TRIBAL MEMBER for any Detention services as utilized for the period of March 1991 until termination by mutual agreement between the SKULL VALLEY TRIBE and the COUNTY. The Tribe also agrees to pay the sum of \$5,000.00. These funds shall be paid as follows: \$2,500.00 upon the signing of the Agreement and \$2,500.00 at the end of the year. The BUREAU agrees to commission any full time COUNTY Deputy Sheriff as a Federal Law Enforcement Officer for the purpose of providing the services contained herein. The SKULL VALLEY TRIBE and the

- COUNTY agree to allow the COUNTY to call onto the Reservation such backup personnel from other Law Enforcement agencies as is necessary to carry out the terms of this Agreement.
9. The BUREAU agrees to make training opportunities available to the COUNTY'S Sheriff Department through the Indian Police Academy, Marana, Arizona. The COUNTY agrees to bear the cost of transportation of its employees to and from the Indian Police Academy and subsistence, if any, of its employees while in training.
 10. The BUREAU and/or Tribal Attorney will provide technical assistance to the COUNTY in matters dealing with Tribal Government, Reservation Jurisdiction, Federal Jurisdiction and related matters.
 11. The COUNTY, the BUREAU and the SKULL VALLEY TRIBE will review this agreement annually on or before April 1, or each year for purposes of evaluating the services and effectiveness of the agreement.
 12. It is further agreed that either party to this agreement may cancel or terminate this agreement upon thirty (30) days written notice to the other party to the agreement.
 13. The term of this agreement shall commence on (March 1, 1991) and continue for fifty years or until cancelled or terminated by either party.
 14. The COUNTY will provide regular patrols on the highway passing through the Skull Valley Indian Reservation and into the Village on the Reservation as part of their regular patrols. The COUNTY will also include areas of patrol as requested by the SKULL VALLEY TRIBAL GOVERNMENT.
 15. The COUNTY recognizes that the Skull Valley Indian Reservation is a separate sovereign political entity; independent of the State of Utah.

ATTEST:



[Handwritten Signature]
County Clerk

COUNTY OF TOOELE, UTAH

[Handwritten Signature]
Chairman, County Commission

[Handwritten Signature]
Tribal Chairman

BUREAU OF INDIAN AFFAIRS

[Handwritten Signature]
Superintendent

Approved as to form this 12 day of MARCH, 1991.

[Handwritten Signature]
Tribal Vice-Chairman

Approved as to form this _____ day of _____, 1991

Attorney General

Approved this _____ day of _____, 1991

Field Solicitor
Department of the Interior

Approved as to form this 19th day of March, 1991.

[Handwritten Signature]
RONALD L. ELTON
Tooele County Attorney

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22-ISFSI
)
(Independent Spent)
Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF UTAH'S MOTION FOR RECONSIDERATION OF THE BOARD'S RULING ON STATE OF UTAH PHYSICAL SECURITY PLAN CONTENTIONS" in the above captioned proceeding have been served on the following by E-mail transmission or by hand delivery as indicated by and asterisk, with copies by deposit in the United States mail, first class, this 22nd day of July, 1998:

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Administrative Judge
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