

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	September 13, 1999

**STATE OF UTAH'S RESPONSE TO APPLICANT'S MOTION FOR
RECONSIDERATION AND CLARIFICATION OF RULING ON THE
APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF
CONTENTION UTAH K/CONFEDERATED TRIBES B**

The State of Utah opposes the Applicant's September 3, 1999, Motion for Reconsideration and Clarification of Ruling on the Applicant's Motion for Summary Disposition of Contention Utah K/Confederated Tribes B ("Motion for Reconsideration"). PFS's Motion for Reconsideration recharacterizes portions of its original Motion for Summary Disposition and attempts to create for the State burdens to respond that the original motion lacked. The State requests that the Board reject these attempts and deny PFS's motion.

A. Standard of Review

Pursuant to NRC regulations at 10 C.F.R. § 2.740, a party is entitled to summary disposition if "there is no genuine issue as to any material fact" and the party "is entitled to a decision as a matter of law." The burden of proving entitlement to summary disposition is on the movant, and the movant is obligated to present a prima

facie case. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). Because the burden of proof is on the proponent, "the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any favorable inferences that can be drawn." *Sequoyah Fuels Corp. and General Atomics Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, *aff'd* 40 NRC 55, CLI-94-11 (1994). Furthermore, if there is any possibility that a litigable issue of fact exists or any doubt as to whether the parties should be permitted or required to proceed further, the motion must be denied. *General Electric Co.* (GE Morris Operation Spent Fuel Storage Facility), LPB-82-14, 15 NRC 530, 532 (1982).

B. Argument

In both of the arguments raised in its Motion for Reconsideration PFS asserts that it should be entitled to summary disposition because the State failed to respond to one or more legs of a multi-legged argument. PFS's arguments would be reasonable if PFS had made clear in its original motion that each leg supported the argument independently. Although PFS has now recast each of the arguments as supported by a single prong in its Motion for Reconsideration, that was not the case for the arguments made in PFS's original motion. In fact, for both of the arguments PFS now raises it was clear that PFS intended to rely on the cumulative evidence it had presented.

Under these circumstances, then, it was reasonable for the State to conserve its limited resources and respond as it did by presenting evidence to dispute only part of PFS's argument. Had the State been given adequate notice that PFS intended to rely on only parts of the evidence it had presented, the State would have responded separately to that evidence.

Because the burden of proof is on the proponent, "the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any favorable inferences that can be drawn." For these reasons, it would be unfair to the State to grant summary disposition.

1. Applicant's Motion for Reconsideration Regarding Hazards Posed by Conventional Ground-based Munitions Should be Denied

PFS's motion with respect to this matter relied on several factors presented in conjunction:

[M]ilitary training exercises and the firing and testing of conventional weapons will not pose a hazard to the PFSF because 1) the firing of weapons is covered by rigid procedures, 2) the closest firing position to the PFSF is more than 15 miles away, 3) the ranges of most of the weapons are insufficient to reach the PFSF from those distances, *and* 4) the weapons are fired toward the south and northwest, away from the PFSF. . . . Thus, it is not credible that a conventional munition fired from Dugway would strike the PFSF. (*Emphasis added.*) (Citations omitted.)

Applicant's Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B ("Motion for Partial Summary Disposition") at 11.

Similarly, PFS's expert Carruth concluded:

I am aware of no incident in which people or property off of DPG were harmed by the firing of conventional weapons on DPG and I am aware of no incident in which a conventional munition fired or launched from DPG ever struck in the vicinity of the Goshute reservation. Therefore, because of the stringent safety measures imposed at DPG, the orientation of most conventional weapons firing to the south and west – directly away from the PFSF, and the fact that most of the weapons fired at DPG do not have the range to reach the PFSF, conventional weapon firing at DPG would pose no credible hazard to the PFSF.

Carruth Decl. (Exhibit 6 to Applicant's Motion for Partial Summary Disposition) at ¶ 8.

Because PFS's conclusions relied on all of the factors listed, it was sufficient as a matter of law for the State to provide facts that supported a genuine dispute as to material facts for any one of the legs. The State did so, by providing information about ground-based weapons used at the UTTR with a range that exceeded the ranges described by PFS. Matthews Decl. (Exhibit 2 to the State of Utah's Opposition to Applicant's Motion for Partial Summary Disposition) at ¶ 11. Because PFS did not state or in any way indicate its intention in the original motion to single out only one of the factors mentioned as adequate to support the final motion, the State cannot, in fairness, be required to divine which legs of PFS's argument it believes are most

important and dispute those facts or the inferences made from those facts.¹

Accordingly, the State should not now be penalized for its reliance on PFS's original statement of its argument.

PFS's original motion and supporting documents do not support the importance that PFS now places on the direction of munitions. The submission says "[s]ome firing is conducted in the vicinity of Wig Mountain, on the northern part of the DPG, . . . but with the gun target line oriented to the northwest, away from the reservation and the PFSF." Carruth Decl. (Exhibit 6 to Applicant's Motion for Partial Summary Disposition) at ¶7. It does not say that this is the only firing that occurs. The State did not argue that firing does occur in another direction, but the nature of PFS's statement made it impossible for the State to infer PFS's newly-stated intention to rely on this factor as one that, alone, is sufficient to support summary disposition.

PFS has argued that the State's evidence regarding longer range munitions than were considered in PFS's motion should be discounted given that PFS claimed only that "most" munitions have a shorter range than would be required to reach the PFS facility. PFS should not now be allowed to rely on the weakness of its prima facie case

¹ Note that the State need not necessarily provide evidence controverting evidence presented by PFS in order to defeat a motion for summary disposition. It may instead present new evidence that demonstrates PFS's evidence is of diminished value. Although the State would like to be in a position to gather and provide all pertinent information in response to a Motion for Summary Disposition, it is not required to do so if it has otherwise provided sufficient evidence to survive the motion, and in many cases must direct limited resources toward controverting evidence provided by the Applicant.

to advance its Motion for Reconsideration. PFS's original motion and supporting documents went into some depth about the munitions used and their shorter ranges and did not acknowledge the existence of longer range munitions in any way other than by the use of the word "most" in its summary. Any reader of the Motion for Partial Summary Disposition and its supporting documents would infer that PFS had not considered other, longer-range munitions. The State therefore provided information about the munitions that PFS did not consider.

Where it is not stated clearly, the State cannot be required to divine PFS's argument, and cannot be expected to respond to it.

2. Applicant's Renewed Request for Summary Disposition on Hazards Posed by Conventional Aircraft-based Munitions Should be Denied

PFS originally moved for summary disposition on hazards from conventional air-fired munitions generally:

The use of air-delivered weapons on the UTTR would not pose a significant hazard to the PSFS. Cole Dec. at ¶ 20. First, aircraft outside DoD land boundaries (i.e., the UTTR and DPG) are required to maintain weapons release switches on "safe" and thus the likelihood of an accidental weapon release that would hit the PFSF is very low. *Id.* Second, weapon releases on the UTTR are carefully planned and strictly controlled; the closest weapon launch/drop boxes are about 30 miles from the PFSF. Indeed, the UTTR has never experienced a weapon release outside an intended launch area. Cole Dec. ¶ 20. Thus, weapon use at the UTTR is too far away to pose a risk to the PFSF.

Applicant's Motion for Partial Summary Disposition at 17-18. This portion of the motion, then, deals with air-based conventional weapons generally. The State responded adequately by controverting the first statement and the declaration underlying that statement -- "no aircraft over-flying Skull Valley are allowed to have their armament switches in a release capable mode, and all switches are "safe" until inside DOD land boundaries, which are 9 statute miles to the southwest (Dugway Proving Ground) at the closest point"² -- by pointing out that PFS had failed to consider the very real potential for equipment failure and/or pilot error.³

With this motion for reconsideration, PFS is seeking to re-write its original motion as one in two parts: one addressing conventional air-fired munitions fired over DOD property; and a second addressing conventional air-fired munitions fired over land not owned by DOD, including Skull Valley. The State could not be expected to infer this intention given the original motion and it would be unfair to require the State to have responded to a motion that wasn't made. The original motion was not bifurcated, and it would be unfair to judge the State's response as though it were.

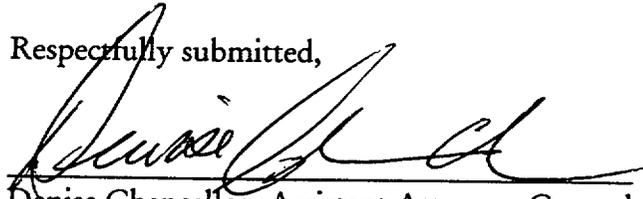
² Cole Decl., Exhibit 5 to Applicant's Motion for Partial Summary Disposition, at ¶ 20.

³ See Matthews Decl., Exhibit 2 to the State's Opposition to Motion for Partial Summary Disposition, at ¶ 17.

If the Board does choose to decide this issue, the State requests that it deny the motion because the potential hazard from munitions is an aircraft hazard that cannot be considered by itself, but should be considered along with other aircraft hazards in a cumulative analysis. See State of Utah's Opposition to Applicant's Motion for Partial Summary Disposition of Utah Contention K and Confederate Tribes Contention B, at 4.

DATED this 13th day of September, 1999.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the STATE OF UTAH'S RESPONSE TO APPLICANT'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF RULING ON THE APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION UTAH K/CONFEDERATED TRIBES was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 13th day of September, 1999:

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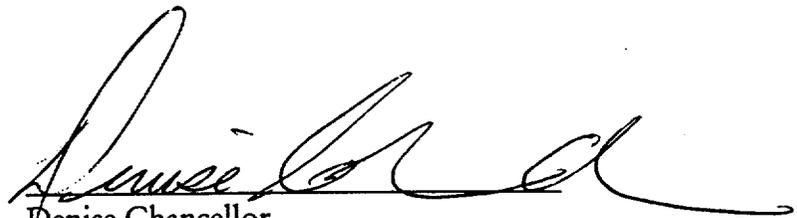
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