

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))	July 22, 1999

**STATE OF UTAH'S OPPOSITION TO APPLICANT'S MOTION FOR
PARTIAL SUMMARY DISPOSITION OF UTAH CONTENTION K AND
CONFEDERATE TRIBES CONTENTION B**

The State of Utah opposes the Applicant's June 7, 1999, Motion for Partial Summary Disposition of Utah Contention K and Confederate Tribes Contention B ("Applicant's Motion") on the grounds that there are genuine disputes regarding material facts and therefore that the Applicant is not entitled to summary disposition. The State's opposition is supported by a Statement of Material Facts in Dispute ("State's Material Facts"), which is in turn supported by the Declaration of Dr. Marvin Resnikoff (July 21, 1999) ("Resnikoff Declaration," attached hereto as Exhibit 1); the Declaration of Major General John Matthews, U.S. Air Force (retired) (July 21, 1999) ("Matthews Declaration," attached hereto as Exhibit 2); the Supplemental Declaration of Major General John Matthews, U.S. Air Force (retired) (July 22, 1999) ("Matthews Supp. Declaration," attached hereto as Exhibit 3); and the Declaration of Martin D. Gray (July 22, 1999) ("Gray Declaration," attached hereto as Exhibit 4).

PROCEDURAL BACKGROUND

Contention K, which challenges the adequacy of evaluating credible accidents, was admitted in its entirety by the Board in LBP-98-7, 47 NRC 142, 188-189 (1998). Applicant moved for Partial Summary Disposition on June 7, 1999.

Applicant has not moved for summary disposition on the issue of the adequacy of its consideration of credible accidents that may impact the intermodal transfer facility (ITF). Those issues will therefore not be determined by disposition of this Motion.

This response does not cover all issues addressed in the Applicant's Motion. The State of Utah on July 20, 1999 filed an "Unopposed Motion for Extension of Time for Partial Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention K and Confederated Tribes Contention B" ("Unopposed Motion for Extension of Time"). If this Unopposed Motion for Extension of Time is granted, the State's response to those portions of Applicant's Motion related to credible accidents involving military aircraft (other than accident risks that may be posed by "hung bombs" or malfunctioning ordnance) will be postponed until after the staff is able to take a position regarding military aircraft impacts.

Finally, the State has reviewed the pleadings, motion, and supporting evidence for issues relative to risks from wildfires and from explosions at the site of the Tekoi

rocket testing facility (as opposed to explosions of rockets being transported to the facility) and will not be filing responses to those portions of Applicant's Motion.

ARGUMENT

I. THE APPLICANT HAS FAILED TO SHOW THAT IT IS ENTITLED TO SUMMARY DISPOSITION OF CONTENTION B AS A MATTER OF LAW.

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. *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. There Are Genuine Material Facts in Dispute Relative to the Risk from Commercial and Private Aircraft, Military Aircraft, and Missile Activity

1. The Applicant's Risk Analysis Is Inadequate Because it Fails to Consider Cumulative Risk

The Applicant has taken several separate slices of risk from commercial and private aircraft, and from military aircraft and missile activity (including cruise missiles), and has argued for each slice that there is no significant risk. Even if the Applicant's arguments for each slice were correct – and they are not, as described below in section two – this risk analysis is not adequate because it fails to consider the whole risk, which is the "sum of the individual probabilities." Resnikoff Dec. at ¶ 7, *quoting* NUREG-0800 at 3.5.1.6-5. The risk analysis is also inadequate because it fails to consider all of the relevant sources of risk from these activities, again as described in section two. It is the opinion of the State's expert that, when these risks are adequately evaluated individually and cumulatively, the total risk will exceed 1.E-7, the standard used by NRC in determining acceptable risk. Resnikoff Dec. at ¶ 6.

It is important to recognize that the Board does not have before it at this time a record that is sufficiently complete to allow evaluation of cumulative risk. Pursuant to the State's Unopposed Motion for Extension of Time, if approved, the State's response to certain portions of Applicant's Motion relative to military aircraft will not be due until after the staff takes a position regarding military aircraft impacts. Because it is the cumulative risk that must be considered, that analysis cannot be made until the State's

response is submitted. Resnikoff Dec. at ¶ 8. Similarly, unless risk relative to the ITF is disposed of in some other manner, the Board should not grant summary disposition on these matters because it has not considered the risk to the ITF as part of the cumulative risk.

2. The Applicant Has Relied on Invalid Assumptions and Has Failed to Consider Significant Risks

(a) Cruise Missiles

The Applicant concedes that cruise missiles are tested in and around the Utah Test and Training Range ("UTTR"). Applicant's Motion at 18. However, the Applicant claims that these tests pose no significant risk to the Private Fuels Storage Facility ("PFSF"), because: (a) there are few cruise missile tests; (b) the cruise missile targets are far from the ISFSI; (c) the "run-ins, drops, and launches" are normally conducted in directions away from the PFSF; and (d) each missile is equipped with a protective device known as a "Flight Termination System" ("FTS"), which "enable" destruction of the missile if it goes off course. *Id.* In fact, the Applicant claims that the FTS has never failed in the UTTR. *Id.*

As discussed in the Supplemental Matthews Declaration, these claims are not supported by the facts. Not only are cruise missile tests permitted in the vicinity of the ISFSI, they have actually been conducted there, and one has crashed in the same unit of military airspace. Matthews Supp. Dec. at ¶¶ 4-7 and 14. As discussed by Gen. Matthews, the Air Force conducts cruise missile exercises in the Sevier B Military

Operating Area ("MOA") airspace. *Id.* The Sevier B MOA airspace is directly over the PFSF site and adjacent to the UTTR land and is considered part of the UTTR airspace. Cole Dec. at ¶ 9; Matthews Dec. at ¶ 3 and ¶ 12. Cruise missile flight patterns may include a cruise missile flight within one nautical mile of the site. Matthews Supp. Dec. at ¶¶ 3-5 and ¶ 10. See also Resnikoff Dec. at ¶ 15. Just last month, in June 1999, a cruise missile crashed on U.S. Bureau of Land Management property in the southern portion of the Sevier B Military Operating Area (MOA), the same MOA beneath which the Applicant proposes to build its facility. Matthews Supp. Dec. at ¶¶ 5 and 16.

The FTS was either ineffective or absent from the cruise missile that crashed in June of 1999. Whether the system failed, was not installed in the missile, or was simply not activated because the missile was not off course is still unknown because the accident investigation is not complete; the salient fact, however, is that the FTS did not work in that case. Matthews Supp. Dec. at ¶ 10 and 13.

Malfunctioning equipment was also involved in the 1997 crash, in which the operators lost communication, and therefore control, of the cruise missile. As a result, they were unable to direct it away from the civilian observatory to which it was headed. Matthews Supp. Dec. at ¶ 15. The missile had a working FTS, which the operators were unable to use to prevent the crash. *Id.* The 1997 and 1999 cruise missile crashes demonstrate that cruise missiles are prey to equipment failure and/or

human error, with potentially devastating results. *Id.* at ¶¶ 14-15, and Resnikoff Dec. at ¶ 17.

Applicant's assumption that targets for the cruise missile are no closer than 30 miles away from the proposed PFSF (Applicant's Statement of Material Facts at 15; Cole Dec. at 21) is also incorrect. One cruise missile target is located approximately 15 miles from the proposed PFSF. Matthews Supp. Dec. at ¶ 12. Notably, the December 1997 cruise missile crash mentioned in the Applicant's Motion at 18 (fn. 38) occurred on Cedar Mountain, which borders the proposed PFSF. Since the missile was out of control at the time of the crash, it could easily have overflowed Cedar Mountain and struck a target in Skull Valley. Resnikoff Dec. at ¶ 18.

Applicant's reliance on the small number of cruise missile launches is also misplaced given the apparently extremely high rate of mishaps, including one crash in the vicinity of the proposed PFSF and a second within the Sevier B MOA under which the proposed PFSF site is located.

Given the flight paths, the targets, the nature and number of mishaps for cruise missiles, and the magnitude of the disaster that would result from a cruise missile hit of the ISFSI, the risk posed by cruise missile activity alone is very significant and has not been adequately analyzed by the Applicant.¹ See Resnikoff Dec. at ¶ 16.

¹ Again, however, this risk must be considered as part of the cumulative risk posed by all aircraft and military activities. See part B.1 above.

(b) Commercial and Private Air Traffic

The Applicant claims that the accident risks from commercial aircraft are too small to be measurable. Applicant's Motion at 7-8; Cole Dec. at ¶¶ 8. As discussed above, these risks must be taken into consideration as a part of the overall risk, rather than parceled out individually. However, examining this portion of the risk independently, the Applicant's methodology is defective. Applicant's expert, General James Cole, Jr., has assumed that any commercial aircraft that would fly near the facility would be in "cruising phase." Applicant's Motion at 7 and 9. This method fails to take into account the fact that aircraft approaching the Salt Lake City International Airport would be descending at that point. Matthews Dec. at ¶¶ 6-9 and Resnikoff Dec. at ¶ 10. The accident rate for descending aircraft is higher than for cruising aircraft. Resnikoff Dec. at ¶ 10. In addition, Applicant failed to consider predictable growth of air traffic. *Id.* at ¶ 11.

(c) Military Air Traffic

As described in the "Procedural Background" section above, the State intends to respond to much of the Applicant's Motion on this issue at a later date.

The Applicant has assumed that armaments from military aircraft flying over Skull Valley will pose no significant danger to the PFSF because pilots maintain their armament release switches on "safe" until they are over Defense Department land, because they are required to follow strict procedures for weapons releases, and because

UTTR pilots have never experienced a weapons release outside of an intended launch area. Applicant's Motion at 16-17. Applicant's reliance on equipment, procedures, and human controls is misplaced. There is a very real potential for equipment error or pilot error that the Applicant must evaluate. Matthews Dec. at ¶ 17. The result of even a concrete dummy bomb hitting the ISFSI would be significant. Resnikoff Dec. at ¶¶ 12-13.

The Applicant has also failed to analyze a significant risk from overflying military aircraft. In the event of an engine problem, an F-16 pilot is under instructions to "jettison all stores," including fuel tanks and munitions. Matthews Dec. at ¶ 17. The State intends to demonstrate in the postponed portion of its response to this motion that F-16s will fly over or near the PFSF site.² Assuming F-16s fly over the site, this would be a significant risk given the large number of engine problems experienced by the F-16. *Id.* at ¶ 17.

(d) Other Issues

Contrary to Applicant's assertion that other kinds of weapons from military ground training exercises could not reach the PFSF site (Applicant's Motion at 11), U.S. Army and National Guard training at the Wig Mountain site, 15 miles from the proposed PFSF site, using rockets with a range of over 18 miles does have the potential to reach the PFSF site. Matthews Dec. at ¶¶ 10-11

² But see Matthews Dec. at ¶ 14.

C. There Are Material Facts in Dispute Relative to the Applicant's Analysis of Risk from Biological and Chemical Weapons at or from Dugway Proving Grounds

Applicant's Motion identifies and analyzes only two possible risks relative to the disposal of chemical and biological agent: the risk posed by managed disposal of chemical munitions and agent, as governed by the federal Resource Conservation and Recovery Act and state hazardous waste laws (Applicant's Motion at 12-13), and the risk posed by unexploded ordnance (*Id.* at 14). This analysis is inadequate because it fails to consider potentially significant sources of risk: the risk posed by historical disposal of chemical agents, biological agents, and/or explosives and propellants in areas where that disposal has not yet been rediscovered. Gray Dec. at ¶ 5-7 and 9-10. Dugway Proving Ground, in cooperation with state regulators, has identified 216 such sites. Gray Dec. at ¶ 6. Nor is the search for such sites complete; seventeen new sites were added in 1998 and more are expected. Gray Dec. at ¶ 9. This danger is not just theoretical. Chemical agent munitions were discovered at three separate contaminated sites during the past two years. *Id.* A biological munition was also found at another contaminated site this year. *Id.* In addition to demonstrating the folly of considering only the risks posed by hazardous materials whose locations are currently known, this find proves the inaccuracy of Applicant's statement that all biological agents were destroyed by 1969. (Applicant's Statement of Material Facts, Dugway Proving Ground, ¶ 8. *See also*, Carruth Aff. at ¶ 25.)

In some cases, unstable munitions must be detonated in place. Gray Dec. at ¶7. The possibility exists that unstable munitions could be found at or near the PFSF site, resulting in evacuation of the site, toxic fumes at the site, or other impacts. *Id.* at ¶7 and ¶12. Toxic agent fumes were detected following a similar detonation at the Aberdeen Proving Ground in Maryland. *Id.* at ¶7. It is also possible that undiscovered munitions will explode spontaneously. *Id.* at ¶9. Applicant did not consider risks from these activities in its motion.

The Applicant has assumed, in its analysis of the probability of risk from unexploded ordnance, that Army records may be relied upon to determine where munitions were fired and therefore where unexploded ordnance may be found (Applicant's Motion at 14). This assumption is false. Army records of past munition firing and other disposal practices have proven to be poor and unreliable. Gray Dec. at ¶10. Moreover, it is not possible at this time to estimate risk or establish worst-case conditions for as-yet undiscovered sites where contaminants were disposed of because the quantity of the contaminants, an essential factor in determining risk, cannot be known. *Id.* at 5.

D. Applicant's analysis of risk of transporting rocket engines to the Tekoi rocket testing facility is inadequate because it fails to consider all risks

With respect to the transportation of rocket motors to the Tekoi rocket testing facility, the Applicant's Motion must fail because it analyzes only one of the possible

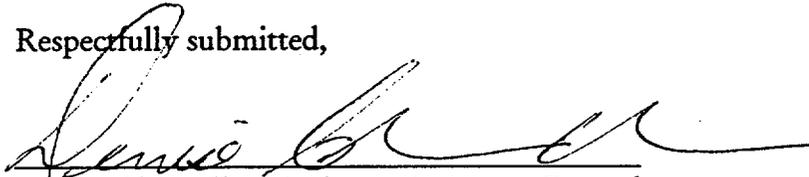
risks from an accident, the risk from increased air pressure caused by an explosion. Applicant's Motion at 5-6. The Applicant has failed to analyze another source of risk from such an accident, the risk caused by objects that would be sent flying by the explosion of the rocket, which contains 40,000 lbs of explosives. Resnikoff Dec. at ¶ 19.

CONCLUSION

The State's response raises significant safety concerns that the Applicant has not addressed. The Applicant's Motion for Summary Disposition must fail because there are numerous significant disputes relative to material issues of fact.

DATED this 23rd day of July, 1999.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S OPPOSITION TO APPLICANT'S MOTION FOR PARTIAL SUMMARY DISPOSITION OF UTAH CONTENTION K AND CONFEDERATE TRIBES CONTENTION B was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 22nd day of July, 1999:

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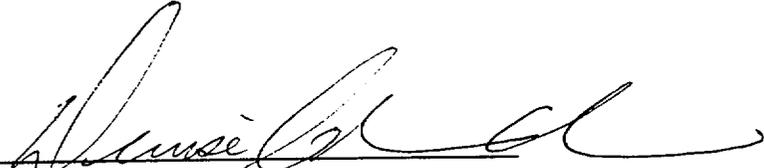
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PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
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STATEMENT OF MATERIAL FACTS IN DISPUTE
REGARDING UTAH CONTENTION K
AND CONFEDERATED TRIBES CONTENTION B

The State responds to the Applicant's Statement of Material Facts on Which No Genuine Dispute Exists ("Applicant's Statement"), by identifying the following issues on which there *do* exist genuine factual material disputes.¹

1. The State disputes the assertion in para. A.10. of the Applicant's Statement that "[a] rocket motor explosion at Tekoi, on the Tekoi access road, or on Skull Valley Road, would not pose a significant hazard to the PFSF." See, Resnikoff Dec. at ¶ 19.
2. The State disputes the assertion in para. A.17. of the Applicant's Statement that "[n]o other activities at or emanating from the Tekoi facility would pose a significant risk to the PFSF." See, Resnikoff Dec. at ¶ 19.
3. The State disputes the assertion in para. B.7. of the Applicant's Statement that "[a]ircraft flying in airways J-56 and V257, or otherwise in the region of the

¹ This list does not include issues of material fact in dispute regarding matters for which the State has filed an Unopposed Motion for Extension of Time. See "Procedural Background" in the "State of Utah's Opposition to Applicant's Motion for Partial Summary Disposition of Utah Contention K and Confederate Tribes Contention B."

PFSF would be in the cruise mode of flight.” Aircraft would likely be descending when they are in the vicinity of the proposed ISFSI. *See*, Matthews Dec. at ¶¶ 7-9.

4. The State disputes the assertion in para. B.9. of the Applicant’s Statement that “[a]ircraft in airways J-56 and V257, or otherwise in the region of the PFSF, would pose no significant hazard to it.” *See*, Resnikoff Dec. at ¶¶ 9-11 .
5. The State disputes the assertion in para. C.2. of the Applicant’s Statement that “[m]ilitary training exercises and the firing and testing of conventional weapons at DPG will not pose a hazard to PFSF because” “the ranges of most of the weapons are insufficient to reach the PFSF.” *See*, Matthews Dec. at ¶ 11.
6. The State disputes the assertion in para. C.4. of the Applicant’s Statement that “[c]hemical munitions and chemical agent at Dugway will pose no significant hazard to the PFSF because of the distance between the locations where the munitions and agent may be found and the PFSF.” *See*, Gray Dec. at ¶¶ 9-10.
7. The State disputes the assertion in para. C.6. that the “worst credible threat to the PFSF posed by chemical agent at Dugway would arise from the accidental detonation of a previously unexploded 8-inch projectile.” *See*, Gray Dec. at ¶ 5 and ¶ 9.
8. The State disputes the assertion in para. C.7. of the Applicant’s Statement that “[t]he disposal of chemical munitions and agent at Dugway will not pose a hazard to the PFSF because of the extensive safety precautions taken in its disposal and the distance between the disposal location and the PFSF” to the extent “at Dugway” also refers to chemical munitions and chemical agent buried by Dugway outside of the current boundaries of Dugway itself. *See*, Gray Dec. at ¶¶ 9-10.
9. The State disputes the assertion in para. C.8. of the Applicant’s Statement that “[t]he United States destroyed its biological agents and munitions after a presidential decree in 1969.” *See*, Gray Dec. at ¶ 8.
10. The State disputes the assertion in para. C.9 of the Applicant’s Statement that “[b]iological materials present on Dugway would not pose a significant hazard to the PFSF because all such materials are used in the Life Sciences Test

facility.” See, Gray Dec. at ¶¶ 8-10.

11. The State disputes the assertion in para. C.14. of the Applicant’s Statement that “[u]nexploded ordnance at DPG would not pose a significant hazard to the PFSF in that” “the PFSF is far enough away that the material in the round would not pose a significant hazard.” See, Gray Dec. at ¶¶ 9-10.
12. The State disputes the assertion in para. C.15. of the Applicant’s Statement that “[t]here is no reason to believe that any unexploded ordnance is likely to be found off DPG close enough to pose a risk to the PFSF, . . . Army records . . . give no indication that munitions were fired elsewhere.” See, Gray Dec. at ¶¶ 9-11.
13. The State disputes the assertion in para. C.22. of the Applicant’s Statement that “[n]one of the following activities at DPG would pose a credible hazard to the PFSF: 1) the firing of conventional ground weapons in military testing and training; 2) the” “disposal of chemical munitions and agents;” and “5) unexploded ordnance.” See, Gray Dec. at ¶¶ 5-7 and ¶¶ 9-10, Matthews Dec. at ¶ 11.
14. The State disputes the assertion in para. D.11. of the Applicant’s Statement that “[t]argets for training and testing with air-delivered weapons on the UTTR South Area are at least 25 miles from the PFSF.” See, Matthews Supp. Dec at ¶ 12.
15. The State disputes the assertion in para. D.12. of the Applicant’s Statement that “[t]he UTTR has never had a weapon released outside a designated release area.” to the extent an air-delivered weapon includes cruise missiles. See, Matthews Supp. Dec at ¶¶ 5, 8.
16. The State disputes the assertion in para. D.13 of the Applicant’s Statement that “[b]y virtue of the distance from the targets to the PFSF and the procedures governing their use, the use of air-delivered weapons on the UTTR South would not pose a significant hazard to the PFSF.” See, Resnikoff Dec. at ¶¶ 12-13. See also, Matthews Dec. at ¶¶ 13-17.
17. The State disputes the assertion in para. D.15. of the Applicant’s Statement that “[c]ruise missile targets are at least 30 miles from the PFSF.” See, Matthews

Supp. Dec. at ¶¶ 11-12.

18. The State disputes the assertion in para. D.16. of the Applicant's Statement that "[p]rocedures for the use of and (*sic*) flight termination systems on cruise missiles are designed to prevent cruise missiles from causing harm outside their intended target areas" to the extent the Applicant implies that flight termination systems are always effective. *See*, Matthews Supp. Dec. at ¶¶ 14-16.
19. The State disputes the assertion in para. D.17. of the Applicant's Statement that the December 1997 cruise missile "struck a trailer on the range because range personnel were unaware of the trailer's presence on the range" to the extent this statement means being unaware of the trailer's presence was the sole reason for the incident. This statement is also disputed to the extent the Applicant asserts that the operators have control over the cruise missile at all times. *See*, Matthews Supp. Dec. at ¶ 15.
20. The State disputes the assertion in para. D.18 of the Applicant's Statement that cruise missiles on the UTTR would not pose a significant hazard to the PFSF." *See*, Resnikoff Dec. at ¶¶ 15-18, Matthe's Dec. at ¶ 18, Matthews Supp. Dec. ¶¶ 3-16.
21. The State disputes the assertion in para. D.19 of the Applicant's Statement that "[a]ctivities at the UTTR other than aircraft flights and munitions testing will pose no significant hazard to the PFSF" to the extent "munitions testing" does not include air launched weapons and other objects dropped from military aircraft while overflying the proposed facility. *See*, Resnikoff Dec. at ¶¶ 12-18, Matthews Dec. at ¶¶ 12-18, Matthews Supp. Dec. at ¶¶ 3-16.