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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

OFFICE OF THE
GENERAL COUNSEL
ADJUTANT GENERAL

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S RESPONSE TO STATE OF UTAH'S REQUEST FOR
ADMISSION OF LATE-FILED UTAH CONTENTION KK**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the "State of Utah's Request for Admission of Late-Filed Utah Contention KK," filed July 27, 2000 ("State Req."). Contention KK asserts that the NRC Staff's Draft Environmental Impact Statement ("DEIS") for the Private Fuel Storage Facility ("PFSF")¹ is deficient for failing to assess the impacts on military training and testing on the Utah Test and Training Range ("UTTR"), and hence on military readiness and national security as well as the economy of the State of Utah, that would allegedly arise from the construction and operation of the PFSF in Skull Valley, Utah. The State's request should be denied because Contention KK is lacking in good cause for its late filing, will broaden and delay the proceeding, and is unsupported by the necessary factual basis.

¹ Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, U.S. Nuclear Regulatory Commission, Office of Nuclear Material Safety and Safeguards, NUREG-1714 (June 2000).

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SECY-02

I. BACKGROUND

In June 1997, PFS filed its license application. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 157 (1998). In November 1997, the State filed contentions on the application, including Contention Utah K, which concerned, inter alia, “credible accidents caused by external events and facilities affecting the ISFSI, . . . including the cumulative effects of . . . military testing facilities in the vicinity.” Id. at 160-61, 190. In April 1998 the Atomic Safety and Licensing Board (“Licensing Board” or “Board”) admitted Contention Utah K. Id. at 190. The bases for the contention asserted that PFS had failed to take into account the hazard to the PFSF posed by military testing and training on the UTTR.²

The PFSF site is located on the Skull Valley Band of Goshute Reservation, in Skull Valley, Utah. PFSF Safety Analysis Report (“SAR”) at 2.2-1. The site is approximately 18 miles east of the land boundary of the UTTR, an Air Force range on which military training and weapons testing takes place. Id. at 2.2-8. The UTTR is commonly used by aircraft based at Hill Air Force Base (“Hill AFB”), in Ogden, Utah. Id. The airspace over the UTTR extends somewhat beyond the range’s land boundaries and is divided into military operating areas (MOAs) and restricted areas. Id. The MOAs are located on the edges of the range, adjacent to the restricted areas. Id. The PFSF site lies under the airspace of the Sevier B MOA, two miles to the east of the restricted airspace on the UTTR. Id. The Sevier B MOA (which is on the far eastern edge of the UTTR) is approximately 145 statute miles long (north to south) and, in the vicinity of the

² State of Utah’s Contentions on the Construction and Operating License Application by Private Fuel Storage, L.L.C. for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) at 76 [hereinafter “State Cont.”]. Contention K is scheduled to be litigated later in this proceeding. Order (General Schedule Revision and Other Matters) (February 2, 2000) Attachment A.

PFSF, is approximately 12 miles wide (east to west).³ PFS has assessed the military activity that takes place with respect to the land area of the UTTR, as well as the restricted airspace and the nearby Sevier B MOA (under which the PFSF is located), and has determined that such activity does not pose a credible risk to the facility. Id. at § 2.2.

On June 19, 2000, at the evidentiary hearing in Salt Lake City, the State received a copy of the DEIS for the PFSF. See Tr. 1387 (June 19, 2000).⁴ On June 23, 2000, the NRC Staff made the DEIS available to the public.⁵ In a June 1998 Memorandum and Order, the Licensing Board had provided that any contentions based on the DEIS “should be submitted no later than thirty days” after the DEIS is “made available to the public.” Memorandum and Order (General Scheduling for Proceeding and Associated Guidance) (June 29, 1998) at 5.

On July 27, 2000, more than thirty days after the DEIS had been made available to the public, the State filed its request to admit late-filed Utah Contention KK (“Utah KK”), which seeks to challenge the NRC Staff’s DEIS for failing to assess the impacts on military training and testing on the UTTR, and hence on military readiness and national

³ See Salt Lake City Sectional Aeronautical Chart, National Oceanic and Atmospheric Administration; Las Vegas Sectional Aeronautical Chart, National Oceanic and Atmospheric Administration. The Sevier B MOA extends from a point approximately 9 miles north of the PFSF to a point approximately 137 miles south-southwest of the facility. At its widest point, approximately 100 miles south-southwest of the PFSF site, the MOA is approximately 56 miles wide.

⁴ On a May 8, 2000 conference call with the Licensing Board, the NRC Staff had told the parties that the DEIS would be published in June. Tr. 1357, 1367-69. In a June 12, 2000 letter, the Staff had stated that the DEIS would be provided to the parties at the hearing on June 19. Letter from Robert M. Weisman, Counsel for NRC Staff (June 12, 2000).

⁵ See 65 Fed. Reg. 39,206 (June 23, 2000) “Notice of Availability of Draft Environmental Impact Statement and Notice of Public Meetings for the Proposed Private Fuel Storage, L.L.C.; Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, UT.”

security as well as the economy of the State of Utah, that would allegedly arise from the construction and operation of the PFSF. Specifically, Utah KK alleges that:

The draft Environmental Impact Statement fails to comply with the National Environmental Policy Act and 10 CFR § 51.71(d) because it does not adequately assess the cumulative and socioeconomic impacts from loss of military operations area airspace use, including a reduction in military readiness and national security, and potential socioeconomic impacts to Utah communities that rely on employment and patrons of military agencies that use the Sevier B military operating area.

State Req. at 3. The State acknowledges, however, that PFS's Environmental Report ("ER") similarly did not discuss the issues raised in Utah KK (id. at 8), which under Commission precedent and regulation required the State to include this contention as part of its initial contentions. Moreover, the State also admits that it became aware of the specific issues that it now attempts to raise in Utah KK in May 1999. Id.

As the basis to support its contention, the State claims that there is a conflict between the military's use of the Sevier B MOA and the proposed PFSF (and the rail line PFS will build to connect the Union Pacific mainline at Low Junction to the PFSF site). Id. at 6. The Sevier B MOA is assertedly the only suitable airspace through which aircraft from Hill AFB carrying live ammunition can make "an undetected approach to war targets located on [the] UTTR." Id. The State claims that "regardless of the outcome of Contention Utah K" (which, as noted above, concerns the alleged risks to the PFSF from military activities on the UTTR), it is "reasonably foreseeable" that "the military will be forced to voluntarily restrict or eliminate military training or weapons testing activities currently authorized over the area of the proposed PFS facility." Id. The State asserts that "[e]ven a five nautical mile overflight prohibition above the [PFSF] would

basically eliminate the use of the Sevier B MOA.” Id. Restricting or eliminating military testing activities allegedly conducted over the PFSF would “result in a decrease in military readiness and threaten national security. Id. Such “[w]eakening of the UTTR [would] cripple the military value of Hill [AFB] and subject it to possible closure” which would cause socioeconomic impacts in Utah, in that Hill AFB is Utah’s largest “basic” employer. Id. at 6-7. The impacts would result from, e.g., loss of jobs, reductions of expenditures in the state, and loss of tax revenues. Id. at 7-9.

As set forth in Section II.B below, however, the State fails to provide any factual basis for the critical proposition underlying Utah Contention KK – that the Air Force would have to restrict operations in Sevier B MOA near the PFSF regardless of risk, i.e., merely because of its presence. Thus, there is no support for the remainder of the State’s claims, i.e., that the building of the PFSF would have dire consequences for military readiness or the Utah economy. Further, consequences flowing solely from fear of perceived risks, such as those that the State asserts here, are not cognizable under the National Environmental Policy Act (“NEPA”).

II. DISCUSSION

In Contention KK, the State attempts to raise an environmental impact issue more than 30 days after the NRC Staff published the PFSF DEIS and long after the information that assertedly supports the State’s position was available to the State. Thus, the State’s request to admit Utah KK must be denied as unjustifiably late. In addition, while the State provides some documents and expert opinion in support of the contention, the contention must be rejected because of the critical factual gap, referred to above, that leaves the contention without the basis required by NRC regulations.

A. The State's Request to File Contention KK Is Unjustifiably Late

Utah KK must be rejected as unjustifiably late. First, it was filed more than 30 days after the publication of the DEIS and second, it was filed long after the information that assertedly supports it was available to the State. Since the State provides no valid explanation for the lateness and the other factors in the Commission's test for admitting late contentions do not provide compelling support for the admission of Utah KK, the contention must be rejected.

1. The State is Late Without Good Cause

At the outset, the Licensing Board has clearly stated to the parties that "any contentions based on [the NRC Staff's DEIS] should be submitted no later than thirty days after [the] document[is] made available to the public." Memorandum and Order (General Scheduling for Proceeding and Associated Guidance) (June 29, 1998) at 5; see Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-7, 51 NRC 139, 143 n.1 (2000). The DEIS was made available to the public on June 23, 2000 (65 Fed. Reg. at 39,206) while the State filed Utah KK on July 27, 34 days later.⁶ The State's excuse for lateness is that it was involved in the first phase of the evidentiary hearing on the PFS license application until June 27. State Req. at 8. NRC law rejects this excuse – parties participating in NRC litigation must accept the burdens attendant upon such participation, to include meeting filing deadlines.⁷ See Duke Energy Corporation (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338-39 (1999).

⁶ As noted above, the State actually received a copy of the DEIS on June 19, 2000.

⁷ If the State believed as of June 27 or shortly thereafter that the hearing was going to cause it to be late but with good cause, the State could have requested an extension of time to file contentions based on the DEIS. See 10 C.F.R. § 2.711(a). The State, however, made no such request.

Second, and more importantly, the State is late without good cause in that, by its own admission, it became aware of the issue it raises in Utah KK in May 1999 – 15 months ago. State Req. at 8.⁸ Furthermore, the State admits that it could have raised this issue based on Applicant’s ER, rather than waiting until the publication of the DEIS, in that neither document discusses the impacts that the State asserts will arise from the building of the PFSF. Id. In fact, since the State argues that the mere presence of the PFSF – regardless of the risk posed to or by the facility – is incompatible with Air Force operations in the Sevier B MOA, see State Req. at 6, the information necessary for the State to have filed Utah KK has been available ever since PFS filed its license application in June 1997, over three years ago. Indeed, Contention Utah K, which the State filed in November 1997, asserts that military activity on the UTTR creates an unacceptable risk that an accident would harm the PFSF. See State Cont. at 76. This unjustified delay is fatal to Utah KK.

NRC rules allow the filing of a new contention on the basis of the Staff’s DEIS only “if there are data or conclusions in the [DEIS] that differ significantly from the data or conclusions in the applicant’s [ER].” 10 C.F.R. § 2.714(b)(2)(iii). The Board has explained the rule previously as follows:

the Commission has stated “a petitioner has an ‘ironclad obligation’ to examine the application, and other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention.” Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999). Further, participants in agency proceedings have been

⁸ As acknowledged there by the State, “[it] became aware of the significance of the potential impacts to the military in May 1999,” id., referencing Exhibit 5 to its late-filed request, the May 3, 1999 letter from Colonel Oholendt, former Vice Commander, 388 Fighter Wing, Hill AFB, Utah to Governor Leavitt.

counseled to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983) (intervenors expected “to raise issues as early as possible”). And along this same line, a Licensing Board previously has indicated that where “a new contention purportedly is based on information contained in a document recently made publicly available, an important consideration in judging the contention’s timeliness is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document’s release.” LBP-98-29, 48 NRC 286, 292 (1998).

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 307 (1999), review declined, CLI-00-2, 51 NRC 77 (2000). The Commission has explained that this standard applies with equal force to environmental contentions:

The rule [10 C.F.R. § 2.714(b)(2)(iii)] makes clear that to the extent that an environmental issue is raised in the applicant’s ER, an intervenor must file contentions on that document. The NRC staff in its DE[IS] . . . may well take a different position than the applicant. 10 CFR 2.714(b)(2)(iii) explicitly recognizes for environmental matters existing precedent regarding the right to amend or supplement contentions based on new information. The Commission wishes to emphasize that these amendments to § 2.714(b)(2)(iii) are not intended to alter the standards in § 2.714(a) of its rules of practice as interpreted by NRC caselaw, e.g., [Catawba], CLI-83-19, 17 NRC 1041 . . . , respecting late-filed contentions nor are they intended to exempt environmental matters as a class from the application of those standards.

Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, Final Rule, 54 Fed. Reg. 33,168, 33,172 (1989) (emphasis added).

Therefore, because the information necessary for the State to have filed Utah KK was available at the time the license application was filed three years ago, or, at the very

least (by the State's admission), 15 months ago, and no new information on which the contention is based is contained in the Staff's DEIS, Utah KK is unjustifiably late. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 47, aff'd, CLI-99-10, 49 NRC 318 (1999) (45 days "approach[es] the outer boundary of 'good cause'").

The State's excuse for not filing Utah KK based on PFS's ER was that it thought the NRC Staff would address the issue in its DEIS. State Req. at 9-10. The State says that it filed supplemental EIS scoping comments informing the NRC Staff of the issue in Utah KK in May 1999 and the State asserts that it believed, based on the Staff's November 1999 Supplemental Scoping Report, that the issue would be addressed in the DEIS. Id. This affords the State no relief. The EIS comment process is no substitute for filing timely contentions with the Licensing Board. If an intervenor awaits the publication of a DEIS or FEIS before filing a contention for which the intervenor has sufficient information to do so, the intervenor does so "at its peril." See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 212 (1994); cf. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986) (delaying the filing of a contention in the hopes of settling an issue without resort to litigation does not constitute good cause).

Thus, the State lacks good cause for its late filing of Utah Contention KK.

2. The Other Factors Do Not Justify Admission of the Late-Filed Contention

"In the absence of good cause, the State must make a compelling showing that the remaining four section 2.714(a)(1) factors outweigh factor one so as to favor admission." LBP-99-43, 50 NRC at 315 (emphasis added). Those factors are: (ii) the availability of

other means to protect the petitioner's interest, (iii) the extent to which petitioner will assist in the development of a sound record, (iv) the extent to which the petitioner's interest will be represented by other parties, and (v) the extent to which admitting the contention will broaden the issues or delay the proceeding. 10 C.F.R. § 2.714(a)(1). Of those factors, the third and fifth are to be accorded more weight than the second and fourth. LBP-98-7, 47 NRC at 207-209.

At the outset, factor five clearly weighs against admitting Utah KK in that it would undeniably broaden and probably delay the proceeding. While Utah KK arises out of some of the same facts as Contention Utah K, the issues raised in Utah KK are not safety-related. Rather, the questions raised in Utah KK involve the extent to which the Air Force might voluntarily decide to curtail operations in Sevier B MOA because of the PFSF, regardless of safety risks, and the impact that such curtailment would have on national security, the usefulness of Hill AFB, and ultimately the economy of Utah. These are far different issues than the assessment of the likelihood of an aircraft crash at the PFSF site. Hence, Utah KK represents a clear broadening of the issues. Furthermore, Utah KK would likely delay the proceeding in that it comes after two and a half years of litigation, the completion of most document production and most formal written discovery, and the Staff's publication of its DEIS. See South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 888-89 (1981). The current trial schedule allows for only a limited window of additional discovery on environmental contentions prior to the second phase of the evidentiary hearing.⁹ With the addition of Utah KK, and a host of new discovery requests and

⁹ Order (General Schedule Revision and Other Matters) (Feb. 2, 2000) Attachment A.

depositions, that window may well have to be expanded and the hearing schedule delayed.

The third factor also does not support the admission of Utah KK. This Board has found support wanting in the past when “the State has done little more than point to . . . two affiants supporting the contention, without providing any real clue about what they would say to support the contention beyond the minimal information they provide for admitting the contention.” LBP-98-7, 47 NRC at 208-09; see Braidwood, CLI-86-8, 23 NRC at 246 (proponents of late-filed contentions should, with as much particularity as possible, summarize the proposed testimony of their witnesses). Here, the State names two potential witnesses but their declarations provide no information other than the witnesses’ asserted qualifications.¹⁰ Moreover, as shown below, the State’s pleading contains a critical factual gap that leaves it deficient under the Commission’s contention admission standards. Thus, the State’s proffer simply falls short of what is required.

While the State’s position may not be protected by other means (such as providing comments on the DEIS) or represented by another party (factors two and four), those factors carry less weight than the others. Thus, the four factors taken together militate against admitting Utah KK, and therefore clearly do not make the compelling showing required to overcome the State’s patent lack of good cause.

B. The State’s Late-Filed Contention Is Inadmissible

The State’s Request should also be denied because Utah KK fails to satisfy the standards of admissibility for contentions. In particular, a critical link in the State’s

¹⁰ See Declaration of Michael D. Pavich in Support of State of Utah’s Request for Admission of Late-Filed Bases for Utah Contention KK; Declaration of John A. Harja in Support of State of Utah’s Request for Admission of Late-Filed Bases for Utah Contention KK.

argument lacks factual or expert opinion support. 10 C.F.R. § 2.714(b)(2)(ii). The State asserts that there is a conflict between Air Force operations in Sevier B MOA and the presence of the PFSF. State Req. at 6. According to the State, “[r]egardless of the outcome of Contention Utah K [i.e., regardless of the risk that Air Force operations in Sevier B MOA would or would not pose to the PFSF], it is reasonably foreseeable that, in order to avoid potential liability, the military will be forced to voluntarily restrict or eliminate military training or weapons testing activities currently authorized over the area of the proposed PFS facility.” Id. at 6. Such voluntary restrictions would assertedly reduce military readiness, harm national security, and render Hill AFB subject to closure, which in turn would harm the Utah economy. See id. at 6-8.

The State’s argument is flawed because it provides no support for the proposition that the Air Force would have to restrict operations in Sevier B MOA near the PFSF regardless of risk, i.e., merely because of its presence. See id. at 6 (no citation provided).¹¹ Thus, there is no support for the remainder of the State’s argument, i.e., that the building of the PFSF would have dire consequences for military readiness or the Utah economy. The letter from Col. Oholendt (Exhibit 5) provides no support, in that it only states what would happen if an overflight prohibition with a radius of five nautical miles were imposed over the PFSF site. Exh. 5 at 1. It does not state that a five nautical mile prohibition (or a prohibition of any size) would be necessary or even would likely be imposed. See id. Similarly, the letter from Congressman Hansen (Exhibit 3) also

¹¹ The State also implies – without support – that military training and weapons testing takes place in the Sevier B MOA over the area of the PFSF site. See id. at 6. According to Col. Oholendt, however, Sevier B MOA is used for access to the UTTR. Other military training and weapons testing activities take place in the restricted areas within the UTTR, not in the Sevier B MOA over the site. Exh. 5 at 1-2.

provides no support. That letter asserts that “[w]ith or without airspace restrictions, the nature of the proposed facility creates an unacceptable risk that the Air Force will be forced to curtail operations in the area in the future.” Exh. 3 at 1. It does not say what the risk is and it provides no basis for allegation that the risk exists at all.¹² Such a conclusory statement provides no basis for the admission of a contention, LBP-98-7, 47 NRC at 180, even if made by an expert, *id.* at 181.¹³ Similarly, the vague declarations of Michael Pavich and John Harja provide no support for the alleged curtailment of operations near the PFSF, regardless of risk, merely because of its presence.¹⁴

¹² The assertions by Rep. Hansen that “any loss of access in this area” or “[w]eakening of the UTTR will cripple the military value of Hill Air Force Base and subject it to possible closure . . .” are also wholly conclusory and provide no basis for the admission of a contention. LBP-98-7, 47 NRC at 180-81. On its face it is simply impossible to believe that any restriction in operations, no matter how small, would “cripple” the value of the base and subject it to closure. In fact, Air Force Instructions applicable to the UTTR reflect that there are currently overflight restrictions in place around a number of locations including, *e.g.*, English Village (on Dugway Proving Ground), approximately 13 miles south of the PFSF. Air Force Instruction, AFI 13-212, UTTR SUPPLEMENT I (TEST) (1 April 1998) at 12. PFS does not believe, however, that any such overflight restriction, or other curtailment, is necessary with respect to the PFSF, given the lack of any credible risk posed to the facility by military training and testing activities that take place on either the UTTR or Dugway. *See* SAR at § 2.2; *see also* note 13, *infra*. Likewise, the Skull Valley Band in a November 10, 1999 letter to Col. Oholendt at Hill AFB stated its concurrence that the presence of the PFSF should not impact the Air Force’s continued unrestricted use of the MOA airspace above the Reservation. *See* Exhibit 1 attached hereto.

¹³ It is not correct that the Air Force would be required to implement special flight restrictions if the PFSF were identified in the Department of Defense Area Planning Guide. *See* Exh. 3 at 2. Although the Area Planning Guide imposes explicit restrictions on the location of low-level military training routes (*i.e.*, those below 1,500 ft. above ground level) near nuclear power plants, it imposes no such restrictions regarding “radioactive waste sites,” such as spent fuel storage facilities. *See* Department of Defense, Area Planning, Military Training Routes, North and South America, DOD Flight Information Publication AP/1B, Introduction and Ch. 5 (4 NOV 1999).

¹⁴ The Pavich and Harja declarations, in addition to providing their qualifications, simply declare that “the technical facts” presented in the contention, and “the conclusions drawn” therefrom, are true and correct. At least in the circumstances here, such undefined declarations are insufficient, in that they do not identify the particular facts or conclusions being attested to, or their bases. In the first place, the State appears to be relying on the letters from Col. Oholendt (former Vice Commander for the 338th Fighter Wing stationed at Hill AFB) and Rep. Hansen (*see* State Req. at 6-7), neither of which support the State’s proposition, as shown above. Furthermore, even assuming that the State’s declarants are experts, their conclusory claim of alleged curtailment of Air Force operations near the PFSF, regardless of risk, merely because of its presence, provides insufficient basis for admitting a contention. *See* LBP-98-7, 47 NRC at 180-81.

Indeed, if the State's argument that any threat of liability would cause the Air Force to restrict its operations is to be believed, the Air Force would never have operated in Sevier B MOA. The Skull Valley Band of Goshute Reservation has been located in Skull Valley, under what is now the MOA, for over 80 years.¹⁵ Taking the State's argument to its logical conclusion, the Air Force would not operate out of Hill AFB, in that the base is adjacent to the city of Ogden, Utah¹⁶ and thus, by the State's reasoning, poses an unacceptable accident hazard to the people living around Hill AFB. Clearly, some significant level of risk would be required before the Air Force would curtail what it perceives to be important operations in Sevier B MOA. Thus, the State has provided no factual support for its assertion that the threat of liability from perceived risks would cause the Air Force to voluntarily restrict its operations, with the resulting dire consequences it alleges.

Moreover, to the extent that Utah KK is based on the assertion that the Air Force will curtail operations in Sevier B MOA out of fear of liability, regardless of the actual risk that an accident involving the PFSF would occur, Utah KK must be dismissed because fear is not a cognizable environmental impact under NEPA and hence need not be addressed in a DEIS. Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 777 (1983). Further, subsequent actions or consequences (e.g., the closure of Hill AFB, the loss of jobs) that will assertedly arise from actions taken as a result of fear of perceived risks are also not cognizable under NEPA and hence need not be addressed in the DEIS. See id. at 775 (where "the element of risk" alone is a "necessary middle

¹⁵ IV Kappler 1048, Sept. 7, 1917 and Feb. 15, 1918 (Executive Orders creating Skull Valley Indian Reservation).

¹⁶ See Salt Lake City Sectional Aeronautical Chart, National Oceanic and Atmospheric Administration.

link[]” in the causal chain leading to alleged impacts, such impacts are “beyond the reach of NEPA”).¹⁷

III. CONCLUSION

For the foregoing reasons, the Applicant requests that the Board deny Utah’s request to admit late-filed Contention Utah KK.

Respectfully submitted,



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Dated: August 10, 2000

¹⁷ In addition, the closure of Hill AFB and the subsequent economic impacts that would allegedly arise from the potential liability of the Air Force are also not cognizable under NEPA in that they are purely economic effects not resulting from an impact on the physical environment beyond the mere presence of the PFSF. See Metropolitan Edison, 460 U.S. at 772; Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56-57 (1992); see also Image of Greater San Antonio v. Brown, 570 F.2d 517, 522 (5th Cir. 1978); Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976), cert. denied, 429 U.S. 1061 (1977) (layoffs at military bases not caused by a physical effect on the environment do not require preparation of an EIS).

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CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Response to State of Utah's Request for Admission of Late-Filed Utah Contention KK were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 10th day of August 2000.

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D. Sean Barnett

PFS Exhibit 1

Skull Valley Band of Goshute Indians
Skull Valley Reservation
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November 10, 1999

Colonel Ronald G. Oholendt
Vice Commander
388th Fighter Wing
5887 D Avenue, Suite 232
Hill Air Force Base, Utah 84056

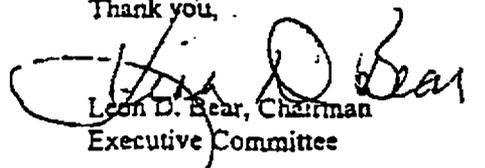
Colonel Oholendt:

The Skull Valley Band of Goshute Indians has agreed to lease land on the northwest corner of our Skull Valley Reservation to the Private Fuel Storage LLC (PFS) for use as a temporary spent fuel storage facility. In recent months the Nuclear Regulatory Commission (NRC) staff has questioned PFS concerning the possible safety impact of the United States Air Force (USAF) training flights down Skull Valley. The Band is aware of these questions and has been briefed by PFS on the results of the evaluations that have been performed in response to the NRC.

The Band recognizes the importance of Skull Valley to the USAF as a Military Operations Area (MOA) to access the Utah Test and Training Range (UTTR) in western Utah. Over many years the Band has witnessed these training flights as they fly down Skull Valley and enter the UTTR. Historical data demonstrate and confirm the Band's belief that the USAF conducts safe operations in Skull Valley. The future presence of the PFS facility should not impact the continued unrestricted use of the MOA by the USAF. The Band concurs with the conclusion offered by PFS to the NRC that the presence of the storage facility on the Reservation and the present operations conducted by the USAF in the MOA are mutually compatible and safe for tribal members.

If you have any questions, feel free to call me at 801-474-0535.

Thank you,


Leon D. Bear, Chairman
Executive Committee

LDB/bbs