



STATE OF UTAH
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84114-0601

MICHAEL O. LEAVITT
GOVERNOR

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LIEUTENANT GOVERNOR

65 FR 39206
June 23, 2000

198

September 20, 2000

72-22

Richard A. Meserve, Chair
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Kevin Gover, Assistant Secretary
U.S. Bureau of Indian Affairs
1849 C Street, NW
Washington, DC 20240

Tom Fry, Director
U.S. Bureau of Land Management
1849 C Street, NW Room 700-LS
Washington, DC 20240

Linda J. Morgan, Chair
U.S. Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

David L. Meyer
Chief, Rules and Directives Branch
Division of Freedom of Information and Publications Services
Office of Administration, Mailstop T-6D-59
US NRC
Washington, DC 20555-0001

Dear Messrs. Meserve, Gover, Fry, Meyer, and Ms. Morgan:

Re: NUREG-1714, Draft Environmental Impact Statement (DEIS) for the Proposed Private Fuel Storage LLC (PFS) Independent Spent Fuel Storage Installation (ISFSI), Docket No. 72-22

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200 SEP 22 PM 3:38
Rules and Directives Branch
USNRC

ADM03

ERIOS
Add Scott Flanders
(SCF)

Template ADM013

The decision you are preparing to make regarding the storage of high-level nuclear waste in Utah, at the proposed facility, is an extremely important one to the future of the two million residents of the State of Utah, the Skull Valley Band of the Goshute Tribe, and the Nation as a whole. It will have significant, long-term impacts on the health and safety of Utah's citizens, and on individuals who live near the high-level nuclear waste transportation corridors throughout the Nation. Approval of the proposal would cause the unprecedented movement of massive amounts of high level nuclear waste spent fuel rods throughout the Nation, creating risks that may, in the end, turn out to have been taken unnecessarily. It will also have significant, long-term impacts on Utah's economy and will harm the readiness and training of the Nation's armed forces.

Federal law, the National Environmental Policy Act, requires an examination of the effects of a major federal action, such as this, on the natural and human environment. The Draft Environmental Impact statement issued does not meet the requirements of NEPA, and must be rejected. The serious issues mentioned above, and many others as documented in the attached comments, are not even mentioned in the DEIS.

I absolutely disagree that 90 days is sufficient time to analyze the details in a proposal of this magnitude. This is a proposal to place high level nuclear waste in Utah for an uncertain period of time. It is a very complex issue involving quality of life and perceptions of safety, not just technical issues related to radiation levels. Utahns are overwhelmingly opposed to the storage of high-level nuclear waste in this state. The law requires and common sense demands a full public review and discussion of the facts and true impacts of this proposal on the human environment. This review must not be cut off for the sake of procedural or bureaucratic convenience. The federal government routinely allows comment periods well in excess of 90 days for large Environmental Impact Statements, for issues that are also important, but not as clearly fundamental to the health and safety of the people of Utah.

Many communities, businesses, and individuals in Utah who will be adversely impacted have not had sufficient opportunity to provide comment on the proposed facility, transportation of the spent nuclear fuel rods, and related impacts. The spirit, as well as the letter of the law behind NEPA, is to be inclusive in participation. Citizens are to be allowed every opportunity to make comment. I cannot believe that any federal agency would put the needs of eastern power companies before the rights and needs of the million citizens who live within 75 miles of the proposed storage site. The State of Utah strongly urges the federal agencies behind this DEIS to grant the request, now strongly supported by its U.S. Senators and Representatives, for additional time to comment.

I also must inform all the federal agencies who assisted in the preparation of the DEIS that the proponent of the project, Private Fuels Storage, does not enjoy limited liability under Utah law. Limited liability is a privilege granted by state law. By virtue of its activities Private Fuels Storage has not met the requirements of Utah law on this issue, and consequently is no longer considered a limited liability corporation. The federal agencies must consider this fact as they review the DEIS and the proposal further.

The Bureau of Land Management has independent authority in reviewing this proposal. However, pursuant to the Defense Authorization Act of 1998, the BLM may not engage in any planning efforts at all for any proposal under or near the Utah Test and Training Range. All planning in that area is frozen. The BLM must cease any further work on this proposal until the requirements of federal law are met. The state will not hesitate to seek enforcement of this law, if the BLM does not meet its requirements.

The proposed facility and transportation decisions deserve your very careful review and consideration. However, this DEIS will not support that careful review. The DEIS is seriously deficient in information and analyses required by the National Environmental Policy Act (NEPA), by federal regulations, and by common sense. Therefore, I urge you to find this DEIS deficient and incapable of supporting the proposed actions and, thereby, halt the license review of the PFS facility and related actions.

Thank you for your careful consideration of these comments.

Sincerely,



Michael O. Leavitt
Governor

MOL:DRN:dco

Attachment

cc: Senator Orrin Hatch, U.S. Senator
Senator Robert Bennett, U.S. Senator
Representative Jim Hansen, U.S. House of Representatives
Representative Chris Cannon, U.S. House of Representatives
Representative Merrill Cook, U.S. House of Representatives
President Lyle Hillyard, Utah Senate
Speaker Marty Stevens, Utah House of Representatives
Administrator Carol Browner, US EPA
J. Neumann, Governor's Washington DC Office

COMMENTS SUBMITTED BY THE STATE OF UTAH

September 20, 2000

on the

DRAFT ENVIRONMENTAL IMPACT STATEMENT (DEIS)

**For the Construction and Operation of an
Independent Spent Fuel Storage Installation
on the Reservation of the Skull Valley Band
of Goshute Indians and Related Transportation
Facility in Tooele County, Utah
NUREG-1714**

DOCKET NO. 72-22

Private Fuel Storage (PFS), LLC

U. S. NUCLEAR REGULATORY COMMISSION

Office of Nuclear Material Safety and Safeguards

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Bureau of Land Management

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

PONY EXPRESS RESOURCE MANAGEMENT PLAN (RMP)

UT-020-00-5101-ER-J206, U-76985

INTRODUCTION

The following comments are provided by the State of Utah (State) in response to the June 20, 2000, NRC request for Comments on the Draft Environmental Impact Statement for the Construction and Operations 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, and the June 23, 2000, BLM Notice of Availability of a Draft Environmental Impact Statement and Proposed Plan Amendment to the Pony Express Resource Management Plan (RMP) issued by the U. S. Nuclear Regulatory Commission (NRC) and by the U.S. Department of Interior for the Bureau of Indian Affairs (BLA), the Bureau of Land Management (BLM), and the Surface Transportation Board (STB). These comments are also being provided in response to the BLM's separate Notice of Intent to Amend the Pony Express

Resource Management Plan (RMP).

There are three agencies involved in this environmental decisionmaking process that were not involved at the time of the NRC's 1998 scoping process, and one agency which was not involved at the time of the NRC's 1999 scoping process. Therefore, the EIS Scoping Comments submitted by the State of Utah on June 19, 1998, and May 27, 1999, are hereby incorporated by reference, and should be included in the considerations of the agencies regarding the DEIS. A copy of the Comments are included as Attachments 1 and 2 to this document.

Comments are organized under topic headings for ease of consideration. However, issues are interrelated and commonly impact or encompass other issues under other topic headings. Issues should not be narrowly construed or evaluated, based on topic headings. If additional information or clarification is needed, please contact:

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The magnitude of this proposed facility, its consequences, and cumulative impacts are inadequately evaluated and in some cases not even identified in the Draft Environmental Impact Statement (DEIS). This site will store 40,000 metric tons of high level nuclear waste. The storage of this volume of waste in one location is unprecedented and is approximately the equivalent volume of all commercial high level nuclear waste currently in the United States. PFS plans to store the waste in up to 4,000 concrete storage casks on concrete storage pads. To put this in perspective, today there are only 436 storage units or casks for commercial spent fuel in the entire United States, 1/10th the number proposed for Skull Valley. Furthermore, 12 of the 15 storage sites are within ¾ mile of a nuclear power plant. The experience to date with transportation of commercial waste involves short distances compared to the cross-country route required for the PFS facility.

The DEIS ignores or inadequately addresses many issues that could have a significant impact on the health and safety of Utah's citizens. While NRC may claim that significant risks are analyzed in its Safety Evaluation Report, the environmental consequences and socioeconomic impact of those consequences of those risk must be described in the DEIS for the proposed facility, the transfer facility, and with respect to transportation impacts. Potentially significant risks and their consequences associated with earthquakes are not analyzed at all in the DEIS. For example, the storage casks operate on a passive cooling system and must be uprighted within 48 hours. There is no mention of this in the DEIS. Nor are risks and consequences associated with nearby military activities analyzed in the DEIS. Information about the risks and consequences resulting

from the transportation of high level nuclear waste to the facility is scarce in the DEIS; it is surprising that, given the unprecedented volumes of high level nuclear waste that would be transported if this project were approved, NRC has chosen to rely on outdated studies, with little project-specific analyses.

The individual and cumulative impacts on military installations and operations in, over, and near Skull Valley are not even described, much less analyzed in the Draft EIS. The risks from Cruise Missile and F-16 crashes, the emergency evacuation route through Skull Valley in case of a chemical agent leak, the essential ongoing use of the airspace over Skull Valley for access to the Utah Test and Training Range (UTTR), air to air combat training, and cruise missile testing – all of these and numerous other military activities are missing from the analysis in the Draft EIS. Furthermore, the socio-economic impacts to Hill Air Force Base and its surrounding communities if UTTR operations are curtailed are never considered in the Draft EIS. These are critical impacts of significant consequence. They cannot be ignored or overlooked.

The Draft EIS does not address potential economic costs of a storage or transportation accident. Despite the fact that the Price Anderson Act does not address liability for a private away-from-reactor storage facility, NRC has no onsite nuclear property or nuclear liability insurance requirements. If there is an accident or other problem, PFS's financial status will not allow it to cope with non-routine costs. Thus, PFS's precarious financial status as an alleged limited liability company without any assets demands that NRC require a centralized ISFSI operated by a limited liability company without any assets to have adequate insurance coverage for the centralized ISFSI. NRC cannot look to PFS's liability under the lease agreement between the Skull Valley Band because it is ordinarily limited to the amount of money available through commercially reasonable nuclear liability insurance, even if actual costs are much higher. Furthermore, the contractual lease arrangements between PFS and the Band are beyond NRC's control and may change over the life of the facility. In sum, there are no assurances that there will be financial resources available to address potential on or off Reservation impacts from an onsite incident.

It is unclear whether the Price Anderson Act will allow recovery of damages for accidents that occur in transportation of high level nuclear waste to or from this facility. But even if it does, nuclear utilities would be liable for less than a maximum of \$9.43 billion of accident costs. Congress must then determine whether the federal government – and ultimately U.S. taxpayers – would be responsible for the rest, and the rest could be significant. The estimated economic costs for a transportation accident in a metropolitan area ranges from \$9 to \$330 billion dollars. Just to put this into local perspective, \$330 billion is nearly 47 times Utah's state government's annual budget.

The PFS Facility is not temporary. There is no assurance that Yucca Mountain will be approved as a permanent repository. Even if it is approved, it is unlikely to have sufficient capacity to store all the nuclear waste that will have been generated by the time it opens. Therefore, even though utilities in the east, midwest, and California may retain ownership of their spent fuel rods,

those spent fuel rods will be sitting here, in Skull Valley, at a de facto permanent storage site. Amending the license or the EIS in the future will not solve the problem. The facility and the problem will be permanent. The Draft EIS ignores that problem.

It is clear reading this DEIS that NRC, the lead agency for preparation of this DEIS, is not objective about PFS's proposed project, and that it is championing this project. Examples of this skewed analysis may be found throughout the DEIS: the skewed cost/benefit analysis described in Part B.5 of these comments, and the NRC's unquestioning acceptance of PFS's proposal to "start clean, stay clean," upon which it bases its apparent determination that no contingency plans and minimal contingency funds are necessary. The State of Utah urges NRC and especially the cooperating agencies to carefully consider the objectivity of this process. We believe that an objective review would lead to the conclusion that this flawed document cannot support any decisionmaking.

The DEIS's lack of objectivity is particularly galling in light of the unfairness of this proposal. Commercial high level nuclear waste is generated from nuclear power reactors. In the United States, there are currently 104 commercial nuclear reactors located in 31 states. The bulk of commercial high level nuclear waste is generated east of Colorado where 92 percent of the reactors are located. Not one is located in Utah. It is unconscionable that Utahns are now being asked to solve the nuclear waste storage problems created in other states by hosting a de facto permanent site with far less protection and far greater risks.

The State of Utah urges careful review of these comments and other comments that the agencies receive. The State especially urges the cooperating agencies not to be complacent and assume that NRC has adequately analyzed the issues. It has not; in many cases NRC has vigorously opposed the State of Utah's contentions only to request the same information from PFS in the non-litigation forum. Furthermore, NRC Staff has zealously defended against those contentions the State has admitted into the adjudicatory proceeding before the Atomic Safety and Licensing Board. The Staff has acted as PFS's advocate rather than as an unbiased participant.

The magnitude, scope and unprecedented movement of spent nuclear fuel cross country solely as the result of the PFS proposal demand that all of the agencies conduct an independent and unbiased analysis. Please give this project the hard look it deserves.

A copy of Utah Governor Leavitt's comments, presented at the Salt Lake City DEIS hearing in July, 2000, is included as Attachment 3. Following are our more detailed comments.

A. PROCEDURAL COMMENTS

- 1. A comment period of ninety days is too short for a document and project of this magnitude.**

The State of Utah has requested an additional ninety days to comment on this DEIS. The DEIS is

a long document that is difficult to review. It should fairly present complex issues. However, the way in which the agencies structured their less than objective presentation makes it all the more difficult to formulate comments because it has required the State to search for and analyze additional information the agencies should have initially presented to the public. Moreover from the perspective of the general public, electronic access to a copy of the DEIS is difficult if not impossible and NRC's parsimonious allocation of printed copies of the DEIS, especially prior to the public hearings in Salt Lake City, has created an formidable task for members of the public to grasp and understand the scope and ramifications of the PFS proposal. The DEIS was not even available at the designated government document repository at the University of Utah library until at least the end of July.

DOE's DEIS on the Yucca Mountain project, which is also national in scope and thus is similar in its impact to PFS, had an initial comment period of 180 days, and an additional extension beyond that time. See Attachment 4.

The DEIS attempt to make a case for the need for this facility but fails. There is no indication that such a centralized, 40,000 MTU ISFSI is currently needed. An extension of ninety days additional comment period for a facility that would have a lifespan of 20 to 40 years, and many believe far longer, is trivial to the project but significant to potential commenters. It should be granted.

2. Three hearings, all in Utah, are far too few for a project with large and nationwide impacts.

If approved, the PFS facility will precipitate the largest movement ever of nuclear waste across the country. It has been our experience, however, that few outside of Utah are even aware that large amounts of nuclear waste may be transported to Utah soon. That is not surprising, given that the responsible agencies have chosen to perpetuate that ignorance by refusing to hold hearings outside of Utah. In recognition of the nationwide impacts of the Yucca Mountain project, impacts which are very similar to the potential impacts from the PFS project, DOE held 20 hearings on the Yucca Mountain DEIS, half of them outside of the State of Nevada. Hearings were held as far away as Georgia, Chicago, and Washington D.C.

The NEPA process was created to assure that federal decisions are made after a public dialogue about a proposal. It was created to avoid the poor quality of decisionmaking that tends to occur when decisions are made by stealth. Residents of the transportation corridor states have been shut out of the dialogue in this process; it is not legitimate to rely on this DEIS process to make decisions that may profoundly affect those residents.

Providing notice and opportunity to comment to residents of corridor states is also practical. Nuclear waste transportation cannot occur surreptitiously; when waste begins to move, residents will become very aware of it and, we believe, will strongly object. Because the outcome of that delayed debate cannot be known, it is far more efficient to have the public debate at the time it is

required – prior to federal approval of the action that causes this impact.

Even the hearings in Utah were insufficient and ineffectual. There was essentially no advertising for the hearings, other than the Federal Register notice and the Utah Department of Environmental Quality's notices to the media. Two of the three hearings were held a mere 37 days after the Federal Register notice indicating the DEIS would be released. The notice for the third, two-part hearing in Salt Lake City was even shorter. At all of the hearings, the number of speakers exceeded the capacity of the time schedule, in some cases causing NRC to require that people speak for no more than two minutes and simply submit anything else they needed to say in writing. Even if other citizens from Utah or along the transportation corridor outside Utah had known of and desired to attend a hearing on the DEIS, there would not have been sufficient time for them to speak.

3. DEIS and close of public comment period are premature

The agencies are improperly limiting public comment. New information and documents, upon which the noticed agency actions will be based, will not be available for review prior to the close of this public comment period on September 27, 2000, and no additional opportunities for public comment under the National Environmental Policy Act (NEPA) have been or are planned to be scheduled. Similar concerns were also discussed in the State's June 19, 1998, and May 27, 1999, Scoping Comments, included as Attachments 1 and 2. Although additional information has been submitted since the time of those comments, there are still substantial gaps in the information available and necessary to complete an EIS. Furthermore, the NRC has not completed its review of the license requirements.

The concern is also evidenced in numerous responses which the NRC has provided in public hearings, specifically the June 28, 2000, hearing in Grantsville, Utah, and in responses to requests for additional time for public comment on the DEIS, e.g. NRC correspondence to Ms Anne Sward Hansen, September 6, 2000, Attachment 5 wherein the NRC has referenced additional opportunities for public input. Those opportunities are identified as the NRC Atomic Safety and Licensing Board (ASLB) hearings on additional Contentions, scheduled for June 2001, the soon to be released Safety Evaluation Report (SER), and the likely opportunity for a Limited Public Appearance Hearing before the SLB in conjunction with its hearings in June 2001. What the NRC does not say, hence misleading the public, is that 1) there will be no public comment period on the final SER, 2) the SLB hearings in June of 2001 are limited to parties with standing before the SLB (not the public), and 3) the NRC is not required to consider or respond to any comments provided as part of a Limited Appearance Hearing, contrary to the procedure under NEPA, as clearly stated in the introductory comments of Judge Bollwerk before the ASLB Limited Appearance hearings on June 23, 2000:

“Under Sections 10.2.715(a) of the Commission's rules of practice, the Board has the discretion to entertain, from any person who is not a party to the proceeding, a written or oral statement of his or her position on the issues in the proceeding.

This provision, which was first adopted as part of the agency's hearing rules back in 1962, recognizes there is a need to provide an opportunity for input from members of the public who, despite not having sought party status, have an interest in the subject matter of the proceeding.

As we indicated in the April 19 and June 7 notices that were published in the Federal Register scheduling this and other sessions, limited appearance statements do not form part of the evidentiary record of the proceeding upon which the Board must rely in making decisions on the merits of the issues proffered by the intervening parties. Nonetheless, we also recognize in that notice the public's limited appearance statements may help the Board and/or the parties in their deliberations in connection with the issues to be considered in this proceeding." (emphasis added)

Unless the NRC schedules additional time for public comment and public hearings, the now concluding public comment period under the NEPA is the last opportunity the public will have to provide comment which must be considered by the agencies as they make decisions regarding the noticed license and related permits, licenses and amendments for the proposed facility.

4. BLM can't participate in this process given §2815 of the 1999 National Defense Authorization Act

PFS has applied for a new right of way across BLM land for its proposed rail line to the site. The current BLM Resource Management Plan (the "Pony Express RMP") for the area prohibits approval of such a right of way. BLM has proposed to amend its RMP, is participating in this planning process and the DEIS, and has noticed the proposed plan amendment. It has indicated it will use the NRC's DEIS as the basis for its plan amendment decision.

The language in the 1999 National Defense Authorization Act (§2815) precludes the Secretary of the Interior from amending individual resource management plans covering "Utah National Defense lands" pending completion of a Department of Defense study evaluating the impact of any land use changes upon military training, testing, and operational readiness. Utah national defense lands are defined to include, *inter alia*, lands beneath Military Operating Areas (MOAs) that make up the Utah Test and Training Range (UTTR). See excerpt from the 1999 National Defense Authorization Act, Attachment 6 The proposed right of way is located directly under the Sevier B MOA, part of the UTTR.

In a letter to U.S. Representative James V. Hansen, the Solicitor for the Department of Interior indicated that the 1999 National Defense Authorization Act freezes not only any decision to change the RMP, but also any planning with respect to that decision. See Letter from John D. Leshy to James V. Hansen, Attachment 7, p. 2. Accordingly, the BLM cannot participate in this EIS process and cannot take any other actions to amend or plan to amend the RMP.

5. Failure to provide supporting documentation, including documentation that has

been withheld for proprietary reasons, means that the public has not had a sufficient opportunity to review and comment.

The DEIS is far from a complete document. Any member of the public wishing to get an accurate picture of the proposed facility from this DEIS would have a very difficult time doing so. Some of the missing information could be obtained by a determined individual, but much of it has been claimed by PFS to be proprietary and is simply not generally available. Only one who is a party to the licensing proceeding and has entered into a confidentiality and non-disclosure agreement with PFS have access to certain proprietary information. Often this information is limited to the scope of the parties admitted contention in the NRC proceeding.

The DEIS does not meet NRC's own requirements for EIS preparation. NRC's NUREG-1555, "Environmental Standard Review Plan" (March 2000), which provides NRC guidance for preparing an EIS, indicates that a DEIS must "stand on its own as an analytical document that fully informs decision makers and the public of the environmental effects of the proposed action..." and that cannot refer to other documents for essential information. *Id.* at pages 3 and 4. Whether licensing a nuclear power plant or an ISFSI, this general directive by the Commission to the NRC Staff must be followed in this EIS proceeding.

6. Agency staffs have made it unnecessarily difficult to submit comments.

Toward the end of this comment period, the State of Utah was flooded with calls from concerned citizens who were confused about how and where to submit comments, as the DEIS itself lacked any guidance; it is likely that many more were just as concerned but failed to call. Moreover, the agencies provided no method for Utah delivery on the day the comments are due, or for email delivery. This essentially shortens the comment period by the number of days it takes to mail comments, and may discourage many potential commenters from submitting anything.

B. GENERAL COMMENTS

1. NRC does not have statutory authority to license this facility.

The DEIS is fatally flawed because NRC is acting beyond its statutory authority in issuing a license to PFS. Congress has not authorized NRC to issue a license to a private entity for a 4,000 cask, away-from reactor, centralized, spent nuclear fuel storage facility. The NRC may only license the storage of spent fuel at facilities which are authorized by statute. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

The Nuclear Waste Policy Act (NWPA), Part B, Interim Storage Program, 42 USC §§ 10151 - 10157, defines the scope of facilities authorized for interim storage of spent nuclear fuel. In light of the NWPA, NRC cannot rely on its general statutory authority or authority to license spent

nuclear fuel as the source of its authority to license a centralized 4,000 cask away-from-reactor facility operated by a corporation claiming limited liability. American Petroleum Institute v. EPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (“EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area.”); Sierra Club v. EPA, 719 F.2d 436, 455 (D.C. Cir 1983), *cert. denied*, 468 U.S. 1204 (1984). NRC’s general licensing authority does not give NRC carte blanche authority to make any rules it wishes regarding away-from-reactor storage of spent nuclear fuel.

Initially, NRC licensed ISFSIs under its general regulation for the Domestic Licensing of Special Nuclear Material, 10 CFR Part 70. *See* 45 Fed. Reg. 74,693 (Nov. 12, 1980). Chapter 6 of the Atomic Energy Act deals specifically with special nuclear material in terms of the acquisition and domestic and foreign distribution of special nuclear material. 42 USC §§ 2071, 2073 to 2077. Under the Atomic Energy Act congressional authorization extended to NRC’s authority to license civilian ownership and possession of special nuclear material. 42 USC § 2073. However, it was not until the NWPA that Congress specifically addressed storage of spent nuclear fuel.

In the NWPA of 1982 Congress specifically authorized private storage of spent nuclear fuel at reactor sites. Congress authorized storage of spent nuclear fuel away from reactors only at federally owned facilities. 42 USC § 10,155(h). Neither the NWPA, nor the statutory basis in 1980 for NRC to promulgate Part 72, can be construed as authorizing NRC to issue a license for a 4,000 cask, centralized, privately owned, away-from-reactor, nuclear waste storage facility that is being sought by PFS.

The NWPA expresses Congress’s purpose and intent in dealing with spent nuclear fuel storage. 42 USC § 10,151. Congress directed the NRC and other authorized federal officials to encourage and expedite the storage of spent nuclear fuel at the site of each civilian nuclear power reactor. 42 USC §§ 10,151 and 10152. Congress granted the NRC rulemaking authority for licensing technologies for the storage of civilian spent nuclear fuel at the site of any civilian nuclear power reactor. *Id.* § 10,153. Finally, the NWPA authorized the “establishment of a federally owned and operated system for the interim storage of spent nuclear fuel at one or more facilities owned by the Federal Government with not more than 1,900 metric tons of capacity....” *Id.* § 10,151(b)(2).

Congress imposed limits on centralized storage of spent nuclear fuel. First, the facility is to be federally owned and operated. 42 USC § 10,155(a). Second, maximum storage capacity is no more than 1,900 metric tons. *Id.* Third, when providing storage capacity, Congress directed the Department of Energy (DOE) to seek to minimize the transportation of spent nuclear fuel. *Id.* at § 10155(a)(3). Fourth, storage of spent fuel must be removed from the site not later than 3 years following the date on which a repository or monitored retrievable storage (MRS) facility is available. *Id.* § 10,155(e). Finally, Congress imposed annual reporting requirements on DOE. *Id.* § 10155(f).

The stark contrast between what PFS is requesting NRC to authorize under Part 72 and the directives Congress imposed on the federal ownership and operation of centralized interim away-from-reactor storage under the NWPA bespeaks the lack of statutory authority for NRC to license the proposed PFS facility. First, PFS's facility would not have the backing of the federal government but would be owned and operated by a company claiming limited liability and with no independent assets. Second, instead of a maximum limit of 1,900 metric tons, PFS requests a maximum limit of 40,000 metric tons. Third, spent nuclear fuel would be transported from all over the United States, primarily from the eastern states, thousands of miles to the Utah facility. Fourth, PFS's facility is de-linked from completion of Yucca Mountain or an MRS. There is no assurance that the stored fuel in Utah will ever be moved. Finally, as the licensing of an off-site ISFSI is totally an NRC regulatory creation, there are no Congressional reporting requirements.

Another glaring aberration between PFS's proposal and the centralized away-from-reactor storage under NWPA is to contrast the involvement of States. *See* 42 USC § 10,155(d). First, under NWPA, the Secretary of Energy must appraise the State Governor and its legislature of potentially acceptable interim storage sites and the Secretary's intention to investigate those sites. 42 USC § 10,155(d)(1). Second, the Secretary is required to give timely updates and results of investigations to the Governor and State legislator and enter into negotiations to establish a cooperative agreement between the Secretary and the State. Under such an agreement the State "shall have the right to participate in a process of consultation and cooperation ... in all stages of the planning, development, modification, expansion, operation and closures of storage capacity at a site or facility within such State for the interim storage of spent fuel from civilian nuclear power reactors." *Id.* § 10,155(d)(2). Third, the cooperative agreement must include sharing of all technical and licensing information; use of available expertise; joint project review, surveillance and monitoring arrangements; and schedule of milestones and decisions points and opportunities for State review and objection. *Id.* § 10,155(d)(3). Fourth, the Secretary must periodically report to Congress. *Id.* § 10,155(f). Finally, a State may voice its disapproval to Congress of a proposal to construct storage capacity of 300 metric ton or larger at any one site. *Id.* § 10,155(d)(6).

In contrast to a cooperative federal-state role and meaningful involvement ascribed to the State under the NWPA, Part 72 requires no federal cooperation or involvement with the State. The State is treated merely as any other party to the NRC proceeding. What has occurred to date is indicative of the pitiful role assigned to the State under Part 72. First, PFS made no effort to apprise the State of its proposed facility. The State first learned about the facility through press releases and by sending State officials to Washington, D.C. to attend meetings between PFS and the NRC, where the public was permitted to listen to the PFS-NRC discussion. Second, there has been no cooperation or consultation between PFS and the State. Failure to even allow the State to review and comment on the Emergency Plan, as required by 10 CFR § 72.32(a)(14), is just one conspicuous example of PFS's refusal to deal up-front with the State. Finally, there is no opportunity for State review or oversight of the project, except through litigation. This has meant that the State has had to expend hundreds of thousands of dollars to participate through intervention in the NRC formal license adjudication in order to have any voice in the siting and

licensing of this facility. This is a far cry from the role Congress assigned to the State under § 10,155(d).

After comparing what PFS is requesting and what Congress requires under the NWPA, it should be obvious that NRC by regulation is thwarting the national policy and directives Congress set in the NWPA. NRC is without statutory authority to license the proposed PFS facility.

2. BLM does not have statutory authority to make any change in its Resource Management Plan.

As described in Part A.3 of these comments, the BLM may not make any changes in its resource management plan until the Department of Defense completes a study evaluating the impact of any land use changes upon military training, testing, and operational readiness.

3. This DEIS and related process cannot support BLM's proposed action.

The Bureau of Land Management has independent authority in this proposal, and must make an independent examination of the facts and legal requirements. This is true even if the BLM is cooperating with other federal agencies in the preparation of the necessary NEPA work. The desire of federal agencies to cooperate in the preparation of an EIS is laudable and sometimes necessary, but none of the cooperating agencies may delegate any of their decision making authority to any of the other agencies. Neither may the BLM segregate its particular part of the whole project from the whole, and pretend its part of the EIS work is only covered by its authority. This is a proposal to transport to, and store within the state of Utah, high level nuclear waste. The decisions made by BLM must consider this.

Most importantly, the BLM has no authority to conduct any planning in this area, nor amend the Resource Management Plan. As mentioned above, the Defense Authorization Act of 1998 and a letter written by John Leshy, Solicitor of the Department of Interior, put a freeze on planning anywhere under or near the military operating area of the Utah Test and Training Range. The propose site for the storage and the proposed rail spur are clearly under and near the military operating area. Thus, the BLM is prohibited from engaging in any planning or from amending the Pony Express Plan until the requirements of the Defense Authorization Act are met.

BLM has not, and is not following its normal procedures in the issuance of the NEPA work required for this proposal. This is a major federal proposal involving BLM lands and BLM authority. There have been many others in recent years, the massive multi-volume DEIS on wilderness, the DEIS and draft plan for the Grand Staircase-Escalante National Monument, the draft plan for the Dixie Resource Area. All of these were presented to the state and the public in a much more open posture than this proposal. All were given review times far in excess of 90 days. BLM and Department of Interior staff were much more available to meet with state, local and private interests, both to answer questions, and listen to concerns. The State of Utah strongly requests that the BLM resist what is obviously the overbearing attitude of the NRC, and live up

to these established procedures and policies. BLM must take the time to make information and personnel available to state, local and private interests.

BLM interests and authorities in this proposal are far more than the need to amend the Pony Express Resource Management Plan and authorize the construction of a spur railroad line or a transfer facility. The BLM must recognize and acknowledge in its portion of the DEIS that the purpose of the rail line or transfer facility is for the transportation and storage of high-level nuclear waste. BLM must consider all of the facts about this transfer and storage of high-level nuclear waste. Most importantly, BLM is specifically required by law to consider these facts in the light of consistency and inconsistency with state plans, policies, and programs.

The Grand Staircase-Escalante National Monument DEIS contained an entire section devoted to a discussion of consistency/inconsistency with state law, plans and programs. The DEIS for the proposed waste pile does not even mention the idea of consistency/inconsistency. The state will exercise, to the maximum extent, its right under federal law to consistency review. The state expects that BLM personnel, at the highest level, will participate with the Governor in this review at the earliest date.

Specifically, among other things, the BLM's portion of the DEIS does not address inconsistencies with state law, programs or policies related to siting of high level nuclear waste, the allocation of liability among corporations and the equity interest owners in those corporations, railroad crossings and studies related to Wild and Scenic River studies.

State law, Utah Code section 19-3-301 et. seq., contains the requirements for siting of high-level nuclear waste in Utah. Section 19-3-318 concerns the allocation of liability within corporations or other organizations and equity interest owners in those corporations. The BLM must consider the effects of these laws on the proposal, and indicate before any final decision, in coordinated action with the governor of Utah, how the proposed action may be inconsistent with state law, and what can be done about it. For example, because PFS is no longer a limited liability corporation pursuant to Section 19-3-318, has the BLM considered that an accident or other nuclear incident on the rail spur (which is on BLM land) may cause the federal taxpayers to bear the burden of clean-up? Alternatively, has the BLM considered that the equity interest owners are not aware that they may be personally liable for such an incident?

Section 54-4-15 of the Utah Code requires the permission of the state for the construction of a rail grade crossing across a public highway. This permission also requires the concurrence of the governor and legislature. Several public roads will be crossed by the proposed rail spur. These are roads owned by the state, some of which may have been granted by the federal government to the state pursuant to R.S. 2477. The BLM has not considered the effect of this law at all, nor the effects of inconsistency with this state law.

The BLM, the Forest Service, the National Park Service, and the State of Utah entered into an MOU in December of 1997. The MOU envisioned that Wild and Scenic River studies would

happen in a cooperative basis, and on a regional basis. Studies were coordinated in the Virgin River Basin, and in the Grand Staircase-Escalante National Monument. The DEIS contains conclusions about Wild and Scenic River eligibility which were made outside this process. The BLM conclusions are inconsistent with this cooperative MOU.

BLM also needs to consider its own requirements. The current BLM Pony Express RMP specifically requires that "public lands will not be made available for inappropriate uses such as storage or uses of hazardous materials (munitions, fuel, chemicals, etc.) And live artillery firing" The DEIS includes no specific justification or evaluation to support changing that prohibition. However, the rail spur cannot be constructed and operated under this restriction. The proposed action, as discussed in the DEIS is based in part on a specific finding of the "absence of significant conflicts with existing resource management plans or land use plans." Obviously, that finding cannot be supported.

The criteria for BLM's evaluation of the proposal, as listed on page 1-15 of the DEIS, are extremely limited. BLM is also obligated to consider other BLM-specific issues such as: the possibility that BLM lands will be contaminated as a result of PFS activities; the absence of a responsible party with respect to any such contamination; the potential for an increase in wildfires, especially after the worst wildfire season in history on rangelands as well as forests, and the adequacy of local firefighting forces. On this, it is important to note that one state legislator has remarked that all the firefighters who responded at Chernobyl died. See also Comment B.23.

There is also no indication of how BLM will comply with the requirement of the Federal Land Policy and Management Act that BLM is required to get fair market value for the use of its right of way. As evidenced by the payments that the Skull Valley Band will get (undisclosed but known to be very large, much greater than grazing fees), the market value for property that is to be used to handle extremely hazardous materials is much greater than the market value for land used for grazing cattle. This is particularly true when the party conveying an interest also retains interests in that or adjacent property, as is the case here.

The mission statement for BLM indicates that it seeks to sustain the health, diversity, and productivity of the land for use and enjoyment of present and future generations. The State of Utah requests that BLM take an independent, unbiased look at this DEIS, this process, and this project. We believe that with an unbiased look, BLM will conclude that it is not possible to make the changes proposed in this DEIS and still meet those mission objectives.

4. Proposed action and process violates BIA statutory authority.

The Secretary of Interior, through the Bureau of Indian Affairs, is required to approve PFS's lease with the Skull Valley Band of the Goshutes. Before 1970, it was acknowledged that the BIA's primary purpose in exercising that authority was to preserve the Indian land base for the furtherance of Indian culture and values. See Felix S. Cohen, Handbook of Federal Indian Law,

§ B, at 508-509 (1982 ed.).

In 1970, however, the Indian leasing statute was amended by Public Law Number 91-275, which considerably broadened the list of factors that the Secretary must satisfy himself have been considered before approving a lease. The language of the amendment is as follows:

Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

Pub. L. No. 91-275, §§ 1, 2, 84 Stat. 303 (codified as amended at 25 U.S.C. § 415(a)(1993)) (Add. at 15). The Senate Report, issued in connection with the approval of this amendment, is instructive with respect to its purpose:

While it is not the intention of the committee to unduly burden development plans for Indian lands, the committee and the Department of the Interior have an obligation to protect the public interest and safety.

S. Rep. No. 91-832 (1970), reprinted in 1970 U.S.C.C.A.N. 3245 (Add. at 16).

The requirement in the 1970 amendment that environmental factors be considered by the Secretary in approving leases of tribal lands, led to a decision by this Court that the requirements of NEPA are triggered by the Secretary's action in approving Indian leases. In Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), the Court held that Secretarial approval of a long-term lease would be likely to have a significant impact on the human environment and thus constituted "major federal action" which required the preparation of an EIS. See Id. at 598. The Court held specifically that the purpose of the 1970 amendment to § 415(a) was to reaffirm "congressional intent that environmental considerations are to play a factor in any Bureau of Indian Affairs decisions." Id.

This DEIS cannot satisfy the requirements of 25 U.S.C. § 415(a). As these comments have made clear, there can be no expectation that nuclear waste will be removed from the facility at the end of the lease period, clearly a very negative impact on the environment.

Moreover, the consequences of an accident at the facility could be staggering, far more than the amounts of insurance to which PFS's liability is limited under the proposed lease. As PFS claims to be a limited liability company, the Skull Valley Band and affected individuals would not have much recourse in any event. This lack of financial resources could have large and

negative impacts on the environment that must be considered; these impacts are not discussed in the DEIS.

PFS's lack of financial resources means that the lease is also not in the best interest of the Band; the BIA will fail to meet its trust responsibility if it approves this flawed lease.

There is also no indication that there will be adequate police and fire protection and other services, as is required by statute.

The BIA has so narrowly defined the scope of its review in the DEIS that it has failed to meet its trust responsibilities. On DEIS, p. 1-15, BIA states that "[a]s part of its government-to-government relationship with the Skull Valley Band, BIA's NEPA review is limited to the scope of the proposed lease negotiated between the parties, not evaluation of actions outside the lease (e.g., ultimate disposition of the SNF)." BIA cannot wish away this part of its trust responsibility. Ultimate disposition of nuclear waste is central to the question of whether the Indian land base will be preserved for the long term.

5. The cost benefit analysis is not impartial, but is one-sided, weighted heavily in favor of the PFS facility, and fails to consider many important negative impacts.

a. Cost benefit analysis is biased in favor of approving the project

As described throughout these comments, the DEIS makes numerous errors in its cost/benefit analysis, and nearly every error skews the analysis to PFS's favor. If NRC's cost/benefit analyses were correct, there would not be a community in this country that would not welcome this facility. It is not correct, and accordingly every community other than the Skull Valley Band of Goshutes that has considered such a facility has rejected it. The Band has set a price for siting this facility – a price that has been kept secret throughout these proceedings. If this project is approved, they will receive their price, but all of Utah and the rest of the nation will pay the cost.

Costs to reactor companies and reactor communities should not be weighted more heavily than the costs to Utah communities, as they have been in the DEIS. The DEIS states major benefits of building the PFS facility include ensuring ongoing nuclear power output and potentially reducing nuclear waste storage costs for specific reactor companies. Utah generates an excess of electricity, which it exports. Utahns do not require or rely on the supply of nuclear power. Thus, Utahns will not benefit from ongoing nuclear power or the reduction in nuclear power costs. However, if the facility is approved, built, and operated, Utahns will 1) bear the risks of transporting an enormous volume of nuclear waste throughout the State, 2) bear risks associated with storage as neighboring communities, 3) bear negative economic impacts, 4) lose use of public lands and enjoyment of wildlife and recreation in Skull Valley, 5) bear the costs of training emergency responders and medical personnel, and 6) continue to bear, in addition, the costs of Utah's own power production externalities, including costs associated with air pollution.

b. The DEIS does not even recognize, much less analyze, significant impacts on HAFB and the Utah economy

Congress recognized, in its 1999 National Defense Authorization Act, the potential for conflict between possible uses of federal land and the important goal of preserving the Utah Test and Training Range. This DEIS, in contrast, does not even recognize that potential, much less describe any possible conflict or its economic and other impacts.

If an objective analysis had been done, it would have been clear that there would be substantial negative impacts to military training, military readiness, and Utah's economy. The DEIS must consider the effects to The Utah Test and Training Range and the operations of Hill Air Force Base. This is much more than an examination of the relative risk of a crash. Moreover, the State alerted NRC and the other cooperating agencies of these concerns in its supplemental scoping comments dated May 27, 1999. Thus, there is no excuse for the agencies to have ignored analyzing in the DEIS an issue of both national military significance and State economic importance. The storage facility and proposed rail spur in Skull Valley are located under a military operating area (MOA) and next to the Utah Test and Training Range (UTTR) land and Dugway Proving Ground. Numerous military flights, military exercises and weapons tests are conducted in the MOA over the proposed storage facility and rail spur. Use of the MOA is critical to the value of the UTTR to Hill Air Force Base because it offers an ingress route that is irreplaceable. Hill Air Force Base considers the use of the military operating area essential to training and national security.

The UTTR-Dugway Proving Ground is the largest overland military training land mass in the continental United States. The Air Force, in part, credits its success during Desert Storm and its overall military readiness to its ability to train at the UTTR. Because of military and public concern about the potential for extremely serious accidents involving the nuclear waste facility, the military would curtail its training in the military operating area. This would result in a loss of military readiness.

Impacts from curtaining military training because of the presence of the PFS facility would create adverse socioeconomic impacts to Hill Air Force Base, the Utah Test and Training Range, the Utah economy and the State and local communities. In order to avoid potential liability the military will be forced to voluntarily restrict or eliminate military training and weapons testing activities requiring currently authorized access through the Military Operating Area (MOA) over the proposed PFS site. In fact, the commander of a fighter wing, or arm of the military conducting a test of experimental aircraft or pilotless craft in the test range cannot afford even the slightest chance of a crash into the PFS facility or PFS transportation vehicle. The only relevant statistic to them is zero chance of impact. Thus, the effect of the current proposal to transport and store extremely dangerous high-level nuclear waste in above ground storage, under an active MOA, requires the military to place large portions of the UTTR off-limits to flight.

Without full use of UTTR, Hill AFB is at much greater risk during any future review

under the Base Closure and Realignment Act. Socioeconomic consequences that may ensue if the viability Hill AFB is threatened. Hill AFB employs a total of 21,077 positions (11,628 civilians, 4,619 military personnel, 1,112 reservists and 3,718 contractors) and is Utah's largest basic employer. The State estimates that 12,351 additional jobs are attributable to the operation of the base and new contracts and other realignments are expected to create about 3,000 additional new jobs in the next few years. State and local communities may experience a loss in tax revenue and direct and indirect socioeconomic impacts from the loss of Hill AFB will affect the entire State, including Davis, Weber, Morgan and Salt Lake counties. Further information is provided in Attachment 8, Utah Contention KK.

c. The DEIS includes local economic development benefits in Tooele County in its cost benefit analysis without including the parallel local economic development impacts in the communities around the reactors in the no-action scenario

The DEIS presentation in Chapters 8 and 9 is defective in that it counts as part of net benefits the economic development impacts in Tooele County of constructing and operating the PFS facility, while ignoring the corresponding benefits to the parallel communities in the No-Action alternative.

On DEIS, p. 8-10 the DEIS states "Benefits and costs are considered from a *societal perspective*." Given that the agency actions being considered in this proceeding are the actions of national regulatory bodies including the NRC, it is inappropriate to count as a benefit lease revenues, jobs, and economic activity in the Tooele County area when considering the benefits of the PFS alternative, but then not to consider the same very substantial parallel benefits as to jobs and economic activity in the alternative no-action scenario for onsite ISFSIs. See DEIS, p. 8-10 and 9-9.

As the DEIS has noted (DEIS, p. 1-7) there are a large number of on-site ISFSIs already operational, and even more in the works. These constitute the core of the No-Action Alternative. Construction and operation of these facilities – many of which may also hire Native Americans – will produce substantial benefits in jobs and incomes in the communities where they are built. It is a serious error in methodology and unreasonable not to reflect these parallel benefits.

Finally, to compound the problem, the DEIS lists as one of their four major points in recommending PFS over the alternatives the economic benefits for the Tooele County area. (DEIS, p. 9-13). The DEIS relies explicitly on a flawed analysis for its conclusion to prefer the PFS alternative. It is unacceptable to reach such a conclusion when the agencies have refused to consider the benefits of the alternative.

d. Failure to consider costs to communities from transportation

The DEIS fails to consider the infrastructure costs to communities along the transportation

routes. Unlike federal shipments, private shipments of spent fuel do not require any funding for assessment of emergency response needs, local emergency response training, equipment for radioactive incidents, or additional training for medical personnel. Responsible communities will have to make these expenditures anyway; those costs must be considered in an objective analysis.

e. Stigma

The economic impact from real and perceived risks must be evaluated. There is significant evidence that Utah will suffer economically from the stigma, as such large volumes of high level nuclear waste will be transported through the state and along the Wasatch Front and be stored close by. This is likely to result in a decrease in property values, and a decrease in tourism, two significant costs, neither of which have been evaluated in this DEIS.

f. Some of the items identified as “costs” for the no action alternative are actually policy choices and should not be analyzed as costs in the DEIS.

The DEIS indicates that some nuclear reactors are or will be prohibited by local policies from storing additional nuclear wastes such that the facilities may be forced to shut down. Prohibitions on storing additional waste are policy choices made by local citizens, made with awareness of the cost and power-related consequences. It is arbitrary and capricious to consider the natural consequences of these choices to be costs that will be used to justify the PFS facility.

g. The DEIS’s description of the PFS members and their nuclear facilities is outdated

The Staff has concluded that the level of net benefits generated by the PFS facility is directly proportional to the spent nuclear fuel which passes through the facility. It is not unreasonable to assume that the primary source of customers, at least in the first instance, will be PFS members, since they have been the driving force behind PFS and they are all utilities with nuclear plants. In these circumstances it is unreasonable for the agencies not to reflect the substantial changes and pending changes in PFS member utilities (*e.g.* Illinois Power, GPU and Florida Power), and the impact of ownership changes on the location of member reactors, spent nuclear fuel, and timing questions on PFS’ net benefits relative to the No-Action alternative, especially at low levels of throughput.

h. The number of actual reactors which may reasonably provide a market for PFS should be reviewed. If PFS is not viable at the level of demand that may reasonably be forthcoming in the relevant period, there will be no benefits to even those reactors that might send spent nuclear fuel

i. Net benefits and market for spent fuel storage

The DEIS is clear that the net benefits of the PFS facility are directly proportional to the amount of the market for spent nuclear fuel storage that it will attract. (e.g., DEIS at p. 8-9). The marketability of PFS has not been proven. To date, PFS has not disclosed whether any customers have signed up to store fuel at the PFS site. Furthermore, since filing its license application with the NRC the number of PFS members has been declining and thus there is a declining number of member companies who may store fuel at PFS. In addition, the DEIS tells us that the utilities have licensed 15 ISFSIs and have another 15 or 20 in the works (DEIS, p. 1-7). Also, other transshipment options have been implemented and continue to be utilized by utilities. Thus, there is no recognized market for spent fuel storage at the PFS facility which invalidates the DEIS's claimed net benefits from the PFS ISFSI alternative.

ii. Viability and timing

The potential net benefits of PFS relative to the alternatives depend upon a number of factors. Of critical significance is the timing of PFS relative to the needs of its potential customers, to the availability of the permanent repository and other alternatives, and to the 20-year life of PFS at issue in this DEIS.

For example, were PFS to come on line in 2003, and only be able to accept a limited amount of spent nuclear fuel each year, and were the permanent repository to come on line in 2010 with a policy of accepting spent nuclear fuel from decommissioned or decommissioning reactors on a priority basis, and if PFS had to get all its spent nuclear fuel off-site before the expiration of its 20 year license in 2021, then PFS's market share might well be so small that it would not be a viable operation. If under these circumstances PFS is not viable no benefits would accrue because it cannot be assumed that PFS would in fact operate even if NRC granted it a license.

The DEIS analysis is unreasonable in that it ignores or assumes away these very real timing issues. Chapter 8 needs to be rewritten to reflect timing factors in the net benefits of the PFS, Wyoming, and No-Action alternatives. At the heart of PFS's proposal is "interim" storage. Interim spent nuclear fuel storage is in essence a timing issue. Net benefits depend on timing, yet other than the 2010 versus 2015 scenarios for "Yucca Mountain" (but not 2025), the Staff has completely disregarded timing as a major variable – the timing of PFS, and of reactor need given the alternatives, and the timing of a competing facility, all are assumed fixed, or are ignored altogether. This is especially unreasonable because the NRC itself has assumed that a permanent facility would only be available by 2025. (55 FR 38502, September 18, 1990.)

j. The DEIS assumption that the no-action alternative will require long term storage in pools is arbitrary and capricious.

The DEIS recognizes that the industry is moving rapidly towards the construction of onsite ISFSIs. Fifteen ISFSIs already exist and 15 to 20 more are planned. Some reactors will cease operations before 2002 and will not require expensive in-pool cooling, but can rely instead on less costly local ISFSI's. In the case of Trojan, for example, Portland General Electric has,

during the pendency of the PFS application, elected to decommission Trojan by closing the pool and placing all its spent nuclear fuel in a new on-site ISFSI. Transfer of spent nuclear fuel from storage pools to onsite ISFSIs or local centralized intra-utility facility can be done after five years of cooling. There is no reason to assume that the expensive pools and the reactor systems required to support them need to be kept open beyond the five year cooling period for the youngest fuel.

From the foregoing it can reasonably be concluded that NRC has evaluated the wrong no action alternative to the PFS facility. The appropriate no action comparison to the PFS facility is on-site ISFSI storage, using five year or older cooled fuel and without a supporting spent fuel storage pool. The DEIS's assumption that the alternative to PFS is onsite pools because they are cheaper than onsite or local centralized ISFSIs is faulty and mischaracterizes the most economical no-action alternative. Significantly, it is unreasonable to assume that a pool will have to be kept open at reactor sites after all the spent nuclear fuel has been transferred to an onsite ISFSI, given that the NRC staff does not intend to require a pool at the PFS site.

Another aspect that the DEIS overlooks is that on-site ISFSI's are easy to license and comparatively cheap to maintain. There is no reason to assume that nuclear reactor shutdown is a necessary consequence of the no action alternative. Accordingly, the analysis in the DEIS, Chapter 8 (e.g., DEIS, pp. 8-5 and 8-6) is deficient and must be revised to delete the costs of maintaining backup pools after the spent nuclear fuel has been transferred either to an onsite ISFSI or to a local central offsite facility through transshipment. This in turn will require a re-analysis of the correct and most comparable no action alternative. To do otherwise is unreasonable and introduces a sharp bias in favor of the PFS facility and against the No-Action alternative.

k. Deletion of the "Small Throughput" scenario when this is one of PFS' central scenarios, and when the first license condition focuses on it, is arbitrary and capricious

Calculations for the storage costs without the PFS facility, the storage costs with the PFS facility, and the cost of the PFS facility for Scenario I, II, III and IV (Table 8-2, DEIS, p. 8.6) leaves out a most relevant scenario. Staff claim that it "makes no judgment about the comparative likelihood" (DEIS, p. 8-1) of the various scenarios and yet eliminates one of the most useful and probable scenarios, the Small Throughput Scenario, *i.e.* a capacity of 6,600 or 8,000 MTU and spent nuclear fuel throughput of 12,565 MTU from PFS member utilities only, DEIS at 8-1. To comply with NEPA, the benefits and costs created by the small throughput scenario must be included in Table 8-2 and 8-3.

The DEIS' Benefit/Cost chapter, at DEIS pp. 8-1 and 8-2, deletes from consideration the Small Throughput" scenario for PFS. The NRC Staff's only apparent reason for the deletion is that as a result of NRC's confidential evaluation of PFS financial qualifications "a license condition has been proposed that would require PFS to have service agreement providing for long-term storage

of SNF in excess of the 8,000 capacity scenario.” DEIS at 8-2. From this statement the NRC Staff concludes that it may eliminate the Small Throughput Scenario. The NRC Staff has kept the volume capacity under proposed license condition confidential. It is grossly unfair to the public and a violation of NEPA to fail to analyze either the volume amount under the proposed license condition or under the small throughput scenario. The next largest scenario is four to five times as large as the small throughput scenario and skews the preferred alternative analysis in favor of PFS.

The Staff has conceded that the viability of the PFS facility is very sensitive to quantity throughput. Furthermore, it is uncertain whether PFS may be able to attract sufficient storage customers to be viable for a small volume facility (see Marketing comments above) Thus, it is unwarranted and arbitrary and capricious to eliminate the small throughput scenario. Furthermore, it is almost certain that an analysis of the small throughput scenario or the volume amount under the proposed license condition would show that PFS is not the preferred alternative and sharply biases the DEIS’s conclusion in favor of the PFS alternative when compared to the No Action (on-site storage) Alternative. The DEIS should be rewritten to include an analysis of a small throughput scenario based on the volume capacity under the proposed license condition. To do otherwise is unreasonable.

l. The DEIS fails to reflect the fact that this proceeding is for a 20-year license

On DEIS, p. xxix the Staff is clear what action this DEIS is concerned with:

“NRC’s action is to grant or deny a *20-year license* to PFS to receive, transfer, and process spent nuclear fuel on the Reservation.”

DEIS xxix. (Emphasis added).

It is inappropriate to consider costs or benefits other than for the action being reviewed. Thus, the cost benefit analysis in Chapter 8 is altogether misconceived in that it is based on Supko’s and the agency staffs’ assumption that the facility will be a 40 year facility. Not only does the DEIS base its analysis solely on a 40 year accumulation of net benefits, but even in its sensitivity analysis it doesn’t provide a 20 year scenario. Chapter 8 needs to be redone to reflect the fact that the action here being considered is for a 20 year license. There is the possibility of a subsequent 20 year license, but that license is not at issue here, nor is it automatic. Moreover, any subsequent license issuance would depend on data not available in this proceeding.

m. The DEIS fails to mention, much less consider, the impact of a second off-site ISFSI to the PFS alternative

The DEIS analyses ignore the fact that there may be a second off-site ISFSI proposal that may have an impact on the net benefits from of the PFS facility. NRC has stated:

In addition, the NRC is reviewing an application for an away-from-reactor Independent Spent Fuel Storage Installation (ISFSI), and a second application is expected in fiscal year 2000.

64 FR 68007 (December 6, 1999). NRC, *Status Report on the Review of the Waste Confidence Decision* (Emphasis added).

The DEIS emphasizes at a number of points that the viability of the PFS facility, vis-a-vis the alternatives, depends on the quantity of spent nuclear fuel shipped to it:

From an economic perspective, the net benefit of the proposed PFS FACILITY is directly proportional to the quantity of SNF shipped to the facility.

DEIS, p. 8-9. In light of this, it is arbitrary and capricious to ignore in this DEIS what the NRC announced in its Waste Confidence Decision Review only last December. If, in fact, NRC no longer contemplates a second off-site license application, the DEIS should clearly state that fact. The DEIS needs to be revised to reflect whether there is a competing off-site ISFSI and, if so, to describe its impact on the PFS proposal.

n. Transshipment of spent nuclear fuel between reactors has been ignored in the discussion of the on-site storage alternative

The Staff has ignored the obvious probability (and current reality) of shipments of spent nuclear fuel between facilities owned or controlled by the same utility. Thus, if a utility has several reactors and one on-site ISFSI (or other available storage facility) all in the same general area but not on the same site, there is no apparent reason why the NRC would not allow the utility to store spent nuclear fuel from some or all of its reactors at a common site. The NRC has already held that ISFSIs are, as a general matter safe, and has allowed transportation of spent nuclear fuel from commercial reactors to away-from-reactor spent nuclear fuel storage facilities in the past, for instance at Hatch, with spent nuclear fuel transfers from Brunswick and Robinson.¹

Failure to consider the possibility of intra-utility transshipment of spent nuclear fuel, given its current authorized use, sharply biases the DEIS toward the PFS and against the no-action alternative. This is clearly arbitrary and capricious, especially in light of the fact that the Staff concedes that the industry is in the middle of a building boom of local ISFSIs:

As of January 2000, there were 15 ISFSIs operating in the U.S., and approximately 15 to 20 additional ISFSIs are proposed in the near term.”

DEIS, p. 1-7.

¹ See, for example, the ASLAB ruling in *Carolina Light and Power et al (Shearon Harris)*, 23 NRC 525 (1988), May 29, 1986.

The agency staffs need to redo Chapters 8 and 9 to reflect the economics of intra-utility multi-site storage sharing.

- o. The DEIS's assumption that deliveries to the geologic repository will be based on the Oldest Fuel First (OFF) Principle is incorrect**

The Staff's conclusion that the PFS facility is a superior alternative is based in significant part on its assertion that some utilities would have to delay decommissioning of closed reactors for years due to their poor position in the DOE's priority ranking queue for the geological repository. The Staff's assertion is based on the faulty assumption that all movements of spent nuclear fuel from commercial reactors to the geologic repository are governed by an "oldest fuel first" priority system:

"(E)ven after the permanent repository is complete and begins to accept SNF, it would be able to take only a limited amount of fuel in any given year. PFS assumed that DOE would accept the oldest fuel first (OFF) at the permanent repository. This assumption is used for all shipments bound for the repository."

DEIS, p. 8-3.

The problem with this assumption is that it is both factually incorrect and unreasonable. What determines the priority ranking for fuel shipments into the geologic repository is the Standard Contract between the utilities and DOE contained in 10 CFR 961.11. This contract has three provisions of interest in the current context:

- Article IV(B)(5) sets forth a general statement that the priority for fuel deliveries to the geologic repository will be based on the relative age of the utilities' spent nuclear fuel²;
- Article IV(E) provides, however, that utilities may trade their priority rankings within the OFF queue. This provision allows the creation of a market where a utility with old fuel but no shortage of space could contract with another utility with young fuel and a space problem to allow the younger fuel to be sent first; and,
- Article VI(B)(1)(b) provides:

Notwithstanding the age of the SNF . . . , priority may be accorded

² This does not mean that the utility has to actually deliver the oldest fuel first, but only that the number of MTUs it is entitled to send from any of its storage sites year by year is based on the age structure of its spent nuclear fuel overall relative to other utilities. As a practical matter, any particular utility might wind up sending younger fuel from a space-short reactor, rather than its oldest fuel.

any SNF . . . removed from a civilian nuclear power reactor that has reached the end of its useful life or has been shut down permanently for whatever reason.

10 CFR §§961.11.

Given these provisions of the Standard Contract, it is clearly arbitrary and capricious for the agency staffs to conclude (e.g. at DEIS, p. 8-11, last paragraph) that a major benefit of the PFS facility is that it will solve the spent nuclear fuel storage problem for utilities with plants awaiting decommissioning and unfavorable OFF queue positions problem. The DEIS fails to document that such a problem exists as a practical matter and it hasn't addressed the on point provisions of the Standard Contract (especially Article VI(B)(1)(b)) which appear to deal with the issue and provide a resolution.

The agencies should revise their analysis underlying Chapter 8 of the DEIS in light of the provisions of the Standard Contract cited above.

- p. The DEIS analysis of transport-related costs and risks is defective in that it assumes that the geologic repository will be at Yucca mountain, contrary to the NRC's explicitly articulated position in the Waste Confidence Decision**

The DEIS, for the purposes of its comparative transportation analysis of the PFS facility versus the Wyoming or No-Action Alternatives, has assumed Yucca Mountain will be the geologic repository. DEIS, p. 5-39, lines 41-46. Yet given the NRC's clear statement in its 1990 Waste Confidence Review Decision³, Yucca Mountain is *not* to be assumed to be the location of the geologic facility:

In order to obtain a conservative upper bound on the timing of the repository availability, the Commission has made the assumption that the Yucca Mountain site will be found to be *unsuitable*. If DOE were authorized to initiate site screening for a repository at a different site in the year 2000, the Commission believes it reasonable to expect that a repository would be available by the year 2025."

NRC, Waste Confidence Review, 55 FR 38505 (September 18, 1990)(emphasis added).

Moreover, since most of the nation's commercial reactors are located to the east of Utah (DEIS, p. 5-1), and closer to the alternative site in Wyoming (Map, DEIS, p. 5-41), it is quite possible that a permanent repository site other than at Yucca would enhance the transportation benefits of the Wyoming site in relation to the Goshute site.

³ Affirmed without change in its December 6, 1999 review. 64 FR 68005 et seq.

In light of the explicit determination made by the NRC in its Waste Confidence Decision, it is arbitrary and capricious for the agency staff to contradict the Nuclear Regulatory Commission and assume that for the purposes of the DEIS, Yucca is not only "a" possibility to consider, but the "only" possibility it would consider. This assumption is integral to the DEIS's analysis of both the PFS and Wyoming alternatives and its conclusion that the Wyoming Alternative is not "obviously superior." (DEIS xli).

The agencies should revise the analysis without the assumption that Yucca Mountain is the site of the geologic repository. At the very least, the agencies should consider another site, either a specific site or a composite location, and provide a full sensitivity analysis.⁴

q. The DEIS fails to reflect the regulatory costs and bonding requirements applicable to PFS as set forth in the Utah Radiation Control Act

The Utah Radiation Control Act establishes substantial regulatory fees and bonding requirements for the class of facilities which includes PFS. See, for example, Utah Code Ann. §§ 19-3-308 (application fees) and 19-3-306(10) (bond requirement). Since these amounts are significant, it is unreasonable to ignore them when calculating the costs of the PFS facility.

The agencies should revise their analysis to reflect these requirements or explain why they should not be included.

r. Benefits to the Skull Valley Band of Goshutes must be disclosed

PFS's request for right-of-way across public lands and BIA's approval of the lease between Skull Valley Band of Goshutes are major federal actions. In weighing the costs and benefits, the DEIS claims substantial benefits will be derived by the Skull Valley Band of Goshutes. The economic terms and conditions of the deal between PFS and the Skull Valley Band are contained in the lease, which has been conditionally approved by BIA. Neither the parties to the lease nor BIA will release a full copy of the lease. In order to determine the appropriateness of the federal decisions as well as the full cost and benefits of the PFS proposal, the terms of the lease, including lease payments to the Skull Valley Band must be publicly disclosed. Without such disclosure the public and governmental officials not privy to the lease are deprived of evaluating the DEIS's claimed benefits to the Band.

s. The assumptions of the expected production of spent nuclear fuel are wrong

⁴ As it did by choosing the Maine Yankee location as the composite location of the nation's reactors for the purpose of its incoming spent nuclear fuel shipping analysis. It would be easy to take some centralized major rail center as the composite location and re-run the staff tables with the new location. The task is too simple not to be reasonable to do.

In calculating the expected production of spent nuclear fuel, no credence is given to unreliability experienced with respect to some U.S. nuclear reactors. There is no sensitivity analysis comparing anything other than each reactor completing a 40-year operating life with an 80 percent capacity factor.

Several plants owned by member utilities have not produced electricity over a significant period of time. Cook unit 1 has been off-line for three years (9/97). Indian Point 2 has not produced power since February 15th of this year. Cook 2 and Clinton were down for a considerable period of time in the late 1990s. In addition, Millstone 2 and LaSalle 2, plants owned by other electric producers, also were down for periods of time extending into years.

Many reactors have been retired well before their 40 year expected life, including three plants owned by member utilities: LaCrosse, Indian Point 1 and San Onofre 1. Furthermore, a number of researchers have estimated that several operating US reactors will retire early from service.

These predictable changes will mean less nuclear waste will be generated, and the need for this facility will be correspondingly less. The DEIS should be revised to reflect this reality.

t. Costs of spent nuclear fuel storage wrong

The assumption which is reflected in Table 8-2 and 8-3, DEIS at p. 8-5 that PFS FACILITY has a 30 percent cost advantage for overpacks and canisters is unusually biased in favor of PFS FACILITY. The DEIS, at the very least, should incorporate equal costs for overpacks and canisters in the sensitivity analysis in Table 8-3.

u. Costs associated with facility are time-sensitive; potential for delay not analyzed.

Many of the net benefits of PFS described in Table 8.3 of the DEIS turn negative if the PFS facility is delayed by only two years.⁵ The DEIS describes a "detailed chain of logic" (DEIS, p. 8-2) which leads from the ERI April 2000 report⁶ to the figures in Table 8.2 and 8.3. We assume

⁵ This is true even allowing PFS's assumptions we find unusually biased in favor of PFS facility, e.g. PFS facility is given a 30 percent cost advantage for overpacks and canisters, and the DEIS accepts the assumption that most nuclear power plants would continue to keep spent nuclear fuel in storage pools after the reactor is closed.

⁶ Energy Resources International, Inc., "Utility At-Reactor Spent Fuel Storage Costs For The Private Fuel Storage Facility Cost-Benefit Analysis Revision 2," April 2000. Within the last few days the State received a copy from PFS of the proprietary data supporting the ERI report, after entering into a Confidentiality and Non-Disclosure agreement with ERI. The State is in the process of analyzing the data and will submit separate proprietary DEIS comments at the beginning of next week. The State requests the agencies to accept these comments because the

the net benefits of the PFS facility accepting spent nuclear fuel in the years 2002 and 2003 in the ERI April 2000 report flow through this chain of logic into the overall net benefits of the PFS facility in the various scenarios in Table 8.2 and 8.3. If this is so, the net benefits shown in Table 8.2 and 8.3 would be greatly overstated if PFS FACILITY is not available to accept waste in these early years.

The proprietary ERI analysis shows that a delay in opening PFS facility could greatly reduce the net benefits. The DEIS does not adequately address these concerns. State comments based on the proprietary ERI analysis are attached separately and addressed only to the NRC Staff.

v. The DEIS's sensitivity analysis fails to analyze a number of reasonable and obvious scenarios

A defensible DEIS will have a well prepared sensitivity analysis. In this DEIS the sensitivity analysis is in Table 8-3 (DEIS, p. 8-8) and associated text. The sensitivity analysis needs to be redone to correct for all of the problems identified in these comments, including:

- The lack of a "small throughput" scenario;
- The re-specification of the analysis to reflect the benefits and costs limited to the costs and benefits of a 20-year PFS facility;
- The lack of the an analysis of the impact of a second away-from-reactor ISFSI competitor to PFS;
- The lack of an analysis of the impact of transshipment on the benefits and costs of PFS;
- The unreasonable \$8 million per year pool maintenance cost;
- The lack of timing scenarios of when PFS would come online relative to when a permanent geologic repository would come on line;
- The assumption in the transportation analysis that Yucca Mountain will be the site of the permanent repository; and
- The lack of a 2025 permanent repository scenario.

The sensitivity analysis as currently drawn is arbitrary and capricious for these reasons and must be redone.

timing of receipt of the data for the ERI report was beyond the State's control and the information was not otherwise available. Furthermore, evaluation of the ERI data by the State's experts is time-consuming and cannot be completed any more expeditiously than next week.

6. Failure to analyze incompatibility with surrounding military activities.

The PFS facility is incompatible with surrounding military activities. The PFS facility will be located east of the Utah Test and Training Range (UTTR) property and underneath the UTTR airspace designated as a military operating area. The activities approved in the airspace over the PFS storage facility include air-to-air training, low-altitude training, cruise-missile testing, and major military exercises. The main use of the Skull Valley airspace is to allow low- and medium-altitude entries of F-16s into the UTTR from Hill Air Force Base. The risk of aircraft crashes, including military aircraft, into the storage facility has not been evaluated at all in this DEIS. Although PFS has contended that the risk is insignificant, the State will demonstrate during the licensing proceeding that there is a significant risk that has not been evaluated in this DEIS.

Additionally, the military tests large footprint weapons, including cruise missiles, on the UTTR. Cruise-missile testing may last up to five hours, as the cruise missile follows a preplanned flight path through the UTTR airspace. Three cruise missiles have crashed since December 1997, including two outside of military property under the military operating area airspace. The risk of such crashes to a nuclear storage facility has not been evaluated at all.

See also Attachments 9, 10, and 11.

7. Failure to include the Department of Defense as a consulting agency.

The Department of Defense, and specifically the U.S. Air Force and the U.S. Army and their installations, have a clear interest in, impact on, and consequence from the proposed facility and transportation corridor. Congress clearly felt that was the case when it passed the 1999 National Defense Authorization Act, discussed above in Part A.3. The military's interest in the area is so significant that the Department of Defense should have been added as a cooperating agency in this process. In this DEIS process, however, there is no indication that the Army and Air Force have even been consulted.

8. Analysis of alternatives does not meet the requirements of NEPA, and implementing regulations

The DEIS has selected an appropriate "no action" alternative – leaving waste "near facility" at individual reactors until a permanent repository is ready – but it has not come close to giving it the fair analysis it deserves. The comparison should have come down to one between the fairly weak impacts from additional near facility storage – increased cost, additional easily obtained licensing of local ISFSIs, overcoming some physical limitations – and the potentially very substantial impacts from transporting nuclear waste throughout the country, as well as the substantial costs to the State of Utah described in Part B.5 of these comments. That comparison was not made.

If the DEIS had fairly made this comparison, it would have come to the same conclusion reached by the GAO in its 1991 report "Nuclear Waste Operating Monitored Retreivable Storage Facility Unlikely by 1998," GAO/RCED 91-194: there is sufficient on-site storage for waste, and that is where the waste should stay. The DEIS's failure to consider the GAO findings represents a serious oversight.

9. The DEIS does not demonstrate a need for the proposed facility.

The environmental review staff from the NRC, BIA, BLM, and STB have concluded that the benefits of the proposed facility outweigh the costs based in part on the supposed need for an alternative to at-reactor storage, and, for some facilities, for economical storage. DEIS, p. 9-13. The staff is simply wrong about the assumption of need for additional storage. The GAO Report described in Part B.8 clearly identifies adequate existing storage for spent nuclear fuel. Again, the GAO Report's findings should have been included in the discussion in the DEIS, and the findings utilized or specifically refuted with facts. In the limited case where space is not available and cannot be secured, the utility could build its own dry cask storage at the reactor site or contract with the US Department of Energy to manage waste fuel.

There may, in some cases, be local laws or local political pressure that prevent expansion of on-site or near-site storage. Those are choices that local communities have made; those communities have indicated by passing those laws that they are willing to live with the consequences, including shutting down of the facility. NRC and the cooperating agencies must not mistake these local choices for a need for additional storage space.

In addition, the action alternatives analyzed are not adequate. The second Skull Valley site is indistinguishable from the first, and is contiguous to it, and the Wyoming site is not even described and is clearly not taken seriously in the analysis.

The loss of full core offload capacity data, Table 1.1 is not sufficient to justify the need for the proposed facility. The DEIS fails to evaluate the impact of numerous other actions under consideration by individual PFS members and prospective customers, actions which, if taken, would extend the dates of loss of full core offload capacity. All of those actions are part of the No Action Alternative and should be evaluated.

Furthermore, the DEIS must identify the potential impacts of the No Action Alternative to the individual PFS participants and prospective customers. The DEIS fails to show how the individual members and participants will actually be impacted. It is not sufficient to describe impacts in terms of "broad observations about the nuclear power industry." DEIS, p. 6-41.

10. The DEIS does not support the need for such a large facility.

PFS has applied for a permit for a 40,000 MTU facility. The State of Utah does not believe this DEIS or the record in the proceeding before the NRC can support a conclusion that there is a

need for any facility at all. But even if the need for a facility is demonstrated, there is plainly no need for a facility of this size. There are approximately 40,000 MTUs of commercial high level nuclear waste in the entire country; much of this could continue to be stored on the site of the generating nuclear reactor. Obviously, the risks associated with the facility – particularly with transportation of fuel to the facility – will be smaller if the facility is smaller. This option has not been analyzed in the DEIS, and it should be in order to give the federal agencies an appropriate basis for their decisionmaking.

Furthermore, PFS's phased approach to construction is evidence that even PFS does not now see the need for a 40,000 MTU facility. The NRC should not license any facility larger than that for which PFS can demonstrate the need. It is unconscionable that NRC will consider issuing PFS a license so that PFS may canvas the nation for customers to store fuel at the PFS site. Each agency has cited need for the facility as a justification for its proposed action in this DEIS. In fact, no such need has been or can be demonstrated for a 40,000 MTU facility.

11. The DEIS fails to adequately address obvious safety and environmental concerns regarding the rail spur.

The proposed rail spur will cross numerous unpaved public roads between Low and the Reservation. These crossings will create a potential hazard to motorists. Under Section 2.1.1.3, New Rail Line, on page 2-14, the second to last paragraph states that there will be no need for active warning devices. We do not believe that this statement is correct. Under the Utah Code, the responsibility for approval and control of all at grade public crossings is assigned to the Utah Department of Transportation. Upon receipt of a formal request for a public crossing(s), a railroad surveillance would be performed by UDOT, following Federal Highway Administration (FHWA) guidelines. In the interest of public safety and concurrent with FHWA, it is our goal to reduce the number of at grade crossings by 25%. Where new crossings become necessary, the current practice is to require active warning devices. We will also need to know the exact routes to be taken by trains entering the State of Utah carrying spent fuels, in order to determine if any existing warning devices need to be upgraded.

12. Risks and costs of transportation are not adequately discussed.

The EIS does not adequately address the responsibilities and liabilities of PFS in the event of an incident. The proposed rail spur would begin in the vicinity of Interstate 80, which is the principal east-west highway corridor for the State of Utah and Wasatch Front. Closure of I-80 due to a spent fuel incident could create serious public safety and interstate commerce problems. Additionally, the proposed spur will cross numerous streams along the route. Again, the EIS does not adequately address the responsibilities and liabilities of PFS in the event of an incident. The questions of liability, cleanup, and routing of traffic need to be addressed.

The State has also included significant additional comments as Attachment 19.

13. Inappropriate reliance on the waste confidence decision means many significant impacts are not addressed.

Much of analysis in DEIS is based on the assumption that this is an interim facility. See e.g., 6-42. If this assumption had been objectively analyzed in the DEIS, it would not have survived. There is no way to ensure the nuclear waste will ever be removed from the site. The proposed permanent repository at Yucca Mountain, Nevada, is still undergoing extensive testing to determine whether the site is suitable for geologic disposal of high level nuclear waste. If construction of the Yucca Mountain site is determined to be not viable, then the contentious repository siting process will start over again, and the PFS site would almost certainly become a defacto permanent storage site.

If Yucca Mountain is built, there is still no certainty if or when all the high level nuclear waste stored at Skull Valley will be removed to Yucca Mountain. Current federal law limits Yucca Mountain's capacity for commercial high level nuclear waste to 63,000 MTUs, and capacity cannot be increased until a second repository is built. 42 U.S.C. § 10134(d). Currently, no second repository is even being considered, but DOE projects that more than 105,000 MTUs of commercial spent fuel will be generated. Draft Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste in Yucca Mountain, Nye County, Nevada, Volume I - Impact Analyses, July 1999, at 1-23. Thus, under current law over 40,000 MTUs (the amount potentially stored in Skull Valley) will not have a disposal place. Simple arithmetic makes it clear this repository will not be temporary.

Even if a permanent repository were to become available, DOE and the owners of the nuclear waste, not PFS, would determine what and when waste from PFS will go to any available permanent repository.

The DEIS relies on NRC's Waste Confidence Decision (55 Fed. Reg. 38474; Sept. 18, 1990)⁷ in support of its faulty assumption that the PFS facility will be temporary (DEIS, p. xxxii), but it provides no other support or basis for the assumption. The NRC's reliance on the Waste Confidence Decision in this context is misplaced because it flies in the face of the facts, as described above. But there is also no indication anywhere in any incarnation of the waste confidence rule that the Commission considered its confidence that waste would be moved off-site from an away-from-reactor ISFSI. The only consideration of an away-from-reactor ISFSI, in fact, leads to the opposite conclusion. The Commission cites this PFS application (although not by name) in further support of its Waste Confidence Decision. 64 Fed. Reg. 68005) In other words, other nuclear facilities may have confidence that they will not have to store waste for extended periods of time, because that waste will be coming to Utah to be stored. Clearly, this does not reflect an expectation on the part of the Commission that this facility is temporary. The Waste Confidence Decision should not be applied with respect to this facility at all.

⁷ Iterations of the Waste Confidence Decision are scattered in Federal Register notices, but the rule itself is in 10 C.F.R. § 51.23.

Even if the Waste Confidence Decision were intended to be applied to this away-from-reactor facility, however, it is not appropriate for the cooperating other agencies to use that rule to avoid doing their own analysis of the permanence of this facility. Those analyses need to be made in light of their own statutory and regulatory mandates and obligations. BIA, for example, is required to evaluate the effects of the environment from the use of leased lands. 25 U.S.C. § 415(a). This reflects a trustor's obligation to assure that the trustee's land will not be saddled with problems upon the lease's end. BIA must perform its own analysis to assure that is the case.

If there is no permanent repository for this waste at the end of the licensing period, as appears likely, the agencies will be faced with two choices. Either the facility will have to continue to store the waste indefinitely, or the waste will have to be returned to its owners. The latter choice may not be possible for facilities that are decommissioned. The consequences of both of these choices should have been analyzed in the DEIS and must be analyzed before any decision may be made which results in moving nuclear waste to Utah.

14. Mixed oxide fuel poses special storage and disposal problems that have not been addressed in this DEIS.

PFS has indicated that it intends to accept and store mixed oxide fuel at the facility. ER, at 1.2-8, Rev 6. However the certificate of compliance for the Holtec cask system that PFS proposes to use has not been approved for storage of mixed oxide fuel. In addition it is not clear, even if Yucca Mountain goes forward as a permanent repository for commercial nuclear waste and has room for other wastes from PFS, that it will accept mixed oxide fuel, thus making the PFS facility the de facto permanent storage facility for this fuel. Failure to consider this scenario is a serious omission in the DEIS.

15. Facility's lack of a contingency plan for spills, and a realistic closure plan means that there is a risk of contamination that has not been described.

In many cases, the NRC appears to have uncritically accepted PFS's assurance that it will "start clean, stay clean." DEIS, pp. 2-19, 2-25, 4-42. It has been the experience of the State of Utah as a regulator that, while some polluters intend to pollute, most do not. We do not take our regulated entities word that they will not spill or release contaminants, however. In most cases, we require management practices and controls to prevent spills, contingency plans to respond to them, and financial assurance to assure that problems are addressed. With minor exceptions, none of the commonsense regulatory mechanisms have been employed by NRC. As a consequence, the agencies can have no assurance that problems will be avoided or addressed at the PFS facility.

It should also be noted that the Surface Transportation Board requires there be contingency plans for spills in place, a requirement that has not been met by PFS in time for this public review.

16. Impacts of PFS's claimed limited financial responsibility and liability not described.

As the Governor stated in his September 20, 2000 letter introducing these comments, all federal agencies who assisted in the preparation of the DEIS should be aware that PFS does not enjoy limited liability under Utah law. However, PFS continues to claim limited liability.

The DEIS does not address PFS financial responsibility and liability to ensure impacts to the environment and human health will be minimized. PFS claims to be a limited liability company with no assets of its own. As a limited liability company, each member utility company that forms PFS would not be individually liable nor will its assets be individually at risk. If PFS does not have adequate financial resources to safely operate, the DEIS evaluation is meaningless.

NRC has not required PFS to submit detailed financial information. Prior to license issuance, NRC will *not* require PFS to demonstrate that it will likely be able to obtain sufficient funds to build, operate, and close the proposed facility. Instead, NRC will allow PFS to build the storage facility upon a showing that PFS has sufficient commitments, rather than actual funds in hand, to fund phased construction. In addition, NRC will allow PFS to operate if it has contract commitments, not funds, to cover costs of storing the volume of waste covered by PFS contracts.

Because NRC is deferring any financial evaluation, the BLM, BIA, and STB will be asked to make decisions before a financial analysis is completed. The environmental consequences that may flow from PFS's lack of a solid financial foundation cannot be assessed. Thus the BLM, BIA and STB will need to make an independent analysis of the environmental impacts associated with granting approval to a corporation that claims limited liability and with no assets for their respective federal actions.

NRC has a poor record of evaluating a licensee's financial reliability. NRC failed to ensure that a private company had adequate funds to cleanup the Atlas tailings contamination near the Colorado River. Atlas declared bankruptcy and, therefore, was not ultimately responsible for the necessary cleanup.

17. Dry cask technology presents risks not discussed.

The proposed canisters and casks have not been subjected to any full scale tests. Moreover, some casks in use today have had numerous problems, such as hairline fractures during manufacturing, an explosion due to a chemical reaction during loading of the casks, and cask-weld failures. Furthermore, as to the PFS site, there is no discussion of the very real risk of cask sliding and tip over that may occur as a result of an earthquake. See Attachments 12 and 13, regarding Utah Contention GG.

18. The risks and consequences of sabotage must be discussed.

Rather than evaluate them, the DEIS simply opines that the consequence of sabotage accidents would not be "unacceptably large." DEIS, p. 5-53. In order to assess impacts, the potential consequences of sabotage or terrorism while the spent fuel is in transportation and storage must

be determined. Consequences may be significant because new armor-piercing weapons are currently available that may easily penetrate the transportation casks.

19. Analysis of required federal and state permits is incorrect.

The Draft Environmental Impact Statement ("DEIS") does not list all permits, licenses, approvals and other entitlements which must be obtained in connection with the PFS ISFSI License Application (DEIS pp. 1-18 to 1-23). The State believes these permits should be referenced in the EIS. There are unlisted State permits and approvals for activities which are not on the reservation. There are also State requirements which apply to activities on the reservation which are also not listed. The Skull Valley Goshutes have no environmental regulations. The federal government, in many of the listed circumstances, does not have rules which cover the PFS activities. Because of this void in regulatory oversight, the State's interests are potentially directly affected; therefore, State approvals must be obtained and State requirements must be met to protect State interests.

NRC and this DEIS are primarily concerned with radiological pollution. Unless the State's jurisdiction is accepted as described below, there would be a void in regulation. This is particularly true for sources of pollution not regulated by the EPA, e.g., septic tanks, ground water.

a. State Jurisdiction on Skull Valley Reservation.

PFS has challenged the State's authority to enforce otherwise applicable state regulations because the proposed storage project will be located on the reservation of the Skull Valley Band of Goshute Indians, and has asserted that State law has no application to activities in "Indian Country." This is a simplistic and misleading statement of the pertinent law which recognizes State civil-regulatory authority in the case of some on-reservation activities, particularly where those activities have off-reservation effects.

State civil-regulatory authority over tribes and tribal members has been recognized in a variety of circumstances, including record keeping and collection responsibilities for state cigarette sales taxes (Washington v. Confederation Tribes of Colville Indian Reservation, 447 U.S. 134, 159-60, 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980) and Moe v. Confederated Salich and Kootenai Tribes, 425 U.S. 463, 482-83, 48 L.Ed.2d 96, 96 S.Ct. 1634 (1976)), state regulation of on-reservation liquor sales by tribal members for off-premises consumption (Rice v. Rehner, 463 U.S. 713, 732-33, 77 L.Ed.2d 961, 103 S.Ct. 3291 (1983)) and tribal member fishing practices (Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 53 L.Ed.2d 667, 97 S.Ct. 2616 (1977)).

Under the Supremacy Clause of the United States Constitution (Article VI, cl.2), state laws clearly in conflict with federal law or policy are preempted. However, federal

preemption of state law will not be lightly inferred.⁸ Preemption will only be found where there is express statutory language signaling an intent to preempt and the courts

infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law,...or where the state law at issue conflicts with federal law, either because it is impossible to comply with both...or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives[.]⁹

Where, as here, a variety of state, federal and tribal interests are involved, the Supreme Court has held that, “there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members.”¹⁰ and that what is needed is a, “particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether in the specific context, the exercise of state authority would violate federal law.”¹¹ In connection with such a preemption analysis, “any applicable regulatory interest of the state must be given weight.”¹²

In connection with the balancing of federal, tribal and state interests required to determine whether state civil-regulatory authority can be enforced on an Indian reservation, the courts have held that an important consideration is whether the on-reservation activity in question has potentially serious off-reservation effects. “A State’s regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention” New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336, 76 L.Ed.2d 611, 103 S.Ct. 2378 (1983); accord Rice v. Rehner, 463 U.S. 713, 724, 77 L.Ed.2d 961, 103 S.Ct. 3291 (1983).

State interest may also be greater where a third party locates a pollution source on tribal trust lands primarily to avoid State regulation. In the case of State of Washington v.

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International Paper Co. v. Ouellette, 479 U.S. 481, 491, 93 L.Ed.2d 883, 107 S.Ct. 805 (1987) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947).

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Northwest Central Pipeline Corp. v. State Corporation Comm’n, 489 U.S. 493, 509, 103 L.Ed.2d 509, 109 S.Ct. 1262 (1989); accord *English v. General Electric Co.*, 496 U.S. 72, 79, 110 L.Ed.2d 65, 110 S.Ct. 2270 (1990); *California Fed. Savings & Loan Ass’n v. Guerra*, 479 U.S. 272, 280-81, 93 L.Ed.2d 613, 107 S.Ct. 683 (1987); *Cotten Petroleum Co. v. New Mexico*, 490 U.S. 163 (1989).

¹⁰ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980).

¹¹ *Id* at 145.

¹² *Id* at 144.

Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980) the Court held that the state could tax on-reservation sales of cigarettes at tribal smokeshops to nonmembers who traveled to the shops to purchase cigarettes sold at a lower cost because state taxes were not being paid. The Court's reasoning was as follows:

We do not believe that principles of federal Indian law whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere. (Emphasis added). Id. at 155.

In the case of California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219-220, 94 L.Ed.2d 244, 107 S.Ct. 1083 (1987), the court recognized that state claims to jurisdiction are stronger where the tribe is primarily marketing an exemption from state laws.

In making the preemption analysis required in the instant case, several points are important to consider:

- (1) Even though comprehensive federal pollution control statutes have been enacted, the legislation gives states the right to adopt programs that parallel or exceed federal pollution standards. These provisions constitute a clear recognition by Congress that state authority in the area is not excluded. Specifically, Section 510 of the Federal Water Pollution Control Act recognizes the right of Utah to adopt and enforce water quality protections. 33 U.S.C. §1370. Similarly, the federal Clean Air Act, Section 116, retains Utah's authority over air pollution sources. 42 U.S.C. §7416.
- (2) Tribes have the right to seek authority to administer some federal pollution control programs, to adopt pollution standards, and to organize a regulatory capability of their own. However, the Skull Valley Band has taken none of these steps, and thus its interest in preserving self-government will not be a factor.
- (3) State interests are substantial – the potential sources of pollution are located very close to important off-reservation resources and the State has a direct interest in consistent, comprehensive regulation of resources within the State. The effectiveness of State programs could be undermined if less stringent federal standards are applied to tribal lands, and especially if potentially pollution-emitting sources are induced to locate within Indian reservations as a way of evading State regulations.

As has been amply demonstrated, the argument that pertinent State air quality and ground water regulations have no application because the proposed project is located on an Indian reservation is incorrect. In fact, the required preemption analysis leads inevitably to the conclusion that State law dealing with the vital matters of air and ground water has not been preempted and that it is enforceable.

b. State and Other Permits

(1) Water Quality

UCA § 19-5-107 provides that it is unlawful for any person to discharge a pollutant into waters of the state or to cause pollution which constitutes a menace to the public health and welfare, or is harmful to wildlife, fish or aquatic life, or impairs domestic, agricultural, industrial, recreational, or other beneficial uses of water, or to place or cause to be placed wastes in a location where there is probable cause to believe it will cause pollution. It is also unlawful, without first securing a permit from the Executive Secretary, to construct, install, modify, or operate any treatment works, the operation of which would probably result in a discharge. Treatment works includes disposal fields and lagoons under UCA § 19-5-102(15).

Surface waters in the Skull Valley area are classified under UAC R317-2-13.14 Unclassified Waters which provides that all surface waters not specifically classified are presumptively Class 2B, 3D. Water Quality Standards and numeric criteria are listed in UAC R317-2 for these classes of waters.

(a) UPDES Storm water

In circumstances where the State has jurisdiction, if there will be a storm water discharge, a UPDES permit is required under UAC R317-8-2.1(1)(a). Even if the storm water permit is covered by a general permit, the Executive Secretary may call for a permit on a case-by-case basis under the provisions of UCA R317.8-2.1(3) and 2.5(2)(b). It should be specifically noted that UAC R317-8-3.1(2) requires that facilities proposing a new discharge of storm water associated with industrial activity shall submit an application 180 days before that facility commences the industrial activity which may result in a discharge of storm water associated with that industrial activity.

PFS proposes a retention basin to collect storm water. The Draft EIS (p. 4-12) indicates that PFS would sample and analyze water from the basin when water is present to determine if contaminants are present (PFS/ER 2000). This is not an accurate description of what PFS proposes. See p. 4.2-8 of PFS/ER2000. PFS states that under current state and federal storm water regulations since the storm water flows into an on-site retention pond and since PFS considers there is no possibility of discharge to the waters of the United States, a UPDES or NPDES storm water permit, with its associated monitoring and reporting requirements, is not applicable to PFS and its operations. Nevertheless, PFS states that it

considers it prudent to obtain samples of water from the retention pond to verify that storm-water runoff is contamination free of radiological contaminants but PFS does not plan to sample for non-radiological contaminants. Water collects from across the facility to the storm water detention basin. If there have been any spills of either radiological or non-radiological contaminants, the down gradient repository is the detention basin.

The DEIS (p. 4-10) describes the PFS facility as a zero release facility. It is not a zero release facility. It is specifically identified that water from the detention basin will infiltrate into the ground (DEIS p. 4-10). Of specific note is the fact that PFS will be discharging to waters of the State of Utah. The DEIS notes that water from the storm water detention basin will be seeping into the ground and hence will be discharging to groundwater, which is waters of the State, even if the seepage occurs on the Indian reservation. See discussion below.

Further, the DEIS represents that water in the detention basin will be pumped out if it accumulates (DEIS p. 2-10). There is no indication in the DEIS where the water is going to be pumped and where it is going to be discharged. Any discharge to waters of the State requires permits as described.

For construction activities of five acres or more, a state UPDES permit is required for storm water discharges associated with those activities. UAC R317-8-3.8(6)(d)10. A state general permit may be issued which requires 48 hours prior notification of construction activities and development of a Storm Water Pollution Prevention Plan (SWPPP) prior to construction to be kept on site for review. The Executive Secretary may call for a specific permit if circumstances warrant. PFS has represented that a draft SWPPP is under preparation. Construction activities for each of the Low rail corridor railroad, and the ITF, and for the ISFSI involve five acres or more.

(b) Construction Permit - Septic Tank Systems.

If the domestic wastewater discharges exceed 5,000 gallons per day, the requirements of UAC R317-5 must be met and a construction permit must be issued by the State. UAC R317-5-1.3. If the discharges are less than 5,000 gpd, the requirements of UAC R317-4 et seq must be met and approval of plans and specifications must be given by the local health department having jurisdiction. UAC R317-4-3. Both State and local approvals require construction inspections to insure compliance with State

requirements.

Additionally, the DEIS at p. 4-12 indicates that drains from process systems are kept separate from septic systems. No indication is given as to where drains from the process system are discharged which would require State and federal permitting.

(c) Construction Permit - Wastewater retention pond

UAC R317-1-2.2 requires a construction permit for construction of the wastewater retention pond. Design requirements are contained in UAC R317-3. PFS describes its proposed retention pond as being free-draining and sized to accommodate 100-year storm event. Water dissipates by evaporation and percolation into the subsoils. This would not meet the State design requirements unless the storm water is uncontaminated. If the storm water is contaminated by substances of concern, design standards would be governed by criteria established by the ground water permit in order to protect ground water quality, and the current design would not meet standards. Again, water collects from across the facility to the storm water detention basin. If there have been any spills of either radiological or non-radiological contaminants the down gradient repository is the detention basin.

(d) Groundwater Permit UAC R317-6-6 and 317-6-6.2(C)

No person may construct a new facility which discharges or would probably result in a discharge of pollutants that may move directly or indirectly into ground water, including, but not limited to ponds, and lagoons whether lined or not, without a groundwater discharge permit from the State. UAC R317-6-6. On July 8, 1997, because of the potential for pollution of waters of the State, the Executive Secretary of the Utah Water Quality Board called for an application from PFS under the provisions of UAC R317-6-6.2(C) as an exception to any permit by rule which may be applicable. A groundwater discharge permit will be issued only if the State determines that the applicant has demonstrated that it will meet applicable class TDS limits, ground water quality standards protection levels and permit limits, monitoring requirements, and sampling and reporting requirements. In addition, the applicant must use best available technology to minimize the discharge of any pollutant, and there must be no impairment of present and future beneficial uses of the ground water. UAC R317-6-6.4(A).

The application for a groundwater discharge permit must include maps

showing all water wells and a geologic, hydrologic, and agricultural description of the geographic area. The applicant must identify the type, source and characteristics of the water, information on control measures, and information to classify the ground water sufficient to determine the applicable protection levels. A proposed monitoring and compliance plan must be submitted identifying groundwater flow direction and gradient, monitoring well construction, parameters to be monitored, and plans and specifications for construction, modification, and operation of the systems. A complete description of information required in the application is contained in UAC R317-6-6.3.

While the ground water potentially affected by the PFS facility is as yet unclassified, it is likely the highest class of ground water, Class IA - Pristine Ground Water. Protection levels are listed in UAC R317-6-4. Ground water quality standards are listed in UAC R317-6-2.

PFS has represented that groundwater in the area of the ISFSI site is approximately 125 feet below the surface. PFS has also indicated that the volume of water in the cask storage area produced by a typical rainstorm will probably settle into the one foot thick compacted gravel surface surrounding the storage pads and not drain to the retention pond raising additional permit and groundwater protection issues.

Even if an exemption may apply which establishes a permit by rule, the Executive Secretary has the authority to call for a groundwater permit for lagoons and leach fields if the Executive Secretary determines that the discharge is likely to cause increases above water quality standards or limits or would otherwise interfere with probable future beneficial use of the ground water. UAC R317-6-6.2(C). As indicated, the Executive Secretary has determined that the proposed facilities may interfere with probably future beneficial use of the ground water, and has determined a permit is necessary. (See Attachment 14, Letter to PFS dated July 8, 1997, from Don Ostler, Executive Secretary, Utah Water Quality Board, to John D. Parkyn, Chairman of the Board, Private Fuel Storage, L.L.C.)

(e) Section 404 Permits and State Certification

A Section 404 permit is required from the U.S. Army Corps of Engineers for discharge of dredged or fill materials into waters of the United States which includes inland waters, lakes, rivers, streams including wetlands and tributaries to navigable waters. 33 U.S.C. § 1344. State certification of 404 permits is required under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. The State must certify that the permit will not cause an

exceedance of state water quality standards or otherwise be in violation of a state requirement. State certification is not discussed in the DEIS.

It should be noted that there has been no official delineation of wetlands by the Army Corps of Engineers in the area of the rail corridor, ISFSI or ITF. To adequately assess wetland impact, such a delineation must formally occur.

(f) UIC - Class V Permit

UAC R317-7-1 et seq. regulates underground injections. Under State jurisdiction, the septic tank/leach fields are Class V wells under UAC R317-7-3.5(I) because they are used to inject the waste or effluent from a multiple dwelling, business establishment, community, or regional business establishment septic tank. The systems are not exempted by UAC R317-7-3.5(i) because they have the capacity to serve more than 20 persons per day or there is the potential they will not be used solely for the disposal of sanitary waste. While new Class V injection wells are authorized by rule and are not required to obtain a UIC permit under UAC R317-7-6, the Executive Secretary of the Utah Water Quality Board may require the owner or operator of a Class V well to apply for and obtain an individual permit for specific circumstances to include, where appropriate, protection of a Underground Sources of Drinking Water (USDW). The ground water in the area of the Goshute Reservation is a USDW by definition. UAC R317-7-2.47.

EPA requirements for the PFS septic tank/leach fields which serve 20 or more people, 40 CFR 144.26(a), is simply registration. There are no construction standards or requirements. EPA has similar authority to the State to require a UIC permit. The State would request EPA call for a UIC permit if it asserts jurisdiction. At a minimum, since the two PFS FACILITY septic tank/leach fields will qualify as Class V injection well, a UIC inventory form would need to be filed with EPA prior to placing these septic tank/leach field systems into service.

(2) Drinking Water

a. Construction Permit - Drinking Water System

Under authority of UCA § 19-4-104(1)(b), the Utah's Drinking Water Board requires the submission to its executive secretary of plans and specifications for approval prior to construction of any public water system. UAC § R309-102-2. For the purpose of protection of the public

health and the environment, the public drinking water system must meet the construction and operation requirements and standards in UAC R309-200 et seq. There must be protective zones established for wells used in the system before the system can be approved. UAC R309-113 et seq. A public drinking water system is defined as any system, either publicly or privately owned, providing water for human consumption and other domestic uses, which has at least 15 service connection, or serves an average of at least 25 individuals daily at least 60 days out of the year. PFS has represented it will be employing a significant number of individuals, including Utah citizens, above the 25 threshold. It will be providing water for human consumption and other domestic uses that must meet state requirements. Neither the Goshute tribe or EPA have comparable construction standards and approval process.

b. Drinking Water Requirements

During operation of the system, the public water system must meet the monitoring and operation requirements of the State rules. Water quality maximum contaminant levels must be met with appropriate monitoring and reporting. UAC R309-103 and 104. Even if PFS is determined not to be subject to state requirements, it would qualify as a public drinking water system under the federal Safe Drinking Water Act, 41 USC §§ 300g et seq., and would be subject to the operation and monitoring requirements of implementing federal rules.

(3) Water Rights

The State has jurisdiction over the water within the State, to include water on or under the Skull Valley Goshute reservation, contrary to the representation in the DEIS (p. 1-23).

The water law of Utah embodies the appropriation doctrine. Priority and quantity of a water right is established by the date and in the amount the water was first put to beneficial use. Congress has recognized this state system in determining reserved water rights for federal lands. United States v. City and County of Denver, 656 P.2d 1, 4-8 (Colo. 1982). The Courts developed a reserved water rights doctrine which was formally identified in Winters v United States, 207 U.S. 564 (1908). Under Winters, tribes hold implicitly reserved water rights. Congress has attempted to integrate reserved water rights into state water appropriations systems by authorizing states to adjudicate such rights in general adjudication proceedings and to administer those rights.

In 1952, the Congress passed the McCarran Amendment, waiving the sovereign

immunity of the United States and allowing it to be named as a defendant in state water rights general adjudication and administration proceedings. In Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), the Supreme Court held that the McCarran Amendment allowed Indian water rights to be adjudicated in state court by suing the United States in its role as trustee for the tribes. The Court has stated that the intent of Congress in enacting the McCarran Amendment was to subject all federal water rights of whatever nature to comprehensive state proceedings. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

The reserved rights of the Goshute Skull Valley Reservation have not as yet been determined either in quantity or priority through a State general adjudication proceeding. It is clear that all water, both surface and groundwater, on and within the reservation are held in trust by the State of Utah. Utah Code Annotated § 73-1-1. The Goshutes may have reserved rights to an as yet undetermined quantity of water. The exact quantity must be determined by assessing the “practicably irrigable acreage”. That quantification standard was established by the Supreme Court in Arizona v. California (Arizona I), 373 U.S. 546 (1963) and (Arizona II) 460 U.S. at 605 (1983).¹³

The appropriation, adjudication, and supervision of diversion and distribution of recognized water rights for both surface water and groundwater are functions of each state water law system. The Goshute Tribe’s reserved rights are subject to that Utah State system. In United States v. Anderson 736 F.2d 1358 (9th Cir. 1984) the court upheld the State of Washington’s permitting authority with respect to unappropriated waters on the Spokane Indian Reservation. Appropriators are entitled to the maintenance of the conditions substantially as they existed on the date they first exercised their rights. Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d. 1217 (Colo. 1988). The State of Utah and water rights holders have direct interests in the surface water and groundwater on the Goshute Skull Valley Reservation, and specifically so where the proposed PFS facility affects quality and quantity of water use beyond the reservation boundary.

(a) Well Permit

The DEIS indicates that the “large quantities” of water needed for dust control, soil compaction, and concrete case manufacturing may require new on-site wells (p. xxxv and p. 2-11 of DEIS). UCA § 73-3-25 requires that “no person may construct a well in this state without first obtaining a license”. Well drillers are required to comply with the rules enacted by the State Engineer in UAC R655-4 et seq. Prior to commencing work on any

¹³ see also *In Re Big Horn River System*, 835 P.2d 273 (Wyo. 1992).

well, all drillers must file a written notice of intention to start as provided in UAC R655-4-4 which must include a currently valid authorization to drill, approved by the state engineer as described in Section R655-4-2.27. Wells intended for public water systems must comply with the requirements of the DEQ rules. UAC R655-4-13.

Evaluation of potential draw down from wells and impact on private or reservation groundwater is part of the evaluation to obtain the approvals required from the State Engineer.

(b) Certificate of Appropriation of Water

UCA § 73-3-1 et seq. requires an application and certificate to appropriate an waters of the State, including groundwater on the Skull Valley Indian Reservation.

(c) Change of Point of Diversion, Place or Nature of Use of Water.

Any change of place of diversion or use or change of purpose for which water was originally appropriated requires the grant of an application. UCA § 73-3-3.

(4) Air Quality

(a) State Approval Order

Any person intending to construct, modify, or relocate a new installation which will or might reasonably be expected to become a source or an indirect source of air pollution or any person intending to install a control apparatus or other equipment intended to control emission of air contaminants is required to submit to the executive secretary a notice of intent and receive an approval order prior to initiation of construction, installation, modification or relocation. UCA § 19-2-108 and UAC R307-401-1. Submitted with the notice of intent must be a description of the processes, expected emissions, control apparatus, location and elevation of emission points, sampling points, operating schedule, and construction schedule. UAC R307-401-2. A public review and comment period for State approval is required (UAC R307-401-4), and best available technology as defined in UAC R307-101-2 must be applied (UAC R307-401-6). An evaluation must be made as to whether National Primary and Secondary Ambient Air Quality Standards and Prevention of Significant Deterioration concentration requirements are met. UAC R307-401-6.

PFS has represented that it will use a concrete batch plant, diesel generator, and space heating furnaces, all of which would require an approval order from the State Division of Air Quality.

It should be noted that it is unclear from the DEIS (p 4-13 to 4-16) the time and extent of operation of the concrete batch plant during construction and operation of the facilities.

The State would treat all activities of PFS as a single source for purposes of issuing an approval order which would require inclusion of the gas heating units and fugitive dust control as part of the State permit.

A State or Federal PSD permit may be required if emission thresholds are exceeded, UAC R307-405-6 and 40 CFR 52.21.

(b) Fugitive Dust

To the extent applicable, the control of fugitive dust requirements in UAC R307-205-3 and 4 must be complied with. Construction activities for the low corridor, ITP and ISFSI site will require the control of fugitive dust.

(c) Title V Permit

The concrete batch plant (p. 2-5 of DEIS) is potentially an NSPS sources and therefore a Part 70 Source. UAC R307-415-4(1)(b) and R307-415-5a(3)(c), 40 CFR § 71.3(a)(2) and § 71.4(b) (tribal area). To the extent the State has jurisdiction, PFS would be required to apply for and obtain a Title V Permit. 40 CFR 70.3(a)(2)

The aggregate processing for the batch plant is not defined and may be covered by 40 CFR Part 60 Subpart 000 as an NSPS source which would also make it an area source subject to the requirements of Title V of the federal Clean Air Act. In that circumstance, the State Title V requirements or the Part 71, EPA requirements would be applicable.

No mention is made of use of an asphalt plant other than a reference to use of existing plants in the area. An asphalt plant is also an NSPS source under Subpart I, 40 CFR Part 60, and consequently is covered by Title V. Part 71, EPA requirements would be applicable if the State did not have jurisdiction. If an asphalt plant is going to be used, and should EPA determine it has jurisdiction on the Skull Valley Reservation, PFS would be required to obtain a Title V Permit from EPA.

A diesel generator, depending on the amount of nitrogen oxides emissions, may trigger a requirement for a Title V permit. UAC R307-415-4.

Title V of the Clean Air Act requires submission of information for a permit that documents the emission characteristics of the PFS emission points and inventories of Title III Hazardous Air Pollutants.

40 CFR 60 Part 116 may be applicable to diesel tanks and would need to be documented in a Title V permit application.

(5) RCRA and State Solid and Hazardous Waste

PSF has projected that it will not generate sufficient quantities of RCRA regulated Hazardous Waste to be classified as a small quantity generator. However in order to manage and track offsite disposal of its de minimus quantities of generated RCRA wastes, PFS FACILITY represents that it may still file for a RCRA ID number. The State is delegated authority to administer the complete RCRA program and administration of the rules would depend on State and EPA determination of jurisdiction. Lead, dye, penetrant materials, fluorine, ultrasonic inspection solutions, hydraulic and miscellaneous lubricants are substances of concern.

(6) Spill Prevention for Diesel Fuel.

PFS is subject to the requirements of 40 CFR 112.3(b).

(7) Stream Alteration Permit - Utah State Engineer

The DEIS represents the rail route will cross 32 streams with ephemeral flows (p. xxxiv of DEIS). Any stream relocation or alternation or change of the beds and banks of any natural stream must receive written approval of the State Engineer. UCA § 73-3-29. The DEIS incorrectly identifies the Utah Department of Environmental Quality as the State agency having jurisdiction over stream alteration permits (p.1-23 of DEIS).

(8) Permits and Approvals under UCA § 19-3-301 et seq.

No mention is made in the DEIS of the construction and operating license from the Utah Department of Environmental Quality with approval from the Legislature and the Governor that is required for a high level nuclear waste transfer, storage, decay in storage, treatment, or disposal facility. UCA § 19-3-304. A transfer facility includes any facility which transfers waste from and between transportation modes and includes an intermodal transfer point.

Information to be contained in an application and findings required for approval by DEQ are listed in UCA § 19-3-305 and 307. Information that must be submitted includes identification of groundwater resources in the area, transportation routes and plans, environmental, social and economic impacts of the facility, detailed engineering plans and specifications for construction, operation and closure of the facility, detailed cost estimates and funding sources, a security plan, description of site suitability to include geologic, meteorologic, and ecologic features, identification of sources of waste and persons having legal responsibility, quantitative and qualitative environmental and health risk assessments, qualification and training of personnel, quality assurance/radiation safety/ and environmental monitoring programs, regional emergency plan, and other information determined by the DEQ necessary to insure protection of the public health and the environment.

DEQ may not issue a construction and operating license to any waste transfer, storage, decay in storage, treatment, or disposal facility unless the facility location meets the siting criteria in UCA § 19-3-307. Unless an exemption is granted by the DEQ based on a demonstration that a modification of the criteria would be protective of and have no adverse impacts on the public health and the environment, the facility may not be located within or underlain by: parks or wilderness areas, in ecologically or scientifically significant natural areas, including areas for listed or proposed endangered species, 100 year flood plains, areas 200 feet from Holocene faults, underground mines or salt beds, dam failure flood areas, landslide or mud flow areas, prime farmlands, areas within 5 miles of existing residential areas, areas within 5 miles of surface wastewaters including intermittent streams, areas within 1000 feet of archeological sites, aquifer recharge zones, and drinking water source protection areas. The PFS facility would be required to request an exemption from a number of the listed criteria, to include proximity to waters of the State, recharge zones, water protection areas, and residential areas.

Application fees and annual fees are listed in UCA § 19-3-308. An initial fee of \$5 million is required with subsequent payment to cover additional costs to the state associated with review of the application. To cover state oversight, a per ton annual fee is assessed. A benefits agreement is required under UCA § 19-3-310 which is sufficient to offset adverse environmental, public health, social, and economic impacts to the state as a whole, and also specifically to the local area in which the facility is to be located.

(9) Rail Construction

No tract of any railroad may be constructed across a public road, highway, or street at grade without the permission of the Utah Department of Transportation.

UCA § 54-4-15. The requirements in UAC R930-5 must be met. There is no mention in the DEIS that the proposed rail line will be crossing public roads, and is therefore subject to UDOT approval.

(10) State Roads and Excavation in State Right-of-Way

UDOT UCA § 72-7-102 requires that no person may dig or excavate within a right-of-way of any state highway without approval from the State. Permits may require a surety bond or other security.

The State has assumed responsibility and control over the Skull Valley Road. Any road improvements must be performed in cooperation with the State and meet State requirements. These issues should be addressed under the requirements of 10 CFR § 51.45(d). Additionally, as is noted in the DEIS (p. xxxviii and 2-42), special permits would be required from the State of Utah because of the size and weight of heavy-haul vehicles. PFS has inaccurately represented that the Skull Valley Road is capable of handling the heavy haul vehicles without road improvements or upgrades (p. xxxviii of DEIS). The DEIS has inadequate information to support such a conclusion.

(11) State Lands.

State lands are located throughout the proposed area. If any state lands are to be impacted, easements, rights of way, or use of state lands is regulated by the Division of Forestry, Fire and State Lands. UCA § 65A-1-1 et seq.

(12) Underground Storage Tank

If tanks for storage of petroleum products are underground (see p.4-12 of DEIS which refers to on site vehicle fuel tanks), they are subject to State (UCA § 19-6-401 et seq. and implementing regulations, UAC § 311-200 et seq.) or federal law if the State does not have jurisdiction.

(13) Liquified Petroleum Gas

The provisions of UCA § 53-7-301 et seq. and implementing rules must be complied with.

(14) Fire Prevention

The provisions of UCA § 53-7-201 et seq. and implementing rules must be complied with.

(15) Division of Oil Gas and Mining - Permits and Approvals

Depending on the nature of the activities, permits may be required under UCA §§ 40-8-1 et seq and implementing rules.

NRC and this DEIS do not consider or evaluate any form of pollution other than radiological. It relies on PFS's "start clean/stay clean" statement to conclude that PFS won't pollute. There is a void in regulation here. Either the State or local jurisdiction would usually be regulating those sources. EPA seems to be absent or, alternatively, the sources are not the type EPA usually regulates (e.g., septic tanks). Accordingly, the EIS must include the above-referenced state permits and requirements.

20. The DEIS's analysis of risks associated with seismic instability is legally and factually inadequate.

Earthquake, ground motion, soil stability concerns, surface rupturing, and other major geologic and seismic considerations are not addressed in the DEIS, but instead according to the NRC are addressed only in the NRC's Safety Evaluation Report (SER). The DEIS states that the "adequacy of the proposed PFS facility design to withstand earthquakes will be addressed in the NRC's final Safety Evaluation Report (SER) and is not addressed in this DEIS." DEIS, p. 4-2. See also "Background Information on NRC's Safety Review Process," DEIS, p. 1-14. This is unacceptable and represents a significant flaw in the DEIS, both technically and procedurally. NRC's deferral of this important issue to the SER does not meet the requirements of NEPA. It avoids public access and public comment on the issue. Even if the SER were open for public review and comment, its purpose is not the same as for the DEIS, and it cannot serve the same function. The DEIS must address environmental consequences of subsurface hazards, including seismic, faulting, and soil/foundation hazards to transportation, transfer, and storage of high level nuclear waste. The DEIS must also be capable of withstanding public scrutiny of NRC's geotechnical analysis. The State has challenged the quality, interpretation, and comprehensiveness of PFS's seismic data. The public should have the same opportunity through review of the DEIS. Moreover, environmental consequences due to subsurface hazards may be significant, particularly if the structures and equipment are not adequately designed to withstand potential ground motion or loading. In addition, the SER does not evaluate site specific seismic, faulting, or soil/foundation hazards and potential environmental consequences along the transportation corridors, including the requested right-of-way for a rail spur on public lands or the requested right-of-way for an intermodal transfer site on public lands.

In addition, the NRC's draft SER dated December 15, 1999, revised and reissued on January 4, 2000, cannot serve as a stand-in for a DEIS on this issue because there are substantial problems with the geological analyses in that document. See Attachment 6, Utah's Contention GG.

NRC staff, despite objections from the State and significant evidence of geologic and seismic problems, is considering exempting the proposed facility from certain existing NRC seismic

regulation. If that does occur, it would allow the PFS to build and operate a facility to a lower design standard which may have significant environmental consequences. Since the SER is not subject to public notice and comment, it would also not meet the requirements of NEPA, and may not be relied upon in finalizing the EIS. Because the general public is excluded from participation in hearings before the Licensing Board, the public will be unable to fairly and completely respond to these critical decisions, contrary to the requirements of the National Environmental Policy Act and federal administrative procedures.

21. Future land use is inadequately analyzed for this fast-growing area.

In numerous sections of the report, the percentage change from the 1996 population is used to determine impacts to the Tooele County population. There is more current year information, which should be used. See Part C.5 of these Comments. Tooele County's growth rate has continued to climb. The DEIS does not acknowledge that, but instead relies on a growth rate of 2.9%. No discussion of expected land use can be complete without a better understanding of population growth than this DEIS exhibits.

22. Construction schedule not provided.

The DEIS provides no construction schedule. DEIS p. 2-3. PFS has indicated it is planning to construct after the FEIS and license have been issued, but the ER also says construction will begin in September of 2000. (ER, § 3-2). Construction must not be allowed to begin until all agency decisionmaking has been completed; no agency should be forced to try and make an objective determination in the face of PFS's commitment of large amounts of resources to this project.

It is also important to have a construction schedule in order to accurately assess costs and benefits. See Part B.5.h(ii) above.

23. Adequacy and cost of local emergency services, including firefighting capability, not discussed.

PFS's planned fire fighting unit is inadequately staffed and trained, as has become clear in the course of the licensing hearings. Furthermore PFS cannot rely on timely fire fighting assistance from Tooele County because the distance involved and the all volunteer nature of the Tooele County Fire Department. The Staff's SER is inadequate to support the environmental consequences of PFS's inability to deal with an on-site fire and thus, this aspect must be addressed in DEIS. The discussion in the DEIS is relegated to a statement that PFS will plant crested wheat as a fire barrier. See e.g., DEIS at 4-25. Nowhere is there a substantive discussion of the consequences that will result from PFS inadequately staff and trained fire fighting unit. Moreover, PFS will have no fire fighters on-site after normal working hours.

The EIS must adequately and accurately describe the environmental effects of the proposed

action. The Applicant's proposal to build a rail spur down the middle of Skull Valley and ship casks by locomotive from Low at Interstate-80 to the reservation presents a new wildfire ignition source. This is a serious matter in an area that is prone to wildfires and which the DEIS. See Attachment 16, Utah Contention HH. The NRC Staff's attitude to the State's concern about a new ignition source in Skull Valley was that the PFS proposal to build a rail spur down the middle of Skull Valley "does not raise any issue that does not appear to apply as well to the rail spur alternative contained in the original application." See Attachment 17, Staff's Reply to Contention HH at 4. In the original application PFS proposed to build the rail spur in the right-of-way next to Skull Valley Road. The Staff's myopic view and basic misunderstanding of the potential for wildland ignition sources is perpetuated by the DEIS's failure to address wildland fires.

The local Tooele County Fire District is a volunteer fire department. DEIS, p. 3-43. Of particular concern is the fact that local volunteer fire fighters will not go anywhere near radioactive materials and the facility may have to be evacuated for several days. As Utah Sen. Ron Allen from Tooele County testified during the ASLB's special appearances session:

I served as the fire chief for nearly ten years and frequently fought fires in Skull Valley. Because the area is dry and often experiences high winds, it is very common to have range fires in this area in which thousands of acres burn. These wind-driven fires typically travel at speeds of over 30 miles per hour and sparks and embers often travel as much as a half mile in front of the active fire line. This often sets fires on ranches and lands that would normally be protected by roads and fire breaks. The most common procedure in fighting these fires in the Skull Valley area has been to evacuate all persons at risk as quickly as possible, miles ahead of the fire. If PFS were to promote the security of the area by planning to have a fire brigade on site, in front of the advancing flames, it would violate the basic wildfire training of every firefighter in the fire service: That you never get in front of a wind-driven advancing wildfire; you fight from the area already burned. I'm wondering if PFS is willing to completely evacuate and abandon the site for what could be a period of several days. I have not seen a plan to deal with site evacuation and abandonment in an area where the fires occur nearly every fire season. In terms of providing fire assistance to the site, I have talked to the county and city fire chiefs in this area that would provide support, and not one of them has been contacted or asked about potential aid agreements to the site. Fire chiefs and medical crews have been completely left out of the planning process. Interestingly enough, I have heard proponents talk about the excellent level of fire service available to the area. This is simply not true. In fact, the departments are all staffed by volunteers who are very highly trained but many of them have expressed their intention to not assist in fire suppression in an area that contains nuclear material, regardless of how safe it may be. The primary concern is it takes them out of their area of protection. Several also offered their observations that they just finished some training concerning nuclear hazards in the fire service and

were informed of the fact that all the firefighters brought in to Chernobyl later died. When I reminded them there's a big difference between a reactor accident and materials stored in casks, they said they would not respond anyway. As a volunteer, the risks are just not worth it.

So to summarize, we are creating a major economic disincentive for others business that would otherwise locate in Tooele County, and fire suppression and public safety have not been addressed at a practical operational level. Those providing the service have not been included at all in the process and we are now aware of the fact that many volunteers are reluctant to respond to a fire in the area.

Accordingly, PFS must be prepared to abandon the facility for several days if a wildfire comes through the site and the consequences of leaving the facility unattended for several days must be addressed in the EIS. Furthermore, PFS cannot rely on local firefighters to fight fires near the PFS facility or near its spent fuel shipment en route to the PFS ISFSI. This, too must be analyzed in the EIS.

The DEIS fails to address PFS's reliance on local government fire fighting resources, as well as local law enforcement nor does the DEIS address the adequacy of these resources for the task. In addition, there is an economic and societal cost in providing these services. PFS chose to locate on an Indian reservation, thus attempting to avoid many State and local environmental regulations and taxing requirements. There is no assessment in the DEIS of these costs that would occur from PFS using governmental resources.

24. Constancy of electrical power sources may not be assumed.

The DEIS indicates that the facility will have a backup diesel generator. DEIS, p. 2-10. At the Tooele Chemical Demilitarization Facility, we have learned that backup systems do not always work when primary systems have failed. However the DEIS has failed to provide any information about the possible consequences of loss of power.

25. Potential impacts of lighting on the facility have not been described.

Aside from a brief acknowledgment that lighting will make the facility visible to Skull Valley motorists at night, impacts from lighting are not discussed. Increased light pollution could have significant impacts on astrological observatories at Dugway, as astronomers Wayne Springer and Lawrence Wienche testified during NRC limited appearances in June 2000.

26. Failure to provide "hot cell" creates considerable risks that have not been considered in the DEIS.

PFS will not have a hot cell or other facility in which it may open the casks, inspect the condition of spent fuel and cladding or conduct any necessary canister repairs. PFS's license, if granted

will allow it to receive up to 4,000 casks. It is highly probably that with the massive amount of shipments to PFS there will be some casks or canisters that are damaged or contaminated. If a canister is damaged or is contaminated, PFS plans to refuse the shipment and send the damaged or contaminated canister back across country to the originating power plant without first addressing the problem or store the damaged fuel on-site. This obviously would create significant risks, as described in Utah's Contention J, which is included with these comments in Attachment 1. The EIS must address the significance and environmental consequences of PFS not having on-site access to a hot cell.

27. Impacts on wildlife inadequately described.

The DEIS still fails to recognize that the areas near the site are important migratory bird areas. This issue was also addressed during our scoping comments.

28. Impacts on historical resources inadequately described.

The State of Utah is amazed that federal agencies would appear to give so little consideration to destroying and blocking historic trails. These are important historical resources that deserve protection. This issue was also addressed in our scoping comments.

29. Impacts on proposed wilderness inadequately described.

The rail spur will pass near a proposed wilderness area in the Cedar Mountains. Aside from a cursory comment about access during rail spur construction, the potential impacts on this potential wilderness have not been described. BLM should insist on a more comprehensive analysis of potential conflicts with the wilderness it administers.

30. Reclamation of rail spur not addressed.

The DEIS fails to commit to decommissioning or reclaiming the rail spur right of way. If the facility is not temporary, the rail spur and the ITF also cannot be temporary. Yet, the DEIS fails to evaluate impacts of a permanent rail line or ITF.

31. Impacts to nearby state lands, private lands, and R2477 roads not addressed.

The DEIS completely fails to evaluate impacts to nearby state lands, private lands, and to rights of way owned by the state (RS2477 roads).

32. Steps to protect ground water not taken.

Under Utah law, and by common sense, potential sources of ground water contamination are separated from the ground by a liner and monitored to assure protection of the ground water. Under PFS's proposal, however, two significant potential sources of ground water contamination

are left unlined and unmonitored. As described at DEIS, p. 2-8 and 2-9, the pad upon which the casks will be placed will be made from native soils mixed with cement. As further described at DEIS, p. 4-19, surface water runoff from the restricted-access area would be routed to a detention pond. PFS currently has no plans to protect either of these sites with a liner, however, or to monitor them. They both need to be lined and monitored.

33. Monitoring proposed is inadequate.

PFS has proposed no biological monitoring during operation, but has indicated instead that it will simply implement surveillance programs to prevent wildlife habitation within the storage area. DEIS, p. xxxvi. The impossibility of this goal was evidently recognized by the agency staffs. In the DEIS "Mitigation Measures" section, they indicated that PFS would be required to develop an adequate wildlife monitoring program before initiating operations. DEIS, p. xlv. The State of Utah agrees with the requirement, but disagrees with the timing; any such monitoring plan should be subject to review in this DEIS process. The State also does not believe that the requirement goes far enough. Vegetation and soils should also be monitored. There is no point in establishing baseline for these media, as specified at DEIS, p. 2-28, if there is no ongoing monitoring.

34. Failure to adequately address Alternative Action--Federal Government Taking Possession of Spent Nuclear Fuel

The DEIS fails to adequately describe or fully evaluate the Alternative Action identified under Section 2.2.1.3. No analysis of the environmental impacts of spent fuel storage can be complete without considering the management program preferred by the U.S. Department of Energy (DOE). The NRC summarily dismisses the program as unripe. In fact, the program has sufficient credibility and detail that it would be arbitrary and capricious not to consider it. Moreover, the program was formulated, in part, to avoid some of the impacts that this facility would create.

Under DOE's management program, DOE will take title to spent fuel while that fuel remains in on-site facilities associated with the reactors where the fuel was generated. On a case-by-case basis according to the preference of the utility, DOE would either undertake responsibility for managing these on-site storage facilities or would reimburse the utility for its management costs. See, e.g., March 12, 1999 testimony of Bill Richardson, Secretary of Energy, before the United States House Subcommittee on Energy and Power of the Committee on Commerce, which is included with these comments in Attachment 2 (Scoping Comments dated May 27, 1999, Attachment C).

DOE prefers this on-site storage option to a centralized DOE interim storage facility because it will postpone the costs and potential hazards of waste transport until a permanent repository site has been selected, thus avoiding any unnecessary transport in the event a site other than the proposed Yucca Mountain site is finally approved. *Id.* at 4. DOE also prefers this option

because it avoids the additional costs associated with building a new, temporary DOE repository. *Id.* Both of these reasons apply to a privately-owned temporary repository as well. *Id.* See also the discussion of cost/benefit analysis in the May 27, 1999, Utah scoping comments.

Federal regulations require consideration of reasonable alternatives even if they are not within the jurisdiction of the lead agency (Council on Environmental Quality (CEQ) regulations at 40 C.F.R. § 1502.14(c); and NRC regulations, 10 C.F.R. Part 51, Subpt A, App. A, Section 5 (incorporated through 10 C.F.R. 51.70(b)).

35. The environmental consequences of the rail line cannot be limited to the immediate, proposed rail spur.

The logical termini of the project may not be adequate. FHWA regulations state that:

In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are evaluated, the action evaluated in each EIS or finding of no significant impact shall (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope.

23 CFR 771.111(f).

The study of the environmental consequences may not be limited to just the immediate location of the proposed action. Since this project proposes the transport of nuclear waste by rail, a more appropriate study area would be from where the waste is loaded by train to where it is removed from the train.

36. Failure to address impacts of rise in Great Salt Lake.

The EIS must address the relation of the elevation of the rail bed and the historic high lake water levels of the Great Salt Lake. Rises in the level of the Great Salt Lake in the late 1980s and early 1990s jeopardized the use and safety of the rail transportation corridor on the south end of the Lake. The DEIS does not reference the problems, much less provide an evaluation of risks, an alternative if flooding occurs in the future, and an evaluation of the financial impacts to remedy the problems.

37. The DEIS fails to address significant impacts on highways and highway users.

If the Skull Valley Road (State Route 196) Alternative is selected as a haul road in place of the Rail Alternative, it would create substantial impacts on the highway and highway users. This haul would create numerous safety concerns and would likely cause substantial pavement damage. Specific concerns and comments are:

- The planned haul vehicles would be oversize and overweight. Oversize/overweight permits would be required for each trip. A separate permit for hauling the nuclear waste material would also be required. Escort vehicles would be required for each haul. The hauling and permitting are governed by provisions of the Utah Code and Utah Administrative Code.
- The pavement subgrade materials over much of the highway length are weak. The pavement shows extensive cracking over much of the area. Frequent heavy loads from the proposed haul would cause severe pavement and subgrade damage. Oversize/overweight permits would likely not be granted until the pavement and subgrade can be strengthened. Highway drainage structures may also need to be strengthened. There are currently no plans in the Statewide Transportation Improvement Program to improve this highway. The Permittee would likely be required to make the necessary improvements as a condition of the permits.
- Motorist safety on this highway is a major concern. Although the average accident rate for this route is below the expected rate, the severity rate is high. The highway was not designed and built to accommodate heavy trucks. The pavement is narrow, with narrow unpaved shoulders. Because of the long tracker/trailer combinations required, there is high potential for head-on accidents. There are numerous horizontal and vertical curves that have insufficient passing sight distance to accommodate vehicles of the size required. The roadway will require significant improvements in order to handle the planned haul. Improvements could include widened pavements, increased shoulder widths, flattened highway curves, and pullout areas to facilitate safe passing and to accommodate vehicle safety inspections. Again, there are no plans in the Statewide Transportation Improvement Program for this highway. The Permittee would likely be required to make these improvements before a permit could be issued.
- Prior to making the above improvements to the Skull Valley Road (SR-196), and any other related roadway, an environmental analysis would have to be completed. NEPA or state and local requirements would apply. The needed improvements would require addressing impacts to stream/drainage crossings, rare and endangered species, and cultural and historic resources. State permits, including an UPDES storm water discharge permit for construction would be required.

38. Agencies have failed to address impacts of geologic hazards along the proposed rail spur.

a. Earthquake hazards

New data collected by Private Fuel Storage and provided to the State of Utah indicates that the railway may be subject to fault rupture of the surface during large earthquakes and subject to strong ground shaking. Either surface rupture or strong ground shaking could be sufficient to

cause derailment of a train carrying nuclear materials.

The railway would cross at least two branches of the 'East' and 'West' capable faults, recently identified by PFS's consultants while investigating hazards at the proposed storage site. PFS's consultant's also identified at least 2 dozen other young faults under or adjacent to the storage site, the size and extent of which are as yet undetermined. The Utah Geological Survey is currently evaluating the PFS data and it appears that there are more faults present than those recognized by PFS's consultants.

The railway would cross the western extension of the Pass Canyon fault, labeled the 'Pass Canyon structure' by PFS. This geologic feature needs to be evaluated to determine if it is a capable fault.

Just south of Interstate highway 80, the proposed railway parallels segments of the Cedar Mountain fault. The size, extent, location, and nature of this fault is poorly known. We do not at present know how much of a hazard the Cedar Mountain fault presents to the railway.

We believe that a large earthquake on the nearby Stansbury Fault could trigger significant earthquakes on the shallow buried faults in the valley. Scientific studies have found that nearly two-thirds of all the historical earthquakes that ruptured the surface in the Basin and Range province (between Salt Lake City and Reno), occurred on faults that had no evidence of surface rupturing in the last 10,000 years.

Fault zones similar to that underlying the storage site and parts of the railway, exist in many areas of the world, including parts of the Wasatch Fault. In similar zones of multiple faults, history demonstrates that surface fault rupture can occur on any of the fault strands or in rare cases may cause a new fault branch to be propagated and rupture the surface in a new location.

Therefore, we strongly encourage the EIS to consider the impacts of strong ground shaking, and the possibility of a surface rupturing earthquake that might occur anywhere, at any time, along the railway.

b. Expansive and collapsible soils

The railway crosses the piedmont slope on the eastern edge of the Cedar Mountains. The slope is underlain by Lake Bonneville and alluvial-fan deposits. These deposits may contain expansive and collapsible soils which may subject the rail bed to instability because of volumetric change.

c. Debris flows and floods

The alluvial fans were formed as sediment and debris were deposited by streams flowing from mountain canyons. Debris flows, debris floods, and stream floods emanate from canyon mouths and flow down the fans during periods of intense rainfall or rapid snowmelt. These processes are

expected to continue and pose a hazard to the operation of a rail spur in their path.

39. The DEIS does not consider impacts to Wasatch Front

The DEIS addresses only purely local impacts, those to Tooele County and the Skull Valley Reservation. A reader unfamiliar with the area would barely be aware that the proposed site is close to Salt Lake City, or that much of the nation's nuclear waste would be transported through downtown Salt Lake City as a result of the approval of this project. The DEIS also fails to discuss the substantial transportation impacts to the Wasatch front. The DEIS needs to expand the area in which the impacts may occur and do more than a purely local analysis. Salt Lake City is only 45 miles from the proposed site. The rest of the Wasatch front is not much further. In the vast area of the western U.S., these distances are close.

40. Greater than Class C Wastes

NRC has proposed allowing storage of greater than Class C wastes at ISFSIs (including off-site ISFSIs). Accepting these classes of waste at the PFS facility could be done after only a fairly simple license amendment. The possibility and impacts of storing these wastes should have been considered in the DEIS. See Attachment 18, Comments by the State of Utah on NRC's proposed rulemaking.

C. SPECIFIC COMMENTS

1. Page 1-1: Illinois Power is no longer a member, having been bought out by Florida Power and Light.
2. Page 2-8 and 2-9: The DEIS states that surface soils would be enhanced with a soil concrete mix to stabilize soil for loading, however the construction and stability are not adequately described. PFS has said it will easily be engineered during design to meet the "necessary strength requirements" but not even those requirements are described.
3. Page 2-10: Wood power poles could pose fire danger; steel should be required.
4. Page 2-11: Descriptions of the septic tank/leach field system leave many important questions unanswered. All of PFS's wastewater, including drainage from the Cask Transfer Building, would be disposed of using a drain to a leach field in soil. It is impossible, based on the information provided in the DEIS, to determine whether this is adequate. What would be going down the drain? What quantities? What about truck or cask wash down? What about runoff, both rain and washdown of equipment. What about non-radiological pollution?
5. Various: There is more current data available for the following statistics from the Governor's Office of Planning and Budget, Demographic and Economic Analysis (DEA)

website (www.qget.state.ut.us) with respect to the following:

- For Section 3.5.2.2
 - Tooele County and Tooele City population projections
 - State of Utah and Tooele County persons per square mile
- For Section 3.5.2.3
 - State of Utah and Tooele County employment and income statistics
 - Tooele County residential building permits (University of Utah, Bureau of Economic and Business Research)
- For Section 4.5.1
 - Tooele County average school aged children per household