

February 9, 2001

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSIONBefore the Atomic Safety and Licensing BoardOFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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

**APPLICANT'S MOTION TO STRIKE PORTIONS OF STATE OF UTAH'S RE-  
 SPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION ON  
UTAH CONTENTION K/CONFEDERATED TRIBES CONTENTION B**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby moves to strike portions of the State of Utah's ("State's") Response to Applicant's Motion for Summary Disposition on Utah Contention K/Confederated Tribes Contention B ("Utah K") (dated January 30, 2001)<sup>1</sup> ("Response"). Applicant moves to strike on the grounds that portions of the State's Response 1) are supported by evidentiary material that PFS had previously requested in discovery but which was provided to PFS for the first time in the State's Response, 2) are supported by a witness not qualified to testify as an expert, and 3) are irrelevant to Utah K.

**I. BACKGROUND**

Contention Utah K concerns credible accidents that allegedly threaten the Private Fuel Storage Facility ("PFSF"), specifically accidents arising from the use of ground-based weapons on Dugway Proving Ground, the testing of cruise missiles on the Utah Test and Training Range ("UTTR"), and aircraft crashes. See PFS Motion at 1-3. On December 30, 2000, PFS filed its motion for summary disposition of Utah K. On January 30, 2001, the State filed its Response, in which it includes material that PFS had re-

<sup>1</sup> See Applicant's Motion for Summary Disposition of Utah Contention K and Confederated Tribes Contention B (Dec. 30, 2000) ("PFS Motion").

quested in discovery but which the State provided to PFS for the first time with the State's Response to PFS's Motion, material irrelevant to Utah K, and a declaration that includes expert opinions to which the witness is unqualified to testify. A motion to strike part of a response to a motion for summary disposition is permitted where the response is improper. See, e.g., Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), LBP-81-34, 14 NRC 637, 676-78 (1981); see also 10 C.F.R. §§ 2.718(c) and (e), 2.743(c) (a board has authority to regulate the conduct of the proceeding and to exclude irrelevant evidence). Thus, PFS files this motion.

## **II. THE STATE'S RESPONSE CONTAINS MATERIAL NOT PROVIDED TO PFS IN DISCOVERY THAT SHOULD BE STRICKEN**

In his declaration supporting the State's Response, Lt. Col. Hugh Horstman, USAF (Ret.) provided his assessment of some of the F-16 accident investigation reports that PFS had used as the basis for its assessment of the probability that an in-flight mishap over Skull Valley involving an F-16 would leave the pilot in control of the aircraft. See Horstman Dec. ¶¶ 35-59;<sup>2</sup> compare Private Fuel Storage, Aircraft Crash Impact Hazard at the Private Fuel Storage Facility, Revision 4 (Aug. 10, 2000), Tab H. His assessment of the reports challenged PFS's assessment set forth in Tab H of the aircraft crash hazard report in a number of respects. See Horstman Dec. ¶¶ 35-59. Nevertheless, at his December 11, 2000 deposition, Lt. Col. Horstman stated that he had reviewed PFS's assessment of the accident investigation reports (Tab H in PFS's report) and that he did not identify anything in particular with which he disagreed. Horstman Dep. 203-04.<sup>3</sup>

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<sup>2</sup> Declaration of Lt. Colonel Hugh L. Horstman, Air Force (Retired) in Support of the State of Utah's Response to PFS's Motion for Summary Disposition of Contention Utah K and Confederated Tribes B (Jan. 30, 2001) ("Horstman Dec.").

<sup>3</sup> Deposition of Hugh L. Horstman (Dec. 11, 2000), attached to PFS Motion at Tab F.

Furthermore, Lt. Col. Horstman stated that his disagreement with PFS's assessment of the aircraft crash hazard to the PFSF was limited to those issues that the State had identified in an early December 2000 supplemental discovery response to PFS (which Lt. Col. Horstman had helped prepare).<sup>4</sup> The discovery response did not challenge PFS's determination of the probability that an in-flight mishap over Skull Valley involving an F-16 would leave the pilot in control of the aircraft or PFS's assessment of the F-16 accident reports which served as the basis for its determination. Now, however, in his declaration, Lt. Col. Horstman challenges for the first time PFS's determination of the probability that an in-flight mishap over Skull Valley involving an F-16 would leave the pilot in control of the aircraft based on his assessment of the F-16 accident reports. Thus, PFS saw Lt. Col. Horstman's assessment of the accident reports for the first time when the State filed its Response.

PFS requests that Lt. Col. Horstman's testimony on the aircraft accident investigation reports be stricken. Because PFS's aviation experts did not see Lt. Col. Horstman's assessment of the reports prior to PFS filing its motion, and indeed Lt. Col. Horstman stated that he did not disagree with PFS's assessment of the reports, PFS could not respond to or anticipate the challenges Lt. Col. Horstman raised in his declaration.<sup>5</sup> The assessment of the accident reports is an important part of the analysis required to resolve Utah K, in that it has a significant bearing on the calculated probability that a crashing F-16 would impact the PFSF. See Aircraft Dec. ¶¶ 20-23.<sup>6</sup>

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<sup>4</sup> See State of Utah's Supplemental Response to Applicant's First Set of Discovery Requests for Contention Utah K (Dec. 5, 2000) ("State Disc. Resp.") at 3-5; Declaration of Hugh Horstman (Dec. 3, 2000); Horstman Dep. at 67-70.

<sup>5</sup> By contrast, the State has been in possession of PFS's latest assessment of the reports since August 2000.

<sup>6</sup> Declaration of James L. Cole, Jr., Wayne O. Jefferson, Jr., and Ronald E. Fly (Dec. 30, 2000), attached to PFS Motion at Tab C.

“[T]he failure to fulfill discovery obligations [not only] unnecessarily delay[s] a proceeding, it is also manifestly unfair to the other parties.” Commonwealth Edison Co.

(Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1417 (1982).

The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the positions of the intervenors, discharging that burden may be impossible.

Id. (quoting Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 338 (1980)). This Board has stated that a party’s failure to timely disclose information that was the subject of an interrogatory would be grounds for seeking to bar the admission of the information. Order (Ruling on Applicant’s 4/22/99 Motion to Compel) (May 11, 1999) at 2 n.1. Here, PFS did not have the opportunity to fully inquire into the position of the State. Thus, PFS was unfairly deprived of an opportunity to resolve one or more of the issues that comprise Utah K.

Therefore, PFS requests that Lt. Col. Horstman’s assessment of the aircraft accident reports and all portions of the State’s Response restating his assessment<sup>7</sup> be stricken.<sup>8</sup>

### **III. THE STATE’S RESPONSE CONTAINS STATEMENTS MADE BY A TECHNICALLY UNQUALIFIED WITNESS THAT SHOULD BE STRICKEN**

In his declaration supporting the State’s Response, Dr. Marvin Resnikoff calculates the probability that a cruise missile would impact the PFSF. See Resnikoff Dec. ¶¶ 52-54.<sup>9</sup> To perform the calculation, Dr. Resnikoff interprets a number of statements from a number of sources regarding cruise missile mishaps and arrives at a probability that “1-

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<sup>7</sup> Horstman Dec. ¶¶ 35-59; Resnikoff Dec. ¶¶ 33-34; State of Utah’s Statement of Disputed and Relevant Material Facts (“State Mat. Facts”) ¶¶ 37-41; Response at 18 & n.22.

<sup>8</sup> As an alternative to striking the material from Lt. Col. Horstman’s declaration and the State’s Response, PFS requests that it be allowed to depose Lt. Col. Horstman again in order to question him about his assessment of the reports.

<sup>9</sup> Declaration of Dr. Marvin Resnikoff Regarding Material Facts in Dispute With Respect to Contention K (Jan. 30, 2001).

2 out of 150 cruise missile crashes result[] in uncontrollable situations.” Id. ¶ 54. Dr. Resnikoff then assumes that these “uncontrollable” missiles could land anywhere under the airspace of the UTTR. See Resnikoff Dec., Exhibit I. Thus, Dr. Resnikoff calculates an impact probability for the PFSF. Id. While a witness may be qualified to perform a calculation, if the input to the calculation is not valid, the calculation is of no value.

PFS moves to strike Dr. Resnikoff’s calculation<sup>10</sup> on the grounds that he is not qualified as an expert witness as necessary to derive the proper input values to the calculation.<sup>11</sup> Specifically, he is not qualified to determine the probability that a cruise missile will go “out of control” and he is not qualified to judge where a cruise missile flying on the UTTR might impact the ground in the event of a mishap.

A witness’ expertise may stem from his knowledge, skill, experience, training or education. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC \_\_\_, slip op. at 29-30 (2000). According to Dr. Resnikoff’s declaration, he has no experience analyzing cruise missile crashes or the hazard posed by cruise missiles to ground facilities. See Resnikoff Dec. ¶¶ 1-6; id. Exhibit A (Resume of Dr. Marvin Resnikoff). Nor is Dr. Resnikoff an aeronautical engineer, a former military officer, or a former defense contractor with cruise missile operational or testing experience. See id. In his deposition of May 19, 1999, he stated that he “ha[d] little knowledge about military training activities.” Resnikoff Dep. at 94.<sup>12</sup> Indeed, Dr. Resnikoff acknowledged that he would not be “testifying to the activities underlying the accident[s]” on the

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<sup>10</sup> The calculation also appears in State Mat. Facts, supra note 7, ¶ 5.

<sup>11</sup> While Lt. Col. Horstman states in his declaration that he has some experience with cruise missiles, he did not support Dr. Resnikoff’s cruise missile assessment. Indeed, Lt. Col. Horstman stated in his deposition that he did not take issue with the NRC Staff’s assessment of cruise missiles in the Safety Evaluation Report which concluded that cruise missile testing would not pose a hazard to the PFSF. Horstman Dep. at 224-25; see Safety Evaluation Report Concerning the Private Fuel Storage Facility, Docket No. 72-22 (Sept. 29, 2000) at 15-101.

<sup>12</sup> Deposition of Marvin Resnikoff (May 19, 1999), excerpts attached as Exhibit I.

UTTR that would pose a potential hazard to the PFSF. Id. at 111-12. As he expressly stated, “[n]o, I assume we would have someone else who would be discussing the nature of the activities” on the UTTR for which he would be performing probability hazard calculations. Id.<sup>13</sup>

Thus, Dr. Resnikoff is not an expert concerning the inputs to his cruise missile probability calculation. Non-expert testimony on a technical issue is accorded no weight. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-55, 20 NRC 1646, 1651 (1984); see Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 367 (1983) (non-expert cannot sponsor technical analyses for admission as evidence). Therefore, because the input to Dr. Resnikoff’s calculation is not supported by an expert witness, the calculation should be stricken.

#### **IV. THE STATE’S RESPONSE CONTAINS IRRELEVANT MATERIAL THAT SHOULD BE STRICKEN**

##### **A. Evidence Pertaining to the Radiation Dose Consequences of a Beyond-Design-Basis Accident at the PFSF is Irrelevant and Should Be Stricken**

In his declaration supporting the State’s Response, Dr. Resnikoff testified to the radiological consequences that would allegedly result from a piece of jettisoned ordnance striking and penetrating a spent fuel storage cask at the PFSF. Resnikoff Dec. ¶¶ 16, 66-74 (citing Exhibits L and M). The State claims that the dose consequences of such an accident are relevant because, with such allegedly high consequences, the applicable regulatory criterion for determining credible design basis events for the PFSF should be less than the 1 E-6 per year criterion set forth in 10 C.F.R. Part 60 for above ground facilities

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<sup>13</sup> Here, the only witness that the State has identified as testifying to cruise missile activities on the UTTR is Lt. Col. Horstman. See State Disc. Resp., supra note 4, at 3. Lt. Col. Horstman does not, however, discuss cruise missiles in his declaration and, as previously noted, his deposition testimony does not support Dr. Resnikoff’s cruise missile assessment. See note 10 supra.

at nuclear waste repositories<sup>14</sup> (which PFS has shown is applicable to ISFSIs as well). See Response at 8-9; see also State Mat. Facts, supra note 7, ¶ 68. The 1 E-6 standard, however, is generic and is applicable to ISFSIs independent of the dose consequences of the accidents in question. Therefore, Dr. Resnikoff's testimony and the cited exhibits and the portions of the Response restating them should be stricken as irrelevant to Utah K.

The State asserts that the Part 60 1 E-6 probability criterion was a "site-specific conclusion based on site-specific analyses of risk at the Yucca Mountain facility" and quotes a part of the Part 60 Statement of Considerations pertaining to the scope of the external phenomena that should be considered in defining the facility design basis. Response at 7-8 (quoting 61 Fed. Reg. at 64,263). First of all, Part 60 is a generic rule, applicable to all geologic repositories that might be licensed by the Department of Energy ("DOE") in the United States. See 10 C.F.R. § 60.1. Second, in the Statement of Considerations in which it promulgated the 1 E-6 standard, the Commission stated explicitly that assessments of conceptual designs for Yucca Mountain only served to provide perspective on risk:

The dose estimates of the DOE risk assessment are only reflective of a conceptual design for a repository at Yucca Mountain, Nevada. Nonetheless, the Commission believes that they provide perspective on the magnitude of the estimated consequences to members of the public from postulated Category 2 design basis events, and that variations in repository design or site selection would not likely vary these estimates by more than an order of magnitude. The results of the DOE risk assessment also provide some perspective on the estimated probabilities of occurrence of the postulated repository design basis events and, as such, perspective on actual risk from an operating repository.

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<sup>14</sup> Disposal of High-Level Radioactive Wastes in Geologic Repositories; Design Basis Events, Final Rule, 61 Fed. Reg. 64,257 (1996).

61 Fed. Reg. at 64,266 (emphasis added).<sup>15</sup> The Commission recognized that a repository could be designed and located differently than the conceptual facility at Yucca Mountain, but it maintained that Part 60 is generically applicable.<sup>16</sup> Therefore, State arguments about differences between PFS and Yucca Mountain (see Response at 7-8; Resnikoff Dec. ¶¶ 12-15) and dose consequences allegedly arising from an accident at the PFSF are irrelevant.<sup>17</sup>

Further, in promulgating Part 60, the Commission specifically rejected suggestions that a standard lower than 1 E-6 was applicable. It changed the standard from 1 E-9 (in the proposed rule) to 1 E-6 and specifically recognized that the risks posed by repository above ground facilities and ISFSIs were significantly lower than those posed by nuclear reactors. 61 Fed. Reg. at 64,258-59, 64,262, 64,265.<sup>18</sup> Furthermore, the Commission specifically rejected a suggestion that “the most improbable sequences and combinations of events and accidents (Category 2 and beyond) should be evaluated in reposi-

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<sup>15</sup> The Commission also looked to risk assessments for nuclear power plants to provide perspective on risk. See 61 Fed. Reg. at 64,266 & n.7.

<sup>16</sup> See 61 Fed. Reg. at 64,259, 64,265 (discussing the application of the 1 E-6 risk standard in generic terms).

<sup>17</sup> As an aside, the Yucca Mountain accident assessment cited by the Commission included an assessment of the consequences of an aircraft crash. U.S. Department of Energy, “Site Characterization Plan Yucca Mountain Site,” DOE/RW-0199 (Dec. 1988) at 6-252 to -253, -255 to -257 (citing Jackson et al., “Preliminary Safety Assessment Study for the Conceptual Design of a Repository in Tuff at Yucca Mountain,” Sandia National Laboratory, SAND83-1504 (Dec. 1984)), cited in 61 Fed. Reg. at 64,266 n.6.

<sup>18</sup> While the State claims that the dose from accidents at the PFSF would cause the risk of cancer to be “much greater than the  $10^{-8}$  range deemed acceptable in the Commission’s rulemaking relied upon by PFS,” Response at 8, the Commission actually stated that the acceptable cancer risk from exposure to radiation is “in the range of  $1 \times 10^{-6}$  to  $1 \times 10^{-5}$  per year.” 61 Fed. Reg. at 64,265. Thus, beyond design basis accidents (i.e., those with probabilities less than  $10^{-6}$  per year) could be screened from further consideration “due to their negligible contribution to overall [cancer] risk,” which the Commission estimated to be on the order of  $10^{-8}$  per year. Id. On that basis, the Commission stated that the  $10^{-6}$  design basis accident probability threshold “is expected to provide conservative estimates of risk” and that “[a] higher screening criterion could probably be justified given the magnitude of the consequences and risks from this facility . . . .” Id. Indeed, the discussion of risk in the Part 60 rulemaking is entirely consistent with and is even conservative in light of the Commission’s policy on risk from nuclear power plants. The current policy goal is to limit the frequency of a large early release of radioactive material resulting from a power plant accident to  $10^{-5}$  per reactor per year. Modifications to the Reactor Safety Goal Policy Statement, SECY-00-77 (Mar. 30, 2000), approved by Staff Requirements Memorandum (June 27, 2000).



tory accident analysis.” Id. at 64,259. Therefore, the dose consequences arising from an accident at the PFSF are irrelevant to the applicability of the 1 E-6 standard and the portions of the Response and supporting materials discussed above should be stricken.<sup>19</sup>

**B. Evidence Pertaining to the Value of the UTTR to the Training of U.S. Military Forces is Irrelevant to Utah K**

In his declaration supporting the State’s Response, Lt. Col. Horstman states that “[t]he UTTR is a unique and valuable asset to the U.S. military, and its continued use as a military training and testing area is vital to military training and the national security of the United States.” Horstman Dec. ¶ 10 (citing Statement by Utah First District Congressman, Representative James V. Hansen, Limited Appearance Session, Salt Lake City, June 23, 2000, Tr. 13-19, attached to the declaration as Exhibit C). Lt. Col. Horstman’s statement and the statement of Rep. Hansen attached to his declaration concern the importance of the UTTR to the training of U.S. military forces. That issue is irrelevant to Utah K, which concerns “credible accidents caused by external events and facilities affecting the ISFSI.” LBP-98-7, 47 NRC at 253. Indeed, the issue of the alleged threat that the construction and operation of the PFSF would pose to the continued viability of the UTTR and Hill Air Force Base was the subject of late-filed Utah Contention KK, which was rejected by the Board.<sup>20</sup> Therefore, PFS moves to strike the portion of Lt. Col. Horstman’s declaration quoted above plus Exhibit C to the declaration.

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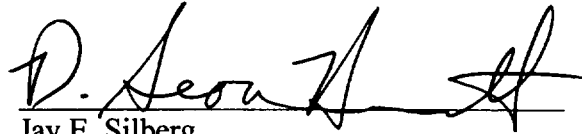
<sup>19</sup> Resnikoff Dec. ¶¶ 12-16, 66-74 (citing Exhibits L and M); Response at 8-9; State Mat. Facts ¶ 68.

<sup>20</sup> Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC \_\_ (Oct. 30, 2000).

**V. CONCLUSION**

For the foregoing reasons, PFS respectfully requests the Board to strike the portions of the State's Response specified above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Sean Barnett", written over a horizontal line.

Jay E. Silberg

Ernest L. Blake, Jr.

Paul A. Gaukler

D. Sean Barnett

SHAW PITTMAN

2300 N Street, N.W.

Washington, DC 20037

Counsel for Private Fuel Storage L.L.C.

Dated: February 9, 2001

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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

**CERTIFICATE OF SERVICE**

I hereby certify that copies of "Applicant's Motion to Strike Portions of State of Utah's Response to Applicant's Motion for Summary Disposition on Utah Contention K/Confederated Tribes Contention B" were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 9<sup>th</sup> day of February 2001.

G. Paul Bollwerk III, Esq., Chairman Ad-  
ministrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
e-mail: GPB@nrc.gov

Dr. Jerry R. Kline  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
e-mail: [JRK2@nrc.gov](mailto:JRK2@nrc.gov); [kjerry@erols.com](mailto:kjerry@erols.com)

Dr. Peter S. Lam  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
e-mail: PSL@nrc.gov

\* Susan F. Shankman  
Deputy Director, Licensing & Inspection  
Directorate, Spent Fuel Project Office  
Office of Nuclear Material Safety &  
Safeguards  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
Attention: Rulemakings and Adjudications  
Staff  
e-mail: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)  
(Original and two copies)

\* Adjudicatory File  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Catherine L. Marco, Esq.  
Sherwin E. Turk, Esq.  
Office of the General Counsel  
Mail Stop O-15 B18  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
e-mail: [pfscase@nrc.gov](mailto:pfscase@nrc.gov)

John Paul Kennedy, Sr., Esq.  
Confederated Tribes of the Goshute  
Reservation and David Pete  
1385 Yale Avenue  
Salt Lake City, Utah 84105  
e-mail: [john@kennedys.org](mailto:john@kennedys.org)

Diane Curran, Esq.  
Harmon, Curran, Spielberg &  
Eisenberg, L.L.P.  
1726 M Street, N.W., Suite 600  
Washington, D.C. 20036  
e-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)


Richard E. Condit, Esq.  
Land and Water Fund of the Rockies  
2260 Baseline Road, Suite 200  
Boulder, CO 80302

\* By U.S. mail only

Denise Chancellor, Esq.  
Assistant Attorney General  
Utah Attorney General's Office  
160 East 300 South, 5<sup>th</sup> Floor  
P.O. Box 140873  
Salt Lake City, Utah 84114-0873  
e-mail: [dchancel@state.UT.US](mailto:dchancel@state.UT.US)

Joro Walker, Esq.  
Land and Water Fund of the Rockies  
2056 East 3300 South, Suite 1  
Salt Lake City, UT 84109  
e-mail: [joro61@inconnect.com](mailto:joro61@inconnect.com)

Danny Quintana, Esq.  
Skull Valley Band of Goshute Indians  
Danny Quintana & Associates, P.C.  
68 South Main Street, Suite 600  
Salt Lake City, Utah 84101  
e-mail: [quintana@xmission.com](mailto:quintana@xmission.com)

  
D. Sean Barnett

## **Exhibit 1**

**Excerpts of Deposition of Marvin Resnikoff (May 19, 1999)**

ORIGINAL

1

1 IN THE UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION

3 \*\*\*

4 BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

5 - - - - -x

6 In Matter of: : Docket No. 72-22

7 PRIVATE FUEL STORAGE, L.L.C : ASLBP No.

8 (Private Fuel Storage Facility) : 97-732-02-ISFI

9 - - - - -x

10

11 Washington, D.C.

12 Wednesday, May 19, 1999

13

14 Deposition of MARVIN RESNIKOFF, was called  
15 for examination by counsel, commenced pursuant to  
16 notice, at 10:10 a.m., at the offices of Shaw,  
17 Pittman, Potts & Trowbridge, 2300 N Street, NW,  
18 Washington, D.C., before Karen K. Brynteson,  
19 Registered Professional Reporter and Notary Public.

20

21

22

ANN RILEY & ASSOCIATES, LTD.  
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Washington, D.C. 20036  
(202) 842-0034

1 munitions?

2 A No.

3 Q Did you ask General Matthews about any of  
4 the safety procedures that they may have?

5 A I didn't. Our conversation was limited to  
6 an hour or so. I wasn't able to ask all questions.

7 Q With respect to -- what is your knowledge  
8 and background with respect to military training  
9 exercises and activities?

10 A Oh, I have little knowledge about military  
11 training activities, but that's not going to be my  
12 role in the proceeding. My role is to estimate the  
13 probability of an accident. And for that I need to  
14 review what accidents have taken place and what kind  
15 of operations are taking place near the PFS or the  
16 IT, you know, the intermodal transfer facility. And  
17 I will have to know all the details.

18 Q How do you determine the probability of an  
19 accident taking place?

20 A I am going to look at the number of  
21 accidents that have taken place and try to make an  
22 estimate of the accident rate within a certain

1           Q     As it concerns the contention case. So  
2     you will be calculating the accident probabilities  
3     with respect to particular events?

4           A     Yes.

5           Q     But you won't be testifying to the nature  
6     of the events as such in terms of how many sorties  
7     are flown or what type of activities take place on  
8     Hill Air Force Base?

9           A     The number of accidents that have been  
10    flown?

11          Q     The number of sorties that have been flown  
12    or the accidents that have taken place, or the  
13    activities that actually take place on Hill Air  
14    Force Base or UTTR?

15          A     Well, I would look into, yes, the  
16    consequences of an accident at the PFS facility.

17          Q     You'll look into the consequences of  
18    accidents, but you are not going to be testifying to  
19    the activities underlying the accident or the  
20    potential, the nature of the activities underlying  
21    the accidents?

22          A     No, I assume we would have someone else



1 who would be discussing the nature of activities at  
2 UTTR, yes.

3 Q Okay. Let's take a short break and check  
4 on something.

5 (Recess.)

6 MR. GAUKLER: Back on the record.

7 BY MR. GAUKLER:

8 Q Based on your discussion with General  
9 Matthews, did you identify any other potential  
10 accidents for which you intend to calculate the  
11 probability of impact on the Private Fuel Storage  
12 facility or the ITP?

13 A No, I don't think so, no.

14 Q Do you have any other -- are there any  
15 notes or other records of your one-hour conversation  
16 with General Matthews?

17 A Notes? I might have scribbles.

18 Q I would request a copy of them.

19 A Okay. You are probably going to want to  
20 depose me to read these scribbles to you.

21 (Laughter.)

22 BY MR. GAUKLER: