

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-ISFSI
)	
(Independent Spent)	
Fuel Storage Installation))	

NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY
DISPOSITION OF OGD CONTENTION O -- ENVIRONMENTAL JUSTICE

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's Order of June 13, 2001,¹ and 10 C.F.R. § 2.749, the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the "Applicant's Motion For Summary Disposition of OGD Contention O -- Environmental Justice" ("Motion") filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") on May 25, 2001. For the reasons set forth below and in the attached affidavits,² the Staff submits that the issues pertaining to OGD Contention O have been resolved and there does not exist a genuine dispute of material fact with respect to these matters. Accordingly, the Staff submits that the Applicant is entitled to a decision in its favor as a matter of law, and its Motion should be granted.

¹ "Order (Deposition and Summary Disposition Response Extensions; Clarification of LBP-01-19 Correction)," dated June 13, 2001.

² See (1) "Joint Affidavit of Sam A. Carnes, Paul R. Nickens and Michael J. Scott Concerning OGD Contention O, Basis 1" ("Basis 1 Affidavit"); (2) "Joint Affidavit of Terence J. Blasing, Richard H. Ketelle and Michael J. Scott Concerning OGD Contention O, Basis 5" ("Basis 5 Affidavit"); and (3) "Joint Affidavit of David L. Allison, Sam A. Carnes and Michael J. Scott Concerning OGC Contention O, Basis 6" ("Basis 6 Affidavit").

BACKGROUND

In June 1997, the Applicant filed a license application for its proposed independent spent fuel storage installation ("ISFSI"), to be located on the Reservation of the Skull Valley Band of Goshute Indians ("Skull Valley Band").³ The application consisted of several documents including, as pertinent here, an Environmental Report ("ER"), which addressed the environmental impacts of the Applicant's proposed facility.

In November 1997, Ohngo Gaudadeh Devia ("OGD") filed a number of safety and environmental contentions relating to the PFS application.⁴ Included among these was OGD Contention O, in which OGD challenged the adequacy of the Applicant's consideration of environmental justice issues in the ER.⁵ On April 22, 1998, the Atomic Safety and Licensing Board ruled on OGD's standing to intervene and the admissibility of its contentions, in LBP-98-7. Contention OGD O, as admitted in LBP-98-7 and revised in LBP-98-10,⁶ asserts as follows:

OGD O -- Environmental Justice Issues Are Not Addressed

CONTENTION: The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In Executive Order 12898, 3 C.F.R. 859 (1995) issued February 11, 1994, President Clinton directed that each Federal agency "shall make achieving environmental justice part of its

³ The Skull Valley Band is a federally recognized sovereign Indian tribe that has conditionally leased tribal land to PFS for construction and operation of the proposed ISFSI; the Skull Valley Band supports the PFS application. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 159 (1998).

⁴ As the Licensing Board has observed, OGD "is an organization that consists primarily of members of the Skull Valley Band who oppose the PFS application and its plan to construct and operate an ISFSI on reservation land." LBP-98-7, 47 NRC at 159.

⁵ "Ohngo Gaudadeh Devia's Contentions Regarding the Materials License Application Of Private Fuel Storage In An Independent Spent Fuel Storage Installation," dated November 24, 1997 ("OGD Contentions").

⁶ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288 (1998). With respect to Contention OGD O, the Licensing Board deleted reference to the Utah Test and Training Range ("UTTR") South, UTTR North, and the Environmental Protection Agency sites identified on a map referenced in basis 5. *Id.* at 298-99, 301.

mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States.” It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, APTUS Hazardous Waste Incinerator, and Grassy Mountain Hazardous Waste Landfill.

See LBP-98-10, 47 NRC at 301.⁷

OGD submitted six basis statements in support of this contention.⁸ The Licensing Board admitted only certain issues in its ruling on admissibility, explicitly limiting the contention to the “disparate impact matters outlined in bases one, five, and six.” LBP-98-7, 47 NRC at 233. These admitted issues involve disparate impacts on minority and low income populations, as compared to the overall population, with respect to economic and sociological impacts on the Goshute Indian community (Basis 1), cumulative impacts of the PFS facility in combination with the impacts from other specified facilities (Basis 5), and adverse impacts on property values (Basis 6). See OGD Contentions at 28-36. The Board further limited basis six to “the effects of the PFS facility on property values in and around the Skull Valley Goshute community as a component in the

⁷ The six basis statements raised the following issues: (1) negative economic and sociological impacts on the Goshute Indian community caused by siting the proposed facility on the Goshute Reservation, (2) environmental, sociological and psychological costs to members of the Skull Valley Band living nearby (including increased traffic, more people, and impacts on traditional lifestyles), (3) lack of a cost-benefit analysis that considers the alternative of leaving the spent fuel at reactor sites, (4) need for the facility, (5) cumulative impacts of this facility in combination with impacts from other specified nearby hazardous waste facilities, and (6) adverse impacts on property values around the proposed facility. See OGD Contentions at 27-36.

⁸ Basis 1 of Contention OGD O is expressly limited to “economic and sociological impacts,” while Basis 6 of the contention relates only to “property values.” Thus, only Basis 5 of the contention raises a human health issue -- in the context of “cumulative” impacts in conjunction with other facilities.

‘environmental justice’ assessment of any disparate impacts suffered by minority and low-income communities.” LBP-98-7, 47 NRC at 233.

Subsequently, the Commission, in ruling on another matter, commented on the permissible scope of Contention OGD O, stating as follows:

OGD’s contention (with its supporting bases) . . . not only alleges “disparate impacts,” but also claims that the siting process was not “just and fair.” . . . This formulation arguably seeks a broad NRC inquiry into questions of motivation and social equity in siting. As we held in *Claiborne [Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 101-06 (1998)]*, and as the Board held with regard to the State of Utah’s environmental justice contention [proposed Contention Utah BB], such questions lay outside NEPA’s purview. . . . “The NRC’s goal [with respect to analyzing disparate impacts] is to identify and adequately weigh, or mitigate, effects [of the proposed action] on low-income and minority communities that become apparent only by considering factors peculiar to those communities.” . . . That should be the focus of the Board’s environmental justice inquiry.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998) (citations omitted).

In June 2000, the Staff published its “Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah,” NUREG-1714 (“DEIS”). Therein, the Staff, *inter alia*, addressed the economic and sociological impacts of the proposed PFS facility (“PFSF”) on the Goshute Indian community, the cumulative impacts of the PFS facility in combination with the impacts from several other industrial facilities in the region, and the effects of the PFS facility on property values in and around the Skull Valley Goshute community. See DEIS § 4.5 (“Socioeconomics and Community Resources”), § 4.6.3 (“Native American Cultural Resources”), § 6.2 (“Environmental Justice”), § 6.3 (“Cumulative Impacts”), and Appendix E (“Census Bureau Data As Used In Environmental Justice Analyses”).

On May 25, 2001, PFS filed the instant Motion, on the grounds that there does not exist a genuine dispute of material fact with respect to the matters raised in Contention OGD O. Specifically, with respect to OGD O Basis 1, PFS states that there is no basis for the contention's assertion that "the ER is inadequate with respect to 'negative economic and sociological impacts' on the Goshutes," or that the ER "does not reflect "consideration of the fact that the [PFSF] is to be placed in the dead center of an Indian Reservation" (Motion at 5). PFS further states that (a) the contention is improperly "focused on the alleged racial motivation for the siting of the PFSF," in that any alleged racial motivation for the siting of the PFSF is outside the purview of the NEPA (*Id.*); (b) the DEIS "clearly reflects that the PFSF will be located on the Skull Valley Reservation" (*id.* at 6); (c) OGD has not alleged any specific environmental impacts not discussed in the DEIS" (*id.* at 5-6); (d) "the DEIS plainly addresses the sociological impacts of the construction and operation of the PFSF on the Band and, where they are more than 'small,' the impacts' mitigation" (*id.* at 6); and (e) "the economic impact of the PFSF on the Band is positive" and is not an environmental justice concern, inasmuch as such concerns must involve "disproportionate high and adverse impacts" (*id.* at 8, emphasis in original).

With respect to OGD O Basis 5 (cumulative impacts), PFS states that "because of the limited emissions of the enumerated facilities, the even more limited emissions from the PFS project, and the great distances between the facilities and PFSF site, the facilities will cause no significant impacts on or around the Goshute Reservation that could be cumulative with the impacts of the PFSF. Hence, . . . such asserted impacts need not be discussed in the DEIS." *Id.* at 12.⁹

⁹ The Licensing Board recently denied the State of Utah's request for clarification of the effect of a ruling on ground and surface water contamination in Contention OGD O on Contention Utah O (hydrology), noting that the Staff and Applicant had indicated they did not believe a ruling on the Applicant's motion for summary disposition of Contention OGD O would have a preclusive effect on the litigation of Contention OGD O. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), "Memorandum (Clarification Request)" (June 11, 2001), slip op. at 2.

Finally, with respect to OGD O Basis 6 (property values), the Applicant observes that OGD asserts that the ER fails to address this issue at all, and that this issue is rendered moot by the Staff's consideration of those matters in the DEIS; and, in any event, the property value impacts will be positive. *Id.* at 18.

As set forth below and in the attached affidavits, the Staff has reviewed the Applicant's Motion and the Statement of Material Facts attached thereto, and is satisfied that the statements of fact contained therein are correct, subject to the modifications contained in the attached affidavits (none of which affect the Staff's determination that there does not exist any genuine dispute of material fact with respect to Contention OGD O). Accordingly, the Staff submits that summary disposition of Contention OGD O is appropriate at this time.

DISCUSSION

A. Legal Standards Governing Motions for Summary Disposition.

Pursuant to 10 C.F.R. § 2.749(a), “[a]ny party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party’s favor as to all or any part of the matters involved in the proceeding. The moving party shall annex to the motion a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard.” In accordance with 10 C.F.R. § 2.749(b), when a properly supported motion for summary disposition is made, “a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact.” In addition, an opposing party must annex to its answer a short and concise statement of material facts as to which it contends there exists a genuine issue to be heard. 10 C.F.R. § 2.749(a). All material facts set forth in the moving party’s statement will be deemed to be admitted unless controverted in the

opposing party's statement. *Id.*¹⁰ Pursuant to 10 C.F.R. § 2.749(d), "[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavit, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law."¹¹

The Licensing Board has previously ruled upon various motions for summary disposition filed by PFS, in accordance with these principles. In doing so, the Board succinctly summarized the standards for granting summary disposition, as follows:

Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting

¹⁰ *Accord, Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 93 (1986). General denials and bare assertions are not sufficient to preclude summary disposition when the proponent of the motion has met its burden. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993) ("AMS"). Although the opposing party does not need to demonstrate that it will succeed on the issues, it must at least demonstrate that a genuine issue of fact exists to be tried. *Id.*; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 154 (1992) (to avoid summary disposition, the opposing party had to present contrary evidence that was so significantly probative as to create a material issue of fact).

¹¹ The Commission's summary disposition procedures have been analogized to Rule 56 of the Federal Rules of Civil Procedure. See, e.g., *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-99-32, 50 NRC 155, 158 (1999). Indeed, the Commission, when considering motions for summary disposition filed pursuant to 10 C.F.R. § 2.749, generally applies the same standards that the Federal courts use in determining motions for summary judgment under Rule 56 of the Federal Rules. *AMS*, CLI-93-22, 38 NRC at 102. Decisions arising under Rule 56 of the Federal Rules may thus serve as guidelines to the Commission's adjudicatory boards in applying 10 C.F.R. § 2.749. *Perry*, ALAB-443, 6 NRC at 754. Under Rule 56, the party seeking summary judgment has the burden of proving the absence of genuine issues of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *AMS*, 38 NRC at 102. In addition, the record is viewed in the light most favorable to the party opposing the motion. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962); *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 144 (1991). If the moving party makes a proper showing for summary disposition and the opposing party fails to show that there is a genuine issue of material fact, the court (or Licensing Board) may summarily dispose of all of the matters before it on the basis of the filings in the proceeding, the statements of the parties, and affidavits. See Rule 56(e), Fed. R. Civ. P.; 10 C.F.R. § 2.749(d); *AMS*, 38 NRC at 102.

material, shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant’s facts will be deemed admitted. See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-19, 53 NRC ___, (May 31, 2001) (summary disposition of Contention Utah K), slip op. at 7-8, *citing PFS*, LBP-99-23, 49 NRC 485, 491 (1999) (Contention Utah C).¹²

The Commission has encouraged the use of summary disposition procedures “on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues.” *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 457 (1981).¹³ Likewise, the Appeal Board has recognized that summary disposition provides “an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues.” *Wisconsin Electric Power Co.* (Point Beach

¹² *Accord, Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-99-31, 50 NRC 147, 152 (1999) (Security-A, B, and C); LBP-99-32, 50 NRC 155, 158 (1999) (Utah G); LBP-99-33, 50 NRC 161, 164-65 (1999) (Utah M); LBP-99-34, 50 NRC 168, 173-74 (1999) (Utah B); LBP-99-35, 50 NRC 180, 184 (1999) (Utah K); LBP-99-36, 50 NRC 202, 207 (1999) (Utah R); LBP-99-42, 50 NRC 295, 301 (1999) (Utah H); LBP-00-06, 51 NRC 101, 112 (2000) (Utah E).

¹³ The Commission recently endorsed this policy statement, but indicated that “Boards should forego the use of motions for summary disposition except upon a written finding that such a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding.” *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20-21 (1998). The Staff submits that summary disposition of this contention will reduce the number of issues to be decided and will serve to expedite the proceeding.

Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980).¹⁴

Finally, if a contention challenges an applicant's environmental report, the contention may be viewed as a challenge to the Staff's EIS. See, e.g., *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998). Accordingly, where a contention asserts that the ER failed to consider some matter or did not explain clearly how that matter was treated, those assertions may be deemed to apply to the Staff's EIS as well, and may be resolved by a showing that the EIS resolved the alleged deficiency.

As more fully set forth below, the Staff submits that summary disposition of Contention OGD O is appropriate in accordance with these established standards, in that a genuine dispute of material fact no longer exists with respect to any of the specific matters alleged in the contention.

B. Summary Disposition of Contention OGD O, Basis 1, Is Appropriate.

As set forth in the Staff's Basis 1 Affidavit attached hereto, the Staff has reviewed the Applicant's Statement of Material Facts, and has determined that it is correct. See Basis 1 Affidavit, ¶¶ 5, 7, 9, 12, 14, 16, and 18. Accordingly, the Applicant is entitled to summary disposition on Contention OGD O, Basis 1, as a matter of law. The Staff's views with respect to each of the issues raised in Basis 1 are as follows.

1. Allegations of Discriminatory Siting

In Basis 1 of Contention OGD O, OGD appears to claim that race was the most significant variable in siting the proposed PFSS, citing a study which makes this assertion with respect to the location of commercial hazardous waste facilities; similarly, OGD claims that Congress, in the Nuclear Waste Policy Act, targeted Native American lands for nuclear waste disposal.

¹⁴ It is well settled that an agency may ordinarily dispense with an evidentiary hearing where no genuine issue of material fact exists. *Veg-Mix, Inc. v. U.S. Dep't of Agriculture*, 832 F.2d 601, 607-08 (D.C. Cir. 1987).

OGD Contentions at 28-29. As noted above, however, the Commission has stated that “such questions lay outside NEPA’s purview.” *PFS*, CLI-98-13, 48 NRC at 36. Accordingly, allegations of discriminatory siting such as these may not be litigated in an NRC proceeding. Summary disposition of this issue is therefore appropriate.

2. Consideration of the Facility’s Location on an Indian Reservation.

OGD also asserts in Basis 1 that the ER was deficient in that it “does not reflect consideration of the fact that the plant is to be “placed in the dead center of an Indian Reservation.” OGD Contentions at 28. Despite OGD’s claim that the Applicant’s ER failed to reflect the fact that the PFSF will be located on an Indian Reservation, it is clear that the Staff’s DEIS describes the facility’s location and considers its impacts on the Reservation. As set forth in the Staff’s Basis 1 Affidavit, the evaluation in the DEIS reflects that the preferred location for the proposed PFSF is in the northwest corner (rather than the “dead center”) of the Skull Valley Band Reservation. See Basis 1 Affidavit, ¶ 6. Further, the Staff’s evaluation of the sociological and economic effects of the proposed PFSF, including the Staff’s evaluation of any potential environmental justice concerns, reflects this location. *Id.* See DEIS §§ 4.5, 6.1.5, 6.1.6, and 6.2. No genuine dispute of material fact exists in this regard, and the Applicant is entitled to summary disposition of this issue as a matter of law.

3. Negative Economic Impacts on Goshute Indians in the Vicinity of the PFSF.

OGD asserts that the proposed PFSF would have “negative economic . . . impacts” on the “Native community of Goshute Indians who live very close to the proposed site.” OGD Contentions at 28. OGD did not provide further specification of these alleged negative economic impacts in this contention or Basis 1. In OGD’s responses to the Applicant’s discovery requests, the only

“negative economic impacts” identified by OGD related to property values¹⁵ -- a concern which is being considered separately under Basis 6. Duplicative consideration of this issue would be improper, and this issue may be resolved by a ruling on summary disposition of this issue in Basis 6.

Further, summary disposition of OGD’s allegation of negative economic impact is appropriate, in that environmental justice concerns encompass only those environmental impacts which are “disproportionately high and adverse.” Exec. Order 12898, 3 C.F.R. 859 (1995); see *Claiborne*, CLI-98-3, 47 NRC at 100 (disparate impact analysis is principal tool for advancing environmental justice). The Staff has determined that the proposed PFSF would not have an adverse economic effect on the Skull Valley Band. See Basis 1 Affidavit, ¶ 7. Since the economic effects of the proposed PFSF on the Skull Valley Band would not be “high and adverse,” such effects would not represent a disparate impact on the Skull Valley Band, and would not constitute an impact that would be an environmental justice concern. Basis 1 Affidavit, ¶¶ 7, 15. Accordingly, there is no genuine dispute of material fact in this regard, and the Applicant is entitled to summary disposition as to this issue as a matter of law.

4. Negative Sociological Impacts on Goshute Indians in the Vicinity of the PFSF.

OGD also claims that the proposed PFSF would have “negative . . . sociological impacts” on the “Native community of Goshute Indians who live very close to the proposed site.” OGD Contentions at 28. OGD did not provide any specification of these alleged sociological

¹⁵ See (1) “[OGD] Responses to Applicant’s First Set of Discovery Requests,” dated May 28, 1999 (“May 1999 Discovery Response”); (2) “[OGD] Second Response to Applicant’s First Set of Discovery Requests,” dated July 7, 1999 (“July 1999 Discovery Response”); (3) “[OGD] Supplemental Responses to Applicant’s First Set of Discovery Requests and Initial Responses to Applicant’s Second Set of Discovery Requests,” dated March 8, 2001 (“March 8, 2001 Discovery Response”); (4) “[OGD] Second Supplemental Responses to Applicant’s First Set of Discovery Requests and Initial Responses to Applicant’s Second Set of Discovery Requests,” dated March 26, 2001 (“March 26, 2001 Discovery Response”); and (5) “[OGD] Second Additional Response to Private Fuel Storage’s (PFS) (Renewed) Motion to Compel,” dated May 4, 2001 (“May 2001 Discovery Response”).

impacts in either the contention or Basis 1. However, in its responses to discovery, OGD explained that this refers to (a) sociological impacts involving cultural resources (May 1999 Discovery Response, at 4); (b) disproportionate impacts on the Skull Valley Band resulting from noise, traffic, the presence of more people on the Reservation, and psychological stress and stigmatization (*id.* at 5), and (c) impacts on the Band's cultural integrity, the perpetuation of the Band's language and traditions, and the Band's relationship to its lands (March 8, 2001 Discovery Response at 5). As explained below, summary disposition of these issues is appropriate.

(a) OGD Has Not Controverted the DEIS Evaluation of Cultural Resource Impacts.

Nowhere in Contention OGD O did OGD allege that cultural resources may be affected by the proposed PFSF. See OGD Contentions at 28-29. However, in its responses to the Applicant's discovery requests, OGD claimed that "the proposed facility and the proposed rail line will occupy traditional ancestral lands which are of central importance to the members of the Skull Valley Band and which may contain important artifacts of their traditional culture." May 1999 Discovery Response at 4 (emphasis added). Significantly, OGD did not identify any concrete effect of the proposed PFSF on cultural resources.

Cultural resources were considered and addressed in the DEIS. Basis 1 Affidavit, ¶¶ 8, 10-11; see DEIS §§ 3.6.2, *et seq.*, 4.6.1, 4.6.2, and 4.6.5. As set forth in the DEIS, the proposed PFSF would have only a small potential, if any, to affect Tribal cultural values or traditional cultural properties. Basis 1 Affidavit, ¶ 10. Insofar as effects on traditional cultural properties might be sociological impacts on the Skull Valley Band, they would not be high, and would not represent an impact to the Band that would be an environmental justice concern. *Id.*, ¶¶ 17, 18. Accordingly, there does not exist a genuine dispute of material fact with respect to this issue, and summary disposition is appropriate as a matter of law. *Id.*, ¶ 18.

- (b) The Issues of Noise, Traffic, the Presence of More People, Psychological Impacts, and Impacts on the Skull Valley Band's Traditional Way of Life Are Outside the Scope of This Contention.

Basis 1 for Contention OGD O raises concerns as to “sociological” impacts, but nowhere in this contention or Basis 1 did OGD define what it meant by this term. Further, nowhere in Basis 1 did OGD raise the issues of noise,¹⁶ traffic, the presence of more people on the Reservation, or impacts on the Skull Valley Band's traditional way of life. See OGD Contentions at 28-29. In contrast, these issues were specifically raised in Contention OGD P -- and were dismissed from the proceeding in the Licensing Board's ruling on admissibility in LBP-98-7.¹⁷ Later,

¹⁶ While traffic and the presence of more people on the Reservation may have socioeconomic impacts, “noise” does not constitute such an impact.

¹⁷ Proposed Contention OGD P (“Members of OGD Will Be Adversely Impacted by Routine Operations of the Proposed Storage Facility and Its Associated Transportation Activities”) asserted as follows:

CONTENTION: The ability of OGD members to pursue the traditional Goshute life style will be adversely impacted by the routine operations at the storage facility. Obvious impacts resulting from the physical presence of the facility are: visual intrusion, noise, worker and visitor traffic to and from the storage site, and presence of strangers in the community. Those impacts that are not as obvious but nonetheless serious are: individual and collective social, psychological, and cultural impacts such as a sense of loss of well-being because of the dangerous wastes that are being stored near their homes, in their community, and on their ancestral lands.

The ability of OGD members to pursue a traditional Goshute life style will be adversely affected by routine transportation operations of spent nuclear fuel and/or the presence of trucks, especially very large heavy haul trucks. The other obvious and other effects include the same kind of effects that are listed above including fear that a transportation accident might happen, fear of acts of terrorism or sabotage which could expose members of OGD and their families, their homes, the community and their ancestral land.

LBP-98-7, 47 NRC at 233-34 (emphasis added). The Licensing Board rejected this contention on the grounds that it and its supporting bases failed to establish with specificity any genuine dispute; lacked adequate factual or expert opinion support; and/or failed properly to challenge the PFS application). *Id.*

in OGD's responses to the Applicant's discovery requests, OGD asserted for the first time that Contention OGD O includes these same concerns -- notwithstanding the fact that they had not been identified in this contention and were instead listed in Contention OGD P and disposed of by the Board's ruling in LBP-98-7. Inasmuch as these concerns were not identified within Contention OGD O or its supporting bases, and were instead raised in a contention which the Board rejected, they may not properly be introduced into this contention by OGD's discovery responses.¹⁸ To conclude otherwise would deprive the Board's ruling on Contention OGD P of any real meaning.

Further, while OGD's discovery responses raise the issues of psychological impacts such as stress, stigmatization, and fear,¹⁹ such concerns were raised in Bases 2 and 6 of the contention (see OGD Contentions at 30, 35), and were rejected by the Licensing Board on the grounds, *inter alia*, that they lacked basis and/or raised an inadmissible psychological concern. LBP-98-7, 47 NRC at 233 and 234, citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S.

¹⁸ Consistent with the Commission's Rules of Practice, a contention may be interpreted to include only those impacts which are explicitly set forth in the contention and its supporting basis statements, and may not be interpreted to raise some other issue that was not specified in the contention. See 10 C.F.R. § 2.714(b)(2) (requiring a specific statement of the issue of fact or law raised in the contention, a brief explanation of the bases of the contention, a concise statement of the alleged facts or expert opinion which support the contention and which the Intervenor intends to prove at hearing, and sufficient information to show that a genuine dispute of material fact exists). In this regard, it is well established that the scope of a contention is limited to its terms coupled with its stated bases. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988). Further, an intervenor is "bound by the literal terms of its own contention." *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 709 (1985), *aff'd in part*, CLI-86-5, 23 NRC 125 (1986).

¹⁹ In its discovery responses, OGD stated that Contention OGD O includes "psychological impacts," and impacts caused by "stigmatization" or by "pervasive fear of living in close proximity to the [PFSF]" (see May 1999 Discovery Response, at 3-4, and 5; July 1999 Discovery Response, at 1-3). OGD also asserted in its discovery responses that the PFSF and rail spur will have "individual . . . impacts caused by added traffic, more people, . . . [and] changes in traffic patterns (May 1999 Discovery Response, at 5). These assertions restate portions of Basis 2 of the contention, which had asserted that the application failed to consider "sociological, individual and psychological costs of added traffic, more people, cultural impacts on traditional lifestyles, stigmatization . . . , changes in traffic patterns, and . . . fear" (OGD Contentions at 30).

766, 772-79 (1982) (“PANE”).²⁰ OGD’s continued assertion of these concerns disregards the Licensing Board’s ruling on admissibility, and runs afoul of the Supreme Court’s decision in *PANE*.²¹ Accordingly, these issues should be rejected as failing to raise a genuine dispute of material fact.²²

C. Summary Disposition of Contention OGD O, Basis 5, Is Appropriate.

As set forth in the Staff’s Basis 5 Affidavit attached hereto, the Staff has reviewed the Applicant’s Statement of Material Facts, and has determined that it is correct, except to the extent modified in the Staff’s affidavit -- none of which modifications affects the Staff’s determination that summary disposition of these issues is appropriate. See Basis 5 Affidavit, ¶¶ 5-13, 15-18, and 22.

²⁰ The Supreme Court rejected the need to consider anxiety, tension, and fear in an EIS:

Anyone who fears or dislikes a project may find himself suffering anxiety, tension[,] or fear[.] Neither the language nor the history of NEPA suggests that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements.

PANE, 460 U.S. at 777.

²¹ OGD’s discovery responses also asserted that certain impacts “will be amplified by the symbolism of the proposed facility,” and describes this symbolism. See July 1999 Discovery Response, at 2. These assertions must be rejected as a matter of law, because NEPA “does not require consideration of stress caused by the symbolic significance individuals attach to federal actions.” *PANE*, 460 U.S. at 777, n.12.

²² OGD also asserted in its discovery responses that the proposed PFSF is close to “the Community Building, where Band members have . . . traditional spiritual ceremonies . . . [that] connect the participants to their traditional ways of life and to Mother Earth” (May 1999 Discovery Response, at 3); that Band members “will be suddenly and continually exposed to the intrusion of high-tech culture which shows little respect for and humility toward Mother Earth,” which will have a synergistic effect with an “alienation from the landscape” (*Id.* at 4); and that this will result in “acculturation of the Skull Valley Band members into the dominant culture and will impede efforts to revitalize and invigorate traditional Band Goshute Shoshone culture” (*Id.*). To the extent that OGD raises a concern as to impacts on religious practices, it has been held that such a claim need not be considered under NEPA. *Lockhart v. Kenops*, 927 F.2d 1028, 1036-37 (8th Cir. 1991) (NEPA “does not mandate consideration of a proposal’s possible impact on religious sites or observances”).

Accordingly, the Applicant is entitled to summary disposition on Contention OGD O, Basis 5, as a matter of law. The Staff's views with respect to each of the issues raised in Basis 5 are as follows.

1. Deficiencies Asserted in Basis 5.

In Contention OGD O, Basis 5, as admitted, OGD asserted that "within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Desert Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste and Low Level Radioactive Waste Landfill, Clive Hazardous Waste Storage Facility, Aptus Hazardous Waste Incinerator, [and] Grassy Mountain Hazardous Waste Landfill." OGD Contentions at 32. OGD then provided several exhibits that identify wastes present at these facilities (*Id.* at 33-34). However, OGD identified "emissions" from only one facility, the Clive Incineration Facility -- which only involve air emissions. *See Id.* at 33, and Exh. 21 thereto, at 1. Further, while OGD asserted that the listed facilities "contain numerous chemical and nuclear material that OGD members may be breathing, eating and living with on a daily basis" (*id.* at 34),²³ OGD did not identify any pathway through which its members might be exposed. Indeed, in responses to the Applicant's requests for discovery, OGD has stated that it has not analyzed how such exposure might occur. *See, e.g.,* March 8, 2001, Discovery Response at 2.

2. The Staff has addressed cumulative impacts in the DEIS.

As set forth in Contention OGD O, Basis 5, OGD's concern is that an environmental assessment "needs to look at these facilities as part of cumulative impacts and disproportionate impacts that the OGD community has been made to suffer." OGD Contentions at 34 (emphasis added). As set forth in the Staff's Basis 5 Affidavit, the Staff has made precisely that inquiry. *See* Basis 5 Affidavit, ¶¶ 19-22. The evaluation in the DEIS addresses the potential cumulative effects

²³ Since OGD has described effects suffered on "a daily basis," OGD has limited the contention to effects resulting from normal operation, and not accidents, since contentions are limited to their terms coupled with their stated bases. *See Seabrook*, ALAB-899, 28 NRC at 97.

of the proposed PFSF and other facilities in the region. *Id.*, ¶¶ 21-22. Further, the environmental justice aspects of cumulative impacts were considered and addressed in the DEIS. *Id.*, ¶ 22; see DEIS § 6.3.9. (“Environmental Justice”). Inasmuch as this concern has been addressed, and no genuine dispute of material fact exists with respect to these matters, the Applicant is entitled to summary disposition on these issues as a matter of law.

3. Any cumulative impacts at the Reservation are small, at most.

As discussed above, OGD presented a concern in Basis 5 that the cumulative impacts of the PFSF and other facilities in the area need to be evaluated, but did not provide a basis to believe that the cumulative impacts at the Reservation would be “high and adverse.” As set forth in the Staff’s Basis 5 Affidavit, the Staff has concluded its evaluation of this issue, and has determined that the proposed PFSF, in combination with other facilities in the region, would have no more than a small cumulative effect on air quality at the Reservation. Basis 5 Affidavit, ¶¶ 6-12, 16-18.²⁴ Further, no data has been identified which would indicate that any unique health conditions exist among the Skull Valley Band that may be pertinent to such impacts, and there is no evidence that the proposed PFSF would compound any health problems of nearby residents or visitors in the Skull Valley vicinity. *Id.*, ¶ 21. Based on the foregoing, any cumulative impact on air quality on the Reservation would not be “high and adverse”, and would not represent an impact to the Band that would be an environmental justice concern. *Id.* Accordingly, there is no genuine dispute of material fact with respect to these matters, *Id.*, and the Applicant is entitled to summary disposition on Contention OGD O, Basis 5, as a matter of law.

²⁴ As set forth above, the only emissions from other facilities asserted in Basis 5 were air emissions. The Staff notes, however, that the Applicant’s Motion also addresses cumulative water impacts. Motion at 14-15. While the Staff agrees that the Statement of Material Facts is correct with respect to such impacts (Basis 5 Affidavit, ¶¶ 14-18), the Staff believes that such issues are beyond the admitted scope of the contention and need not be considered in a ruling on the Applicant’s Motion. *Seabrook, supra*, 28 NRC at 97.

D. Summary Disposition of Contention OGD O, Basis 6, Is Appropriate.

As set forth in the Staff's Basis 6 Affidavit attached hereto, the Staff has reviewed the Applicant's Statement of Material Facts, and has determined that it is correct, except to the extent modified in the Staff's affidavit -- none of which modifications affects the Staff's determination that summary disposition of these issues is appropriate. See Basis 6 Affidavit, ¶¶ 9, 11-16, and 19-22. Accordingly, the Applicant is entitled to summary disposition on Contention OGD O, Basis 6, as a matter of law. The Staff's views with respect to each of the issues raised in Basis 6 are as follows.

1. Deficiencies Asserted in Basis 6.

In Contention OGD O, Basis 6, as admitted, OGD asserted that "[t]he ER, fails to address the effect that the facility will have on the property that is owned by members of OGD or by people living in and around the area of the proposed [PFSF] site"; that "[t]he property values of the surrounding lands will be diminished by the [PFSF] site itself, and dangers of nuclear waste transport"; that "[t]he property values of the tribal members and members of the OGD will be adversely impacted by the siting of [the PFSF]"; that "the danger inherent in the transport of nuclear waste will also decrease their property values"; and that "the NRC has utterly failed to consider this concern." OGD Contentions at 34-36.

2. The Staff has addressed impacts on property values in the DEIS.

As set forth in the Staff's Basis 6 Affidavit, the DEIS evaluation addresses the potential effect of the proposed PFSF on property values on and around the Reservation. Basis 6 Affidavit, ¶ 24. Further, the property value issues raised in Contention OGD O, Basis 6, concerning environmental justice were considered and addressed in the DEIS. *Id.*; DEIS at 6-30 to 6-31. Accordingly, no genuine issue of material facts exists with respect to these matters, and the Applicant is entitled to summary disposition of them as a matter of law.

4. The impacts of the proposed PFSF on property market values do not present environmental justice concerns.

As set forth in the Staff's Basis 6 Affidavit, the proposed PFSF could increase the market values of property outside the Reservation, but would not have an adverse effect on such values.²⁵ Basis 6 Affidavit, ¶¶ 13-15.

With respect to the value of property on the Reservation, the Staff has determined that the proposed PFSF would have little, if any, impact on property values, due to the unique form of property ownership on an Indian Reservation, whereby the land is held in trust for the Tribe by the U.S. Department of Interior, Bureau of Indian Affairs ("BIA"), and individual Tribal members own only the housing structures placed on the land. *Id.*, ¶ 6. At meetings of the Skull Valley Band attended by BIA representative David L. Allison, while some persons suggested that construction of the PFSF on the Reservation might cause some members of Band to move away or sell their houses, no persons were identified who would, in fact, do so; in contrast, other members living off the Reservation expressed an interest in returning to the Reservation if the facility is built and jobs are created. *Id.*, ¶ 8. Accordingly, construction of the PFSF could have the net effect of increasing the demand for housing on the Reservation. *Id.* As a result, the market value of existing property on the Reservation is more likely to increase or remain the same, rather than decrease, if the PFSF is constructed. *Id.*, ¶ 19-21, 23.

In any event, regardless of whether the net result is positive or negative, the proposed PFSF project would likely have only a small effect on the market value of existing housing structures on the Reservation. *Id.*, ¶ 23. Thus, any impact on market values of property on the Reservation would not be "high and adverse," and would not represent an impact to the Band that

²⁵ Neither Contention OGD O, Basis 6, nor the Motion makes a distinction between property on the Reservation and that which is off the Reservation. Given the differences in how such property is owned (see Basis 6 Affidavit, ¶ 6), the Staff's analysis of property values considers whether the property is on or off the Reservation. See *id.*, ¶¶ 13-15, and 19-23.

would be an environmental justice concern. *Id.*²⁶ Accordingly, no genuine dispute of material fact exists as to these matters, and the Applicant is entitled to summary disposition on this issue as a matter of law.

CONCLUSION

For the reasons set forth above, the Staff submits that the Applicant is entitled to summary disposition on Contention OGD O as a matter of law.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland
this 28th day of June 2001

²⁶ In its responses to discovery, OGD stated that “Anglo law and methods of calculation do not adequately represent the current value of Reservation lands and homes and the devaluation of the land and homes that will occur as a result of construction and operation of the proposed [PFSF] and rail spur.” May 1999 Discovery Response at 7. However, OGD did not identify in the contention or its bases any means to determine property values on the Reservation that would differ from the methods used in normal real property valuations. Inasmuch as contentions are limited to their terms coupled with their stated bases (*see Seabrook*, ALAB-899, 28 NRC at 97), any claim that “Anglo” methods of valuation are inadequate is outside the scope of the contention.

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-ISFSI
)
(Independent Spent)
Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF OGD CONTENTION O -- ENVIRONMENTAL JUSTICE" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 28th day of June, 2001:

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