**RAS 3230**

July 19, 2001
**DOCKETED 07/20/01**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
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| 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 CONTENTION SUWA B -- RAILROAD ALIGNMENT ALTERNATIVES

## INTRODUCTION

Pursuant to 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 Contention SUWA B -- Railroad Alignment Alternatives" ("Motion"), filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") on June 29, 2001. For the reasons set forth below and in the attached "Affidavit of Gregory P. Zimmerman Concerning Contention SUWA B" ("Zimmerman Affidavit"), the Staff submits that issues pertaining to the Southern Utah Wilderness Alliance ("SUWA") Contention B ("SUWA B") have been resolved, and there does not exist a genuine issue of material fact with respect to these matters. Inasmuch as there does not exist a genuine issue of material fact, the Applicant is entitled to a decision in its favor as a matter of law. The Staff, therefore, submits that the Applicant's Motion should be granted.

## BACKGROUND

In June 1997, the Applicant filed its license application for its proposed Independent Spent Fuel Storage Installation ("ISFSI"). The PFS application consisted of several documents, including an Environmental Report ("ER"), which addressed many issues pertaining to the National Environmental Policy Act of 1969 ("NEPA").

In November 1998, SUWA sought to intervene in the proceeding and filed two environmental contentions relating to the PFS application.[1] Contention SUWA B addressed the Applicant's discussion of alternatives to the proposed rail spur to the PFS facility ("PFSF"). *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 53-54, *aff'd*, CLI-99-10, 49 NRC 318, 325-27 (1999). The Atomic Safety and Licensing Board ("Board") admitted SUWA as a party to the proceeding and admitted the Contention SUWA B, which states as follows:

> The License Application Amendment fails to develop and analyze a meaningful range of alternatives to the Low Corridor Rail Spur and the associated fire buffer zone that will preserve the wilderness character and the potential wilderness designation of a tract of roadless Bureau of Land Management (BLM) land -- the North Cedar Mountains-- which it crosses. .

*Id.* at 53. The Board admitted the contention "[a]s it seeks to explore the question of alignment alternatives to the proposed placement of the Low Junction rail spur[.]" *Id*.

In June 2000, the Staff published the "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 addressed the location of the rail line running to the proposed PFSF. *See* DEIS Chapter 2, Section 2.2.4.2 (Local Transportation Options (in Skull Valley)).

On June 29, 2001, the Applicant filed the instant Motion, asserting that there does not exist a genuine dispute of material fact with respect to the matters raised by SUWA in Contention SUWA B. Specifically, the Applicant asserts that SUWA's contention is rendered moot by the Bureau of Land Management's ("BLM") refusal to consider as wilderness the area of the North

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[1] "[SUWA] Request for Hearing and Petition to Intervene" (Nov. 18, 1998); "[SUWA] Contentions Regarding [PFS] Facility License Application (The Low Rail Spur)" (Nov. 18, 1998) ("SUWA Contentions").

Cedar Mountains identified by SUWA (Motion at 8-9); and further, that PFS has considered appropriate alternatives and that the Low Corridor is preferable (*id*. at 9-13). [2]

As set forth below and in the Affidavit of Gregory P. Zimmerman, the Staff has reviewed the Applicant's Motion and the Statement of Material Facts attached thereto, and is satisfied that Material Facts Nos. 6-9, and 17-26, contained therein are correct; further, the Staff expresses no position with respect to Material Facts Nos. 10-16, which pertain to new information concerning an alternative rail route referred to by PFS as the "West Skull Valley Alterative," which the Staff has not fully evaluated.[3] Further, the Staff believes that there no longer exists a genuine issue of material fact concerning the matters raised in Contention SUWA B, and that summary disposition of this contention is therefore appropriate.

## 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

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[2] In addition, PFS argues that the Licensing Board's decision regarding the alternatives discussed in the Motion can be deemed to amend the DEIS *pro tanto*, without the DEIS being formally redrafted. *Id*. at 9.

[3] As further set forth below and in the attached Affidavit, the Staff is satisfied that the "West Skull Valley Alternative" discussed by PFS in its Motion would result in similar or greater environmental impacts when compared to the proposed rail line discussed in the DEIS, and no genuine issue of material fact exists with respect to this matter. *See* Zimmerman Affidavit, ¶¶ 18-20.

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.*[4] 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."[5]

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[4] *Accord, Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units I 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). 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).

[5] 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. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). 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,* 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); *Advanced Medical Systems,* 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 District 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); *Advanced Medical Systems*, 38 NRC at102.

The Licensing Board in this proceeding 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 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-99-23, 49 NRC 485, 491 (1999) (granting summary disposition of Contention Utah C).[6]

Finally, 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).[7] Likewise, the Appeal Board has recognized that summary

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[6] *Accord, Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-99-31, 50 NRC 147, 152 (1999) (Contentions 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).

[7] 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.

disposition provides "an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues." *Wisconsin Electric Power* Co. (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit1), ALAB-590, 11 NRC 542, 550 (1980).[8]

As more fully set forth below, the Staff submits that summary disposition of Contention SUWA B is appropriate, in accordance with these established standards.

B. Legal Standard Governing Consideration of Alternatives Under NEPA

The Commission has established a comprehensive set of regulations addressing its responsibilities under NEPA, in 10 C.F.R. Part 51. An applicant for an ISFSI pursuant to 10 C.F.R. Part 72 must file an environmental report. 10 C.F.R. §§ 51.60(b)(iii) and 51.45. Following the environmental scoping process, the Staff must issue a draft environmental impact statement ("EIS"), which is to include a preliminary analysis that considers and weighs the environmental effects of the proposed action; the environmental impacts of alternatives to the proposed action; and alternatives available for reducing or avoiding adverse environmental effects. 10 C.F.R. §§ 51.70 and 51.71(d). The Staff then must issue its Final EIS, based on a review of information provided by the applicant, information provided by commentors on the Draft EIS, and information and analysis which the Staff itself obtains. 10 C.F.R. § 51.97(c).

NEPA requires federal agencies to take a "hard look" at environmental consequences, as well as reasonable alternatives to the proposed action. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-03, 47 NRC 77, 89 (1998); *Boston Edison Co.* (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 779 (1978). Consideration of alternatives has been referred to as the "linchpin" of the entire EIS. *New England Coalition on*

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[8] 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).

*Nuclear Pollution v. NRC*, 582 F.2d 87, 95 (1st Cir. 1978). In considering alternate sites, an agency should carefully study the environmental effects of building the facility at those sites and factor that analysis into the ultimate decision.[9] *Id*.

An EIS must "rigorously explore . . . all reasonable alternatives." *Id.* (emphasis in original). In assessing the adequacy of an agency's EIS, discussing the impacts of a proposed action and any reasonable alternatives, a "rule of reason" test is employed to determine whether the EIS contains "a reasonably thorough discussion of the significant aspects of probable environmental consequences." *Hells Canyon Alliance v. United States Forest Service*, 227 F.3d 1170, 1177 (9th Cir. 2000), *citing Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1376 (9th Cir. 1998); *see All Indian Pueblo Council v. U.S.*, 975 F.2d 1437, 1445 (10th Cir. 1992); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367, 399 (1997), *rev'd in part on other grounds*, CLI-98-3, 47 NRC 77 (1998); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1011-12 (1973). For those alternatives that have been eliminated from detailed study, the EIS should "briefly discuss" why they were ruled out. *Claiborne,* CLI-98-3, 47 NRC at 104, *citing* 40 C.F.R. § 1502.14(a).

An EIS need not address impacts that are not reasonably foreseeable. *See Scientists; Institute for Public Information v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). Environmental impacts that could be avoided only by highly speculative and not reasonably

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[9] License applicants use the site screening process to identify sites meeting the goals of the proposed action. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 103 (1998). An applicant may deem only one of many possible sites to be reasonable. *Id.* at 104, *citing Tongass Conservation Society v. Cheney*, 924 F.2d 1137, 1141-42 (D.C. Cir. 1991). When reviewing a license application filed by a private applicant, a federal agency may appropriately "accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project." *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 55 (2001), *citing Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 104 (1998), *citing City of Grapevine v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1043 (1994).

foreseeable events need not be considered. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 146 (1993). The need for significant changes in governmental policy or legislation may make an impact speculative. *Cf. Rancho Seco*, CLI-93-3, 37 NRC at 145, *citing Process Gas Consumers Group v. U.S. Dep't of Agriculture*, 694 F.2d 728, 769 (D.C. Cir. 1981)(no need to consider alternatives that could only be implemented after significant changes in governmental policy or legislation); *City of Angoon v. Hodel*, 803 F.2d 1016, 1021-22 (9th Cir. 1986) (an alternative requiring legislative action does not automatically exclude it from consideration, but the alternative must be ascertainable and within reach).

C. Summary Disposition of Contention SUWA B Is Appropriate.

As set forth in the Zimmerman Affidavit attached hereto, the Staff has reviewed the Applicant's Statement of Material Facts, and has determined that Material Facts Nos. 6-9, and 17-26, are correct. Further, while the Staff expresses no position with respect to Material Facts Nos. 10-16 (which pertain to new information concerning an alternative rail route referred to by PFS as the "West Skull Valley Alterative," that the Staff has not fully evaluated), the Staff is satisfied that this alternative would result in similar or greater environmental impacts when compared to the proposed rail line discussed in the DEIS (*i.e.*, the "Low Corridor Rail Spur"), and no genuine issue of material fact exists with respect to this matter. *See* Zimmerman Affidavit, ¶¶ 18-20. Accordingly, the Staff believes that there no longer exists a genuine issue of material fact concerning the matters raised in Contention SUWA B, and that the Applicant is entitled to summary disposition of this contention, as a matter of law. The Staff's views with respect to the contention are as follows.

1. The DEIS considers alternatives to the Low Corridor Rail Spur.

Contentions based on an applicant's ER are appropriately deemed to be challenges to the Staff's EIS. *See Claiborne*, CLI-98-3, 47 NRC at 84; *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983). Following the issuance of the Staff's EIS, an opportunity exists for a petitioner to amend its contention or file new contentions if the Staff sets

forth an analysis in the EIS that differs significantly from the applicant's ER. *Catawba*, CLI-83-19, 17 NRC at 1049. A contention which asserts that some matter has been omitted from an applicant's ER, however, cannot be interpreted to challenge the adequacy of any analyses performed later, unless the bases of the contention have been revised to raise that challenge.

Contention SUWA B alleges that "the [ER] fails to develop and analyze a meaningful range of alternatives to the Low Corridor Rail Spur and the associated fire buffer zone that will preserve the wilderness character and the potential wilderness designation of a tract of . . . the North Cedar Mountains[,] which it runs through." SUWA Contentions at 5. As the Commission stated in affirming the Licensing Board's admission of the contention:

> [The] alternatives [in the ER] addressed only general transportation options (e.g., trucking vs. railroad) and did not reflect consideration of alternative configurations to the proposed Low Corridor rail spur alignment. In the light of the fact that the rail spur has now become PFS's preferred option, we agree with the Board that a failure to consider alternative configurations to the specific alignment in question is at least worthy of further consideration on the merits.

*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 326 (1999) (emphasis added).

As documented in the DEIS, the Staff explicitly considered two rail alternatives to the Low Corridor Rail Spur. *See* DEIS, Section 2.2.4.2. As set forth in the DEIS, the Staff assessed one entirely new rail corridor and one corridor that would use existing rail line, in part, and new rail line, in part. *Id.* at 2-42. The entirely new rail line would run through the eastern side of Skull Valley (along Skull Valley Road) (*id.*), while the existing rail line runs east of the Stansbury Mountains (east of Skull Valley), and would connect to a new rail line around the northern end of these mountains and continue south along Skull Valley Road (*id.*).

The Staff eliminated the new eastern Skull Valley rail line from detailed evaluation due to the likelihood for any construction activity on such a rail line to directly impact wetlands at Horseshoe Springs, existing houses and ranches, or traffic on Skull Valley Road. *Id*. Inasmuch

as the partially existing, partially new rail line would also run alongside of Skull Valley Road, it would also likely directly impact wetlands at Horseshoe Springs, existing houses and ranches, or traffic on Skull Valley Road. *Id.* In addition, the partially existing, partially new line would require substantial excavation at the north end of the Stansbury Mountains. *Id*. Accordingly, the Staff eliminated it from detailed evaluation. *Id*. Because of their likely impact on Horseshoe Springs, existing houses and ranches, or traffic, both of these alternatives would likely have greater environmental impacts than the proposed Low Corridor Rail Spur. *See* Zimmerman Affidavit, ¶¶ 12-15.

In addition, a new rail corridor originating from a location in the northern end of Skull Valley other than the proposed siding at Low (Skunk Ridge) would involve construction of a siding to the north of Interstate 80 ("I-80"), creating an unresolved problem in how to cross the interstate to reach the Reservation to the south. DEIS at 2-42; Zimmerman Affidavit, ¶ 10. Resolving this problem would likely involve additional environmental impacts.[10] Zimmerman Affidavit, ¶ 10. Accordingly, such an alternative rail corridor (originating at a siding north of I-80), whether located in the center of Skull Valley or on its eastern side, was deemed to offer similar or greater impacts when compared to the proposed Low Corridor Rail Spur. *Id.*, ¶ 11.

The Staff has performed the evaluation requested by SUWA in the contention. SUWA had an opportunity to amend Contention SUWA B to challenge the adequacy of the Staff's analysis following the issuance of the DEIS, but did not do so. The DEIS discussion of alternatives to the proposed Low Corridor Rail Spur eliminates any genuine dispute of material fact with respect to the assertions contained in Contention SUWA B. *See* DEIS at 2-42; Zimmerman Affidavit at ¶¶ 8,

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[10] Although not explicitly mentioned in the DEIS, a central Skull Valley rail corridor would share this unresolved problem. *See* Zimmerman Affidavit, ¶ 11.

16-17, and 21. Therefore, there is no genuine dispute of material fact with respect to Contention SUWA B, and summary disposition of this contention is appropriate as a matter of law.[11]

2. The possibility of designation of part of the North Cedar Mountains as a wilderness area, which SUWA has sought, is speculative, and does not warrant consideration of additional alternatives.

SUWA asserts that the Low Corridor Rail Spur will cross a portion of the North Cedar Mountains (the "North Cedar Mountains area"), which SUWA identified as "possessing wilderness character and therefore suitable for wilderness designation and projection under the Wilderness Act of 1964." SUWA Contentions, at 2. SUWA complains that PFS "has failed to adequately develop . . . alternatives to the Low Rail Spur . . . [that] will preserve, for Congress, the opportunity to designate the [North Cedar Mountains] area as wilderness pursuant to the Wilderness Act of 1964." *Id*. at 6. As explained below, the BLM has already rejected this area as a candidate for designation as wilderness as defined in the Wilderness Act of 1964 ("Wilderness Act"), and it is entirely speculative that Congress would designate this area as wilderness. Accordingly, as discussed below, alternatives intended to avoid impacts to that area need not be considered.

In 1980, the BLM made its final wilderness inventory decision as part of its implementation of Section 603 of the Federal Land Policy and Management Act ("FLPMA").[12] *See* "Final

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[11] Although the "West Skull Valley Alternative" rail corridor discussed by the Applicant (*see* Motion at 10-11) was not discussed in the DEIS, this does not affect the Staff's conclusion that summary disposition of Contention SUWA B is appropriate -- in that the deficiency alleged in the contention (*i.e.*, that the application failed to consider alternatives to the Low Corridor Rail Spur) was addressed in the DEIS. Specifically, the DEIS considers a reasonable range of rail corridor alternatives, as set forth in the text above.

[12] 43 U.S.C. § 1782 (1994). The Wilderness Act defines "wilderness" as:

> an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean . . . an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural

(continued...)

Wilderness Inventory Decision," 45 Fed. Reg. 75,602 (Nov. 14, 1980) ("1980 Decision"). As set forth in the 1980 Decision, BLM explicitly dropped the North Cedar Mountains area from further consideration as wilderness. *Id*. at 75,603-04.[13] Although BLM provided a procedure in the 1980 Decision for protesting the decision for each inventory unit (by December 15, 1980) (*id*. at 75,604), BLM did not receive a protest regarding its decision on the North Cedar Mountains area, and the decision dropping that area from wilderness consideration became effective on December 31, 1980. *See* "Utah; Final Wilderness Inventory Decisions Are In Effect," 45 Fed. Reg. 86,556, 86,557 (Dec. 31, 1980).

In 1999, pursuant to Section 201 of the FLPMA, the BLM completed a reinventory of certain lands in Utah that had been selected by the Utah Wilderness Coalition, a group which includes SUWA, as allegedly containing wilderness character. *See* "Utah Wilderness Inventory," dated 1999

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[12](...continued)

> conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological geological, or other features of scientific, education, scenic, or historical value.

16 U.SC. §1131(c). Using this definition of "wilderness," the FLPMA provided for BLM to perform an inventory of certain public lands and to identify areas that are roadless, include five thousand or more acres, and have wilderness characteristics. *See* 43 U.S.C. §§ 1711, 1782. The FLPMA directed BLM to report to the President a recommendation as to the suitability or nonsuitability of each such area for preservation as wilderness. *Id*., § 1782(a). *See generally, Utah v. Babbitt*, 137 F.3d 1193, 1197-99 (10th Cir. 1998) (describing how BLM implemented the FLPMA).

[13] This area was identified by SUWA in 2001 as an area having wilderness characteristics, although, as the Applicant notes, the area identified by SUWA is not entirely congruent with the area identified by BLM as the North Cedar Mountains unit. *See* Motion at 6, n.11.

(excerpts of which are attached hereto as Exhibit A); 43 U.S.C. § 1711.[14] The North Cedar Mountains area was not included in the reinventory. *See* Exhibit A at xiv, xv. In response to a submission from SUWA, which asserted that the North Cedar Mountains area possesses wilderness character, BLM informed SUWA that the conclusion reached for the North Cedar Mountains in the 1980 inventory remains valid and no further review is warranted at this time.[15] *See also Utah v. Babbitt*, 137 F.3d at 1199 n.4 (legislation pertaining to BLM land in Utah has repeatedly failed to pass).

The foregoing demonstrates that nothing SUWA has presented to BLM has caused BLM to change its previous determination that the North Cedar Mountains area should not be considered for protection as wilderness at this time. Contrary to SUWA's assertion, locating the rail line someplace other than the Low Corridor Rail Spur would not preserve that area for Congress to designate as a wilderness area, unless there were a change in BLM policy, or additional legislation.[16]

As discussed *supra* at 7-8, environmental impacts that could be avoided only by highly speculative and not reasonably foreseeable events need not be considered (*see Rancho Seco*, CLI-93-3, 37 NRC at 146), and the need for significant changes in governmental policy or

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[14] BLM is preparing an EIS on matters relating to the reinventory. *See* "Notice of Intent to Prepare a Statewide [EIS] and Multiple Plan Amendments To Consider Establishment of New Wilderness Study Areas (WSAs) on Selected Public Land in Utah, and Call for Information," 64 Fed. Reg. 13,439 (Mar. 18, 1999); "Notice of Intent Modify Scop of Statewide [EIS] and Multiple Plan Amendments To Consider Establishment of New Wilderness Study Areas (WSAs) on Selected Public Land in Utah, and Call for Information," 64 Fed. Reg. 59,787 (Nov. 3, 1999).

[15] *See* Letter from G. A. Carpenter, Field Office Manager (BLM) to S. Bloch, Staff Attorney (SUWA), dated May 8, 2001 (Exhibit B hereto).

[16] In *Angoon*, the U.S. Court of Appeals for the Ninth Circuit rejected a challenge to an EIS prepared by the Army Corps of Engineers regarding a proposed log transfer facility on Admiralty Island, Alaska. *See Angoon*, 803 F.2d at 1017-19. The challenge asserted that a possible land exchange should have been considered as an alternative. *See id*. Even though Congress was considering legislation to implement such an exchange, the Ninth Circuit decided that the Corps need not consider such an exchange as an alternative. *See id*. at 1020-22.

legislation may make an impact speculative (*cf. id.,* at 145 (alternative requiring changes in policy or legislation need not be considered)). In this regard, the Staff submits that because an analysis of alternatives is subject to a rule of reason, an additional alternative need not be considered merely because an interested person speculates that if a change in legislation or policy occurs, the impacts of that alternative might merit consideration. As set forth below, unless Congress designates the area of interest to SUWA (*i.e.*, the "North Cedar Mountains area") as "wilderness," the environmental effects to that area, which SUWA alleges will be caused by the Low Corridor Rail Spur, will not materialize; accordingly, consideration of alternatives intended to avoid impacts to that area, absent its designation as "wilderness," is not required.

As set forth above, it is speculative whether BLM would ever recommend that Congress designate the North Cedar Mountain area as a wilderness area, or whether Congress would indeed take such an action. Such speculative changes in governmental policy or legislation should not require consideration in an EIS. Accordingly, summary disposition of this contention is appropriate.[17]

[17] SUWA also asserts in the contention that alternatives need to be considered to "preserve the wilderness character . . . of . . . the North Cedar Mountains[.]" SUWA Contentions at 5. The Staff, however, has evaluated the environmental impacts of the proposed Low Corridor Rail Spur in the DEIS, and eliminated two rail alternatives from detailed consideration, as discussed above. *See* DEIS Section 2.2.4.2; Zimmerman Affidavit, ¶¶ 8-11. Therefore, the effect of the Low Corridor Rail Spur on the "wilderness character" of the North Cedar Mountains area, if any, does not warrant any further consideration of other rail corridor alternatives. *See id.*, ¶¶ 13 and 16-17.

## CONCLUSION

For the reasons set forth above, the Staff submits that the Applicant's motion for summary disposition of Contention SUWA B should be granted.

Respectfully submitted,

**/RA/**

Robert M. Weisman
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of July 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-ISFSI |
| | ) | |
| (Independent Spent Fuel Storage Installation) | ) | |
| | ) | |

## CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION SUWA B -- RAILROAD ALIGNMENT ALTERNATIVES" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, with copies by electronic mail as indicated, this 19th day of July 2001.

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