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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SKULL VALLEY BAND OF
GOSHUTE INDIANS and PRIVATE FUEL
STORAGE, L.L.C.

Plaintiffs,

vs.

MICHAEL O. LEAVITT, in his official
capacity as Governor of the State of Utah, et
al.,

Defendants.

PLAINTIFFS'

**1) RESPONSE TO DEFENDANTS'
SUGGESTION OF LACK OF
JURISDICTION,**

**2) MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO
DEFER RESPONSE TO SUMMARY
JUDGMENT, AND**

**3) MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE DEFENDANTS'
REPLY**

Case No. 2:01CV00270C

Judge Tena Campbell

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Plaintiffs filed this action to establish the unconstitutionality of legislation enacted by the State of Utah to block construction and operation of a facility proposed by Plaintiff Private Fuel Storage, L.L.C. ("PFS") to temporarily store spent nuclear fuel on the reservation lands of Plaintiff Skull Valley Band of Goshute Indians ("Skull Valley Band" or "Band"). All of Plaintiffs' claims concern the constitutionality of the Utah statutes.

Plaintiff has filed Motions for Summary Judgment and a Motion to Dismiss which, if granted, will bring this matter to a conclusion on the merits. Defendant has also filed a Motion for Judgment on the Pleadings which challenges whether Plaintiff PFS can lawfully proceed with its project, again seeking a determination on the merits. All of these motions are set for hearing in April. Defendants' recent filings are a desperate, procedural attempt to avoid the merits, and the Defendants' failure to timely respond to Plaintiff's Motions for Summary Judgment.

Plaintiffs submit this Memorandum in combined response to a group of recent filings by the Utah Defendants: (1) a Suggestion of Lack of Jurisdiction, filed January 14, 2002 (the "Suggestion"); (2) a Motion to Defer Defendants' Response to Summary Judgment Motions, filed January 14, 2002, (the "Deferral Motion"); and (3) a Reply in Support of Defendants' Motion for Judgment on the Pleadings, filed January 9, 2002 (the "Reply").

Plaintiffs request the Court to deny the Suggestion and find that Plaintiffs have the requisite standing and that their claims are ripe.

Plaintiffs also request the Court to deny Defendants' Deferral Motion because it is untimely and is premised on faulty arguments concerning standing and ripeness.

Finally, Plaintiffs move to strike the portion of the Reply relating to standing because it improperly raises an issue that was not raised in the previous briefing on Defendants' Motion for

Judgment on the Pleadings. Additionally, the Reply raises an issue (standing) of no relevance to the Motion for Judgment on the Pleadings.

PROCEDURAL BACKGROUND

As noted, this case concerns the constitutionality of several Utah statutes enacted to block the PFS project. Following the filing of their Answer and Counterclaim, Defendants moved for judgment on the pleadings (September 20, 2001), arguing that the Nuclear Regulatory Commission (“NRC”) is not authorized to license the facility proposed by PFS, and requesting judgment for Defendants on that basis. Plaintiffs opposed (November 8, 2001) on the grounds that the NRC is indeed authorized to license the facility and that the Hobbs Act, 28 U.S.C. §§ 2342-51, divests this Court of the jurisdiction to render a decision on the scope of the NRC’s authority. Defendants then requested a lengthy extension in which to file a reply brief, to which Plaintiffs agreed (stipulation filed November 15, 2001).

Before Defendants filed the reply brief (on January 9, 2001), Plaintiffs filed two Motions for Summary Judgment on all of their claims and a Motion to Dismiss Defendants’ entire counterclaim (all filed on December 12, 2001). The Summary Judgment Motions demonstrated that the Utah statutes at issue in this case are preempted by federal law and are unconstitutional in many ways, including their violation of the Interstate Commerce Clause and the Contracts Clause of the Constitution. Plaintiffs’ Motion to Dismiss demonstrated, among other things, that Defendants’ Counterclaim was another attempt to adjudicate claims that this court (Judge Dale Kimball) and the Tenth Circuit have already rejected on standing and ripeness grounds. Thereafter, Defendants requested an extension of time in which to oppose the Motion to Dismiss, to which Plaintiffs agreed (stipulation filed January 8, 2002). Plaintiffs also offered an extension of the time for Defendants to

respond to the Summary Judgment Motions, but Defendants did not accept the offer, and to this day they have failed to file any response to the Summary Judgment Motions at all.

Defendants then filed the three filings to which this Memorandum responds (on January 9 and 14, 2001). Collectively, the filings raise for the first time the issues of Plaintiffs' standing and the ripeness of Plaintiffs' claims.¹ As demonstrated below, both Plaintiffs have standing and their claims are ripe. Given the lack of merit in Defendants' arguments, the timing with which Defendants raise the arguments—i.e. after Plaintiffs moved for summary judgment—is significant and demonstrates an intention to delay consideration of Plaintiffs' motions.

The Court has set oral argument for April 11 on Plaintiffs' Motions for Summary Judgment and Motion to Dismiss, and on Defendants' Motion for Judgment on the Pleadings.

ARGUMENT

With its three recent filings, Defendants have raised for the first time the argument that Plaintiffs lack standing to bring their Complaint. Also for the first time, Defendants have raised the issue that Plaintiffs' claims are not ripe. In doing so, Defendants have placed themselves in the curious position of arguing that Plaintiffs have no standing to challenge state legislation that was passed with no other purpose than to hinder and stop the very project proposed by PFS and for which

¹ Defendants' filings confuse whether they are challenging both Plaintiffs' standing or only that of PFS. Defendants' filings refer to "PFS's" standing, but only after defining PFS to mean Plaintiffs. In any event, this Memorandum addresses standing and ripeness for both Plaintiffs. Defendants generally refuse to acknowledge that the Skull Valley Band of Goshute Indians is a co-plaintiff with PFS. All references to Plaintiffs' positions, pleadings, and motions are variously referred to as "PFS' Argument," "PFS' Complaint," etc. The rationale behind this editorial artifice may be found on page 11 of the Suggestion where the Band is referred to as the "Leon Bear component of PFS" and the "Leon Bear faction," along with several extraneous and dubious assertions such as that the "Leon Bear faction's right to speak for the Band is in serious question and the subject of a pending Bureau of Indian Affairs' proceeding . . .," which are not in evidence.

The pleadings in this case belie Defendants' editorial gimmick. Defendants answered Paragraph 3 of the Complaint with an admission that Plaintiff Skull Valley Band is a federally recognized tribe with a reservation in the State of Utah, Answer ¶ 30, and then named the Band as a counterdefendant in its First Amended Counterclaim.

the Band has leased land. Indeed, Plaintiffs and the PFS project were identified by name in the legislative debates concerning the acts challenged by Plaintiffs. As described in greater detail below, Defendants have repeatedly expressed the intention to enforce the legislation, including in a letter to PFS by Governor Leavitt dated March 18, 1999. In the NRC licensing proceeding, Defendants have even explicitly used the legislation as the basis for an argument that the NRC cannot issue a license for the facility.

On the substance of Defendants' argument, Plaintiffs clearly have standing to challenge the constitutionality of the statutes which are explicitly aimed at outlawing their project. Defendants' decision to wait until after Plaintiffs moved for summary judgment to raise the standing and ripeness issues is telling, particularly when viewed with the clear lack of merit that those issues have. Plaintiffs respectfully submit that the Court should not countenance Defendants' delaying tactics and should require Defendants to respond to the Summary Judgment Motions forthwith. Plaintiffs have already offered, and will agree to, any reasonable extension required by Defendants so that the briefing is completed, with adequate time for the Court's consideration, prior to the April 11 hearing date.

**I. THE SUGGESTION OF LACK OF JURISDICTION SHOULD BE DENIED;
PLAINTIFFS HAVE STANDING AND THEIR CLAIMS ARE RIPE.**

A. Plaintiffs Are Engaged In Lawful Conduct.

Defendants' argument that Plaintiffs lack standing begins with the premise that Plaintiffs are engaged in unlawful conduct. See Reply at 2, Suggestion at 3. This premise is incorrect. Plaintiffs are not engaged in unlawful conduct. To the contrary, PFS is engaged in the lawful process of seeking a license from the NRC, and the Skull Valley Band has entered into a lease with PFS. Moreover, if the NRC issues a license, it will be lawful for PFS to accept that license and to act pursuant to it. A license issued by the NRC is entitled to a presumption of validity until such time as it is successfully

contested in the court of appeals pursuant to the Hobbs Act.² Defendants have no basis to argue that Plaintiffs are engaged in any illegal conduct and therefore lack standing, and they offer no legal support for that argument.³ A presumption of illegality does not flow simply because Defendants do not concur with the NRC's interpretation that its statutory mandate encompasses the possibility of permitting an away-from-reactor, spent fuel storage facility such as the one proposed by PFS. Those cases in which courts have denied standing for lack of a legally protected interest involve situations where "the plaintiff's claim has no foundation in law." Claybrook v. Slater, 111 F.3d 904, 907 (D.D.C. 1997). See also Arjay Assoc., Inc. v. Bush, 891 F.2d 894 (Fed. Cir. 1989) (denying standing because plaintiffs "have not even a colorable right" to undertake their activity). Before the Arjay court undertook the extraordinary act of dismissing a case for lack of a legally protected interest, it first found that there was a "clear absence of any right on which

² See Mobil Oil Co. v. Federal Power Comm'n Municipal Distribs. Group, 417 U.S. 283, 307 (1974) (Federal Power Commission order establishing rate structure for natural gas sales was entitled to "[a] presumption of validity [which] attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable.") (internal quotations and citations omitted); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), overruled on other grounds, 430 U.S. 99 (1977), (Secretary of Transportation's approval of highway project is "[c]ertainly ... entitled to a presumption of regularity"); Federal Communications Comm'n v. Schreiber, 381 U.S. 279, 296 (1965) (there is a "presumption to which administrative agencies are entitled—that they will act properly and according to law). See also Plaintiffs' Memorandum of Points and Authorities In Opposition to Defendants' Motion for Judgment on the Pleadings, filed November 8, 2001, at 32-37. There, Plaintiffs demonstrate that, pursuant to Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984), and other cases, decisions of the NRC are entitled to deference. See e.g. Environmental Defense Fund v. Nuclear Regulatory Comm'n, 902 F.2d 785, 788 (10th Cir. 1990) ("an unusual degree of deference is due NRC agency actions under the [Atomic Energy Act]") (internal quotation marks and citation omitted).

³ Defendants cite to an unsupported statement from a treatise to the effect that a drug smuggler would lack standing to challenge customs practices that disrupt his drug trafficking business. Reply at 8-9, citing 13 Wright & Miller, Federal Practice and Procedure § 3531.4 (which Defendants erroneously refer to as § 3551.4) at 420. Defendants' reliance on the smuggler analogy is misplaced. The smuggler is engaged in *per se* illegal activity, and Plaintiffs are not. Wright & Miller expressly acknowledges that standing would be recognized for a business firm, as opposed to a drug smuggler, asserting a commercial injury arising from enforcement of the customs practices. 13 Wright & Miller § 3531.4 at 420; Reply at 8-9. Defendants' analogy is therefore erroneous. Defendants cite to several cases, Reply at 3-12; Suggestion at 3-6, 12-14, but none bears any meaningful similarity to this case. Most of these cases simply recount standard doctrines of standing, ripeness, and jurisdiction which Plaintiffs do not dispute. Elsewhere in this Memorandum Plaintiffs take issue with Defendants' interpretation of a few cases.

these appellants might found a challenge. They simply have no rock on which to stand.” 891 F.2d at 898. That case is obviously distinguishable from this one, where the license would enjoy the presumption of validity.

B. Plaintiffs Have Properly Alleged Injury.

It is clear that the legislation at issue in this case has caused injury in fact to Plaintiffs. Plaintiffs’ Complaint clearly alleges as much, and those allegations must be taken as true at this stage of the litigation.⁴ The Complaint alleges, among other things, uncertainty in planning for the project given the impossible requirements of the state legislation, including uncertainty over: whether PFS will have to post a \$2 billion cash bond; whether any of the Plaintiffs’ agreements remain in effect; whether there is a risk of criminal liability if PFS continues with the federal licensing procedure or if either PFS or the Skull Valley Band obtains goods or services under their supposedly voided

⁴ Any arguments supporting Defendants’ standing argument should be treated as a motion to dismiss, with the allegations of the Complaint taken as true. See Atlantic Richfield Co. v. Farm Credit Bank of Wichita, 226 F.3d 1138, 1160 (10th Cir. 2000) (motion for judgment on the pleadings is treated as a motion to dismiss and court “accept[s] the well-pleaded allegations of the complaint as true and construe[s] them in the light most favorable to the non-moving party”) (internal quotation marks and citation omitted); Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 449-50 (10th Cir. 1996) (the issue of standing is raised by motion to dismiss or for summary judgment; where it is raised by motion to dismiss, court relies on general standing allegations of the complaint); Utah v. Babbitt, 137 F.3d 1193, 1204-5 (10th Cir. 1998) (same).

Defendants suggest that Plaintiffs cannot rest on the allegations of the Complaint to establish standing, but that is only true where there is a motion for summary judgment or at trial. As established in Rio Hondo, a plaintiff can rest on the allegations of the Complaint where, as here, Defendants have not moved for summary judgment. The cases Defendants cite do not support their assertion that Plaintiffs must submit proof at this juncture. See Reply at 5-6, citing Table Bluff Reservation v. Phillip Morris, Inc., 256 F. 3d 879, 882 (9th Cir. 2001) (allegations of complaint must be accepted as true); Reply at 6, citing U.S. ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc., 190 F. 3d 1156, 1160 (10th Cir. 1999) (discussing standard of review for summary judgment motion); Reply at 6-7, where Defendants carefully (and misleadingly) edit the excerpt from 13A Wright & Miller § 3531.15 to remove the fact that it is discussing summary judgment; Reply at 7 and Suggestion at 5-6, citing Federal Deposit Ins. Corp. v. Oaklawn Apartments, 959 F. 2d 170, 174 (10th Cir. 1992) (well pled facts of complaint must be accepted as true if uncontroverted by defendant’s affidavits); Coalition for Sustainable Res., Inc. v. United States Forest Serv., 259 F.3d 1244, 1249 (10th Cir. 2001) (court may consider evidence outside of pleadings if motion to dismiss is converted into motion for summary judgment).

Some authorities suggest that the district court has discretion to decide what procedure is best for the determination of jurisdictional disputes in a particular case. See 13A Wright & Miller § 3531.15, Oaklawn Apartments, 959 F. 2d at 174. But Defendants here have not suggested any real possibility of a factual dispute concerning either ripeness or standing, and even concede that the standing issue is entirely legal. Suggestion at 12.

contracts; whether the members of PFS and the shareholders of the members are subject to unlimited personal liability for the debts and obligations of PFS; whether PFS's investments are being made in a legally sound venture; and whether the Band may exercise its property rights and governmental authority over its reservation land. Complaint ¶¶ 70-75. Defendants have not addressed these allegations of the Complaint at all; they have certainly not specified their legal insufficiency or controverted them by affidavits supporting summary judgment. The allegations are therefore to be accepted as true. Supra n. 4. The allegations are sufficient to support Plaintiffs' standing and the ripeness of the claims.

C. The Utah Statutes Injure Plaintiffs Now, Without Regard to Whether the License Is Ever Issued.

In addition to the allegations of the Complaint, it is clear from the face of the statutes that many of the provisions of the Utah legislation impose immediate injury on Plaintiffs, without regard to whether the facility is ever licensed. Thus, Defendants are incorrect in asserting that Plaintiffs have no injury because PFS will never get a valid license. The statutory provisions which on their face are presently injurious include: voiding any contract to which PFS or the Band is a party, Utah Code Ann. § 19-3-301(1); imposing prohibitory taxes on any contracts not voided, id.; imposing civil and criminal penalties on those who "facilitate" violations of any part of Utah's ban and regulatory scheme purportedly applicable to spent nuclear fuel (which certainly encompasses the "facilitation" of the storage of spent fuel in the State of Utah, and which in turn criminalizes PFS's efforts to obtain the federal license, the Band's lease to PFS, and even counsel's participation in prosecuting this case), § 19-3-312; revoking statutory and common-law limited liability, § 19-3-318; and imposing state permitting processes on Indian reservation activities, § 19-3-302(7)(b) and (c). Other injuries are

detailed in Plaintiffs' Summary Judgment Motions. As is clear on the face of the statutes, Utah has inflicted injury on Plaintiffs now, without regard to the outcome of the licensure proceeding.

Finally, the Court can take judicial notice of the fact that in the NRC licensing proceeding, Defendants have explicitly used the Utah legislation as the basis for an effort to argue that the NRC cannot issue a license for the facility. Exhibit A, State of Utah's Request for Admission of Late-Filed Contention Utah Security J, at 3-8. In this filing, Utah argues that one of the provisions of the challenged Utah legislation prohibits the provision of law enforcement services to the proposed facility site. *Id.* Therefore, the State's argument continues, PFS should be denied a license because it cannot demonstrate adequate security for the facility. *Id.* at 7-8. In sum, the State is thus trying to use its legislation as an offensive weapon against Plaintiffs, yet Defendants maintain the statutes cause no injury in fact. It is simply illogical to argue that legislation designed to bar Plaintiffs from taking certain actions does not adversely affect Plaintiffs.

D. Courts Have Found Standing Where, as Here, the Plaintiffs Have Applied For a License.

Other courts have found that a party seeking a license has standing to challenge the constitutionality of state legislation that forces the party either to scuttle its development plans in deference to a potentially invalid statute, or to complete an expensive licensing process under the cloud of a potentially invalid law. See Triple G Landfills, Inc. v. Bd. of Comm'rs of Fountain County, 977 F.2d 287, 288-91 (7th Cir. 1992) (finding plaintiff had standing and its claims were ripe under these circumstances). Cases finding claims to be ripe under similar circumstances support this proposition because of the similarity of the standing injury-in-fact test and the ripeness hardship-to-the-party test. See Gary D. Peake Excavating, Inc. v. Town Bd. of Hancock, 93 F.3d 68, 72 (2d Cir. 1996); 1995 Venture I, Inc. v. Orange County, 947 F. Supp. 271, 276, 277 (E.D. Tex. 1996).

Moreover, a party has standing to challenge state rules, where, as here, the rules conflict with federal law, impose costs on the party, and impair contractual obligations. See ANR Pipeline Co. v. Corporation Comm'n of Oklahoma, 860 F.2d 1571, 1578-79 (10th Cir. 1998).

These authorities are in accord with general principles applicable to standing determinations. As the United States' amicus brief explains, a showing of standing requires only a showing that the injury is "fairly traceable to the challenged action of the defendant" and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth v. Laidlaw, 528 U.S. 167, 180 (2000). See Amicus Brief at 14. As demonstrated herein, Plaintiffs' injuries are far from being of a "speculative" nature based on "some day intentions" that the Supreme Court has found to be insufficient. Id. quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992). See also Faustin v. City, County of Denver, 268 F.3d 942, 947 (10th Cir. 2001) ("Plaintiffs must show they have sustained or are immediately in danger of sustaining some direct injury, and the injury or threat of injury must be real and immediate, not conjectural or hypothetical").⁵

⁵ Defendants have also asserted "a second standing point" in their Suggestion (at 4), namely that PFS must demonstrate that it has a validly approved lease on the Skull Valley Reservation. But they do not argue the issue and purport to limit their "present challenge" to their first point, that the activity for which the NRC license is sought is unlawful, arguing "If this Court does not resolve the first standing point (or a ripeness issue) against PFS, this Court, before proceeding to the merits, must hold PFS to its burden of establishing its standing [on the second point], but that this 'will require resolution of some contested factual issues . . .'" This contention is also meritless. Plaintiffs' allegations that they have entered into a lease which has been conditionally approved by the Bureau of Indian Affairs (BIA) is sufficient to establish Article III standing. Complaint ¶¶ 16, 47-51. Defendants are once again attempting to litigate whether BIA's approval of the lease was legally deficient, an effort already rejected in Utah v. Department of the Interior, 210 F.3d 1193 (10th Cir. 2000). See pp. 9-17 of Plaintiffs' Memorandum in Support of Motion to Dismiss Counterclaim. Defendants should not be given a trial on this issue before they should have to respond to Plaintiffs' Motions for Summary Judgment on the constitutionality of the Utah statutes.

E. Plaintiffs Meet the Standing Requirements For Claims For Declaratory Relief.

Plaintiffs have brought this suit for declaratory relief pursuant to 28 U.S.C. § 2201. Complaint ¶ 1. When considering parties' standing to bring cases for declaratory relief, courts have relaxed the "injury-in-fact" requirement and allow such actions "before a completed 'injury-in-fact' has occurred." National Rifle Ass'n of America v. Magaw, 132 F.3d 272, 279 (6th Cir. 1997). See also United Transp. Union v. Foster, 205 F.3d 851, 857 (5th Cir. 2000) (same); Hyman v. City of Louisville, 132 F. Supp. 2d 528, 533 (W.D. Ky. 2001) ("[a] declaratory judgment action brought prior to the completion of an injury-in-fact is, nevertheless, proper if the plaintiff can demonstrate ... a significant possibility of future harm") (internal citations and quotations omitted).

In Navegar, Inc. v. United States, 103 F.3d 994 (D.C. Cir. 1997), the court considered the plaintiffs' standing to challenge a statute that made the manufacture of plaintiffs' firearms illegal. See Navegar, 103 F.3d at 996-97. In Navegar, the plaintiffs sought "pre-enforcement review" of the statute meaning the plaintiffs challenged the law before the United States attempted to enforce it. Id. at 997-99. As to both standing and ripeness the court stated that:

[T]hreats of enforcement can simultaneously ripen a pre-enforcement challenge and give the threatened party standing. A credible threat of imminent prosecution can injure the threatened party by putting her between a rock and a hard place—absent the availability of pre-enforcement review, she must either forego possibly lawful activity because of her well-founded fear of prosecution, or willfully violate the statute, thereby subjecting herself to criminal prosecution and punishment. In such situations the threat of prosecution provides the foundation for justiciability as a constitutional and prudential matter, and the Declaratory Judgment Act provides the mechanism for seeking pre-enforcement review in federal court.

Id. at 998 (emphasis added) (citations omitted).

In Navegar, the D.C. Circuit reversed the district court's dismissal for lack of standing because the "district judge overlooked [] that the Act in effect singles out the appellants as its intended targets, by prohibiting weapons that only the appellants make." Id. at 1000 (emphasis added). Similarly, in the present case, Defendants have made clear, through statements of the Governor, the sponsors of the challenged statutes, and others--see Memorandum of Points and Authorities in Support of Plaintiffs' Joint Motion for Summary Judgment, filed December 12, 2001, at 17-24 (hereinafter "Summary Judgment Memorandum")--that the challenged statutes "single[] out" Plaintiffs as the "intended targets" by prohibiting only Plaintiffs' conduct. As the Navegar court stated:

To conclude that the appellants face no credible threat of prosecution under these portions of the Act [and thus lack standing], we would have to believe that the government would enact a widely publicized law targeting products that only the appellants make, send its agents to the appellants' facilities on the day of enactment to inform them of the law's prohibitions, and to begin quarantining "grandfathered" units, and soon thereafter remind appellants of the provisions of the Act by letter, but then sit idly by while the appellants continued [to violate the law].

Navegar, 103 F.3d at 1000. In the present case, this Court would likewise have to believe that the Plaintiffs "face no credible threat of prosecution" even though Defendants have "enact[ed] a widely publicized" series of laws targeting only the activity of Plaintiffs. See Summary Judgment Memorandum at 12 n.3, 13 n.4, 17-24, 38 n.11, 52 n.20, 58 n.25. Furthermore, just as in Navegar, the Defendants in this case have threatened enforcement. See id. Defendants even sent a letter to the chairman of PFS informing him of the provisions of one of the Utah laws and

promising enforcement. Exhibit B, Letter from Governor Michael Leavitt to John D. Parkyn, March 18, 1999.

Moreover, as the court stated in National Rifle, “pre-enforcement review is usually granted under the Declaratory Judgment Act when a statute “imposes costly, self-executing compliance burdens or if it chills protected First Amendment activity.” National Rifle, 132 F.3d at 279 (internal quotations omitted). In the present case, Defendants have “impose[d] [a] costly, self-executing compliance” scheme that includes, among many other onerous provisions, an outright prohibition on Plaintiffs’ conduct, a provision voiding Plaintiffs’ contracts, taxes, and criminalization of Plaintiffs’ activities. See Summary Judgment Memorandum at 9-15. The Defendants’ have also “chill[ed] [the Plaintiffs’] protected First Amendment activity” by violating Plaintiffs’ First Amendment right of freedom of Association. See id. at 53-60.

F. Defendants’ Are Improperly Attempting to Have this Court Decide a Substantive Issue Instead of Standing.

As noted, Defendants argue that the Court must first decide whether the NRC has authority to license the PFS facility before allowing Plaintiffs’ standing. The logic of Defendants’ standing argument would lead to absurd results by placing the substantive “cart” before the standing “horse.” Where, as here, a plaintiff asserts the violation of its constitutional rights, that plaintiff has standing to assert the violation if it has suffered injury, even if there is a risk that the court will later determine that the plaintiff’s claim on the merits is not well founded. So, for example, a student who is suspended from school for wearing a shirt printed with a message deemed offensive by school administrators would have standing to sue the school based on First Amendment grounds, even if there is a risk that the court may determine later that the student’s right to free speech does not extend to wearing the shirt in school. Under Defendants’ interpretation of the law, the court should decide the case on the

merits as a prerequisite to making an initial standing determination. Under the logic of Defendants' standing argument, the student would only have suffered an injury in fact for standing purposes if his constitutional right had actually been violated. Putting the cart before the horse in this manner leads to absurd results.

Contrary to Defendants' view of standing law, the student in the hypothetical case clearly suffered injury for standing purposes by being suspended from school. The student need not first establish that he had a right to wear the shirt. So here, Plaintiffs have suffered injury by enactment of laws purporting to ban the project. Yet Defendants would have the Court ignore the real injury – the banning of the project – and focus instead on the merits of the case for standing purposes. This Court has held that for standing purposes, injury is found without reaching the substance of the claims. Initiative and Referendum Institute v. Walker, 161 F. Supp. 2d 1307, 1310 (D. Utah 2001) (standing found where plaintiffs would be in the class of people injured if it is subsequently found that the challenged legislation violates constitutional rights); see also id. at 1312 (“it would be inappropriate to dismiss the case on ripeness grounds because one might find that the Free Speech claim is not meritorious”); Claybrook v. Slater, 111 F.3d 904, 907 (D.D.C. 1997) (“Whether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits. Otherwise, every unsuccessful plaintiff will have lacked standing in the first place.”).

In order to follow Defendants' argument that any license that may be issued by the NRC will necessarily be illegal, the Court would have to invalidate a license before it is ever issued. The amicus brief of the United States suggests that the joinder of the United States as a party might well be necessary. United States Brief at 7-8. The threshold issue of standing can and should be decided

without such a hypothetical and arduous analysis, and without the joinder of the United States. See Gadlin v. Sybron Intern. Corp., 222 F.3d 797, 799 (10th Cir. 2000) (“in most instances subject-matter jurisdiction will involve no arduous inquiry”) (internal quotation marks and citations omitted).

G. Plaintiffs’ Claims Are Ripe.

The Deferral Motion, by incorporating the Suggestion, also makes an argument that Plaintiffs’ claims are not ripe. Suggestion at 4-12. Defendants are unable to cite any decisions holding, on facts similar to those presented here, that a claim is not ripe. On the contrary, it is well established that where, as here, the plaintiff has applied for a license, the plaintiff’s claims challenging contested legislation are ripe. See Gary D. Peake Excavating, Inc. v. Town Bd. of Hancock, 93 F.3d 68, 72 (2d Cir. 1996) (challenge of constitutionality of statute was ripe, even though plaintiff did not yet have permit to operate landfill, because plaintiff had “spent considerable sums of money in an effort to obtain a permit [and] [r]eviewing the ordinance at this time will allow [the plaintiff] to make an informed decision as to whether ... [plaintiff should] cut his losses by halting his efforts to obtain a [] permit ... [or] continue with the [] permitting process, knowing that obtaining the [] permit would not be in vain”); 1995 Venture I, Inc. v. Orange County, 947 F. Supp. 271, 276, 277 (E.D. Tex. 1996) (constitutional challenge of regulations was ripe even though plaintiff had not yet even applied for permit to take action under the regulations because “the only questions remaining for the court are purely legal, i.e., the validity of Defendant’s regulations” and “Plaintiff has allegedly expended over \$200,000 on a business it cannot open without fear of a criminal conviction for violating the” regulations).

Defendants’ ripeness argument also fails because when seeking declaratory relief, as Plaintiffs do here, “[o]ne does not have to await the consummation of threatened injury to obtain

preventive relief.” Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n, 461 U.S. 190, 201 (1983) (internal quotations omitted). The plaintiffs in Pacific Gas sought a declaratory judgment regarding the constitutionality of a state law that “condition[ed] the construction of nuclear plants on findings by the” state that the federal government had approved a disposal method for high-level nuclear waste. Id. at 194. The Court found the plaintiffs’ challenge ripe because “[t]o require the industry to proceed without knowing whether the [state law] is valid would impose a palpable and considerable hardship on the utilities.” Id. at 201-02. See also Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967), overruled on other grounds, 430 U.S. 99 (1977) (promulgation of “clear-cut” and immediately effective regulations requiring certain procedures when printing the names of prescription drugs, “puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate ... [e]ither they must comply [with the regulations] and incur the costs ... or they must follow their present course and risk prosecution) (internal citations and quotations omitted); National Rifle, 132 F.3d at 286 (challenge to statute affecting plaintiffs’ business ripe because the “plaintiffs, for all practical purposes, are coerced into a particular course of conduct by the prospect of heavy civil and criminal penalties that might be visited upon them”); Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 265 n. 13 (1991) (challenge to unexercised agency power is ripe when it creates “sword over Damocles”).

Because the Utah statutes have a “chilling effect” on Plaintiffs’ First Amendment right of freedom of association, the “[r]easonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim.” New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995) (internal quotations omitted). See

also National Rifle, 132 F.3d at 284-85 (recognizing that ripeness requirement under Declaratory Judgment Act is relaxed when state statute has “chilling effect” on First Amendment freedoms).

All of the arguments and authorities cited above in connection with standing also support a finding that Plaintiffs’ claims are ripe due to the similarity of the injury-in-fact test for standing and the hardship-to-the-party test of ripeness analysis. See, e.g. Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997) (“threats of enforcement can simultaneously ripen a pre-enforcement challenge and give the threatened party standing”).⁶

As demonstrated, Plaintiffs claims are ripe. Plaintiffs simultaneously maintain (in their Motion to Dismiss) that Defendants’ Counterclaim cannot be adjudicated for various reasons including that this Court lacks jurisdiction, there is no final agency action, Defendants’ lack of standing, and the Counterclaim is barred by the doctrines of res judicata and collateral estoppel. Defendants assert that if Plaintiffs’ claims are ripe, so must theirs be, because the Counterclaim is “merely the flip side of PFS’s own claim.” Reply at 3 n.1. Defendants do not elaborate on what they mean by the “flip side.” In any case, there is no merit to Defendants’ assertion. Plaintiffs’ claims concern solely the constitutionality of the Utah statutes, and are ripe because those statutes are injuring Plaintiffs now. On the other hand, Defendants’ Counterclaim

⁶ Defendants’ Suggestion requests that the Court not rule on the ripeness issue, because it will first “require substantial discovery” concerning the hardship to Plaintiffs. Id. at 14. See also id. at 11 (expressing a desire to “interrogate under oath” PFS executives). Defendants fail to identify what discovery they believe will be necessary and which allegations of the Complaint they hope to be able to controvert. The Court should therefore not defer a decision on ripeness until after some period of discovery.

In connection with their request for discovery, Defendants claim that Plaintiffs have refused to provide discovery. Suggestion at 12 n. 5, 14. This is wholly incorrect. Defendants have never served a discovery request. At the Rule 26(f) meeting, Plaintiffs requested that Defendants delay any discovery until after seeing Plaintiffs’ summary judgment motions, which were to be filed shortly after the meeting. Defendants agreed. Moreover, because this case presents entirely legal issues, Plaintiffs are unaware of any disclosures to be made pursuant to Fed. R. Civ. P. 26(a)(1), which calls for identification of witnesses, documents, and insurance agreements, as well as a computation of damages.

challenges administrative proceedings which are not final, and other decisions of this Court and the Tenth Circuit have found that Defendants' claims cannot yet be adjudicated for various reasons.

II. DEFENDANTS' DEFERRAL MOTION SHOULD BE DENIED.

Defendants seek an indefinite postponement of the time to oppose Plaintiffs' Summary Judgment Motions on the grounds that they want first to litigate standing and ripeness, and they request extensive but unspecified discovery on the ripeness issue. The Deferral Motion should be denied for several reasons.

A. The Deferral Motion Is Based On Faulty Arguments Concerning Standing And Ripeness And Would Result In Needless Delay.

The Deferral Motion serves Defendants' attempt to turn the Court's attention from the issue of the unconstitutionality of the Utah statutes, potentially for many months. Plaintiffs request the Court not to countenance such a delay because the Deferral Motion, which incorporates by reference the arguments made in the Reply and Suggestion, relies on erroneous legal arguments. As demonstrated in Part I, Plaintiffs have standing and their claims are ripe.

Issues concerning a court's jurisdiction may be raised at any time, but the timing of the Deferral Motion and the other filings on which it is based (the Reply and Suggestion) is significant. The timing suggests that Defendants are attempting to raise their ill-founded jurisdictional objections to avoid having to defend the unconstitutional Utah statutes. As demonstrated more fully below in Part III, Defendants' first attempt to argue the issue of Plaintiffs' standing is the Reply, followed five days later by the Suggestion. The Suggestion contains the Defendants' first attempt to raise the issue

of the ripeness of Plaintiffs' claims.⁷ As is clear from the chronology in the Procedural Background section above, Defendants' standing and ripeness arguments are made for the first time after Plaintiffs moved for summary judgment. Defendants' express bewilderment as to why Plaintiffs, "faced with substantial challenges to PFS's standing and the ripeness of its claims, elected to devote the time needed to create 400 pages of summary judgment motions." Deferral Motion at 8-9. As the record shows, Plaintiffs were not "faced with substantial [or any other] challenges" to standing and ripeness when they filed the Summary Judgment Motions. Defendants' bewilderment is of the self-made variety. (Incidentally, the two summary judgment motions total less than 100 pages, not 400, and are hardly overwhelming for dispositive motions in a case of this magnitude.) Defendants' attempt to argue the jurisdictional issues only after summary judgment had been requested, coupled with their plain lack of merit, suggests that Defendants hope to use those issues to divert this Court, for as long as possible, from considering Plaintiffs' Summary Judgment Motions.

B. The Deferral Motion is Untimely.

Defendants did not accept Plaintiffs' offer to extend the time for filing the oppositions to Plaintiffs' summary judgment motions. Exhibit C, letter from Val Antczak to Monte Stewart, January 4, 2002. Therefore, the oppositions were due on January 11, 2002 (30 days after the motions were filed). Moreover, by order dated January 10, the Court set the Summary Judgment Motions for argument on April 11. Defendants' Deferral Motion is dated January 14. The Deferral Motion is untimely pursuant to Fed. R. Civ. P. 6(b)(1), which requires that motions to extend time be filed within the time originally prescribed. Furthermore, Defendants make no claim that the exception for

⁷ Defendants had identified standing as an issue in their Amended Answer and Counterclaim, but had never argued it. Defendants did not identify the issue of ripeness in the Amended Answer and Counterclaim.

excusable neglect applies. See Rule 6(b)(2). Accordingly, the Deferral Motion is untimely and should be denied.

C. The Deferral Motion Does Not Justify Its Request for an Indefinite Deferral.

Even assuming that Defendants had raised a colorable argument that this Court lacks jurisdiction over this case, Defendants have not justified their request for an indefinite deferral of the consideration of Plaintiffs' Summary Judgment Motions. See supra n. 6.

III. THE PORTION OF DEFENDANTS' REPLY BRIEF THAT CONCERNS STANDING SHOULD BE STRICKEN.

A. The Reply Brief Raises the Standing Issue for the First Time.

As discussed above, Defendants' Reply asserts that Plaintiffs have not suffered the injury in fact requisite to establish standing because PFS, even with a license issued by the NRC, will be engaging in an unlawful act – the interim storage of spent nuclear fuel at a site other than the site of a nuclear reactor. Reply at 8-9. There is no injury, Defendants' argument goes, because the unconstitutional Utah legislation intended to stop PFS from building the spent fuel storage facility merely prevents PFS from doing something that is allegedly prohibited under federal law.

Defendants did not raise this standing argument in their Memorandum in Support of the Motion for Judgment on the Pleadings (filed September 20, 2001) (the "Opening Memorandum"). Defendants' Opening Memorandum argued instead that the NRC could not lawfully license the proposed facility, and that therefore the Court should grant them judgment on the pleadings, that is, on the merits of Defendants' Counterclaim. The Opening Memorandum contained no request to dismiss

Plaintiffs' claims for lack of standing, or any argument directed to standing at all.⁸ See Opening Mem. at 45 (“this Court should hold that governing federal law excludes and disallows PFS’s proposed Skull Valley waste facility, on that basis grant Utah’s Rule 12(c) motion, and then enter a judgment on the pleadings in favor of Utah . . .”). Therefore, Plaintiffs were given no notice of this argument prior to drafting their opposition to the Opening Memorandum.

In response, Plaintiffs’ Opposition to the Motion for Judgment on the Pleadings (filed November 8, 2001) demonstrated that federal law clearly authorizes the NRC to license the facility, and also raised, as Plaintiffs were obliged to do, the Court’s lack of jurisdiction to decide the issue because, under the Hobbs Act; jurisdiction to decide matters of NRC authority is vested solely in the courts of appeal. Plaintiffs pointed out that the Defendants’ argument that the NRC lacks authority to license the proposed facility would properly be resolved in a court of appeals after issuance of the license, if indeed it is issued. See Opposition to Defendants’ Motion for Judgment on the Pleadings. The United States has recently filed an amicus brief taking the same position.

Now in reply, attempting to avoid the Hobbs Act, Defendants have seemingly abandoned the point of their Opening Memorandum. Instead of asking for judgment on the pleadings on their Counterclaim, they request dismissal of the Complaint for lack of standing. See Reply at 39 (requesting a ruling that “PFS has no standing to assert the claims set forth in its Complaint” and “an Order dismissing the Complaint”). As noted, Defendants did not argue standing in the Opening Memorandum. Plaintiffs were not on notice when drafting their Opposition to the Motion for

⁸ The Opening Memorandum mentions standing only once, and that only a vague and passing reference in a footnote. See page 44 n. 12 (“PFS has no basis (or standing, if you will) for challenging the disliked Utah statutes”). Defendants certainly made no effort to argue the issue.

Judgment on the Pleadings that Defendants sought dismissal of Plaintiffs' claims based on a lack of standing.

It is improper to argue an issue for the first time in a reply brief. See DUCivR 7-1(b)(3) ("A reply memorandum must be limited to rebuttal of matters raised in the memorandum opposing the motion . . ."). The portions of the Reply that argue standing should therefore be stricken.

B. The Standing Issue is Unrelated to the Motion for Judgment on the Pleadings.

The Reply's newly raised issue concerns the Plaintiffs' standing to bring their own claims. This issue has nothing at all to do with Defendants' motion for judgment on their claims. The standing argument does not support Defendants' motion for a judgment, nor does it bear any other logical connection to the motion. The Reply should therefore be stricken.

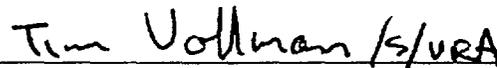
Defendants repeatedly assert that Plaintiffs have alleged that the NRC license, if granted, will be valid, thus arguing that Plaintiffs have put the validity of the license at issue and that Plaintiffs must prove that issue to establish their standing. See e.g. Reply at 4, 8. These assertions are incorrect, and they are a red herring. Plaintiffs have alleged only that PFS has applied for a license and that, if it is granted, PFS intends to proceed with the construction and operation of the facility. Complaint ¶ 33. Plaintiffs' position, and that of the United States in the amicus brief, is that the Hobbs Act requires that the validity of any NRC license, including any that may be issued to PFS, may only be challenged in, and determined by, a court of appeals after the license is actually issued. Plaintiffs have not put the validity of any license at issue for purposes of Defendants' Motion for Judgment on the Pleadings or any other purpose – indeed, the Hobbs Act would prohibit Plaintiffs from doing so. The validity issue has been injected into this litigation solely by Defendants. Defendants' latest iteration of the license-

validity issue, that the Court must decide it in order for Plaintiffs to have standing, is only the latest ploy to keep the issue before this Court, when the Hobbs Act plainly requires otherwise.

CONCLUSION

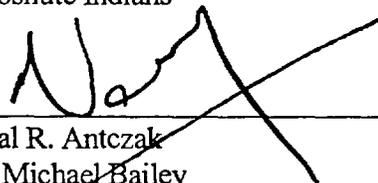
For the foregoing reasons, Plaintiffs respectfully request the Court to: (1) deny the Suggestion and find that Plaintiffs have the requisite standing and that their claims are ripe; (2) deny the Deferral Motion and require Defendants to respond to the summary judgment motions forthwith and in time for the briefing to be completed, with adequate time for the Court's consideration of the briefs, prior to the April 11 argument date; and (3) strike the portions of the Reply concerning standing.

DATED this 24 day of January, 2002.



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CERTIFICATE OF SERVICE

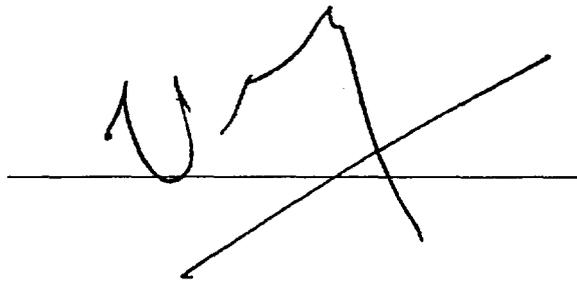
I hereby certify that on the 28 day of January, 2002, I caused to be hand delivered a true and correct copy of the foregoing **PLAINTIFFS' 1) RESPONSE TO DEFENDANTS' SUGGESTION OF LACK OF JURISDICTION, 2) MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DEFER RESPONSE TO SUMMARY JUDGMENT, AND 3) MEMORANDUM IN SUPPORT OF MOTION TO STRIKE DEFENDANTS' REPLY**, to:

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A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

PRIVATE FUEL STORAGE, LLC
(Independent Spent Fuel
Storage Installation)

) Docket No. 72-22-ISFSI
)
) ASLBP No. 97-732-02-ISFSI
)
) April 13, 2001

STATE OF UTAH'S REQUEST FOR ADMISSION OF
LATE-FILED CONTENTION UTAH SECURITY J
(Law Enforcement)

Legislation passed during the 2001 Utah Legislative Session prohibits a county from providing municipal-type services, including law enforcement, to any high level nuclear waste storage facility or transfer facility within the State of Utah and invalidates any pre-existing contract to provide such services. Pursuant to 10 CFR § 2.714, the State hereby seeks the admission of late-filed Contention Utah Security J which asserts that the Applicant, Private Fuel Storage, LLC ("PFS") may not rely on Tooele County to provide law enforcement assistance to the PFS storage facility or transfer facility. Thus, PFS does not comply with 10 CFR Parts 72 and 73.

The State meets the late-filed factors and, for the reasons stated below, the State requests the Board admit Contention Utah Security J.¹

¹ The request for admission of this security contention relies upon information in the public record. In particular, the State cites to or relies upon previous Board decisions which have been made publicly available, NRC regulations, and State of Utah legislation. The State does not believe there is any safeguards-protected information in this document and accordingly files it as a public record.

BACKGROUND

In January 1998 the State timely filed nine contentions based on PFS's Physical Security Plan.² One of those contentions, Utah Security C, Local Law Enforcement, contended: "The Applicant has not met the requirements of 10 C.F.R. Part 73, App. C, Contents of the Contingency Plan, Law Enforcement Assistance." LBP-98-13, 47 NRC 360, 369 (1998).

At an in camera prehearing conference, held in Rockville, Maryland, on June 17, 1998, counsel for the Applicant presented the Board and the parties with a cooperative law enforcement agreement entered into by the U.S. Bureau of Indian Affairs ("BIA"), the Skull Valley Band of Goshutes ("Band") and Tooele County, Contract No. 97-06-02, on June 3, 1997 ("CLEA"). Of the nine Utah security contentions, the Board initially admitted only Utah Security-C, in part. *Id.* at 369-70, 374. The Board relied on the CLEA to find inadmissible portions of Utah Security A, B and C with respect to the Tooele County Sheriff's alleged lack of jurisdiction on the Band's reservation, *id.* at 368-70, but later reversed that decision based on the State's request for reconsideration which asserted that the County had improperly adopted the CLEA. *See* LBP98-17, 48 NRC 69 (1998).

In September 1998, Tooele County passed a resolution approving the County's entry into the CLEA. In December 1998, the State received a letter from the Tooele County Attorney who was of the opinion that, under the CLEA, the County is not obligated to provide law enforcement protection to PFS or its proposed storage site. The Board denied

² State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan, January 3, 1998.

as untimely the State's December 1998 attempt to amend Utah Security-C based on the Tooele County Attorney's letter. See LBP-99-7, 49 NRC 124 (1999).

PFS's September 1999 motion for summary disposition, relying on passage by Tooele County of a resolution approving the County's entry into the CLEA, requested dismissal of Utah Security-A and Security-B and, in part, Security-C. The Board, ruling that the County had rectified any procedural deficiencies in entering into the CLEA, granted PFS's motion. LBP-99-31, 50 NRC 147 (1999).

The remaining issue in Utah Security-C-- whether the Tooele County Sheriff could provide timely response to the PFS facility-- was set to be heard on February 29, 2000. Prior to the hearing, the State advised the Board that, given the limited issue the Board had admitted for hearing, the State saw no purpose in going forward with the Utah Security-C hearing because the State's real security concerns would not be heard. State of Utah's Notification of its decision not to go forward with Utah Security-C (February 14, 2000). In particular, the State took issue with the notion that a CLEA conferred jurisdiction on the Tooele County Sheriff for law enforcement activities relating to the PFS facility on the Skull Valley Reservation. *Id.* at 4. On February 29, 2000, the Board dismissed Security-C. LBP-00-05, 51 NRC 64 (2000).

On March 15, 2001, Utah's Governor signed into law Senate Bill 81, "Provisions Relating to High-Level Nuclear Waste."³ This legislation, *inter alia*, amends Utah Code Annotated §§ 17-27-102, 17-34-1, 19-3-301(6) and 19-3-303 and prohibits a county from

³ See Letter from Governor Leavitt dated March 15, 2001 to President Mansell and Speaker Stephens, attached hereto as Exhibit 1.

entering into or implementing a contract to provide municipal-type services, including law enforcement, to any area under consideration for a storage facility or transfer facility for the placement of high level nuclear waste.⁴

CONTENTION Security J. Law Enforcement.

The Applicant's Physical Security Plan does not comply with 10 CFR Part 73 because the Applicant does not have valid documented liaison with a designated local law enforcement authority (LLEA), and redundant communications between onsite security force members and the LLEA, to provide timely response to unauthorized penetrations at the PFS facility. See 10 CFR §§ 72.180; 73.51(d)(6), (8) and (12); and Part 73, Appendix C.

BASIS:

Part 72 applicants must establish, maintain and follow a physical protection plan as described in § 73.51, and a safeguards contingency plan as described in Part 73, Appendix C. 10 CFR §§ 72.180, 72.184. PFS is requesting a specific license to store spent nuclear fuel in an ISFSI and, thus, is subject to the physical protection requirements of section 73.51 at the PFS facility. 10 CFR § 73.51(a)(1)(i).

The general performance objective of section 73.51 is for a licensee to provide "high assurance that activities involving spent nuclear fuel and high-level radioactive waste do not constitute an unreasonable risk to public health and safety." 10 CFR § 73.51(b)(1). To meet the general performance objective, a licensee must have the performance capability of

⁴ Relevant portions of Utah Senate Bill 81,S2, are attached hereto as Exhibit 2.

storing spent nuclear fuel only in a protected area; granting access to a protected area to only those individuals authorized to enter that area; detecting and assessing unauthorized penetrations; providing timely communication to a designated response force; and managing the physical protection organization to maintain its effectiveness. Id. § 73.51(b)(2). Methods acceptable to NRC for a licensee to meet the performance capabilities are contained in section 73.51(d) and includes:

Documented liaison with a designated response force or local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetration or activities.

Id. at (6); *see also* 10 CFR Part 73, App. C, Contents of Plan at (3)(d). Other methods include a timely means of assessment of alarms; and redundant communications capability between onsite security force members and designated response force or LLEA. 10 CFR § 73.51(b)(3) and (8). Furthermore, the licensee's physical protection program must be reviewed once every 24 months and must include an evaluation of the effectiveness of the physical protection system and a verification of the liaison established with the designated response force of LLEA. Id. at (12). PFS cannot now meet these performance capabilities.

The Board found that PFS has response arrangements with the Tooele County Sheriff's Office, the local law enforcement agency (LLEA). LBP98-13, 47 NRC 360, 363 (1998). Thus, to meet the documented liaison and timely response requirements of Part 73, and potentially other requirements of section 73.51(b), PFS must rely on the Tooele County Sheriff's Office to provide timely law enforcement assistance to its facility.

In ruling on the admissibility of Contention Security-C, the Board found that the State did not present a supportable legal or factual challenge to the existence of a law

enforcement agreement among Tooele County, the BIA and the Band. 47 NRC at 370. The State now presents such a challenge.

On March 15, 2001, the State enacted into law certain provisions relating to high level nuclear waste. See Exhibit 2. Under the newly enacted law, before implementing or executing “any agreement or contract to provide goods and services to any storage facility or transfer facility for high-level nuclear waste, or greater than class C radioactive waste,” a county must comply with certain mandatory provisions of the law. Utah Code Ann. § 17-27-102(2). In addition, pursuant to Utah Code Ann. § 17-34-1(3) a county may not:

- (a) provide, contract to provide, or agree in any manner to provide municipal-type services, as these services are defined in Section 19-3-303, to any area under consideration for a storage facility or transfer facility for the placement of high-level nuclear waste, or greater than class C radioactive waste; or
- (b) seek to fund services for these facilities by:
 - (i) levying a tax; or
 - (ii) charging a service charge or fee to persons benefitting from the municipal-type services.

The definition of “municipal-type services” in Utah Code Ann. § 19-3-303(6) includes but is not limited to:

- (a) fire protection service;
- (b) waste and garbage collection and disposal;
- (c) planning and zoning;
- (d) street lighting;
- (e) life support and paramedic services;
- (f) water;
- (g) sewer;
- (h) electricity;
- (i) natural gas or other fuel; or
- (j) law enforcement.

Furthermore, “[p]olitical subdivisions of the State may not enter into any contracts

or any other agreements for the purpose of providing any goods, services, or municipal-type services” to a high level waste storage facility. Utah Code Ann. § 19-3-301(6)(b). Under the 2001 law, any new or existing contract or agreement to provide goods, services or municipal-type services to any entity involved in placement of high-level nuclear waste at a storage or transfer facility within the State of Utah is against the public interest and is void from its inception. *Id.* at (9). Accordingly, the CLEA which the County entered into with the Skull Valley Band of Goshutes and the BIA to provide law enforcement services on the Skull Valley Reservation is subject to this new law.

The record in this proceeding is that the scope of the CLEA encompasses the provision of law enforcement services by Tooele County Sheriff’s Office to the PFS facility located on the Skull Valley Reservation. *See* Background Section *supra*. There can be no doubt that the CLEA is invalid as it relates to the PFS facility. First, the Cooperative Law Enforcement Agreement, on its face, is an “agreement” or “contract.” Second, the agreement is to provide law enforcement services, a sub-set of “municipal-type services.” Third, the service to be provided, as it relates to the PFS facility, is to a storage facility or transfer facility for the placement of high-level nuclear waste. Accordingly, Tooele County’s provision of law enforcement services under the CLEA as it relates to the PFS facility is void as against public policy in the State of Utah.

The enactment of laws prohibiting a county from providing law enforcement services to a high level nuclear waste storage facility means that PFS does not have the performance capability to provide high assurance that its activity involving spent nuclear fuel does not constitute an unreasonable risk to public health and safety because a method

acceptable to the NRC to meet the performance capability -- documented liaison with an LLEA to permit timely response to unauthorized penetration or activities -- does not exist. Moreover, under 10 CFR § 73.51(b)(12) the requirement for an established liaison with an LLEA is ongoing and its effectiveness must be reviewed once every 24 months. Even if the Board found that PFS had such a documented liaison in the past, such a finding should not preclude admission of this contention given the requirements of section 73.51(b)(12).

Finally, the supporting information, Exhibits 1 and 2, are sufficient to provide the contention with an admissible basis without the need for expert opinion support. In reviewing the security contentions the State filed in 1998, the Board held that once having access to PFS's physical security plan "expert opinion support is not required for a contention, at least as long as there is other supporting information sufficient to provide the contention with an admissible basis." LBP98-13, 47 NRC 360, 367 (1998). Therefore, the State submits there is a supportable basis to find Contention Utah Security J admissible.

LATE-FILED FACTORS

The State meets the 10 CFR § 2.714(a) late-filed factors for proposing its Contention Utah Security J.

Good Cause: The State has good cause for late filing Utah Security J. The law prohibiting the county from providing law enforcement service to a high level nuclear waste facility became effective on March 15, 2001. See Exhibit 1, and Exhibit 2 (Section 17).

Thus, the State is filing this contention within thirty days of the effective date of the information relied upon to support this contention.

On numerous occasions in this proceeding the State has raised its concerns about the jurisdictional authority and resource capability of Tooele County to provide timely and effective law enforcement service to the PFS facility. The State has not pre-authorized the use of any State resources to assist the County in fulfilling any future private contractual obligations in providing law enforcement to the PFS facility. The Board did not accept these argument in the past but under the new law such law enforcement contracts and assistance are prohibited. Thus, the State has good cause for now filing this contention.

Development of a Sound Record: Utah Security J challenges whether PFS can meet the requirements of Part 73 based on the LLEA not encompassing the PFS facility. No party other than the State will present this important issue to the Board and thus, the State's participation will assist in developing a sound record. As described above, the State has provided documentary support for this contention.

Availability of Other Means for Protecting The State's Interests: The State has no alternative means, other than this proceeding, of protecting its interest. The State has significant concerns about the unreasonable risk to public health and safety if PFS cannot provide assurance of the availability of law enforcement assistance to the PFS facility.

Representation by Another Party: The State's position will not be represented by any other party, as there is no other party in this proceeding who has an admitted contention relating to law enforcement.

Broadening of Issues or Delay of the Proceeding: The admission of late-filed Utah Security J should not broaden the proceeding because Utah Security J may be accommodated in the existing schedule with the remaining Group III contentions. Thus,

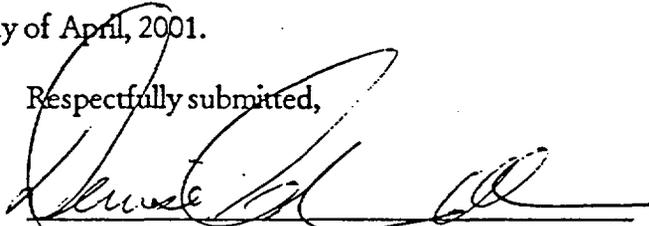
the licensing proceeding should not be delayed. Moreover, safety concerns outweigh any broadening or delay in the proceeding.

CONCLUSION

For the foregoing reasons, Contention Utah Security J meets the Commission's standard for late filed contentions and, thus, should be admitted.

DATED this 13th day of April, 2001.

Respectfully submitted,



Denise Chancellor, Assistant Attorney General
Fred G Nelson, Assistant Attorney General
Connie Nakahara, Special Assistant Attorney General
Diane Curran, Special Assistant Attorney General
Laura Lockhart, Assistant Attorney General
Attorneys for State of Utah
Utah Attorney General's Office
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Salt Lake City, UT 84114-0873
Telephone: (801) 366-0286, Fax: (801) 366-0292

Chapter 157
47-2-15-01
upon 277, p. 438

MICHAEL O. LEAVITT
GOVERNOR

STATE OF UTAH
OFFICE OF THE GOVERNOR
SALT LAKE CITY
84114-0601

OLENE S. WALKER
LIEUTENANT GOVERNOR

March 15, 2001

Honorable L. Alma Mansell
President of the Senate
and
Honorable Martin R. Stephens
Speaker of the House
BUILDING MAIL

Dear President Mansell and Speaker Stephens:

This is to inform you that on March 15, 2001, I have signed Senate Bill SB0081, ^{S2} Provisions Relating to High-level Nuclear Waste, of the 2001 General Session of the Fifty-Fourth Legislature and have forwarded this to the Lieutenant Governor for filing.

Sincerely,



Michael O. Leavitt
Governor

PROVISIONS RELATING TO HIGH-LEVEL NUCLEAR WASTE

2001 GENERAL SESSION

STATE OF UTAH

Sponsor: Terry R. Spencer

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 17-27-102 is amended to read:

17-27-102. Purpose.

(1) To accomplish the purpose of this chapter, and in order to provide for the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, and aesthetics of the county and its present and future inhabitants and businesses, to protect the tax base, secure economy in governmental expenditures, foster the state's agricultural and other industries, protect both urban and nonurban development, and to protect property values, counties may enact all ordinances, resolutions, and rules that they consider necessary for the use and development of land within the county, including ordinances, resolutions, and rules governing uses, density, open spaces, structures, buildings, energy-efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, public facilities, vegetation, and trees and landscaping, unless those ordinances, resolutions, or rules are expressly prohibited by law.

(2) A county shall comply with the mandatory provisions of this part before any agreement or contract to provide goods, services, or municipal-type services to any storage facility or transfer facility for high-level nuclear waste, or greater than class C radioactive waste, may be executed or implemented.

....

Section 5. Section 17-34-1 is amended to read:

17-34-1. Counties may provide municipal services – First class counties required to provide paramedic services.

(1) For purposes of this chapter, [~~"municipal-type"~~] except as otherwise provided in Subsection (3):

(a) "Greater than class C radioactive waste" has the same meaning as in Section 19-3-303.

(b) "High-level nuclear waste" has the same meaning as in Section 19-3-303.

(c) "Municipal-type services" means:

~~[(a)]~~ (i) fire protection service;

~~[(b)]~~ (ii) waste and garbage collection and disposal;

~~(c)~~ (iii) planning and zoning;

~~(d)~~ (iv) street lighting;

~~(e)~~ (v) in a county of the first class, advanced life support and paramedic services; and

~~(f)~~ (vi) all other services and functions that are required by law to be budgeted,

appropriated, and accounted for from a municipal services fund or a municipal capital projects fund as defined under Chapter 36, Uniform Fiscal Procedures Act for Counties.

(d) "Placement" has the same meaning as in Section 19-3-303.

(e) "Storage facility" has the same meaning as in Section 19-3-303.

(f) "Transfer facility" has the same meaning as in Section 19-3-303.

(2) A county may:

(a) provide municipal-type services to areas of the county outside the limits of cities and towns without providing the same services to cities or towns;

(b) fund those services by:

(i) levying a tax on taxable property in the county outside the limits of cities and towns; or

(ii) charging a service charge or fee to persons benefitting from the municipal-type services.

(3) A county may not:

(a) provide, contract to provide, or agree in any manner to provide municipal-type services, as these services are defined in Section 19-3-303, to any area under consideration for a storage facility or transfer facility for the placement of high-level nuclear waste, or greater than class C radioactive waste; or

(b) seek to fund services for these facilities by:

(i) levying a tax; or

(ii) charging a service charge or fee to persons benefitting from the municipal-type services.

~~(3)~~ (4) Each county of the first class shall provide advanced life support and paramedic services to the area of the county outside the limits of cities and towns.

....

Section 8. Section 19-3-301 is amended to read:

19-3-301. Restrictions on nuclear waste placement in state.

(6) (a) State agencies may not, for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility, or to any organization engaged in the transportation of waste, enter into any contracts or any other agreements prior to:

(i) the satisfaction of the conditions in Subsection (4); and

(ii) the executive director of the department having certified that the requirements of

Sections 19-3-304 through 19-3-308 have been met for the purposes of a license application proceeding for a storage facility or transfer facility.

(b) Political subdivisions of the state may not enter into any contracts or any other agreements for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility, or to any organization engaged in the transportation of waste.

(c) This Subsection (6) does not prohibit a state agency from exercising the regulatory authority granted to it by law.

....

(9) (a) (i) Any contract or agreement to provide any goods, services, or municipal-type services to any organization engaging in, or attempting to engage in the placement of high-level nuclear waste or greater than class C radioactive waste at a storage facility or transfer facility within the state are declared to be against the greater public interest, health, and welfare of the state, by promoting an activity which has the great potential to cause extreme public harm.

(ii) These contracts or agreements under Subsection (9)(a)(i), whether formal or informal, are declared to be void from inception, agreement, or execution as against public policy.

(b) (i) Any contract or other agreement to provide goods, services, or municipal-type services to storage or transfer facilities may not be executed within the state.

(ii) Any contract or other agreement, existing or executed on or after the effective date of this act, is considered void from the time of agreement or execution.

Section 10. Section 19-3-303 is amended to read:

19-3-303. Definitions.

As used in this part:

(1) "Final judgment" means a final ruling or judgment, including any supporting opinion, that determines the rights of the parties and concerning which all appellate remedies have been exhausted or the time for appeal has expired.

(2) "Goods" means any materials or supplies, whether raw, processed, or manufactured.

[†] (3) "Greater than class C radioactive waste" means low-level radioactive waste that has higher concentrations of specific radionuclides than allowed for class C waste.

(4) "Gross value of the contract" means the totality of the consideration received for any goods, services, or municipal-type services delivered or rendered in the state without any deduction

for expense paid or accrued with respect to it.

~~[(2)]~~ (5) "High-level nuclear waste" has the same meaning as in Section 19-3-102.

(6) "Municipal-type services" includes, but is not limited to:

(a) fire protection service;

(b) waste and garbage collection and disposal;

(c) planning and zoning;

(d) street lighting;

(e) life support and paramedic services;

(f) water;

(g) sewer;

(h) electricity;

(i) natural gas or other fuel; or

(j) law enforcement.

(7) "Organization" means a corporation, limited liability company, partnership, limited liability partnership, joint venture, consortium, association, trust, or other entity formed to undertake an enterprise, whether or not for profit.

(8) "Placement" means transportation, transfer, storage, decay in storage, treatment, or disposal.

(9) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

~~[(3)]~~ (10) "Rule" means a rule made by the department under Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(11) "Service" or "services" means any work or governmental program which provides a

benefit.~~[(4)]~~ (12) "Storage facility" means any facility which stores, holds, or otherwise provides for the emplacement of waste regardless of the intent to recover that waste for subsequent use, processing, or disposal.

~~[(5)]~~ (13) "Transfer facility" means any facility which transfers waste from and between transportation modes, vehicles, cars, or other units, and includes rail terminals and intermodal transfer points.

~~[(6)]~~ (14) "Waste" or "wastes" means high-level nuclear waste and greater than class C radioactive waste.

....

Section 17. Effective date.

If approved by two-thirds of all the members elected to each house, this act takes effect upon approval by the governor, or the day following the constitutional time limit of Utah Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto, the date of veto override.

B

**STATE OF UTAH**

OFFICE OF THE GOVERNOR
SALT LAKE CITY
84114-0601

MICHAEL O. LEAVITT
GOVERNOR

OLENE S. WALKER
LIEUTENANT GOVERNOR

March 18, 1999

John D. Parkyn
Chairman of the Board
Private Fuel Storage, L.L.C.
P.O. Box C4010
La Crosse, WI 54602-4010

Dear Mr. Parkyn:

As you are aware, the State of Utah opposes the location of a storage facility for high level nuclear waste within its boundaries. I am writing to advise you and the members of your Board of Directors of changes in Utah law that were recently enacted.

Senate Bill 177, a copy of which is enclosed, deals with requirements for grade crossing and liability for businesses managing high level nuclear waste. The bill revokes statutory and common law grants of limited liability for any entity that arranges for or engages in the transportation, transfer, or storage of high level nuclear waste and greater than Class C radioactive waste in Utah.

Limited liability for equity holders of corporations and other limited companies is a matter of state law. Limited liability is a privilege, not a right, that the Legislature grants to foster commerce and other activities the state considers beneficial to citizens. Since the proposed storage facility is contrary to state policy, the state can no longer continue to protect directors, officers, and equity interest holders of Private Fuel Storage and its parent organizations from liabilities incurred in Utah. Each officer, director, and equity holder of your company will now be held individually, strictly, and jointly and severally liable for obligations incurred in Utah.

Utah will continue to vigorously challenge the proposed "temporary" facility and its associated activities.

If you have questions or want additional information, please contact Dianne R. Nielson at 801-536-4404. Thank you for your attention to this critical matter.

Sincerely,

Michael O. Leavitt
Governor

Enclosure

C



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Val R. Antczak

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E-Mail
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January 4, 2002

VIA FACSIMILE

Monte N. Stewart
Office of the Attorney General
State of Utah
5110 State Office Building
Salt Lake City, UT 84114-2477

Re: Skull Valley Band v. Leavitt-Civil Case No. 2:01 CV-00270

Dear Monte:

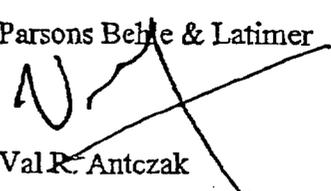
I am in receipt of your letter dated December 20, 2001 and have discussed the same with counsel for the Skull Valley Band. We do not agree with your proposal that Defendants' Motion for Summary Judgment should be held in abeyance pending a ruling on the Motions to Dismiss. Our position is that briefing should be concluded and the issues decided together.

As contemplated by the Rules of Civil Procedure and the Rules of Practice of the District Court, both sides should complete the briefing as currently scheduled. If you need an additional and reasonable extension of time to complete your briefing, we would grant such a request. Please contact Mike Bailey or me directly to discuss that matter, if necessary. Also, please inform us when you intend to file an opposition memorandum to our Motion to Dismiss. That opposition memorandum was due on December 27, 2001, and I hope that we can see a response in the near future.

I look forward to your response.

Sincerely,

Parsons Behle & Latimer



Val R. Antczak

ST

cc: Jay Silberg
Tim Vollmann
James Holtkamp
Larry Jensen

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