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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter Of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	JUNE 7, 2002

SOUTHERN UTAH WILDERNESS ALLIANCE'S (SUWA'S) PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATIVE TO CONTENTION SUWA B.

Pursuant to the Order of the Atomic Safety and Licensing Board ("Board") dated September 17, 2001 and 10 C.F.R. § 2.754, intervenor Southern Utah Wilderness Alliance (SUWA) hereby submits the following proposed findings of fact, conclusions of law, briefing, and proposed decision relative to Contention SUWA B.

I. Introduction

Contention SUWA B seeks to ensure that the Staff of the Nuclear Regulatory Commission ("the Staff")[1] fully complies with the National Environmental Policy Act of 1969, 43 U.S.C. §§ 4321 to 4370dd (NEPA), in assessing the application of Private Fuel Storage, L.L.C., (PFS or "the applicant") to store high level nuclear waste on the Skull Valley Reservation. Particularly, SUWA B reinforces the obligation of the Staff to undertake the core requirement of NEPA – the alternatives analysis. To meet this requirement, the Staff must draft an environmental impact statement (EIS) that "rigorously explore[s] **all** reasonable alternatives" to the Low rail spur "in comparative

[1] In referring to the Staff, SUWA also is referring to all the cooperating agencies that authored the PFS EIS.

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form, and give[s] each alternative **substantial treatment** in the [EIS]." Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162, 1174 (10th Cir. 1999).

II. Legal Background

The Staff must "defin[e] the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes." Id. at 1175. NEPA requires the Staff "**to study in detail all 'reasonable' alternatives.**" Id. at 1174 (*citing* 42 U.S.C. §§ 4332(2)(C)(iii) and (E); 40 C.F.R. §§ 1502.1, 1502.14(a)) (emphasis added). The agency need not consider alternatives that are "too remote, speculative, or . . . impractical or ineffective." Id. at 1174 (*quoting* All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444 (10th Cir. 1992). However, a "viable but unexamined alternative renders [the] environmental impact statement inadequate." Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 814 (9th Cir. 1999) (*quoting* Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985).

In addition, a determination of whether the Staff met its NEPA obligations "to rigorously explore all reasonable alternatives" to the Low rail spur must be examined in the context of its ultimate NEPA obligations. The Staff must provide the decision maker the information it needs to "carefully consider detailed information concerning significant environmental impacts" and provide **the public** with the same relevant information so that this "larger audience may also play a role in both the decisionmaking process and the implementation of that decision." Robertson v. Methow Valley Citizens Council, 109 S.Ct. 1835, 1845 (1989).

Finally, in assessing the adequacy of an agency's alternatives analysis, for example, "the number of alternatives . . . and the requisite level of detail," the Tenth

Circuit will apply the "rule of reason." Colorado Environmental Coalition, 185 F.3d at 1174. The court will ensure that the agency "take[s] a hard look" at the proposed project "**and its alternatives**" sufficient "to make a reasoned decision." Id.

III. The Staff Has Failed to Develop and Analyze a Meaningful Range of Alternatives to the Low Rail Spur that Will Preserve the Wilderness Character of the North Cedar Mountains Roadless Area.

An examination of the EIS for the PFS project and the relevant testimony at the April 23-24, 2002 hearing shows that the Staff did not meet its NEPA obligations. This is because the agency refused to carry forward for analysis an alternative to the Low Rail spur that would protect the wilderness character of the North Cedar Mountains roadless area. Indeed, the Staff refused to analyze in detail any rail alternative to the Low route. As detailed below, the result is an EIS that is legally inadequate and must be remanded to the Staff.

A. In Rejecting the West Valley Route for Detailed Evaluation, the Staff Violated NEPA's Alternative Analysis Requirement.

Initially, the Staff violated NEPA by preempting the decisionmaker's responsibility to determine, on the basis of **all** the environmental facts, an appropriate transportation route to the proposed storage site. Rather than letting the NEPA process work, the Staff determined, **without** "detailed evaluation," EIS at 2-47, that the Low rail spur was better than the West Valley rail route. The Staff then decided that it need not further evaluate the West Valley route, or present full analysis of this alternative to the decisionmaker or the public. In doing so, the Staff took the decisionmaking out of the hands of the decisionmaker and substituted its judgment for that of the decisionmaker.

To reject the West Valley alternative for further consideration, the Staff concluded that this alignment "would result in greater environmental impacts" and "would not result in any significant reduction in impacts to recreation or wilderness characteristics of the adjacent land, when compared to the proposed route." EIS at 2-51. However, while these are the type of conclusions that the Staff may present to the decisionmaker and the public after full analysis of the West Valley alternative, it is not appropriate for the Staff to use these determinations, made without the benefit of "detailed evaluation," to reject an alternative.

That the Staff prematurely rejected the West Valley alternative, preempted the decisionmaker's ability to weigh the environmental impacts of various alternatives to the Low rail spur, and frustrated the public's ability to participate in the evaluation of alternative rail corridors is evident under the relevant case law. As the Tenth Circuit made clear, the Staff must consider a range of alternatives to the proposed action – or the reasonable alternatives that "fall between the obvious extremes" of the proposal and no action. Colorado Environmental Coalition 185 F.2d at 1175; 40 C.F.R. § 1502.14 (agencies "shall [r]igorously explore and objectively evaluate all reasonable alternatives"). The purpose of this is to present the "alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14; 40 C.F.R. § 1502.14(b) (agencies shall "[d]evote substantial treatment to each alternative considered in detail including the proposed action **so that reviewers may evaluate their comparative merits**").

Thus, the Staff is charged with laying out the comparative merits of the alternatives for the decisionmaker and the public, not using its conclusion regarding these merits to reject an alternative for further consideration. In this case, the decisionmaker and the public have no choice among rail alternatives. The Staff has foreclosed the opportunity for the decisionmaker and the public to weigh the comparative merits and make a selection based on this balancing of pros and cons. Instead, the Staff has made the decision for the reviewers – the West Valley alternative has more environmental impacts and does not significantly reduce impacts to the wilderness character of adjacent lands and therefore is not an appropriate rail route. EIS at 2-51.

The Tenth Circuit has also made clear that the agency obligation to analyze "in detail all 'reasonable' alternatives, " Colorado Environmental Coalition, 185 F.2d at 1175, is qualified only by the proviso that agencies do not have to "analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective." Colorado Environmental Coalition, 185 F.2d at 1174. The reasons the Staff gives for refusing to analyze the environmental impacts of the West Valley alternative certainly do not rise to the level of being too remote, speculative, impractical, or ineffective.

Moreover, the Staff never suggests that it is rejecting the alternative because it is too remote, speculative, impractical or ineffective. At hearing and in prefile testimony, PFS suggests that the West Valley alternative is expensive, but the applicant never contends the alternative is unworkable.[2] In addition, the Staff never contends that the West Valley alternative does not meet the purpose and need for the project. *See* Colorado Environmental Coalition 185 F.2d at 1175-76 (not requiring the Forest Service to

[2] Webster's defines "impractical" as "not workable or useful."

consider the Conservation Biology alternative because it did not meet the purpose and need of the project to add terrain to the ski area as defined in the Forest Plan).

Finally, EISs necessarily contain, and decisionmakers often choose, alternatives that are more expensive or have more environmental impact than other alternatives or that do not significantly reduce impacts to the wilderness character of adjacent lands.[3] The alternative analysis requirement is designed specifically to present to the decisionmaker a variety of alternatives with a variety of environmental impacts and pros and cons and then to let the decisionmaker choose among them. By preempting this process, and taking on the decisionmaking for itself, the Staff has fun afoul of the NEPA process. Instead, the Staff should have fully considered, in detail, the full range of environmental impacts of the West Valley alternative and presented this information to the public, for its input, and to the decisionmaker so that it could then evaluate the comparative merits of the two proposals.

B. The Staff Based its Decision to Reject the West Valley Alternative on Incorrect Findings.

In addition to prematurely rejecting the West Valley alternative and robbing the decisionmaker of opportunity to weigh the pros and cons of the this rail alternative, the Staff eliminated the West Valley route from further consideration on the basis of incorrect findings. These findings, the only reasons the Staff gives for discarding the West Valley rail line, are: 1) "the west valley rail alternative would result in greater environmental impacts, compared to the proposed rail route;" and, 2) "the west valley rail alternative would not result in any significant reduction in impacts to recreation or wilderness characteristics of the adjacent land, when compared to the proposed route."

[3] Indeed, if only environmentally benign alternatives that reduced impacts to wilderness values were considered in the NEPA process, the job of environmentalist would suddenly get much easier.

EIS at 2-51. Starting with the second, SUWA establishes why each of these statements is wrong.

1. The Staff's Statement that the North Cedar Mountain Roadless Area Does Not Have Wilderness Character Is Wrong.

The Staff's evaluation of the **impacts** of the West Valley alternative on the wilderness values of the North Cedar Mountains roadless area is wrong because it, in turn, is based on an incorrect finding. The Staff defended its conclusion as follows:

> [I]mpacts to wilderness values from the proposed [Low] rail line would not significantly differ from impacts expected from the west valley alternative route, because the North Cedar Mountains **contain no wilderness or wilderness study designation and contain no wilderness values or characteristics.**

EIS at 2-49 (emphasis added). As SUWA establishes below, the Staff is wrong when it states that the North Cedar Mountains roadless area contains no wilderness values or characteristics. Rather, the North Cedar Mountains, including the area traversed by the Low rail spur, has wilderness values, including roadlessness.

a. Roadlessness is a Wilderness Characteristic.

As the Wilderness Act of 1964, 16 U.S.C. §§ 1131-36, and the Bureau of Land Management's (BLM's) Wilderness Inventory and Study Procedures make clear, roadlessness is a key wilderness value. For example, the Wilderness Act defines wilderness as "an area of undeveloped Federal land . . . without permanent improvements . . . and which . . . generally appears to have been affected primarily by the forces of nature, with the imprint of [human's] work substantially unnoticeable; . . ." 16 U.S.C. § 1131(c) and (c)(1). The Wilderness Act also prohibits, with narrow exceptions, any permanent and temporary roads in designated wilderness areas. 16 U.S.C. § 1133(c).

In the implementation of the Wilderness Act, the BLM has focused on roadlessness as a key element of wilderness quality. In instructing how the agency is to identify wilderness, BLM procedures provide that the first step toward assessing "wilderness values" is to determine if the "area being inventoried contains roads." H-6310-1 *Wilderness Inventory and Study Procedures* 6310-1.13 & .13 (A), Exhibit SUWA 6, attached to Trial Transcript. Moreover, to determine whether an area is sufficiently large to qualify as wilderness – usually 5,000 acres – these same procedures focus on whether the area is "roadless." 6310.13(B)(1) (1)(a) (the size criteria will be satisfied for "[r]oadless areas with over 5,000 acres of contiguous public lands"); Trial Transcript at 4695 ("in assessment of wilderness values, the area does need to be roadless").

In addition, Dr. Catlin testified extensively at trial and in his declarations that roadless is a key wilderness value as it: 1) functions to preserve large, relatively primitive areas, which in turn protects and enhances biodiversity; 2) prevents habitat fragmentation, including access across gradients; and, 3) furthers an ecosystem approach to land management. *For example,* Second Declaration of Dr. Catlin at ¶ 17, attached to Reply of SUWA to Staff and Applicant Responses to SUWA's Petition to Intervene.

b. The North Cedar Mountains Area, Including the Area Over Which the Low Corridor Will Travel, is Roadless.

As SUWA has long maintained, the North Cedar Mountains area, including the lands over which the Low rail spur will travel, is roadless. *For example*, Second Declaration of Dr. Catlin at ¶¶ 4, 5 & 8. Moreover, the BLM admits as much. For example, the agency's Intensive Wilderness Inventory Decision recognized the "North Cedar Mountains" unit, which includes the corridor of the Low rail spur, was roadless. Exhibit SUWA 7 to Trial Transcript. Indeed, the BLM stated that while "the peripheral

road is well maintained and gives rise to numerous 'ways,' SUWA 7 at unnumbered page 3, the entire area qualified for "further wilderness consideration." Id.[4] Clearly, the BLM could not come to such a conclusion if the area had not been roadless. *For example,* SUWA 6, Wilderness Inventory and Study Procedures H-6310-1.13(A) (roads disqualify an area for wilderness).

When the BLM took a second look at the North Cedar Mountains area, it also confirmed that the area, including the area over which the Low rail spur will travel, is roadless. Exhibit SUWA 5 to Trial Transcript, Wilderness Intensive Inventory, unnumbered page 2 ("size, and naturalness, to a degree, have placed this unit into the intensive inventory phase of the wilderness review"); at numbered page 1, after summary ("maintained county roads comprise the entire boundary of the unit") at 2 ("yes" the area has "at least 5,000 acres of contiguous land").

c. The North Cedar Mountains Roadless Area, Including the Area Over Which the Low Corridor Will Travel, has Additional Wilderness Values.

As SUWA has long maintained, the North Cedar Mountains area, including the area crossed by the Low route, has wilderness values above and beyond its roadlessness. *For example*, Second Declaration of Dr. Catlin at ¶¶ 4, 5 & 8. In addition, the BLM has admitted as much.

For example, the BLM recognized these wilderness values when it determined that the North Cedar Mountains exhibited sufficient wilderness character and recreation value to qualify for the "intensive wilderness inventory" process. Exhibit SUWA 7 to

[4] Importantly, "ways" are not roads for the purposes of determining wilderness values and do not disqualify an area for wilderness. BLM's Wilderness Inventory and Study Procedures states that "'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained by the passage of vehicle[s] does not constitute a road." H-6310-1.13(A)(1). As the field trip made clear, none of the "ways" in the North Cedar Mountains roadless area over which the Low rail corridor will travel are more than routes maintained by the passage of vehicles.

Trial Transcript, Intensive Wilderness Inventory Decision. In so nominating the North Cedar Mountains roadless area, the BLM determined that: 1) "[a]greement was clear and obvious: primarily the interior of the unit is unintruded; man's imprints are not visible," Id. at unnumbered 3; 2) "[h]unting, sightseeing, horseback riding, rock collecting, historical trail interpretation . . . take place in the unit," Id. at unnumbered 5; 3) "[t]he area remains in essentially a natural condition [and] . . . . [the] works of man . . . do not dominate the landscape;" Id. at 7; 4) "[t]he units' size and varied terrain, with its secluded canyon and hidden washes, provide outstanding opportunities for solitude," Id.; 5) "[o]pprotunities for both a primitive and unconfined type of recreation exits in may areas within the unit," Id.; 6) "any loss of naturalness is only minimal compared to the total size of the unit . . . " Id.

When the BLM visited the North Cedar Mountains roadless area again, it again found that the area possessed wilderness values. SUWA 5 to Trial Transcript, Wilderness Intensive Inventory. The agency declared that: 1) "[s]ome vast, interior hillsides are untrammeled by man and affected by the sole forces of nature," Id. at numbered 3 (following unnumbered introduction); 2) "[t]opographic features do conceal spots of naturalness from [] affected areas," Id.; 3) "[t]he upper elevations and inner portions of the unit provide opportunities for solitude [and] . . . .[o]ccasional protective vegetative covering, mountainous topography, and lack of penetrating roads, are evident," Id. at 5; 4)"[t]he area as a whole, excluding external factors, does offer limited opportunities for solitude," Id.; 5) "[o]pportunities for a primitive and unconfined type of recreation that exist in the North Cedars are hunting, horseback riding, hiking, wildlife observation and sightseeing," Id. at 6; and, 6) "[r]ock windows, sawtooth ridges and

small caves in cliff terraces are common throughout the northern section of the unit." Id. at 7.

While the agency ultimately determined that the area did not qualify as a wilderness study area, this determination does not mean that the North Cedar Mountains roadless area, including the area traversed by the proposed Low rail spur, does not exhibit wilderness values. As this Board already recognized, even though the area was not designated as a wilderness study area pursuant to the Federal Land Management Policy Act (FLPMA), the area could possess wilderness values or a naturalness that would be impacted by the Low rail spur:

> [I]n the context of NEPA, even absent the FLPMA statutory scheme, there would be a need to consider the natural state of the land and alternatives, if any, that would preserve that status.

Memorandum and Order Denying Motion for Summary Disposition Regarding Contention SUWA B, LBP-01-34 at 11.

In addition, the BLM specifically recognized the wilderness values of the North Cedar Mountains roadless area, including the area over which the Low corridor would run, by designating it as a "limited use area" for off-road vehicles. SUWA 4, attached to Trial Transcript. In other words, the agency determined that in this area "[m]otor vehicle use is limited to designated roads and trails year-road for public safety and to assist in the protection of soils, vegetation, wildlife habitat, cultural resources, watershed, riparian wetlands, and visual resources." Id. Thus, any "ways" created in this area were illegally established. Id.

Finally, it is important to note that BLM's own policies direct that human impacts outside areas containing wilderness values do not "normally" detract from the naturalness of an area:

> Human impacts outside the inventory area will not normally be considered n assessing naturalness of a[n] area. . . . . Human impacts outside the area should not automatically lead to a conclusion that a[n] inventory area lacks wilderness characteristics.

SUWA 6 at H-6301-1.3(B)(2)(c). Thus, given the BLM's own understanding of wilderness qualities, the North Cedar Mountains roadless area, including its perimeter, can clearly contain wilderness values and naturalness even if human impacts outside the boundary of the area affect the area. Id.

2. Because the Staff's Conclusion Regarding the Impacts of the West Valley Alternative on Wilderness Values is Based on an Incorrect Finding – that the North Cedar Mountains Roadless Area do not Possess Wilderness Character – its Conclusion Is Erroneous.

The Staff based its conclusion that the impacts to wilderness values of the West Valley alternative would be essentially the same as those of the Low route entirely on its finding that the North Cedar Mountains "**contain no wilderness or wilderness study designation and contain no wilderness values or characteristics.**" EIS at 2-49 (emphasis added). Because, as established above, the North Cedar Mountains roadless area does have wilderness character, the Staff's finding cannot be defended. Because the Staff relied heavily on its conclusion that the impacts of the two routes would not differ with regard to wilderness values to reject further consideration of the West Valley alterative, this rejection also cannot be defended. As a result, the EIS's alternative analysis is fatally flawed.

3. Low Rail Corridor Will Impact the Roadlessness of the North Cedar Mountains, Including the Area Over Which the Low Rail Spur Will Travel.

Little is more obvious than the fact that the construction of the Low rail spur will impact the roadless character of the North Cedar Mountains roadless area. Construction of the rail line will, in effect, create a road and a permanent development in an otherwise roadless area. Second Declaration of Dr. Catlin at ¶¶ 6, 7 & 12. Thus, the area will lose its roadless character. Moreover, the record contains nothing to suggest that the construction of the Low rail spur will **not** adversely impact the roadlessness of the North Cedar Mountains.

In addition, it is important to note that the BLM's Wilderness Inventory and Study Procedures finds wilderness qualities in an area "in which human imprints are substantially noticeable, but which otherwise contains wilderness characteristics" where the area has the potential to return to its natural condition. Thus, such an area "may be further considered for designation . . . when it is reasonable to expect that human imprints will return or can be returned to a substantially unnoticeable level either by natural processes or by hard labor." SUWA 6, H-6310-1.13 (D) (explaining "wilderness values"). Importantly, the BLM specifically determined that the North Cedar Mountain roadless area could be restored to "a natural state, free from man's imprint" with "a lengthy cycle characterized by hand labor, reseeding, and protective restriction of the unit." SUWA 5 at numbered 8. Again, because the Low rail spur would be permanent development in a roadless area, its construction would mean that the area would no longer have the potential to return to its natural condition. Currently, the "ways" that infringe slightly on the edge of roadless area, which **do not** jeopardize the area's roadlessness, are highly reclaimable.

4. The Low Rail Corridor Will Impact the Additional Wilderness Values of the North Cedar Mountains Roadless Area, Including the Area Over Which the Low Rail Spur Will Travel.

As SUWA has long maintained, the North Cedar Mountains, including the area crossed by the Low route, has wilderness values above and beyond its roadlessness. *For example*, Second Declaration of Dr. Catlin at ¶¶ 4, 5 & 8.

The BLM's Wilderness Inventory and Study Procedures also confirm that to preserve the wilderness character of an area, the boundary of a wilderness area should be drawn on the edge of the "imprint of" humans. Thus, the procedures state: "[w]hen the boundary of the area found to have wilderness character is adjusted due to human impacts, the boundary should, where possible, be located on the physical edge of the 'imprint of man.'" SUWA 6 at H-6310-1.13(C)(2). Thus, applying this reasoning to the current situation, where the North Cedar Mountains roadless has wilderness values, it follows that allowing the Low corridor to cross a portion of roadless area will adversely impact the wilderness characteristics of the area. To allow encroachment into the roadless area means that "future impacts would in effect be able to encroach on a[n] area creating a new 'zone of influence.'" SUWA 6 at H-6310-1.13(C)(2). In other words, an encroachment into an area with wilderness character pushes the influences of human imprints further into the core area. Each time this is allowed to happen, the integrity of the area is compromised.

5. The Staff's Determination that the West Valley Alternative "Would Not Result in Any Significant Reduction in Impacts to Recreation or Wilderness Characteristics of the Adjacent Land, when Compared to the Proposed Route" Is Wrong.

In the EIS, the Staff concludes that the West Valley alternative, which avoids the portion of North Cedar Mountains area crossed by the Low route, would have essentially

the same impacts on the wilderness character of the North Cedar Mountains as would the Low route. As established above, this statement is wrong for several reasons.

First, the Staff wrongly determined that the North Cedar Mountains roadless area did not have wilderness character and based its conclusion of similar impacts on this finding. Because the finding is wrong, the conclusion is wrong.

Second, the Staff wrongly ignored and failed to address the significant adverse environmental impacts that would result from building the Low rail spur across the North Cedar Mountains roadless area. As documented, the Low project **would** have adverse impacts on the wilderness values and naturalness of the roadless area.

6. The Staff's Determination that the West Valley Alternative "Would Result in Greater Environmental Impacts, compared to the Proposed Rail Route" Is Wrong.

The Staff offered two reasons for rejecting the West Valley alternative for further consideration. SUWA has established that the second is incorrect. The Staff's first reason for rejecting the alternative was that the West Valley alternative "would result in more environmental impacts" than the Low rail spur. EIS at 2-52. For several reasons, this also is not an legally adequate basis for dismissing the West Valley alternative prematurely.

First, as explained above, while the Staff is free to come to such conclusions, it is ultimately up to the decisionmaker, informed by the public as well as the Staff, to weigh the pros and cons, including the potential environmental impacts of the various alternatives. Rather than letting the process worked, the Staff improperly took this decision from the hands of the decisionmaker. Second, because the Staff did not properly consider the impacts of the Low rail corridor on the roadlessness and other wilderness

characteristics of the North Cedar Mountains, it necessarily erred when it stated that West Valley alternative would not reduce the impacts on the roadless area. The Staff refused to consider and weigh the environmental impacts of the Low rail corridor on the wilderness character of the North Cedar Mountains roadless area. Therefore the Staff could not accurately quantify and qualify the environmental impacts of either rail line and could not correctly compare the environmental impacts of the two rail lines.

7. Because the Staff Wrongly Rejected the West Valley Alternative for Detailed Evaluation, the EIS's Alternative Analysis if Fatally Flawed.

As established above, the only reasons that the Staff gave for rejecting the West Valley alternative for further evaluation are invalid. As a result, the Staff failed to present a "sufficient discussion of the relevant issues" and failed "to take a hard look at the environmental impacts of the proposed [project] and its alternatives" and therefore violated the "rule of reason." Colorado Environmental Coalition, 185 F.3d at 1174.

C. The West Valley Alignment is not a Real Alternative to the Low Rail Spur.

The West Valley alignment is not a real alternative to Low corridor. Rather, it is merely a detour around the North Cedar Mountains – leaving and rejoining the Low rail corridor. *For example,* Exhibit CC to PFS Prefile Testimony. The West Valley alternative is not what it should be – a rail line designed from scratch to get from Low to the reservation, avoiding the North Cedar Mountains, balancing cut and fill, and minimizing other environmental impacts. By treating the West Valley alterative as a detour, rather than an independent rail spur, PFS encounters problems that ultimately caused the Staff to reject the alternative.

For example, an area of fill is required to allow the West Valley route to rejoin the Low route. *For example,* Exhibit EE to PFS Prefile Testimony. Indeed, according to PFS diagrams, this is the area that requires the highest sections of fill. Id. Ultimately, the Staff rejected the West Valley alterative on the basis of these areas of high fill. EIS at 2-51 (rejecting the West Valley alternative because it "would result in greater environmental impacts . . . due to increased excavation and cut and fill activities"). However, had PFS designed the West Valley alternative as an independent route and not forced it to rejoin the Low corridor in this location, the alternative may have been less objectionable to Staff. Thus, if the applicant had been designed an independent route rather than an awkward appendage of the Low corridor, it could well have presented a more appealing alternative to the Low corridor.

D. The Staff did not Fairly Compare the West Valley and Low Alternatives, and Therefore Its Analysis is Further Suspect.

PFS provided several exhibits, which it alleged, showed that the West Valley alternative involved prohibitive amounts of fill. *For example*, Exhibits DD, EE, PFS Prefile Testimony. The Staff did not supplement these exhibits. These exhibits do not fairly portray the West Valley alternative and do not provide the basis for an accurate comparison of the two proposals. For example, the cross-sections of the cut and fill for the West Valley alternative are distorted five to one (5:1) so that the height of the fills are emphasized five times their proportional size. Trial Transcript at 4609. More importantly, the record does not contain similar cross-sections for the Low route. Instead, the applicant provided only at profile of scale so small no one in the courtroom could read it. *For example,* Trial Transcript at 4595; PFS Exhibit BB, Figure 3.2-2, Sheet 2 of 4 & 3 of 4. As PFS admits "the scale is so small, and the vertical distortion there is

not enough to really demonstrate it the way you normally would on a one to a hundred or something." Trial Transcript at 4595.

However, as close examination of the record reveals, where necessary, the Low rail corridor involves massive cuts at the siding, EIS at 2-15 ("The new siding would require extensive excavation . . . . Approximately 261,000 [cubic yards] of material would have to be removed"). With considerable effort, one can also determine that the Low rail route requires at least one fill 20 feet high. Profile of Low Corridor Rail Spur at Figure 4.5-6 (Sheet 2 of 4); Trial Transcript at 4596.

This unequal treatment of the two alternatives underscores several points. First, that the Low rail route contained many of the same elements that the Staff used to disqualified the West Valley route from detailed evaluation. Also, the two proposals are more alike in terms of cut and fill than indicated by the Staff in the EIS. Finally, the unequal approach of the Staff suggests that the it was more interested in pointing out the faults of and ultimately rejecting the West Valley alternative than in accurately comparing the pros and cons of the two routes. Such an approach runs afoul of NEPA's requirement that "[e]nvironmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, **rather than justifying decisions already made.**" 40 C.F.R. § 1502.2(g).

IV. Findings of Fact

Based on the record and the analysis above, the following are appropriate findings of fact relative to SUWA B:

FF 1: The Staff based its decision to reject the West Valley alternative on incorrect findings.

FF 2: The Staff's statement that the North Cedar Mountain roadless area does not have wilderness character is wrong.

FF 3: Roadlessness is a wilderness characteristic.

FF 4: The North Cedar Mountains area, including the area over which the Low corridor will travel, is roadless.

FF 5: The North Cedar Mountains roadless area, including the area over which the Low corridor will travel, has additional wilderness values.

FF 6: The Low rail corridor will impact the roadlessness of the North Cedar Mountains, including the area over which the low rail spur will travel.

FF 7: The Low rail corridor will impact the additional wilderness values of the North Cedar Mountains roadless area, including the area over which the Low rail spur will travel.

FF 8: The Staff's determination that the West Valley alternative "would not result in any significant reduction in impacts to recreation or wilderness characteristics of the adjacent land, when compared to the proposed route" is wrong.

FF 9: The Staff's determination that the West Valley alternative "would result in greater environmental impacts, compared to the proposed rail route" is wrong.

FF 10: The West Valley alignment is not a real alternative to the Low rail spur.

V. Conclusions of Law

Based on the record and the analysis above, the following are appropriate conclusions of law relative to SUWA B:

CL 1: In rejecting the West Valley route for detailed evaluation, the staff violated NEPA's alternative analysis requirement.

CL 2: Because the Staff's conclusion regarding the impacts of the West Valley alternative on wilderness values is based on an incorrect finding – that the North Cedar Mountains roadless area do not possess wilderness character – its conclusion is erroneous.

CL 3: Because the Staff wrongly rejected the West Valley alternative for detailed evaluation, the EIS's alternative analysis if fatally flawed and in violation of NEPA.

CL 4: The Staff did not fairly compare the West Valley and Low routes and therefore its alternatives analysis violates NEPA.

CL 5: The Staff has failed to develop and analyze a meaningful range of alternatives to the Low rail spur that will preserve the wilderness character of the North Cedar Mountains roadless area and therefore violated NEPA.

VI. Proposed Decision

Based on the record and the analysis above, the following is an appropriate decision in this matter:

PD 1: The Staff and it cooperating agencies, have failed to develop and analyze a meaningful range of alternatives to the Low rail spur that will preserve the wilderness character of the North Cedar Mountains roadless area. Therefore, the EIS for the PFS project is fatally flawed and is remanded. The Staff will develop and fully analyze at least one rail alternative that will preserve or minimize impacts to the wilderness character of the North Cedar Mountains roadless area.

DATED this 7th day of June, 2002.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

Private Fuel Storage, a Limited Liability Company; (Independent Spent Fuel Storage Installation).	Docket No. 72-22 ASLBP No. 97-732-02-ISFSI June 7, 2002

CERTIFICATE OF SERVICE

I hereby certify that I emailed copies of **SUWA's Proposed Findings of Fact and Conclusions of Law Relative to Contention SUWA B** on the persons listed below (unless otherwise noted) on **June 8, 2002** and, where indicated served conforming copies by U.S. mail, first class, postage prepaid, on **June 8, 2002**.

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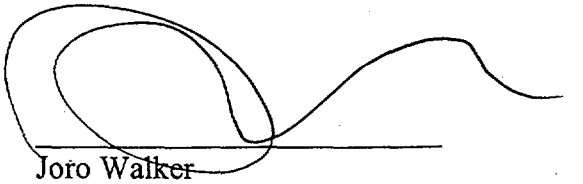

Joro Walker