UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

October 25, 2002

Thomas L. Sansonetti
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice, Rm. 2143
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: The Skull Valley Band of Goshute Indians, et al. v. Michael O. Leavitt, et al., No. 02-4149 (10th Cir.)

Dear Mr. Sansonetti:

I am writing to recommend the filing of an amicus curiae brief in the above-captioned appeal. We learned of the filing of appellant's opening brief earlier this week and felt it necessary to refer the case and our recommendation to your office as quickly as possible. Since this is a case already familiar to your office, and with time of the essence, I only briefly summarize the background as relevant to the NRC and include attachments that lay out in detail the NRC's legal position and interests.

A private consortium of nuclear utilities, Private Fuel Storage, L.L.C. ("PFS"), currently is seeking a license from our agency, the Nuclear Regulatory Commission, to build and operate a temporary spent nuclear fuel storage facility on land belonging to the Skull Valley Band of Goshute Indians in Utah. The NRC licenses and regulates such facilities pursuant to regulations, codified in 10 C.F.R. Part 72, issued under the Atomic Energy Act.

More than a year ago, PFS and the Band initiated a lawsuit in the United States District Court for the District of Utah challenging Utah legislation that is specifically designed to prevent construction of a temporary spent nuclear fuel storage facility on Indian land in Utah. Utah filed a counterclaim in the lawsuit asserting primarily that the NRC lacks authority to license the PFS facility. The core of Utah's position was that the Commission lacks regulatory jurisdiction under the Atomic Energy Act ("AEA") to license the construction and operation of such nuclear waste storage facilities because the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 et seq., allegedly repealed the NRC's general AEA authority to license the construction and operation of such facilities and thus prohibits the NRC from licensing facilities like the one PFS proposes.

By letter dated October 1, 2001, we recommended that your office file an amicus curiae brief urging the district court to dismiss Utah's counterclaim for lack of jurisdiction. The crux of our legal position was that: 1) under the Hobbs Act, the courts of appeals have exclusive subject-matter jurisdiction over all questions as to the NRC's licensing authority; and 2) any court review of the NRC licensing authority question would be premature because licensing proceedings were ongoing and the NRC had not had an opportunity to address the licensing authority question in a final decision. We stressed that preserving the integrity of the NRC's administrative process and of Congress's carefully-prescribed judicial review scheme -- by

preventing collateral attacks on NRC's licensing authority through district court lawsuits -- is of considerable importance to the agency. On January 19, 2002, your office filed an amicus brief in the lawsuit urging the district court to dismiss Utah's counterclaim for lack of jurisdiction consistent with our referral letter.

PFS and the Band subsequently filed a joint motion for summary judgment and supporting memorandum challenging the constitutionality of the Utah legislation on various grounds. Among other claims, PFS and the Band challenged the constitutionality of the Utah legislation on the ground of federal preemption under the Atomic Energy Act. In a referral letter dated February 22, 2002, I recommended the filing of another amicus curiae brief in the district court case to address federal preemption. As detailed further in that letter, we felt that a number of the provisions of the Utah legislation were prohibited under "field preemption" and also "conflict preemption" doctrines; we urged that, in light of the unusual breadth and scope of Utah's legislation, it would be in the interests of the agency and the government-at-large to ensure that the court gained a full appreciation of the NRC's exclusive regulatory responsibilities in the field of nuclear safety from the federal government itself. While ultimately deciding not to file an amicus brief (though we understand not because of disagreement with the NRC's legal position), your office did prepare a draft brief on federal preemption in final form along the lines suggested in my referral letter.

In July 2002, the district court in Utah issued an order that struck down the bulk of Utah's anti-PFS legislation as preempted by federal law. The Skull Valley Band of Goshute Indians, et al. v. Michael O. Leavitt, et al., 215 F. Supp. 2d 1232 (D. Utah 2002). The district court also found, consistent with the NRC's position and the amicus brief, that it lacks jurisdiction to hear Utah's claims regarding the NRC's authority to license the proposed PFS facility or the propriety of such a license because, pursuant to the Hobbs Act, the federal court of appeals is the proper forum for review of such matters.

Earlier this week we learned unexpectedly that Utah had already filed its opening brief in the Tenth Circuit appeal of the district court's decision (the above-captioned lawsuit). We were informed that respondents' briefs are due on November 18, 2002, sooner than we had anticipated.

For the reasons outlined in my earlier referral letters, we continue to believe that our legal positions on both lack of subject matter jurisdiction (to decide the question of the NRC's authority to license temporary spent nuclear fuel storage facilities) and federal preemption are sound and that important institutional interests are implicated. I therefore strongly recommend that an amicus curiae brief be filed in this case urging the court of appeals to affirm the district court's decision with respect to both of these issues. The fact that these matters are now before the Tenth Circuit makes an amicus filing all the more crucial in light of the precedential weight accorded to court of appeals decisions. I should note also that the question of the NRC's authority to license the PFS facility is currently squarely before the Commission on an intra-agency administrative appeal, with an agency decision expected in the near future. So there is a heightened urgency in preventing the disruption and confusion that would inevitably result from duplicative and premature judicial review of the same issue.

I fully appreciate that the time to prepare an amicus brief is quite short under the current schedule. Fortunately, due in large part to the work of Maureen E. Rudolph of your Division, your office prepared excellent comprehensive briefs on both the licensing authority and federal preemption issues, which would provide a solid foundation for an amicus brief on appeal. Nonetheless, it would be understandable if your office were to find it necessary to request an extension of time to prepare and file an amicus brief.

Ms. Kim may be reached at 301-415-3605. I may be reached at 301-415-1600. Please feel free to contact her or me if you have questions or need additional information. I would appreciate your advising us promptly on how you wish to proceed in this case.

We appreciate your prompt attention to this matter.

Sincerely,

John F. Cordes, Jr.
Solicitor

Attachments: A. NRC's 1st referral letter re: NRC licensing authority (Oct. 1, 2001)
B. NRC's 2nd referral letter re: federal preemption (Feb. 22, 2002)
C. United States' Amicus Curiae brief re: NRC licensing authority (Jan. 19, 2002)
D. United States' draft Amicus Curiae brief re: federal preemption (March 2002)
E. Agency order granting review of NRC licensing authority issue (April 3, 2002)

# ATTACHMENT A

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

October 1, 2001

John C. Cruden
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice, Rm. 2143
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: The Skull Valley Band of Goshute Indians, et al. v. Michael O. Leavitt, et al., Civil No. 2:01CV00270C (D. Utah)

Dear Mr. Cruden:

An Indian tribe and a private consortium of nuclear utilities brought the above-captioned lawsuit against Utah state officials. The lawsuit challenges recently-enacted Utah legislation rendering it all but impossible to construct a temporary facility for storing spent nuclear fuel on Indian land in Utah. The Indian tribe is the Skull Valley Band of Goshute Indians; the private consortium is Private Fuel Storage, L.L.C. ("PFS").

PFS currently is seeking a license from our agency, the Nuclear Regulatory Commission, to build and operate a spent fuel storage facility on Goshute land in Utah. Utah has filed a counterclaim in the Goshute-PFS lawsuit asserting that the NRC lacks authority to license the PFS facility. The NRC is not a party to the lawsuit.

I write to recommend the filing of an amicus curiae brief urging the district court to dismiss Utah's counterclaim for lack of jurisdiction. Utah's claim lies in the wrong court (NRC licensing disputes lie exclusively in the courts of appeals). And it is premature (Utah's grievance is part of still-ongoing NRC licensing hearings). We explain our legal position in greater detail below.

The matter has taken on some urgency because recently (on September 20) Utah filed a Motion for Judgment on the Pleadings and supporting memorandum requesting that the district court enter a judgment that governing federal law "excludes and disallows" the proposed off-site spent nuclear fuel storage facility being proposed by PFS. The core of Utah's position is the assertion in its counterclaim that the Commission lacks regulatory jurisdiction under the Atomic Energy Act ("AEA") to license the construction and operation of such nuclear waste storage facilities. Utah believes that the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 et seq., repealed the NRC's general AEA authority and prohibits the NRC from licensing storage facilities like the one PFS proposes.

We believe that the district court has no jurisdiction to entertain Utah's counterclaim, which directly implicates the Commission's licensing authority under the AEA. Under the Hobbs Act all questions as to the Commission's licensing authority under the AEA belong exclusively in the courts of appeals, and can be brought to court only after final Commission determination. Our Commission favors filing an amicus curiae statement of its views to this effect. We request the Department of Justice to authorize such a filing. The NRC has independent litigating authority, but only in the Hobbs Act context - - i.e., where a party seeks direct review of NRC orders in the courts of appeals. This is not a Hobbs Act case. If the Department of Justice authorizes an amicus submission, we would work closely with DOJ lawyers in drafting an appropriate pleading or, alternatively, draft the pleading ourselves.

As noted above, PFS is in the midst of an ongoing proceeding before the Commission seeking an NRC license to construct and operate an offsite spent nuclear fuel storage facility on lands located in Skull Valley, Utah and leased from the Skull Valley Band of Goshute Indians. Utah, which has been granted intervention and is participating as a party to the proceeding before the Commission, vigorously opposes the licensing of this facility on a number of grounds, including the argument that the NRC has no authority under the Atomic Energy Act to issue a license approving the construction and operation of this type of facility. This is the same argument Utah now makes before the district court - - i.e., that subsequently-enacted legislation, the Nuclear Waste Policy Act of 1982, sets forth a specific scheme for federal storage and disposal of the nation's spent fuel that did not include the type of private offsite facility proposed by PFS and, therefore, Congress implicitly amended the AEA to repeal the Commission's authority to license such facilities.

The relief requested by the Defendants goes to the heart of the Commission's licensing jurisdiction under the AEA. Pursuant to the Administrative Orders Review Act (the "Hobbs Act"), the court of appeals "has exclusive jurisdiction to enjoin, set aside, suspend...or to determine the validity of...all final orders of the [NRC] made reviewable by section 2239 of title 42." 28 U.S.C. § 2342(4). Section 2239 of Title 42, in turn, makes reviewable under the Hobbs Act any order of the NRC entered in any proceeding "for the granting, suspending, revoking, or amending of any license," and "for the issuance or modification of rules and regulations dealing with the activities of licensees." Significantly, the Hobbs Act review procedure with respect to Commission orders is not limited to the particular agency licensing actions listed in section 2239 of Title 42. Rather, the scope of judicial review under the Hobbs Act is to be determined "solely by reference to the subject matter of the Commission's action and not by reference to the procedural particulars of the Commission action." Florida Power and Light v. Lorion, 470 U.S. 729, 737 (1985).

In short, as the Supreme Court held in Lorion, Congress has established a review structure under the Hobbs Act and the AEA designed to vest the courts of appeals with exclusive subject-matter jurisdiction over any Commission action related to licensing under the AEA, see Lorion, 470 U.S. at 740-41, including NRC decisions regarding its own licensing jurisdiction. See NRDC v. NRC, 606 F.2d 1261, 1265 (D.C. Cir. 1979) ("NRC's decision concerning jurisdiction ...is well within the class of final orders reviewable under [the Hobbs Act]"); General Atomics v. NRC, 75 F.3d 536, 539 (9th Cir. 1996) ("courts of appeals have exclusive jurisdiction to review NRC decisions regarding jurisdiction").

Moreover, the scope of the exclusive jurisdiction of courts of appeals under the Hobbs Act extends well beyond direct challenges to final agency actions. See, e.g., Whitney Bank v. New Orleans Bank, 379 U.S. 411, 421 (1965); Southwestern Bell Telephone v. Arkansas Public Service Commission, 738 F.2d 901, 906 (8th Cir. 1984); California Save Our Stream Council v. Yeutter, 887 F.2d 908, 911 (9th Cir. 1989). Rather, it is firmly established that the scope of the courts of appeals' exclusive jurisdiction under the Hobbs Act extends not only to all matters "preliminary or ancillary to the core issue in a proceeding" where the final order would be reviewed in the court of appeals (Lorion, 470 U.S. at 743), but also to any suits that may affect and infringe upon the courts of appeals' future jurisdiction even where no appeal has been perfected. Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984) ("TRAC").

These principles clearly apply in the present case. When the Commission issues a final decision in the licensing proceeding regarding the PFS facility, the appropriate court of appeals will have exclusive jurisdiction to review the final decision, including the licensing authority issue raised earlier by Utah before the NRC licensing board. Accordingly, there is no doubt that, by requesting the district court to decide the issue of the Commission's authority, Utah has sought relief in the district court that would affect and impinge upon the court of appeals' future jurisdiction within the meaning of TRAC and similar cases.

In addition to the exclusive jurisdiction argument outlined above, Utah's counterclaim is premature and should not be entertained by a court because "pending administrative proceedings or further agency action might render the case moot and judicial review completely unnecessary." General Atomics v. NRC, 75 F.3d at 540. This reflects the policy underlying the doctrines of finality and exhaustion, both of which are applicable here.

In a Commission licensing proceeding, "the final order is one that disposes of all issues as to all parties." NRDC v. NRC, 680 F.2d 810, 815 (D.C. Cir. 1982). Thus, in a Commission licensing proceeding such as the one for the PFS facility, it is the "order granting or denying the license that is ordinarily the final order." City of Benton v. NRC, 136 F.3d 824 (D.C. Cir. 1998). Although an NRC licensing board has upheld the NRC's licensing authority in the agency licensing proceeding, see Private Fuel Storage, L.L.C., LBP-98-7, 47 NRC 142, 183 (1998), that decision is interlocutory since there has been no final Commission decision on PFS's license application. In fact, it could well be a year or more before a final Commission decision is rendered in the proceeding since a number of matters remain to be adjudicated before the licensing board. If the Commission ultimately denies the license requested by PFS, the Commission would have "'resolve[d] satisfactorily all the claims of the parties,'" NRDC, 680 F.2d at 815 (citations omitted), and judicial review of the jurisdiction issue would be unnecessary.

It is, in any event, premature for any court to decide the authority question now since Utah has failed to exhaust its administrative remedies. See, e.g., General Atomics, 75 F.3d at 541 ("'It is well established in administrative law that before a federal court considers the question of an agency's jurisdiction, sound judicial policy dictates that there be an exhaustion of administrative remedies.'") (citation omitted). The Commission initially promulgated regulations, codified in 10 C.F.R. Part 72, governing private "storage and disposal away from the reactor" in 1980, two years prior to the passage of the NWPA. See "Licensing Requirements for the Storage of Spent Fuel in an Independent Fuel Storage Installation," 45 Fed. Reg. 74,693 (1980). See generally Pacific Gas and Electric Co. v. State Energy Resources Conservation

and Dev. Comm'n, 461 U.S. 190, 217 (1983). The Commission amended these regulations in 1988 to add provisions for Commission licensing of federally-owned storage and disposal facilities for spent nuclear fuel and high-level radioactive waste as required under the NWPA, but left essentially intact the existing provisions governing the licensing of offsite private storage and disposal facilities. 53 Fed. Reg. 31651 (1988).

Utah has never petitioned the Commission to rescind or in any way amend the Part 72 regulations pertaining to private offsite waste storage facilities despite the existence of specific procedures allowing any interested person to "petition the Commission to issue, amend or rescind any regulation" (10 C.F.R. 2.802). The Commission currently believes that it has authority to license nuclear waste facilities such as the one proposed by PFS and it is unlikely to revise its rules to embrace Utah's position. But the Commission thus far has not had occasion to address Utah's NWPA-driven arguments. And, in any event, courts have made clear that the probability of an adverse agency decision does not render exhaustion futile if "effective means for judicial review are ultimately available." Gaunce v. deVincentis, 708 F.2d 1290, 1293 (7th Cir. 1983). See also, e.g., West v. Bergland, 611 F.2d 710, 719 (8th Cir. 1980). Indeed, effective means for judicial review of a Commission denial of a petition for rulemaking would ultimately be available since, under the Lorion and TRAC principles, Utah could seek judicial review in the court of appeals in the event that the Commission denies a petition for rulemaking or delays unreasonably in answering it.

PFS and the Skull Valley Band contend in the current lawsuit that the State of Utah has enacted several pieces of unconstitutional and otherwise preempted legislation in an effort to stop the project, and seek declaratory and injunctive relief from the operation of these laws. I should clarify that the Commission is not requesting that the amicus curiae brief address the preemption aspect of this lawsuit. I should also note that the Commission's interest in filing an amicus curiae brief does not depend upon any interest that the Interior Department's Division of Indian Affairs may have for filing such a brief on behalf of the Skull Valley Band, although I understand that the Division is considering suggesting an amicus brief on Indian sovereignty grounds. The issue concerning Commission licensing authority is a discrete legal issue that is not in any way related to the sovereignty issues concerning the Band.

Our jurisdictional arguments may seem complex, but they are of considerable importance to our agency. Collateral attacks on NRC licensing authority though district court lawsuits threaten the integrity of the NRC's administrative process and of Congress's carefully-prescribed judicial review scheme. Moreover, acquiescence in premature district court consideration of the NRC's licensing authority may inhibit our ability to claim judicial deference to the NRC's statutory interpretation. As you no doubt are aware, the Supreme Court recently has held that only formal agency interpretations -- i.e., those rendered in rulemakings or adjudications -- warrant full judicial deference. See United States v. Mead Corp., 121 S.Ct. 2164 (2001). Here, Utah seeks a judicial construction of the NRC's enabling legislation without awaiting the agency's formal views. Accelerated judicial review of this kind is decidedly against the NRC's (and the government's) interests.

Other issues, which we have not had time to research or analyze, may be lurking here. For example, Utah's "licensing authority" grievance may not amount to a legitimate "counterclaim" under the Federal Rules of Civil Procedure. Or, under those same rules, the NRC may be an "indispensable party" to the counterclaim. In addition, we would like to explore

with your office the advisability of offering a merits defense against Utah's claim that the NRC lacks authority to license the proposed PFS facility. With time of the essence, however, we thought it vital to refer the case, and our general recommendation, to your office without further delay.

I may be reached at 301-415-1600. In addition, the Special Counsel to the Solicitor, Leo Slaggie will be available at the same number, as will Grace Kim, who may also be reached at 301-415-3605. Please advise us promptly on how you wish to proceed in this case.

We appreciate your prompt attention to this matter.

Sincerely,

John F. Cordes

John F. Cordes, Jr.
Solicitor

Attachments: A. PFS/Band's Complaint against Utah
B. Utah's Answer/Counterclaim
C. Utah's Memorandum in Support of Motion for Judgment on the Pleadings

cc: Justin Smith, ENRD - DOJ (by fax)

# ATTACHMENT B

G. Kim

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

CONFIDENTIAL ATTORNEY-CLIENT/ATTORNEY WORK PRODUCT COMMUNICATION

February 22, 2002

Thomas L. Sansonetti
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice, Rm. 2143
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: The Skull Valley Bank of Goshute Indians, et al. v. Michael O. Leavitt, et al., Civil No 2:01CV00270C (D. Utah)

Dear Mr. Sansonetti:

A private consortium of nuclear utilities, Private Fuel Storage, L.L.C. ("PFS"), currently is seeking a license from our agency, the Nuclear Regulatory Commission, to build and operate a temporary spent nuclear fuel storage facility on land belonging to the Skull Valley Band of Goshute Indians in Utah. The NRC licenses and regulates such facilities pursuant to regulations, codified in 10 C.F.R. Part 72, issued under the Atomic Energy Act.

The above-captioned lawsuit, which was brought by PFS and the Band, challenges Utah legislation that is designed to prevent construction of a temporary spent nuclear fuel storage facility on Indian land in Utah. Utah filed a counterclaim in the lawsuit asserting that the NRC lacks authority to license the PFS facility. On January 19, 2002, following receipt of our referral letter dated October 1, 2001, your office filed an amicus curiae brief in the lawsuit urging the district court to dismiss Utah's counterclaim for lack of jurisdiction.

In December PFS and the Band filed a joint motion for summary judgment and supporting memorandum challenging the constitutionality of the Utah legislation on various grounds. Among other claims, PFS and the Band challenge the constitutionality of the Utah legislation on the ground of preemption under the Atomic Energy Act. Utah has not yet responded to the summary judgment motion.

In light of the recent filing by PFS and the Band, the issue of federal preemption of Utah's legislation is now squarely before the court. We believe that, given the government's current participation in this case as amicus curiae, and given the sweeping nature of the Utah legislation, it is important for the court to hear from the government on federal preemption. Accordingly, I write to recommend the filing of another amicus brief in this lawsuit, this time to address federal preemption. We summarize our legal position below.

Under federal preemption principles, where Congress has determined under the Supremacy Clause that a particular field "admits only of national supervision" or "demands exclusive federal regulation in order to achieve uniformity vital to national interests," Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1153 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972), Congress is said to have preempted the "field." A state may not "assert[] the right to act" in a preempted field. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 213 (1983).

The Supreme Court has found that Congress has preempted the field of nuclear safety regulation. Id. In a series of cases, the Court has made clear that the federal government's "prime area of concern in the licensing context...is national security, public health, and safety." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 550 (1978). "With respect to these matters, no significant role was contemplated for the States." English v. General Electric Co., 496 U.S. 72, 81 (1990). Accordingly, as the Supreme Court has explained, "[s]tate safety regulation is not preempted only when it conflicts with federal law[;] [r]ather, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." Pacific Gas, 461 U.S. at 212.

The NRC's regulations governing independent storage of spent nuclear fuel, codified at 10 C.F.R. Part 72, reflect the NRC's judgment that storage of such waste may be accomplished in a safe manner. Thus, any state regulation that would prohibit storage of spent fuel based on radiological safety concerns would "fall[] squarely within the prohibited field" and "conflict directly with the countervailing judgment of the NRC." Pacific Gas, 461 U.S. at 213.

Moreover, a state cannot veto an NRC decision to license storage of spent fuel in a particular case, even on the basis of a non-radiological hazard over which the state has jurisdiction under its traditional Tenth Amendment police powers. See English, 496 U.S. at 79, see also Brown v. Kerr-McGee Chemical Corporation, 767 F.2d 1234, 1240-42 ( 7th Cir.), cert denied, 475 U.S. 1066 (1985) (in area of concurrent federal and state jurisdiction where the federal and state regulated hazards are inseparable, state law is preempted if actual conflict exists between federal and state law); cf. Kerr-McGee Chemical Corp. v. City of West Chicago, 914 F.2d 820, 827 (7th Cir. 1990) (distinguishing the Pacific Gas case, where Court found no preemption of state law imposing an economics-driven "moratorium" on construction of nuclear power plants from situation where NRC on the basis of an administrative record approves a license in a particular case).

Utah has enacted comprehensive and complex legislation that would render it all but impossible for any entity to construct a temporary facility for storing spent nuclear fuel on Indian land in Utah, even if the NRC ultimately issues a license to PFS for the construction and operation of such a facility pursuant to 10 C.F.R. Part 72. See § 19-3-301 (requiring a separate state license for the construction and operation of a temporary spent nuclear fuel storage facility in addition to an NRC license). We believe that a number of the provisions of the Utah legislation may be prohibited under field preemption and perhaps also conflict preemption doctrines.

One of the more blatant examples is the state licensing scheme established by the legislation. That scheme on its face appears to overlap or duplicate NRC regulatory powers in the areas of radiological safety, public health, and national security. Specifically, in licensing the construction and operation of a temporary spent nuclear fuel storage facility, the Utah Department of Environmental Quality is required to assess, inter alia, groundwater, security plans, health risks, quality assurance programs, radiation safety programs, and emergency plans (see § 19-3-305). These are precisely the same areas regulated by the NRC under 10 C.F.R. Part 72. Utah, in effect, plans to replicate the NRC regulatory role.

In an apparent attempt to take the legislation out of the preempted field of nuclear health and safety regulation, the "Legislative Intent" section of the legislation claims that the state's motivation is to protect "environmental and economic interests which do not involve nuclear safety regulation." §19-3-302. But, even assuming that this is believable, the Supreme Court has made clear that "a finding of radiological safety motivation is not necessary to place a state law within the pre-empted field." English, 496 U.S. at 84. Rather, as reflected in English, "state regulation of matters directly affecting...radiological safety....'even if enacted out of nonsafety concerns, would nevertheless [infringe upon] the NRC's exclusive authority.' " Id. (quoting Pacific Gas, 461 U.S. at 212) (emphasis supplied).

In light of its statutory mission as an impartial nuclear safety regulator, the NRC as a general matter is conservative about taking sides in private lawsuits not involving the agency. Here, though, the government already is before the reviewing court as an amicus curiae. As we see it, the unusual breadth and scope of Utah's legislation justify filing a government brief on preemption. By claiming a state role in regulating the health, safety, and security aspects of nuclear facilities, the Utah legislation has the potential to confuse the regulated and commercial industries and the general public. It is decidedly in our agency's interest, and we believe in the interest of the government-at-large, to make sure that the federal district court in Utah gains a full appreciation of the NRC's exclusive regulatory responsibilities in the field of nuclear safety. PFS and the Band already have argued the preemption point, but it would come with particular force from the federal government itself.

As we understand the procedural posture of the case, the district court expects to hear oral argument in April both on Utah's counterclaim (where the government's amicus brief asserts a lack of jurisdiction) and on preemption and the other issues raised in the PFS-Skull Valley Band summary judgment motion. The court has indicated that it expects all parties' briefs to be filed by March 28.

Grace H. Kim is the attorney in our office assigned to this case. Ms. Kim worked with Maureen E. Rudolph of your Division on the government's initial amicus brief. We are grateful for Ms. Rudolph's fine work, and look forward to working with her again.

Ms. Kim may be reached at 301-415-3605. I may be reached at 301-415-1600. Please feel free to contact her or me if you have questions or need additional information. I would appreciate your advising us promptly on how you wish to proceed in this case.

Thank you for your attention to this matter.

Sincerely,

John F. Cordes, Jr.
Solicitor

cc: Maureen E. Rudolph, DOJ (by fax)

# ATTACHMENT C

Maureen E. Rudolph
U.S. Dept. of Justice
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Attorney for United States

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

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| THE SKULL VALLEY BAND OF GOSHUTE INDIANS, et al., | * | |
| | * | Case Number 2:01CV00270C |
| Plaintiffs | * | |
| vs. | * | |
| | * | UNITED STATES' AMICUS CURIAE BRIEF |
| MICHAEL O. LEAVITT, et al., | * | |
| Defendants. | * | |

The United States submits this amicus curiae brief to address the portion of the State of Utah's counterclaim that contends the Nuclear Regulatory Commission lacks authority under the Atomic Energy Act to license an offsite interim spent nuclear waste storage facility. This Court is without jurisdiction to address Utah's counterclaim, and must instead dismiss that part of the counterclaim for lack of subject-matter jurisdiction. Through the Hobbs Act, Congress has vested exclusive jurisdiction in the Courts of Appeals over all challenges to NRC licensing decisions. Moreover, the NRC has not made a final determination on the license application and thus, the required finality is not present for Hobbs Act review. The exhaustion of administrative remedies doctrine requires that the State of Utah exhaust its administrative remedies, which it has not done. Likewise, the doctrine of primary jurisdiction allows for this Court to dismiss the counterclaim or stay resolution of it pending the close of the administrative licensing process.

## INTEREST OF THE UNITED STATES

Congress has vested the Nuclear Regulatory Commission (NRC) with the authority to license, supervise, and regulate nuclear facilities. *See* Atomic Energy Act, 42 U.S.C. § 2201, *et seq.* The Commission also has authority, granted by Congress, to interpret the Atomic Energy Act, and has substantial expertise, extending over several decades and numerous licensing proceedings, with the proper interpretation of that Act and the lawful and safe operation of facilities that handle nuclear materials. The Commission has a strong interest in the proceedings before this Court because the arguments presented by the State of Utah's counterclaim lie within the Commission's expertise; indeed, the same issues are now before the Commission. These issues are properly addressed by the Commission in the first instance, and Utah's attempt to litigate them prematurely interferes with the Commission's exercise of its authority. The United States therefore appears in this proceeding to notify the Court that it lacks jurisdiction to consider Utah's counterclaim regarding the relationship between the Atomic Energy Act and the Nuclear Waste Policy Act, and in the alternative, that the issues raised by Utah have not yet been addressed by the Commission in a final agency action. Additionally, Utah should fully exhaust its arguments before the Commission in advance of litigation in the Court of Appeals.

## BACKGROUND

### A. Procedural Background

The Skull Valley Band of Goshute Indians and Private Fuel Storage (PFS), a private consortium of nuclear utilities, brought suit against Utah State officials challenging five State statutes on constitutional grounds. *Skull Valley Band of Goshute Indians v. Leavitt*, Case No. 2:01V0027OC, Plaintiffs Complaint (April 19, 2001) (hereinafter "Complaint"). Skull Valley

and PFS allege that the State statutes are unconstitutional under the Treaty, Supremacy, Contract and Indian Commerce clauses of the Constitution, and that they are otherwise inconsistent with federal law. *See* Complaint, p. 26-30. In response to the plaintiffs' complaint, Utah filed an answer, which counterclaims that the Nuclear Regulatory Commission (NRC) does not have statutory authority under the Atomic Energy Act to license a private, off-site facility such as that proposed by PFS. *See* Utah's Answer, Counterclaim, and Demand for Jury Trial p. 26-29, ¶ 81 (July 17, 2001) ("the NRC (despite its own position to the contrary) has no authority or jurisdiction to license a private, for profit, off-site SNF dump of the kind contemplated by the foreign utilities' scheme"). Utah then filed a Motion for Judgment on the Pleadings detailing its belief that the Nuclear Waste Policy Act (NWPA) represents Congress's exclusive plan for dealing with nuclear spent fuel waste, and thus, the NRC cannot license the facility proposed by PFS under the Atomic Energy Act. *See generally* Defendants' Memorandum in Support of their Motion for Judgment on the Pleadings (Sept. 20, 2001). According to Utah, since the NRC cannot license the facility, PFS lacks standing to challenge the constitutionality of the State's statutes. *Id.*; Utah's Reply Re: Utah's Motion for Judgment on the Pleadings. The Plaintiffs have also filed a motion to dismiss the counterclaim. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Dismiss Counterclaim (December 12, 2001).

B. The Statutes that Govern Challenges to NRC Licensing Decisions

The Atomic Energy Act, 42 U.S.C. § 2239, and the Hobbs Act, 28 U.S.C. §§ 2341-2351, govern civil actions that challenge licensing and rulemaking decisions of the NRC. The Hobbs Act specifies that judicial review of a final order issued by the NRC shall only be pursued in the U.S. Court of Appeals. The Hobbs Act grants to the Court of Appeals "exclusive jurisdiction to

enjoin, set aside, suspend ... all final orders of the [Nuclear Regulatory Commission] made reviewable by section 2239 of title 42 [the Atomic Energy Act]." 28 U.S.C. § 2342(4) (emphasis added).[1] In turn, the Atomic Energy Act provides that the Hobbs Act governs review of "[a]ny final order entered in any proceeding of the kind specified in subsection (a) [of § 2239]." "The granting, suspending, revoking, or amending of any license ... and [] any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees" qualify as Subsection (a) proceedings. 42 U.S.C. § 2239(a)(1)(A).

C. Skull Valley and PFS Licensing Procedure

NRC regulations provide a procedure governing the licensing of temporary Independent Spent Fuel Storage Installations (ISFSI's). *See* 10 C.F.R. pt. 72.[2] On June 20, 1997, PFS submitted a license application to the NRC, pursuant to 10 C.F.R. pt. 72, to construct and operate a temporary Independent Spent Fuel Storage Installation (ISFSI) within the Skull Valley Band's reservation. *See* Complaint, p.10. The Commission has not yet issued an order granting or

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[1]The Hobbs Act refers to the "Atomic Energy Commission," not the NRC. 28 U.S.C. § 2342(4). The NRC is the successor agency to the AEC, which was abolished in 1974. *See* 42 U.S.C. §§ 5814, 5841(f). Under 42 U.S.C. § 5871(g), final orders of the NRC in performing functions transferred from the AEC are reviewable as if they had been made by the AEC. Accordingly, the exclusivity provision imposed on challenges to AEC decisions now applies to challenges to NRC decisions. *See Florida Power and Light Co. v. Lorion*, 470 U.S. 729, 733 (1985); *see also General Atomics v. NRC*, 75 F.3d 536, 538 n.2 (9th Cir. 1996).

[2]The NRC initially promulgated regulations governing the licensing of facilities for the storage and disposal of nuclear waste away from the reactor in 1980, two years prior to the passage of the NWPA. *See* "Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation," 45 Fed. Reg. 74,693 (1980). The NRC amended the regulations in 1988 to add additional provisions for NRC licensing of federally-owned storage and disposal facilities for spent nuclear fuel and high-level radioactive waste as required under the NWPA. *See* 53 Fed. Reg. 31,651 (1988) (codified at 10 C.F.R. pt. 72).

denying the license.

The licensing process includes both a technical review by the NRC staff and an opportunity for a formal adjudicatory hearing before the Atomic Safety and Licensing Board (the "Licensing Board"). *See* 10 C.F.R. pt. 2 (G). Under the NRC's regulations on hearings, any interested party may seek intervention into the licensing process and obtain a full adjudicatory hearing on its contentions about the license. *See* 10 C.F.R. § 2.105, 72.46. The Licensing Board presides over such a hearing.[3] After a full adjudicatory hearing, the Licensing Board issues an "initial decision" on the licensing application. 10 C.F.R. § 2.760(a). An initial decision approving issuance of a license is appealable to the Commission, and becomes effective only upon an order of the Commission. 10 C.F.R. §§ 2.764(c); 2.786(b). The Commission's final order is subject to a petition for reconsideration, 10 C.F.R. § 2.771, and, in accordance with the Hobbs Act, to judicial review in the appropriate Court of Appeals.

The State of Utah sought to intervene in the PFS licensing process in 1997 and submitted contentions. *See generally In the Matter of Private Fuel Storage, LLC.* 47 N.R.C. 142 (April 22, 1998). The Licensing Board granted intervention to the State of Utah. The Licensing Board admitted many of Utah's contentions for hearing, including the one claiming that the NWPA eliminated the NRC authority under the Atomic Energy Act to issue a license approving the construction and operation of an away from the reactor ISFSI. *Id.* at 183.-84. In other words, Utah's contention before the Licensing Board was the same in substance as its counterclaim before this Court, i.e., that the NRC lacks jurisdiction to license the facility proposed by PFS. In

[3] A Licensing Board is generally composed of a lawyer as a chair and two technically-trained hearing examiners. 42 U.S.C. § 2241; 10 C.F.R. § 1.15.

ruling on this contention, the Licensing Board held that the NRC has promulgated regulations that govern the licensing of ISFSI's and that Utah's contention "impermissibly challenge[d] the agency's existing regulatory provisions or rulemaking-associated generic determinations" because Utah had not asked the Commission to revisit the regulations. *Id.* at 183-184.

The Licensing Board's ruling is subject to Commission appellate review upon completion of the still-ongoing Board hearing process. *See* 10 C.F.R. § 2.786(b). Utah also remains free to seek alteration or recission of the NRC's existing rules on ISFSI licensing (Part 72). *See* 10 C.F.R. § 2.802. As of now, however, the Commission has not had occasion to address nor rule on Utah's argument that the NWPA took away the agency's AEA authority to license PFS's proposed ISFSI.

## SUMMARY OF ARGUMENT

As detailed below, the Court does not need to reach the merits of Utah's counterclaim regarding the NRC's jurisdiction and should simply dismiss it for lack of subject-matter jurisdiction. As the Supreme Court has made clear, decisions by the NRC related to licensing or rulemaking, including "preliminary" or "ancillary" orders regarding the agency's jurisdiction, are reviewed exclusively in the federal courts of appeals under the Hobbs Act. *See generally Florida Power and Light Co. v. Lorion*, 470 U.S. 729 (1985). Utah is asking this Court to intervene in an ongoing NRC licensing process over which the Court lacks jurisdiction. At the appropriate time, after the Commission has had an opportunity to issue a final ruling on Utah's arguments regarding the Commission's licensing authority, Utah can seek judicial review in the court of appeals.

At this time, the Commission has not yet issued any final decision, reviewable in any

court, on PFS's license application or on the relationship between the AEA and NWPA. The lack of final agency action is fatal to Utah's claim, and this Court should therefore dismiss it as premature. Alternatively, this Court may reject Utah's attempt to obtain interlocutory review as violating Utah's obligation to exhaust its administrative remedies. Utah has not allowed the Commission the opportunity to complete PFS's licensing, and has failed to administratively challenge the current NRC regulations governing "away from the reactor" interim storage of spent nuclear fuel. The doctrine of primary jurisdiction also weighs in favor of this court dismissing the counterclaim with prejudice or staying resolution of the counterclaim pending the outcome (and any subsequent judicial review by the appropriate court of appeals) of the NRC licensing or ancillary proceedings to amend the agency's regulations.

ARGUMENT

The State of Utah styles its argument that the NRC lacks the authority to license ISFSI's (and derivatively its argument that the plaintiffs in this case lack standing) as a counterclaim. In order to focus attention on the State of Utah's more serious attempt here to evade the processes established by federal law for proper review of NRC regulations and NRC licensing decisions, the United States will not brief the procedural issues presented. The United States simply notes that serious questions exist as to whether a counterclaim is the proper vehicle here for asserting the arguments the State of Utah wishes to make. The State of Utah's arguments here seem more like defenses than counterclaims (though such pleading mistakes are often easily corrected under Fed. R. Civ. P. 8(c)). But more importantly, if the State of Utah is in fact seeking affirmative relief that amounts to a declaration that terminates an ongoing NRC licensing process and which would call for this Court to invalidate preexisting NRC regulations, at the

very least the State of Utah's counterclaim would appear to raise joinder problems for failing to bring the United States into the case under Fed. R. Civ. P. 19.

The State of Utah appears to concede in its Reply brief that its supposed counterclaim is really more in the nature of a defense. State of Utah's Reply Brief at p. 21 ("None of the cases cited by [plaintiffs] in support of this argument addresses the present situation in which the defendants have raised an agency's authority, not as a challenge to some agency action, but as a defense to claims made against them by the plaintiffs, and, even more specifically, as an essential element of plaintiffs' standing."); *see also id.* at p. 13-14 (also arguing that the formulation of its arguments as counterclaims has no significance). If properly styled as an affirmative counterclaim (i.e., as an independent suit that could have been brought in its own right), the United States believes that the Hobbs Act bars the counterclaim in the district court and the failure to exhaust administrative remedies certainly bars the State of Utah's arguments under consideration. With respect to Utah's standing arguments, although the Supreme Court requires that this Court decide standing questions before proceeding to the merits, this court need not adjudicate NRC's licensing authority in order to decide the standing question. Further, the doctrine of primary jurisdiction allows this Court to either dismiss the counterclaim or to stay resolution of the counterclaim pending the administrative resolution of PFS's licensing application and any subsequent review by the appropriate court of appeals.

I. The Hobbs Act vests exclusive jurisdiction over all challenges to NRC licensing proceedings in the Courts of Appeals, including those challenging the NRC's authority to license a facility.

The counterclaim raised by the State of Utah in district court challenges the NRC's jurisdiction to issue licenses to off-site interim nuclear fuel storage facilities. *See* Utah's Answer,

Counterclaim, and Demand for Jury Trial pp. 26-29, ¶ 81 (July 17, 2001) ("the NRC (despite its own position to the contrary) has no authority or jurisdiction to license a private, for profit, off-site SNF dump of the kind contemplated by the foreign utilities' scheme"). The relief requested by Utah goes to the heart of the Commission's licensing jurisdiction under the Atomic Energy Act. This Court lacks subject-matter jurisdiction over Utah's counterclaim[4] and should dismiss it. In the Hobbs Act, Congress vested exclusive jurisdiction over all aspects of a licensing proceeding or rulemaking under the Atomic Energy Act with the Courts of Appeals. *See* Hobbs Act, 28 U.S.C. § 2342(4); *see also Florida Power and Light Co. v. Lorion*, 470 U.S. 729 (1985); *Quivira Mining Co. v. U.S. EPA*, 728 F.2d 477 (1984).

"Jurisdiction is, of necessity, the first issue for an Article III court. The federal courts are courts of limited jurisdiction, and they lack the power to presume the existence of jurisdiction in order to dispose of a case on any other grounds." *T.R.A.C. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) (quoting *Tuck v. Pan American Health Organization*, 668 F.2d 547, 549 (D.C. Cir. 1981)); *see Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Because federal question jurisdiction is lacking over Utah's counterclaim, this court should not entertain it. Nor

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[4]Through the Hobbs Act, Congress has vested exclusive jurisdiction in the Courts of Appeals statute to review controversies regarding NRC licensing or rulemaking proceedings, and divested the district courts of any jurisdiction to review such controversies. The fact that Utah has raised these arguments in the context of a counterclaim does not invest this Court with jurisdiction to consider them. *Squillacote v. International Brotherhood of Teamsters*, 561 F.2d 31, 40 (7th Cir. 1977) ("Congress, however, has vested the courts of appeals with exclusive jurisdiction to review the merits of Board action in unfair labor practice cases. ... [A]uthorizing premature district court review of all purely legal issues would be an unwarranted departure from the jurisdictional scheme prescribed by Congress."); *United States v. Brunwasser*, 1990 WL 264715 (W.D. Pa.) ( "Therefore, to the extent that defendants [counterclaims] are seeking a review of the findings of the Tax Court ... defendants are precluded from raising such issues in this court since the Unites States Courts of Appeals have exclusive jurisdiction to review Tax Court decisions.").

can Utah raise its challenge to the NRC's licensing authority by recasting it in terms of standing; as we explain below, although *Steel Company* requires that this Court decide standing questions before proceeding to the merits, this court need not adjudicate NRC's licensing authority in order to decide the standing question.

Generally, 28 U.S.C. § 1331 grants the district courts federal question jurisdiction. However, this general federal question jurisdiction under 28 U.S.C. § 1331 can be superseded by special statutory review schemes, such at the Hobbs Act, which provide for exclusive jurisdiction in the federal Courts of Appeal over the review of agency actions. *See Clark v. Busey*, 959 F. 2d 808, 811 (9th Cir. 1992) ("district court's federal question jurisdiction is preempted by ... Federal Aviation Act['s]" review scheme); *California Save Our Streams Council v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989) ("specific jurisdictional provisions of the [Federal Power Act] ... control over" more general jurisdictional schemes); *Public Utility Comr. v. Bonneville Power Administration*, 767 F.2d 622, 627 (9th Cir. 1985) ("jurisdiction over a specific class of claims which Congress has committed to the Court of Appeals generally is exclusive.").

The Hobbs Act grants the Courts of Appeals "exclusive jurisdiction to enjoin, set aside, suspend ... all final orders of the [NRC] made reviewable by [the Atomic Energy Act]." 28 U.S.C. § 2342(4) (emphasis added). The Atomic Energy Act (AEA), in turn, makes reviewable any final order in a proceeding for the "granting, suspending, revoking or amending of any license" or "the issuance or modification of rules and regulations dealing with the activities of licensees." 42 U.S.C. § 2239(a)(1)(A). Further, the review structure under the Hobbs Act includes challenges to NRC decisions regarding its own licensing jurisdiction. *See General Atomics v. NRC*, 75 F.3d 536, 539 (9th Cir. 1996) ("courts of appeals have exclusive jurisdiction

to review NRC decisions regarding jurisdiction"); *NRDC v. NRC*, 606 F.2d 1261, 1265 (D.C. Cir. 1979) ("NRC's decision concerning jurisdiction ... is well within the class of final orders reviewable under [the Hobbs Act]"). Thus, even if the NRC ultimately decides it has jurisdiction to license the facility proposed by PFS, it is for the appropriate court of appeals, not this Court, to review that determination.

The Supreme Court interprets the jurisdictional grant of authority under the AEA broadly, and has held that decisions "ancillary" or "preliminary" to a NRC licensing decision may be challenged only on direct review in the Courts of Appeals. *Lorion*, 470 U.S. at 743. As noted above, PFS and Utah are currently in the midst of an ongoing administrative hearing before the NRC, in which PFS seeks an NRC license to construct and operate an offsite spent nuclear fuel storage facility on lands located in Skull Valley, Utah, and leased from the Skull Valley Band of Goshute Indians.[5/] At this point in the administrative proceeding, the Licensing Board has issued several preliminary decisions, including one rejecting Utah's arguments regarding the relationship between the NWPA and the AEA, but the Commission has not yet ruled on whether to issue a license to PFS.

The Hobbs Act exclusive review provision applies fully to cases, such as this one, where

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[5/]Utah has additionally challenged the conditional approval of the lease by the Department of the Interior in its answer and counterclaim. Utah's Answer, Counterclaim, and Demand for Jury Trial p. 2, 14-15, 27-18. This contention is also at issue in the *Blackbear v. Norton*, Civil No. 2:01CV0317C, litigation before this Court. The Department of the Interior filed a Motion to Dismiss on October 19, 2001 for lack of subject matter jurisdiction, specifically on ripeness grounds. We assume the Court will look to the arguments made in the *Blackbear* case to the extent the Court thinks necessary to resolve this litigation.

a party brings a pre-final or interlocutory challenge to the agency's authority.[6] The scope of exclusive jurisdiction under the Hobbs Act extends not only to challenges to preliminary rulings in licensing proceedings, but also to any suits that might affect the court of appeals' future jurisdiction over final agency actions. *California Save Our Streams v. Yeutter*, 887 F.2d 908 (9th Cir. 1989); *Public Utility Comr. v. Bonneville Power Administration*, 767 F.2d 622 (9th Cir. 1985); *accord, TRAC v. FCC*, 750 F.2d 70, 75 & 78-79 (D.C. Cir. 1985) ("[w]e hold that where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals."). *See also Ecology Action v. AEC*, 492 F.2d 998 (2d Cir. 1974).

When the Commission issues a final decision in the licensing proceeding regarding the PFS facility, the appropriate court of appeals will have exclusive jurisdiction to review the final decision. In addition, should Utah choose to contest the NRC's ISFSI regulations in court, (presumably after failing to persuade the Commission to rescind it), the court of appeals also has jurisdiction over that suit. The Hobbs Act leaves no room for federal district court jurisdiction over an NRC licensing or rulemaking dispute. Accordingly, by seeking to have this Court decide the issue of the Commission's authority, Utah has sought relief that impermissibly impairs the exclusive jurisdiction of the courts of appeals pursuant to the *TRAC* line of cases.

Congress enacted the Hobbs Act's exclusive jurisdictional scheme for several strong policy reasons. First, Congress intended to avoid the delay inherent in the creation of two separate records before the agency and the district court. *Florida Power and Light Co. v. Lorion*,

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[6] As mentioned *infra*, a final decision for purposes of judicial review in a licensing procedure is the order granting or denying the license. *See infra*, section II (A).

470 U.S. 729, 744 (1985) ("One crucial purpose of the Hobbs Act and other jurisdictional provisions that place initial review in the courts of appeals is to avoid the waste attendant upon this duplication of effort."); *see also Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 593 (1980) ("The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal"). Second, placing exclusive review in the Courts of Appeals allows that Court to "develop an expertise concerning the agencies assigned them for review," and "promote[] judicial economy and fairness to the litigants by taking advantage of that expertise." *TRAC v. FCC*, 750 F.2d at 78. Third, this review scheme presumes the development of a record before the NRC, an arrangement that permits an expert agency to conduct an initial review of what may be a highly complex and technical problem, rather than leaving this task with the courts. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

Utah has presented its arguments as a challenge to PFS's and the tribe's standing in the underlying suit. Utah claims that the challenged State statutes will not affect the plaintiffs as they cannot obtain a valid license from the NRC in the current licensing adjudication. *See* Defendants' Memorandum in Support of their Motion for Judgment on the Pleadings, p. 1 (Sept. 20, 2001) ("The pleadings in this action, when measured against the federal law governing storage of nuclear waste, establish that Utah is entitled to a judgment on the pleadings. That is because the governing federal law renders unauthorized and unlicensable the plaintiffs' proposed nuclear waste dump in Skull Valley, Utah."); Utah's Reply p.8-10 (stating that PFS's proposed nuclear waste storage facility would be an "unlawful activity" even if it were to obtain an NRC license and hence, PFS does not have standing to challenge the State statutes).

This Court need not decide the NRC's jurisdiction in order to determine whether this action presents a case or controversy. A showing of standing requires only a showing that 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). The Tribe and PFS have a concrete plan to construct a storage facility on Tribal lands; although the question of whether that facility can be licensed is now before the NRC, the plan is far from being one of the "speculative 'some day intentions'" that the Supreme Court has found to be insufficient to show standing. Id. at 184 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)). *Cf. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149,160-62 (4th Cir. 2000) (en banc) (finding that "probabilistic" injury is actionable, and that the standing inquiry does not require "the litigation of complicated issues of scientific fact that are entirely collateral" to the underlying lawsuit). Applicable NRC regulations on their face allow facilities like the one at issue in this case to be licensed; in view of the presumption of regularity applicable to governmental action, *see United States v. Armstrong*, 517 U.S. 456, 463 (1993), this is enough to demonstrate that plaintiffs' claims are not speculative.[2/]

In short, Congress has established a review structure under the Hobbs Act and the AEA designed to vest the courts of appeals with exclusive subject-matter jurisdiction over any Commission action related to licensing or rulemaking under the AEA. See *Lorion*, 470 U.S. at

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[2/]For the same reason, Utah is incorrect in maintaining that the Tribe has no standing to sue because the facility it seeks to construct is unlawful. The question of the lawfulness of the Tribe's activity is now before the NRC. The possibility that the NRC will determine that it is appropriate to issue a license is sufficient for the Tribe to establish injury in fact and traceability.

740-41. This Court should not allow Utah to proceed with its counterclaim or its collateral attack on the NRC's licensing authority, which threatens the integrity of the NRC's administrative process and of Congress's carefully prescribed judicial review scheme.[8/]

II. The Nuclear Regulatory Commission has not yet ruled on Utah's NWPA-driven contentions in the administrative proceeding and thus Utah's counterclaim lacks finality.

A. The ongoing agency licensing proceeding lacks the needed finality for review under the Hobbs Act.

The Hobbs Act permits review only of "final" NRC decisions. 28 U.S.C. § 2342(4). The language of the Hobbs Act grants the Courts of Appeals "exclusive jurisdiction to enjoin, set aside, suspend ... all final orders of the [NRC] made reviewable by [the Atomic Energy Act]." *Id* In other words, the statute "mandate[s] a jurisdictional inquiry into the finality of the agency actions being challenged." *NRDC v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982) (citing to *Citizens for a Safe Environment v. AEC*, 489 F.2d 1018, 1020 (3d. Cir. 1974)). The Commission has not yet issued an order granting or denying PFS's license application for the proposed facility; nor has the Commission been asked to reconsider its ISFSI licensing rule. Hence, Utah cannot yet pursue a lawsuit in the courts of appeals, much less in this Court. Accordingly, there would be no point in transferring this case to the appropriate court of appeals. *See General Atomics v. NRC*, 75 F.3d at 539-540.

Courts have narrowly construed when a order is considered "final" for the purpose of judicial review under the Hobbs Act. *NRDC v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982).

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[8/]In its reply, Utah does not state that the Hobbs Act does not apply to this situation. In fact, Utah has not rebutted plaintiffs claims that the Hobbs Act does apply. *See generally* Utah's Reply.

"Finality" occurs if an order "imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process." *Id* (quoting *Honicker v. NRC*, 590 F.2d 1207, 1209 (D.C. Cir. 1978)). Specific to the NRC, "a final order in a licensing proceeding under [the Atomic Energy Act] would be an order granting or denying the license." *Id.* (quoting *Citizens for a Safe Environment v. AEC*, 489 F.2d 1018, 1021 (3d Cir. 1974)); *see also City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998). At this point in the PFS licensing proceeding, the Licensing Board has determined that the State of Utah's arguments concerning the relationship between the AEA and the NWPA are not properly being adjudicated before the agency. *See In the Matter of Private Fuel Storage, LLC*, 47 N.R.C. 142, 183-84 (April 22, 1998). But that does not mean that it is appropriate for Utah to seek review of these arguments in federal district court. The Licensing Board's decision represents an interlocutory position of the agency because there is still another level of review that will take place within the agency by the Commission. *See* 10 C.F.R. § 2.764(c) ("An initial decision directing the issuance of an initial license for the construction or operation of an independent spent fuel storage installation (ISFSI) located at the site ... under 10 CFR part 72 [the applicable regulations for the licensing of temporary Independent Spent Fuel Storage Installations] shall become effective only upon order of the Commission."). Thus, the proper route for Utah to advance its arguments is before the full Commission.

Here, however, the Commission has yet to rule or make a final determination on PFS's application for a license. In making the final determination on whether to license the facility proposed by PFS, the Commission could consider Utah's contention regarding the NWPA and the AEA or Utah could raise the matter in a petition for rulemaking under 10 C.F.R. § 2.802. For

purposes of judicial review, until the Commission issues an order "granting or denying the license" or reaffirming or rescinding its ISFSI regulations, there does not exist a "final" order. Review of an interlocutory decision is impermissible under the Hobbs Act.[9]

The statutory requirement of allowing judicial review of only final orders has several practical advantages. *NRDC v. NRC*, 680 F.2d 810, 816- 818. First, it is possible that Utah will obtain the result it seeks from the Commission, thereby avoiding judicial review entirely. Second, deferring review at the interlocutory stage weighs in favor of judicial economy, as the appropriate court of appeals ultimately will be able to consider all issues in a single review proceeding. Additionally, along the same lines, the court of appeals will benefit from a fully developed factual record by waiting until the completion of the licensing proceeding. Finally, withholding judicial review now does not foreclose the possibility of judicial review at the appropriate time following the close of the administrative process and the issuance of a final

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[9]/Courts have recognized two exceptions to the finality requirement, neither of which applies here. First, there is a "possible exception for rulings that are 'so flagrantly wrong and demonstrably critical as to make' reversal a virtual certainty if the petitioner were to lose at the administrative level." *NRDC v. NRC*, 680 F.2d 810, 816, fn. 15 (D.C. Cir. 1982) (quoting *Ecology Action v. Atomic Energy Commission*, 492 F.2d 998, 1000 (2d Cir. 1974)). The "flagrantly wrong" exception is to be applied in "exceedingly limited" situations. *Id.* At the very least, it is clear that the Atomic Energy Act gave the Commission general licensing authority over the handling, storage, and disposal of nuclear waste. The NWPA made clear Congress's intention that spent fuel from nuclear reactors should eventually be disposed of in a geological repository, but the NWPA has no language that would clearly abrogate the Commission's pre-existing authority to provide for and regulate the storage of that waste prior to the availability of the geological repository. There is nothing "flagrantly wrong" with the Commission's moving forward with a proceeding to license the proposed PFS facility. Second, courts have recognized a "collateral order" exception that results if an "immediate appeal [is] necessary to preserve rights that would otherwise be lost on review from final judgment." *Id.* at 816, fn. 16. When the Commission issues an order granting or denying the license, Utah can appeal the final decision at that point.

order.

B. The State of Utah has not exhausted its administrative remedies.

Utah seeks to challenge the jurisdictional authority of the NRC to implement its regulations that govern the licensing of interim nuclear storage waste facilities before the agency has taken a final position on the matter. But it is "well established in the jurisprudence of administrative law" that litigants must ordinarily exhaust available administrative remedies before seeking court intervention. *McKart v. United States*, 395 U.S. 185, 193 (1969); *see also Marshall v. Burlington Northern, Inc.*, 595 F.2d 511, 513 (9th Cir. 1979); *General Atomics*, 75 F.3d at 541 ("It is well established in administrative law that before a federal court considers the question of an agency's jurisdiction, sound judicial policy dictates that there be an exhaustion of administrative remedies.") (citation omitted). The Supreme Court has found that factors weighing in favor of exhaustion include: (1) the need to permit the agency to apply its expertise to the matter, (2) respect for the autonomy of the agency, and (3) reducing the workload of the courts. *McKart*, 395 U.S. at 194-195.

The requirement of exhausting administrative remedies before gaining access to the courts is both an expression of administrative autonomy and a rule of judicial administration. *United Tribe of Shawnee Indians v. U.S.*, 253 F.3d 543, 550 (10th Cir. 2001); *State of California ex rel. Christensen v. FTC*, 549 F.2d 1321, 1324 (9th Cir. 1977). Where, as here, "the agency has the opportunity and authority to consider, change and eventually finalize its position," simultaneous judicial review "would inappropriately interfere with the [] agency decision making process before it is completed." *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408 (9th Cir. 1996). Further, "[h]aving two governmental bodies simultaneously review an agency action wastes

scarce government resources" and "poses the possibility that an agency authority and a court would issue conflicting rulings." *Id.* at 1408-09. The Supreme Court has noted that if the courts fail to allow an agency this type of autonomy "it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *McKart*, 395 U.S. at 195. As has been mentioned, PFS's application for a license is in the midst of an ongoing administrative proceeding. Allowing collateral review of the NRC's proceeding at such at early date threatens the integrity of the agency's licensing process.

Judicial efficiency favors permitting the administrative process to proceed uninterrupted, and then subjecting the results to judicial review at the conclusion of the process rather than permitting judicial intervention at each phase of the process. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967).[10] A complaining party, in this case Utah, may be successful in vindicating its rights in the administrative process, negating the need for the court to intervene at all. *Sierra Club v. NRC*, 825 F.2d 1356, 1362 (9th Cir. 1987) ("We will not entertain a petition where pending administrative proceedings or further agency action might render the case moot and judicial review completely unnecessary."). In this case, the Commission may deny PFS's

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[10] As *Abbott Laboratories* indicates, Utah's attempt to litigate the NRC's jurisdiction prematurely can also be analyzed as a question of ripeness. "The problem [of ripeness] is best seen in a twofold aspect, requiring us to evaluate the fitness of the issues for judicial decision and the hardship of the parties of withholding court consideration." *Abbott Labs*, 387 U.S. at 149. As the exhaustion discussion indicates, the relationship between the NWPA and the AEA is not ready for judicial review. Also, Utah has not shown how they will harmed by deferring judicial review by the appropriate court of appeals following final agency action. A third closely related concept is that of primary jurisdiction; under that analysis, this Court should defer to the NRC as the agency with expertise to consider this question in the first instance.

license application or ultimately may decide to treat Utah's contention as a petition for review of the regulations; both of which, may relieve the need for judicial review.

Additionally, Utah has failed to exhaust its administrative remedies with respect to challenging the regulations that govern the off-site interim storage of spent nuclear fuel waste. The NRC initially promulgated regulations governing the licensing of facilities for the storage and disposal of nuclear waste away from the reactor in 1980, two years prior to the passage of the NWPA. *See* "Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation," 45 Fed. Reg. 74,693 (1980). The NRC amended the regulations in 1988 to add additional provisions for NRC licensing of federally-owned storage and disposal facilities for spent nuclear fuel and high-level radioactive waste as required under the NWPA. 53 Fed. Reg. 31,651 (1988) (codified at 10 C.F.R. pt. 72). The amended regulations did not revoke the regulations that govern offsite private storage. *Id.* There exist specific administrative procedures allowing any interested person to "petition the Commission to issue, amend or rescind any regulation." *See* 10 C.F.R. § 2.802. Even though Utah now requests this Court to rule on the validity of the Part 72 regulations, Utah has never petitioned the Commission to rescind or in any way amend the Part 72 regulations pertaining to private offsite waste storage facilities. Thus, Utah has bypassed the NRC's administrative process specifically designed to allow rescission or modification of existing regulations.

The Commission thus far has not had occasion to address Utah's arguments regarding the relationship between the AEA and the NWPA. And, even assuming for the moment that the Commission does not adopt Utah's position, courts have made clear that the probability of an adverse agency decision does not render exhaustion futile if "effective means for judicial review

are ultimately available." *Gaunce v. deVincentis*, 708 F.2d 1290, 1293 (7th Cir. 1983); *see also West v. Bergland*, 611 F.2d 710, 719 (8th Cir. 1979). Further, effective means for judicial review of a Commission denial of a petition for rulemaking is available since, under the Hobbs Act, Utah could seek judicial review in the court of appeals. *See Public Citizens v. NRC*, 845 F.2d 1105, 1108-09 (D.C. Cir. 1988).

C. The Primary Jurisdiction Doctrine requires this Court to Stay Or Dismiss the State of Utah's Counterclaim.

Whether Utah's argument is in fact properly styled as a counterclaim or a defense, the doctrine of primary jurisdiction bars any avenue of retreat that might hinge on the procedural distinction between a defense and a counterclaim. *See Reiter v. Cooper*, 507 U.S. 258, 260-63 (1993) (primary jurisdiction doctrine applied to counterclaim (even though improperly labeled as a defense)); *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 74 (1956) ("We hold, therefore, that the limitation of § 16(3) does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commission's primary jurisdiction, as were these questions relating to the applicable tariff.").

The Supreme Court nicely summarized the effects, purposes, and underpinnings of the primary jurisdiction doctrine as follows: "The doctrine of primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233 (1971) (citing *United States v. Western*

*Pac. R. Co.*, 352 U.S. 59, 63--64). The doctrine is based on the principle "that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference v. United States*, 342 U.S. 570, 574, and "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme," *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 353." *Local Union No. 189, Amalgamated Meat Cutters, etc. v. Jewel Tea Co.*, 381 U.S. 676, 684-685 (1965) (opinion of White, J., announcing judgment).

In this case, there can be no doubt that the issues of the continuing validity of the NRC's regulations that authorize the agency to license ISFSI's, as well as the particular question of whether those regulations to license the facility contemplated by the plaintiffs are matters, "under the regulatory scheme" "placed within the special competence of" the NRC. It is equally clear that the licensing of nuclear-waste facilities "rais[e] issues of [complex, technical] fact not within the conventional experience of judges," or at the very least that the question of the continuing validity of the NRC's applicable regulations requires the exercise of NRC's administrative discretion. Hence, the State of Utah's counterclaim challenging the validity of NRC's regulations and having the effect of interrupting an ongoing licensing proceeding by the NRC is appropriate for referral to the agency under the doctrine of primary jurisdiction. *See Williams Pipe Line Co. v. Empire Gas Co.*, 76 F.3d 1491 (10th Cir. 1996) (referring question arising under the Department of Energy Reorganization Act to the Federal Energy Regulatory Commission).

Indeed, not only is this case a *candidate* for a primary-jurisdiction referral to the NRC for prudential reasons, this Court is actually *required* to do so here. This is because where a party

has "a right to have [an agency's] order reviewed" (as the State of Utah has in this situation concerning the outcome of the NRC licensing proceedings to which it is a party), and only another court "has the jurisdiction to review it" (which is also true here under the Hobbs Act), then a court is "under a duty to stay its proceedings pending this review." *Pennsylvania R.R. v. United States*, 363 U.S. 202, 205 (1960); *see also Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-71 (1970) (same). Accordingly, a referring court "must . . . await the outcome of any appeal that may be taken from" the agency proceedings. *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1360, 1363 & n.13 (9th Cir. 1987). "[W]hen primary jurisdiction is invoked . . . agency proceedings are not considered complete until judicial review of the agency's determination is complete." *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 269 (7th Cir. 1984).

Accordingly, under the primary jurisdiction doctrine, it is no answer to the thrust of the plaintiffs' argument against the State's counterclaim, arguing that any challenges to the NRC's licensing proceedings or to its regulations authorizing the licensing of ISFSI's must be entertained before the NRC in the first instance, for the State to lay stress upon the fact that a final agency order has not yet resulted from the relevant NRC proceedings. The primary jurisdiction doctrine clearly applies in favor of agency proceedings that are not yet complete, even in favor of agency proceedings that have not even begun. *See Allnet Communication Serv. v. National Exch. Carrier Ass'n*, 965 F.2d 1118, 1120 (D.C. Cir. 1992) (chronology of the events making clear that *after* the time the District Court should have dismissed a case on the basis of the doctrine of primary jurisdiction was the occasion when the party urging application of the doctrine first filed with the agency to initiate the administrative process to which the Court of

Appeals was referring the relevant issues).

Should this Court agree that the doctrine of primary jurisdiction applies to the State of Utah's counterclaim, it then possesses the discretion to either dismiss the counterclaim with prejudice or to stay resolution of the counterclaim pending the outcome (and subsequent judicial review by the State or other parties) of the NRC licensing or ancillary proceedings to amend the agency's regulations. *See Volkman v. United Transp. Union*, 73 F.3d 1047 (10th Cir. 1996) (citing *Reiter*). The United States at that point would defer to an exercise by this Court of its sound discretion as to which option to choose. The key point that has induced the United States to file in an *amicus* capacity in this matter is that this Court should not resolve whether the facility at issue should be granted a license, or whether the NRC's regulations that authorize the licensing of ISFSI's are valid, before the NRC first addresses these questions and any judicial review thereof that the State of Utah chooses to seek in the Courts of Appeals consistent with the Hobbs Act is completed.

III. Merits of Utah's Contentions Regarding the Relationship Between the AEA and the NWPA.

The Court does not need to reach the merits of Utah's claim that the NRC lacks jurisdiction to license an off-site interim nuclear waste facility and should dismiss Utah's counterclaim for lack of subject-matter jurisdiction. The United States will not address the merits of Utah's counterclaim here, except to note as we did *supra* in footnote 9, that the NWPA contains "no language that would clearly abrogate the Commission's pre-existing authority to provide for and regulate the storage of that waste prior to the availability of the geological repository." As stressed above, Utah's NWPA argument has not yet come before the

Commission and thus, the Commission has not ruled on whether the NWPA eliminated the NRC's jurisdiction to license such a facility as that proposed by PFS. If the Court chooses to address the merits of Utah's arguments regarding the relationship between the AEA and the NWPA, the United States requests the opportunity to present its views on the NRC's licensing jurisdiction under the Atomic Energy Act.

## CONCLUSION

For all of the aforementioned reasons, the United States requests that this Court dismiss the portion of State of Utah's counterclaim that challenges the NRC's licensing jurisdiction for lack of subject-matter jurisdiction, and decline to rule on the merits of the relationship between the NWPA and the AEA.

Dated: January 19, 2002

Respectfully Submitted,

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# ATTACHMENT D

Revised 5 PM 3/26

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

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|---|---|---|
| THE SKULL VALLEY BAND OF GOSHUTE INDIANS, et al., | * | |
| | * | Case Number 2:01CV00270C |
| Plaintiffs | * | |
| vs. | * | |
| | * | UNITED STATES' AMICUS CURIAE BRIEF ON FEDERAL PREEMPTION |
| MICHAEL O. LEAVITT, et al., | * | |
| Defendants. | * | |

The United States submits a second amicus curiae brief to address the arguments contained in the Plaintiffs' Joint Motion for Summary Judgment on the federal preemption of Utah's statutes regarding the storage of spent nuclear fuel. Congress has established a comprehensive scheme for the regulation of nuclear energy production in the Atomic Energy Act and in the Nuclear Waste Policy Act. Under either of these statutes, Utah's attempt to regulate the proposed facility through a duplicative licensing process is preempted due to Congress occupying the field. Further, the other attempts by Utah to prohibit the storage of spent nuclear fuel, i.e., the transportation, municipal services to a facility and the liability provisions, obstruct the federal policies inherent in the federal regulation of spent nuclear fuel and are also preempted.

## INTEREST OF THE UNITED STATES

Congress has vested the Nuclear Regulatory Commission (NRC) with the authority to

license, supervise, and regulate nuclear facilities. See Atomic Energy Act, 42 U.S.C. § 2201, et seq. The Commission also has authority, granted by Congress, to interpret the Atomic Energy Act, and has substantial expertise, extending over several decades and numerous licensing proceedings, with the proper interpretation of that Act and the lawful and safe operation of facilities that handle nuclear materials. The United States has a strong interest in avoiding duplicative regulation of nuclear facilities and nuclear safety. The United States therefore appears in this proceeding to notify the Court that Congress has fully preempted the storage of spent nuclear fuel, i.e., the area in which Utah has legislated.

## BACKGROUND

### A. Procedural Background

The Skull Valley Band of Goshute Indians ("Skull Valley") and Private Fuel Storage (PFS), a private consortium of nuclear utilities, brought suit against Utah State officials challenging five State statutes on constitutional grounds. Skull Valley Band of Goshute Indians v. Leavitt, Case No. 2:01V0027OC, Plaintiffs Complaint (April 19, 2001) (hereinafter "Complaint"). Skull Valley and PFS allege that the State statutes are unconstitutional under the Treaty, Supremacy, Contract and Indian Commerce clauses of the Constitution, and that they are otherwise inconsistent with federal law.[1] See Complaint, p. 26-30. The challenged State statutes

[1]In response to the plaintiffs' complaint, Utah filed an answer, which affirmatively counterclaims that the Nuclear Regulatory Commission (NRC) does not have statutory authority under the Atomic Energy Act to license a private, off-site spent nuclear storage facility. Utah also filed a Motion for Judgment on the Pleadings detailing its belief that the Nuclear Waste Policy Act (NWPA) represents Congress's exclusive plan for dealing with nuclear spent fuel waste, and thus the NRC cannot license the facility proposed by PFS under the Atomic Energy Act. According to Utah, the plaintiffs must be able to secure a valid license for the facility in order to have standing in the underlying suit challenging the State statutes. In response to Utah's affirmative counterclaim, the United States filed an amicus curiae brief arguing that the Court

impose extensive obstacles to the storage of spent fuel within the State boundaries, including permitting and licensing requirements, outlawing the transportation of spent nuclear fuel through the state, forbidding local communities from providing municipal services to interim storage facilities, voiding private contracts and imposing civil and criminal liability on the shareholders of corporations that engage in the storage of spent nuclear fuel waste. See Utah Statutes §§ 19-9-301-319;72-4-125; 72-3-301; 54-4-15; 78-34-6; 17-27-102; 17-27-301, 303, 308; 17-34-6; 17-34-1; see also Plaintiffs' Joint Motion for Summary Judgment, Attachment 1.

In December 2001, the plaintiffs filed a motion for summary judgment arguing, among other things, that Utah's statutes are unconstitutional as they are preempted under the Atomic Energy Act. See generally Memorandum of Points and Authorities in Support of Plaintiffs' Joint Motion for Summary Judgment (Dec. 12, 2001). Utah filed a response to the motion on March 7, 2002,[2] which first reemphasises their argument that the AEA cannot preempt the state's statutes because it does not govern the licensing of the proposed storage facility. Utah's Response to Plaintiffs' Joint Motion for Summary Judgment p. 4, 10. Second, Utah argues that the state statutes were premised upon legitimate state concerns. Id. at p. 16, 24.

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must dismiss the counterclaim because the district court lacks jurisdiction to adjudicate the counterclaim, since the Hobbs Act requires that all challenges to NRC licensing decisions be brought in circuit court. We also argued that the State has failed to exhaust its administrative remedies and that the doctrine of primary jurisdiction applies. We did not address the merits of Utah's counterclaim, i.e., the relationship between the AEA and the NWPA, primarily because the NRC, at the Commission level, has not addressed this issue yet. Contrary to Utah's suggestions, the United State's submission fully addressed Utah's claim that the plaintiffs lack standing in our brief. See pages CITE.

[2]Although counsel for the United States has filed a pro hac vice motion and a notice of appearance in this case, Utah did not serve the United States with a copy of their response. The United States obtained a copy on March 25, 2002 from the plaintiffs.

B. The Federal Statutes That Govern Spent Nuclear Fuel Waste Storage and Disposal

In the Atomic Energy Act (AEA), Congress granted the NRC exclusive authority to regulate the health and safety aspects of "radiation hazards" which includes the licensing, transfer, delivery, receipt, acquisition, possession and use of nuclear materials. 42 U.S.C. § 2021(k); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 206 (1983). In carrying out its statutory mandate, NRC has promulgated regulations providing a comprehensive procedure for the licensing of temporary Independent Spent Fuel Storage Installations (ISFSI's). See 10 C.F.R. pt. 72.[3]

Additionally, Congress addressed the storage of spent nuclear fuel in the Nuclear Waste Policy Act (NWPA). The NWPA and its subsequent amendments primarily address the construction of a permanent storage facility for spent nuclear fuel. See 42 U.S.C. § 10101 et seq. However, Congress also spoke to certain types of interim storage facilities. Id.

C. Utah's State Statutes

Utah's scheme for regulating the storage of spent nuclear fuel within the state borders can be broken down into four categories: 1) the regulation of a spent nuclear fuel storage facility including licensing, permitting, bonding and fee requirements, 2) transportation of spent nuclear fuel into and throughout the state, 3) provisions regarding providing municipal services to storage facilities and 4) liability standards for engaging and planning to engage in the .

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[3]The NRC initially promulgated regulations governing the licensing of facilities for the storage and disposal of nuclear waste away from the reactor in 1980, two years prior to the passage of the NWPA. See "Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation," 45 Fed. Reg. 74,693 (1980). The NRC amended the regulations in 1988 to add additional provisions for NRC licensing of federally-owned storage and disposal facilities for spent nuclear fuel and high-level radioactive waste as required under the NWPA. See 53 Fed. Reg. 31,651 (1988) (codified at 10 C.F.R. pt. 72).

transportation and storage of spent nuclear fuel. See Utah Statutes §§ 19-9-301-319;72-4-125; 72-3-301; 54-4-15; 78-34-6; 17-27-102; 17-27-301, 303, 308; 17-34-6; 17-34-1; see also Plaintiffs' Joint Motion for Summary Judgment, Attachment 1 (providing the state statutes) and pg. 9-11 (providing a detailed summary of the individual provisions).

ARGUMENT

Congress has legislated fully in the storage of spent nuclear fuel. First assuming the AEA governs the licensing of the proposed interim spent nuclear fuel storage facilities,[4] then the AEA governs the nuclear safety regulation of this facility and preempts Utah's statute. In the alternative supposing that Utah is correct in its assertion that the NWPA governs the licensing of this facility, then the NWPA preempts Utah's attempts to legislate in the field of spent nuclear fuel. Because Utah's statutes are preempted whether the AEA or the NWPA governs, we urge this Court not to reach the issue of the relationship between the AEA and the NWPA. Under either statute, Congress has mandated that federal law dictates the guidelines for the storage and disposal of spent nuclear fuel. Utah's pervasive statutory scheme for the regulation of nuclear waste infringes upon a field occupied by federal law and thus the state statutes are impermissible under the Supremacy Clause of the Constitution.

There are generally three situations in which federal law preempts state law. First, a federal statute can expressly preempt any state statutes. Second, where Congress has evidenced

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[4]The United States has not taken a position on the relationship between the AEA and the NWPA. The United States has argued that the Court does not have jurisdiction under the Hobbs Act to adjudicate whether the NRC has jurisdiction to license the proposed storage facility because this issue is now before the NRC and challenges to the NRC's jurisdiction are only cognizable in the Circuit Courts. In contrast, the preemption inquiry is properly before this Court and the Court can rule that Utah's statutes are preempted by the AEA without touching on the issues that are properly adjudicated before the NRC or in the Courts of Appeal.

an intent under the Supremacy Clause that a particular field "admits only of national supervision" or "demands exclusive federal regulation in order to achieve uniformity vital to national interests," state law is preempted. Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1153 (8th Cir. 1971); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984). This is usually called "field preemption." Third, even if Congress has not entirely displaced state law in a field, state law is still preempted if an "actual conflict" exists between state and federal law. Id. Such a conflict occurs "when it is impossible to comply with both state and federal law" or "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Id.

1. Congress has fully legislated in the area of nuclear safety regulation through the Atomic Energy Act, which occupies the field in which Utah has enacted state statutes.

The AEA preempts the field of nuclear safety regulation and thus preempts Utah's statutes regarding the licensing for storage of spent nuclear waste. See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 US 190, 213 (1983). As noted by the Supreme Court, the federal government's "prime area of concern in the licensing context ... is national security, public health, and safety." Vermont Yankee Nuclear Power Co. v. NRDC, 435 U.S. 519, 550 (1978). "With respect to these matters, no significant role was contemplated for the States." English v. G.E., 496 U.S. 72, 81 (1990). Accordingly under the AEA, "[s]tate safety regulation is not preempted only when it conflicts with federal law[;] [r]ather, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." Pacific Gas, 461 U.S. at 212. The AEA expressly states that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation

hazards." 42 U.S.C. § 2021(k)[5]; see Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234, 1241-1242 (7th Cir. 1985) (distinguishing between the regulation of radiation hazards and non-radiation hazards; the former is left to federal regulation, whereas the latter can be regulated by the states). The disposal of spent nuclear fuel is regulated as a potential radiation hazard. See Pacific Gas, 461 U.S. at 206 ("The AEC [now the NRC] however, was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials. Upon these subjects, no role was left for the states."). In short, the AEA occupies the field of regulation and disposal of spent nuclear fuel in an interim storage facility.

Utah's statutes establishes a separate state licensing procedure for the construction and operation of a temporary spent nuclear fuel storage facility, in addition to the NRC's licensing procedure. See § 19-3-304 - 19-3-306. Additionally, Utah's scheme requires the Utah Department of Environmental Quality to assess groundwater, security plans, health risks, quality assurance programs, radiation safety programs and emergency plans. See § 19-3-305. The NRC has promulgated comprehensive regulations regarding the licensing of interim storage facilities (10 C.F.R. Part 72) and Utah's statute overlaps and duplicates the NRC's regulatory powers in the area of radiological safety, public health, and national security.[6]

In part, the Supreme Court has defined a preemption field by reference to whether the

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[5]This saving provision has not been construed to prohibit conflict preemption.

[6]Utah's scheme also limits road access onto the reservation and outlaws transportation of spent nuclear fuel by rail line. NRC regulates the containers that spent nuclear fuel is transported in. CITE. The Hazardous Waste Materials Act regulates the movement of spent nuclear fuel. The United States does not take a position on whether the HWMA preempts Utah's statutes, but as far as the State's statutes attempt to regulate safety concerns over accidental spillage, the AEA preempts.

scope of the AEA's field preemption effect of state law was motivated by safety concerns or other concerns. English v. GE, 496 U.S. 72, 84 (citing to Pacific Gas, 461 U.S. at 213). If a state statute specifically refers to a safety concern, the state statute most likely comes within the AEA's field preemption reach. Id. The state statutes say on their face that they were passed primarily with environmental and economic concerns in mind. See Utah Statute § 19-3-302 (stating "[t]he state of Utah has environmental and economic interests which do not involve nuclear safety regulation" in storing spent nuclear fuel within its boundaries). To justify its environmental concerns, Utah's brief contains an affidavit detailing potential damage from an accidental waste spillage. Utah's Response, p. 16-17 (discussing the type of facility proposed, amount of waste the manner of storage). To justify its economic concerns, Utah's brief contains an affidavit predicting the lowering of property values along the transportation corridor.[7] Id. The potential for the spillage of spent nuclear waste, the manner in which the spent nuclear fuel would be stored and the amount of waste in one location properly concerns the NRC as the agency tasked with regulating the safety of transporting and storing the spent fuel. See 10 C.F.R. Part 72. In other words, even on their face Utah's concerns go into the safety realm Congress mandated to the NRC for regulation.

Additionally, the Court has made clear only that "part of the preempted field is defined by reference to the purpose of the state law in question" and the Court will also look to "the state law's actual effect on nuclear safety." English v. GE, 496 U.S. at 84. The test is whether the

[7]The Supreme Court has accepted the lack of a permanent storage space for spent nuclear fuel as a valid economic concern justifying a state moratorium on the construction of new power plants due to the "high costs to contain the problem, or worse, shutdowns in reactors." Pacific Gas, 461 U.S. at 212. Utah does not present any similar type of evidence, which would rise to an economic concern justifying their statutes.

state statute has "some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." Id. at 85. Even assuming that the state's motivation in passing these statutes is to protect "environmental and economic interests," the Court can still find Utah's statutes preempted due to the effect of the statutes. As expanded below, even if the NRC decided to issue a license to the plaintiffs for the construction and operation of a spent nuclear fuel storage facility, the State's statutes made it impossible for the facility to operate lawfully under the state's laws. See Nevada v. Watkins, 914 U.S.1545, 1561 (9th Cir. 1990) ("Although the professed motivation for Nevada's legislative veto is the economic and environmental effects of nuclear waste disposal, the state's action has the actual effect of frustrating Congress' intent. Thus, the attempted legislative veto is preempted by the 1987 NWPA amendments.").[8]

2. Utah's state statutes obstruct Congress's regulatory scheme under the Atomic Energy Act.

Even where Congress has not expressly prohibited dual regulation nor unequivocally declared its exclusionary exercise of authority over a particular subject matter, federal preemption may be implied. See Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1146 (8th Cir. 1971). Courts have consistently recognized that state laws cannot stand that either frustrate the purpose of national legislation or impair the ability of agencies of the federal government to discharge their statutory duties efficiently. See Nash v. Florida Industrial

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[8]Additionally, Utah's secondary licensing scheme seems to imply that Utah can veto a decision by the NRC to license a facility. However, a state cannot veto an NRC licensing decision in a particular case, even based upon a non-radiological hazard, i.e., non-safety concern, over which the state has jurisdiction under its traditional Tenth Amendment police powers. See English, 496 U.S. at 79; Brown v Kerr-McGee Chemical Corp., 767 F.2d 1234, 1240-42 (7th Cir.).

Commission, 389 U.S. 235 (1967); New York State Commission on Cable Television v. FCC, 669 F.2d 58, 62 (2d Cir. 1982); Iowa Public Service Co. v. Iowa State Commerce Commission, 407 F.2d 916, 919 (8th Cir.), cert. denied, 396 U.S. 826 (1969). One factor in the determination is "whether, under the circumstances of a particular case state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. (citations omitted); Perez v. Campbell, 402 U.S. 637, 649 (1971). In short, a state simply does not possess the power to interfere with the operation of federal policies mandated by Congress.

Here, the State has created civil and criminal penalties for any activity related to the storage of spent nuclear fuel in Utah (§ 19-3-312) and has required that any facility attempting to engage in storage put exorbitant amounts of money into a cleanup fund. Additionally, the State statutes outlaw the transportation of spent nuclear fuel through the State (§ 19-3-301(1); 19-3-315) and specifically declare the access road onto the reservation to be a State highway. Finally, the State has created a "catch-22" by forbidding any local communities from providing municipal services to any interim storage facility (§ 17-34-1(3)) while at the same time requiring a facility to show that adequate emergency services will be provided (§ 19-3-306). In other words, even if the NRC ultimately issues a license to PFS for the construction and operation of such a facility pursuant to 10 C.F.R. Part 72, Utah has enacted comprehensive and complex legislation that would render it all but impossible for any entity to construct a temporary facility for storing spent nuclear fuel on Indian land in Utah.

III. The Court Need Not Decide Whether The AEA or NWPA Governs This Facility In Order to Find Utah's Laws Preempted.

Nor need the Court resolve the question of whether the AEA or the NWPA governs the licensing of this interim storage facility in order to decide this case. Irrespective of which statute

governs here, the AEA and NWPA taken together unquestionably establish a comprehensive federal scheme for the regulation of the radiological hazards associated with nuclear wastes. As the Supreme Court explained in Pacific Gas, from the first development of nuclear energy the Federal government has played a central role in its control and regulation. 461 U.S. at 204-12. Under the Atomic Energy Act, "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." Id. at 212. Along the same lines, the NWPA establishes a federal policy and program with respect to the disposal of spent nuclear fuel and other waste generated by civilian nuclear reactors. See § 42 U.S.C. 10101 et seq; General Electric Uranium Management Corp. v. DOE, 764 F.2d 896, 898 (D.C. Cir. 1985).

As mentioned above, "[w]hen the Federal government completely occupies a given field or an identifiable portion of it ... the test of preemption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" Pacific Gas, 461 U.S. at 212-13 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947)). The same arguments that demonstrate that the AEA preempts the field of regulation of nuclear safety also show, mutatis mutandis, that the NWPA does so. The NWPA is simply another aspect of the pervasive Federal scheme for regulation of nuclear materials, and shares a common history and set of objectives with the remainder of that scheme. Although the NWPA provides for a limited State role in some areas, see, e.g., 42 U.S.C. § 10136, these are only "limited powers expressly ceded to the states," Pacific Gas, 461 U.S. at 212. There is no indication of any Congressional intent that the NWPA deviate from the long-standing rule that the States may not regulate nuclear safety. Cf. United States v. Morros, 268 F.3d 695, 702 (9th Cir. 2001) (noting that the NWPA

may have a field-preemptive effect, although not deciding this question) Indeed, Utah's own arguments that the NWPA establishes a pervasive, specific and comprehensive scheme for the regulation of spent nuclear fuel serve only to underline that the NWPA must have field-preemptive effect.[9] It follows that, whether the disputed facility is properly regulated under the AEA or the NWPA, the State's laws are preempted, for the reasons set forth above.

Utah contends that the disputed facility is prohibited under the NWPA, and that field preemption cannot operate to invalidate a state law that prohibits an activity already barred under federal law. Utah's Response to Plaintiffs' Joint Motion for Summary Judgment p. 5. But this argument misses the very essence of field preemption, confusing field and conflict preemption. Field preemption operates on any state legislation that seeks to regulate activities within its scope, irrespective of whether there is any conflict between the State and Federal laws in question. Cf. Pacific Gas, 461 U.S. at 212 ("State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states."). Where federal law preempts the field, the state cannot legislate, even if the State conceives of itself as supporting the underlying Federal purpose. The question of what Federal law permits is instead one to be resolved under Federal law, in the existing proceedings before the Commission.

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[9] Defendants' Memorandum in Support of their Motion for Judgment on the Pleadings (Sept. 20, 2001) p. 11 ("When enacting the NWPA, Congress established a comprehensive program for the interim storage of SNF pending completion of a permanent repository."); Petition to Institute Rulemaking and to Stay Licensing Proceeding (Feb. 11, 2002) p. 4 (attachment 1 to Utah's Response to Plaintiffs' Joint Motion for Summary Judgment (stating that "in the NWPA, Congress created (in its own words) 'the Nation's nuclear waste management system.' 42 U.S.C. §§ 10163(a)(1)(B)). The United States repeats that it takes no position as to whether Utah is correct in claiming that the NWPA displaces the AEA, or as to how the two schemes relate to one another.

## CONCLUSION

For the aforementioned reasons, the United States requests this Court to find that Utah's state statutes are preempted by federal law.

Dated: April 1, 2002

Respectfully Submitted,

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# ATTACHMENT E

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

**COMMISSIONERS:**

**Richard A. Meserve, Chairman**
**Greta Joy Dicus**
**Nils J. Diaz**
**Edward McGaffigan, Jr.**
**Jeffrey S. Merrifield**

**In the Matter of** **Docket No. 72-22-ISFSI**

**PRIVATE FUEL STORAGE, L.L.C.**
**(Independent Spent Fuel Storage Installation)**

**April 3, 2002**

## STAY OF PROCEEDINGS

In determining whether to grant a stay of a licensing proceeding, the Commission looks at four factors: (1) whether the petitioner has made a strong showing that it is likely to prevail upon the merits; (2) whether the petitioner faces irreparable injury if a stay is not granted; (3) whether the issuance of a stay would harm other interested parties; and (4) where the public interest lies. *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994); *Allied-General Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-78 (1975).

## STAY OF PROCEEDINGS

The proponent of the stay has the burden of demonstrating that the four factors are met. *See Hydro Resources Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 323 (1998); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).



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[1] 42 U.S.C. § 10101 *et seq*

CLI-02-11

## STAY OF PROCEEDINGS: IRREPARABLE INJURY

It is well established in Commission case law that the incurrence of litigation expenses does not constitute irreparable injury for the purposes of a stay decision. *See Sequoyah Fuels Corp. and General Atomics*, CLI-94-9, 40 NRC at 6. *See also Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

## STAY OF PROCEEDINGS: HARM TO OPPOSING PARTIES

The inconvenience of being forced to reschedule attorney and expert time when a scheduled hearing is imminent constitutes harm to opposing parties militating against granting a stay of proceedings. (The argument that opposing party will actually benefit by saving litigation costs if the Commission stays proceedings that will ultimately prove futile once we determine that we have no authority to issue this license. Although this reasoning is imaginative, PFS does not agree and opposes the stay. The proceedings, which have gone on for over 4 years, are at last nearing completion and further hearings are imminent. If the other parties are forced to reschedule expert and attorney time for some future date, it will cause them great inconvenience.

The imminence of the hearings is also a factor in our determination that the public interest will be served if the parties are allowed to wrap up the matters they have been litigating for so long.

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April 3, 2002

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## MEMORANDUM AND ORDER

This Order concerns two documents filed by the State of Utah on February 11, 2002, relating to the pending license application submitted by Private Fuel Storage, L.L.C. (PFS). Utah's "Suggestion of Lack of Jurisdiction" argues that the Nuclear Waste Policy Act of 1982, as amended (NWPA),[1] deprives the Commission of "jurisdiction" over PFS's application for a license to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians. In its "Petition to Institute Rulemaking and to Stay Licensing Proceeding," Utah asks the Commission to amend its regulations in accordance with this theory, and to suspend related proceedings while the rulemaking is pending.

For the reasons set forth below, we deny the request for stay, set a schedule for interested parties to submit briefs on the substantive issue whether the NRC

[1] 42 U.S.C. § 10101 *et seq*

has authority under federal law to issue a license for the proposed privately owned, away-from-reactor spent fuel storage facility, and defer a decision on the rulemaking petition until we have had the opportunity to decide this threshold legal question.

## I. BACKGROUND

In 1980, the NRC promulgated its regulations allowing for licensing of ISFSIs, 10 C.F.R. Part 72, under its general authority under the Atomic Energy Act (AEA) to regulate the use and possession of special nuclear material.[2] This was 2 years before Congress enacted the NWPA.

In both its Petition for Rulemaking and "Suggestion of Lack of Jurisdiction," Utah argues that the NWPA contemplates a comprehensive and exclusive solution to the problem of spent nuclear fuel and does not authorize private, away-from-reactor storage facilities such as the proposed PFS facility. Utah rests its argument on the following provision:

> Notwithstanding any other provision of law, nothing in this act shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on the date of the enactment of this Act.[3]

Thus, says Utah, the NWPA cannot be said to "authorize" a private, away-from-reactor ISFSI like the proposed PFS facility. Utah claims that because the NWPA established a comprehensive system for dealing with spent nuclear fuel, it is the only possible source for NRC's jurisdiction over spent fuel storage and overrides the Commission's general authority under the AEA to regulate the handling of spent fuel.

PFS opposes Utah's petitions, and argues that nothing in the NWPA expressly repeals the NRC's general, AEA-based licensing authority over spent fuel. PFS emphasizes that the NWPA provision on which Utah relies does not explicitly prohibit a private, away-from-reactor facility. The NRC Staff opposes Utah's petitions on procedural grounds.

## II. DISCUSSION

### A. Request for Stay of Proceedings Pending Review

We find that Utah's request does not meet the four-part test for a stay of Board proceedings. In determining whether to grant a stay of a licensing proceeding, the

[2] *See* 45 Fed. Reg 74,693 (Nov. 12, 1980)
[3] NWPA § 135(h).

Commission looks at four factors: (1) whether the petitioner has made a strong showing that it is likely to prevail upon the merits; (2) whether the petitioner faces irreparable injury if a stay is not granted; (3) whether the issuance of a stay would harm other interested parties; and (4) where the public interest lies.[4] The proponent of the stay has the burden of demonstrating that these factors are met.[5]

First, Utah does not make a strong showing of probable success on the merits. The NWPA on its face does not prohibit private, away-from-reactor spent fuel storage. The NWPA section on which Utah relies, if intended to prohibit such storage, certainly does not do so directly. It says only that "*nothing in this act* . . . encourage[s], authorize[s], or require[s]" the use of such facilities. It does not, in terms, prohibit storage of spent nuclear fuel at any privately owned, away-from-reactor facility — which is Utah's position. We are willing to consider Utah's complex legislative history and statutory structure arguments, but we are not prepared to say that Utah's arguments are likely to prevail.

Second, we find no evidence that Utah faces "irreparable injury" if an immediate stay is not granted. Utah claims that it will suffer a loss of "costs, expenses, and attorneys' fees" resulting from its participation in the PFS licensing proceeding.[6] It is well established in Commission case law, however, that we do not consider the incurrence of litigation expenses to constitute irreparable injury in the context of a stay decision.[7] Therefore, the State has failed to demonstrate that it would be irreparably harmed if a stay is not granted.

We also find that the third and fourth factors of the stay test are not met. Utah argues that PFS is not harmed, and will in fact benefit by saving litigation costs, if the Commission stays proceedings that will ultimately prove futile once we determine that we have no authority to issue this license. Although this reasoning is imaginative, PFS does not agree and opposes the stay. The proceedings, which have gone on for over 4 years, are at last nearing completion and further hearings are imminent. If the other parties are forced to reschedule expert and attorney time for some future date, it will cause them great inconvenience. The imminence of the hearings is also a factor in our determination that the public interest will be served if the parties are allowed to wrap up the matters they have been litigating for so long.

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[4] *See Sequoyah Fuels Corp and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994), *Allied-General Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-78 (1975); *cf Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 225 n 7 (2002) This is the same test set forth in our regulations for determining whether to grant a stay of the effectiveness of a presiding officer's decision 10 C.F.R. § 2.788(e)

[5] *See Hydro Resources Inc* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 323 (1998), *Alabama Power Co* (Joseph M Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981)

[6] Rulemaking Petition at 37-38

[7] *See Sequoyah Fuels Corp and General Atomics*, CLI-94-9, 40 NRC at 6 *See also Metropolitan Edison Co* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

For the foregoing reasons, we deny Utah's request for a stay of these proceedings.

## B. Commission Consideration of NWPA Issue on the Merits

Both the NRC Staff and PFS argue that the Commission should not consider the NWPA issue at this time because the Suggestion of Lack of Jurisdiction is untimely. They maintain that the "suggestion" constitutes an untimely interlocutory appeal of a 1998 Atomic Safety and Licensing Board decision ruling on Contention Utah A.[8]

Utah first made its NWPA argument in 1997 in its Contention Utah A in the proceedings before the Licensing Board.[9] On April 22, 1998, the Board rejected the contention as an impermissible challenge to the Commission's regulations.[10] Utah's newly filed "suggestion" could be viewed as merely a misnamed interlocutory appeal of the 1998 Board ruling, particularly because NRC's rules of practice have no provision for a pleading or motion called a "Suggestion of Lack of Jurisdiction." A petition for interlocutory Commission review, if desired, should have come 15 days after the Board entered the ruling.[11] Otherwise, interlocutory rulings must wait for resolution until a final decision is entered.

Despite the reasonableness of the Staff's and Applicant's timeliness argument, we find countervailing concerns that make immediate merits consideration appropriate. The issue presented here raises a fundamental issue going to the very heart of this proceeding. If in fact NRC has no authority to issue PFS a license, completion of the licensing process would be a waste of resources for all parties as well as the Commission. In addition, Utah has filed a petition for rulemaking, arguing that NRC's regulations must be amended in accordance with the state's legal theory. The underlying legal question, whether the law requires a rule change, must be resolved before NRC can accept or deny that petition.

We have decided that the legal issue is better resolved in an adjudicatory format — i.e., through legal briefs — than in a rulemaking format. We therefore take

[8] *See* "NRC Staff's Response to the State of Utah's (1) Request to Stay Proceeding, and (2) Suggestion of Lack of Jurisdiction" (Feb 26, 2002), at 7-8, "Applicant's Response to Utah's Suggestion of Lack of Jurisdiction" (Feb 21, 2002), at 4-7.

[9] *See* "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage L.L.C. for an Independent Spent Fuel Storage Facility" (Nov 23, 1997) ("Congress has not authorized the NRC to issue a license to a private entity for a 4000 cask, away-from-reactor, centralized, spent nuclear fuel storage facility")

[10] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 183 (1998).

[11] *See* 10 C.F.R. § 2.786(b).

review in the exercise of our inherent supervisory authority over adjudications and rulemakings.[12]

The parties to this adjudication are intimately concerned and eminently well informed about the legal question raised in Utah's petition. These litigation parties, as opposed to the general public, are likely to be the source of the most pertinent arguments and information. Public comment is likely to be less useful here, in a situation calling for pure legal analysis, than in the usual situation where the rulemaking proceeding raises scientific, policy, or safety issues. We do consider, however, that persons outside this litigation should have an opportunity to weigh in on the NWPA issue and therefore invite any interested persons to submit *amicus curiae* briefs.

We conclude that the rulemaking process should be put on hold until the Commission rules on the threshold issue of whether the NWPA deprives it of authority to license a private, away-from-reactor spent fuel storage facility. If the legal issue is ultimately resolved in Utah's favor, then a formal revision clarifying Part 72 could be issued at that time.

## III. BRIEFS

We already have before us extensive arguments by Utah (in its Suggestion and Rulemaking Petition) and PFS (in its Response to Utah's Suggestion of Lack of Jurisdiction and attachments). We will consider the legal arguments set forth in those documents.

If these parties wish to supplement the arguments made therein, they may submit further briefs to the Commission by May 15. In addition, interested persons are invited to submit *amicus curiae* briefs by May 15. Briefs should be no longer than thirty pages and should be submitted electronically (or by other means to ensure that receipt by the Secretary of the Commission by the due date), with paper copies to follow. Briefs in excess of ten pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, and like material.

[12] *See, e.g., North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129 (1998), *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52-53 (1998), *cf. Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-5, 49 NRC 199 (1999).

## IV. CONCLUSION

For the foregoing reasons, the request for a stay of proceedings is denied, the petition for rulemaking is deferred, Commission review of the NWPA issue is granted, and the adjudicatory parties and any interested *amicus curiae* are authorized to file briefs as set out above.

IT IS SO ORDERED.

For the Commission[13]

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 3d day of April 2002.

[13] Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.