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UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

OHNGO GAUDADEH DEVIA, Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION, and the UNITED STATES OF AMERICA Respondent.	)))))))))))	Case No. _____

PETITION FOR REVIEW

Notice is hereby given this the 7th day of 2005, that Petitioner, OHNGO GAUDADEH DEVIA ("OGD"), through its attorneys, EchoHawk Law Offices, and pursuant to 28 U.S.C. § 2342, 42 U.S.C. § 2239, and Fed. R. App. P. 15, hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the following orders of the respondents, UNITED STATES NUCLEAR REGULATORY COMMISSION, and the UNITED STATES OF AMERICA, entered on the following dates:

1. Nuclear Regulatory Commission ("NRC") Memorandum and Order, CLI-05-19, docketed on September 9, 2005, regarding the Private Fuel Storage licensing proceeding (Docket No. 72-22-ISFSI) and, among other things, authorizing issuance of a license to Private Fuel Storage, LLC;

2. NRC Memorandum and Order, CLI-02-20, docketed on October 1, 2002, reversing the Atomic Safety Licensing Board's ("ASLB") partial denial of summary disposition of OGD's Contention O (Environmental Justice Contention), and directing the Board to grant summary disposition for PFS on OGD Contention O;

    a. NRC Memorandum and Order, CLI-02-08, docketed on March 7, 2002;

    b. ASLB Memorandum and Order, LBP-02-08, docketed on February 22, 2002, partially denying summary disposition of OGD Contention O (Environmental Justice Contention);

3. NRC Memorandum and Order, CLI-04-09, docketed on March 24, 2004, denying OGD's motion to reopen the case record on Contention O based on the criminal indictment of Leon Bear;

4. NRC Memorandum and Order, CLI-04-04, docketed on February 5, 2004;

5. NRC Memorandum and Order, CLI-02-25, docketed on December 18, 2002;

6. ASLB Memorandum and Order, LBP-98-29, docketed November 30, 1998;

7. ASLB Memorandum and Order, LBP-98-10, docketed May 5, 1998;

8. ASLB Memorandum and Order, LBP-98-7, 47 NRC 142 (1998) docketed April 22, 1998, ruling as admissible Contentions OGD A, OGD B, OGD C, OGD D, OGD E, OGD F, OGD G, OGD H, OGD I, OGD J, OGD K, OGD L, OGD M and OGD N. 47 NRC at 226-234, 248-49.

DATED: November 7, 2005.

Attorney for Petitioners,

By [Original Signed by Paul C. EchoHawk]

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November 2005, I caused to be served a true and correct copy of the foregoing by facsimile and first class U.S. mail, and addressed to the following:

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
COMMISSIONERS:

DOCKETED 09/09/05

SERVED 09/09/05

Nils J. Diaz, Chairman
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE, L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	

CLI-05-19

MEMORANDUM AND ORDER

The State of Utah has petitioned for review of a series of Licensing Board orders concerning the hazard from a potential aircraft crash into Private Fuel Storage, L.L.C.'s (PFS's) proposed Independent Spent Fuel Storage Installation (ISFSI). The Board found, ultimately, that the probability of a release of radiation from an aircraft crash into the facility was less than one in a million, and therefore the facility complied with applicable NRC safety standards.[1] For the reasons set forth below, we deny the petition for review and we also authorize the NRC staff to issue a license to construct and operate the PFS facility.[2]

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[1] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), Memorandum (Public (Non-Safeguards) Version (Regarding F-16 Aircraft Accident Consequences)), ADAMS ML050620391 (Feb. 24, 2005) and *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-12, 61 NRC 319 (2005) (Memorandum and Order (Ruling on Reconsideration)). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-04, 57 NRC 69, 122 (2002).

[2] *See* 10 C.F.R. § 2.764(c)(2004). Throughout today's decision we cite the NRC's former adjudicatory rules, which appear in the 2004 volume of the *Code of Federal Regulations*. In early 2004, the Commission issued new adjudicatory rules, but they do not apply to this case, which began before their promulgation. *See Final Rule: Changes to Adjudicatory Process*, 69 Fed. Reg. 2182 (Jan. 14, 2004).

I. BACKGROUND[3]

Because the proposed PFS facility would lie in Skull Valley, Utah – underneath the flight path of military aircraft – the possibility of an aircraft crash into the site raised concerns to which this agency has devoted much attention, including lengthy adjudicatory hearings before our Licensing Board. Air Force jets travel between Hill Air Force Base and the Utah Testing and Training Range over Skull Valley, including the proposed PFS site, at the rate of about 7000 flights per year.

NRC regulations require that ISFSIs be able to withstand "credible" accidents.[4] In this case, a significant question faced by the Board was how likely an aircraft crash had to be before it was considered "credible" – in other words, at what point does an accident become so unlikely that the Commission does not require that it be considered in the facility's design? The Board determined that any event having a less than one-in-a-million annual probability could be disregarded in the facility's design.[5] The Board referred its ruling to the Commission. A Commission decision agreeing with the Board was issued in November, 2001.[6]

After extensive hearings in 2002, the Board, applying its "credible" accident criteria, ruled that an F-16 crash into the facility was within the design basis for the facility. The Board drew this conclusion after finding that the probability of an aircraft crashing into the proposed PFS site was more than one in a million – 4.29 in a million, to be precise.[7] The Board rejected

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[3] The public version of the Board's partial initial decision explains the background of this complicated proceeding in detail, so we will summarize only briefly here. The Board also issued a non-public, "safeguards" version of its order. *See generally* 42 U.S.C. § 2167; 10 C.F.R. § 73.21. That version discusses evidence and findings that cannot be made public because of security concerns. Our decision today discusses only publicly available information, but our ruling also relies on discussions and findings in the Board's Safeguards order.

[4] *See, e.g.*, 10 C.F.R. § 72.24(d)(2).

[5] LBP-01-19, 53 NRC 416 (2001).

[6] CLI-01-22, 54 NRC 255, 265 (2001).

[7] *See* LBP-03-04, 57 NRC 69, 122 (2003).

PFS's theory that the likelihood of a crash into the facility would be measurably reduced by an "R" factor, representing the likelihood that the pilot of a crashing F-16 would deliberately steer the aircraft away from the PFS facility before ejecting. Consequently, the Board ruled, before the PFS facility could be licensed, PFS would have to show that such a crash would not release unacceptable levels of radiation. Accordingly, the Board called for a second hearing on the air crash issue, this one to consider the consequences of an F-16 crashing into the site.

PFS and the NRC staff sought Commission review of the Board's decision. Among other things, PFS claimed the Board erred in rejecting the "R" factor,[8] while the NRC staff argued that the Board's "4.29 in a million" finding came close enough to the NRC's "one in a million" standard to deem the aircraft crash threat acceptably low.[9] The Commission held those petitions in abeyance until after the Board-ordered "consequences" hearing on the basis that probability and consequences are "intimately linked" and the Board's initial "probability ruling may be rendered moot or unimportant by subsequent Board findings."[10]

The Board's effort to analyze radiological consequences of an aircraft crash into a facility has no adjudicatory precedent at the NRC.[11] Because the various possible crash scenarios are nearly limitless, the Board and the parties were plowing new ground in calculating the consequences of a "credible" aircraft accident. After much analysis, PFS proposed to carve out from all credible accidents a subset of accidents that it could prove, based on the speed and angles of impact, would *not* rupture the interior multi-purpose canister, which is the last barrier to release of the fission products in stored spent nuclear fuel.[12] PFS

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[8] See Applicant's Petition for Review of LBP-03-04 (Mar. 31, 2003), at 8-9.

[9] *See* NRC Staff's Petition for Commission Review of the Licensing Board's Partial Initial Decision in LBP-03-04 (Mar. 31, 2003), at 6-7.

[10] CLI-03-5, 57 NRC 279, 283 (2003).

[11] Public Partial Initial Decision (PID) at A-10.

[12] *Id.* at B-3.

argued that if the percentage of accidents that would *not* breach the canister was 80% or more, then the percentage of accidents that *could possibly* breach it must be 20% or less. In that case, PFS reasoned, the overall probability (20% of 4.29 in a million) that an accident could release radiation would be less than the one-in-a-million threshold.[13]

The parties performed complex computer simulations attempting to establish the dividing line between crashes the canister could survive without leaking and those it might not. Determining the breach probability had three basic steps. The first was to determine the maximum strain that the canister theoretically could survive without rupture. (The parties diverge at this point because Utah calculated that maximum strain before failure to be much lower than PFS and the NRC staff did.)

PFS then selected a hypothetical "bounding event" accident that it said would not exceed the maximum strain and therefore would not breach a canister. Of necessity, any accident at a *lower* speed or *greater* angle than the "bounding event" would have a lesser impact.[14] PFS did not fully analyze accidents exceeding the bounding event because the probability of those accidents was, by PFS's calculus, less than one in a million.[15] The probability of crashes exceeding the bounding event is referred to as the "unanalyzed event probability."

The last step for PFS was to demonstrate, based on statistical analyses of historic crashes, that 80% or more of the expected crashes at the site would indeed be within the bounding event.

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[13] *Id.* at B-3.

[14] The particular speeds and angle discussed as the "bounding event" is considered safeguards material. The assumed angle of impact for the bounding event is near to the horizontal, because blunter angle impact at the same speed would have a less forceful impact on the cask.

[15] PFS submitted some analysis showing that some higher speed accidents would also not breach a cask. *See* Public PID at B-9.

Utah countered PFS's approach by challenging PFS's premise that its canisters would withstand the force of the so-called "bounding event." Utah also maintained that a larger percentage of the predicted accidents would exceed the "bounding event" than PFS claimed.[16] The NRC staff supported PFS's approach.

The Board found 2-1 in PFS's (and the NRC staff's) favor, holding that the annual probability of a radiation-releasing air crash was less than one in a million.[17] The Board majority credited PFS's evidence on the performance of the multi-purpose canisters in an air crash scenario, on the strains imposed by the bounding event crash, and on the relative probability of crashes below or exceeding the bounding event. The majority also emphasized that PFS's crash analysis included "materially conservative assumptions ..., leading to the logical conclusion that the probability computed by the Applicant (and agreed [to] by the Staff) is likely to materially overestimate the probability (perhaps by an order of magnitude)."[18]

In dissent, Judge Lam objected to the findings in favor of PFS for various reasons, some of which Utah reiterates in its petition for review. Judge Lam stated, for example, that there were insufficient data relating to historical crashes to reliably predict future crash probabilities. He also cited various uncertainties in the methods used to translate historical crash rates into a

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[16] Utah also analyzed accidents with a slightly different speed and angle than PFS's hypothetical "bounding event," but the force of impact of the "bounding event" accident is not in dispute in Utah's petition for review.

[17] *See* Public PID at B-8, C-1.

[18] The "conservatisms" include the following: (1) PFS's analyses assumed direct hits that would "maximize" damage, whereas in reality "a large fraction of such incidents would be expected to be other than direct hits;" (2) it was assumed that an aircraft hitting the "skid zone" around the facility would continue undamaged to hit a canister, even though the aircraft would be unlikely "to rebound off the desert without damage and without loss of part of its energy to the ground;" (3) because of the so-called "R" factor, there is some likelihood that a pilot would steer the aircraft away from the PFS site prior to ejection; and (4) PFS presented analyses indicating that the casks could withstand some higher speed impacts than the "bounding speed impact." *See* Public PID at B-8 to B-9. *See also* LBP-03-04, 57 NRC at 92-98 (explaining the "R factor").

predicted rate.[19] In addition, Judge Lam stated that PFS should use a DOE-prescribed ductility ratio as the standard for predicting "failure," at least of the canister's overpack.[20] He concluded that PFS had not met its burden to satisfy the 10^{-6} safety standard.

II. Discussion

A. Motion for Reconsideration: 1×10^{-6} Probability Standard

As an initial matter, Utah asks the Commission to reconsider its 2001 decision setting a "one-in-a-million" (1×10^{-6}) threshold probability standard for a design basis air crash at the PFS facility.[21] Utah argues that the 2001 Commission ruling wrongly presupposed that the threshold standard had to be either one in a million or one in ten million, without considering the possibility of an intermediate number, for example (as Utah now suggests) one in five million.[22] Utah also disputes the Commission's finding that the consequences of an accident at an ISFSI would be more like an accident at a so-called geologic repository operations area ("GROA") than at a nuclear power reactor.

The Commission's ruling compared the one-in-a-million threshold standard established for a GROA – a temporary storage area to be used in conjunction with a permanent repository for disposing of spent nuclear fuel – to the one-in-ten-million threshold standard established for a nuclear power reactor. The decision noted that in terms of both everyday operation and potential accident consequences, PFS's proposed ISFSI resembles a GROA more than a nuclear power reactor.[23] In addition, it pointed out that in previous rulemakings the NRC had

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[19] *See* Public PID, at D-2 to -3.

[20] *See id.* at D-4.

[21] CLI-01-22, 54 NRC 255.

[22] *See* State of Utah's Petition for Review of Contention Utah K (Aircraft Crashes), at 4.

[23] *See* CLI-01-22, 54 NRC at 264-65.

announced its intent to "harmonize" regulations pertaining to ISFSIs and GROAs.[24]

Utah's new challenge to the one-in-a-million threshold probability standard amounts to an untimely motion for reconsideration.[25] Lateness alone is sufficient to reject Utah's reconsideration request.[26] Moreover, Utah's new argument fails to meet our reconsideration criteria. Reconsideration motions must be based on "elaboration or refinement of an argument already made, an overlooked decision or principle of law, or a factual clarification."[27] Utah's reconsideration request is none of these. Utah's argument for an intermediate accident probability standard, such as one in five million, was not raised in its 2001 appellate brief before the Commission.[28] Nor did the 2001 decision "overlook" legal principles or require "factual clarification." As the Commission held in 2001, in rulemakings prior to this adjudication it was made clear that GROAs and ISFSIs are similar facilities and should have the same design bases.[29] The Commission stated that there is "little basis" for using a reactor-like probability standard at an ISFSI (or a GROA); an accident at a reactor poses a greater risk than the accidental release of stored spent fuel because the contents of the reactor are under pressure that presents a "driving force behind dispersion" of radioactive materials.[30] For these reasons,

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[24] *See id.* at 264, citing 61 Fed. Reg. 64,257, 64,262 (Dec. 4, 1996).

[25] *See* 10 C.F.R. §2.786(e) (2004) (setting forth a 10-day deadline for filing a petition for reconsideration of a Commission decision).

[26] *See, e.g, Private Fuel Storage , L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-14, 51 NRC 301, 310-11 (2000) (late-filed motion for reconsideration requires good cause, as well as new information or changed circumstances).

[27] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-02-1, 55 NRC 1, 2 (2002).

[28] *See* "State of Utah's Brief on the Question Certified in LBP-01-19: The Regulatory Standard for Aircraft Crash Hazards at the PFS Site - Contention Utah K (Credible Accidents)," (July 13, 2001).

[29] CLI-01-22, 54 NRC at 264.

[30] *Id.* at 264-65.

Utah's request does not make the requisite showing.

In any event, the Board found that even a small breach of a single storage cask was not credible in the event of a direct hit by the single-engine F-16. A single F-16 crash could not significantly damage more than one cask, so the total number of casks on site – in other words, the total radioactive source term contained in the entire facility – is irrelevant. The number of casks increases the probability of a hit, but does not increase the potential consequences of a hit.[31] The Board's recent decision bolsters our 2001 ruling.

B. The Licensing Board's Rulings

The Commission will grant plenary appellate review of Licensing Board decisions – a discretionary step – in limited circumstances only. Among other things, we inquire whether there is reason to believe that (1) a Board "finding of fact is clearly erroneous," (2) a Board "legal conclusion is without governing precedent or is a departure from or is contrary to established law," or (3) the Board committed a "prejudicial procedural error."[32] Here, because of the complexity of this proceeding, we granted the parties an increase in page limits and extra time to file a petition for review and responses. After considering Utah's petition carefully we see no factual, legal or procedural basis for disturbing the Licensing Board's carefully-rendered decision in this case. Below, we set forth the reasons why we find Utah's petition unpersuasive.

1. Standard of Review

Utah's petition for review focuses largely on the Licensing Board's fact-driven evaluation of the evidence on air crash risks at the PFS facility. As we have held previously in this proceeding, our "standard of 'clear error' for overturning a Board factual finding is quite high."[33]

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[31] Similarly, Utah's argument the proposed PFS facility is unlike the planned geologic repository in that PFS cannot control military overflight of the facility, goes to probability of a crash, not the similarity of the consequences.

[32] *See* 10 C.F.R. §2.786(b)(4)(2004).

[33] CLI-03-8, 58 NRC 11, 25-26 (2003).

"A 'clearly erroneous' finding is one that is not even plausible in light of the record viewed in its entirety."[34] The short of the matter is that we expect our Licensing Boards to review testimony, exhibits, and other evidence carefully and to resolve factual disputes. That is the Boards' chief function in our adjudicatory system. Thus, unless there is strong reason to believe that in a particular case a Board has overlooked or misunderstood important evidence, we will defer to its findings of fact.

This very proceeding illustrates why it is sensible to defer to the Board acting in its factfinding capacity. At the hearing leading to the ruling before us today, the Board heard from 20 witnesses, who presented 225 exhibits, over the course of 16 days. The hearing transcript spans over 4,500 pages. In making its findings, the Board was required to sift through this evidence, to review studies and documents, and to make countless judgments on the credence to give each expert witness. We are not inclined to engage in any kind of *de novo* factual inquiry, particularly in a proceeding of this complexity, involving numerous experts and voluminous exhibits. As the United States Supreme Court has pointed out, the likelihood that a reviewing body will rely on the presumption of correctness of a trial court's factual determinations "tends to increase when trial judges have lived with the controversy for weeks or months instead of just a few hours."[35]

2. Cruise Missile Testing.

Utah challenges the Board's 2001 summary disposition ruling that impacts from errant cruise missiles need not be considered in the design basis of the facility.[36] In that decision, the

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[34] *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 189 (2004) (internal citations and quotations omitted).

[35] *Bose Corporation v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 500 (1984).

[36] *See* LBP-01-19, 53 NRC 416, 424-29 (2001). As this ruling granted only a partial summary disposition, it was interlocutory and not appealable by the parties until the final disposition of this portion of the case.

Board granted a PFS motion for summary disposition and found that a cruise missile accident at PFS is not a credible event. Utah argues that its air crash contention – "Utah Contention K" – is whether the cumulative probability of a crash from military activities, including cruise missile testing, constitutes a credible event. It was error, Utah says, for the Board to look at the probability of a cruise missile impact separately to determine that the probability of that event is too small for consideration.

But the Board's ruling, as we read it, was not based on the probability of a cruise missile impact falling below the 1×10^{-6} threshold probability for a credible event. Rather, the Board cited PFS's undisputed evidence that the flight path for cruise missiles tested at the Utah Test and Training Range would not be within ten nautical miles of the facility.[37] The Board also relied on PFS's undisputed evidence that, according to Air Force officials, no cruise missile has crashed more than one mile off its flight path.[38] Given these two pieces of evidence, it was reasonable for the Board to conclude, as it did, that there was no material factual dispute suggesting that cruise missiles present any statistically significant threat to the facility. It is therefore not necessary to determine whether a cruise missile crash is sufficiently like an F-16 crash to necessitate adding the probabilities together to reach a total probability for threats from the air.

3. Loss of Shielding

Utah claims the Board committed a prejudicial procedural error in ruling on reconsideration that "loss of shielding" was not preserved as a issue in the second hearing.[39] Utah argued in its motion for reconsideration that even if the multi-purpose canister was not penetrated in a crash, its concrete overpack could be stripped away, leading to excessive

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[37] *Id.* at 427.

[38] *Id.*

[39] *See* LBP-05-12, 61 NRC 319 (2005).

offsite radiation doses. Utah says the Board was wrong to end its analysis once it found that the canister would not rupture in a credible accident.

Utah argues that it never had the opportunity to present evidence on the loss of shielding claim because of the Board's ruling that the second hearing, rather than considering the "consequences" of a radiation release as originally envisioned, instead would focus on the probability of rupturing the canister. Excessive radiation doses due to damage to the overpack would go to the "consequences" of the crash, Utah says, an issue specifically precluded by the Board's pre-hearing ruling.[40]

In our view, the Board reasonably found that Utah had waived the right to argue about shielding loss by not bringing it up earlier. Our understanding of the procedural history of the air crash issue supports the Board's decision.

The first hearing on aircraft crash hazards examined the likelihood that an F-16 would crash anywhere on the site of the PFS facility.[41] After that hearing, the Board ruled against PFS, finding the likelihood of an F-16 crash onto the PFS site unacceptably high (an annual chance of 4.29 in a million). The Board found that the license could not be issued at that juncture unless PFS addressed the "consequences" issue, either by demonstrating that an F-16 would not penetrate a cask, or that, if it did, there would be no significant radiation doses to the public.[42]

Over the next year, the parties worked steadily to gather experts and statistics and perform the calculations necessary to determine what the "consequences" of an aircraft crash would be. It soon became clear that delineating between the "probability" of an aircraft crash and its "consequences" is not simple. To illustrate, if there is a 4.29 in one million chance that

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[40] *See Memorandum Concerning Scheduling* (April 15, 2004), at 2.

[41] The Board limited the scope of the first aircraft crash hearing in response to a PFS motion *in limine*. *See* Tr. at 3008; LBP-03-4, 57 NRC at 136-41.

[42] LBP-03-4, 57 NRC 69, 135 (2003).

an F-16 would crash somewhere on the PFS site, a certain percentage of those crashes would not even hit a spent fuel storage cask, because portions of the facility site would be vacant or not used for spent fuel storage. A percentage of those crashes that did hit a spent fuel container would strike a only glancing blow. Some would be at high speed, and some would be at a speed too slow to inflict damage. Therefore, only a portion of the estimated 4.29 in one million crashes would actually result in damage to a cask.

After performing its calculations, PFS argued that even if the annual probability of a crash on the site was greater than one in a million, the probability of *significant damage* to a cask was below one in a million. It then asked the Board to limit the scope of the second hearing to the probability of a crash severe enough to penetrate the storage canister and to release contaminants. The Board agreed to limit the scope of the hearing to the probability of canister breach, which, as it pointed out, could be seen as either a part of the probability or the consequences factors of risk.[43]

Utah now argues that the Board's decision limiting the scope of the second hearing to the probability of a canister breach precluded it from making its argument that the "loss of shielding" from a damaged overpack would have unacceptable dose consequences even in the event that the canister was not penetrated. Utah argues that damage to the overpack should have been at issue in the second hearing because the parties repeatedly referred to "cask breach" and "cask damage" when discussing the results of an accident. Utah points out that the parties in this proceeding have regularly used the term "cask" when referring to the concrete overpack (which provides shielding), and "canister" when referring to the multi-purpose canister inside (which confines the radioactive byproducts).

We conclude that the Board acted reasonably in deciding that Utah had not timely

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[43] Memorandum Concerning Scheduling (April 15, 2004) (committing to writing the Board's April 8, 2004 oral decision), n.1.

raised the overpack-shielding issue. It is evident from the record that the entire phase two hearing was aimed at determining the likelihood that the multi-purpose canister would be breached, based on the assumption that only the release of radioactive materials from inside the spent fuel canister would raise concerns. Utah did not raise arguments or concerns about the shielding, either at the hearing itself or in the lengthy lead-up to the hearing. The NRC staff pointed out in its argument on Utah's reconsideration motion[44] – and the Board emphasized in its reconsideration decision[45] – that Utah never even mentioned the phrase "loss of shielding" in any of the 15 pre-hearing conferences leading up to the second hearing.

Utah, in short, never complained, until its reconsideration motion, that the Board hearing had focused on too narrow an issue – canister breach. It was Utah's burden to "structure its participation so that it is meaningful, so that it alerts the agency to [its] position and contentions"[46] As the Board indicated,[47] had Utah presented its loss of shielding argument sooner, the phase two hearing might have been restructured to include the probability of an accident stripping the overpack in addition to (or rather than) the probability of perforating the canister. It is too late to take that tack now. We see no obvious abuse of discretion, or procedural error, in the Board's refusal to restart its phase two hearing in response to Utah's untimely loss of shielding claim.

Indeed, accepting Utah's late claim would, in effect, return the complex probability-

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[44] *See* Tr. at 19,771 (Staff searched the transcripts for the phrase). The Board also searched the transcript for the word "shielding" and it never appeared. *See* Tr. at 19,717. Although Utah could not point to any time when it specifically made this argument, Utah now claims that its position was evident from the whole of its presentation. But the Board found otherwise. On this point, we do not find a basis to second guess the Board, which is much more familiar with the record and with the parties' statements and expectations than we are.

[45] LBP-05-12, 61 NRC at 327 ("*During the entire time the matter was under discussion the question of diminished shielding never arose.*" (emphasis in original)).

[46] *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978)

[47] LBP-05-12, 61 NRC at 328.

consequences inquiry to the starting line. The Board would first have to determine the probability that a crash would strip away a portion of the overpack before it went on to examine the offsite dose consequences of a partially or totally exposed canister.[48] In short, the parties would then be subject to another three-week hearing and the months of investigation preceding it. Such a result would be patently unfair to PFS, the NRC staff, and the Board, which have already focused extraordinary resources on the probability issues as originally framed.

Utah argues that potential violations of NRC dose limits cannot be waived by procedural default.[49] Utah's failure to raise its loss of shielding claim in timely fashion does not, however, waive NRC safety standards or excuse PFS from meeting them. It means only that Utah cannot litigate the loss of shielding issue at an NRC hearing. Absent a statutory "mandatory hearing" requirement, NRC licensing boards sit to resolve discrete (and timely raised) *contested* issues only.[50] We depend on the NRC's expert technical staff to ensure that our licensees meet all other agency requirements.

4. Rejection of DOE Standard for Failure Strains of Steel Components.

Utah claims that the Board "arbitrarily rejected" a DOE standard for analyzing the performance of hazardous facilities in aircraft crashes.[51] At the phase two hearing, Utah urged the Board to use the DOE's Standard, *Accident Analysis for Aircraft Crash into Hazardous Facilities,*[52] to predict what strains PFS's multi-purpose canister could tolerate before failing in

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[48] The Board might also have to determine the likelihood of other factors, for example, the probability that a crashing aircraft would strike a cask on the outside boundary of the formation (because radiation from a cask situated in the interior of the cask formation would be blocked from the boundary by the surrounding casks).

[49] *See* Utah's Petition at 12.

[50] *See generally Exelon Generation Co., LLC* (Early Site Permit for Clinton Site), *et al.,* CLI-05-17, 62 NRC __ (July 28, 2005).

[51] *See* Utah's Petition at 17.

[52] U.S. Department of Energy, DOE Standard DOE-STD-3014-96, October, 1996.

an aircraft crash. In particular, Utah argued that the Board should follow the DOE Standard's prescription of a "ductility ratio" of 20 as a criterion by which to gauge when the steels at issue would fail in tension. Rather than relying on the DOE approach, the Board relied on tests, placed in the record by PFS, showing the performance of stainless steel under tension.

The Board gave two reasons for not applying the portions of the DOE Standard Utah cites.[53] First, DOE's prescribed "ductility" ratios were apparently intended for a different type of structure, primarily buildings. Second, the type of failure the DOE Standard addressed was failure by collapse or deformation, not perforation. The Board's view was carefully considered and does not strike us as "clearly erroneous" or unreasonable. The parties argued the point during the phase two hearing and again at length at the oral argument on Utah's motion for reconsideration. The Board listened to a great deal of argument and testimony and considered numerous exhibits in making its decision.

The DOE Standard provisions that Utah cites prescribe a permissible "ductility ratio" to determine when a structure will fail by "excessive structural deformation and collapse."[54] If the strain of the crash exceeds the prescribed ratios, then the DOE Standard says that the steel structure is assumed to fail.

> 6.3.3.3 Structural Evaluation Criteria. Deformation responses computed for various target structural components ... are then used to compute the ductility ratio (the ratio of computed displacement to elastic displacement) Computed ductility ratios are then compared to the permissible ductility ratios specified below to determine if the component would *deform excessively or collapse* under impact loads. ...
>
> b. for steel structural components, the permissible ductility ratios shall be as specified in Section Q1.5.8 of AISC Nuclear Specification, ANSI-N690 (Reference 11). For plate structures, the permissible ductility ratio is 10 is recommended.[55]

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[53] *See* Public PID at B-3 to -4, B-10; LBP-05-12, 61 NRC at 332-33.

[54] *See* DOE Standard at 35, §4.3c. A ductility ratio is the ratio of computed displacement to elastic displacement or the yield strain. The yield strain is the point at which the material is changes from elastic to plastic, in other words, when it will be permanently deformed.

[55] *See* DOE Standard at 76, § 6.3.3.3. (Emphasis added.) *See also* n. 61 below.

In calculating how much strain PFS's multi-purpose canister could withstand, both PFS and the NRC staff looked at experimental data that showed the canister's stainless steel make-up could tolerate 90 percent true strain in tension before it failed by rupture.[56] By comparison, the DOE Standard-prescribed ductility ratios would result in much more frequent assumed failures – 1/40th the strain of the experimentally determined failures.[57] PFS and the NRC staff advocated deriving an assumed canister failure rate by reducing – in accordance with customary engineering practice – the experimentally determined strain to allow a safety factor of two or three.[58] Their approach won the approval of the majority of the Board.

a. The DOE Standard is Intended for a Different Type of Structure than the Multipurpose Canister

The Board observed that the DOE Standard addressed collapse of buildings, which are typically constructed of carbon steel, not stainless steel like a multi-purpose canister.[59] Stainless steel is considerably more ductile than carbon steel – that is, it will bend farther without breaking. Vessels such as the multi-purpose canister tend to be constructed of stainless steel.[60] The portions of the DOE Standard that Utah seeks to apply refer to an ANSI/AISC Standard that explicitly excludes pressure vessels.[61]

Utah now argues only that (1) the DOE Standard never explicitly says it does *not* apply to stainless steel pressure vessels and (2) an appendix to the DOE Standard describes how to

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[56] *See* Public PID at B-4.

[57] *See id.*

[58] *See id.*

[59] *See id.* at B-10, (discussed in more detail in Safeguards PID at B-12 to -13); LBP-05-12, 61 NRC at 332-33.

[60] Soler/McMahon Reb., Post Tr. 15,228 at 15. Utah does not dispute this, but rather cites this testimony in its brief.

[61] ANSI/AISC Standard N690, *Specifications for the Design, Fabrication, and Erection of Steel Safety-Related Structures for Nuclear Facilities* (1994), at 23.

evaluate potential exposure patterns in case a pressure vessel containing hazardous materials ruptures in an airplane crash. But neither argument persuades us that the Board's decision--to look at actual stainless steel performance instead of attempting to "fit" the problem to some pre-existing code--was wrong. Utah apparently does not dispute the proposition that stainless steel would perform differently from carbon steel in a crash. Utah does not offer any evidence that the two types of steel would perform similarly. Nor do we see any reason why the Board should have applied the DOE Standard to pressure vessels when that standard relies on an ANSI standard that explicitly excludes pressure vessels. Finally, the appendix that Utah cites is used to determine various exposure scenarios when a hazardous material container is breached; it is not used for determining whether a breach has occurred.

b. The DOE Standard Addresses a Different Failure From That at Issue Below

It is apparent, as the Board found, that the portions of the DOE Standard that Utah advocates were not intended to address the type of failure that lies at the heart of the matter here. The majority of the Board determined that the ductility ratios in that standard were developed to determine the ability of structural components to carry loads: "[T]here was no justification for us to adopt a standard ductility ratio, developed for other situations, when that standard ratio was not shown to be relevant to, or derived from experiments about, the particular type of failures at issue here."[62] Judge Lam, in his dissent, thought the DOE Standard applicable to the concrete and carbon steel overpack, but his dissent takes no position on whether the "ductility ratios" should be used to determine perforation of the multi-purpose canister.[63]

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[62] LBP-05-12, 61 NRC at 333.

[63] Judge Lam argued:

> A singularly important but unresolved dispute with respect to the Applicant's structural analysis is the Applicant's declination to adopt the DOE ductility ratio standard as the failure criterion for the spent fuel storage cask. The DOE ductility ratio standard was developed by a group of experts, assembled by the Department of Energy, to protect

The Board found that the DOE's ductility ratio did not answer the specific question at issue in the hearing – when the multi-purpose canister would rupture and allow its contents to escape. The portions of the DOE Standard invoked by Utah may help determine whether a steel component may fail by buckling or deformation. Other provisions of that standard address failure by penetration (the failure of concern here), but Utah does not advocate using those provisions.[64] At the hearing below, the Board did not need to inquire whether the canister might be deformed or even weakened by the impact – rather, the Board considered the narrower question of whether the canister would *leak*. The Board held that Utah's preferred DOE Standard was not helpful in resolving that question.

The Board explained that other kinds of damage were not at issue in the proceeding because only a release of fission products would have offsite effects:

> [A]n incident which does not release radiation, but nonetheless causes the overpack and the [multipurpose canister] to be so damaged that the fuel contained within the [multipurpose canister] is no longer intact, may well be significantly more likely than one which is so damaging that radiation is released. *But such incidents are not at issue here.* Under the regulatory system, such incidents–because they are not radiation releasing–are to be dealt with by a licensee if and when they occur. Under that circumstance, the agency will become heavily involved (as it does in the aftermath of any accidents) to assure that possible effects of radiation arising out of the recovery operations are safely handled. Such incidents may present a serious problem in terms of what it takes of a licensee to clean up, but with no radiation "consequences," they do not have to be designed against.[65]

In sum, we find no clear error of fact in the Board's decision to use experimental data rather than the DOE Standard. The Board explained in detail its reasoning in rejecting the DOE

> facilities containing radioactive or chemical materials from the hazards of an accidental aircraft crash.

Public PID, at D-4 (citations omitted).

[64] *See* DOE Standard at 35, §4.3b. "Local damage to steel targets: 1. penetration - to prevent perforation of a steel target, the minimum wall thickness required is at least 125 percent of the predicted penetration depth." *See also* DOE Standard, at 69-70, §6.3.2.2 Local Response Evaluation – Evaluation of Steel Targets.

[65] Public PID at B-2 (emphasis in original).

Standard, both in its original ruling and on reconsideration, and its reasoning rested on the evidence before it.

We should also observe that all three parties, NRC staff, PFS and Utah performed extensive computer simulations, using sophisticated computer codes, and found as a common result that "*the maximum strain computed to occur in the [multipurpose canister] was well below (by at least a factor of eight or nine) the experimentally determined failure strain.*[66] Thus, there is a wide margin of safety.

There is no basis for further Commission review.

5. Claimed Errors in Calculating Probability[67]

Utah next argues that the Board used skewed accident data when estimating the probabilities of air crash accidents at various speeds.[68] Utah claims that the Board should have eliminated seven historical accidents that Utah says were dissimilar to possible Skull Valley accidents, and which had the effect of shifting the probability distribution toward slower speeds. In addition, Utah also argues that the Board arbitrarily eliminated from consideration certain hypothetical "top impact" crashes that should be considered "unanalyzed events."

As discussed above, the Board found acceptable PFS's "bounding aircraft impact"

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[66]*See id.* At B-3 (emphasis in original).

[67]As noted above, in countering Judge Lam's dissenting view that too many uncertainties infected PFS probability analysis, the Board majority pointed to "large conservatisms ... built into the analyses." *See* Public PID at B-12; *see also id.* at B-8 to B-9. Utah's petition for review says that the Board's "conservatism" finding rests on "subjective judgement, speculation and lack of evidentiary support." *See* Utah's Pet. at 26 *et seq.* But, as set out in detail in PFS's response to the petition for review, ample record evidence supports the Board's finding. *See* Applicant's Response to State of Utah's Petition for Review of Contention Utah K, at 25-29. In any case, the Board did not reduce the calculated probability at all to account for the conservatisms. Utah does not come close to suggesting there was "clear error."

[68]*See* Utah's Petition at 21-26.

representing the top speed for the majority of accidents.[69] The "bounding speed" the Board used rested on PFS's structural analysis showing that its canister would not rupture at that or any lower speed. The bounding event is not necessarily a precise "cut-off" between crashes that would breach the canister and those that would not. The actual "cut-off" might well be at higher speeds than the bounding event. But because PFS's calculations showed that crashes at higher speeds, while not impossible, were too improbable to be credible, the effects of those impacts were not analyzed. Thus, higher speed accidents are unanalyzed events and the probability of their occurrence is called the "unanalyzed event probability."

Utah argues that PFS (and the Board) set the unanalyzed event probability too low. In other words, according to Utah, certain higher speed crashes are more likely than the Board figured and therefore should have been considered credible. Utah claims that the Board "ignore[d] critical evidence" that the unanalyzed event probability exceeds one in a million.[70]

a. Seven Disputed Crashes

Utah would eliminate from consideration seven historical crashes that occurred at low speeds when the pilot delayed ejection in an attempt to land following engine failure. Including these accidents, which Utah says could not take place in Skull Valley, made the probability of a crash at lower speeds seem more likely.

Because there are limited available data of actual F-16 crashes, determining the probability of crashes at particular speeds and angles within Skull Valley proved a challenge for the parties and the Board. Of 121 accidents worldwide for which data were available, PFS identified 61 that it thought were of a type possible in Skull Valley. Further analysis eliminated

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[69] The Board accepted PFS's bounding speed and angle over Utah's (which involved a slower speed and slightly different angle) because it found that *neither* impact would have sufficient strain to breach a cask. Since either bounding speed was within the bounds of safety, it was appropriate to use the larger set (higher bounding speed) when calculating the relative probabilities of crashes within or outside the bounding speed. *See* Public PID at B-5 (explained more fully in safeguards version).

[70] *See* Utah's Petition at 21.

four of those that were runway accidents, and therefore not possible in the air over Skull Valley, leaving 57 for the Board's analysis.

The Board considered the historical data issue at hearing and again in response to Utah's motion for reconsideration.[71] At the hearing, Utah sought to eliminate 13 additional crashes,[72] but on reconsideration focused its argument on the seven crashes on which it bases its petition for review. [73] As with the Board's other factual findings, the Board's decision on which historical air crashes to include and exclude from its probability calculation is not "clearly erroneous."

It is apparently undisputed that an F-16 could not take off or land in Skull Valley.[74] But the Board did not find this sufficient reason to eliminate the seven crashes now in dispute, even though they involve accidents where the pilots were looking to land, because the crashes were all initiated by the type of engine failure that *could* occur in Skull Valley. The Board found that these accidents were "fairly representative of one end of the range of crash scenarios."[75]

We find no clear error in the Board's ruling. Even assuming that Utah is correct in its view that eliminating these crashes from the data set would shift the probability distribution toward higher speeds, it is not clear that the result would be a more accurate prediction of future Skull Valley accidents. The Board found that the significant feature of the seven disputed crashes is that they resulted from engine failure. The Board explained that in case of engine failure, pilots are trained to trade forward speed for higher altitude, thus giving the pilot more

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[71] Public PID at B-7 to-8; LBP-05-12, 61 NRC at 334-36.

[72] Safeguards PID at B-20.

[73] LBP-05-12, 61 NRC at 335

[74] *See* LBP-05-12, 61 NRC at 319.

[75] *See id.*

time to attempt to restart the engine prior to ejecting.[76] Of the 57 accidents the Board agreed were relevant, 91% involved loss of engine power. In 63% of the loss of engine power loss accidents, it appeared that the pilot followed proper procedures.[77] And when the pilot follows procedures, the Board found, the aircraft crashes at a speed that "at any angle, is well below the speed of the Bounding Aircraft Impact."[78]

For these reasons, pilot experiencing engine failure over Skull Valley would probably not attempt to land; he would be expected to follow the above procedures to attempt to restart the engine. Utah has not given us reason to believe that most engine failure crashes would actually occur at higher speeds than in the seven disputed incidents.

It is also clear that there is more than one way to consider the data. For example, PFS suggested that if the Board were to eliminate the seven disputed incidents, then it should also "weight" the remaining crashes to reflect their likelihood of occurrence in Skull Valley. PFS argued that because the vast majority of flights in Skull Valley are at the 3000-4000 foot altitude range, the Board could "weight" historical accidents occurring at that initial altitude more than accidents that initiated at higher altitudes, which tend to result in higher speed impacts.[79] Weighting the probabilities would skew the data back toward slower speeds. The Board considered still other approaches to evaluating the available data, but concluded that using the entire set of 57 Skull Valley-type events would maximize the use of available data.[80]

The Board's inclusion of the seven disputed engine failure accidents does not appear to

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[76] *See* Public PID at A-6.

[77] *Id.* at B-6.

[78] *Id.* Another 10 percent of relevant historical accidents were "deep stall" incidents where the aircraft falls vertically to the ground "like a leaf." A deep stall accident would not strike a cask with a force exceeding the bounding impact. *Id.*

[79] *See* LBP-05-12, 61 NRC at 335.

[80] *See* Safeguards PID at B-23.

us "clearly erroneous" – that is, not even "plausible" on the record.[81] The Board, in any event, found no reason to believe that a re-analysis, leaving out the seven disputed accidents, would raise the unanalyzed event probability above acceptable bounds.[82]

b. Side Impacts Following Top Impacts.

Utah claims that the Board erroneously eliminated from consideration side impacts to a second cask after an F-16 first strikes the top of another cask. Utah argues that after a shallow impact to the top of a cask, an aircraft could continue without a significant loss of speed to crash into the side of another cask.

Again, we see no basis for declaring the Board's decision "clearly erroneous." The Board accepted PFS's expert's testimony that in the case of impacts to the top of the cask, the critical concern is the *vertical* speed at which the aircraft is traveling. An F-16 coming in at a shallow angle (close to the horizontal) would have a vertical speed much slower than the aircraft's overall speed. Therefore if the vertical speed were within the bounding event speed, then the crash would be within the bounding event.

Utah argues that any top impact with a *horizontal* speed greater than the bounding impact speed should be considered an unanalyzed side impact to neighboring casks. Therefore, Utah argues, the unanalyzed event probability is higher than the Board found.

The Board considered this argument on reconsideration, and rejected it. The Board explained why it would not expect such grazing, or "topping," incidents to contribute materially to the unanalyzed event probability.[83] Due to the arrangement of casks in the storage area, initial top impacts are more likely, because the sides of most casks are somewhat shielded by neighboring casks. Therefore, all potential crashes were divided into "top impact" or "side

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[81] *See Tennessee Valley Authority*, CLI-04-24, 60 NRC at 189.

[82] *See* LBP-05-12, 61 NRC at 336.

[83] *See* LBP-05-12, 61 NRC at 336-41.

impact" for analysis, with the parties calculating the effective area for all tops or sides of casks that could be exposed to accident.

PFS introduced the testimony of Dr. Alan I. Soler[84] at the hearing. He testified that an F-16 hitting the top of one cask at a high speed and shallow angle would not drop more than a few inches before hitting the next cask, and the tops of the casks have protuberances that would snag on the F-16's underside, preventing it from simply skipping to the next cask without loss of momentum.[85] The Board addressed this point in its reconsideration ruling. Where a major portion of the F-16 strikes the top of a cask, the Board said, it will "suffer material deformation" and "lose substantial momentum." [86]

Because of these factors, the Board found, the only way a craft hitting the top of a cask could continue unimpeded to strike the side of the next cask would be if it struck a glancing blow to the far side of the cask (that is, if only a small portion of the F-16's fuselage hit the cask top).[87] The Board reasoned that accounting for these side impacts would simply reallocate some impacts from "top" to "side" and "*effectively enlarge[], from a computational perspective, the cross-sectional area of the sides of the casks being impacted.*"[88]

Relying on an estimate provided by the NRC staff's expert, Dr. Dennis R. Damon,[89] the Board found that although this reallocation would increase the unanalyzed event probability, it

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[84] Ph.D. (Mechanical Engineering); Executive Vice President for Engineering, Holtec International (lead structural expert for design of the HI-STORM 100 cask system).

[85] LBP-05-12, 61 NRC at 337; Testimony of Dr. Soler, Tr. 19,555-567.

[86] LBP-05-12, 61 NRC at 339.

[87] *Id.*

[88] *Id.* (emphasis in original).

[89] Ph.D, (Nuclear Engineering), Senior Level Advisor for Risk Assessment, Office of Nuclear Material Safety and Safeguards.

would not be by enough to raise it to one in a million or more.[90] Reallocating some top impacts to side impacts would increase the unanalyzed event probability because the top impact was measured by vertical speed and the side impact would be measured by the greater horizontal speed.

Utah claims that simply reallocating a small fraction of "grazing" top impacts is not enough. It argues that every top impact with a horizontal speed exceeding the bounding speed should be considered to be an above-bounding impact to neighboring casks without regard to where on the cask lid the aircraft hits. It complains that the Board's analysis "allows countless high impact crashes to escape any contribution towards the probability of breach because the F-16 first strikes a cask top and the fact that it could continue on at speeds sufficient to breach is disregarded."[91]

Utah's petition has two problems: first, Utah does not specify the number of crashes with which it is concerned, and, second, its overarching theory of unimpeded secondary impacts seems to us unproven, if not far-fetched. The Board already has determined that the majority of crashes would not occur at speeds sufficient to breach a canister regardless of whether the impact was to the top or sides. Utah says the probability of a sufficiently high speed top impact is 1.94×10^{-7}, based on a calculation performed by PFS's expert Dr. Allin Cornell. According to PFS, however, that calculation was performed merely to determine the effect Utah's "unrealistic" scenario would have on the unanalyzed event probability.[92] The second difficulty we have with Utah's argument is understanding the mechanics of such a crash. An expert's opinion does not seem necessary to conclude that an F-16 cannot simply pass unimpeded through several feet of steel and concrete. Conceivably, we suppose, there could be a crash

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[90] LBP-05-12, 61 NRC at 341 (total unanalyzed event probability would be 7.8×10^{-7}).

[91] Utah's Petition for Review, at 22.

[92] PFS Brief at 23, n. 53.

where an F-16 would hit the top of the cask at an angle and push it over, allowing the aircraft to continue on its trajectory. If so, however, Utah has given us no record evidence to support it or to perform probability calculations. The only relevant expert evidence called to our attention is that of Dr. Solar – who said that an F-16 hitting squarely on the top of a cask lid would itself bear the brunt of the impact.

Therefore, Utah has not demonstrated that the Board committed any error, much less "clear error," in deciding this issue.

III. License Issuance

Our decision today concludes this protracted adjudication – which has generated more than 40 published Board decisions and more than 30 published Commission decisions. The adjudicatory effort, plus our staff's separate safety and environmental reviews, gives us reasonable assurance that PFS's proposed ISFSI can be constructed and operated safely. We express our appreciation for the diligent efforts of all involved in the adjudication – the intervenors (particularly the State of Utah), the NRC staff, and PFS itself.

There are no remaining adjudicatory issues to resolve. Accordingly, once it has made the requisite findings pursuant to 10 C.F.R. § 72.40, the Staff is authorized to issue PFS a license to construct and operate its proposed ISFSI.[93]

CONCLUSION

For the foregoing reasons, Utah's petition for review is *denied*, and the NRC staff is

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[93] Under 10 C.F.R. § 2.764(c)(2004) the NRC staff cannot issue a license to construct and operate an away-from-reactor ISFSI without express Commission authorization. In this case we might have authorized license issuance earlier this year, once the Board issued its last partial initial decision, and notwithstanding Utah's subsequent reconsideration motion and petition for review. *See, e.g., Massachusetts v. NRC*, 924 F.2d 311, 322 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991). We decided, however, to hold off on license issuance until (in consultation with our technical and legal staff) we could complete our consideration of Utah's concerns.

authorized to issue to PFS a license to construct and operate its proposed ISFSI.[94]

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of September, 2005

Commissioner Gregory B. Jaczko respectfully dissents, in part:

I appreciate the efforts of all parties involved in this long and detailed adjudication. I join in the Commission's decision to the extent the decision addresses the issues raised in the State of Utah's brief to the Commission seeking review of the final licensing board actions. I, too, am unconvinced by the arguments raised by the State of Utah in its brief and would defer to the Board's findings of fact regarding these issues.

I dissent in part because I believe the decision involves an important interpretation of the Commission's regulations and associated guidance related to aircraft hazard analyses that has not been adequately addressed – that of when an actual consequence analysis should be performed. Because I believe the final figures reached by the Board's calculation (which I do not disagree with) render an accident credible, I believe an additional analysis of the consequences of the F-16 aircraft hazard should be assessed prior to the issuance of the license.

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[94] In view of today's decision, we need not consider the petitions for review still before us (held in abeyance) that challenge the Licensing Board's original probability ruling. *See* notes 8-10, *supra*, and accompanying text. Those petitions are, in effect, moot.

As the NRC staff described in earlier briefs, the probability of a credible aircraft crash at the PFS site is calculated to be right at the established threshold at which additional analysis of the consequences of a crash is required. There is detailed analysis in the record of the exhaustive efforts to determine whether the actual probability is a fraction above that threshold or a fraction below. This analysis unfortunately missed the point and resulted in lengthy and unnecessary delays in this adjudication. An objective review of the inherent uncertainties associated with a calculation of this magnitude makes it clear that the probability of an accident is "about" at the threshold which makes it credible. The precedent setting question then is, if the probability falls right at the established standard, what is the appropriate action for the Commission to take to ensure the adequate protection of the public?

I believe that in such situations fraught with uncertainty, it is the Commission's responsibility to approach these issues cautiously. The standard for establishing whether or not an accident is credible must be respected and if it is reached, the Commission should require the additional analysis necessary to determine any potentially harmful consequences. If those consequences could result in radiation exposures to the public that are above the exposure limits as defined by NRC regulations, then applicants are required to design against those possibilities.

These hearings were originally proceeding along this very path, but unfortunately never reached this logical conclusion. In an extensive opinion, the Licensing Board found that the Applicant, Private Fuel Storage, failed to show that the probability of an aircraft hazard was less than approximately 10^{-6}. The Board stated 'there is enough likelihood of an F-16 crash into the proposed facility that such an accident must be deemed "credible"', requiring an additional analysis of the design of the facility to show that such credible accidents would not result in a radiation exposure that exceeds the limits of 10 C.F.R part 100.[95] Specifically, the Board found

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[95] *See* LBP-03-04, 57 NRC 69, 77 (2003).

that the probability of an accident was 4.29 x 10^{-6} per year, which exceeded the approximate 10^{-6} threshold for credibility.[96] The Board's finding on this issue was based on an understanding that the calculation for this probability was determined using the "classic four-factor NUREG-0800 formula".[97] Following a challenge of this decision to the Commission by the applicant, the Board's decision was upheld. [98] As a result, the applicant was forced to further evaluate the aircraft hazard.

The decision now before the Commission depends exclusively on a refinement of the calculation by the Board and I have concerns about the Board's application of this refined calculation. In arriving at the new probability for an aircraft hazard the Board adopted a new calculation that involved a consideration not only of the probability of an accident, but also the probability that an F-16 which crashed at the facility would breach one of the casks, leading to radiation exposure. After a contentious and complicated hearing, the Board found that the new probability was 0.74x10^{-6} and, more important, found that this number was below the threshold of 10^{-6}, eliminating aircraft hazard as a credible accident scenario.

As I indicated above, I do not dispute the Board's determination that this new probability calculation was 0.74x10^{-6}, but I do dispute the conclusion of the Board that this meets the established screening criteria to eliminate the aircraft hazard as a credible scenario. The staff's brief to the Commission appealing LBP-03-04, also supports this argument. There, the staff indicated that, "Dr. Campe testified that the criterion [for determining credibility of aircraft hazard] is expressed as an order of magnitude criterion – *i.e.*, an approximate value. He further testified that typically, order of magnitude thresholds are viewed as midpoints, such that 5 x 10^{-6} would be

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[96] *Id.* at 88.

[97] The applicant argued that this formula should be modified to account for pilot actions in the event of a crash, but the Board rejected this argument in LBP-03-04, leaving the traditional four-factor formula.

[98] *See* CLI-03-05, 57 NRC 279.

the dividing point between 10^{-6} and 10^{-5}.[99] Although the staff was arguing in that instance that, since the initial probability of an aircraft crash of 4.29×10^{-6} per year was consistent with 10^{-6} per year, the aircraft hazard should not be considered credible, I agree that the staff's description of the *interpretation* of the probability calculation is correct. In other words, the staff is correct that 4.29×10^{-6} is *of the same order of magnitude* as 10^{-6}. Similarly 0.74×10^{-6} is *of the same order of magnitude as* 10^{-6}. The important content of the calculated number is just the order of magnitude.

I believe this is an important issue, because the Board has now effectively overturned Commission precedent in having flexibility to deal with the approximate probabilities in NUREG-0800. As NUREG-0800 clearly states, "This requirement is met if the probability of aircraft accidents resulting in radiological consequences greater than 10 CFR Part 100 exposure guidelines is less than *about* 10^{-7} per year (see SRP Section 2.2.3)."[100] Probability calculations of this kind are extremely difficult and fraught with uncertainty and can be rendered meaningless if the numerical results are given greater specificity than they actually inherently contain. For that reason, the staff correctly drafted and interpreted NUREG-0800 to reflect on order of magnitude estimate, not an absolute number. As the staff brief indicates, citing several cases, "[f]or events the estimated probability of which is of the order of 10^{-7} per year, there is virtually no hope that there will ever be sufficient data available to obtain a precise measured value."[101]

The Board majority and minority acknowledged the practical realities of this staff position in the difficulties of making its decision. Judge Farrar stated, "[i]n contrast, even those of us in the majority recognize that the F-16 accident crash challenge presents a close case, in which

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[99] Staff's Petition for Commission Review, March 31, 2003, at 6.

[100] *See* NUREG-0800, §. 3.5.1.6., (emphasis added). Although NUREG-0800 references 10^{-7}, the Commission determined in CLI-01-22 that the appropriate numerical standard in this case is 10^{-6}.

[101] *Id.*

the demonstrated margins are, by our lights, narrow (and not persuasive to our dissenting colleague)."[102]

As a result, I believe the Board erred by establishing a new interpretation for the NUREG-0800 approximate probability, essentially replacing the credibility standard of "about 10^{-7}" with "exactly 10^{-7}". Using the staff's reasoning, the Board should merely have looked at the *second* probability calculation as providing an order of magnitude estimate, which would be 10^{-6}. Thus, the *second* probability calculation failed to show conclusively that the aircraft accident was not credible, that is *less than* 10^{-6}.

Thus the Commission needs to consider alternative criterion to determine whether the aircraft hazard is high or low risk. The probability analysis simply failed to provide information useful in ruling out aircraft hazard as a credible threat. That leaves the applicant with only one option – complete a full consequence analysis of the design of the facility to show that the consequences of a credible aircraft crash will not lead to exposures above the 10 C.F.R. Part 100 limits. Such an approach would assure the adequate protection of public health and safety.

Although I have expressed my views in a slightly different manner, my concerns draw upon the dissent of Judge Lam. I agree fully with his conclusions that, "[more needs to be done. The Applicant should demonstrate that a breached spent fuel storage cask would not result in a site-boundary radioactive dose exceeding regulatory limits, or should implement other remedies such as the installation of physical barriers. Such a decisive demonstration, or the implementation of genuine remedies, would ensure the adequate protection of public health and safety."[103]

Therefore, I dissent in the decision of the Commission to authorize the staff to issue to Private Fuel Storage a license to construct and operate its proposed storage facility at this time. The misinterpretation of our regulations should be remedied by performing the necessary

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[102] See Board's Public Memorandum and Order, p. B-13 (Feb. 24, 2005).
[103] *Id.* at D-7.

consequence analysis to ensure the adequate protection of the public health and safety from the issuance of this license.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-05-19) have been served upon the following persons by electronic mail or facsimile, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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Docket No. 72-22-ISFSI
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Docket No. 72-22-ISFSI
COMMISSION MEMORANDUM AND ORDER
(CLI-05-19)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of September 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Nils J. Diaz, Chairman
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Jeffrey S. Merrifield

DOCKETED
USNRC

March 24, 2004 (10:43AM)

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SERVED March 24, 2004

In the Matter of	)	
PRIVATE FUEL STORAGE, L.L.C.	)	Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage Installation)	)	

CLI-04-09

MEMORANDUM AND ORDER

I. Introduction

Now before the Commission is intervenor Ohngo Gaudadeh Devia's (OGD) motion to reopen the case record on Contention O, an "environmental justice" contention. The NRC staff, the applicant Private Fuel Storage (PFS), and intervenor Skull Valley Band of Goshute Indians oppose the motion. For the reasons cited below, we deny the motion.

II. Background

In CLI-02-20, 56 NRC 147 (2002), the Commission directed the Atomic Safety and Licensing Board to grant PFS's motion for summary disposition of Contention O, an "environmental justice" contention submitted by intervenor OGD. Our decision explained at some length why the intratribal dispute[1] OGD sought to litigate in Contention O -- over how

[1] OGD members oppose the PFS project. The group includes individuals who are members of the Skull Valley Band. Some OGD members live on the Skull Valley reservation and some do not. In opposing the PFS motion for summary disposition of its environmental justice contention, OGD alleged that Skull Valley Band tribal Chairman Leon Bear

(continued...)

particular Skull Valley band leaders have utilized or distributed lease payments made by PFS -- fell beyond the scope of the National Environmental Policy Act ("NEPA") and beyond the Licensing Board's jurisdiction. As we stated, "unless Congress has specifically acted to abrogate a tribe's sovereign immunity, a wholly intratribal dispute must be resolved within the tribe."[2] The Licensing Board therefore lacked jurisdiction "to provide declaratory or injunctive-type relief to OGD on its complaint that the tribal leadership is mishandling PFS lease payments,"[3] and denying OGD members a share in the financial benefits of the PFS lease.

Our decision further stressed that both NEPA and President Clinton's Executive Order on "environmental justice" are, at bottom, concerned with *environmental* impacts.[4] The executive order, for example, calls upon agencies to determine whether a proposed action would have "disproportionately high and adverse *human health or environmental effects*," not disproportionate financial effects among different "subgroups" of a minority population.[5] OGD has not claimed that its members will suffer a disproportionate or greater environmental injury from the proposed action, but that the Band leadership has used PFS lease payments "for personal gain and to bribe other Band members," and has accused OGD of "treason" and

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[1](...continued)
misappropriated funds paid by PFS under the lease PFS entered into with the Band in 1997, and used these funds for his own personal use or to bribe other tribe members into supporting his administration. OGD alleged that Chairman Bear wrongfully had denied to share money obtained from the PFS lease with tribe members that either opposed the PFS project or his chairmanship of the tribe. *See* CLI-02-20, 56 NRC 147, 150-51 (2002).

[2] *Id.* at 159.

[3] *Id.*

[4] *Id.* at 153-59. In 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," directing federal agencies to consider "environmental justice" in their decisions. *See* 59 Fed. Reg. 7629 (Feb. 11, 1994).

[5] CLI-02-20, 56 NRC at 153 (quoting E.O. 12898, § 1-101)(emphasis added).

sought to terminate their tribal membership.[6] These are political and criminal issues, not environmental. Indeed, as we noted in CLI-02-20, the Environmental Impact Statement (EIS) for PFS found the overall impact on residents of the reservation "small to moderate."[7] None of the listed adverse impacts were found to pose a disproportionately high impact to the Skull Valley Band or to any other minority population living near the Skull Valley Band reservation.[8]

Moreover, as we earlier explained, the executive order is intended only to underscore existing law. In this case, the relevant existing law is found under NEPA, which similarly is focused on a need to take a "hard look" at *environmental* impacts of proposed actions.[9] In CLI-02-20, the Commission acknowledged that the NRC staff's NEPA review does consider a project's anticipated socioeconomic benefits along with its costs, but we stressed that such a "broad and informal balancing of costs and benefits does not call for an investigation into perceived financial misdeeds going well beyond the natural or anticipated effects of a proposed project."[10] In short, we declined in CLI-02-20 "to use NEPA as authority for (in effect) a corruption investigation, a major undertaking far afield from the NRC's experience and expertise"[11]:

> Claims of financial and political corruption inside the Skull Valley tribe do not belong in our hearing process under the rubric of environmental justice or NEPA. Our mission is to protect the

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[6] OGD's Motion to Reopen the Record on OGD Contention O (Jan. 29, 2004)("OGD Motion") at 2, 4.

[7] CLI-02-20, 56 NRC at 154 (citing NUREG-1714, Vol. 1, Final Environmental Impact Statement (Dec. 2001)("FEIS") at 6-21 to 6-33).

[8] *Id.* at 154 n.37. *See also* FEIS at 6-28.

[9] CLI-02-20, 56 NRC at 153, 159; *see also, e.g., Robertson v. Methow Valley Citizens Council* 490 U.S. 332, 349-50.

[10] CLI-02-20, 56 NRC at 154-55 (internal quotations and citation omitted).

[11] *Id.* at 155.

> public health and safety and the environment. We lack the expertise, the resources, and the statutory mandate to get to the bottom of tribal corruption charges. Other government bodies, including the Federal Bureau of Investigation and the Bureau of Indian Affairs, are far better positioned to consider OGD's complaint.[12]

III. Analysis

Under our rules, a motion to reopen a record to consider additional evidence will "not be granted" unless it satisfies three requirements.[13] The motion must (1) address a significant safety or environmental issue; (2) demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially; and (3) be timely.[14] OGD's motion fails to meet our standard for reopening.

OGD's basis for reopening the record is a recent criminal indictment.[15] In December 2003, a federal grand jury indicted tribal Chairman Leon Bear on two counts of theft from Indian Tribal Organizations, one count of theft concerning programs receiving federal funds, and three counts of filing false tax returns. The indictment charges Mr. Bear with embezzlement, misapplication, and conversion to his own use of funds belonging to the Skull Valley Band. It also charges Mr. Bear with knowingly filing false tax returns in the years 2000-2002.

By filing a motion to reopen the record, OGD suggests that had there been an "actual criminal indictment" of Leon Bear when we last considered OGD's environmental justice

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[12] *Id.* at 150.

[13] 10 C.F.R. § 2.734 (2003).

[14] *Id.*

[15] *See* OGD's Motion at 1, 6-9.

contention, we likely would have reached a different result.[16] On the contrary, however, in CLI-02-20 the Commission "*assume[d] the truth of the facts alleged*" by OGD for purposes of legal analysis.[17] Moreover, the existence of an indictment has no bearing on the reasons we gave for rejecting OGD's environmental justice claims. The indictment in no way changes the fact that OGD's claims center upon allegations of an illegal diversion and misallocation of tribal money, and of problems with the leadership of the Skull Valley Band -- financial and political matters that the NRC is neither equipped nor authorized to investigate, sort out, or in any fashion resolve.

The Commission has always recognized and acknowledged the seriousness of OGD's charges. But the indictment itself serves only to reinforce our view that other, more legitimate and effective avenues exist for OGD to seek redress of its concerns. As we stated previously, "OGD's charges of corruption *may prove salient* -- but for criminal investigators, for civil lawsuits, or for voters in future tribal elections, not for NEPA reviewers."[18]

OGD seeks to portray the alleged "financial misdeeds and corruption of Leon Bear" as a significant safety and environmental issue warranting the reopening of the record.[19] But neither Mr. Bear nor the Skull Valley Band will own or operate the PFS facility. OGD does not suggest how the alleged theft of tribal monies or the filing of false tax returns -- even if true -- would have any bearing on facility operations. Despite OGD's unsupported claim, Leon Bear and members of his administration will have no role in "overseeing" operations.[20]

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[16] *Id.* at 8-9.

[17] CLI-02-20, 56 NRC at 151 n.11 (emphasis added).

[18] *Id.* at 157 (emphasis added).

[19] *See* OGD Motion at 7.

[20] *See id.*

OGD's real complaint is that because of the Bear administration's actions, OGD is not "enjoying the financial benefits of the [PFS] lease."[21] Yet as we noted previously, "[s]ubject to criminal and tribal law, the Band ultimately gets to decide how to handle its own revenues."[22] The Bureau of Indian Affairs recognizes Mr. Bear "as the duly elected Chairman of the Skull Valley Band."[23] The Skull Valley Band leadership chose to enter into a land lease with PFS, and the Bureau of Indian Affairs conditionally approved the proposed lease in 1997.[24] For the NRC to intervene in an attempt to protect a "disaffected 'subgroup' of the Band, namely OGD's members, ... would place [our agency] uncomfortably and unlawfully, right in the middle of an internal tribal dispute."[25] Our position is consistent with that of the Bureau of Indian Affairs, which has stressed that the NRC has "no jurisdiction to investigate the [Skull Valley] Band's internal financial affairs concerning these [PFS] payments."[26]

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[21] *See id.*

[22] CLI-02-20, 56 NRC at 160.

[23] Indictment, *United States of America v. Leon Bear* (C.D. Utah filed Dec. 17, 2003) at 2, attached as Exhibit "A" to Affidavit of Margene Bullcreek in Support of OGD's Motion (Jan. 29, 2004). Before the Licensing Board, OGD claimed that Leon Bear is not the legitimate tribal leader and that instead Mr. Blackbear is the legitimate leader of the Skull Valley Band. *See, e.g.*, OGD's Response to PFS Motion for Summary Disposition (June 28, 2001) at 9. OGD's motion to reopen the record references and includes a copy of a recent federal indictment of Mr. Blackbear, on 1 count of theft from an Indian tribal organization and 5 counts of bank fraud. Mr. Blackbear's indictment states that the Bureau of Indian Affairs recognizes Leon Bear as the chairman of Skull Valley Band, and that Mr. Blackbear has no authority to act on behalf of the tribe. *See* Indictment, *United States of America v. Malinda Moon, Sammy Blackbear, Miranda Wash, and Duncan Steadman* (C.D. Utah filed Dec. 17, 2003) at 2-3, Exhibit "A" to Affidavit of Margene Bullcreek, *supra.*

[24] Final lease approval by BIA is conditioned on a finding that the lease will be in the best interest of the Band. PFS cannot begin construction of the facility until final approval has been granted.

[25] CLI-02-20, 56 NRC at 159-60.

[26] Brief of *Amicus Curiae* (April 15, 2002) at 1. Prior to our decision in CLI-02-20, the Commission invited BIA to set forth its position.

The FEIS cites the Skull Valley Band leadership's declared intention to use PFS lease payments "for a number of beneficial purposes, including on-Reservation improvements to housing, development of schools, day-care, medical facilities, higher education opportunities, and commercial improvements to the Pony Express Convenience Store."[27] NEPA, however, does not require the NRC to investigate or enforce whether the Band leadership in fact fulfills its promises -- whether PFS payments indeed are spent prudently, legally, or otherwise to the satisfaction of the entire tribe. To be sure, OGD's concerns are very serious, but they belong in another forum, not an NRC licensing proceeding. There would be no end to the NRC's environmental review if the agency had to follow and scrutinize ongoing contract payments and the actions of tribal leaders.

Lastly, OGD's motion claims that the Commission in CLI-02-20 "assumed the existence of an adequate tribal forum for resolution of internal tribal disputes" and that "it is now clear that no tribal court exists for the Skull Valley Band."[28] OGD argues that had the Commission "had an opportunity to consider the evidence of criminal activity and financial corruption of Leon Bear ... together with the lack of any tribal court to resolve matters of internal tribal disputes, a materially different result would have been likely."[29]

But CLI-01-20 nowhere rested on the existence of a tribal court. It does not even mention a tribal court. Clearly, the decision emphasizes that the issues raised by OGD constitute an intratribal dispute, subject to tribal *and* criminal or civil law, but not NEPA. The decision describes OGD's charges as matters "for criminal investigators, for civil lawsuits, or for

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[27] *See* FEIS at 4-39. Other stated socioeconomic benefits include possible jobs for tribal members, a potential for increased business at the Pony Express Convenience Store, and significant payments to Tooele County.

[28] OGD's Motion at 8.

[29] *Id.* at 9.

voters in future tribal elections."[30] And it acknowledges that tribal dissidents have filed administrative appeals with the Bureau of Indian Affairs, have sued in federal district court to challenge BIA's approval of the PFS lease, and further, that criminal claims have been referred to the Federal Bureau of Investigation -- all "more appropriate, avenues of redress ... open to OGD."[31] Yet whether or not the Skull Valley Band specifically has a tribal court -- the Band affirms that it *does* utilize a tribal court "from time to time"[32] -- makes no difference to the reasoning or result in CLI-02-20.[33]

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[30] CLI-02-20, 56 NRC at 157.

[31] *Id.* at 160. For example, dissident members of the Skull Valley Band have sued in federal court challenging the PFS lease and the legitimacy of the currently recognized Band leadership. A recent decision in the United States Court of Appeals Tenth Circuit found these challenges premature, given that: (1) a challenge to the PFS lease is still pending before the Interior Board of Indian Appeals, and (2) the proper method for challenging tribal election results is first to file a complaint with the Secretary of the Interior, a remedy the plaintiffs have yet to exhaust. *See Blackbear v. Norton*, No. 02-4230 (10th Cir.)(Mar. 5, 2004).

[32] Intervenor Skull Valley Band's Response to OGD's Motion (02/09/04) at 8.

[33] We need not address whether OGD's motion is timely, for it is clear that the motion does not meet 10 C.F.R. § 2.734's other requirements: the motion does not raise a significant safety or environmental issue, and it does not demonstrate that a materially different result would have been likely had the Leon Bear indictment been considered initially.

IV. Conclusion

The Commission denies OGD's motion to reopen the record on Contention "O."

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of March, 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-04-09) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution with copies by electronic mail or facsimile as indicated.

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Docket No. 72-22-ISFSI
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Docket No. 72-22-ISFSI
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of March 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

February 5, 2004 (10:58AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
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SERVED February 5, 2004

COMMISSIONERS

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of PRIVATE FUEL STORAGE L.L.C. (Independent Spent Fuel Storage Installation)	Docket No. 72-22-ISFSI

CLI-04-04

MEMORANDUM AND ORDER

In response to the Commission's order of November 13, 2003,[1] Utah and Ohngo Gaudadeh Devia (OGD) filed their Petitions for Review presenting numerous issues for our consideration. We have considered each issue to determine whether it meets our standards for review under 10 C.F.R. §2.786. For the reasons we give below, we deny review for the most part, but grant review and request further briefs on two issues.

The Commission always has discretion whether to accept review of issues raised in our licensing proceedings. Our rules say that the Commission may grant review based on "any consideration" it "deems to be in the public interest."[2] Review is particularly appropriate where there is a possibility that the Board's ruling made a clear error as to a material fact, where a legal

[1] CLI-03-16, 58 NRC 360 (2003).

[2] *See* 10 C.F.R. § 2.786(b)(4).

conclusion therein is without precedent or conflicts with existing precedent, or where the ruling raises an important policy issue that the Commission should consider itself.[3]

With these standards in mind, below we consider the petitions for review filed by Utah and OGD.

II. UTAH'S POINTS OF ERROR

A. Security Related Contentions:

Utah initially challenged PFS's physical security plan with nine contentions, Utah Security A through Security I. Utah now asks review of portions of Utah Security A (inadequate staffing), Security G (inadequate protection against terrorism and sabotage), and Security J (no documented relationship with local law enforcement authority).

1. The Board Did Not Err In Applying Not-Yet-Effective Regulations

Utah's petition complains that the Board improperly applied regulations that were not yet effective. At the time the Board considered Utah's original security contentions, these regulations had been published in the Federal Register as final rules,[4] but would not take effect until five months after the Board's ruling. We see no real point to Utah's argument. The rules took effect in November, 1998, and will apply to the PFS facility, if licensed. It was sensible for the Board to evaluate Utah's contention under the rules that will cover the PFS facility.

2. Utah Security A (Security Implications of Lack of Nearby Housing)

Utah's Security A argued that the lack of housing near the PFS facility would make it impossible for PFS to call on off-duty security personnel in the case of an emergency. But as PFS's response pointed out, its security plan does not rely on off-duty security personnel to

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[3] *See id.*

[4] *See* Final Rule, Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste, 63 Fed. Reg. 26,955 (1998).

ruled the Utah statutes to be preempted by federal law,[8] the Board dismissed the contention.[9] Utah appealed the district court's ruling to the United States Court of Appeals for the Tenth Circuit, and a decision on that matter is pending.

Utah argues that the Board erred in dismissing its contention when the matter was still under appeal to a higher court. We see no error. The Board was bound to apply the law as it existed at the time of its ruling, which was as the district court ruled. In addition, the district court's legal conclusion that the Utah statutes were preempted by federal law seems reasonable. Congress, in enacting the Atomic Energy Act, clearly intended the federal government to occupy the field of regulating the safety of atomic energy.[10] Utah's laws seemingly amount to an attempt to make it impossible for any applicant to obtain an NRC ISFSI license, thereby effectively prohibiting this project. If, on appeal, the law on this point changes, we can consider requests to revive this contention.

5. Utah U, Basis 4 (EIS Should Describe Environmental Impact of Terrorism)

Utah U, Basis 4, argued that the EIS is deficient in not describing the environmental impacts of a saboteur successfully breaching one or more casks. Review of this matter is denied, as the Commission has already held in this proceeding that the environmental impacts of terrorism or sabotage are not subject to review under NEPA.[11]

B. Contentions Relating to the Intermodal Transfer Facility

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[8] *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F.Supp.2d 1232 (D.Utah, 2002).

[9] LBP-02-20, 56 NRC 169 (2002).

[10] *English v. General Electric Co.*, 496 U.S. 72, 81; 11 S.Ct. 2270; 110 L. Ed. 2d 65 (1990).

[11] CLI-02-25, 56 NRC 340 (2002).

PFS envisions that spent fuel will be shipped to its facility on existing rail lines to an area north of the facility. At that point, PFS proposes to either build a new rail line to ship the casks the final 32 miles to the PFS facility, or to transfer the casks onto heavy-haul trucks at an Intermodal Transfer Facility (ITF). Utah claims that the volume of traffic at the proposed ITF would necessitate some temporary storage, thereby making the facility a storage facility that must be licensed under Part 72 and conform to all applicable regulations. Both PFS and the NRC staff believe that the ITF would not be an NRC-licensed facility at all. Rather, they argue, the spent fuel will still be in transit and would be covered by Department of Transportation ("DOT") regulations that will ensure public health and safety.

The Board initially found portions of the ITF related contentions admissible.[12] It later dismissed them as an attack on applicable NRC and Department of Transportation regulations, which hold spent fuel in transit to fall under DOT's jurisdiction.[13] The Board cited the Hazardous Materials Transportation Act,[14] which defines DOT's authority to regulate the "transportation" of nuclear materials, including "the movement of property and loading, unloading, or storage incidental to the movement" of materials.[15]

It appears to us that the Board reached the proper conclusion under the NRC-DOT regulatory regime. PFS-bound spent fuel will be in shipment, even during temporary holding at the transfer point, until it arrives at the PFS facility in Skull Valley. Thus it falls under DOT regulations. We see no basis for accepting review on the ITF contentions.

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[12]LBP-98-7, 47 NRC at 184-85.

[13]LBP-99-34, 50 NRC 168 (1999).

[14]49 U.S.C. §§ 5101-5127.

[15]*Id.* at § 5102(12). *See* LBP-99-34, 50 NRC at 177 n. 3.

C. Contentions Utah J and Utah U, Basis 2 (Inspection and Maintenance of Safety Components–Lack of a Hot Cell)

1. Utah J (Inspection and Maintenance of Safety Components, including Canisters and Cladding).

Utah J argues that the ISFSI's design is inadequate to protect public safety because there is no "hot cell" or other means through which a canister may be opened to inspect the condition of the fuel. Utah argues that this deficiency violates 10 C.F.R. § 72.122(f), which provides that components important to safety (that is, the fuel cladding) must be designed to permit inspection, and 10 C.F.R. § 72.128(a), which provides that spent fuel storage facilities "must be designed with ... [a] capability to test and monitor components important to safety."

The Board found this contention to be an attack on agency regulations and rulemaking-associated determinations and to be lacking in factual or expert support.[16]

Other than the general requirements that components important to safety must be capable of inspection, Utah cites no regulation requiring a hot cell at an ISFSI. The fuel cladding is not a "structure or system important to safety," as that term is defined in our regulations.[17] Those structures or systems are limited to parts of "the ISFSI,[18] MRS, or spent fuel *storage cask*" important to maintain the safe condition of the spent fuel. The regulation does not refer to the *contents* of the canister. NRC has made rulemaking-associated

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[16]LBP-98-7, 47 NRC at 189-90.

[17]10 C.F.R. §73.3.

[18]That is, the "complex," or larger facility. *See id.*

determinations that the fuel cladding, once encased in a canister, is no longer important to safety.[19]

We therefore see no basis for questioning the Board's determination that this contention presented an impermissible challenge to our regulations, rulemaking-associated determinations, and lacked factual or expert opinion support.

2. Utah U, Basis 2 (Impacts of Onsite Storage Not Considered)

The Board rejected basis 2 of Utah U, which claimed the ER was defective in failing to "consider the safety risks and costs raised by PFS's failure to provide adequate means for inspecting and repairing the contents of spent fuel canisters or for detecting and removing contamination on the canisters." The Board found that this basis impermissibly attacked agency regulations or rulemaking-associated determinations. But whether or not NRC safety regulations impose certain requirements does not resolve the question whether there are potential environmental consequences that should be discussed under NEPA. Because we do not find the Board's rationale for rejecting Utah U, basis 2 entirely clear, the Commission grants review of whether that basis should have been admitted.

Various portions the FEIS discussed inspections and procedures to ensure that no contaminated canisters are stored at the PFS facility. Because Utah U, basis 2 was filed in response to the ER, it never addressed the FEIS. Among other issues the parties should address is whether the FEIS moots any of Utah's concerns. As the Commission recently held in *Catawba Nuclear Station,* complaints about the adequacy of an applicant's ER are superseded

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[19] *See, e.g.*, Proposed Rule Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High Level Radioactive Waste, 51 Fed. Reg. 19,106 (1986) "[F]or storage of spent fuel the cladding need not be maintained if additional confinement is provided ... the canister could act as a replacement for the cladding." *Id.* at 19,108.

when the issues involved are discussed in the FEIS.[20] Therefore, Utah's complaint may have been mooted by the FEIS.

D. NEPA/Economic Contentions

1. Contentions Utah X (Need for the Facility) and Utah Z (No Action)

In Contentions Utah X and Z, Utah claims that PFS's ER, and, subsequently, the Staff's EIS, overstate the need for the facility and the disadvantages of not building the facility. Utah claims that in looking at the "need" for the facility the EIS focuses on the advantages primarily to PFS and its potential customers, rather than including "an evenhanded discussion of the actual need for the proposed facility." In support of this, Utah claims that simply storing spent fuel at reactors until a permanent repository is ready is a safe and environmentally preferable option. In addition, in looking at the "no action" alternative, Utah claims that the Board erred in looking at only environmental effects. We are not persuaded that the EIS either overstates the need for the facility or fails to adequately discuss the advantages of not building the facility.

The heart of Utah's complaint is that the EIS fails to consider whether the country as a whole "needs" the facility or not. But that question borders on the political. We do not believe that NEPA charges the staff, in drafting the EIS, or the Board, in its hearing process, with answering that question. Rather, the EIS enumerated certain benefits of the project, which would accrue primarily to PFS and its customers. In addition, it listed benefits to certain communities–such as the benefit of allowing early decommissioning of shutdown reactors and the economic benefit to the Skull Valley Band of Goshutes, an impoverished Indian tribe. The

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[20] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-84 (2002).

EIS acknowledged that at-reactor storage was a viable option presenting no significant environmental impacts.[21]

On the other hand, the EIS examines in great detail various environmental effects of the project. Utah points to no significant environmental effect the staff failed to consider. Similarly, Utah does not specify any advantages of the "no action" alternative that it claims the EIS ignored. It is apparent that the disadvantages of allowing the project are the mirror image of the advantages of not allowing it (the "no action" alternative), and *vice versa*. As did the Board, we see no genuine dispute here.

We recently said that "NRC adjudicatory hearings are not EIS editing sessions."[22] Neither is the Commission appeals process. We find that Utah's complaint fails to raise any clear Board error of fact or law on the "need" and "no action" issues.

2. Contention Utah Y (Connected Actions)

The Board rejected Utah's proposed Contention Y at the outset of the adjudication.[23] Utah Y contended that the environmental analyses of the project should consider its impact on the Department of Energy's plans for a permanent waste repository at Yucca mountain. Utah argues that storing up to 40,000 metric tons of spent fuel would reduce the pressure on DOE to pursue a permanent waste repository. It also claims that "[o]ne implication of licensing the PFS facility is to practically foreclose DOE and congressional decisions on future [spent nuclear fuel] storage."

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[21] *See* Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714, Vol. 1 at liii.

[22] *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC __, __ (2003).

[23] LBP-98-7, 47 NRC at 202.

In a NEPA analysis it is proper for an agency to consider the overall effect of a government program involving smaller connected actions, rather than considering only the components, each of which may have only insignificant environmental effects.[24] But we do not agree that the logical result of approving the PFS facility is that it will affect, adversely, the development of a permanent repository. Utah believes that approval of the PFS facility will both delay the development of a permanent repository, and "commit the federal government to one of many courses of action."

We do not see why the availability of *private* offsite storage would affect *DOE's* duties under the Nuclear Waste Policy Act. The NWPA assigns DOE a duty to develop a permanent repository, which is not discretionary or dependent on DOE's deciding that there is a "need" for it. Further, the NWPA also requires DOE to fully investigate Yucca Mountain, and only Yucca Mountain, to determine whether it is suitable for long-term storage. The decision to go forward with the Yucca Mountain plan is to be based on scientific criteria only. Whether or not PFS is in place as an interim storage facility has no bearing at all on the Yucca Mountain decision.

Because Utah has not shown a connection between the PFS facility and the permanent repository to be developed by DOE, NEPA does not require the PFS EIS to consider impacts on the development of a permanent repository. We see no error in the Board's finding no genuine dispute here.

3. Contentions Utah CC (One-sided Cost-Benefit Analysis) and Utah SS (Final EIS Revised Cost-Benefit Analysis)

Utah argues that the cost-benefit analysis in the EIS is biased and inaccurate. Utah claims that the EIS improperly considers the benefit of a 40-year storage period, when it should

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[24]In *Thomas v. Peterson*, 753 F.3d 754 (9th Cir. 1985), cited by Utah, the court held that the environmental review of the effects of building a timber road through a National Forest must also consider the effects of the timber sales the road was designed to accommodate.

only consider the benefit of storing fuel at the site for 20 years, because PFS has applied for only a 20-year license. If one assumes that spent fuel will not be stored at the facility beyond 20 years of license issuance, the net benefit, in terms of costs avoided, would be reduced, Utah says. The Board dismissed Utah CC at the contention filing stage, finding no genuine dispute.[25]

After the FEIS was issued, Utah submitted contention SS, which again challenged the cost/benefit analysis as biased in favor of the project for failing to include a sufficient economic analysis. In a ruling from the bench, the Board found the contention timely, but rejected it for failing to state a claim for which relief could be granted. The Board held that NEPA did not require the staff to redo the analysis.[26] The Board noted that Utah had not alleged that there was "gross environmental harm," as in the cases requiring an economic analysis. Further, the Board found that the benefit put forward for the project was not economic, but "a sort of insurance policy" against late creation of a permanent repository for high level waste.

Utah points to our decision in *Claiborne Enrichment Center*, where we said that "[m]isleading information on the economic benefits of a project ... could skew an agency's overall assessment of a project's costs and benefits, and result in approval of a project that otherwise would not have been approved because of its adverse environmental impacts."[27]

Because NEPA cost/benefit questions have proved troublesome in the past, as for example in the *Claiborne* case,[28] because the record would benefit from a written decision on

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[25]LBP-98-7, 47 NRC at 204.

[26]*See* Oral decision at evidentiary hearing, Tr. 9213-14 (May 17, 2002).

[27]*Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

[28]*See* CLI-98-3, 47 NRC at 87-100. *See also, e.g., Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 48-51 (2001).

these issues, and because the context of the question here is unusual, the Commission believes that review of the admissibility of Utah CC and SS is appropriate.

4. Contention Utah HH and II (Low Rail Corridor Fire Hazards)

Utah contends that the Board improperly found its proposed contentions Utah HH and II to be impermissibly late. The issue for the Commission's review is whether the Board improperly found that Utah did not have good cause for filing these contentions late.

PFS originally proposed a rail spur to run alongside Skull Valley Road to bring the spent fuel from the existing rail line to the PFS facility. A year later, PFS amended its plan by moving the rail line to the west, through open rangeland along the edge of the Cedar Mountain range. Within 30 days of that license amendment, Utah sought to add Contention Utah HH, saying that this rail spur would cause fire hazards by providing a new ignition source and an obstacle to fire trucks attempting to cross the rail line, and Utah II, saying that the ER had failed to consider environmental impacts and costs of operating the rail line. The Board rejected this contention as impermissibly late, finding no reason that Utah could not have raised these issues with the original application.[29]

Utah now claims that the reason it did not file the contention at the time of the original application was that only the new alignment presented the fire hazards.

The Board noted that the differences in the new alignment and the old one might be a basis to find "good cause" for late filing, but found that Utah did not explain why the original alignment would not also provide a potential ignition source, impediment to firefighters, and so on.[30] Utah, however, did not present its argument with its contention to show good cause for late

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[29]LBP-98-29, 48 NRC 286 (1998).

[30]*See* LBP-98-29, 48 NRC at 292-93 n. 2 (1998).

filing, as it is required to do by our rules of practice.[31] Rather, the reason Utah gave for not filing its fire-related objections to the rail line at the outset was that the rail line was only one of many possibilities mentioned in PFS's initial application.[32]

In presenting a late contention, the proponent's first duty is to demonstrate good cause to the Board.[33] Even if a party on review provides a credible argument that there was good cause, if the intervenor did not present that argument to the Board along with the late contention, we have no basis for concluding that the Board erred.

Basis 1 of Utah II challenged the ER's failure to consider environmental impacts of fires caused by the rail spur. The Board found that basis untimely for the same reason it rejected HH, that is, that this issue could have been raised with respect to the original rail spur proposal.[34] Utah II also listed six additional bases, arguing that the ER failed to consider the rail line's effects on species, visual impacts, noise levels, historical resources, and the impact on grazing rights. The Board found these bases timely, but inadmissible on other grounds, such as lacking factual support and impermissibly challenging NRC regulations.[35]

Utah's petition does not discuss the Board's legal conclusions with respect to each of bases 2-7 of Utah II, making it difficult to ascertain any particular error. Rather, Utah makes a general allegation that the Commission has not complied with NEPA by evaluating the environmental impacts of the rail spur. But the FEIS does discuss the rail line's impacts on

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[31] 10 C.F.R. § 2.714(a)(1)(i).

[32] LBP-98-29, 47 NRC at 292-93 (1998).

[33] *See* 10 C.F.R. §2.724(a)(1)(i).

[34] *Id.* at 295-96.

[35] *Id.* at 296.

vegetation and species,[36] livestock,[37] historic resources,[38] noise,[39] visual impacts,[40] recreation,[41] and wildfires.[42] Therefore, even if the Board erred (and we see no suggestion of error), Utah's contention II appears to be insubstantial, or even moot, given the FEIS's contents.

D. Utah KK (Interference with Use of UTTR and Resulting Economic Impacts)

In July, 2000, Utah filed Utah KK, which argued that the presence of the PFS facility would cause the military to restrict operations in the Utah Test and Training Range. This would both impair the nation's military readiness and possibly lead to closing Hill Air Force base, which in turn, Utah claims, would have adverse impacts on the local economy.

The Board rejected the contention as untimely as Utah showed no good cause for the late filing.[43] The issue before us is whether the Board properly rejected the contention on that basis.

Utah argues that it first raised this issue in comments on the scope of the EIS, and that the staff represented that the EIS would include all direct and indirect economic impacts. It argues that it relied on the staff's pronouncement that it would consider these impacts, but that the DEIS did not do so.

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[36] *See* FEIS § 5.4.

[37] *See* FEIS §§ 5.5.1.1, 5.5.2.1, 5.5.4.

[38] *See* FEIS § 5.6.1.1.

[39] *See* FEIS § 5.8.1.

[40] *See* FEIS § 5.8.2.

[41] *See* FEIS § 5.8.3.

[42] *See* FEIS § 5.8.4.

[43] LBP-00-27, 52 NRC 216 (2000).

The Board was correct in finding no good cause for Utah's late contention. Commenting on the scope of EIS does not substitute for raising a timely contention. It is essential to efficient case management that intervenors file contentions on the basis of the applicant's environmental report and not delay their contentions until after the staff issues its environmental analysis.[44] In the interest of expedition, our rules require the filing of contentions as early as possible. Utah did not do this and the Board rightly refused to allow Utah to bring up old grievances late in the hearing process.

Further, we reject the argument that the national significance of Utah's military concerns warrants overriding the usual requirement that intervenors show good cause for untimely filing. Utah has offered no factual support for its theory that the military will curtail training in Skull Valley if the PFS facility is built; in fact, there is evidence in the record to the contrary.[45] Thus, there appears to be little cause for concern either that the proposed facility could impact military preparedness or that it could cause the military to close Hill Air Force Base.

E. Transportation Contentions–Proposed Utah LL-OO

Utah contention V complained that PFS's ER failed to discuss environmental impacts of transportation. The Board admitted a single basis, whether PFS improperly relied on Summary Table S-4, Environmental Impact of Transportation of Fuel and Waste to and From one Light

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[44] *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993), *petition for review and motion for directed certification denied*, CLI-94-2, 39 NRC 91 (1994).

[45] *See* FEIS §§ G.3.8.1.8, G.3.13.3.1. We also note that the parties are currently preparing for a hearing on the subject of the consequences of a military aircraft crashing into the PFS site. Last year, the Board found that, while such a crash is extremely unlikely, its probability is just within the range making it a "credible event" under the Commission's stringent safety standards. That ruling was premised on the military taking no steps to curtail flights over the site.

Water Cooled Nuclear Power Reactor,[46] because the shipping casks involved would be heavier than those assumed by Table S-4.

Instead of relying on table S-4, the DEIS calculated the transportation impacts using a PFS-specific computer analysis, called the RADTRAN 4 computer model. When Utah in turn challenged this model in Contentions Utah LL-OO, the Board found the new contentions impermissibly late.[47] The Board later dismissed Contention Utah V as moot.[48] The issue before us is whether the Board erred in finding the new transportation-related contentions impermissibly late.[49]

Recognizing that the DEIS could give rise to new contentions, the Board's procedural order governing the underlying proceeding required the staff to give all parties 15 days' notice before it planned to release the DEIS and make the DEIS available to the intervenors on an expedited basis.[50] The order explicitly provided that intervenors would have 30 days to file new contentions.

On June 12, 2000 the staff informed Utah that the DEIS had been completed and that a copy would be provided at the start of a June 19, 2000 evidentiary hearing. Utah filed its contentions on August 2, 2000. The Board found that, because staff had not given a full 15 day's notice before it gave Utah a copy of the DEIS, the due date for new contentions under its

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[46]10 C.F.R. §51.52.

[47]LBP-00-28, 52 NRC 226 (2000), *review denied*, CLI-01-01, 53 NRC 1 (2001).

[48]LBP-01-22, 54 NRC 155 (2001).

[49]Although Utah suggests that the dismissal of Utah V as moot denied it "due process," it does not explain how any aspect of that contention, as admitted, was still in issue after the staff's DEIS performed a PFS-specific analysis not relying on Table S-4.

[50]Licensing Board Memorandum and Order (General Schedule for Proceedings and Associated Guidance)(June 29, 1998), at 4-5 (unpublished).

order should be considered 45 days after that notice–or July 27, 2000. It ruled that Utah's amended contentions were therefore at least 5 days too late. It also found that portions of contentions Utah NN (economic effects of the maximum credible accident) and Utah OO (economic risks of a transportation accident) were nearly three years too late, because they could have been raised with respect to the PFS ER.[51]

Utah argues that, considering the timing of the DEIS's release at the start of a week-long hearing and narrow margin by which it missed the deadline, the Board's rejection of its contentions was a denial of due process. We can't agree. Although the size of the document and the timing of its release might well have justified an extension of the filing deadline, had Utah requested it, we cannot find that the Board's action amounted to a denial of due process when the schedule for late contentions was spelled out clearly in the Board's 1998 order.

In addition, we reject Utah's argument that the significance of the issues involved warrants overriding the Board's finding of no good cause for late filing. The Board noted that, had its inquiry reached the substantive stage, it would have admitted only a single subpart of one transportation contention, Utah MM (DEIS underestimates the severity of a category 6 accident by underestimating the release of Chalk River Unidentified Deposits (CRUD)).[52] We emphasize that our staff analyzes the safety of license applications in their entirety, whether or not particular questions are admitted for hearing. Thus rejecting contentions as too late is not the same as ignoring safety concerns.

IV. OHNGO GAUDADEH DEVIA'S PETITION FOR REVIEW

A. OGD Contention B (Emergency Plan and EPCRTKA)

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[51] LBP-00-28, 52 NRC at 235.

[52] *Id.* at 239, n. 3.

OGD's proposed Contention B contended that the emergency plan failed to address the safety of persons living outside the facility and failed to meet the requirements of the Emergency Planning and Community Right to Know Act of 1986 (EPCRTKA).[53] The Board found the contention inadmissible as a collateral attack on agency regulations, as lacking factual or expert support, and for failing to show any genuine dispute.[54]

As the Board recognized, NRC regulations distinguish between ISFSIs that will only store packaged waste and facilities that process or reprocess waste. NRC does not require a facility like the one PFS proposes to build, which will only store prepackaged waste, to have a formal offsite emergency plan because no onsite accident is expected to have significant offsite consequences.[55] Therefore, we see no suggestion that the Board may have made a mistake of law or fact in rejecting this portion of the contention.

In addition, the Board was correct in rejecting OGD's EPCRTKA claim as lacking a factual basis. EPCRTKA imposes reporting and emergency planning requirements on facilities possessing certain listed hazardous substances in excess of prescribed quantities established by the Environmental Protection Agency. PFS's Emergency Plan stated that it will not possess any listed substance in threshold quantities,[56] and OGD submitted no evidence to contradict that

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[53]Title III, Pub. L. 99-499.

[54]LBP-98-7, 47 NRC at 227.

[55]*See* 10 C.F.R. § 72.32(a). *See also* Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Facilities (ISFSIs) and Monitored Retrievable Storage Facilities (MRS), 60 Fed. Reg. 32,430. The statement of considerations provided:

> NUREG-1140 concluded that the worst-case accident involving an ISFSI has insignificant consequences to the public health and safety. Therefore, the final requirements to be imposed on most ISFSI licensees reflect this fact, and do not mandate formal offsite components to their onsite emergency plans.

Id. at 32,431.

[56]PFS Emergency Plan at 2-6.

statement. Although the spent fuel itself is "hazardous," in that is requires safe handling under NRC regulations, it is not an "extremely hazardous substance" on the EPA's EPCRTKA list. The safe handling of spent nuclear fuel is NRC's bailiwick, and our own regulations describe all necessary emergency planning procedures. Because OGD did not show PFS would possess any EPCRTKA substances in reportable quantities, the Board properly rejected OGD's EPCRTKA complaint as lacking a factual basis.

B. OGD Contention E (Failure to Plan for Leaking or Contaminated Casks)

OGD's proposed Contention E argued that the license application failed to provide a plan for dealing with casks that may leak or become contaminated during the 20 to 40 year storage period. OGD claimed that the license application should have a plan for dealing with a leaking cask or canister, should have an alternative location to store a canister that becomes defective, and should address "uncertainties" about whether permanent storage will ever become available at Yucca Mountain. The Board rejected this contention as lacking a factual basis and constituting an attack on our regulations and rulemaking-associated determinations, and failing to show a genuine dispute.[57]

The problem with the contention is that NRC determined that even worst-case scenarios (such as drops) involving a cask would not breach it.[58] OGD's contention lacks a factual foundation because it does not present any plausible scenario requiring special planning for a breached cask. In addition, the applicant's response to this contention pointed out that its SAR did plan for either returning any defective cask to the shipper or enclosing it in a transportation cask at the ISFSI.[59] Other than the bald assertion that PFS does not adequately provide for

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[57]LBP-97-8, 47 NRC at 228-29.

[58]See 60 Fed. Reg. 32,430, 32,438 (1995).

[59]PFS Answer to Contentions, p. 524-25.

contingencies, OGD did not address PFS's proposals. Therefore, there is no error apparent in the Board's decision that this contention lacked factual support, failed to show a genuine dispute, and amounts to an attack on NRC regulations which rest on the premise that NRC-approved casks will survive accidents without contaminating the environment or causing safety concerns.

C. OGD Contention J (Licenses, Permits and Approvals)

OGD's proposed Contention J claimed that the license application failed to discuss the compliance with all applicable permits, licenses and approvals. It also alleged that the NRC, as a federal agency, owes a "trust responsibility" to Native Americans to ensure that their tribal lands are not contaminated.

The Board found this contention inadmissible for various reasons. We note that the FEIS discusses the permits, licenses and approvals PFS will need for its facility, mooting any deficiency in the ER.[60]

OGD's petition focuses not on any particular environmental permitting issue, but rather on the Board's conclusion that the NRC doesn't owe any heightened "trust responsibility" to Native Americans. OGD does not cite any legal basis for the proposition that the NRC owes a fiduciary duty to Native Americans to protect their land from contamination. Rather, the cases OGD cites deal with the government's fiduciary duties in handling funds owed or held in trust for Native Americans.

The NRC certainly has a statutory duty to protect all members of the public, including Indian tribes, from radiation hazards without regard to ethnic origin. The NRC is attempting to do so here both through the hearing process and through the NRC staff's safety and environmental review process. But we see no reason to foreclose Indian tribes from possible

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[60]FEIS at 1.6.2.

economic opportunities (such as the PFS facility, if built) under the guise of protecting Indian tribes from environmental harm, no matter how slight.

OGD complains that the Board erred in placing the "burden of producing information" on OGD. But the party proffering a contention always has the burden to offer sufficient fact-based allegations showing that a genuine dispute exists.[61] That is the essence of our contention-pleading process.

D. OGD Contention O (Environmental Justice)

OGD initially offered six bases for its environmental justice claim. The Board accepted the contention as admissible insofar as it claimed that the facility would cause disparate environmental impacts to tribe members, who are both ethnic minorities and poor.[62] It later narrowed the issue to whether there was a subgroup within the tribe that was not receiving or would not receive any benefit from the project, thereby suffering a "disparate environmental harm" from the project.[63] The Commission reversed that ruling, finding that this agency's approach to environmental justice was to look at disparate environmental harms, not disparate economic benefits.[64]

OGD now argues that the Board improperly rejected bases that claimed the license application failed to discuss the "environmental, sociological, and psychological costs" to the Skull Valley Band. The Board rejected this claim both because the cost/benefit analysis was not

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[61] *See, e.g., Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

[62] LBP-98-7, 47 NRC at 233.

[63] LBP-02-08, 55 NRC 171 (2002).

[64] CLI-02-20, 56 NRC 147 (2002).

pertinent to the environmental justice inquiry and also because "psychological harm" resulting from fear or stigma associated with a facility is not cognizable under NEPA.[65]

OGD also says the Board should have admitted, under the environmental justice rubric, its argument that the ER should have weighed the costs and benefits of operating the ISFSI against the alternative of leaving the wastes where they are until a permanent facility is available. The Board rejected that claim because it found the cost/benefit analysis had nothing to do with an environmental justice claim. Here, however, the environmental justice concern is that society at large is reaping the economic benefits of a project while imposing its costs unfairly on an economically disadvantaged minority. The EIS did discuss various environmental impacts, including visual and cultural impacts.[66] The EIS concluded, however, that the particular benefits to the Skull Valley Band of Goshutes outweigh the particular environmental harms that will be suffered by the Band.[67] Therefore, it is not apparent how factoring in the costs to society at large of allowing the PFS facility (such as transportation costs and hazards), and the benefits to society at large of operating the PFS facility would give a more accurate picture of environmental justice considerations.

We therefore deny review of OGD's environmental justice issues.

V. CONCLUSION

For the foregoing reasons, Commission grants review in part and denies review in part. The parties are directed to file briefs, not to exceed 20 pages, on Utah U, basis 2, and on Utah CC and SS, as outlined above. Utah should file its opening brief within 21 days of this order; the

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[65]LBP-98-7, 47 NRC at 233. *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-79 (1983).

[66]*See* FEIS 4.5 (Socioeconomics and Community Resources); 4.6 (Cultural Resources); 4.8.2 (Scenic Qualities).

[67]*See* FEIS 6.2.1.2.

NRC staff and PFS should file their answering briefs within 21 days after receipt of Utah's brief. Utah may file a reply brief, not to exceed 5 pages, within 7 days after receipt of the staff and PFS briefs. All briefs should be served electronically. Any brief exceeding 10 pages shall contain a table of cases and authorities and a table of contents. Any interested *amici curiae* are authorized to file briefs as set out above, at the time of the party they support.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook,
Secretary of the Commission

Dated at Rockville, MD
This 5th day of February, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-04-04) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution with copies by electronic mail or facsimile as indicated.

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Docket No. 72-22-ISFSI
COMMISSION MEMORANDUM AND ORDER
(CLI-04-04)

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Docket No. 72-22-ISFSI
COMMISSION MEMORANDUM AND ORDER
(CLI-04-04)

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Dated at Rockville, Maryland,
this 5th day of February 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 12/18/02
SERVED 12/18/02

COMMISSIONERS

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

In the Matter of	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage Installation)	)	

CLI-02-25

MEMORANDUM AND ORDER

On December 13, 2001, the Atomic Safety and Licensing Board referred to the Commission its decision denying admission of a late-filed contention of the State of Utah. Utah's contention related to the threat of a terrorist attack on Private Fuel Storage, L.L.C.'s (PFS) proposed independent spent fuel storage installation (ISFSI).[1] We subsequently accepted review,[2] and also agreed to review three other cases raising terrorism-related issues.[3]

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[1] LBP-01-37, 54 NRC 476 (2001).

[2] CLI-02-03, 55 NRC 155 (2002). The Commission accepted review of the question whether either the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA) requires the NRC to consider the risk of terrorism in a licensing proceeding. The Commission declined to review the Board's ruling that Utah's proffered contention met our late-filing criteria. Utah subsequently dropped its AEA claim, leaving only its NEPA claim for our review.

[3] *Duke Cogema Stone and Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-04, 55 NRC 158 (2002) (granting petition for review); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-06, 55 NRC 164 (2002) (accepting certified question); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-05, 55 NRC 161 (2002) (accepting referred ruling).

The primary question in these cases is whether NEPA requires the NRC, in rendering licensing decisions, to consider the impacts of terrorism. We hold today that NEPA does not require a terrorism review.[4]

I. BACKGROUND

A. Overview

Below we consider in some detail the legal question whether NEPA requires an inquiry into the threat of terrorism at nuclear facilities. At the outset, however, we stress our determination, in the wake of the horrific September 11th terrorist attacks, to strengthen security at facilities we regulate. We currently are engaged in a comprehensive review of our security regulations and programs, acting under our AEA-rooted duty to protect "public health and safety" and the "common defense and security."[5] We are reexamining, and in many cases have already improved, security and safeguards matters such as guard force size, physical barriers, access control, detection systems, alarm stations, response strategies, security exercises, clearance requirements and background investigations for key employees, and fitness-for-duty requirements. More broadly, we are rethinking the NRC's threat assessment framework and design basis threat. We also are reviewing our own infrastructure, resources, and communications.

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[4] We reach the same conclusion in the other three companion cases. *See Duke Power Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-__, 56 NRC __ (Dec. 18, 2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-__, 56 NRC __ (Dec. 18, 2002); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-__, 56 NRC __ (Dec. 18, 2002).

[5] *See, e.g.*, AEA §§ 103(b) & (d), 104(d), 161(b), 182a, 189a(1)(B)(ii) & (iii), 42 U.S.C. §§ 2133(b) & (d), 2134(d), 2201(b), 2232(a), 2239(a)(1)(B)(ii) & (iii). *See also Florida Power & Light Co.* (Turkey Point Nuclear Generating Units No. 3 and 4), 4 AEC 9, 12 (Commission 1967) (these two statutory phrases "are fundamental to a delineation of the Commission's licensing authority and responsibility for [nuclear power plant] facilities"), *aff'd sub. nom. Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968).

Our comprehensive review may also yield permanent rule or policy changes that will apply to the proposed PFS facility and to other NRC-regulated facilities. The review process is ongoing and cumulative. It already has resulted in a number of security-related actions to address terrorism threats at both active and defunct nuclear facilities.

For instance, just after the September 11th terrorist attacks, we issued Threat Advisories to all licensees of nuclear power plants, non-power reactors, nuclear fuel facilities, gaseous diffusion plants, and decommissioning reactors. The Advisories indicated that these facilities should go to the highest level of security. As a result of our initial Advisories, nuclear power plant licensees increased patrols, augmented security forces and capabilities, added security posts, installed additional physical barriers, increased the stand-off distance for vehicle checks,[6] enhanced coordination with law enforcement and military authorities, and imposed more restrictive site access controls for all personnel. We continue to provide updates to the licensees regarding our original Threat Advisories, having so far issued more than 30 such updates. NRC security specialists have performed numerous onsite physical security vulnerability assessments at licensed facilities to evaluate the effectiveness of our licensees' enhanced security measures.

On February 25, 2002, after further security reviews, we took the additional step of issuing Orders to all 104 power reactor licensees requiring them to take interim compensatory security measures over and above those required by our regulations. The Orders formalized steps that those licensees had voluntarily taken in response to our Threat Advisories, and also included additional measures to further protect nuclear power plants. The newly required safeguards measures (whose details are not available to the public) include more patrols, more security personnel, and physical and vehicle barrier modifications. The orders also require

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[6] The stand-off distance between a barrier and the nuclear plant is the distance between vital plant equipment and the closest exterior point of the vehicle barrier system.

additional security measures pertaining to waterways and owner-controlled land outside the plants' protected areas. The NRC staff has confirmed that, as of August 31st, all nuclear power plant licensees are in compliance with the requirements set forth in these Orders. In addition, the staff is conducting independent inspections at licensee sites.

We have subsequently issued similar security-driven orders to Honeywell International, Inc, for its uranium conversion facility in Metropolis, Illinois, on March 25th; to General Electric Company for its wet storage facility in Morris, Illinois, on May 23rd; to twelve nuclear plants that are being decommissioned also May 23rd; to two enriched uranium fuel fabricators (BWX Technologies, Inc. and Nuclear Fuel Services) on August 22nd; and to independent spent fuel storage facilities using dry cask storage on October 23rd.

This set of orders will remain in effect until either the threat environment changes or we determine that additional orders or rules are needed.

In a related action, in January we increased the full-time staffing at the NRC Headquarters Operations Center, which takes in fast-breaking security and safety information. In April, we established a new Office of Nuclear Security and Incident Response. The new Office is responsible for immediate operational security and safeguards issues as well as for long-term policy development. It works closely with law enforcement agencies and the Office of Homeland Security. It also coordinates the NRC's ongoing comprehensive security review, including (for example) a major research effort to evaluate the vulnerabilities and potential effects of a large commercial aircraft crashing into a nuclear facility or into storage and transportation casks -- issues raised in this proceeding.

B. Facts and Procedural Posture of this Case

PFS seeks a license to operate an ISFSI on the Skull Valley Goshute Indian Reservation in Utah. During the course of this litigation and prior to September 11, 2001, the

Licensing Board admitted numerous issues for hearing, many of which await final merits resolution. But the Board rejected various contentions relating to the risks of terrorism or sabotage at the proposed facility, finding each to be inadmissible.[7]

In response to the terrorist attacks of September 11, 2001, intervenor Utah asked the Board to admit its late-filed contention Utah RR, Suicide Mission Terrorism and Sabotage, which claimed violations of both the AEA and NEPA. Utah contended that the events of September 11 had materially changed the circumstances under which the Board had rejected previously proffered terrorism-related contentions by showing that a terrorist attack is both more likely and potentially more dangerous than previously thought.

Utah's new AEA "terrorism" claim argued that PFS's Safety Analysis Report and the staff's Safety Evaluation Report failed to identify and adequately evaluate external man-induced events such as suicide mission terrorism and sabotage, "based on the current state of knowledge about such events," as required by an NRC rule.[8] The Board found this argument an impermissible attack on NRC rules because, in promulgating security rules applicable to ISFSIs, the Commission had specifically considered and rejected requiring protection against the malevolent use of an airborne vehicle.[9]

Utah's new NEPA "terrorism" claim argued that PFS's Environmental Report and the NRC staff's draft Environmental Impact Statement (EIS)[10] were deficient in failing to consider

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[7] *See Private Fuel Storage, L.L.C.*, LBP-98-13, 47 NRC 360, 372 (1998); LBP-98-10, 47 NRC 288, 296 (1998); LBP-98-7, 47 NRC 142, 186, 199, 216, 226, 233-34, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

[8] *See* 10 C.F.R. § 72.94.

[9] 54 NRC at 485-86. *See* Final Rule, Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste, 63 Fed. Reg. 26,955-56 (May 15, 1998).

[10] The Final Environmental Impact Statement, dated December 2001, was not yet available at the time Utah submitted its contention and the Board made its ruling.

the environmental consequences of terrorists flying a fully-loaded commercial jumbo jet into the PFS facility. Relying on a 1973 Appeal Board decision in the *Shoreham* proceeding,[11] the Board found that the rationale for excluding acts of war in our safety analysis -- that this is the responsibility of the national defense establishment -- applies equally to a NEPA analysis. Therefore, the Board held that the NRC's NEPA responsibilities did not include considering the effects of terrorism.[12] The Board also cited a 1989 Third Circuit decision, *Limerick Ecology Action v. NRC*,[13] which found that NRC had no duty to perform a "probabilistic risk assessment" of the risk of sabotage in an EIS because the petitioners had failed to show that such an assessment was possible.[14] Noting, however, that the extraordinary events of September 11 may have changed what can be said to be "reasonably foreseeable," the Board referred its terrorism ruling for immediate Commission review.[15]

We accepted review, asking parties to address all issues "the parties determine are relevant," and in addition the question: "What is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001?"[16]

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[11] *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973).

[12] 54 NRC at 487. *See* 10 C.F.R. § 50.13, "Attacks and destructive acts by enemies of the United States; and defense activities." This provision relieves reactor license applicants from providing for design features that protect against "enemies of the United States." By its terms, section 50.13 applies to production and utilization facilities only. It therefore does not apply directly to ISFSIs such as the one at issue in this proceeding.

[13] 869 F.2d 719, 743-44 (3rd Cir. 1989).

[14] 54 NRC at 487.

[15] *See id.* 487-88.

[16] 55 NRC at 162.

On review, Utah has abandoned its AEA-terrorism claim and focused on its NEPA-terrorism claim.[17] Its NEPA claim does not ask that the NRC staff inquire into or predict the likelihood of a September 11-style terrorist attack on the proposed ISFSI, but argues that the mere fact that these attacks occurred at other U.S. targets makes such an attack a reasonably foreseeable environmental impact of erecting this facility, requiring a NEPA review. Utah asks the Commission simply to assume an attack and go straight to analyzing its consequences. Both PFS and the NRC staff, citing the *Shoreham* and *Limerick Ecology Action* decisions, maintain that terrorism and other intervening malevolent acts lie outside NEPA and need not be considered under that statute.

II. ANALYSIS

A. Introduction.

The issue here is whether an unquantifiable threat of terrorism, in this case a suicidal air crash of a jumbo jetliner into an ISFSI, raises the kinds of environmental concerns that call for a NEPA review in an EIS. That is, does it serve the purposes of NEPA to include in an EIS a discussion of the impact of a catastrophic event which is not directly linked to an NRC licensing decision and the likelihood of which is impossible to quantify?

Terrorism differs from matters ordinarily considered in an EIS. The proposed PFS facility's EIS, for example, considers such matters as likely effects on local water, air quality, vegetation, wildlife, culture, and lifestyle. These effects are reasonably certain; an EIS can quantify them to a fair degree of precision. Terrorism, by contrast, comes in innumerable forms and at unexpected times and places. It is decidedly not predictable. And it is not a natural or

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[17] *See* State of Utah's Brief in Response to CLI-02-03 and in Support of Utah's Request for Admission of Late-filed Contention Utah RR (Suicide Mission Terrorism and Sabotage), dated Feb. 27, 2002, at 3 n.2.

inevitable byproduct of licensing the PFS facility.[18] In our view, an EIS is not an appropriate format to address the challenges of terrorism. The purpose of an EIS is to inform the decisionmaking agency and the public of a broad range of environmental impacts that will result, with a fair degree of likelihood, from a proposed project, rather than to speculate about "worst case" scenarios and how to prevent them.

By its own terms, NEPA is not absolute. It directs federal agencies "to use all practicable means, consistent with other considerations of national policy," in environmental reviews.[19] The NEPA process is governed by a "rule of reason."[20] It does not extend to all conceivable consequences of agency decisions, no matter how far down the causal chain from a nuclear licensing decision and no matter how unpredictable. Using the NEPA process to consider terrorism also would be incompatible with NEPA's (and the NRC's) public participation process. In the wake of September 11, an overriding government priority is to avoid disclosing to terrorists themselves precisely where and how nuclear facilities might be most vulnerable and what steps are being taken to lessen terrorists' chance of success. Yet it would not be possible to embark upon a meaningful NEPA review of any type without engaging such subjects. NEPA does not override our concern for making sure that sensitive security-related information ends up in as few hands as practicable.

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[18] The Commission evaluates the impacts of accidents precipitated by natural events such as earthquakes, hurricanes and other severe storms. Unlike acts of terrorism, such events are closely linked to the natural environment of the area within which a facility will be located, and are reasonably predictable by examining weather patterns and geological data for that region. We do not know of similar principles that would permit reasonable prediction of an act of terrorism against a particular facility. Terrorism is a global issue, involving stochastic criminal behavior, independent of the planned facility.

[19] *See* 42 U.S.C. § 4331(b).

[20] *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 n.41 (2002).

We hasten to add that our decision against including terrorism within our NEPA reviews does not mean that we plan to rule out the possibility of a terrorist attack against NRC-regulated facilities. On the contrary, as we outlined above, the Commission and its staff have taken steps to strengthen security and are in the midst of an intense study of the effects of postulated terrorist attacks and of our relevant security and safeguards rules and policies. These activities are rooted in the NRC's ongoing responsibilities under the AEA to protect public health and safety and the common defense and security. But we see no practical benefit in conducting that review, case-by-case, under the rubric of NEPA, nor any legal duty to do so. Below we set out a series of factors cutting against using the NEPA framework to conduct a terrorism review and against admitting Utah's NEPA-terrorism contention for hearing. These factors stand singly, and cumulatively, as justification against invoking NEPA as the basis for our terrorism review in nuclear licensing cases.

B. NEPA's Goals and the Rule of Reason.

We begin with general NEPA requirements. NEPA demands that federal agencies prepare a "detailed statement ... on the environmental impact" of any proposed major federal action "significantly affecting the quality of the human environment."[21] Council on Environmental Quality (CEQ) regulations, which offer agencies guidance on NEPA compliance, provide that the EIS must discuss direct and indirect effects of the action.[22] Direct effects are "caused by the action and occur at the same time and place."[23] Indirect effects are "caused by the action and are later in time or farther removed in distance, but are still *reasonably*

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[21] *See* 42 U.S.C. § 4332(2)(C)(i).

[22] 40 C.F.R. §1502.16. Although the Commission is not bound by CEQ regulations that it has not expressly adopted (*see Limerick Ecology Action, Inc. v. NRC*, 869 F.2d at 743), the Commission gives those regulations "substantial deference." *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 72 n.2 (1991).

[23] 40 C.F.R. §1508.8(a).

foreseeable," such as growth-inducing effects.[24] CEQ regulations also caution that the EIS should not be overbroad.[25]

NEPA's "dual purpose" is to ensure that federal officials fully take into account the environmental consequences of a federal action before reaching major decisions, and to inform the public, Congress, and other agencies of those consequences.[26] These purposes inform our determination whether the potential impact of a terrorist attack is the type of information Congress intended for agencies to include in an EIS.

It is well-established that NEPA requires only a discussion of "reasonably foreseeable" impacts.[27] Grappling with this concept, various courts have described it as a "rule of reason,"[28] or "rule of reasonableness,"[29] which excludes "remote and speculative"[30] impacts or "worst

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[24] 40 C.F.R. §1508.8(b) (emphasis added).

[25] Environmental impact statements should be "analytic rather than encyclopedic," and "shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and these regulations." 40 C.F.R. §1502.2(a), (b).

[26] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Baltimore Gas and Elec. Co. v. NRDC, Inc.*, 462 U.S. 87, 97 (1983); *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1291 (1st Cir. 1996). We recognize that in *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981), the Court indicated that the Navy should perform a NEPA review in the given circumstances, and to factor it into its decisionmaking, even if the NEPA results could not be publicized or adjudicated. See 454 U.S. at 143. But here, a formal NEPA review, secret or otherwise, would not add meaningfully to our understanding of the terrorism issue, in light of our ongoing studies and existing requirements and directives.

[27] *See, e.g., Wyoming Outdoor Council, Inc. v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999); *Dubois v. U.S. Dept. of Agric.*, 102 F.3d at 1286; *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

[28] *See Davis v. Latschar*, 202 F.3d 359, 368 (D.C. Cir. 2000); *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1300-01 (D.C. Cir. 1984), *vacated on other grounds*, 760 F.2d 1320 (D.C. Cir. 1985).

[29] *See Limerick Ecology Action*, 869 F.2d at 745; *NRDC v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

[30] *See Limerick Ecology Action*, 869 F.2d at 739; *Trout Unlimited v. Morton*, 509 F.2d

(continued...)

case" scenarios.[31] Courts have excluded impacts with either a low probability of occurrence,[32] or where the link between the agency action and the claimed impact is too attenuated to find the proposed federal action to be the "proximate cause" of that impact.[33] NEPA does not call for "examination of every conceivable aspect of federally licensed projects."[34] Here, the possibility of a terrorist attack on the PFS facility is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.

Two federal court of appeals decisions have addressed the issue of terrorism and NEPA in the area of nuclear regulation. Both decisions upheld, as reasonable, an agency refusal to consider terrorism under NEPA. In *Limerick Ecology Action v. NRC*, the Third Circuit determined that in licensing a nuclear power reactor the NRC could decline to consider the effects of terrorism in an EIS because the intervenors had not shown any way to predict or analyze the risk meaningfully.[35] Similarly, in *City of New York v. U.S. Dept. of Transp.*, the

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[30](...continued)
1276, 1283 (9th Cir. 1974).

[31] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. at 354; *Edwardsen v. U.S. Dept. of the Interior*, 268 F.3d 781, 785 (9th Cir. 2001).

[32] *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d at 1300-01 (NRC's exclusion from EIS of consequences of Class 9 accidents upheld in light of agency's finding that there was an extremely low probability of occurrence).

[33] *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 760, 772-775 (1983). *See also Presidio Golf Club v. National Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998); *No GWEN Alliance of Lane County v. Aldridge*, 855 F.2d 380, 1385-86 (9th Cir. 1988). "At bottom the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient." *Holmes v. SIPC*, 503 U.S. 258, 268 (1992)(internal quotations omitted). The concept confines NEPA to "manageable" inquiries. *Metropolitan Edison*, 460 U.S. at 776.

[34] *Louisiana Energy Serv.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102-03 (1998). *See also Private Fuel Storage, LLC.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC ___, slip op. at 10-11 (2002).

[35] 869 F.2d at 744.

Second Circuit held that, in permitting the transport of nuclear materials, the Department of Transportation need not perform a NEPA analysis of the effects of sabotage -- because agencies had discretion to exclude such high-consequence, low-probability events:

> ... DOT simply concluded that the risks of sabotage were too far afield for consideration. To a large degree this judgment was justified by the record. Substantial evidence indicated that sabotage added nothing to the risk of high-consequence accidents. Even the least sanguine commentators could say only that sabotage added an unascertainable risk. In light of these conflicting points of view, it was within DOT's discretion not to discuss the matter further beyond adopting the NRC security requirements.[36]

In short, the only two directly pertinent court of appeals decisions, *Limerick Ecology Action* and *City of New York*, give us no reason to include terrorism within our NEPA review.[37]

It is sensible to draw a distinction between the likely impacts of the PFS facility and the impacts of a terrorist attack on the facility. Absent such a line, the NEPA process becomes truly bottomless, subject only to the ingenuity of those claiming that the agency must evaluate this or that potential adverse effect, no matter how indirect its connection to agency action. In our view, the causal relationship between approving the PFS facility and a third party deliberately flying a plane into it is too attenuated to require a NEPA review, particularly where the terrorist threat is entirely independent of the facility. Nonetheless, we examine below the broad scope of NEPA law to determine if there is any reason to view terrorism differently today, in the wake of the notorious September 11 attacks on the World Trade Center and the Pentagon.

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[36] 715 F.2d 732, 750 (2nd Cir. 1982), *appeal dismissed and cert. denied*, 465 U.S. 1055 (1984).

[37] *See also No GWEN Alliance of Lane County v. Aldridge*, 855 F.2d at 1385-86 (speculation that a foreign nation might target military radio towers in a nuclear war does not trigger a NEPA duty to study the effects of such an attack).

C. The Risk of a Terrorist Attack Cannot Be Adequately Determined.

The horrors of September 11 notwithstanding, it remains true that the likelihood of a terrorist attack being directed at a particular nuclear facility is not quantifiable. Any attempt at quantification or even qualitative assessment would be highly speculative. In fact, the likelihood of attack cannot be ascertained with confidence by any state-of-the-art methodology. That being the case, we have no means to assess, usefully, the risks of terrorism at the PFS facility. Risk, of course, is generally thought of as "the product of the probability of occurrence [and] the consequences."[38] Here, though, we have no way to calculate the probability portion of the equation, except in such general terms as to be nearly meaningless.

Utah has presented no evidence of a system or technique for assessing accurately the probability of a terrorist attack in general or a September 11-type attack specifically. It argues, however, that qualitative factors could show that a terrorist threat is "reasonably foreseeable." It gives as an example a situation where a terrorist group, with the apparent wherewithal to mount such an attack, makes a specific threat against a facility or class of facilities. Although the probability of such attacks would still not be measurable, the threats would make attacks reasonably foreseeable and thus subject to NEPA, according to Utah. We note that there has been no such threat, however, against the proposed PFS facility.

If we were to speculate on the probability of the scenario in Utah's contention -- a hijacked jumbo jet hitting the PFS facility and causing catastrophic effects -- our guess is that the probability is actually minuscule. For one thing, Congress and the Federal Aviation Administration (FAA) have put in place enhanced anti-hijacking measures at airports and on commercial airplanes (*e.g.*, enhanced passenger and baggage screening, strengthening of

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[38] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 262 (2001).

cockpit doors, the Air Marshall program). Moreover, the United States intelligence community and various law enforcement agencies have increased their efforts to identify potential terrorists and prevent potential attacks before they occur. For instance, the FAA and Department of Defense have acted more than once to protect the airspace above nuclear power plants from what were thought at the time to be credible threats.[39]

In addition, terrorists seeking to cause havoc and destruction would find many targets far more inviting than the proposed PFS facility. That facility would be located in a remote, desert location far from population centers. And it would use NRC-approved strong storage casks, which are designed to minimize the effects of off-normal events and accidents.[40] Given this setting, a terrorist attack seemingly would be quite unlikely to result in a high-consequence release of radioactivity.

Because we have seen no evidence to the contrary, in this proceeding or elsewhere, we conclude that the risk of a terrorist attack on the proposed PFS facility (and other nuclear facilities) is beyond this agency's ability to determine meaningfully. Utah has not proposed other means to evaluate terrorism, besides suggesting that the NRC simply assume, on the basis of the September 11 terrorist attacks, that the PFS facility is at risk. This we decline to do, as it would transform NEPA analysis into a form of guesswork and distort NEPA's cost-benefit calculus. As in *Limerick Ecology Action, Inc. v. NRC*, therefore, the contention here fails to provide "some method or theory by which the NRC could ... enter[] into a meaningful analysis of the risk of sabotage despite its asserted inability to quantify the risks."[41]

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[39] *See PSEG Nuclear LLC* (Salem Nuclear Generating Station, Units 1 and 2, and Hope Creek Generating Station), DD-02-03, 56 NRC ___, ___, slip op. at 16-17 (Nov. 6, 2002).

[40] *See generally* NUREG-1714, "Final Environmental Impact Statement for the PFS Facility," Vol. 1, pp. 4-49 through 4-53 (Dec. 2001).

[41] 869 F.2d at 744.

D. NEPA Does Not Require a "Worst Case" Analysis.

Utah's proposed approach -- that the NRC assume the likelihood of a suicidal air crash into the PFS facility and calculate the consequences -- amounts to a form of "worst case" analysis. While that approach at one time found favor in NEPA case law, today it stands discredited. Both the Supreme Court and CEQ have concluded that NEPA does not call for a "worst case" inquiry, which, it is now recognized, simply creates a distorted picture of a project's impacts and wastes agency resources.[42]

In theory, as the NRC staff brief acknowledges, the NRC could attempt to perform a "worst-case" analysis on the basis of much conjecture and numerous assumptions. But is it useful or legally necessary to do so? For instance, with no meaningful way to determine the probability that terrorists will attack the PFS facility, the most that can be said is that a repeat of the September 11 scenario, this time directed at PFS rather than an office building, is a theoretical possibility. A theoretical possibility, though, is not the same as a "reasonably foreseeable" impact, the usual trigger-point for NEPA reviews. Substituting theoretical possibility for probability analysis amounts to a worst case approach. It exaggerates a project's risks and might unduly alarm the public.

In *Robertson v. Methow Valley Citizens Council*, the Supreme Court held that NEPA's "twin functions -- requiring agencies to take a 'hard look' at the consequences of the proposed action and providing important information to other groups and individuals" -- do not call for an inquiry into worst case possibilities.[43] The Court pointed with approval to CEQ's 1986 abandonment of a regulation that had required EIS's to include worst case analyses.[44] The

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[42] *Robertson v. Methow Valley Citizens Council,* 490 U.S. at 354-355.

[43] *Id.* at 356.

[44] *Id.* at 354-56; *see* 40 C.F.R. §1502.22 (1985) (requiring worst case analysis).

Court stated that CEQ's original rule had led agencies to devote substantial effort to "limitless" analyses -- "that is, one can always conjure up a worse 'worst case' by adding an additional variable to a hypothetical scenario."[45] CEQ's new focus on "reasonably foreseeable impacts," the Court said, "will generate information of greatest concern to the public and of greatest relevance to the agency's decision, rather than distorting the decisionmaking process by overemphasizing highly speculative harms."[46]

Under *Robertson*, an analysis of a hypothetical terrorist attack has no place in the EIS for the PFS facility. NEPA's mandate to federal agencies, as we see it, is to consider a broad range of environmental effects that are reasonably likely to ensue as a result of a major agency action, not to engage in speculation about what might happen as a result of criminal terrorist activities. The PFS EIS discusses a range of likely impacts, including radiological impacts on workers and the public, air quality impacts, impacts on plant life, visual impacts, impacts on wildlife, and socioeconomic and cultural impacts on the local community. While not all these effects can be "measured" or "determined" in a concrete fashion -- for example, the facility's impact on scenic values -- the staff can say with some degree of certainty that the impacts studied will take place.

This is in striking contrast to the impacts of an airborne terrorist attack at the PFS site using a commercial aircraft, an event that could possibly happen but is hardly a natural or expected consequence of licensing the facility. Utah says that we should take guidance from *Sierra Club v. Marsh*, a First Circuit decision concluding that "reasonable foreseeability" under NEPA means that "the impact is sufficiently likely to occur that a person of ordinary prudence

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[45] 490 U.S. at 356 n.17, quoting Proposed Rule, "National Environmental Policy Act Regulations," 50 Fed. Reg. 32,234, 32,236 (CEQ, Aug. 9, 1985).

[46] *See* 490 U.S. at 356.

would take it in to account in reaching a decision."[47] Distinguishing "reasonably foreseeable" effects from those which are "highly speculative," the court asked: "With what confidence can one say that the impacts are likely to occur?"[48] Utah, in turn, asks its own question under the *Sierra Club v. Marsh* formulation, "What person of ordinary prudence would not want to know, before deciding to license a facility that might some day house the nation's entire current inventory of spent nuclear fuel, what the reasonably foreseeable environmental impacts would be of an airborne assault on the facility?"[49]

Utah asks the wrong question. The "reasonably foreseeable" effects of a successful attack with a jumbo jet against the PFS facility are not the same as the "reasonably foreseeable" impacts of simply licensing the facility. Utah's attempt to conflate the probability of the initiating event (terrorism) with its consequences simply skips over the question whether the impacts are "likely to occur," a key element of *Sierra Club v. Marsh*'s "ordinary prudence" test.

With Utah having provided no reason to believe that an airborne terrorist attack on the PFS facility is "likely to occur" -- indeed, Utah asks us simply to *assume* that it will -- we cannot conclude that such an attack is a "reasonably foreseeable" impact of building the proposed ISFSI. To hold otherwise would mean that we would have to consider such attacks foreseeable at any facility under our jurisdiction. And Utah's view of foreseeability does not seem confined to airborne terrorist attacks. On Utah's approach, presumably all other kinds of terrorism, if conceivable, would require NEPA review as well, both in EIS's and at NRC hearings. Such an open-ended approach to NEPA is unworkable because it has no stopping point.[50] As the

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[47] 976 F.2d at 767. *See also Dubois v. U.S. Dept. of Agric.*, 102 F.3d at 1286.

[48] 976 F.2d at 768, *quoting Sierra Club v. Marsh*, 769 F.2d 868, 878 (1st Cir. 1985).

[49] *See* Utah's Brief at 8.

[50] To put the burden of considering threats of terrorism into perspective, it is useful to

(continued...)

Supreme Court noted in *Robertson*, it is always possible to "conjure up" progressively more disastrous scenarios.[51]

The Court's rejection of worst case NEPA reviews in *Robertson* relieves agencies of the arduous and unproductive task of analyzing conceivable, but very speculative, catastrophes. It also enables agencies to use their limited resources more effectively.[52]

E. NEPA's Public Process Is Not a Forum for Sensitive Security Issues.

Although we conclude in the previous discussion that there is no basis on which to provide a reasonable measure of the risk of terrorism and that the risk of terrorism is far afield from issues involving the natural environment of the facility, the Commission is presently engaged in analyzing how to keep such risk at a minimum. Part of this effort is to protect

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[50](...continued)
consider the cumulative burden on the Federal government as a whole that would result from such free-ranging inquiries. Because there are no limits or natural boundaries to the possibility of a terrorist strike, if one were to conclude that NEPA requires an agency to consider such threats, then the environmental reviews for thousands of federal actions throughout the nation would be required to consider terrorism, including those for individual highways, dams, bridges, etc.

This is not to suggest that an environmental review should never consider the threat of terrorism. We address today only whether NEPA *requires* such a study. In fact, the NRC has briefly considered, as a matter of discretion, the issue of terrorism in generic environmental reviews for certain broad categories of activities. *See, e.g.*, Generic Environmental Impact Statement for License Renewal, NUREG-1437, Vol. 1 at § 5.3.3.1, p. 5-18 (May 1996); Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437, Vol. 1, Addendum 1, Appendix 1 at p. A1-17 (Aug. 1999).

[51] *See* 490 U.S. at 356 n.17, quoting Proposed Rule, "National Environmental Policy Act Regulations," 50 Fed. Reg. 32,234, 32,236 (CEQ, Aug. 9, 1985).

[52] *See Kansas Gas and Elec. Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 463 (1999); *General Pub. Util. Nuclear Corp.* (Three Mile Island Nuclear Station, Units 1 and 2; Oyster Creek Nuclear Generating Station), CLI-85-4, 21 NRC 561, 563-64 (1985), quoting *Rockford League of Women Voters v. NRC*, 679 F.2d 1218, 1222 (7th Cir. 1982); *Westinghouse Elec. Corp.* (Exports to the Philippines), CLI-80-14, 11 NRC 631, 649 (1980). *See generally Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (NEPA "must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given ... that the resources of energy and research -- and time -- available to meet the Nation's needs are not infinite").

sensitive information from falling into the hands of those with malevolent intentions. The public aspect of NEPA processes conflicts with the need to protect certain sensitive information. NEPA requires agencies to include the public in NEPA reviews.[54] Indeed, public information and public participation form a large part of NEPA's *raison d'etre*.[55] At the NRC, public input includes not just an opportunity to comment on draft EIS's, but also an opportunity to contest environmental findings at agency hearings on the licensing action in question.

In our view, the public interest would not be served by inquiries at NRC hearings and public meetings into where and how nuclear facilities are vulnerable, how they are protected and secured, and what consequences would ensue if security measures failed at a particular facility. Such NEPA reviews may well have the perverse effect of assisting terrorists seeking effective means to cause a release of radioactivity with potential health and safety consequences.

Years ago, before NEPA's enactment, the Atomic Energy Commission (AEC) considered the question whether it should use its hearing process to assess the risk of "enemy attack or sabotage" against a particular facility (the Turkey Point reactor in Florida).[56] The AEC rejected the idea, holding that "examination into the above matters, apart from their extremely speculative nature, would involve information singularly sensitive from the standpoint of ... our national defense."[57] Such matters, according to the AEC, are "clearly not amenable to board

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[54] *See* 42 U.S.C. § 4332.

[55] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. at 356.

[56] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units No. 3 and 4), 4 AEC 9, 13-14 (Commission 1967), *aff'd sub. nom. Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968).

[57] *Id.* at 14.

consideration and determination."[58] The AEC commented that it "would not propose to make them cognizable issues in the absence of a clear Congressional direction to that end."[59] Congress has enacted no such directive.

NEPA does not override the AEC's (and our) concern for making sure that sensitive security-related information ends up in as few hands as practicable. NEPA itself includes limiting provisions. Section 101(b) of NEPA requires agencies to implement the statute's policies using "all *practicable* means, consistent with *other essential considerations of national policy*."[60] Another passage in the same section provides that the federal government's efforts to "attain the widest range of beneficial uses of the environment" are subject to restraints based on "risk to health and safety, or other undesirable and unintended consequences."[61] These provisions caution against using the NEPA process for a terrorism review. A full-scale NEPA process inevitably would require examination not only of how terrorists could cause maximum damage but also of how they might best be thwarted. But keeping those kinds of information secret is vital. To use NEPA's own terms, confidentiality in this area is an "essential consideration of national policy," protects against "risks to health and safety," and avoids "undesirable and unintended consequences."

For the NRC, protecting safeguards information is not simply a policy choice. It is *required* by law. Section 147 of the AEA provides that the NRC "shall" prohibit unauthorized

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[58] *Id.*

[59] *Id.*

[60] 42 U.S.C. § 4331(b) (emphases added). *See also* NEPA § 101(a), 42 U.S.C. § 4331(a) ("it is the continuing policy of the Federal Government ... to use all *practicable* means and measures.... To create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." (emphasis added)).

[61] 42 U.S.C. § 4331(b)(3).

disclosures of key security-related information. Consequently, the NRC cannot make publicly available the kind of information necessary for a more than superficial NEPA review.[62] This limitation on information availability supports our decision not to use NEPA, in part a public information statute, as our vehicle to analyze terrorism.[63]

We recognize that in *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981) (which did not involve issues of terrorism), the Court indicated that the Navy should perform a NEPA review in the given circumstances, and factor it into its decisionmaking, even if the NEPA results could not be publicized or adjudicated.[64] Such a review would be useful to an agency that otherwise might not consider an issue relevant to licensing. But here, a formal NEPA review, secret or otherwise, would not add meaningfully to our understanding of the terrorism issue, in light of our ongoing studies and existing requirements and directives. And widespread NEPA-terrorism reviews, even if we attempted to keep EIS's and hearings confidential, increase the risk of dangerous security breaches.

As we explained above in detail,[65] our refusal to assess terrorism's risks under the ritualized NEPA process -- EIS's, public comment, adjudicatory hearings -- hardly means that the NRC is ignoring those risks, either at individual facilities or in general. Working closely with the Office of Homeland Security and with other agencies, the NRC after September 11 has shifted substantial resources and personnel to a study of the terrorism threat. We already have

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[62] *See Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1027 (9th Cir. 1988)("[e]veryone recognizes the catastrophic results of the failure of the dam; to detail these results would serve no useful purpose").

[63] *Cf. Public Citizen v. FAA*, 988 F.2d 186 (D.C. Cir. 1993) (FAA's statutory mandate to protect airport security overrides Administrative Procedure Act's notice-and-comment and publication requirements for rulemakings).

[64] 454 U.S. 139, 143 (1981).

[65] *See* Section 1.A., *supra*, entitled "Overview."

upgraded security requirements, with more improvements in the pipeline. Our agency is engaged in intensive research on facility vulnerabilities; it is considering additional or alternate means of protection; and it is looking in particular at the effects of suicidal crashes of large commercial airplanes,[66] the focus of Utah's contention here.

Given our existing efforts, it is not obvious what additional information or insights a formal NEPA review might bring into play.[67] We already are reviewing terrorism from nearly every conceivable angle. We have in place substantial security requirements for our facilities and are studying whether additional action is necessary. Thus, even if terrorism were a matter cognizable under NEPA -- and for the reasons given above we believe it is not -- it would elevate form over substance to insist that we supplement our ongoing comprehensive review with a duplicative or formalistic NEPA study.[68]

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[66] *See PSEG Nuclear LLC* (Salem Nuclear Generating Station, Units 1 and 2, and Hope Creek Generating Station), DD-02-03, 56 NRC ___, ___, slip op. at 18 (Nov. 6, 2002), *review declined*, unpublished letter of NRC Secretary (Dec. 6, 2002):

> ... the NRC, in conjunction with DOE laboratories, is continuing a major research and engineering effort to evaluate the vulnerabilities and potential effects of a large commercial aircraft impacting a nuclear power plant. This effort also includes consideration of possible additional preventive or mitigative measures to further protect public health and safety in the event of a deliberate aircraft crash into a nuclear power plant or spent fuel storage facility. The final results from that analysis are not yet available. If the ongoing research and security review recommends any other security enhancements, the NRC will take the appropriate action.

[67] Although the Commission concludes that NEPA does not call for a formalistic NEPA study on the impacts of terrorism, the FEIS for the PFS project will include the Commission's comprehensive discussion here of the terrorism issue. *See Louisiana Energy Serv.*, CLI-98-3, 47 NRC at 89 ("The adjudicatory record and the Board decision (and, of course, any Commission appellate decisions) become, in effect, part of the FEIS. *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 705-07 [1985].").

[68] *See Friends of the River v. FERC*, 720 F.2d 93, 106-08 (D.C. Cir. 1983).

III. CONCLUSION

For the foregoing reasons, we decline to require a NEPA review of the impact of terrorism at the proposed PFS facility. We therefore *affirm* the Licensing Board decision rejecting Utah's late-filed terrorism contention (Late-Filed Contention Utah RR).

IT IS SO ORDERED.

For the Commission[69]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
this 18th day of December, 2002.

[69] Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-25) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution with copies by electronic mail or facsimile as indicated.

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Docket No. 72-22-ISFSI
COMMISSION MEMORANDUM AND ORDER
(CLI-02-25)

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Docket No. 72-22-ISFSI
COMMISSION MEMORANDUM AND ORDER
(CLI-02-25)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of December 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

October 1, 2002 (9:45AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SERVED October 1, 2002

COMMISSIONERS

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In the Matter of	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage Installation)	)	

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CLI-02-20

MEMORANDUM AND ORDER

On February 22, 2002, the Atomic Safety and Licensing Board in this proceeding issued a decision that set for hearing some aspects of an "environmental justice" contention filed by intervenor Ohngo Gaudadeh Devia (OGD).[1] At the urging of another intervenor, the Skull Valley Band of Goshute Indians, we granted interlocutory Commission review of the Board ruling and a stay of all proceedings related to environmental justice.[2] Our order also invited the United States Bureau of Indian Affairs to submit an *amicus curiae* brief.

The Board ordered an environmental justice hearing to resolve the question whether the individual members of OGD, which includes Band members who oppose the PFS project, might suffer the environmental impacts of the project without enjoying its financial benefits. The Board found that the accuracy of the NRC's Environmental Impact Statement ("EIS") had been

[1] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-08, 55 NRC 171 (2002) (summary disposition ruling on OGD Contention O).

[2] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-08, 55 NRC 222 (2002).

called into question by allegations that funds paid on the PFS lease had been misappropriated, thereby raising a question whether the project's adverse environmental consequences would in fact be offset by economic benefits. The Board directed the litigants to prepare for a hearing on payments made by PFS to date and on the manner in which the Band has handled, spent, and distributed the payments.

Before us, on interlocutory appeal, the Band, PFS, and the NRC staff argue that NRC hearing boards lack legal authority, under the National Environmental Policy Act ("NEPA") or otherwise, to adjudicate claims requiring an inquiry into internal financial and governance matters of a federally recognized sovereign Indian tribe such as the Skull Valley Band. The Bureau of Indian Affairs, in response to our request for an *amicus* brief, also opposes the Board decision. OGD, on the other hand, fully supports it.

Without for a moment discounting the seriousness of OGD's claims of financial impropriety, we do not agree with the Board that such claims fall within NEPA or justify an NRC hearing on the issue. OGD's allegations show, at most, a disparity in the financial benefits that the PFS project may bring to different members of the Skull Valley Band. But OGD's financial allegations do not display a disparity in the project's *environmental* impacts -- the focus of a NEPA-environmental justice inquiry at the NRC.[3] Moreover, OGD's original environmental justice contention, as admitted, contained no hint of its financial claims. It is neither fair nor consistent with our usual practice to allow a last-second infusion of new elements into a previously admitted contention.[4] Finally, even were we inclined to overlook these flaws in OGD's claims, we are not nearly as convinced as the Board that an NRC hearing into a tribal

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[3] *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100-110 (1998).

[4] *See id.* at 104-06. *See also* Statement of Policy on Conduct of Adjudicatory Proceedings, 48 NRC 18, 22 (1998).

Chairman's alleged mishandling of tribal funds could go forward without infringing tribal sovereignty, a concern pressed forcefully in the *amicus curiae* brief of our sister federal agency, the Bureau of Indian Affairs.

The Board was well aware that OGD's environmental justice claims might require excessive NRC probing into internal tribal affairs. It attempted conscientiously to avoid the problem by postponing definitive decisions until further facts emerged at a hearing.[5] But, as we see the environmental justice issue, no hearing should take place. Claims of financial and political corruption inside the Skull Valley tribe do not belong in our hearing process under the rubric of environmental justice or NEPA. Our mission is to protect the public health and safety and the environment. We lack the expertise, the resources, and the statutory mandate to get to the bottom of tribal corruption charges. Other government bodies, including the Federal Bureau of Investigation and the Bureau of Indian Affairs, are far better positioned to consider OGD's complaint.

I. Background

OGD is a group of individuals, some of whom are Skull Valley Band members and some of whom are not, some of whom live on the Skull Valley reservation and some of whom do not, all of whom are opposed to the PFS project.

In the Board's original ruling on intervenors' proposed contentions it rejected all of OGD's proposed contentions except OGD O, which relates to environmental justice.[6] That contention claimed that the license application "poses undue risk to public health and safety because it fails to address environmental justice issues." "It is not just and fair," the contention stated, "that this community be made to suffer more environmental degradation at the hands of

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[5] *See* LBP-02-8, 55 NRC at 184-85.

[6] *See Private Fuel Storage*, LBP-98-7, 47 NRC 142, 233 (1998).

the NRC."[7] OGD's contention pointed to "a ring of environmentally harmful companies and facilities" that surround the site of the proposed PFS facility, including the Dugway Proving Ground, the Deseret Chemical Depot, the Envirocare mixed waste storage facility, the APTUS Hazardous Waste Incinerator, and the Grassy Mountain Hazardous Waste Landfill.[8] The Board admitted OGD's environmental justice contention, "with the caveat that the contention is limited to . . . disparate impact matters," including cumulative impacts from the nearby facilities and effects on property values.[9]

PFS moved for summary disposition on OGD's environmental justice contention. In opposing PFS's motion, OGD filed a lengthy affidavit by a member, Sammy Blackbear, that made a number of allegations against tribal Chairman Leon Bear. Among other things, Blackbear claimed that Chairman Bear had misappropriated funds paid by PFS under the lease it entered into with the Band in 1997.[10] Blackbear alleged that Chairman Bear had used these funds both for personal gain and to bribe other tribe members to support his administration. Blackbear also stated that tribe members who opposed the PFS project or Chairman Bear's chairmanship of the tribe were wrongfully denied any share in the proceeds of the lease.[11]

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] The lease provided for the immediate payment of certain fees to keep the lease option open until construction can begin. Because the land is held in trust by the United States for the Band, the Secretary of the Interior, through the Bureau of Indian Affairs, must approve the lease. *See* 25 U.S.C. § 415(a). The BIA gave conditional approval in May 1997. It conditioned final approval on a finding that the lease is in the Band's best interest. *See* Brief of *Amicus Curiae* Bureau of Indian Affairs in the Commission's Interlocutory Review of the Licensing Board's Decision in LBP-02-08 Concerning Contention OGD O (Environmental Justice), at 3 (Apr. 15, 2002).

[11] The Skull Valley Band has not refuted the allegation that some members have received distributions of the PFS lease payments while others have not, arguing instead that this allegation is irrelevant. For the purposes of this order, we will assume the truth of the facts

The Board granted the motion for summary disposition in part and denied it in part.[12] It found that there was no remaining issue of fact as to cumulative impacts from the surrounding facilities or effects on property values.[13] The Board found, however, that the claim that the PFS proceeds had not been used to benefit all members of the tribe raised a litigable question whether there was a minority "subgroup" of the tribe that would suffer a disproportionate environmental impact from the project.[14]

The Board reasoned that because of "unchallenged" environmental effects —operational noise, visual impact, and interference with the Goshutes' traditional lifestyle (a "cultural insult") -- OGD's claim that some Goshutes are not enjoying the financial benefits of the lease constitutes a claim of disproportionate environmental burden "from a NEPA balancing standpoint."[15] According to the Board, OGD's claim of cumulative environmental impacts and impacts on property values were not substantiated and could not proceed to hearing, "[b]ut the same cannot be said" for the claimed disproportionate impact on OGD's members from the uneven sharing of the project's lease income.[16] This issue, the Board ruled, "can be resolved only at a hearing."[17]

To resolve the lease income issue, the Board ordered PFS and the Skull Valley Band to produce records showing how much money had been paid under the lease and how it had been

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alleged by the party opposing summary disposition -- *i.e.*, OGD. *See Advanced Medical Systems, Inc.*, CLI-93-22, 38 NRC 98, 102 (1993).

[12] *See* LBP-02-08, 55 NRC at 203.

[13] *See Id.* at 193-97.

[14] *See Id.* at 189-91.

[15] *Id.* at 197.

[16] *Id.* 193.

[17] *Id.* at 198.

distributed.[18] The Board also suggested that the NRC staff or the Skull Valley Band might provide evidence from a representative of the Bureau of Indian Affairs "detailing his response to the relevant allegations in the Blackbear affidavit and setting out his understanding of the BIA's authority and responsibility to bring about change in the situation."[19] Finally, the Board strongly urged the possibility of settlement.[20]

In directing a hearing on OGD's environmental justice claim, the Board rejected two threshold arguments: (1) that OGD's financial misconduct claim, if litigated, would interfere in internal tribal governance; and (2) that OGD's financial claim fell outside the scope of its original environmental justice contention.[21] On tribal governance, the Board found the doctrine against outside scrutiny "not absolute," but dependent upon a "fact-driven" inquiry into whether this particular case represents a "special situation" allowing an NRC environmental justice review, notwithstanding the usual policy against "interfering in intratribal disputes."[22] As for the argument that OGD's environmental justice contention, as originally framed, did not cover financial misconduct, the Board said that the "argument has something to commend it, but not enough."[23] The Board noted that the original contention had complained of "negative . . . sociological impacts," that "later developments" concerning uneven distribution of the lease

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[18] *See id.* at 199-200.

[19] *Id.*

[20] *See id.* at 201-03.

[21] *See id.* at 184-89.

[22] *See id.* at 184-85.

[23] *Id.* at 186.

income shed "new light" on the contention, and that claims made in discovery gave other parties in the case sufficient advance notice of OGD's concerns.[24]

Subsequently, the Commission granted interlocutory appellate review of the Board decision on the environmental justice contention, and stayed all hearing activity on the contention pending the Commission's decision.[25]

II. Discussion

In 1994, President Clinton issued Executive Order 12898, which instructed federal agencies to consider "environmental justice" in their decisions -- that is, whether a proposed government action will have a disproportionately high and adverse environmental impact on minorities and low-income populations.[26] In 1998, we analyzed the executive order, and its meaning for the NRC, in *Claiborne Enrichment Center*.[27] We pointed out that "the executive order, by its own terms, established no new rights or remedies," but was intended "merely to *underscore* certain provision[s] of *existing* law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment."[28] At the NRC, we said, the "only 'existing law' conceivably pertinent . . . is NEPA, a statute that centers on environmental impacts."[29] At the outset of the current proceeding we reminded all parties of our *Claiborne Enrichment Services* guidance.[30]

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[24] *See id.* at 186-89.

[25] *See* CLI-02-8, 55 NRC at 226.

[26] 59 Fed. Reg. 7629 (Feb. 11, 1994).

[27] CLI-98-3, 47 NRC at 100-02.

[28] *Id.* at 102 (emphasis in original).

[29] *Id.*, *quoting* Memorandum for the Heads of All Departments and Agencies, 30 Weekly Comp. Pres. Doc. 279 (Feb. 14, 1994).

[30] *See* CLI-98-13, 48 NRC 26, 35-36 (1998).

With this background in mind, we turn now to how NEPA and the executive order on environmental justice affect this case. Several considerations, separately and together, persuade us to set aside the Board order requiring a hearing on OGD's "environmental justice" claim of financial mismanagement or chicanery.

A. There Is No Disproportionate Environmental Impact.

Environmental harm is NEPA's "core interest."[31] The essence of an environmental justice claim, in NRC practice, is disparate environmental harm.[32] The executive order on environmental justice, on which the Board bases its decision, calls on agencies to determine whether a proposed action would have "disproportionately high and adverse *human health or environmental* effects."[33]

Here, though, OGD and the Board have focused on disparate economic benefits, not on disparate environmental effects. The Board's reasoning starts to go awry when it conflates economic benefits and environmental effects. In actuality OGD makes no claim that its members will suffer a disproportionate environmental injury when compared to other members of the tribe, and there is no evidence that they will. The Board acknowledged that the environmental impacts are the same for all living on the reservation:

> *The disparity comes about, then, not in the direct environmental burden, but from the net impact as measured by the NEPA-sanctioned balance of environmental burdens and economic benefits* – some obtain an economic benefit from the project to offset its environmental burdens, while others do not, experiencing only the burdens. *We hold that this type of net disparity can be as much a matter for environmental justice review under NEPA – a statute which sets up a process in which the classic burden/benefit balance has always been central – as is the more usual disparate environmental burden viewed alone.*[34]

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[31] *Claiborne Enrichment Center*, CLI-98-3, 47 NRC at 102.

[32] *See id.* at 106-110.

[33] *See* LBP-02-8, 55 NRC at 181, quoting E.O. 12898, § 1-101 (emphasis added).

[34] *Id.* at 192 (emphasis in original).

In our view, the executive order, and NEPA generally, do not call for an investigation into disparate economic benefits as a matter of environmental justice. Even though money (or social services) from the PFS lease payments might make it easier for some to tolerate noise, cultural insult, and unsightliness near the facility, the payments don't "mitigate" environmental harms in the sense of eliminating or minimizing them.[35] We see nothing in the executive order or in NEPA to suggest that a failure to receive an economic benefit should be considered tantamount to a disproportionate environmental impact.

Notably, the executive order asks agencies to consider environmental justice implications only when disparate environmental effects are "high and adverse."[36] Here, the EIS found the overall environmental impacts on reservation residents small or "small to moderate,"[37] a finding not now in dispute before the Board. There is no reason, therefore, to conclude that persons who fail to receive their desired share of the PFS lease money are suffering a "high and adverse" environmental impact. Such persons may well have a grievance against their tribal leadership, but that grievance cannot fairly be considered "environmental." None of this is to say that under NEPA our staff and hearing boards do not consider socioeconomic costs and benefits at all. They do, "to a limited extent."[38] But NEPA has limits. The desirability of a

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[35] It is also noteworthy that we are not even focused on the applicant's direct payments related to this project, but rather on a secondary distribution of those payments. It would raise some troubling questions indeed if NEPA or Environmental Justice were to be seen as requiring a potentially endless trek following the flow of contract payments from major construction projects.

[36] E.O. 12898, § 1-101.

[37] The EIS considered all the adverse impacts that the Board found significant -- noise, visual impact, and cultural insult -- and concluded that none of these would have a disproportionately high impact on the Skull Valley Band, or other low income or minority populations residing near the reservation. *See* EIS, pp. 6-21 - 6-33.

[38] *Claiborne Enrichment Center*, CLI-98-3, 47 NRC at 89.

"broad and informal balancing" of costs and benefits[39] does not call for an investigation into perceived financial misdeeds going well beyond the natural or anticipated environmental effects of a proposed project.[40]

In *Claiborne Enrichment Center,* we held that the executive order on environmental justice does not transform NEPA into a general "civil rights law," and thus we declined to authorize a NEPA hearing on claims of intentional race discrimination.[41] Similarly, we decline today to use NEPA as authority for (in effect) a corruption investigation, a major undertaking "far afield from the NRC's experience and expertise."[42] What we said in *Claiborne Enrichment Center* pertains here as well: "Were NEPA construed broadly to require a full examination of every conceivable aspect of federally licensed projects, 'available resources may be spread so thin that agencies [would be] unable adequately to pursue protection of the physical environment and natural resources.'"[43]

B. The Board's Order Improperly Looks at a "Subgroup" of a Minority Population.

Even if an uneven distribution of financial benefits could be viewed as some form of environmental harm, we would not uphold the Board decision to begin a NEPA inquiry into the

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[39] *See id.*

[40] We add, however, a point of clarification on the Licensing Board's role in this case. The Board commented that because PFS has "no right to use [tribal lands for its own purpose . . . the *only* justification for imposing . . . adverse impact on an impoverished population is the offsetting benefits that will accrue to the Band's members from payment for use of tribal lands." *See* LBP-02-08, 55 NRC at 192 (emphasis added). In balancing costs and benefits under NEPA the Board should also consider the other benefits of the project, such as (for example) the benefit of allowing shutdown reactors to be decommissioned sooner and any tax revenues accruing to the state and local governments. *See* EIS, Sec. 8.2, pp 8-11 - 8-12.

[41] *See id.* at 106.

[42] *Id.* at 103.

[43] *Id.* at 102-03, quoting *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 776 (1983).

matter because it depends upon splitting the pertinent environmental justice population, the Skull Valley Band, into competing "subgroups."[44] The dispute between OGD and others in the Band is not ours to ameliorate or mediate, certainly not under NEPA.

The Board sought to apply environmental justice on the theory that losing out on the PFS lease payments makes OGD a "low-income" subgroup of the larger tribal community. But this approach potentially would create an artificial "environmental justice" concern at virtually all proposed federal projects, for almost any project yields more benefits for some than others. For example, when a project brings jobs to the community, those persons who are hired benefit disproportionately over those who are not. But this does not mean that those not obtaining jobs have a legitimate "environmental justice" complaint. If they did, agencies' NEPA reviews would be endless, because the potential universe of aggrieved individuals and groups is, as the NRC staff's brief stated, "virtually infinite, limited only by one's imagination."[45]

Environmental justice, as applied at the NRC, does not take us down that road. Instead, it means that the agency will make an effort under NEPA to become aware of the demographic and economic circumstances of local communities where nuclear facilities are to be sited, and take care to mitigate or avoid special impacts attributable to the special character of the community.[46] Thus, an NRC EIS looks at the pertinent minority community in general, not at vaguely defined, shifting "subgroups" within that community. Otherwise, "environmental justice" becomes simply a device for ventilating intramural disputes within communities -- which is not a function Congress has assigned to the NRC and is not a function in which we have skill or expertise.

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[44] *See* LBP-02-8, 55 NRC at 189-91.

[45] NRC Staff's Brief on Appeal (Apr. 5, 2002), at 20-21.

[46] *See Claiborne Enrichment Center*, CLI-98-3, 47 NRC at 106.

The Board in this case recognized that the Skull Valley Band as a whole "has welcomed the project," is benefitting from it, and is not complaining of environmental injustice.[47] The Board proposed to "reframe" the environmental justice inquiry, so that instead of looking at the tribe as a whole to determine if its members would suffer a disproportionate impact vis à vis the larger population of Utah or the nation, the Board would consider the OGD members[48] vis à vis the rest of their own tribe:

> As reframed, our inquiry now focuses, at OGD's urging, on a subgroup of the larger community, a smaller but distinct and well-defined population: those who are suffering a *disparate burden, bearing the adverse environmental consequences of the PFS project while remaining impoverished as others have their situation improve.*[49]

But we see no basis for launching an "environmental justice" inquiry into whether some members of a minority community are impoverished when compared to others in the same community or (as is alleged in this case) whether one tribal subgroup is siphoning money or benefits from another. President Clinton's executive order asked agencies to consider whether a disadvantaged community is suffering from disproportionate harmful environmental effects, such as when a number of pollution-emitting neighboring facilities have a cumulative adverse effect on a predominantly poor or minority neighborhood. Nothing in the executive order or in NEPA suggests that agencies also must investigate which subgroups within a minority community may obtain special benefits as compared to others.

Our agency's environmental decision-making under NEPA does not require us to intervene in what is, at bottom, a political dispute inside the Skull Valley Band. It is apparent

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[47] LBP-02-08, 55 NRC at 189.

[48] OGD's members include persons who do not reside on the reservation. Obviously, only those members who do reside there are the subject of the environmental justice analysis because only they are subjected to the anticipated environmental harms. For purposes of this discussion, we will use "OGD" as shorthand for those members on the reservation.

[49] LBP-02-08, 55 NRC at 189-90 (emphasis in original).

from OGD's allegations that OGD represents a political faction opposed to the current tribal leadership. OGD's charges of corruption may prove salient -- but for criminal investigators, for civil lawsuits, or for voters in future tribal elections, not for NEPA reviewers. Our NEPA record already contains ample information on the likely effects and the local and national benefits of the PFS facility, including the infusion of financial resources into the local community. To complete our NEPA review, we do not need to know precisely how those resources are shared.[50]

C. Disparate Financial Benefit Is Outside the Scope of Admitted Contentions.

A further reason for denying a hearing on the environmental justice issue is that the factual dispute over where the lease income is going lies outside the scope of the admitted contentions.

The NRC's "longstanding practice requires adjudicatory boards to adhere to the terms of admitted contentions" in order to give opposing parties "advance notice of claims and a reasonable opportunity to rebut them."[51] OGD's environmental justice contention ("OGD O"), as admitted, alleged that the environmental impacts of the proposed ISFSI would have a cumulative adverse effect on tribe members and would adversely affect property values, and

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[50] The benefits discussion in the EIS does not state that everyone in the community will benefit equally, or even that everyone will benefit to any degree. The EIS speaks in terms of increased revenues and enhanced job opportunities for the "Skull Valley Band." *See, e.g.*, EIS, pp. 4-39, 6-32, 8-11.

The Board interpreted our *Claiborne Enrichment Center* decision as a precedent for dividing environmental justice populations into subgroups. *See* LBP-02-8, 55 NRC at 190. But in *Claiborne Enrichment Center*, we approved a Board decision requiring the NRC staff to consider whether a proposed road relocation would affect pedestrians in an impoverished and minority community where "many residents of the two impoverished communities have no choice but to travel by foot." CLI-98-3, 47 NRC at 107. We did not call for breaking up the community into "subgroups" of car-drivers and pedestrians. There was no controversy between motorists and pedestrians in *Claiborne Enrichment Center* remotely comparable to the financial dispute between rival tribal factions here.

[51] *Claiborne Enrichment Center*, 47 NRC at 105.

that the license application failed to mitigate these impacts.[52] OGD first raised the issue of uneven or corrupt distribution of lease payments when it submitted Sammy Blackbear's declaration in response to PFS's motion for summary disposition -- three years after OGD had filed its original environmental justice contention.

As the litigation went forward, OGD made no effort to amend its contention to add its financial grievance or to introduce the claim that a "subgroup" of the tribe would suffer disparate environmental harm. PFS and the other parties apparently had no reason to know about OGD's new, finance-driven, version of its environmental justice contention. Indeed, PFS's motion for summary disposition did not even address the subject. As the Board acknowledged, this meant "that in most respects we have before us only one side of the story about the matters presented so forcefully in [the Blackbear] declaration."[53]

Our rules of procedure require that contentions include a "specific statement of the issue of law or fact to be raised or controverted."[54] Here, however, the admitted contention included neither the law nor the facts that the Board later set for hearing. As admitted, OGD O did not give fair notice that the parties must litigate the alleged misappropriation of PFS lease money; or that they must address the theory that disparate payments created a "subgroup" of the Skull Valley Band; or that they must produce accountings as evidence at the hearing. The issue set for hearing in the Board's February order nonetheless dealt entirely with those matters; *i.e.*, the new environmental justice theory introduced by the Blackbear declaration. The Board even

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[52] *See* OGD Contentions at 27-36, *see also* LBP-98-7, 47 NRC at 233.

[53] LBP-02-8, 55 NRC at 181.

[54] 10 C.F.R. § 2.714(b)(2).

instructed the parties to develop and produce new evidence for the hearing -- accountings of money PFS paid and how the tribe handled that money.[55]

In *Claiborne Enrichment Center* we rejected an untimely attempt to insert a claim of intentional race discrimination into a previously admitted environmental justice contention. So too, here, it would be unfair, and violative of our rules of procedure, to require the parties to go to hearing on a legal theory that departs dramatically from the admitted environmental justice contention.

D. NEPA Responsibilities Do Not Justify An NRC Inquiry Into Tribal Affairs.

All parties appear to share the common ground that, as a general rule, federal agencies and adjudicators lack power to oversee sovereign Indian tribal matters. OGD, though, says that the normal government reluctance to interfere with tribes does not apply here because, by intervening in our proceeding in support of the PFS project, the Skull Valley Band, in effect, has consented to an NRC inquiry into tribal financial affairs. OGD also maintains that a NEPA cost-benefit analysis requires the NRC to consider how the Band is handling the PFS lease income. PFS and the NRC staff, on the other hand, insist that in this case, as in most situations, federal Indian law prevents outside review of tribal financial affairs. The Band itself and the Bureau of Indian Affairs (in its *amicus curiae* brief) take the same position. So do we.

As we already have explained at length earlier in this opinion, OGD's grievance -- that the Skull Valley Band's leadership is allegedly misappropriating income from the PFS lease -- is not properly a NEPA claim at all. In *Metropolitan Edison Co. v. People Against Nuclear Energy*, the Supreme Court ruled that NEPA comes into play only when there is a "close[] relationship between the change in the physical environment and the 'effect' at issue."[56] Alleged mishandling

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[55] LBP-02-8, 55 NRC at 199-200.

[56] 460 U.S. at 774.

of lease proceeds does not fall in this category. NEPA simply is not the vehicle, and NRC not the forum, to resolve the question whether the leadership of an Indian tribe is dealing unfairly with its members.

The question whether the leadership of an Indian tribe is dealing unfairly with its members relates fundamentally to tribal governance. The specter of quasi-judicial oversight by a federal agency, including the presentation of evidence and cross-examination on tribal financial decisions, undermines well-established principles governing the interaction of the federal government with Indian tribes. The first of these principles is that unless Congress has specifically acted to abrogate a tribe's sovereign immunity, a wholly intra-tribal dispute must be resolved within the tribe.[57] The Board thus lacks jurisdiction to provide declaratory or injunctive-type relief to OGD on its complaint that the tribal leadership is mishandling PFS lease payments.

OGD's argument that the Band has waived its sovereign immunity by intervening in the NRC licensing proceeding is unpersuasive. The Band is not applying for an NRC license, but has simply intervened in an existing proceeding to protect tribal interests. At the time of the Band's intervention, there was not the slightest suggestion that OGD or the Board planned to examine tribal financial records and governance. Waivers of sovereign immunity, in Indian cases and elsewhere, are not lightly implied or presumed.[58]

It is the policy of the federal government to promote self-determination by Indian tribes.[59] This means that the Skull Valley Band is entitled to decide what is best for it as a whole, without

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[57] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (subjecting wholly intra-tribal dispute to a non-tribal forum would infringe on the Indians' right to govern themselves).

[58] *See id.* at 58.

[59] *See* Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* *See also* Executive Order 13175, Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000), 65 Fed. Reg. 67249, Sec. 2 (c) ("The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination").

second-guessing by the Board. The Band evidently determined that the lease was in its best interest when it entered into it. The Board cannot attempt to protect the interests of a disaffected "subgroup" of the Band, namely, OGD's members, for that would place the Board, uncomfortably and unlawfully, right in the middle of an internal tribal dispute.[60] Subject to criminal and tribal law, the Band ultimately gets to decide how to handle its own revenues, even if its distribution scheme appears unfair to outside observers.

The allegations contained in the Blackbear affidavit understandably caught the Board's attention. But they are not matters for NRC licensing hearings. Tribal dissidents, including Blackbear, have filed administrative appeals with the Bureau of Indian Affairs and also have sued in federal district court to challenge the BIA's approval of the lease.[61] In addition, claims that funds have been misappropriated have apparently been referred to the Federal Bureau of Investigation.[62]

In short, other, more appropriate, avenues of redress remain open to OGD in its dispute with the Band's leadership. Our hands-off position is buttressed by the federal agency with the most expertise in this area, the Bureau of Indian Affairs, which has filed an *amicus* brief insisting that the NRC stay out of the Goshutes' intra-tribal dispute.

III. Conclusion

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[60] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 and cases cited therein; *cf. Wheeler v. United States Dept. of the Interior*, 811 F.2d 549 (10th Cir. 1987) (Department of Interior had no jurisdiction to hear appeal of election challenge by unsuccessful candidate for tribal office, which must be determined internally).

[61] *See, e.g., U.S. ex rel. Blackbear v. Babbit*, 2:99CV156K (D. Utah); *Blackbear v. Norton*, No. 2:01CV00318C (D. Utah).

[62] *See* Fahys, "Feds Demand Goshutes Open Financial Books on N-Waste Deal," *Salt Lake City Tribune* (March 14, 2002).

For the foregoing reasons, the Board's partial denial of summary disposition on OGD's environmental justice contention, OGD O, is *reversed*, and the Board is *directed* to grant summary disposition for PFS on OGD O.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 1st day of October, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-20) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution with copies by electronic mail or facsimile as indicated.

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Docket No. 72-22-ISFSI
COMMISSION MEMORANDUM AND ORDER
(CLI-02-20)

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Docket No. 72-22-ISFSI
COMMISSION MEMORANDUM AND ORDER
(CLI-02-20)

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Dated at Rockville, Maryland,
this 1st day of October 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 03/07/02

SERVED 03/07/02

COMMISSIONERS

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Greta Joy Dicus
Nils J. Diaz
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In the Matter of	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage Installation)	)	

CLI-02-08

MEMORANDUM AND ORDER

On February 22, 2002, the Atomic Safety and Licensing Board issued a lengthy decision that set for hearing some aspects of an "environmental justice" contention filed by intervenor Ohngo Gaudadeh Devia (OGD).[1] Another intervenor, the Skull Valley Band of Goshute Indians, now has sought interlocutory Commission review of the Board ruling, and seeks a stay of Board proceedings on environmental justice pending that review. The NRC staff, too, has filed a motion for a stay of Board proceedings. We grant review, set the matter for full briefing, and stay all Board proceedings on environmental justice, including the hearing itself and all upcoming filing deadlines related to it.

In the ruling challenged by the Skull Valley Band and the NRC staff, the Board found a hearing necessary to resolve the question whether OGD, which includes Band members who oppose the PFS project, might suffer the environmental impacts of the project without enjoying

[1] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-08, 55 NRC __ (Feb. 22, 2002) (summary disposition ruling on OGD Contention O).

its financial benefits. Among other things, the Board directed the litigants to be ready for hearing on the payments made by PFS to date and on the manner in which the Band has handled, spent, and distributed the payments. Under the Board ruling, the hearing itself would likely take place sometime during the week of April 22, 2002, and pre-filed testimony and evidence would be due a month earlier, on March 22.

Both the Band and the NRC staff raise the serious question whether an NRC hearing board lawfully may inquire into the internal financial and governance matters of a federally recognized sovereign Indian tribe such as the Skull Valley Band.[2] The NRC staff also represents that "Counsel for the U.S. Bureau of Indian Affairs has expressed serious concerns regarding the Board's decision and its potential impact on BIA, and has expressed interest in the Commission's undertaking immediate review of the Board's decision."[3]

In these circumstances, the Commission has decided to review the environmental justice ruling. We do not ordinarily undertake interlocutory review of Board orders.[4] Our regulations provide an exception to this general rule where delaying review could cause "immediate and irreparable impact" on the party requesting review.[5] We find that the Board decision creates an exceptional situation that warrants immediate Commission attention under this standard. If we defer review until the end of the case, as is our usual practice, the hearing

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[2] The Band, for example, points to a Supreme Court case that seemingly counsels against federal interference in "intratribal disputes." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

[3] NRC Staff's Request for a Stay Pending the Commission's Consideration of Any Requests for Interlocutory Review of the Licensing Board's Decision in LBP-02-08 Concerning Contention OGD O (Environmental Justice) (March 4, 2002), at 2 n.3 (electronic version).

[4] *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5-7 (2001); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-3, 52 NRC 23, 28-29 (2000).

[5] 10 C.F.R. § 2.786(g)(1). *See also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184-85 (1995).

itself and various evidentiary submissions required by the Board, not to mention the Board's actual review, would go forward unimpeded and prior to any Commission consideration of the tribal sovereignty issues the Band and the NRC staff raise. In other words, the allegedly unlawful Board interference in tribal affairs would take place before the Commission has an opportunity to take corrective action (if necessary). As a practical matter, review of the Licensing Board's ruling after a hearing on the internal tribal matters would provide no relief from the type of harm that conceivably could be suffered as a result of such an inquiry.[6] Because the possibility of such irreparable harm is obvious, it would be wasteful of time and effort, in our view, to await further petitions for review and responses before obtaining full briefs from the parties.

To allow meaningful Commission review, we also stay all Board proceedings and filings related to OGD's environmental justice contention. For the reasons suggested above, the Board decision raises serious merits questions going to its authority to act and also threatens the Band with irreparable injury. And no one will suffer significant harm from staying Board proceedings. Should the Commission, after review, affirm the Board decision or otherwise conclude that there must be a hearing on environmental justice, the Commission will direct the Board to reset its filing and hearing schedule, with due regard for fairness to all parties. It is reasonable and in the public interest for the Commission to proceed with caution in the sensitive area of relations between Indian tribes and the federal government. In short, prudent case management and the balance of equities favor staying Board proceedings pending Commission review of the environmental justice issue.[7]

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[6] *See Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 421 (1993).

[7] *Cf.* 10 C.F.R. § 2.788 (setting out 4-part test for stays pending appeal). While time considerations have precluded an extensive Commission merits review at this point in the proceeding, and we therefore have not assessed whether various arguments are "likely to prevail," to use the terms of section 2.788, we are satisfied that the Board decision raises

We are aware that all parties are preparing for upcoming hearings in Utah. We have set the following briefing schedule in the expectation that it will provide enough time for diligent parties both to participate effectively in the hearings and to file useful Commission briefs on OGD's environmental justice contention:

1. All parties seeking reversal of LBP-02-08 shall file opening briefs on or before April 3, 2002. Opening briefs shall not exceed 35 pages.

2. All parties seeking affirmance of LBP-02-08 shall file answering briefs on or before April 30, 2002. Answering briefs shall not exceed 35 pages.

3. Parties seeking reversal may reply to the answering briefs on or before May 10, 2002. Reply briefs shall not exceed 10 pages.

4. We invite the Bureau of Indian Affairs to file an *amicus curiae* brief in this case no later than April 15, 2002. The Secretary is directed to serve a copy of this Memorandum and Order on the Bureau immediately.

The parties shall submit briefs electronically (or by other means to ensure that receipt by the Secretary of Commission by the due date), with paper copies to follow. Briefs in excess of 10 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.

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serious legal questions, a threshold sufficient in the unusual current setting to allow a stay of proceedings to prevent possible irreparable injury.

CONCLUSION

For the foregoing reasons, the Commission grants review of LBP-02-08, establishes the briefing schedule set out above, and stays all Licensing Board proceedings on OGD's environmental justice contention (OGD Contention O). All other Licensing Board proceedings should move forward on their current schedule.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
This 7th day of March, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-08) have been served upon the following persons by deposit in the U.S. mail, first class, as indicated by an asterisk (*) or through the Nuclear Regulatory Commission's internal distribution as indicated by double asterisks (**), with copies by electronic mail or facsimile.

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Docket No. 72-22-ISFSI
COMMISSION MEMORANDUM AND ORDER
(CLI-02-08)

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Docket No. 72-22-ISFSI
COMMISSION MEMORANDUM AND ORDER
(CLI-02-08)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of March 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael C. Farrar, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

LBP-02-08

DOCKETED
USNRC

February 22, 2002 (11:32AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

SERVED FEB 22 2002

MEMORANDUM AND ORDER
(Ruling on Applicant's Motion for Summary Disposition of "Contention OGD O" -- Environmental Justice)

Introduction and Summary. Presented with serious disputes among members of the Skull Valley Band of the Goshute Indians over this proposed NRC licensing action and over certain landlease income, we are called upon here to apply two important federal doctrines that, at first glance, threaten to conflict with each other. On the one hand, the United States Supreme Court has long made it clear that matters of Tribal governance are largely beyond inquiry by federal (and State) instrumentalities, which must defer to a Tribal government's creation of its own substantive laws to assist in Tribal governance and its enforcement of those laws in Tribal forums. On the other hand, an Executive Order issued by President Clinton in 1994, and endorsed by the Nuclear Regulatory Commission, reminds each federal agency to ensure that its actions -- including awarding licenses for private projects -- are consistent with norms of "environmental justice" that protect disadvantaged populations.

This matter had its genesis when the Skull Valley Band, acting through its identified leadership, entered into a business arrangement to lease its Reservation lands, located within

the borders of the State of Utah, to a consortium of electric utility companies called Private Fuel *Storage*, LLC (PFS, or the Applicant). That organization has applied for an NRC license to construct and operate a facility that -- in a manner emanating from earlier federal policy -- would provide for the temporary above-ground storage on the Skull Valley Reservation of spent fuel from nuclear reactors.

That project could eventually result in the presence on the Reservation of 4,000 concrete-encased casks, each nearly 20 feet high and 11 feet in diameter. The Skull Valley Band, having invited the lease arrangement, intervened in this licensing proceeding to support the project, known formally as an "independent spent fuel storage installation" (ISFSI). On the other hand, a group known as Ohngo Gaudedah Devia (OGD), comprised primarily of Band members opposed to usage of the Tribal Reservation for that purpose, intervened to oppose that endeavor on a number of counts, only one of which remains pending.[1]

That OGD challenge to the proposed federal license, denominated "Contention OGD O," raises environmental justice issues, pointing to the provisions of the Executive Order previously mentioned and the National Environmental Policy Act (NEPA). As OGD sees it, the proposed project is inconsistent with the Band's cultural heritage and the sacredness of its Reservation lands and, for those reasons and others involving more tangible sociological matters, thereby imposes environmental injustice upon OGD members in a manner not permitted by NEPA.

While our proceeding has been running its course, a controversy has been building among the various Band members on both sides, and their allies, concerning the legitimacy of the Tribal leadership and the control of Tribal finances. In that regard, and crucial to our

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[1] The State of Utah, the principal opponent of the PFS proposal, also intervened here to present various challenges to the project. For a recent rundown of the overall history and status of the proceeding, see LBP-01-39, 54 NRC ___ (Dec. 26, 2001). At this juncture, OGD's environmental justice contention is the only one, of those that might be the subject of the hearing beginning in April, that has a dispositive motion still pending. Compare id. at ___ (slip op. at 37), note 36.

decision today, allegations have been made that members opposing the project are being deprived, by the Tribal leadership overseeing the business arrangement, of any share in the lease payments coming to the Band from PFS. An OGD leader has filed an affidavit with us expressing his view of the facts related to those allegations.

Our current involvement was triggered when the Applicant asked us, under our rules of practice, to reject OGD's environmental justice claim summarily, as legally and factually deficient. Insofar as the crucial issue is concerned, the Applicant -- essentially seeing this part of the controversy as involving an aspect of Tribal governance -- requests that we therefore defer to, and base our action on, the formal position taken by the Tribal leadership in favor of the project, rather than set the matter for hearing.

The NRC Staff -- whose role in the system is to review the PFS application from an internal regulatory standpoint before it comes to us to adjudicate any outside challenges[2] -- supports the PFS motion for summary disposition. The motion has the Skull Valley Band's tacit approval. Of course, OGD opposes the motion, based in part on the above-mentioned affidavit.

Although we grant the Applicant's motion in part, we also, for reasons that do not ensnare us in the apparent controversy about Tribal governance, deny the Applicant's motion in part, thereby sending an aspect of the environmental justice claim to an April trial on the merits. We set out in Part I of this opinion our reasoning for that decision.

As we there explain, the Supreme Court's Tribal governance doctrines mentioned above do not preclude us from entertaining claims of deprivation of environmental justice that, in the situation here presented, may belong to a subgroup of the overall Tribal community. Under our rules, those claims here must go to hearing, for they cannot now be resolved on the competing assertions of Band members holding very different beliefs about the impact of the project on

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[2] The Staff's work here began with PFS's filing its application in 1997 and has continued through PFS's submission of some twenty-three amendments. The Staff review led it recently to issue a Supplemental Safety Evaluation Report and the Final Environmental Impact Statement.

their individual situations, including the impact of the concomitant lease income that was anticipated would be applied -- but may not be being used -- to relieve their poverty.

But the Supreme Court doctrines on Tribal governance, and similar lessons drawn from other sources, convince us that there are other, far better, ways than a hearing to resolve this controversy. To point the parties in that direction, we focus in Part II on why resolution of the matters underlying the environmental justice dispute may best be driven by those with a greater stake in, and understanding of, the conflict than we possess. We believe that a hearing before us should be a last resort. Accordingly, we strongly encourage the protagonists to settle this matter -- achieving an outcome shaped by, and satisfactory to, themselves -- rather than to turn it over to us for a trial, and an outcome, that may disappoint them all.[3]

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[3] To guide the reader, we provide here a partial outline of our opinion:

I. The Need for a Hearing
- A. The Setting of the Controversy
  - 1. The Nature of the Facility, the Lease and the Disputes
  - 2. The Filings of the Parties
  - 3. The Concept of Environmental Justice
  - 4. The Standards for Summary Disposition
- B. The Interpretation of the Law
  - 1. The Deference Owed to Tribal Governance
  - 2. The Definition of "Low Income Populations"
    - a. Preliminary Matters
    - b. Environmental Justice Populations
  - 3. The Balancing of Environmental Impacts
- C. The Facts in Dispute and the Facts Needed
  - 1. The Impacts on the Environment
    - a. Cumulative Impacts
    - b. Property Values
    - c. Adverse Impacts
  - 2. The Payments under the Lease
  - 3. The Evidence for the Trial

II. The Wisdom of a Settlement
- A. The Policy of the Commission
- B. The Path to a Settlement

I. THE NEED FOR A HEARING

A. The Setting of the Controversy

In early 1983, President Reagan signed the Nuclear Waste Policy Act of 1982 into law. As amended, that law acknowledges the potential for siting nuclear waste disposal facilities of one kind or another on Indian Reservations.[4] The response of Indian Nations to overtures from the Nuclear Waste Negotiator (established as a federal officer by Title IV of that Act) and from others was overwhelming. Although Indian Tribes control only some 3% of the Nation's land, Tribes were responsible for some 3/4 of the 20-odd initial nuclear waste disposal applications and all of the Phase II applications.[5] Eventually, the somewhat different proposal now before us emerged.

1. The Nature of the Facility, the Lease, and the Disputes. As is well-known, the absence of a repository for the permanent storage of spent nuclear fuel that has been and will be generated by the Nation's 100-odd power reactors[6] prompted a consortium of electric utility operators of nuclear power reactors to form the Private Fuel Storage, LLC, organization to seek an NRC license for an off-site facility for spent fuel storage, known in Commission argot as an ISFSI (see p. 2, above). In pursuing its goal, PFS entered into a business arrangement with the Skull Valley Band of the Goshute Indians (which acted through its ostensible leadership representatives) to construct and operate an ISFSI on the Band's Reservation some 50 miles southwest of Salt Lake City. The proposed ISFSI license would permit, among other things, the

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[4] See 42 USC § 10242.

[5] These figures were reflected in various commentaries said to draw upon the records of the now-defunct Office of Nuclear Waste Negotiator.

[6] As of December 2000, a total of 104 power reactors remained licensed to operate. See NUREG-1350, Vol. 13, p. 28 (June, 2001). A number of others had earlier been decommissioned.

storage of 40,000 metric tons of spent nuclear reactor fuel in concrete-encased storage casks (see p. 2, above) to be arrayed on specially-designed concrete pads.[7]

The storage of the casks is intended to be temporary (pending development of a permanent repository such as the one being considered for Yucca Mountain). To that end, PFS's contracts are to require its customers to retain title to the spent fuel they send to the facility, so that it could be sent back to them at the end of the facility's life if a permanent repository is not ready by then.[8]

Under the unique relationship that exists between the United States and sovereign Indian Nations, Tribal contracts are not valid without the approval of the Department of the Interior's Bureau of Indian Affairs (BIA). That agency gave the proposed lease between PFS and the Band preliminary approval in 1997. That lease had been negotiated and signed on behalf of the Band by Leon Bear, exercising the authority he claimed by virtue of having previously been elected the Band's President in a process that, while apparently controversial, earned BIA's approval. Joining him were the Band's Vice Chairperson and Secretary, at that time Mary Allen and Rex Allen, respectively.

Not all Tribal members, however, shared these putative officers' view of the benefits to the Band of the lease arrangement, and a group of project opponents took issue with the leadership's actions. According to the documents before us (as also reflected in contemporary

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[7] The State has put forward various safety issues about the proposed facility, including the potential risks from (1) accidents caused by U.S. military operations to the West and (2) earthquakes and other geotechnical phenomena. We will be considering those issues, along with others, at the upcoming trial. See note 1, above.

[8] See FEIS (note 2, above) at xxxii. Although the initial license period would be for 20 years, the possibility of an extension exists. A controversy about how the expected facility life is treated in the FEIS has just given rise to a new, late-filed contention, submitted by the State on February 11, 2002, which we need not pause to detail here.

newspaper accounts),[9] the years since have been filled with challenges to the officers' authority, status and actions; calls for, conduct of, and disputes over new elections; demands for information about the lease terms; battles for control of the Band's offices and bank accounts;[10] and even attempts to replace the Band's legal counsel involuntarily (see note 20, below).

We touch herein on a number of these disputes. As will be seen, however, our eventual focus (see pp. 28-36, below) primarily rests on only two of the opponents' claims (which turn out to be related), namely, that (1) the project's environmental impacts are unacceptable and that (2) the leadership has deprived them of any share of the significant benefits that should accrue to them from the project, namely, the income from the lease.

2. The Filings of the Parties. In response to the Commission's providing an opportunity for hearing on the PFS application, a number of the Skull Valley Band members, and other individuals, calling themselves Ohngo Gaudedah Devia, petitioned to intervene in this proceeding to oppose the project. (The Band itself is participating in support of the Applicant's position.) On November 24, 1997, OGD filed a number of specific challenges in the form of the "contentions" called for by NRC rules;[11] for a variety of reasons, this Board determined that, with one exception, those contentions could not go forward. LBP-98-7, 47 NRC 142,

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[9] Of course, we mention these accounts not to arrive at any factual determinations but only to highlight the intensity of the underlying controversy.

[10] See Skull Valley Band Goshutes v. Zion's Bank, No. 2:01CV00813C (D. Utah, filed Oct. 18, 2001); see also Brent Israelsen, "Nation" Inserts Itself into Tribal Fray, Salt Lake Tribune, Nov. 13, 2001 (referring to the Native American Tribal Organization, also known as the NATO Indian Nation).

[11] OGD presented 16 contentions, lettered A through P. The last of those (to which we refer later), dealt with the impacts of the facility's "routine operations" and "associated transportation activities," and complained of, among other things, "obvious impacts resulting from the physical presence of the facility," including "visual intrusion, noise, worker and visitor traffic." Contentions at 36.

reconsideration granted in part and denied in part, LBP-98-10, 47 NRC 288, 298-99, aff'd on other grounds, CLI-98-13, 49 NRC 26 (1998).

The one remaining is "Contention OGD O," presenting an environmental justice claim. As framed, that contention invoked the Executive Order in urging that the community not be "made to suffer more environmental degradation at the hands of the NRC." After making reference to the Reservation's being surrounded by a "ring of environmentally harmful companies and facilities" that create or process hazardous waste, OGD presented six specific grounds that it said provided a basis for its claim.

This Board rejected three of those bases, leaving standing the three "disparate impact matters outlined in bases one, five and six." See LBP-98-7, 47 NRC at 233. Basis # 1 involves the disparate economic and sociological impacts on minority and low-income populations compared to the overall population. Basis # 5 addresses the cumulative impacts of the PFS facility coupled with the impacts from other nearby hazardous waste facilities. And Basis # 6 highlights the adverse effects on property values stemming from the proposed facility.[12]

After we admitted that contention into the proceeding, the Commission early on took the opportunity -- afforded by its review of another aspect of this case -- to provide further guidance on the environmental justice concept. CLI-98-13, 48 NRC 26, 35-36 (1998). The Commission there reminded us of its prior teachings, particularly those dealing with the limitations that inhere both in the Executive Order (whose "purpose was merely to underscore" certain already-existing provisions of NEPA) and in the "disparate impact" doctrine (which does not admit of a "broad NRC inquiry into questions of motivation and social equity in siting"). See Louisiana

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[12] See OGD Contentions at 27-36. The rejected bases (numbered 2, 3 and 4) questioned the environmental, sociological and psychological costs to Band members stemming from increased traffic, population, and impacted lifestyles; the lack of a cost-benefit analysis that considers the alternative of leaving spent fuel at reactor sites; and the need for the proposed PFS facility.

Energy Services [LES] (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998). As will be seen, our decision today observes those limitations.

In due course, in June 2000, the Staff issued its draft environmental impact statement (DEIS) for the PFS facility.[13] In there discussing environmental justice matters, the Staff based its conclusions (that the project passed muster) in large measure on information supplied by the Tribal leadership. See, e.g., DEIS at 4-38. In the DEIS, the Staff took the position that any negative environmental impacts attributable to the project's presence on the Reservation -- such as noise or visual impact (p. 6-27) -- would be more than offset by the environmental benefits that would flow to Band members from putting the lease payments to good use in improving their basic living conditions. See DEIS §§ 4.5.2.8 (at 4-36); 6.2.1.2 (at 6-31).

After the parties conducted discovery of each other's evidence, the Applicant moved on May 25, 2001, for summary disposition of Contention OGD O, urging that the undisputed facts render a hearing unnecessary and justify a ruling in its favor. In thus filing the motion that is presently before us for resolution, PFS supplied, along with a supporting statement of material facts not in dispute,[14] supporting information from three experts: George H.C. Liang, Senior Principal Environmental Engineer at Stone & Webster; Roger Bezdek, President of Management Information Services; and George Carruth, an independent consultant experienced in the area of radioactive waste.[15] Their declarations addressed whether the project would have impacts cumulative with other facilities in the area, and included analysis of

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[13] See Draft Environmental Impact Statement for the Construction and Operation of an [ISFSI] on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (June, 2000) [hereinafter DEIS].

[14] See [PFS] Motion for Summary Disposition of OGD Contention O - Environmental Justice (May 25, 2001) [hereinafter PFS Dispositive Motion]; see also id. Statement of Material Facts On Which No Genuine Dispute Exists [hereinafter PFS Undisputed Facts].

[15] See Declaration of George H.C. Liang [hereinafter Liang Decl.]; Declaration of Roger Bezdek [hereinafter Bezdek Decl.]; Declaration of George Carruth [hereinafter Carruth Decl.].

potential groundwater contamination; the impact the proposed facility would have upon Tribal property values; and the cumulative air quality hazards to the Skull Valley Reservation posed by the proposed facility and surrounding hazardous facilities.

On June 28, 2001, OGD filed a response opposing the PFS dispositive motion. OGD's response included a statement of disputed and relevant material facts and the passionate 75-page sworn declaration of a leading OGD member, Sammy Blackbear. In that declaration, Mr. Blackbear identified himself as the Tribal Chairman, based on a disputed election that he claimed had unseated Leon Bear.[16]

Throughout the declaration were detailed allegations of a years-long course of conduct by Mr. Bear "and his cohorts" that Mr. Blackbear characterized (Decl. at 5) as a "systematic, longstanding, blatant pattern of corruption, oppression and abuse." Whatever the legitimacy of that characterization, or of Mr. Blackbear's claim to be the Tribe's legitimate leader, from our perspective the key feature of the allegations is the claim that the Applicant's lease payments, intended for the Band, have been appropriated by Mr. Bear exclusively for his personal use and that of his allies, and withheld from any Tribal members who opposed the project. Blackbear Decl. at 10-11. We discuss that claim at greater length below (pp. 34-36).

On the same date, the NRC Staff filed a response in support of the PFS motion, including various affidavits pertaining to several of the bases of OGD's contention.[17] That a

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[16] See [OGD]'s Response to [PFS]'s Motion for Summary Disposition of OGD Contention "O" (June 28, 2001)[hereinafter OGD Response]; see also id. Statement of Material Facts at Issue in Support of [OGD]'s Response to [PFS]'s Motion for Summary Disposition of OGD Contention O [hereinafter OGD Disputed Facts]; id. Declaration of Sammy Blackbear [hereinafter Blackbear Decl.].

[17] See NRC Staff's Response to Applicant's Motion for Summary Disposition of OGD Contention O -- Environmental Justice [hereinafter Staff Response]; see also id. Joint Affidavit of Sam A. Carnes, Paul R. Nickens and Michael J. Scott Concerning OGD Contention O, Basis 1 [hereinafter Basis One Affidavit]; id. Joint Affidavit of Terence J. Blasing, Richard H. Ketelle, and Michael J. Scott Concerning OGD Contention O, Basis 5 [hereinafter Basis Five Affidavit]; id. Joint Affidavit of David L. Allison, Sam A. Carnes, and Michael J. Scott Concerning OGD Contention O, Basis 6 [hereinafter Basis Six Affidavit].

portion of one affidavit was prepared by David L. Allison -- BIA's Uintah and Ouray Superintendent, who is responsible for the federal government's relationship with the Skull Valley Band -- is of particular interest (see note 57, below). That Staff pleading engendered a July 9, 2001 OGD reply taking issue with a number of points the Staff had presented.[18]

Our rules of practice do not afford moving parties an automatic opportunity to reply to the filings of the other parties. 10 C.F.R. § 2.749(a). The Applicant, not having sought leave to reply, accordingly filed no rejoinder to the Blackbear declaration, which means that in most respects we have before us only one side of the story about the matters presented so forcefully in that declaration. The Band itself, going through a change of counsel around that time,[19] filed no papers in connection with the motion.[20]

3. The Concept of Environmental Justice. Executive Order 12898 (see p. 1, above) directed all agencies in the executive branch to examine, and if necessary to adjust, their activities to guard against inconsistency with norms of environmental justice.[21] Although that

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[18] See [OGD]'s Response to NRC Staff's Response to [PFS]'s Motion for Summary Disposition of OGD Contention "O" (July 9, 2001)[hereinafter OGD Reply].

[19] See Notice of Appearance and Substitution of Counsel (Aug. 8, 2001).

[20] At a later point, certain assertedly "recently elected Tribal executive officers," including Mr. Blackbear, sought to have us "deal exclusively" with them as the Band's representatives. See letter of Oct. 3, 2001. In response to that letter and our Oct. 11, 2001 Memorandum and Order (unpublished), the Band (as represented by its counsel who had newly appeared in August) filed affidavits of the Band's Mr. Bear and the BIA's Mr. Allison, that dealt primarily with the governance issues raised by the letter, not with the lease payment issues before us now. Report to the Board on the Status of Counsel (Oct. 24, 2001). The matter later ended without us having been presented any basis to allow involuntary replacement of counsel (see unpublished Memorandum and Order, Dec. 10, 2001).

[21] That Order, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" and found at 3 C.F.R. 859 (1995), began by directing every agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations . . . ." § 1-101.

Order may not by its terms have been applicable to independent agencies, the Nuclear Regulatory Commission promptly endorsed its principles and agreed to abide by it.[22]

The Executive Order also indicated that it was not intended to add rights beyond those that already existed, but was simply intended to focus agency attention on protecting those rights. The Commission endorsed that limitation in adopting the Order's mandates. See LES, CLI-98-3, 47 NRC at 102.

The Executive Order has two key components. As already noted, one stresses that agencies should make achieving environmental justice part of their overall mission by "identifying and addressing . . . disproportionately high and adverse human health or environmental effects" of agency programs on minority and "low-income populations." § 1-101 (emphasis added). The other reminds an affected agency to conduct agency actions "that substantially affect human health or the environment" in a manner that does not deny benefits from, exclude participation in, or discriminate under agency programs because of an individual's "race, color, or national origin." § 2-2.

As interpreted by the Commission in LES, the NRC's role is to identify and to weigh, or to mitigate, "disparate environmental impacts" upon disadvantaged groups but does not embrace the resolution of claims of "racial discrimination." CLI-98-3, 47 NRC at 100-10. In so denominating the Executive Order's reach, the Commission there pointed out that NRC expertise does not extend to such areas and that ordinarily the agency's resources -- needed to protect the public health and safety and the environment and thus focused on those purposes -- should not be misallocated to matters in which they were unlikely to make a difference.[23]

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[22] See March 31, 1994 letter from the then-Chairman of the NRC to the President.

[23] Id. at 103. See also § 1-101 of the Executive Order, which provides that "[to] the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission . . . ." (emphasis added).

In the course of deciding the LES proceeding, the Commission devoted considerable attention to explaining how the environmental justice concept was to be applied to the work of the NRC. As noted above, the Commission there instructed Licensing Boards to focus on disparate environmental impacts that a proposed facility might create on disadvantaged groups, not on any purported racial discrimination, deliberate or coincidental, that might have been involved in the facility's siting. In doing so, the Commission noted that its purpose was not to diminish the agency's commitment to President Clinton's Executive Order. Because the NRC's environmental role was, however, limited to its authority under the National Environmental Policy Act of 1969 (42 USC § 4321), which the Commission pointed out is not a civil rights law, the agency was not to become involved in "full-scale racial discrimination litigation" in its licensing proceedings. CLI-98-3, 47 NRC at 106. Instead, the focus was to be on an issue that "lies close to the heart of NEPA," namely, the disparate adverse environmental impacts of agency action on "minority and impoverished citizens." Ibid.

4. The Standards for Summary Disposition. The Commission's rules, like those of federal courts, allow judges to resolve summarily -- that is, without an evidentiary hearing -- matters which, although initially contested, turn out not to involve any material factual disputes. We have on many occasions in this proceeding recited and applied the general standards which govern the grant or denial of summary disposition:

> In an NRC proceeding, a party is entitled to summary disposition if the presiding officer determines that there exists "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.749(d). When reviewing a motion for summary disposition, the Commission has used standards similar to those used by the federal courts when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).
>
> Consistent with Rule 56, the moving party bears the initial burden of showing that no genuine issue as to any material fact exists, which the party must do by a required statement of material facts and any supporting documentation submitted with the requisite motion. See Private Fuel Storage L.L.C.

> (Independent Spent Fuel Storage Installation) LBP-99-32,50 NRC 155, 158 (1999). The opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation, or the facts will be deemed admitted. See CLI-93-22, 38 NRC at 102-03. When responding, the opposing party may not rely upon mere allegations or denials but must submit "specific facts showing that there is a genuine issue of fact." [footnote omitted] 10 C.F.R. §2.749(b).

LBP-01-30, 54 NRC 231, 235 (2001).

On some occasions, we have had to look also to more specific standards instructing us how to proceed when faced with opinions from competing experts.[24] Although some experts are involved here, the central dispute is not over experts' technical opinions but about laypersons' factual observations. In this situation, when what is at stake is whether a trial must be held to ascertain the truth, the specific standards are quite clear, and are easily understood and applied: "since the burden of proof is on the proponent of the motion, the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any favorable inferences that can be drawn."[25]

In this instance, the Applicant (supported by the Staff) is the moving party, and OGD is the party opposing summary action. Therefore, we must -- at this stage of the proceeding but for present purposes only -- give credence to the fact-related material OGD has put forward,[26]

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[24] For example, we referred earlier in this proceeding to "the corollary tenets that, among other things, instruct us at the summary disposition stage not to try to decide 'which experts are more correct'." LBP-01-39, 54 NRC ___, ___ (slip op. at 16-17)(Dec. 26, 2001). See also LBP-02-01, 55 NRC __, __ (slip op. at 3)(Jan. 9, 2002).

[25] Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994)(citing 10A Charles A. Wright, et al., Federal Practice and Procedure § 2727 (2d ed. 1983)).

[26] As we observed above, the Applicant did not seek to reply to the fact-based material submitted with OGD's response. In two respects, then, we have no alternative but to accept OGD's version as correct for purposes of ruling on the Applicant's motion. The Applicant will, of course, have an opportunity at the trial to put forward its, and Mr. Bear's, version of the facts.

including specifically the sworn declaration of Sammy Blackbear, and we do so in the next Subpart of this opinion.[27]

B. The Interpretation of the Law

With the stage thus set, we need to consider -- and, if necessary, to reconcile -- a number of legal doctrines and the manner in which they apply to the situation presented. Specifically, we must first determine whether, and if so to what extent, we are permitted to look into (or are foreclosed from inquiring about) matters of Tribal governance. Second, we must ascertain what are the nature of the "low-income populations" or "impoverished citizens" (as described by the Executive Order and the Commission, respectively) that the environmental justice concept is intended to protect from disparate impact. Third, we must focus upon how a NEPA balance is struck between a project's potential adverse environmental impacts and any offsetting economic or other benefits that may be anticipated.

Once those doctrines are clarified and their applicability here settled, we can turn to the task of evaluating the parties' assertions about the facts. Once again, the principles that guide procedure at this stage call on us to determine whether there are material facts in dispute that preclude a summary resolution on the documentary record; if so, a trial, at which live testimony will be heard, is mandated.

1. The Deference Owed to Tribal Governance. When presented disputes involving Tribal members, the Supreme Court has long recognized and deferred to a Tribal government's ability to create its own substantive laws to assist in Tribal governance and its ability to enforce those laws in Tribal forums. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Williams

[27] In contrast to the limited role allowed us at the summary disposition stage, where we simply determine whether factual issues exist, it is our task at a live evidentiary hearing to resolve those factual disputes. For example, for non-expert witnesses, we do so by such means as evaluating their credibility, which can be ascertained not only by detecting any inconsistencies in their testimony but also by observing their demeanor.

v. Lee, 358 U.S. 217 (1959). This policy has led lower federal courts to encourage Tribal self-governance and to refrain from interfering in intratribal disputes. Wheeler v. U.S. Dept. of Interior, 811 F.2d 549, 551 (10th Cir. 1987). In furtherance of this policy, the Supreme Court has recognized Tribal courts, if established,[28] as "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." Santa Clara Pueblo, 436 U.S. at 65 (emphasis added).

This policy of deferring to Tribal governance is, however, not absolute. The courts have also recognized that in some "special situations" the need for agency action may prevail over the desirability of allowing Tribal self governance. Wheeler, 811 F.2d at 551-52. There is some suggestion in that regard that circumstances might permit intrusion into the realm of Tribal governance where no Tribal forum for interpreting Tribal law exists. Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1465 (10th Cir. 1989). And one court has directed the Bureau of Indian Affairs, on an interim basis, to choose between rival Tribal factions in order to allow the agency to interact successfully with the Tribe pending action by the Tribal court. Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983).[29]

The situation before us might be one of the special situations envisioned in Wheeler and Nero, for it differs in a material respect from many of the leading Tribal governance deference cases. Typically, those cases involved suits brought against the Tribe by disgruntled Tribal

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[28] We are told that the Skull Valley Band has no established Tribal courts, although the Tribe is said to contract from time to time for judicial services, predominantly for tax issues. Blackbear Decl. at 3.

[29] Recognizing the agency's obligation to interact with the Tribal government, the Court insisted that BIA make this interim choice pending action by an existing Sioux court system that was capable of successfully resolving the dispute. 708 F.2d at 339. The Court stressed, however, that BIA's decision was intended to be only an interim one, which would be supplanted by the Tribal Court's eventual ruling. Ibid.

members complaining of Tribal action. In other words, there the Tribe did not initiate the process leading to the requested involvement of a non-Tribal government adjudicator.

In contrast, here the Tribe itself initiated the involvement with the non-Tribal adjudicator, first by entering into a business relationship with an organization seeking an NRC license (albeit for a Reservation-centered facility), and then by intervening in this licensing proceeding. For purposes of applying the deference doctrine, these affirmative extra-Tribal steps may invoke an exception by placing the Band in a position distinct from that of a Tribe which is unwillingly forced to defend its purely intratribal action, or on-reservation activity, in an outside forum.

For reasons that shall appear, we need not now resolve the "exception" question. Nor need we now determine the precise boundary between (1) a legitimate look into the factual disputes surrounding the environmental justice issue (see pp. 22-25, below) and (2) a forbidden foray into matters of Tribal governance. In the circumstances of this case, the location of that boundary is likely to prove very much fact-driven -- and at this point we do not have the facts.

What we do have -- even if the Tribal governance deference doctrine admitted of no exceptions -- is a right to examine the facts related to environmental justice at least sufficiently closely to determine our own jurisdiction to proceed, taking the proverbial "peek at the merits" to the extent necessary to resolve jurisdictional issues.[30] In the course of performing that exercise at trial, we are also likely to become more informed about whether any exceptions to the Tribal governance deference doctrine should come into play here. In short, it remains to be seen whether we are dealing with an issue of Tribal governance, or a matter of some other nature.

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[30] See Hardy v. Wigginton, 922 F.2d 294, 297 (6th Cir. 1990) (in the context of a habeas corpus issue, citing International Association of Machinists v. Trans World Airlines, 839 F.2d 809, 812 (D.C. Cir. 1988), to draw upon the time-honored "peek at the merits" practice that courts may follow when deciding jurisdictional issues). See also Nestor v. Hershey, 425 F.2d 504, 511 (D.C. Cir. 1969), explaining that courts always have jurisdiction to determine their own jurisdiction, so that when the "issue of jurisdiction is inextricably intertwined with the merits of the controversy," courts may examine the merits to the extent necessary to determine if they have jurisdiction to hear the issue.

2. The Definition of "Low Income Populations". The environmental justice Executive Order is intended not to create new enforceable rights in individuals, but simply to focus agencies on their existing environmental responsibility to see to it that their actions -- here the licensing of the proposed PFS project -- do not have a disparate environmental impact on minority or impoverished populations.[31] OGD claims that the PFS project will have such an impact on its members, and details a number of such impacts.

a. *Preliminary Matters.* The Applicant and Staff have a two-fold initial response. The first is that some of the impacts OGD now cites are outside the scope of its admitted contention. The other is that the information provided by their experts and by the Band indicates that the OGD-averred adverse impacts simply do not exist. We address both of those preliminary arguments now.

(i). OGD must overcome the assertion that it has not properly pleaded the adverse impacts -- the operational noise, the visual intrusion, and the cultural insult -- which we recognize (see p. 34, below) as furnishing the underpinning for its environmental justice claim. As the Applicant and Staff would read Contention OGD O, these items were not embraced within the contention as first written and as later limited by our order admitting it.

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[31] OGD's papers go beyond the disparate impact issue to allege racially-discriminatory siting. Even if OGD is correct that, notwithstanding its holding in LES (see pp. 12-13, above), the Commission seemingly left some leeway for us to consider such a claim in another case if it were well-pleaded, that leeway seems to have been removed by the Commission's further teachings in this very proceeding. See CLI-98-13, 48 NRC at 36, indicating quite clearly that "the focus of the Board's environmental justice inquiry" here is to be on "disparate impacts," not "questions of motivation and social equity in siting." Even if that limitation were not in place, we are not prepared to agree that targeting of a group as the possible beneficiary of current government-related action can, in a manner that is cognizable before us, have a racially discriminatory effect upon that group if it is currently free (despite the history that led to its situation) to choose to pass up the opportunity so provided.

Of course, OGD would argue that the Band was deprived of the freedom to make that choice because, in seizing the PFS opportunity, its purported "leadership" did not speak for the entire Tribe. That argument, however, simply presents in a different fashion the underlying issue on which this case turns, which receives our full consideration elsewhere herein.

As we said not so long ago on another question in this case, that argument has something to commend it, but not enough. LBP-01-39, 54 NRC at ___ (slip op. at 30). Given the nature and location of this proposed facility, we read the reference in Basis 1 (of what is, after all, an "environmental justice" contention) to "negative . . . sociological impacts" as embracing a number of such impacts. What is important is that the Applicant and Staff had notice of the nature of those impacts as they prepared for trial (and, in the Staff's case, as it conducted the environmental analysis leading to the preparation of the Environmental Impact Statements).

For this contention, the nature of the various impacts is not difficult to comprehend, and to the extent specificity is needed it was provided by the discovery process. That some of the impacts might also have provided a basis for other contentions, or other bases, that were excluded from consideration, does not limit their relevance here. Indeed, that they were mentioned elsewhere indicates the Applicant and Staff could hardly have been unaware of them; the Staff's discussion of them in the DEIS is further evidence that they were not hidden from view -- to the contrary, they are fairly obvious.

We need add only this. We also said in LBP-01-39 that once a contention is deemed sufficiently serious to be admitted into the proceeding (by passing the very stringent threshold screening standards that keep many from being litigated at all), "any number of <u>later developments</u> will also guide and control just how that contention does or does not move into the actual hearing process." <u>Id</u>. at ___ (slip op. at 15) (emphasis added).

To be sure, we said that in the context of an extremely complicated technical issue, one which had led the Applicant to amend its application on more than one occasion. Those circumstances are not present here. But other telling circumstances are.

In the first place, the contentions were drafted, and the late January, 1998 oral argument on them was held,[32] before the Commission issued its April 3, 1998 LES decision defining the contours of environmental justice claims. Second, we had not anticipated, before we ruled on the admissibility and scope of the various contentions, that there would arise a question as to the distribution -- or lack thereof -- of the lease income to OGD's members. In the circumstances of these "later developments" (see above), there is occasion to look at the admitted contention in the new light cast by those events.

We are told by the Staff that when the Applicant conducted discovery, OGD indicated clearly that certain material that had initially been presented as part of a rejected contention (see note 11, above) (as well as in a rejected basis for the pending contention (see note 12, above)) was at that later juncture being relied upon to support the accepted contention. Staff Response at 13-14. In this fashion, the Applicant was put on greater notice of the nature of the allegations it might have to defend against. The Staff as well learned which areas of its DEIS might therefore need to be upgraded in producing the FEIS.

In addition, it could not have come as a surprise that residents of the Reservation complaining of "negative sociological impact" would be objecting to the fundamental, obvious intrusions the project's physical presence would impose on them and on their interaction with each other and with the land -- the noise of operations, the visual blight on the landscape, and the invasion of Reservation sanctity. As we see it, the impacts now in question were contained

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[32] When oral argument was held on admitting the contention, and until two months ago, this Board was under the chairmanship of Judge G. Paul Bollwerk, III. We pointed out in LBP-01-39, issued late last year, that Judge Bollwerk, acting on December 19, 2001 in his capacity as Chief Administrative Judge of the Licensing Board Panel, had appointed another Board, chaired by Judge Farrar, to take over many of the matters remaining in this proceeding, with the original Board retaining jurisdiction over specified matters. 54 NRC at ___ (slip op. at 2), note 3. As we there noted, there is no lack of continuity in the work of the two Boards, and indeed references to "our" past actions, or those of "this Board," are not intended, unless specifically noted, to distinguish between the Board chaired by Judge Bollwerk and the Board chaired by Judge Farrar (both of which have the same technical members).

in the original OGD papers,[33] referenced later during the discovery process, and always conceded to exist. We therefore think it permissible to consider them here.[34]

Taking this approach to the contention is, we think, consistent with an action the Commission took in dealing with an analogous situation in its LES decision on environmental justice. The Commission there commented unfavorably on the Licensing Board's decision to require the submission of certain evidence at the hearing after earlier rejecting for consideration the subject about which the evidence was to deal. CLI-98-3, 47 NRC at 109. Even though the

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[33] To repeat, those impacts were mentioned not only in a rejected contention (lettered "P", see note 11, above) but also in a rejected basis for the admitted and pending environmental justice contention (see note 12, above).

[34] We focus here on the disturbance to OGD members caused by the direct, physical impact of the project on the Reservation. The Applicant and Staff rely, however, on the Supreme Court's having upheld the Commission's view that a matter too remote to be cognizable in our proceedings was the psychological fear (of radiation exposure and the like) induced by the presence of a neighboring, unwanted facility that met applicable licensing standards. Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 776-78 (1983), affirming Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-39, 12 NRC 607 (1980) and CLI-81-20, 14 NRC 593 (1981).

We think the concerns before us here to be of a different nature -- less ephemeral and less speculative -- than those raised by the Three Mile Island plaintiffs. As we see it, a facility put directly on one's homelands -- resulting in physical invasion and effects that are direct and palpable, not indirect and evanescent -- will have cognizable adverse impacts (more substantive than those described in Metropolitan Edison) on the peaceable enjoyment of the benefits that otherwise would be derived from that property.

The Commission recognized as much in LES, when it distinguished non-cognizable "psychological effects" stemming from such things as "a fear of nuclear power" from cognizable environmental impacts which "will flow directly" from the physical presence of a "heavy industrial facility nearby." CLI-98-3, 47 NRC at 109, note 26. Cf. RESTATEMENT SECOND OF TORTS (1965) §§ 46, 312, 436, 436A, indicating that to recover for emotional distress, a tort claim based on negligence must involve some physical injury (which a claim based on deliberate conduct need not show) and that recovery by plaintiff for emotional distress in suit based on intentional or reckless conduct directed at a third party in the plaintiff's presence requires showing of physical harm.

In any event, the Staff included discussion of the matters at issue here in the DEIS, while discussion of "psychological fear" matters is off-limits. This action confirms the inherent difference between the two types of alleged impacts.

Commission also found that the Board there had left its action "unexplained," the Commission allowed the Board's action to stand, given the circumstances there presented. Ibid.

Here, in contrast to the LES situation, this Board is, prior to the hearing, giving advance notice of, and providing an explanation for, our decision to allow further consideration of a subject some of the parties may have thought to have been previously excluded from consideration because it was also included in rejected assertions. In light of the reasons which underlie our explanation, we do not see that any ultimate rights of the parties have been invaded, even though their short-term expectations may not have been met.[35]

(ii). The Applicant's second threshold argument is that and its experts have established, in line with the Band's view, that many other environmental impacts of which OGD complains do not exist, or at least are nowhere near the offensive level that OGD claims. In large measure, we agree with the Applicant, as will be seen from our analysis of the facts in subsections I.C.1.a-b, below. But as we have pointed out above, and as the Applicant and Staff have conceded, this facility brings with it some adverse impacts, and they are not trivial.

How those impacts can be offset in a NEPA balance remains, therefore, an issue to be addressed. Indeed, as will be seen in Section I.B.3 below, it is a key point in the case. But first, having resolved the Applicant's preliminary arguments, we turn to the definitional aspects of the environmental justice issue.

b. *Environmental Justice Populations.* The environmental justice doctrine is supposed to focus an agency on protecting minority or low-income populations or, as the Commission put it, impoverished citizens. But neither the Executive Order nor any other readily available authority tells us how we are to go about defining or circumscribing such "populations" when the

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[35] This somewhat peculiar procedural setting may explain why the Applicant's motion did not deal factually with the lease payment and other grounds on which we now deny that motion (compare p. 11 and note 26, above, with pp. 34-35, below). The Applicant will, however, have full opportunity to present all its relevant evidence on all decisive matters at the hearing.

answer is not obvious. On that score, the Commission indicated in LES (47 NRC at 100) and repeated here (49 NRC at 36) that some of the answers may "become apparent only by considering factors peculiar to those communities."[36]

Here, the Band -- the large community that would have drawn attention as being impoverished when the project was first being considered (see p. 5, above) -- has welcomed the project, and is not now complaining of any environmental injustice. The Applicant's and the Staff's approach, although not framed precisely in terms of our definitional question, would have that be the end the inquiry.

We think not. The Band as a whole may well be benefitting as a result of, and not be complaining about, the project. That does not provide the answer; it only reframes the question.

As reframed, our inquiry now focuses, at OGD's urging, on a subgroup of the larger community, a smaller but distinct and well-defined population: those who are suffering a disparate burden, bearing the adverse environmental consequences of the PFS project while remaining impoverished as others have their situation improve. Just as in the LES proceeding the crucial disparate impact was felt by only a portion of the community at large -- and indeed eventually focused on a particularly disadvantaged subgroup, namely "pedestrians"[37] -- here we perceive no necessary bar to considering the impact of the project on less than the full complement of Band membership.

As we discuss at greater length below (pp. 25-28), an aspect of NEPA involves balancing environmental costs against economic (or other) benefits. A project's "disparate impact" can thus stem from either (1) a disparity in how the environmental burdens of the project are felt by different populations, or (2) a disparity in how the net impact of the project --

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[36] To be sure, the Commission was speaking there of defining the "effects," not the "populations." But we nonetheless are able to take guidance from its approach.

[37] See CLI-98-3, 47 NRC at 107.

as measured by the balance of environmental burdens and economic benefits -- is felt by different populations.

In that context, and under the view of the facts we must take at this stage, OGD's members are indeed "disadvantaged" in relation to Mr. Bear and his leadership allies -- the OGD group is receiving little or nothing in benefits from the project to offset its adverse environmental impacts, while Mr. Bear and his favorites (while bearing no more of the burdens) are receiving most, if not all, of the offsetting economic benefits. If that is true, it may be that only the OGD group remains an impoverished population within the meaning of the environmental justice rubric; the Bear group may no longer fit that mold.

Our manner of inquiring into whether OGD enjoys protected "population" status, or is simply caught up in a Tribal governance matter, is reinforced by the line of pre-NEPA federal court cases invalidating the Department of Housing and Urban Development's placement of low-income housing in a manner that had a disparate impact on a disadvantaged portion of a community. In those cases, it was not determinative that a city's duly-chosen overall leadership had fully concurred in the placement of the housing. What was determinative was the impact of that housing on the disadvantaged portion of the population. That group, voiceless in the city's deliberations, was entitled to be heard by the court and to be relieved of the undue burden upon it. See Gautreaux v. Romney, 448 F.2d 731, 737 (7th Cir. 1971)[Chicago]; see also Shannon v. U.S. Dep't of Housing & Urban Dev., 436 F.2d 809 (3rd Cir. 1970)[Philadelphia]. Had Gautreaux been brought after NEPA had been implemented and the Executive Order issued, it could, we think, have fit quite well within the "environmental justice" rubric.[38]

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[38] We perforce recognize that (1) the theory of these pre-NEPA cases, as presented by the plaintiffs at the time, was one of racially discriminatory siting, and that (2) no such theory is permissible before this Board. But what we see in the housing cases is the emergence of a different principle, one that is instructive here. That is, those cases teach that even though a governing body's overall leadership has given its blessing to a project and welcomes its presence, the negative impact of that project on a disparate subgroup of the [CONT'D]

So too here. If Mr. Blackbear's allegations are true, it may be that the Band as a whole now holds a privileged status vis-a-vis OGD, and that only OGD's members fit the description of "low-income populations" or "impoverished citizens." But we find ourselves unable to decide as a matter of law how the term "population" should be defined. As we see it, the nature of the problem defines the scope of the population. Or, as the Commission put it (see p. 23, above), the answer may "become apparent only by considering factors peculiar to" the situation at hand.

In other words, just as we found with respect to the jurisdictional issue about the reach of "Tribal governance," we have to "peek at the merits" to resolve this definitional matter about the application of the term "low-income population." Here too, then, we come to no conclusion other than that we must go to hearing.

3. The Balancing of Environmental Impacts. As seen in the foregoing section, it may prove appropriate for OGD to challenge the project for its disparate impact on OGD's members, even if the OGD view is not shared by the Tribal leadership. The next question concerns the nature and consequences of those impacts.

Under the practices that various agencies have developed under the National Environmental Policy Act (and at the risk of oversimplifying the subject), it is commonly understood that an agency has several basic options when, after the proverbial "hard look" is taken, a project it proposes to license is seen to have potential adverse environmental consequences.[39] At one extreme, a project might be disapproved entirely, on the grounds that its adverse impacts are too severe. More typically, aspects of all or part of a project might be

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[CONT'D] community at large may be considered by the tribunal before which a challenge to the project is brought. In those pre-NEPA housing cases, the court challenges happened to be based on racial discrimination; under current law, they could just as well, like the matter before this Board, have been based on a type of disparate impact.

[39] See, generally, the Council on Environmental Quality's regulations guiding executive branch agencies, 40 C.F.R. Chapter V, §§ 1500 et seq.

altered to reduce the adverse impacts to the point at which they, and the project, are acceptable.[40] Once those adverse impacts have been reduced to the extent practicable, an agency is free to proceed to license the project, if it determines that the project's overall benefits exceed its environmental and other costs and that no obviously superior alternatives are in sight.[41]

Here, it is a relatively simple matter to apply those precepts. Both the Applicant and the Staff concede there are some adverse environmental impacts associated with putting this project on the Skull Valley Reservation. Because the Applicant otherwise has no right to use those lands for its own purpose, the Applicant and Staff both recognize that when the NEPA-mandated environmental balance is struck with an eye on the Executive Order, the only justification for imposing those adverse impacts on an impoverished population is the offsetting benefits that will accrue to the Band's members from payments for use of Tribal lands.[42]

We would expect that, more typically, a standard NEPA environmental justice contest (if there is such a thing) would feature as the disparate impact the environmental burden being felt by all the disadvantaged neighbors of a proposed project, in contrast to the lack of burden imposed on the further-away, more-privileged, classes. Here, the situation is different: the

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[40] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 82-83 (1977).

[41] We mean in the above analysis to describe generally the internal procedures an agency may go through when it wishes to incorporate environmental factors thoroughly into its decision-making process, not to imply that reviewing courts can to the same extent force an agency's hand on the substance of its determinations. After all, as judicial review has confirmed, NEPA is only a procedural statute that "merely prohibits uninformed -- rather than unwise -- agency action." See, for example, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989).

[42] As the Applicant puts it, "[the DEIS] clearly shows that the economic impact of the [facility] on the Band is positive, in large part because of PFS lease payments to the Band." PFS Motion at 7. The Staff says the same thing in this fashion: "The proposed [facility] would provide substantial lease income to the Skull Valley band and would result in a large positive impact." DEIS at 6-31.

environmental burden on those most affected by the project -- the Tribal members living on the Reservation -- is, as far as we have been told, the same for all.

The disparity comes about, then, not in the direct environmental burden, but from the net impact as measured by the NEPA-sanctioned balance of environmental burdens and economic benefits -- some obtain an economic benefit from the project to offset its environmental burdens, while others do not, experiencing only the burdens. We hold that this type of net disparity can be as much a matter for environmental justice review under NEPA -- a statute which sets up a process in which the classic burden/benefit balance has always been central -- as is the more usual disparate environmental burden viewed alone.

We do not mean to imply by the above analysis that the deeply-held beliefs of OGD's members -- about the overall objectionable nature of this project's invasion of lands they view as sacred -- can be eradicated by a mere monetary payment. That is not how we perceive the purpose of the funds supposed to be provided under the lease -- they do not represent a "payoff" and should not be seen as a "sellout." To the contrary, those funds can represent, and create, something else entirely: a significant, indeed life-altering, sociological improvement for a people that is described by Mr. Blackbear (Decl., ¶ 396) as "in abject poverty"[43] -- better food, shelter, clothing, health care and education. All of these beneficial changes, it was seemingly envisioned by policy-makers and presumably intended by the Applicant, would flow their way from the lease income and would represent the offset for the "negative . . . sociological impacts" on which the environmental justice contention was founded.

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[43] The declaration there indicates that "Leon Bear and his cohorts have grown rich, while the majority of the Goshutes living on the Reservation remain in abject poverty." That poverty is movingly described as being "in inadequate housing, without working plumbing or adequate sewage facilities or weatherization, without reliable motor vehicles, with restricted education, and without meaningful employment opportunities." In that same vein, we are told that "some of the families have little or no utilities, going without adequate heat or any electricity for years."

To be sure, the underlying desire of OGD's members is that the project not invade their Reservation, but their strong objections have thus far not carried the day. So long as that remains so, it would seem vital -- both to the advancement of their welfare and to the success of the project which others in the Band welcome -- that the contemplated lease payments be distributed to all the affected Tribal members. For both the Applicant and Staff have in effect conceded that the project cannot go forward unless the NRC finds it provides some sort of benefits to overcome the environmental costs it imposes upon affected Tribal members.[44] To further disadvantage some among that population does not provide the solution -- it exacerbates the problem.

For OGD's members, the requisite benefits are not flowing, according to their description of the facts (which at this juncture, for the reasons stated earlier, must be taken as true for purposes of ruling on the Applicant's pending motion). We address the significance of what OGD says is happening in the next section.

C. The Facts in Dispute and The Facts Needed

Having reviewed the overarching legal principles that must come into play in resolving Contention OGD O, we now can turn to analysis of various fact-specific matters, so as to determine whether there are any genuine issues of material fact that require a hearing for their resolution. In making this determination, we find it useful to discuss the facts concerning environmental impacts in terms of the remaining three bases that fleshed out the environmental justice contention (see p. 8, above). That discussion is followed by consideration of the situation involving the lease payments.

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[44] Of course, the future of the project is also subject to the State's safety challenges and to the environmental contentions also awaiting trial. In other words, nothing we say here is intended to indicate any view whatsoever on the merits of those safety and environmental issues.

1. The Impacts on the Environment. As indicated below, we find that there are no factual disputes underlying Bases 5 and 6 that would require a hearing to resolve. That is because the types of environmental impacts there described have proven to be of themselves not material to an ultimate decision about the facility. But the same cannot be said about the matters covered by Basis 1, as we understand it.

a. *Cumulative Impacts.* In its Basis 5, Contention OGD O addresses the disproportionate impact the proposed facility will have -- alone and combined with the other hazardous waste facilities located within a thirty-five mile radius of the proposed site -- upon the local Tribal population. OGD asserts that the environmental assessments of the proposed facility, initially conducted by the Applicant and supplemented in the Staff's DEIS,[45] fail to address these important issues and therefore violate the environmental justice Executive Order's embodiment of NEPA.

As explained below, however, due to the Band's contracting with the Applicant for use of Reservation land, and the analysis conducted by the Applicant and Staff -- unchallenged here by OGD -- concerning the impacts this facility will have, the Board finds OGD's arguments to be unpersuasive when applied to the Band as a whole. Thus, the Board concludes that there no longer exists a dispute of material fact regarding this point and grants summary disposition to that extent.

OGD contends that the Executive Order requires the agency to identify and to address the "disproportionately high and adverse health or environmental effects" of the facility upon the surrounding minority, low income community. OGD Contentions at 32. Locating the facility on the Reservation, OGD argues, will limit the exposure of the facility's adverse impacts

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[45] The DEIS has recently been duly transformed into the FEIS (see note 2, above). Because the pending motion papers naturally refer only to the DEIS and no party has called our attention to anything in the FEIS that changes the nature of the matters we must address here, we limit our consideration to the DEIS except for one background matter (see p. 6, above).

exclusively to Indian Tribes and therefore they will be disproportionately subjected to increased risks of cancer and other related injuries. OGD Response at 15-16. Because, according to OGD, Tribal members will be the exclusive victims of these adversities, OGD urges that the Applicant, and subsequently the Staff, must address this disparate impact as part of their environmental assessment. Id.

OGD's argument fails to address a key component of this scenario -- namely, that the Skull Valley Band, as representative of those living on the Reservation, was a full partner in the Applicant's plan to construct the facility. Because it is being allowed to put the proposed facility upon the Reservation in return for the lease payments, the Applicant is insulated from accusations by the intended recipients that its facility will disproportionately affect their community at large, compared to those less disadvantaged who live in other, more distant, locations.[46]

OGD also uses Basis 5 to contend that the Applicant (and, by implication, the Staff in its subsequent DEIS) failed to analyze adequately the cumulative impacts created by adding this facility to an area that is already home to numerous other hazardous waste facilities. According to Contention OGD O:

> [w]ithin a radius of thirty-five (35) miles the members of OGD and the Goshute Reservation are inundated with hazardous waste from: Dugway Proving Ground, Utah Test and Training Range South, Desert Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, Aptus Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North.

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[46] The Applicant's reliance upon the Band's agreement to counter the assertion about the facility's disparate impact, carries with it the implication that the entire host community affected by the facility will receive the "benefits" of the arrangement. This foretells our concern about the distribution of the rental income from the agreement and the net burden/benefit balance.

OGD Contentions at 28. Because these facilities are located within such proximity to the proposed facility, OGD contends that there must be a full analysis of the cumulative impacts of all these facilities.

That the area in question is home to numerous hazardous waste facilities is a given; but OGD's assertion that the Staff and the Applicant have failed to address the cumulative impacts of siting the facility in this area is unfounded. To the contrary, the Staff devotes an entire DEIS section -- Section 6.3, entitled "Cumulative Impacts" -- to the discussion of the potential cumulative impacts that will arise due to the construction and operation of the proposed facility. See DEIS at 6-32 to 6-38.

Going beyond the Staff's discussion in the DEIS, the Applicant, in support of its Motion for Summary Disposition, supplied two expert witnesses' lengthy declarations that discussed the potential cumulative impacts of siting the project on the Reservation. See Liang Decl.; Carruth Decl. In his discussion, Dr. Liang determined that the distance between the other hazardous sites and the Reservation, the geography of the area, and the arid climate makes cumulative impacts from surface or groundwater transmission "not feasible." Liang Decl. at 5. As to hazardous materials, after studying the other facilities, PFS expert Carruth determined that the only conceivable threat would be from air pathways, and the cumulative air quality analysis for each of those facilities indicated air pollutants would be "well below" any level of significance. Ibid., Carruth Decl. at 11, 33. Therefore, Dr. Carruth concluded that combining this low level of pollutants with the minimal emissions anticipated from the proposed facility would result in insignificant cumulative impacts upon the Reservation. Id. at 33.

In contrast to this detailed analysis presented by the Applicant, OGD did not supply any supporting documents to substantiate its claim that there will be adverse cumulative impacts. As has been stated in previous opinions here and elsewhere, the responding party cannot rely upon mere denials and unsupported allegations to answer a motion for summary disposition,

but must demonstrate in some positive fashion the existence of a genuine issue of material fact in dispute.[47] In other words, however sincere its beliefs, OGD cannot simply rely upon its own presumption that there will be such effects; without providing supporting evidence of possible cumulative effects from the surrounding hazardous facilities, OGD's position cannot withstand the contrary declarations offered by PFS and the Staff.

Rather than present supporting documents that disputed PFS's analysis, OGD argued that it was premature for us to rule in light of the number of outstanding contentions that remained to be resolved before the full effects of the proposed facility could be determined. OGD asserts that the outcome of any one of these other contentions may affect the cumulative impact analysis. Since the filing of OGD's brief in June 2001, however, the Board has addressed, at least preliminarily, all outstanding contentions relevant to this issue.[48]

In terms of the contentions that survived the preliminary stages and whose merits will thus be addressed at the April hearing, only Utah O, which involves the impacts of the proposed facility upon the underlying groundwater, can be considered relevant to this cumulative impacts discussion. Even if we were to assume that the proposed facility would have an adverse groundwater impact,[49] it remains that OGD has -- in the face of the Applicant's presentation ---

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[47] See, e.g., LBP-02-02, 55 NRC __, __ (slip op. at 13-14) (Jan. 14, 2002); see also Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 78 (1981).

[48] The Board has until today deferred ruling upon the admissibility of Contention Utah Security J (see LBP-01-39, 54 NRC at ___ (slip op. at 37) note 35), but the issues involved in that contention would not in any way be expected to affect the cumulative impact analysis.

[49] The outcome of that particular dispute seems more likely to be either a finding that no material impact is expected, or a determination that the Applicant must take steps to avoid any such impact, neither of which results would benefit OGD's position. (We make that general observation about Utah O without intending to prejudge the specific evidence that may be provided us at the hearing. But in light of our general view on that score and the Commission's admonition that we urge the parties to settle issues susceptible to such resolution (see Part II of this opinion), we suggested at the last prehearing conference call (Tr. 2913, Feb. 6, 2002) that the parties attempt to settle that issue.)

come forward with no showing that the surrounding hazardous waste facilities are contaminating the groundwater and that these contaminants are traveling to and causing contamination of the aquifer underlying the Reservation.[50] Because OGD has not presented any supporting documentation to substantiate its claims about the effects of other facilities, the Applicant is entitled to summary disposition of this matter.

b. *Property Values.* Basis 6 of Contention OGD O states that the Applicant's environmental report fails to address the impact of the proposed facility upon property values of surrounding Reservation lands. OGD believes construction of the facility on Tribal land will significantly decrease the value of its members' property. In particular, OGD's brief contends, the environmental analysis fails to address the unique cultural and spiritual values that members of all Indian Tribes assign to land. We note that all the Reservation land is held by the United States in trust for the Band as a whole; Tribe members own individually (in contrast to their common interest in the land) only the structures placed on the land. Allison Decl. at 3.

We fully acknowledge the special relationship of Tribe members to their land. But we find that this issue has been adequately addressed by the DEIS. The DEIS discusses (at 6-30 to 6-31) the Reservation's procedures for alienating land and the impact that the construction and operation of the facility will have upon housing demand. In addition, the DEIS specifically recognizes the Tribe's use of the land for cultural and spiritual activities and discusses the impacts that the facility will have upon this use of the land.

Again, an initial answer to OGD's argument is provided by the voluntary nature of the agreement into which the Band entered to bring the facility to the Reservation. In light of that

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[50] The only evidence offered concerning groundwater contamination was contained in the Liang Declaration. In there analyzing the hazardous waste facilities that surround the Skull Valley Reservation (pp. 5-7), Dr. Liang determined that contaminants released into the groundwater would be minimal even if they were able to reach the aquifer below the Reservation, but it is highly unlikely that could occur.

agreement, the main issue underlying this dispute becomes the distribution of the lease payments agreed to by PFS, which will allow the Band to improve its Tribal infrastructure by improving its educational and social service systems. Thus, as the Applicant's brief would have it, any decrease in land value should be offset by the lease and tax payments and the improvements generated by both.[51]

As indicated by the previous discussion, the Board concludes that there no longer remains any dispute of material facts regarding this matter. Thus, the Applicant is entitled to summary disposition on this point as well.

c. *Adverse Impacts.* What the Applicant is not entitled to, however, is a ruling that there are no adverse environmental impacts associated with the physical presence of the proposed facility; indeed, we do not understand either its or the Staff's arguments to embody such a claim. And, as we have seen above, there are a number of direct and simple -- but significant and potentially extremely burdensome -- adverse impacts that fit within the ambit of the sociological impacts referred to in the contention's Basis 1.

To repeat, these are the operational noise, the visual impact, and the cultural insult that the presence of the facility will bring to the Skull Valley Reservation, all now of relevance here (see pp. 19-22, above). We have seen that principles of environmental justice would preclude making OGD's members -- if they do in fact prove to be a protected "population" -- bear disproportionately (from a NEPA balancing standpoint) the net effect of these adverse impacts, whose degree might be contested but whose existence is unchallenged. That brings us to another part of the case that requires a hearing to resolve.

2. The Payments under the Lease. The matter of the allocation of the lease payments presents itself in unusual fashion. In most summary disposition proceedings, the moving party

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[51] PFS Dispositive Motion at 19-20. This assumes the appropriate distribution of the lease payments, the need for which we turn to shortly. See Section I.C.2, below.

presents asserted undisputed facts which it claims warrant a ruling in its favor. As we have seen (pp. 29-34, above), the Applicant was successful to the extent it employed that approach. But that success carried it only so far, for OGD's countering argument introduced a whole new set of asserted undisputed facts in the Blackbear declaration. Because, once again, those stand uncontroverted at this point, the moving party cannot hope to prevail at this stage if the asserted facts presented are relevant and material.[52]

We explained in Section I.B.3 why those facts are material to the issues we must decide. And even a cursory examination of them, as reflected in the Blackbear declaration, reveals their relevance to establishing the propositions for which they are presented. Thus, we need devote little discussion to them. We note merely that Mr. Blackbear claims -- and, again, those claims are not refuted at this point and must be taken as true for present purposes -- that the lease payments, said to amount already to "millions of dollars" (Decl. at ¶ 53.d, p 10; ¶ 258, p. 54), have been misappropriated by Mr. Bear and converted to his own use and that of his allies and favorites (Decl. at ¶ 283.c, p.58; ¶ 300, p. 61; ¶ 327, p. 64; ¶ 334, p. 65; ¶¶ 354-55, pp. 67-68).[53]

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[52] OGD did not cross-file for summary disposition. Thus, even to the extent the facts it has presented are as yet "undisputed," it is not entitled to any relief at this point, for in the procedural posture then presented, the opposition was under no obligation to respond to those "facts." The opportunity to do so will be presented at the hearing.

[53] The Blackbear declaration recounts throughout the numerous efforts he and other Band members have made to obtain an accounting of the PFS funds (and other income streams) flowing to the Tribe. It also recounts (e.g., at 7, 33) the repeated unsuccessful efforts made to get BIA to intervene in an active capacity (which included filing suit against it: Blackbear v. Norton, Case No. 2:01CV00317C (D. Utah, filed May 2, 2001)), and the approaches made to other U.S. officials -- the local U.S. Attorney, the FBI, and the Inspector General and the Solicitor of the Department of the Interior -- that are said to have yielded promises but no results (Decl. ¶ 26, pp. 3-4; p. 35). A reading of the full declaration makes it appear that OGD's members have explored every potential avenue of relief.

Going on, the Blackbear declaration cites examples of OGD members who sought the benefits of and an allocation from the lease payments and other funding sources to meet their most basic needs but who, having opposed the project, were turned down (Decl. at ¶ 53.g, p. 12; ¶¶ 275-76, p. 57; ¶¶ 340-47, pp. 66-67; ¶¶ 375-76, p. 70). On the other hand, Mr. Bear is said to be making extraordinary purchases for his own use (¶ 53.d, p. 11; ¶ 277, p. 57). At the risk of repetition, we point out again that we are not saying these allegations are true,[54] only that, uncontested as they are, the Applicant's motion cannot result in them being summarily denied -- they can be resolved only at a hearing.

The Blackbear declaration covers many other subjects, including the disputes over elections, the violation of Tribal norms, the relative standing of the protagonists,[55] the perception of threats, and other matters. Having found that a hearing is required, we need not delineate all these matters. As the parties see fit and to the extent we concur, some of them may be suitable for consideration at the hearing, but (unless shown otherwise) we do not expect to entertain matters that clearly involve only "Tribal governance," especially given BIA's primacy and action thereon. Some subjects do, however, seem clearly suitable for consideration there, and we list them briefly in the next subsection.

3. The Evidence for the Trial. At a minimum, and for obvious reasons, it seems certain evidence will be relevant to our determination. For instance, assuming Mr. Blackbear puts forth the same testimony about the flow of funds that is in his affidavit, of likely relevance would be a

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[54] Although these and other allegations are not yet proven, the Blackbear declaration says they point to a pattern of corruption (see p. 10, above). It remains to be seen whether, instead of demonstrating human frailty, they portray a matter of Tribal governance legitimized by Goshute culture (for example, the maintenance of Tribal discipline). On the other hand, it may be relevant that the PFS funds come from the leasing of Reservation land held for all Tribe members in common (see p. 33, above).

[55] According to the OGD brief (at 10), Mr. Bear is Goshute only by adoption, not by blood, and has not taken interest in Goshute social and cultural traditions. According to ¶ 8 of his declaration, Mr. Blackbear and his three children have lived on the Reservation since 1996.

PFS (1) tabulation of all the payments it made at any point thus far to the Skull Valley Band or to any of its members, showing at a minimum the amount, form, timing and recipient of each payment; and (2) schedule of future payments to be made if the facility is approved. Similarly relevant would be a Band accounting showing, at a minimum, (1) the amount of the payments received from the Applicant by the Band (or by any member thereof); (2) the manner in which those funds were distributed to individuals in the Band, expended on goods or services, or deposited to the Band's accounts; and (3) to the extent the funds went into those accounts, the manner in which those funds were later distributed or put to other uses.[56]

These documents and any other evidentiary materials shall be made available to the other affected parties and to the Board by Friday, March 22, 2002. If Mr. Bear intends to testify at the hearing to contest the Blackbear allegations, his written testimony shall be pre-filed at the same time by the Applicant and/or the Band, depending on which will be sponsoring him.

By the same token, the Staff or Band should consider providing the parties and the Board with pre-filed testimony from the BIA's Mr. Allison,[57] detailing his response to the relevant allegations in the Blackbear affidavit and setting out his understanding of the BIA's authority and responsibility to bring about change in the situation. Or a party may wish instead to invite the direct participation of the BIA -- the Staff's partner in the preparation of the DEIS, and now the FEIS -- in this proceeding, so that BIA could present these matters on its own behalf. Barring some objection of a nature we do not now envision, we would expect to approve BIA's participation for that purpose. Cf. 10 C.F.R. § 2.715(c).

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[56] The Board is issuing today, covering proprietary information previously submitted, the protective order whose terms the parties had previously agreed upon and have been informally observing. We are not now making any determination as to whether those terms, or similar ones, should apply to the evidence now to be adduced.

[57] As observed above (p. 11 and note 20), the Staff earlier presented an affidavit from Mr. Allison, albeit on a topic different from that now at issue, while the Band presented his affidavit on a related subject.

For its part, OGD will be expected to produce Mr. Blackbear as a witness. While his pre-filed testimony may draw from his declaration, it should focus on the matters now in issue.

Of course, all affected parties may pre-file other written testimony upon which they intend to rely, such as might be related to the reach of Tribal governance (see, e.g., note 54, above). Any such pre-filings or Exhibits (such as photographs of dwelling structures) are likewise due by March 22, as are their briefs on any legal principles or theories bearing on the matters covered in this opinion which they would like to bring to our attention.

The matter will be heard during the week of April 22, assuming the other pending issues do not occupy all of that week. If no time is available then, and if to protect proprietary information the hearing is closed to the public (so that smaller facilities would suffice), then the Board will seek to obtain suitable space during the previous week, during which no hearings are otherwise contemplated. Otherwise, it will be heard after all the other issues. In the interim, the Board will be available, at the request of the affected parties, for prehearing conference calls to set any additional procedural guidelines or to resolve any anticipated procedural disputes.[58]

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[58] No Referral. In light of the potential importance of some of the issues with which this opinion deals -- namely, the potential "Tribal governance" jurisdictional ban and (2) the "protected population" definitional aspects of the environmental justice question -- we have considered whether to refer this matter to the Commission for its early review, as permitted by 10 C.F.R. § 2.730(f). We have decided against that course for several reasons.

Our first thought is that the time for hearing is fast approaching and we think it far better that the parties spend the intervening time preparing for that hearing, rather than preparing briefs for the Commission. Moreover, as it turned out, we have made no final rulings on either of the key points listed above; rather, we have merely said that the key questions -- of (1) our jurisdiction to proceed without intruding into matters of Tribal governance and (2) the proper definition of the protected populations -- are both inextricably bound up with the merits of the underlying disputes. To repeat, we have ruled only that we must go to hearing to obtain enough facts to resolve those threshold, fact-dependent matters; we have made no substantive or precedential rulings on either count.

Finally, we would expect that either the matter will be settled or the hearing on this contention will be a short one. Once it is concluded and we have made rulings on the points at issue, any review the Commission later deems warranted would thereby benefit from the presence of a full evidentiary record and properly developed legal arguments, as well as (if OGD prevails) our decision on a remedy.

One of the purposes of independent adjudicators in any society or culture is to assure that disputes are decided according to applicable law, not by wielding of unfettered power. The powerless or the frustrated who come before a tribunal are not entitled to demand victory, but they are entitled to receive justice.

Here, OGD is seeking environmental justice, as our laws entitle it to do. It may be that some of OGD's complaints will prove beyond our reach, involving matters of Tribal governance that would be reviewable only by Tribal courts, if any existed in the Skull Valley Band (or were imported for particular purposes).[59] But those complaints that prove within our reach will be addressed.

Because at this juncture we have heard essentially from only one side, it is important that we bear in mind the ancient axiom "audi alteram partem" -- "hear the other side."[60] That venerable principle has particular application to the matter before us, where the Blackbear declaration puts forward a stinging indictment of the Bear regime that is as yet unanswered. We can assure the Applicant and the Band that we will come to no conclusions before we hear from Mr. Bear.

There is an alternative course, and a far preferable one. We discuss it in Part II, to which we commend the parties' most serious attention.

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[59] See note 28, above.

[60] See United States v. Steel Tank Barge H 1651, 272 F.Supp. 658, 659 note 1 (E.D. La. 1967), citing John M. Kelley, Audi Alteram Partem, 9 Natural Law Forum 103 (1964). Together, those authorities trace the principle's flow from ancient Greek and Roman literature, through the common law, and into modern Supreme Court opinions on Constitutional law, and point out that the principle embodies elements of both providing due process to litigants and avoiding mistaken decision by judges.

II. THE WISDOM OF A SETTLEMENT

A. The Policy of the Commission

In promulgating the Rules of Practice which govern our proceedings, the Commission included a separate section promoting the value of settling disputes. Given the importance of that policy to the matter before us, it is worth reciting here much of the text of that provision:

> The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or *the entire proceeding. Therefore, . . . the fair and reasonable* settlement of contested initial licensing proceedings is encouraged. It is expected that the presiding officer and all of the parties to those proceedings will take appropriate steps to carry out this purpose.

10 C.F.R. § 2.759. See also 10 C.F.R. § 2.718(h) (authorizing the presiding officer to hold settlement conferences).

The Commission did not leave it at that, but reemphasized the point in a decision in another type of licensing proceeding. Specifically, in Rockwell International Corp. (Rocketdyne Division), CLI-90-5, 31 NRC 337, 340 (1990), the Commission noted that "Commission policy strongly favors settlement of adjudicatory proceedings." See also Policy Statement on Alternative Means of Dispute Resolution (57 FR 36678, Aug. 14, 1992).[61]

Certainly, this Commission viewpoint is consistent with the universal notion that reaching consensus is a valuable endeavor. In this regard, we think there has rarely been an issue so amenable to settlement as that presented here. The interests of the parties would seemingly be well served by resolving their disputes -- which seem to be depriving both sides of peace of mind -- in a fashion which, if not exactly amicable, would free them to pursue more productive activities.

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[61] The Commission's two major policy statements on the conduct of hearings, although directed primarily to other subjects, both encourage attempts to reach settlements. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981), and Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998).

B. The Path to a Settlement

Our opinion today points out that the doctrines that require deference to Tribal governance do not necessarily preclude us from examining the environmental justice dispute before us. But those doctrines certainly instruct us that otherwise it is far better that solutions to disputes among Tribal members come from those who understand their customs and practices -- so that any resolution incorporates conditions within which all can function well as time goes forward.

Accordingly, it is entirely clear to us that it would be a far wiser course for the affected litigants -- the Applicant Private Fuel Storage, the Skull Valley Band of the Goshute Indians, and Ohngo Gaudedah Devia -- and the apparent individual protagonists, Leon Bear and Sammy Blackbear, to settle this dispute rather than go to the hearing that we have ruled is otherwise required.

Moreover, as we see it, there are at least three organizations that might be able to help settle this dispute if the Band is unable to do so on its own. In the first place, we offer the services of a settlement judge from our own Licensing Board Panel. The Commission has encouraged the appointment of settlement judges, noting that to avoid any possible prejudgement problems, the Licensing Board presiding over the merits of the case can play only a limited role in looking at the merits in the course of promoting settlements.[62] In contrast, a settlement judge -- not being involved in a decision-making role, not able to impose a solution, and thus not being bound by the ex parte rule -- can employ a wide variety of potentially beneficial techniques, without compromising any rights of the parties.

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[62] See Rockwell International, CLI-90-5, 31 NRC at 340-41.

Any such appointment would be made by the Licensing Board Panel's Chief, Judge Bollwerk, who is prepared to start the process.[63] Because he is still involved with some aspects of the case and was involved in prior Board rulings involving the parties affected by the possible settlement, he would not appoint himself, but rather another full-time or part-time legal member of the Panel to serve as settlement judge.

An NRC settlement judge would not necessarily bring to the table any particular knowledge of Tribal culture. If that quality were deemed helpful or desirable, it would seem there would be a larger role for the Bureau of Indian Affairs to play than it appears to have been able or willing to play thus far. We do not pretend to understand the nuances of the relationship between BIA and Indian Nations generally, or with the Skull Valley Band in particular. But it still may be that the BIA's Mr. Allison could better serve the public interest, and fulfill his agency role, as a mediator charged to help settle the dispute, rather than as a witness expected to help explain it (see p. 37, above). He might do so on his own or, if the parties desired or the settlement judge wished, he might also participate in aid of the NRC settlement judge (if the parties seek that one be appointed), assuming that would not conflict with his role as a witness if settlement were not accomplished.

If NRC or BIA assistance is not desired, perhaps the Applicant, Private Fuel Storage, is in a good position to guide a settlement. After all, it is the PFS funding that is the source of the dispute, and it is the PFS project that is potentially at risk from Tribal instability. The Applicant needs no approval from us, or invitation from the parties, to press for an amicable settlement on its own. But its apparent inability to calm the controversy thus far hints that it might benefit from NRC and/or BIA involvement in a settlement process.

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[63] This process was implemented recently in the Hydro Resources case (Docket No. 40-8968-ML), in which Judge Farrar was appointed to act as a settlement judge.

We will be contacting the affected parties next week to obtain their thoughts about invoking a formal settlement process. As the two parts of our opinion lay out for them, the parties have a clear choice to make: reach a settlement or go to hearing. We are prepared to help with the former, or to conduct the latter.

Accordingly, for the reasons and to the extent set forth in Part I of this opinion, it is this 22nd day of February, 2002, ORDERED that:

(1) the Applicant's motion for summary disposition of Contention OGD O is GRANTED IN PART and DENIED IN PART; and

(2) the matter is SET FOR HEARING in Salt Lake City during the week beginning Monday, April 22, 2002 (unless otherwise ordered at the suggestion of the parties) under the SCHEDULE ESTABLISHED herein for prehearing filings.

The affected parties are ENCOURAGED to consider the suggestions regarding settlement set forth in Part II of this opinion, and to prepare to respond next week to the inquiry we will be making in that regard.

THE ATOMIC SAFETY
AND LICENSING BOARD

Michael C. Farrar
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 22, 2002

Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, OGD, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State of Utah; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE, L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF "CONTENTION OGD O" -- ENVIRONMENTAL JUSTICE) (LBP-02-08) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 72-22-ISFSI
LB MEMORANDUM AND ORDER
(RULING ON APPLICANT'S MOTION
FOR SUMMARY DISPOSITION OF
"CONTENTION OGD O" --
ENVIRONMENTAL JUSTICE) (LBP-02-08)

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Dated at Rockville, Maryland,
this 22nd day of February 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-98-29

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, L.L.C.	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel Storage Installation)	November 30, 1998

MEMORANDUM AND ORDER
(Ruling on Late-Filed Contentions Regarding August 1998 Low, Utah Rail Spur License Application Amendment)

In filings dated September 29, October 14, and November 2, 1998, respectively, intervenors State of Utah (State or Utah), the Confederated Tribes of the Goshute Reservation (Confederated Tribes), and Ohngo Gaudadeh Devia (OGD) submitted late-filed contentions relating to an August 28, 1998 amendment to the pending 10 C.F.R. Part 72 application of Private Fuel Storage, L.L.C. (PFS). In its license request, PFS seeks authorization under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI) on the Skull Valley, Utah reservation of intervenor Skull Valley Band of Goshute

Indians (Skull Valley Band). The August 28 license application amendment, among other things, outlines a revised proposal to construct a rail spur off the existing Union Pacific rail mainline that would be used to transport flatbed rail cars holding spent fuel shipping casks to the PFS facility approximately thirty miles to the south. In responses to these intervenor filings, applicant PFS and the staff assert that none of the State, Confederated Tribes, or OGD contentions are admissible.

For the reasons set forth below, we find these parties' late-filed contentions relating to the August 1998 application amendment are not litigable.

I. BACKGROUND

As originally submitted in June 1997, the PFS application proposed that shipping casks containing nuclear reactor spent fuel rods would be moved into the Skull Valley area via a Union Pacific rail mainline that runs along the southern shore of the Great Salt Lake. It further stated that "shipping casks are shipped from the railroad mainline to the [Private Fuel Storage Facility (PFSF)] either by rail on a railroad spur or by highway." [PFS], Safety Analysis Report [for PFSF] at 4.5-1 (rev. 0 June 1997) [hereinafter SAR]. The application then went on to detail

the "highway shipment" alternative. First, the shipping casks would be offloaded from rail cars onto heavy haul tractor/trailers at an intermodal transfer point (ITP) located near Rowley Junction, Utah. Rowley Junction is a highway interchange at the intersection of Interstate 80 (I-80), which runs east and west along the Great Salt Lake's southern shore, and the Skull Valley Road (also known as Federal Aid Secondary Road 108), which goes south toward the Skull Valley Band reservation. From the Rowley Junction ITP, the truck trailers would transport the shipping casks some twenty-four miles south down the Skull Valley Road, then west via an access road onto the Skull Valley Band reservation and into the PFSF. See id. at 4.5-1 to -4. In addition, the application described the rail option, stating that "[t]he railroad will consist of a single track installed parallel to the existing Skull Valley Road." [PFS], Environmental Report [for PFSF] at 4.4-1 (rev. 0 June 1997) [hereinafter ER]; see also SAR at 4.5-4 (rev 0 June 1997). The application description further indicated that while a feasibility study would be done to determine on which side of the Skull Valley Road the rail spur would run, the spur would be located "adjacent to the edge of the existing road pavement." ER at 4.4-1 (rev. 0 June 1997).

The August 1998 application amendment makes several changes to this transportation scheme. First, it makes clear the preferred transportation method for shipping spent fuel casks to the PFSF is by rail. See SAR at 3.1-3 (rev. 2 Aug. 1998); ER at 2.1-3, 3.2-6 (rev. 1 Aug. 1998). Also, it relocates the beginning of the proposed rail spur from Rowley Junction seventeen miles west to a point on the Union Pacific mainline near Low Junction, another I-80 interchange. From there, using a two-hundred-foot-wide public lands corridor for which PFS has applied to the United States Bureau of Land Management (BLM) for a right of way, the spur runs thirty-two miles to the PFSF. Specifically, from a Low Junction siding the spur would backtrack southeast approximately three miles along the south side of I-80; then turn due south for some twenty-six miles along the eastern edge of the Cedar Mountains that form the western boundary of Skull Valley; and finally go east three miles into the PFSF located on the Skull Valley Band reservation. See ER at 3.2-6 (rev. 1 Aug. 1998). In addition, the amendment moves the ITP for the train/truck transportation alternative 1.8 miles to the west of its original location at Rowley Junction. See id. at 3.2-5; SAR at 3.1-3 (rev. 2 Aug. 1998).

Three intervenors responded to this amendment with late-filed contentions. On September 29, the State filed two new contentions, Utah HH and Utah II, and a revised contention, Utah B-1. See [State] Contentions Relating to the Low Rail Transportation License Amendment (Sept. 29, 1998) [hereinafter State Low Rail Contentions]. Approximately two weeks later, asserting that it had not been served with the August 28 amendment until September 29, intervenor Confederated Tribes sought admission of six new contentions, Confederated Tribes I through Confederated Tribes N. See Contentions of [Confederated Tribes] Relating to the Low Rail License Amendment (Oct. 14, 1998) [hereinafter Confederated Tribes Low Rail Contentions]. Then, some two weeks after that, intervenor OGD submitted ten new contentions, OGD Q through OGD Z. See [OGD] Contentions Relating to the Low Rail Transportation License Amendment (Nov. 2, 1998) [hereinafter OGD Low Rail Contentions]. In their initial filings, the State and the Confederated Tribes asserted their contentions merit admission under the five criteria for late-filing set forth in 10 C.F.R. § 2.714(a)(1), while all three intervenors maintained their contentions meet the standards for admissibility outlined in section 2.714(b)(2).

In response, PFS declared that none of the contentions filed by the State, the Confederated Tribes, or OGD meets either the section 2.714(a)(1) late filing standards or the section 2.714(b)(2) admissibility standards. See Applicant's Answer to [State] Contentions Relating to the Low Rail Transportation License Amendment (Oct. 14, 1998) [hereinafter PFS State Low Rail Contentions Response]; Applicant's Answer to Confederated Tribes' Contentions Relating to the Low Rail Transportation License Amendment (Oct. 26, 1998) [hereinafter PFS Confederated Tribes Low Rail Contentions Response]; Applicant's Answer to OGD's Contentions Relating to the Low Rail Transportation License Amendment (Nov. 12, 1998) [hereinafter PFS OGD Low Rail Contentions Response]. The staff took a similar, albeit not identical approach. It declared that (1) with the exception of contentions Utah II and Utah B-1, the State, Confederated Tribes, and OGD contentions fail to meet the section 2.714(a)(1) late-filing criteria; and (2) with the exception of portions of Utah HH and Utah B-1 as it seeks to amend the basis for admitted contention Utah B, the State, Confederated Tribes, and OGD contentions do not satisfy the admissibility standards of section 2.714(b)(2). See NRC Staff's Response to [State] Contentions Relating to the Low Rail Transportation License Amendment (Oct. 14, 1998)

[hereinafter Staff State Low Rail Contentions Response]; NRC Staff's Response to Contentions of [Confederated Tribes] Relating to the Low Rail License Amendment (Oct. 26, 1998) [hereinafter Staff Confederated Tribes Low Rail Contentions Response]; NRC Staff's Response to "[OGD] Contentions Relating to the Low Rail Transportation License Amendment" (Nov. 12, 1998) [hereinafter Staff OGD Low Rail Contentions Response].

Subsequently, in a reply filing submitted with leave of the Board, the State continued to maintain its contentions are admissible under both the criteria of section 2.714(a)(1) and section 2.714(b)(2). See [State] Reply to Applicant's and Staff's Responses to Low Rail Contentions (Oct. 26, 1998) [hereinafter State Low Rail Contentions Reply]. On October 30, PFS countered with a pleading, also filed with leave of the Board, addressing the State's reply argument that its challenge to the Low rail spur was not untimely because the use of rail transportation was only presented as a limited option in the original application. See Applicant's Surreply to [State] Reply to Applicant's and Staff's Responses to Low Rail Contentions (Oct. 30, 1998) [hereinafter PFS State Low Rail Contentions Surreply]. Thereafter, with leave of the Board OGD lodged a reply filing, likewise asserting its late-filed contentions are

admissible under both the criteria of section 2.714(a)(1) and section 2.714(b)(2). See [OGD] Reply to the Applicant's and Staff's Responses to Low Rail Contentions (Nov. 23, 1998) [hereinafter OGD Low Rail Contentions Reply].

II. ANALYSIS

A. Standards Governing Admissibility of Late-Filed Contentions

The deadline for filing timely contentions in this proceeding has long passed. See LBP-98-12, 47 NRC 343, 363 (1998). Accordingly, the contentions now before us, as well as any that might be proffered in the future, must meet the five late-filing criteria of 10 C.F.R. § 2.714(a)(1). And, even if they meet these specifications, they also must pass muster under the admissibility standards set forth in section 2.714(b)(2), (d), and (e).

We have discussed both the general standards for contention admissibility and the late-filing criteria in previous decisions in this case, and thus will not repeat those here. See LBP-98-7, 47 NRC 142, 178-83 (general admissibility and late-filing criteria), as modified, LBP-98-10, 47 NRC 288, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998); LBP-98-13, 47 NRC 360, 365 (1998) (general admissibility criteria). An assessment of each of the

intervenors' contentions relative to those standards follows.

B. State Contentions[1]

Utah HH -- The Low Rail Corridor and Fire Hazards

The Applicant's Environmental Report ("ER") fails to give adequate consideration to the potential for fire hazards and the impediment to response to wild fires associated with constructing and operating the Applicant's proposed rail line in the Low corridor, in that:

1. The ER fails to recognize that the Applicant's proposed movement of casks by locomotive in the Low rail line corridor presents a new wildfire ignition source in an area prone to wildfires, such as (a) the "welding, grinding of rail and the presence of fuel for the operation of machinery" associated with rail construction, (b) sparks from friction or train exhaust, and (c) the shearing off of a hot brake shoe during rail operation.

2. The ER fails to evaluate the increased risk of wildfires caused by an increase of human activity near the railroad.

3. The ER fails to address how the Applicant's proposed rail line and the spent fuel transported on it will create an impediment to fighting wildfires.

DISCUSSION regarding Late-Filing Standards: State Low Rail Contentions at 18-19; PFS State Low Rail Contentions Response at 2-4; Staff State Low Rail Contentions Response

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[1] The wording of contentions Utah HH and Utah II reflect the applicant's suggested revisions as adopted and further revised (with PFS's acquiescence) by the State. See PFS Low Rail Contentions Response App. A at 1-2; State Low Rail Contentions Reply at 1-2.

at 3-8; State Low Rail Contentions Reply at 2-3; PFS State Low Rail Contentions Surreply at 1-4.

RULING: Concerning the first late-filing criterion -- good cause for filing late -- in instances such as this one in which a new contention purportedly is based on information contained in a document recently made publically available, an important consideration in judging the contention's timeliness is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document's release. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983); see also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996). In this instance, there are differences between the original application and the August 1998 amendment that might provide material for new issues. For example, besides following a route that physically is ten or more miles to the west of the passageway previously proposed, the Low rail spur is to be built on open rangeland rather than immediately adjacent to, and within the right of way of, an existing highway.

The State, however, does not utilize this or any other information to show what is different about the revised rail route that establishes the wildfire ignition source, human

activity, and firefighting impediment issues in contention Utah HH could not have been specified previously.[2] Instead, the State asserts the rail line alternative as outlined in the original application was not a sufficiently concrete possibility to warrant its effort in formulating any contentions regarding that option. See State Low Rail Contentions Reply at 2-3. The State's protests to the contrary notwithstanding, the rail option was specified in the original PFS application in a manner that made it clear rail-only transportation was on an equal footing with the rail/truck option.[3] See [PFS] License Application for

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[2] An affidavit accompanying the State's contention filing does state the "area" in which the Low rail spur will run is "prone" to wildfires. See State Low Rail Contentions Exh. 1, at 3 (affidavit of David C. Schen). But see PFS Low Rail Contentions Response at 3 n.3 (contesting Schen affidavit on this point). In explaining this conclusion, however, the affidavit states that such fires frequently are the result of fires that originate to the west in the Cedar Mountains and then spread to the east to cover the western part of Skull Valley. It is not apparent how this bears any relationship to the possibility of fires originating from the proposed Low rail spur. In fact, the more relevant consideration is the local vegetation, which the affidavit describes as being essentially uniform across Skull Valley. As a consequence, nothing presented by the State suggests there is anything unique about the Low rail spur, in contrast to the Skull Valley Road rail spur, that would make its wildfire ignition, human activity, or firefighter impediment concerns peculiar to the Low rail spur.

[3] An argument like the State's might have more resonance if an application set out a number of vaguely described options that suggested the applicant was simply

(continued...)

[PFSF] at 1-1 (rev. 0 June 1997). Consequently, that the State may have chosen, for whatever reason, not to address the rail line option in its original contentions does not provide good cause for its failure to answer the central issue of what difference exists between the rail option as set forth in the original applicantion and the option as described in the August 1998 amendment so as to show there is "good cause" for filing contention Utah HH late.

Because the State has failed to demonstrate the information upon which it places substantial reliance as the basis for contention Utah HH was not available in November 1997 when its contentions on the non-physical security plan portions of the PFS application were due, we conclude the State lacks good cause for filing this contention late.[4]

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[3](...continued)
trying to "keep all its options open." We do not see this as being the case here, however.

[4] The State's Low rail spur late-filed contentions, as well as those of the Confederated Tribes and OGD, were filed within approximately 30 days of the date the August 1998 application amendment was provided to them. Neither PFS nor the staff has argued a lack of good cause for late filing based on the time it took the intervenors to prepare and file their contentions regarding the application amendment.

Given the nature of the August 1998 amendment, we do not base our various findings concerning a lack of good cause under late-filing factor one on the timeliness of the actual submission of the intervenors' contentions. We note, however, that such a finding depends in each instance on the
(continued...)

Among the five late-filing standards of section 2.714(a)(1), the good cause factor has been accorded a preeminent role such that the moving party's failure to satisfy this requirement mandates a compelling showing in connection with the other four factors. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Reviewing the remaining four factors, however, we are unable to conclude they support such a showing here.

The State correctly declares that factors two and four -- availability of other means to protect the petitioner's interests and extent of representation of petitioner's interests by existing parties -- favor late admission of this contention. On the other hand, factors three and five -- assistance in developing a sound record and broadening the issues/delaying the proceeding -- provide little, if any, support for its admission. Relative to factor three, the State has submitted an affidavit from a forestry ecosystem manager in support of the contention and asserts

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[4](...continued)
scope and complexity of the "new" information the intervenor relies upon as the basis for late-filing. Further, as this proceeding moves forward, the time involved in preparing and submitting late-filed contentions may well become an element in determinations regarding factor five -- broadening or delaying the proceeding.

that other, unnamed experts will be available to support its position on the contention. See State Low Rail Contentions at 18-19. But this proffer falls considerably short of the specificity regarding witness identification and testimony summaries the Commission has indicated is needed if this factor is to provide strong support for admissibility.[5] See LBP-98-7, 47 NRC at 208-09. As for factor five, it is true (as it is for most of the intervenors' Low rail spur contentions) the fact formal discovery has not yet commenced means prompt admission of this contention likely will not result in a protracted delay in this proceeding. Nonetheless, this is offset by the fact this contention will broaden the issues because the admitted wildfire-related contention -- Utah R -- concerns onsite rather than offsite fire protection.

Bearing in mind that factors two and four are accorded less weight than factors three and five, see Braidwood, CLI-86-8, 23 NRC at 245, despite the fact the former factors support the admission of this contention, a balancing of all four criteria clearly does not provide the requisite

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[5] At best, the affidavit accompanying the State's filing provides very weak support in the admissibility balance.

compelling showing needed to overcome the lack of good cause for its late filing.[6]

Utah II -- Costs and effects associated with the Low Rail Corridor

The Low Corridor License Amendment does not comply with 10 C.F.R. § 72.100(b) or NEPA, including 10 C.F.R. § 51.45(c), and 40 C.F.R. § 1508.25 because it fails to evaluate, quantify, and analyze the costs and cumulative impacts associated with constructing and operating the rail line on the regional environment, in that:

1. The ER fails to quantify the costs and evaluate the cumulative impacts associated with fires potentially ignited as a result of activities occurring in the rail corridor.

2. The ER fails to quantify the costs and sufficiently analyze the impacts of the construction and operation of the rail line on species in the rail corridor, including species habitat, food base, mating and breeding habits, noise levels, and barriers to migration.

3. The ER fails to take account of the visual impact the railroad will have on the BLM Cedar Mountains Wilderness Study Area or other locations in Skull Valley.

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[6] At the same time, while we need not reach the question of its admissibility under section 2.714(b), based on our review of the parties' filings, we would have admitted only the portion of paragraph three of this contention dealing with impediments to four-wheel drive vehicle firefighting activities as being supported by a basis establishing a genuine material dispute adequate to warrant further inquiry. The other portions of this contention and their supporting bases would be inadmissible as impermissibly challenging the Commission's regulations or generic rulemaking-associated determinations (paragraph three as it relates to firefighter response hesitation); and/or lacking adequate factual or expert opinion support (paragraphs one and two). See LBP-98-7, 47 NRC at 179, 180-81.

4. The ER fails to quantify the costs associated with noise levels from the construction and operation of the railroad on the surrounding wilderness and recreational areas.

5. The ER fails to demonstrate how the Applicant plans to carry out the revegetation of the rail corridor and fails to show where and how the Applicant will obtain access to needed water.

6. The ER does not quantify or otherwise evaluate the loss of historical resources that may occur where the rail line crosses the Hastings Trail and the Donner-Reed Trail.

7. The ER fails to quantify the costs or evaluate the cumulative impacts associated with the rail line's impeding recreational users' and ranchers' crossing of Skull Valley from east to west.

1. Late-Filing Standards

DISCUSSION: State Low Rail Contentions at 18-19; PFS State Low Rail Contentions Response at 9, 11, 13-14; Staff State Low Rail Contentions Response at 3-8; State Low Rail Contentions Reply at 2-3; PFS State Low Rail Contentions Surreply at 1-4.

RULING: Applicant PFS asserts that paragraphs one, two, and five of this contention should be dismissed because application of the five-factor test in section 2.714(a) does not weigh in favor of admissibility. Repeating its principal argument regarding Utah HH, PFS maintains that each of these paragraphs is not dependent on information new to the August 1998 application amendment and, accordingly,

each lacks "good cause" under factor one. The staff is in accord for that portion of the contention footed in Utah HH, which the State references as a basis for paragraph one.

We conclude the State has not met its burden to establish good cause for the late-filing of paragraph one by showing it was based on significant new data first revealed in the application amendment. Further, for the reasons set forth in connection with contention Utah HH, we find an analysis of the other four factors is insufficient to offset this lack of good cause in the admissibility balance.[7] See supra pp. 12-14. The first portion of this contention thus is not admissible as late-filed.

The remainder of the contention, including paragraphs two and five, appears to be based on significant new data that was first revealed in the application amendment, so as to provide the requisite good cause under late-filing factor one. Placing this factor one support for admission into the balance with the other four factors as described above, see supra pp. 12-14, we conclude relative to paragraphs two

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[7] In this regard, we note that for each paragraph, admission of the contention would broaden the issues in the proceeding. Further, in connection with factor three we observe there is even less provided concerning identification of witnesses and testimony than there was for contention Utah HH.

through seven that the admission of the contention is not precluded by the fact it was late-filed.

2. Admissibility

DISCUSSION: State Low Rail Contentions at 7-12; PFS State Low Rail Contentions Response at 9-17; Staff State Low Rail Contentions Response at 12-18; State Low Rail Contentions Reply at 6-7.

RULING: In connection with paragraphs two through seven, these portions of the contention are inadmissible because these parts of the contention and their supporting bases impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations (paragraphs two, four, six, and seven);[8] lack adequate factual or expert opinion support (paragraphs two, four, five, six, and seven); and/or fail properly to challenge the PFS application, as amended (paragraphs three, four, six, and seven).[9] See LBP-98-7, 47 NRC at 179-81.

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[8] Although agency regulations implementing the National Environmental Policy Act of 1969 (NEPA) mandate cost quantification of environmental impacts as practicable in an environmental report, they impose a burden on the applicant to provide a quantification discussion only "to the fullest extent practicable." See 10 C.F.R. § 51.45(c).

[9] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings, the first paragraph of the contention also would be inadmissible as impermissibly challenging the

(continued...)

Utah B-1 -- License Needed for Intermodal Transfer Facility

CONTENTION: PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point ("ITP"), in violation of 10 C.F.R. § 72.6(c)(1), in that the Rowley Junction operation is not merely part of the transportation operation but a de facto interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel. Because the ITP is an interim spent fuel storage facility, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.

DISCUSSION: State Low Rail Contentions at 12-17; PFS State Low Rail Contentions Response at 17-20; Staff State Low Rail Contentions Response at 18-20; State Low Rail Contentions Reply at 7-8.

RULING: With this "contention," the State seeks to amend the basis for already admitted contention Utah B to "account for proposed changes at the ITP" resulting from the August 1998 amendment. State Low Rail Contentions at 13 n.2. The applicant opposes this request, asserting the contention should remain as originally admitted except to note that the Rowley Junction ITP is now 1.8 miles west of its original location. The staff takes a somewhat more

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[9](...continued)
Commission's regulations or rulemaking-related generic determinations; and/or as lacking adequate factual or expert opinion support. See LBP-98-7, 47 NRC at 179-80.

expansive view. Declaring that in addition to the location change, factual statements in the State's revised basis concerning the viability of the ITP pending completion of the BLM approval process and a revised description of the Rowley Junction facility, equipment, and expected shipping volume could be admitted, the staff opposes any basis revisions that would expand the contention beyond the scope established in the Board's original admission ruling or that are speculative and unsupported.

Although we see no need to adopt a renumbered contention Utah B as proposed by the State, bearing in mind the admonition that "[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases," Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), we will deem the bases of that contention amended to incorporate: (1) the new location of the proposed Rowley Junction ITP, see State Low Rail Contentions at 13; (2) the assertion about the continuing viability of the ITP proposal pending BLM approval of the right of way for the Low rail spur, see id. at 13 n.3; and (3) the description of the ITP facility and equipment, per statements in the August 1998 PFS application amendment, see id. at 14. In so doing, however, we intend no change in the scope of our original ruling admitting this

contention on a limited basis. See LBP-98-7, 47 NRC at 184-85.

C. Confederated Tribes Contentions

Confederated Tribes I

The Goshute Tribe hereby adopts and restates as though set forth in full herein the additional Contentions and Supporting Bases of the State of Utah filed with the Board on September 29, 1998, relating to the Low Rail Transportation License Amendment.

DISCUSSION: Confederated Tribes Low Rail Contentions at 1, 6; PFS Confederated Tribes Low Rail Contentions Response at 1-2; Staff Confederated Tribes Low Rail Contentions Response at 6.

RULING: As we have held previously, a contention that seeks to adopt another intervenor's contention by reference is inadmissible. See LBP-98-7, 47 NRC at 236-37. Although we would permit the Confederated Tribes to incorporate these State contentions, see id., none of them has been found admissible.[10] See section II.B above.

Confederated Tribes J

The Applicant's Environmental Report fails to provide adequate consideration to the potential fire hazards and the impediment to response to wild fires associated with

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[10] We previously permitted Confederated Tribes to incorporate contention Utah B. See LBP-98-7, 47 NRC at 237. Our ruling regarding the revised basis for that contention, see supra p. 19, would reach that incorporation ruling as well.

constructing and operating the proposed rail line in the Low corridor.

DISCUSSION regarding Late-Filing Standards: Confederated Tribes Low Rail Contentions at 6; PFS Confederated Tribes Low Rail Contentions Response at 3-5; Staff Confederated Tribes Low Rail Contentions Response at 2-6.

RULING: Relative to the first factor, the Confederated Tribes has failed to demonstrate the information upon which it places significant reliance as the basis for this contention was not available relative to the original application. See supra pp. 9-11. The Confederated Tribes thus lacks good cause for filing this contention late.

Nor has the Confederated Tribes made the compelling showing in connection with the other four factors that is needed to overcome a lack of good cause for late filing. As with the State's late-filed contentions, factor two -- availability of other means to protect the petitioner's interests -- favors late admission of this contention. But unlike the State's late-filed issues, factor four -- extent of representation of petitioner's interests by existing parties -- does not. This contention essentially tracks Utah HH, and, based on our previous experience, we have no difficulty in concluding the State is well able to represent

the interests of the Confederated Tribes (or any other intervenor) relative to such an issue. See Licensing Board Memorandum and Order (Memoralizing Prehearing Conference Rulings) (May 20, 1998) at 2 (approving request to change lead party for consolidated contention from Confederated Tribes to State) (unpublished).

So too, factors three and five -- assistance in developing a sound record and broadening the issues/delaying the proceeding -- do not support admission. In connection with factor three, the Confederated Tribes has not provided any information regarding witnesses or testimony that it would proffer in order to develop a record in support of this contention. And relative to factor five, although the fact formal discovery has not yet commenced means prompt admission of this contention likely will not result in a protracted delay in this proceeding, admission of this contention will broaden the issues because the admitted wildfire-related contention -- Utah R -- concerns onsite rather than offsite fire protection.

A balancing of the other four factors thus clearly does not provide the requisite compelling showing needed to

overcome the lack of good cause for the contention's late filing.[11]

Confederated Tribes K

The "Amended" Application fails to account for the costs associated with the construction, maintenance, operation, and decommissioning of the rail line and the costs associated with the ultimate removal of the stored fuel at the end of the lease.

DISCUSSION regarding Late-Filing Standards: Confederated Tribes Low Rail Contentions at 6; PFS Confederated Tribes Low Rail Contentions Response at 7; Staff Confederated Tribes Low Rail Contentions Response at 2-6.

RULING: The Confederate Tribes has not met its burden to establish good cause for the late-filing by showing that significant new data was first revealed in the application amendment. Further, for the reasons set forth in connection with contention Confederated Tribes J, we find that an analysis of the other four factors is insufficient to offset

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[11] While we need not reach the question of its admissibility under section 2.714(b), based on our review of the parties' filings, we would not have admitted the contention because the contention and its supporting basis impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. Part 71; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application, as amended. See LBP-98-7, 47 NRC at 179, 180-81.

this lack of good cause in the admissibility balance.[12] See supra pp. 21-22. This contention thus is not admissible as late-filed.[13]

Confederated Tribes L

The intermodal transfer point (ITP), under the proposed "Amendment," becomes a temporary storage facility which requires a separate and additional license. 10 CFR § 72.6(c)(1).

DISCUSSION regarding Late-Filing Standards: Confederated Tribes Low Rail Contentions at 6; PFS Confederated Tribes Low Rail Contentions Response at 9; Staff Confederated Tribes Low Rail Contentions Response at 2-6.

RULING: The Confederate Tribes again has not met its burden to establish good cause for the late-filing by showing that significant new data was first revealed in the application amendment. Further, for the reasons set forth

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[12] In this regard, relative to factors four and five we note that this contention essentially tracks contention State II and that admission of the contention would broaden the issues in the proceeding.

[13] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings this contention also would be inadmissible because the contention and its supporting basis lack adequate factual or expert opinion support; fail properly to challenge the PFS application, as amended; and/or seek to litigate issues already rejected by the Board relative to contention Confederated Tribes A. See LBP-98-7, 47 NRC at 180-81, 234.

in connection with contention Confederated Tribes J, we find that an analysis of the other four factors is insufficient to offset this lack of good cause in the admissibility balance.[14] See supra pp. 21-22. This late-filed contention thus is not admissible.[15]

Confederated Tribes M

The proposed rail line will increase hazards to the public.

DISCUSSION regarding Late-Filing Standards: Confederated Tribes Low Rail Contentions at 6; PFS Confederated Tribes Low Rail Contentions Response at 11-12; Staff Confederated Tribes Low Rail Contentions Response at 2-6.

RULING: The Confederate Tribes once again has not met its burden to establish good cause for the late-filing by

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[14] In this regard, relative to factors four and five we note that this contention essentially tracks contention State B-1 and that admission of this contention would broaden the issues in the proceeding.

[15] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings this contention also would be inadmissible because the contention and its supporting basis impermissibly challenge agency regulations or rulemaking-associated generic determinations, including 10 C.F.R. Part 71; lack adequate factual or expert opinion support; fail properly to challenge the PFS application; and/or seek to litigate issues already rejected by the Board relative to contention Utah B. See LBP-98-7, 47 NRC at 179-81, 184.

showing that significant new data was first revealed in the application amendment. Factor two and, in contrast to contentions Confederated Tribes J through L, factor four -- extent of representation of petitioner's interests by existing parties -- support admission of this contention. As we have already noted, however, factors two and four are accorded less weight than factors three and five. See supra p. 13. Consequently, when considered with factors three and five that, for the reasons set forth in connection with contention Confederated Tribes J, do not support admission, see supra pp. 21-22, we are unable to conclude the combined weigh of these four factors is sufficient to offset the lack of good cause in the admissibility balance.[16] This late-filed contention is not admissible as well.[17]

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[16] In this regard, relative to factor five we note that admission of the contention would broaden the issues in the proceeding.

[17] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings this contention also would be inadmissible in that the contention and its supporting basis impermissibly challenge agency regulations or rulemaking-associated generic determinations, including 10 C.F.R. Parts 71 and 73; lack adequate factual or expert opinion support; and/or seek to litigate issues already rejected by the Board relative to contention OGD C. See LBP-98-7, 47 NRC at 179-80, 227-28.

Confederated Tribes N

The "Amendment" fails to provide adequate notice to the public of the changes, which are substantial.

1. Late-filing Standards

DISCUSSION: Confederated Tribes Low Rail Contentions at 6; PFS Confederated Tribes Low Rail Contentions Response at 12-13; Staff Confederated Tribes Low Rail Contentions Response at 4-6.

RULING: Challenging, as it does, the adequacy of the procedures under which the August 1998 application amendment is being considered by the agency, the contention raises a concern that could not have been proffered prior to that amendment. There thus is the requisite good cause under factor one. Notwithstanding the fact that factors three and five do not support admission of this contention as described in connection with contention Confederated Tribes J,[18] see supra p. 21-22, placing the factor one

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[18] In this regard, relative to factor five we note that admission of the contention would broaden the issues in the proceeding. We also note relative to factor three that because this is essentially a legal question, the Confederated Tribes failure to specify witnesses or testimony does not count as heavily against admissibility as it otherwise might have. At the same time, in line with the Commission's Braidwood reasoning, see CLI-86-8, 23 NRC at 246, a strong showing under this factor for a legal contention may require a more detailed description of the authority for the intervenor's legal claim then has been provided here.

support for admission into the balance along with the support accorded by factors two and four as described above relative to contention Confederated Tribes M, see supra p. 25, we conclude that the admission of the contention is not precluded by the fact it was late-filed.

2. Admissibility

DISCUSSION: Confederated Tribes Low Rail Contentions at 5-6; PFS Confederated Tribes Low Rail Contentions Response at 12-13; Staff Confederated Tribes Low Rail Contentions Response at 12-13.

RULING: This is essentially a legal contention; nonetheless, it must have a basis sufficient to warrant its admission. Assuming that changes in a license application of sufficient magnitude could provide cause for renoticing the application, compare Rochester Gas & Electric Corp. (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1233-36 (1983) (delay in proceeding of five years pending staff application review renders original notice of hearing sufficiently stale to require renoticing of proceeding), the Confederated Tribes conclusory assertions that "changes on virtually every page" of the application as a result of the August 1998 amendment indicate "substantial changes in the nature of the license" being sought, Confederated Tribes Low

Rail Contentions at 5, are wholly inadequate to support admission of this contention.

D. OGD Contentions

OGD Q

In acting on the proposed license and amendments prior to completing an Environmental Impact Statement (EIS) as required by the National Environmental Policy Act (NEPA), the NRC has made irretrievable commitments of resources resulting in severe prejudice to the EIS process. In particular, the present procedure employed for the PFS license and license amendments prejudices the NRC's ability to fairly assess alternatives to the proposed PFS facility and the transportation of high level spent fuel.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: As we noted above, consistent with longstanding agency practice, all contentions filed subsequent to November 1997 (other than those physical security plan contentions for which the Board granted a filing extension, see LBP-98-13, 47 NRC at 363) are late-filed. Consequently, OGD's arguments to the contrary notwithstanding,[19] this

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[19] OGD asserts its Low rail spur-related contentions are not late-filed because there was no new hearing notice issued about the amendment and, therefore, its contentions need not meet the section 2.714(a)(1) late-filing criteria. See OGD Low Rail Contentions Reply at 1-2. The agency's licensing review procedures contemplate a dynamic process in which an application may be modified or improved without

(continued...)

contention (and all its other Low rail spur-related contentions) cannot be accepted unless a balancing of the five factors set forth in section 2.714(a) supports its admission.

Concerning factor one -- good cause for late filing -- while this issue statement is predominately a legal contention, OGD nonetheless has failed to demonstrate the information upon which it places significant reliance as the basis for this contention was not available relative to the original application. See supra pp. 9-11. It thus lacks good cause for filing this contention late.

OGD also failed to make a compelling showing in connection with the other four factors so as to counterbalance the lack of good cause for late filing. Factors two and four -- availability of other means to protect the petitioner's interests and extent of representation of petitioner's interests by existing parties -- do favor late admission of this contention. As

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[19](...continued)
"renoticing" the application. At the same time, an intervenor is free to mount an adjudicatory challenge to any application revisions proffered after the deadline for filing contentions, at least so long as the new or amended contentions meet the late-filing criteria of section 2.714(a)(1). See Baltimore Gas and Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 243 (1998), appeal pending.

we have noted, however, they are given significantly less weight in the balance as compared to factors three and five. See supra p. 13. Although, in the context of this legal contention, OGD's lack of a witness and testimony proffer means that factor three -- assistance in developing a sound record -- does not necessarily weigh as heavily as it might against late admission, see supra note 18, this is certainly not the case with factor five -- broadening the issues/delaying the proceeding -- which does not support admission given the significant new element this contention would introduce into the proceeding. Even with factors two and four on the admissibility side of the balance, there is not sufficient support to overcome the lack of good cause, rendering this contention inadmissible.[20]

OGD R

OGD and its members will be adversely impacted by the routine operation of the Low rail spur and will be seriously impacted by any transportation-related accidents.

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[20] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis impermissibly challenge the basic structure of the Commission's regulatory process; lack adequate factual or expert opinion support; and/or fail to establish with specificity any genuine dispute. See LBP-98-7, 47 NRC at 178-81.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: Because OGD has failed to show the information upon which it places significant reliance as the basis for this contention was not available relative to the original application, we find it lacks good cause for late submission of this contention. And lacking factor one support, OGD also has failed to make the compelling showing regarding the other four factors that is necessary to gain this contention's admission. While factors two and four -- availability of other means to protect the petitioner's interests and extent of representation of petitioner's interests by existing parties -- once again favor late admission of this contention, in this instance both factors three and five do not. Relative to factor three -- assistance in developing a sound record -- OGD has not provided any information regarding witnesses or testimony that it would proffer in order to develop a record in support of this contention. Further, concerning factor five -- broadening the issues/delaying the proceeding -- although the fact formal discovery has not yet commenced means prompt admission of this contention likely will not

result in a protracted delay in this proceeding, admission of this contention (and indeed any of OGD's remaining contentions) will broaden the issues. With factors three and five thus weighing against admission, the support provided by the less important factors two and four clearly is insufficient to provide sufficient support for admitting this contention.[21]

OGD S

OGD and its members are adversely affected by the potential sabotage of spent nuclear fuel during transportation along the proposed rail spur.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

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[21] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis lack adequate factual or expert opinion support; fail properly to challenge the PFS application, as amended; and/or seek to litigate issues already rejected by the Board relative to contention OGD P. See LBP-98-7, 47 NRC at 180-81, 233-34.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[22] See supra pp. 30-31.

OGD T

OGD and its members are adversely affected by the failure of PFS and/or the NRC to fully evaluate the potential failure of the flat bed rail cars that will transport the spent nuclear fuel along the rail spur.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[23] See supra pp. 30-31.

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[22] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. Parts 71 and 73; raise issues beyond the scope of this proceeding; lack adequate factual or expert opinion support; and/or seek to litigate issues already rejected by the Board relative to contention OGD C. See LBP-98-7, 47 NRC at 179-81, 227-28.

[23] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including

(continued...)

OGD U

OGD and its members are adversely affected by potential fires caused by or enhanced by rail activities.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[24] See supra pp. 30-31.

OGD V

OGD and its members are adversely affected by the potential human health and environmental safety problems associated with any type of failure of the casks that may be

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[23](...continued)
10 C.F.R. Parts 71 and 73; raise issues outside the scope of the proceeding; and/or lack adequate factual or expert opinion support. See LBP-98-7, 47 NRC at 179-181.

[24] In doing so, we note that to the degree this contention attempts to raise some of the same issues as were put forth in contention Utah HH, this weakens the OGD showing relative to factor four -- extent of representation of petitioner's interests by existing parties -- given the State is fully qualified to represent its interest relative to these issues. See supra p. 21.

Further, although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application, as amended. See LBP-98-7, 47 NRC at 180-81.

used to ship spent nuclear fuel to the proposed PFS facility along the proposed rail spur.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[25] See supra pp. 30-31.

OGD W

OGD and its members are adversely affected by potential human errors, accidents, and/or other malfunctions involving the 1) loading of shipping casks, 2) transportation of shipping casks to a railhead, and 3) transportation of shipping casks via rail, including the proposed rail spur to the proposed PFS facility.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

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[25] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. § 51.52 (Summary Table S-4); lack adequate factual or expert opinion support; and/or seek to litigate issues already rejected by the Board relative to contentions OGD C and OGD I. See LBP-98-7, 47 NRC at 179-181, 227-28, 230.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[26] See supra pp. 30-31.

OGD X

OGD and its members are adversely affected by the failure of PFS and/or the NRC to assess environmental justice issues caused by the proposed amendment to transport high level spent nuclear fuel into the Skull Valley area via rail spur.

DISCUSSION regarding Late-Filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[27] See supra pp. 30-31.

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[26] Although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. § 51.52 (Summary Table S-4); lack adequate factual or expert opinion support; and/or seek to litigate issues already rejected by the Board relative to contention Utah V. See LBP-98-7, 47 NRC at 179-81; 200-01.

[27] Because there already is an admitted contention, OGD O, concerning environmental justice, factor five -- broadening the issues/delaying the proceeding -- seemingly would provide somewhat less support on the "inadmissibility" side of the balance than for contention OGD R, albeit not enough to provide the compelling showing needed to overcome

(continued...)

OGD Y

OGD and its members are adversely affected by the taking and use of lands proposed for the construction and operation of the proposed rail spur because they will be deprived of the opportunity to utilize these lands for grazing animals.

DISCUSSION regarding Late-filing Standards: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: For the reasons set forth in our ruling regarding contention OGD R, we find this contention inadmissible.[28] See supra pp. 30-31.

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[27](...continued)
the lack of good cause relative to factor one.

Additionally, although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis raise issues outside the scope of this proceeding; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application, as amended. See CLI-98-13, 48 NRC at 36; LBP-98-7, 47 NRC at 179-81.

[28] OGD maintains good cause exists for late-filing this contention because one of its members use of grazing land is limited to a part of the Skull Valley Band reservation on which the relocated rail spur will run. See OGD Low Rail Contention Reply at 14. The cited affidavit does not, however, support this assertion.

Also in this regard, we observe relative to factor three that the affidavit accompanying the OGD filing provides, at best, very weak support in the admissibility balance that clearly is inadequate, even in combination with
(continued...)

OGD Z

The construction and operation of the proposed rail spur will permanently damage the historically and culturally significant trail used by the Goshute and others who used the area planned for the Low Corridor Rail Spur to travel through the Skull Valley region.

1. Late Filing Standards

DISCUSSION: PFS OGD Low Rail Contentions Response at 1-5; Staff OGD Low Rail Contentions Response at 3-5; OGD Low Rail Contentions Reply at 1-5.

RULING: Because OGD has made a showing that, by reason of the rail spur's relocation, there are now historical or cultural concerns that previously would not have been implicated, we find there is good cause for filing this particular contention late. Notwithstanding the fact that factors three and five provide little, if any support for admission of this contention as described in connection with contention OGD Y, see supra p. 36 & n.28, placing the factor one support for admission into the balance along with the

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[28] (...continued)
factors two and four, to provide the compelling support needed to overcome the lack of good cause.

Additionally, although we need not reach the issue of its admissibility under section 2.714(b), based on our review of the parties' filings we would not have admitted the contention because the contention and its supporting basis lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application, as amended. See LBP-98-7, 47 NRC at 180-81.

support accorded by factors two and four as described above relative to contention OGD R, see supra p. 31, we conclude that the admission of the contention is not precluded by the fact it was late-filed.

2. Admissibility

Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine material dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application, as amended. See LBP-98-7, 47 NRC at 179-81.

III. CONCLUSION

For the reasons set forth above, we find that the late-filed contentions submitted by the State, the Confederated Tribes, and OGD regarding an August 1998 amendment to the PFS application that proposes, among other things, to construct and operate a rail spur between Low Junction, Utah, and its Skull Valley ISFSI are not subject to consideration in this proceeding either because these intervenors have failed to establish (1) a balancing of the five factors in 10 C.F.R. § 2.714(a)(1) governing late-filing supports admitting the contentions; or (2) the

standards in section 2.714(b)(2) support admission of the contentions. Further, although we find contention Utah B-1 inadmissible, we permit the basis for admitted contention Utah B to be amended to incorporate certain information about the proposed Rowley Junction ITP that arises from the August 1998 application amendment.

For the foregoing reasons, it is this thirtieth day of November 1998, ORDERED, that

1. The basis for admitted contention Utah B is amended as specified in section II.B. above.

2. The following late-filed contentions submitted by the State, the Confederated Tribes, and OGD in filings dated September 29, 1998, October 14, 1998, and November 2, 1998, respectively, are rejected as inadmissible: Utah HH, Utah II, Utah B-1, Confederated Tribes I, Confederated Tribes J, Confederated Tribes K, Confederated Tribes L,

Confederated Tribes M, Confederated Tribes N, OGD Q, OGD R, OGD S, OGD T, OGD U, OGD V, OGD W, OGD X, OGD Y, and OGD Z.

THE ATOMIC SAFETY
AND LICENSING BOARD[29]

Original Signed By
G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Original Signed By
Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Original Signed By
Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

November 30, 1998

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[29] Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band, OGD, Confederated Tribes, Castle Rock Land and Livestock, L.C./Skull Valley Company, LTD., and the State; (3) petitioner Southern Utah Wilderness Alliance; and (4) the staff.

47 N.R.C. 288
(Cite as: 47 N.R.C. 288, 1998 WL 303921 (N.R.C.))

**1 IN THE MATTER OF
PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation)

Nuclear Regulatory Commission

Atomic Safety and Licensing Board

LBP-98-10
Docket No. 72-22-ISFSI (ASLBP No. 97-732-02-ISFSI)

May 18, 1998

*288 Before Administrative Judges: G. Paul Bollwerk, III, Chairman; Dr. Jerry R. Kline; Dr. Peter S. Lam

In this proceeding concerning the application of Private Fuel Storage, L.L.C., under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board rules on motions for reconsideration and/or clarification of its decision in LBP-98-7, 47 NRC 142 (1998), admitting parties and contentions.

LICENSING BOARD(S): RESPONSIBILITIES (EXPLANATION OF REASONS FOR DECISION OR RULING)

RULES OF PRACTICE: CONTENTIONS (EXPLANATION OF REASONS FOR RULING ON ADMISSIBILITY); DECISIONS OR RULINGS (EXPLANATION OF REASONS)

In the context of the record before the presiding officer, including the arguments of the participants, if the presiding officer's reasons for rejecting an intervenor's contentions " 'may reasonably be discerned,' " Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983) (quoting Bowman Transportation, Inc. v. *289 Arkansas-Best Freight Systems, Inc., 419 U.S. 281, 286 (1974)), the presiding officer has provided an adequate explanation for that decision.

MOTION FOR RECONSIDERATION: RAISING MATTERS FOR FIRST TIME

RULES OF PRACTICE: MOTIONS FOR RECONSIDERATION (RAISING MATTERS FOR FIRST TIME)

If a party seeks to rely on information as a basis for admitting or rejecting a contention that clearly falls outside the stated scope of its original arguments, this is an impermissible ground for seeking reconsideration. See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997) (reconsideration motions may not rest on a "new thesis").

MOTION FOR RECONSIDERATION: RAISING RELATED MATTERS

RULES OF PRACTICE: MOTIONS FOR RECONSIDERATION (RAISING RELATED MATTERS)

When similar aspects of other contentions have been rejected, consistency concerns counsel that the presiding officer consider a renewed argument regarding a comparable component of an admitted contention to ensure the presiding officer has not overlooked a similar matter. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687 (1983) (reconsideration asks that the deciding body take another took at existing evidence because evidence has been misunderstood or overlooked).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION; NEED TO EXPLAIN SIGNIFICANCE OF SUPPORTING DOCUMENTS)

Attaching a document in support of a contention without any explanation of its significance does not provide an adequate basis for a contention. See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338 (1991).

***290** MEMORANDUM AND ORDER

(Ruling on Motions for Reconsideration of LBP-98-7)

****2** Four of the parties to this proceeding, Intervenors Ohngo Gaudadeh Devia (OGD) and the State of Utah (State or Utah),

Applicant Private Fuel Storage, L.L.C. (PFS), and the NRC Staff have filed motions requesting reconsideration and/or clarification of portions of our rulings in LBP-98-7, 47 NRC 142 (1998). See Motion and Memorandum of [OGD] Requesting Reconsideration of Contentions (Apr. 29, 1998) [hereinafter OGD Reconsideration Motion]; [State] Motion for Clarification and Reconsideration of LBP-98-7 (May 6, 1998) [hereinafter State Reconsideration Motion]; Applicant's Motion for Reconsideration and Clarification (May 6, 1998) [hereinafter PFS Reconsideration Motion]; NRC Staff's Motion for Partial Reconsideration of LBP-98-7 (May 6, 1998) (hereinafter Staff Reconsideration Motion]. In addition, these parties, as well as Intervenors Castle Rock Land & Livestock, L.C., and Skull Valley Co., Ltd. (collectively Castle Rock), have filed pleadings in response to these motions. See [OGD] Response to Applicant's Motion for Reconsideration of Contentions (May 11, 1998) [hereinafter OGD Reconsideration Response]; State's Response to Motions for Reconsideration (May 13, 1998) [hereinafter State Reconsideration Response); [Castle Rock] Response to Motion for Reconsideration (May 13, 1998) [hereinafter Castle Rock Reconsideration Response]; Applicant's Response to NRC Staff, [State], and OGD Motions for Reconsideration and Clarification (May 13, 1998) [hereinafter PFS Reconsideration Response]; NRC Staff's Response to Motions for Reconsideration of LBP-98-7, Filed by the Applicant, the [State] and (OGD] (May 13, 1998) (hereinafter Staff Reconsideration Response].

As is detailed below, we grant in part and deny in part the reconsideration/clarification request of PFS, and deny the requests of OGD, the State, and the Staff.

I. COMMON ISSUES

A. Licensing Board's Contention Admissibility Explanations

In their motions, various parties raise two "common" issues. Both OGD and the State assert, with the Staff's apparent acquiescence, that the Board's explanation of its reasons for rejecting some of their contentions is too terse and requires further explication. See OGD Reconsideration Motion at 2 n. 1; State Reconsideration Motion at 2-6; Staff Reconsideration Response at 3-4. We do not agree. In the context of the record before us, including the arguments of the participants, our reasons for rejecting their contentions " 'may reasonably be ***291** discerned,' " Motor Vehicle Manufacturers Association of the

United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983) (quoting Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc., 419 U.S. 281, 286 (1974)), from our April 22, 1998 issuance and so are adequate. We also note in this regard that their reliance on authority relating to "initial decisions" is not applicable to our nonmerits determination of whether their contentions meet the agency's procedural admissibility threshold.

B. Utah B

**3 For their part, both PFS and the Staff assert that our admission of contention Utah B relating to licensing of the Rowley Junction intermodal transfer point (ITP) was in error. See PFS Reconsideration Motion at 2-5; Staff Reconsideration Motion at 2-10. They contend that, notwithstanding the unresolved question of the PFS role in operating the ITP, there is no basis for concern because the coverage afforded under 10 C.F.R. Part 71 to Commission "licensees" and common or contract "carriers" relative to the transportation of nuclear materials will not leave a regulatory gap. The State disagrees, asserting the contention raises unresolved legal and factual issues. See State Reconsideration Response at 2-8.

We see nothing in the arguments of PFS and the Staff that gives us cause to dismiss what appears to be essentially a legal contention at this nonmerits stage of the proceeding. [FN1] Accordingly, as they relate to Utah B, their reconsideration requests are denied.

II. INDIVIDUAL PARTY ISSUES

In addition to these "common" issues, OGD, the State, and PFS also seek reconsideration or clarification of matters relating to the Board's rulings on certain specific contentions whose admission they either sponsored or opposed. We address these matters below.

A. OGD Reconsideration Requests

OGD seeks reconsideration of our decision rejecting three of its contentions, OGD B, OGD J, and OGD N. As to each, it again

asserts there was sufficient basis to support admission. See OGD Reconsideration Motion at 2-6. The Applicant opposes all three requests as does the Staff, notwithstanding its original position that OGD J was admissible. See PFS Reconsideration Response at 23-30; Staff Reconsideration Response at 6-11.

***292** 1. OGD B

With regard to OGD B, to the extent OGD now seeks to rely on emergency planning at the ITP as a basis for its contention, this clearly falls outside the stated scope of its original contention, making it an impermissible ground for seeking reconsideration. See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997) (reconsideration motions may not rest on a "new thesis"). And as to its assertions the Applicant is not in compliance with the offsite notification and coordination requirements of 10 C.F.R. § 72.32 and the provisions of the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001-11050, OGD provides nothing that causes us to change our initial ruling that in this regard the contention and its supporting bases failed to establish with specificity any genuine dispute; lacked adequate factual or expert opinion support; and/or failed properly to challenge the PFS application. See LBP-98-7, 47 NRC at 226-27.

2. OGD J

Regarding OGD J, which concerns the purported failure of PFS to comply with all permits, licenses, and approvals required for the facility, the only stated basis for the contention other than the purported "trust responsibility" rationale rejected by the Board is found in the first sentence of the contention's basis. OGD has presented nothing that leads us to revise our conclusion the contention and this stated basis failed to establish with specificity any genuine dispute; lacked adequate factual or expert opinion support; and/or failed properly to challenge the PFS application. See LBP-98-7, 47 NRC at 231.

3. OGD N

****4** As for OGD N, which involves allegations of water supply contamination and water table depletion, as the Staff points out,

much of the information cited by OGD is new and thus cannot provide the appropriate basis for a reconsideration request. See Claiborne, CLI-97-2, 45 NRC at 4. Moreover, nothing presented in the reconsideration motion, whether old or new, gives us pause to change our ruling that the contention and its supporting bases failed to establish with specificity any genuine dispute; lacked adequate factual or expert opinion support; and/or failed properly to challenge the PFS application. See LBP-98-7, 47 NRC at 232.

***293** B. State of Utah Reconsideration Requests

As with OGD, the State seeks reconsideration of our rejection of three of its contentions, Utah J, Utah W, and Utah CC. See State Reconsideration Motion at 6-20. PFS and the Staff oppose all three requests. See PFS Reconsideration Response at 8-23; Staff Reconsideration Response at 4-5.

1. Utah J

In connection with Utah 1, which concerns canister and fuel cladding inspection and maintenance, the State asserts that in finding this contention inadmissible as an impermissible challenge to agency regulatory requirements or generic determinations, the Board's reliance on PFS arguments regarding canister inspection and repair, in particular its citation of 59 Fed.Reg. 65,898, 65,901 (1994), was misplaced. Also, the State declares PFS has failed to comply with the requirements of 10 C.F.R. §§ 72.122(f), 72,128(a)(1) by not proposing a "design" feature that would allow onsite inspection and maintenance of canisters and cladding.

While significant portions of the State's reconsideration claims appear to be based on new materials, and thus inappropriate, see Claiborne, CLI-97-2, 45 NRC at 4, ultimately nothing it presents gives us cause to revise our determination regarding this contention. As both PFS and the Staff have documented, the contention and its supporting bases impermissibly challenge agency regulations or rulemaking-associated generic determinations and/or lack adequate factual or expert opinion support. See LBP-98-7, 47 NRC at 189-90.

2. Utah W, Paragraphs One, Three, Four, and Five

The State seeks reconsideration of our rejection of paragraphs one, three, four, and five of contention Utah W, which asserts generally that the PFS facility creates other adverse impacts not considered in the Applicant's Environmental Report, on the grounds that our rejection of these paragraphs is inconsistent with our rulings admitting other contentions. Indeed, the bases for these paragraphs reference other contentions we have admitted, specifically Utah K, Utah L, Utah N, and Utah T.

The fatal flaw in the State's original claim was its apparent assumption that the admission of a safety issue concerning the adequacy of specific portions of the Applicant's Safety Analysis Report or the need for permits or approvals that may relate to safety or other matters a fortiori creates a companion environmental issue. With regard to each of these paragraphs, having failed to make a specific, adequately supported showing that an admissible safety or other issue portends unanalyzed (or inadequately analyzed) but cognizable environmental ***294** impacts, they were inadmissible as failing to establish with specificity any genuine dispute; lacking adequate factual or expert opinion support; and/or failing properly to challenge the PFS application. See LBP-98-7, 47 NRC at 201-02. The State presents nothing in its reconsideration request that causes us to revise this ruling.

3. Utah CC

****5** In seeking reconsideration of Utah CC, which asserts the PFS Environmental Report presents a one-sided cost benefit analysis, in addition to relying on the type of a fortiori "admission of other contentions" analysis we have rejected in section II.B.2 above, the State also asserts that the Commission's discussion of the adequacy of a "no-action alternative" analysis in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 97-99 (1998), requires admission of this contention.

Whatever relevance the Commission's Claiborne analysis of the "no-action alternative" has for the State's admitted no-action alternative contention, Utah Z, we are unable to find it provides any basis for the admission of this contention. As we noted in LBP-98-7, 47 NRC at 204, the problem for the State with regard to this contention is its failure to establish with specificity any genuine dispute; to provide adequate factual or expert opinion support; and/or to properly challenge the PFS application. Once

again, nothing in the State's reconsideration request gives us any reason to question our ruling in this regard.

C. PFS Reconsideration Requests

For its part, PFS seeks reconsideration or clarification relative to seven contentions, some of which encompass consolidated portions of contentions from other parties.

1. Utah E/Castle Rock 7/Confederated Tribes F, Paragraphs Seven and Ten

PFS first asks for reconsideration of the admission of two paragraphs, seven and ten, of consolidated contention Utah E/Castle Rock 7/Confederated Tribes F, which concerns the adequacy of PFS's financial qualifications to construct and operate the proposed Skull Valley facility. See PFS Reconsideration Motion at 5-9. The State, Castle Rock, and the Staff oppose the first request, while the Staff, which originally did not oppose the portions of the unconsolidated Utah, Castle Rock, and Confederated Tribes contentions we admitted, now supports the Applicant's request regarding paragraph ten. See State Reconsideration ***295** Response at 8-13; Castle Rock Reconsideration Response at 1-5; Staff Reconsideration Response at 12-13.

We deny the reconsideration request for paragraph seven concerning the Applicant's showing regarding the service agreements it will obtain from customers. In light of the facial difference between the financial qualifications standards of 10 C.F.R. Parts 70 and 72, compare 10 C.F.R. § 70.23(a)(5) with 10 C.F.R. § 72.22(e), and what, at this juncture, are seeming distinctions regarding the scope of the commitments at issue, we are unable to say, as PFS asserts, that the Commission's decision in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 306-08 (1997), is controlling such that this portion of the contention should be dismissed ab initio.

With regard to paragraph ten, as far as we can ascertain, the PFS arguments regarding the provisions of the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10131 (a)(5), 10222(a)(5)(b), and the Price-Anderson Act, 42 U.S.C. § 2210, are not ones it made previously in challenging this portion of the contention, which was derived from Castle Rock 7, paragraph c. They thus

constitute an inappropriate basis for a reconsideration. See Claiborne, CLI-97-2, 45 NRC at 4. This PFS request is denied. [FN2]

2. Utah H, Paragraphs Three Through Seven

**6 The Applicant's next request is for clarification of our ruling admitting Utah H, paragraphs three through seven, concerning inadequate cask thermal design. PFS declares this should be limited to "site-specific issues-- i.e., whether the [PFS facility] site conditions fall within the envelope of the cask vendors' designs...." PFS Reconsideration Motion at 10. The Staff does not oppose this request, while the State offers its own interpretation of the contention. See State Reconsideration Response at 13-15; Staff Reconsideration Response at 13. We find the Applicant is correct in this regard, with the understanding that the site conditions at issue may include conditions resulting from the effects of the site specific cask interactions specified in the contention.

3. Utah V

PFS also asks for reconsideration of our admission of Utah V, concerning environmental consideration of transportation-related impacts. PFS asserts that, consistent with 10 C.F.R. § 72.108, our decision to admit the contention relative to the "weight" component of Table S-4, 10 C.F.R. § 51.52(c), should be circumscribed to include only consideration of regional impacts. See PFS *296 Reconsideration Motion at 11-12. We do not agree. As the Staff points out in opposing this PFS request, see Staff Reconsideration Response at 13-14, this siting regulation does nothing to circumscribe the agency's responsibility under the National Environmental Policy Act of 1969 (NEPA) to consider reasonably foreseeable environmental impacts, included the potentially extra- regional impacts reflected in Table S-4.

4. Utah Z

In connection with our admission of Utah Z, concerning the no-action alternative, PFS declares that we should exclude consideration of the impacts of "sabotage" and "cross-country transportation" as litigable bases. See PFS Reconsideration

Motion at 13. The State opposes both these requests, while the Staff, which originally did not oppose admission of the contention, now supports dismissal of the contention's sabotage basis. See State Reconsideration Response at 19-21; Staff Reconsideration Response at 14-15.

Having rejected the sabotage-related aspects of other contentions, including Utah U and Utah V, consistency concerns counsel that we consider PFS's renewed argument regarding this component of the contention to ensure we have not overlooked a similar matter with respect to Utah Z. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687 (1983) (reconsideration asks that the deciding body take another look at existing evidence because evidence has been misunderstood or overlooked). And in doing so, we find this aspect of the contention likewise is an impermissible challenge to the Commission's regulations or generic rulemaking-associated determinations. See LBP-98-7, 47 NRC at 179.

The same result is not appropriate for "cross-country transportation," however. As the Staff notes, see Staff Reconsideration Response at 15, because averting the transportation of spent fuel to the Skull Valley site is a reasonably foreseeable consequence of the no-action alternative, this is an impact that merits consideration under this contention.

5. Utah DD/Castle Rock 16, Paragraphs One and Three

****7** With respect to Utah DD/Castle Rock 16, which concerns the PFS Environmental Report's discussion of species and ecology impacts, the Applicant asks for clarification that the Board intended to limit paragraphs one and three simply to the specific species identified. See PFS Reconsideration Motion at 13-15. Although, as the Staff points out, see Staff Reconsideration Response at 15, this ***297** seemingly was clear from the Board's action on the contention, we nonetheless verify that this is the intended limitation. [FN3]

6. Castle Rock 17, Paragraphs b and e

Paragraphs b and e of Castle Rock 17, which concern the adequacy of the PFS Environmental Report's discussion of the Salt Lake Valley population and the potential impacts on a national

wilderness area in the vicinity of the proposed PFS facility, also are the subject of the PFS reconsideration request. In both instances, PFS renews its assertions there was an inadequate basis for the admission of these portions of the contention. See PFS Reconsideration Motion at 15-19. Castle Rock opposes these requests, while the Staff, which initially supported admission of both paragraphs, now agrees with PFS's position. See Castle Rock Reconsideration Response at 5-8; Staff Reconsideration Response at 15-16.

Again, given our rejection of related assertions relative to Castle Rock 9 and Utah W, considerations of consistency warrant further consideration of PFS's arguments. And after reviewing the particular parts of the contention's basis that supported these paragraphs, which constituted only two sentences, we conclude the Applicant is correct with regard to the admissibility of both paragraphs.

Relative to paragraph b, Castle Rock's claims concerning the adequacy of the consideration of regional population impacts in the PFS Environmental Report hinge on the otherwise unsupported allegation that the 50-mile radius used by PFS in reliance on the Staff's standard review plan for independent spent fuel storage installations, see Office of Nuclear Materials Safety and Safeguards, U.S. Nuclear Regulatory Comm'n, Standard Review Plan for Spent Fuel Dry Storage Facilities, NUREG-1567, app. B, at § B.4.2.2 (Draft Oct. 1996), is "misleading." Looking again at the basis for this paragraph, we find it fails to establish with specificity any genuine dispute; impermissibly challenges the Commission's regulations or generic rulemaking-associated determinations; lacks adequate factual or expert opinion support; and/or fails properly to challenge the PFS application. See LBP-98-7, 47 NRC at 178-79, 180-81.

In connection with paragraph e although Castle Rock in its reconsideration response provides a discussion of the potential impacts of the PFS facility on the Deseret National Wilderness area, this clearly is new material that is not ***298** appropriate grist for the reconsideration mill. [FN4] See Claiborne, CLI-97-2, 46 NRC at 4. As to the original contention, upon reconsideration we find its conclusory discussion regarding impacts at the national wilderness area was inadequate to support admission as failing to establish with specificity any genuine dispute; lacking adequate factual or expert opinion support; and/or failing properly to challenge the PFS application. See LBP-98- 7, 47 NRC at 178-79, 180-81.

**8 Appendix A to this Memorandum and Order includes the language of Castle Rock 17, as revised per these rulings.

7. OGD O

In seeking reconsideration of OGD O, which is an "environmental justice" contention, PFS renews its claims regarding a lack of basis. Specifically, it asserts there is no basis whatsoever for consideration of two of the facilities listed in the contention because, unlike the other listed facilities, the Petitioner failed to provide any information on hazardous wastes or other harmful substances on those sites. See PFS Reconsideration Motion at 19-20. The OGD and the Staff oppose this request. See OGD Reconsideration Response at 4; Staff Reconsideration Response at 16. Premised on ensuring that this lack of supporting information is not overlooked, PFS's point is valid. Accordingly, we delete the references to the Utah Test and Training Range South and the Utah Test and Training Range North from the contention. [FN5] Appendix A to this Memorandum and Order sets forth the language of the revised contention.

Also with respect to this contention, again seeking to ensure a lack of supporting information is not overlooked, PFS asserts, with the Staff's support and in the face of OGD opposition, that Environmental Protection Agency (EPA) sites on a map referenced without further explanation in basis five of the contention and attached as Exhibit 20 to OGD's November 24, 1997 contentions pleading should not be considered as within the litigable scope of this contention. See PFS Reconsideration Motion at 20; OGD Reconsideration Response at 3-4; Staff Reconsideration Response at 16. The Board agrees that attaching a document in support of a contention without any explanation of its significance does not provide an adequate basis for a contention. See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338 ***299** (1991). Thus, the impact of the EPA sites is not a matter subject to litigation within the scope of this contention.

III. CONCLUSION

We reject the reconsideration/clarification requests of (1) OGD and the State for a further explication of the reasons for our rejection of certain of their contentions; (2) PFS and the Staff for dismissal of Utah B; (3) OGD for admission of OGD B, OGD J, and OGD N; (4) the State for admission of Utah J, paragraphs one,

three, four, and five of Utah W, and Utah CC; (5) PFS for dismissal of paragraphs seven and ten of consolidated contention Utah E/Castle Rock 7/Confederated Tribes F; (6) PFS for the limitation of Utah V, to the environmental consideration of transportation-related regional impacts; and (7) PFS for dismissal of the cross-country transportation-related aspects of Utah Z. Further, we grant the PFS reconsideration requests for dismissal of (1) the sabotage-related aspects of Utah Z; (2) Castle Rock 17, paragraphs b and e; and (3) certain facilities or sites from consideration in connection with the environmental justice claims of OGD O. We also provide the clarification requested by PFS regarding our rulings admitting (1) Utah H, paragraphs three through seven; and (2) Utah DD/Castle Rock 16, paragraphs one and three.

****9** For the foregoing reasons, it is, this 18th day of May 1998, ORDERED,

1. That the April 29, 1998 and May 6, 1998 reconsideration/clarification motions of OGD, the State, and the Staff are denied.

***300** 2. That the May 6, 1998 reconsideration/clarification motion of PFS is granted in part and denied in part in accordance with the rulings in sections I.B and II.C above.

THE ATOMIC SAFETY AND LICENSING BOARD [FN6]

G. Paul Bollwerk, III

ADMINISTRATIVE JUDGE

Jerry R. Kline

ADMINISTRATIVE JUDGE

Peter S. Lam

ADMINISTRATIVE JUDGE

Rockville, Maryland

FN1 They are, of course, free to renew their arguments in summary disposition motions at the appropriate time.

FN2 PFS is, of course, free to renew its arguments in a summary disposition motion at the appropriate time.

FN3 In addition, the State asks that we reword paragraph one of the contention to make it clear the contention is not limited to only one peregrine falcon with a nest or nests on the Timpie Springs Wildlife Management Area. See State Reconsideration Response at 22-23. We adopted the existing contention language based on our understanding it reflects the negotiated agreement of the State and PFS. See Tr. at 822; Licensing Board Memorandum and Order (Contention Revisions and Transcript Corrections) (Feb. 9, 1998) at 1-2 & attach, 1 (State of Utah Contentions A through DD at 16) (unpublished). At this point, we are not inclined to make any further revisions to the language of this contention absent an additional agreement between the parties.

FN4 Castle Rock may, however, wish to submit this information as part of any comments it may make to the Staff regarding the scope and substance of the Staff-prepared environmental impact statement. See 63 Fed.Reg. 24,197, 24,198 (1998).

FN5 The Staff opposes this request on the basis of Exhibits 25 and 26 attached to OGD's November 24, 1997 contentions pleading. These exhibits, which OGD does not reference in its reconsideration response, appear applicable to the Tooele Army Depot rather than the north and south Utah Test and Training Ranges. If there remains some question in this regard, the matter should be brought to the Board's attention promptly.

FN6 Copies of this Memorandum and Order were sent this date to counsel for the Applicant PFS, and to counsel for Petitioners Skull Valley Band of Goshute Indians, OGD, Confederated Tribes of the Goshute Reservation, Castle Rock, and the State by Internet e-mail transmission; and to counsel for the Staff by e- mail through the agency's wide area network system.

***301** ATTACHMENT A

CONTENTIONS REVISED PER RULINGS ON REQUESTS FOR RECONSIDERATION OF LBP-98-7

1. CASTLE ROCK 17--Inadequate Consideration of Land Impacts

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of the facility upon such critical matters as future economic and residential development in the vicinity, potential differing land uses, property values, the tax base, and the loss of revenue and opportunity for agriculture, recreation, beef and dairy production, residential and commercial development, and investment opportunities, all of which have constituted the economic base and future use of Skull Valley and the economic interests of Petitioners, or how such impacts can and must be mitigated, see, e.g., 10 C.F.R. §§ 72.90(e), 72.98(c)(2) and 72.100(b), in that:

****10** a. the ER does not recognize the potential use of the areas surrounding the PFSF for residential or commercial development;

b. the ER fails to consider the effect of the PFSF on the present use of Castle Rock's lands for farming, ranch operations and residential purposes or the projected use of such lands for dairy operations, residential development, or commercial development; and

c. the ER provides no, or inaccurate, information on the economic value of current agricultural/ranching operations conducted on Castle Rock's lands.

2. OGD O--Environmental Justice Issues Are Not Addressed

CONTENTION: The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In Executive Order 12898, 3 C.F.R. 859 (1995) issued February 11, 1994, President Clinton directed that each Federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States." It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Deseret Chemical

Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, APTUS Hazardous Waste Incinerator, and Grassy Mountain Hazardous Waste Landfill.

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47 N.R.C. 142
(Cite as: 47 N.R.C. 142, 1998 WL 223777 (N.R.C.))

**1 IN THE MATTER OF
PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation)

Nuclear Regulatory Commission

Atomic Safety and Licensing Board

LBP-98-7
Docket No. 72-22-ISFSI (ASLBP No. 97-732-02-ISFSI)

April 22, 1998

*142 Before Administrative Judges: G. Paul Bollwerk, III, Chairman; Dr. Jerry R. Kline; Dr. Peter S. Lam

In this proceeding concerning the application of Private Fuel Storage, L.L.C., under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board rules on (1) the issues of standing and admissibility of contentions relative to pending hearing requests/intervention petitions either supporting or opposing the application; (2) a 10 C.F.R. s 2.758 rule waiver petition; and (3) various administrative and procedural matters, including the use of "lead" parties and informal discovery.

RULES OF PRACTICE: INTERVENTION

Longstanding agency practice requires that an individual, group, business entity, or governmental entity that wants to intervene "as of right" as a full party in an adjudicatory proceeding concerning a proposed licensing action must establish that it (1) has filed a timely intervention petition or meets the standards that permit consideration of an untimely petition; (2) has standing to intervene; and (3) has proffered one or more contentions that are litigable in the proceeding. See 10 C.F.R. ss 2.714(a)(1)-(2), (b)(2). Further, the Commission *143 has recognized that, notwithstanding a potential party's failure to meet the elements necessary to establish its standing to intervene as of right, it is possible, as a matter of discretion, to afford that participant party status. See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976).

RULES OF PRACTICE: INTERVENTION PETITION(S) (TIMELINESS)

Each intervention petition must be timely filed as prescribed in the notice of opportunity for hearing issued by the agency. For a petition that is not filed on time to be accepted for consideration, the participant seeking to intervene must demonstrate that a balancing of the five

factors set forth in 10 C.F.R. s 2.714(a)(1)(i)-(v) support accepting the petition. Those factors include: (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

RULES OF PRACTICE: INTERVENTION (STANDING)

Relative to the question of standing as of right for those seeking party status, the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Further, when an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary elements and who has authorized the entity to represent his or her interests.

RULES OF PRACTICE: STANDING TO INTERVENE (UNCONTESTED; CONSTRUCTION OF PETITION)

****2** In assessing a petition to determine whether the requisite standing elements are met, which the presiding officer must do even though there are no objections ***144** to a petitioner's standing, the Commission has indicated that a presiding officer is to "construe the petition in favor of the petitioner." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

RULES OF PRACTICE: INTERVENTION (DISCRETIONARY)

A petitioner can be granted party status, as a matter of discretion, based upon the presiding officer's consideration of the following factors: (a) weighing in favor of allowing intervention are (1) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record, (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding, and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest; and (b) weighing against allowing intervention are (4) the availability of other means whereby petitioner's interest will be protected, (5) the extent to which the petitioner's interest will be represented by existing parties, and (6) the extent to which petitioner's participation will inappropriately broaden or delay the proceeding. Pebble Springs, CLI-76-27, 4 NRC at 616.

RULES OF PRACTICE: INTERVENTION BY A STATE; STANDING TO INTERVENE (STATE)

When the facility to be licensed is to be located on a reservation of a Native American tribe that

is wholly within the borders of a state, that state's asserted health, safety, and environmental interests relative to its citizens living, working, and traveling near the proposed facility and in connection with its property adjoining the reservation and the proposed transportation routes to the facility are sufficient to establish its standing.

RULES OF PRACTICE: INTERVENTION BY NATIVE AMERICAN TRIBE; STANDING TO INTERVENE (NATIVE AMERICAN TRIBE)

Assertion of standing based on general interests of one Native American tribe or its members in vast "aboriginal lands" that encompass tribe's existing reservation and reservation of second tribe on which facility to be licensed is to be built is inconsistent with the congressionally recognized status of the two tribes as distinct entities with separate reservations some 75 miles apart. Standing for the first tribe must, therefore, be established based on contacts of individual tribal members with the reservation of second tribe where the facility is to be located.

***145** RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT)

Assertion that individual engages in activities in "the vicinity" of the location of the facility to be licensed is too general to provide him with standing as of right individually or in a representational capacity. See Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426-27 (description of activities as "near," in "close proximity," or "in the vicinity" of facility in question insufficient to establish standing), aff'd, CLI-97-8, 46 NRC 21 (1997).

RULES OF PRACTICE: STANDING TO INTERVENE

****3** Standing under 10 C.F.R. s 2.714 is not predicated on whether a petitioner wishes to take a position for or against a pending licensing application. Rather, it turns on the petitioner's ability to show that it has one or more cognizable interests that will be adversely impacted if the proceeding has one outcome rather than another. See Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

RULES OF PRACTICE: DISCRETIONARY INTERVENTION (LATE-FILED PETITION; TIMELINESS)

Nothing in the general terms of 10 C.F.R. s 2.714 governing intervention petitions exempts a discretionary intervention request from its late-filing provisions.

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS (GOOD CAUSE FOR LATE FILING)

Under factor one of the five-factor late intervention balancing test in 10 C.F.R. s 2.714(a)(1), an attempt to justify late filing as a reasonable failure to anticipate that a state's university community would not be willing to discuss the scientific merits of a proposed instate facility does not account for the precept that the failure of some other group to "carry the ball" does not constitute good cause for late filing. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609 (1988), reconsideration denied on

other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd, Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir.), cert. denied, 498 U.S. 896 (1990).

*146 RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS (LACK OF GOOD CAUSE FOR LATE FILING)

When lacking good cause for late filing under factor one of the five-factor late intervention balancing test set forth in 10 C.F.R. s 2.714(a)(1), a petitioner must make a particularly strong showing on the other four factors. See, e.g., Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB- 431, 6 NRC 460, 462 (1977) (citing cases).

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS (OTHER MEANS TO PROTECT PETITIONER'S INTERESTS)

Ability to file 10 C.F.R. s 2.715(a) limited appearance statements or otherwise provide a group's expertise to other participants generally is not pertinent under factor two of five-factor late intervention balancing test set forth in 10 C.F.R. s 2.174(a)(1) because it gives insufficient regard to the value of adjudicatory participation rights. See Duke Power Co. (Amendment to Materials License SNM-1773--Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 & n. 7 (1979).

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS (ADEQUACY OF EXISTING REPRESENTATION)

Under factor four of the five-factor late intervention balancing test set forth in 10 C.F.R. s 2.714(a)(1), NRC Staff interests generally are assumed not to be coextensive with those of a private petitioner. See Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1174- 75 & n. 22 (1983).

RULES OF PRACTICE: UNTIMELY INTERVENTION PETITIONS

**4 In the five-factor balancing test for late intervention petitions under 10 C.F.R. s 2714(a)(1), factor two--other means to protect petitioner's interests--and factor four--adequacy of existing representation--are accorded less significance in the balance. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165 (1993).

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT; ZONE OF INTERESTS)

Interest in presenting "sound science" to presiding officer is laudable, but provides no basis for standing either as an interest cognizable for standing *147 purposes or as one that will be the subject of actual or imminent injury upon the grant or denial of a license. See Sheffield, ALAB-473, 7 NRC at 743 (legal and nuclear organizations seeking to support low-level waste site renewal application lack standing because no showing that granting or denying application would injure any cognizable interest of either organization or its members); Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422

(1976) (when no showing of injury to cognizable interests of its individual members by licensing action, asserted ability of civil liberties organization and its members to provide information and data on civil rights issues inadequate to provide basis for standing).

RULES OF PRACTICE: INTERVENTION (DISCRETIONARY)

Of the six Pebble Springs factors for assessing a discretionary intervention request, factors one, four, five, and six are basically coextensive with the last four factors of the late-filing standard of 10 C.F.R. s 2.714(a)(1), with Pebble Springs factor one--assistance in developing a sound record--having significant sway. See Pebble Springs, CLI-76-27, 4 NRC at 616-17.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY; SPECIFICITY AND BASIS)

For a proffered legal or factual contention to be admissible, it must be pled with specificity. In addition, the contention's sponsor must provide (1) a brief explanation of the bases for the contention; (2) a concise statement of the alleged facts or expert opinion that will be relied on to prove the contention, together with the source references that will be relied on to establish those facts or opinion; and (3) sufficient information to show there is a genuine dispute with the applicant on a material issue of law or fact, which must include (a) references to the specific portions of the application (including the accompanying environmental and safety reports) that are disputed and the supporting reasons for the dispute, or (b) the identification of any purported failure of the application to contain information on a relevant matter as required by law and reasons supporting the deficiency allegation. See 10 C.F.R. s 2.714(b)(2)(i)-(iii). A contention that fails to meet any one of these standards must be dismissed, as must a contention that, even if proven, would be of no consequence because it would not entitle a petitioner to any relief. See id. s 2.714(d)(2).

*148 RULES OF PRACTICE: CONTENTIONS (ACCEPTANCE WHERE SUBJECT TO PENDING RULEMAKING; CHALLENGE OF COMMISSION RULE)

**5 An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, aff'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. See 10 C.F.R. s 2.758; Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); see also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a

litigable issue. See Peach Bottom, ALAB-216, 8 AEC at 20-21 & n. 33.

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

The scope of an adjudicatory proceeding is specified by the notice of hearing/opportunity for hearing and contentions that deal with matters outside that defined scope must be rejected. See, e.g., Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n. 6 (1979).

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

Any issues of law or fact raised in a contention must be material to the grant or denial of the license application in question, i.e., they must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief. See 10 C.F.R. s 2.714(d)(2)(ii); 54 Fed.Reg. 33,168, 33,172 ***149** (1989). This requirement of materiality embodies the notion that an alleged error or deficiency regarding a proposed licensing action must have some significance relative to the agency's general responsibility and authority to protect the public health and safety and the environment. See Seabrook, LBP-82-106, 16 NRC at 1656 (safety contention "must either allege with particularity that an applicant is not complying with a specified [safety] regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent" (footnote omitted)); see also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

****6** The bald assertion that a matter ought to be considered or that a factual dispute exists so as to merit further consideration of a matter is not sufficient. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993), review declined, CLI- 94-2, 39 NRC 91 (1994); see also Connecticut Bankers Ass'n v. Board of Governors, 627 F.2d 245, 251 (D.C.Cir.1980). Nor does mere speculation provide an adequate basis for a contention. See Yankee Nuclear, CLI-96-7, 43 NRC at 267. Instead, a petitioner must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention. See Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, aff'd in part, CLI-95-12, 42 NRC 111 (1995).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

With respect to documentary or other factual information or expert opinion alleged to provide the basis for a contention, the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention. In the case of a document, the Board should review the information provided to ensure that it does indeed supply

a basis for the contention. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990); see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89- 3, 29 NRC 234, 241 (1989) ("where a contention is based on a factual underpinning in a document that has been essentially repudiated by the ***150** source of that document, the contention may be dismissed unless the intervenor offers another independent source"); Yankee Nuclear, LBP-96-2, 43 NRC at 90 ("[a] document put forth by an intervenor as the basis for a contention is subject to scrutiny both for what it does and does not show"). By the same token, an expert opinion that merely states a conclusion (e.g., the application is "deficient," "inadequate," or "wrong") without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion as it is alleged to provide a basis for the contention.

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

In framing contentions regarding a proposed licensing action, the focus of a petitioner's concern should be the license application. See 10 C.F.R. s 2.714(b)(2)(iii). In this regard, a contention that fails directly to controvert the license application at issue or that mistakenly asserts the application does not address a relevant issue is subject to dismissal. See Rancho Seco, LBP-93-23, 38 NRC at 247-48; Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 424 (1991), appeal dismissed, CLI-92-3, 35 NRC 63 (1992).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

****7** Although licensing boards generally are to litigate "contentions" rather than "bases," it has been recognized that "[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases." See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988).

RULES OF PRACTICE: CONTENTIONS (INCORPORATION BY REFERENCE)

Incorporation by reference of one or more of the contentions of other petitioners is permitted in agency proceedings, albeit subject to the five late-filing factors set forth in 10 C.F.R. s 2.714(a)(1)(i)-(v) if adoption by reference is sought after the time for filing contentions has expired.

***151** RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS

As set forth in 10 C.F.R. s 2.714(a)(1)(i)-(v), the factors that must be balanced in determining whether to admit a late-filed contention are (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding. See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17

NRC 1041, 1046-47 (1983).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

Relative to the first factor set forth in 10 C.F.R. s 2.714(a)(1)(i)-(v) that must be balanced in determining whether to admit a late-filed contention, unavailability of proprietary documents does not provide good cause for delay in filing a contention when review of nonproprietary materials timely available indicates proprietary information was not necessary to the development of the late-filed contention. See Catawba, CLI-83-19, 17 NRC at 1043, 1045 (if contention's factual predicate otherwise available, unavailability of document does not constitute good cause for late filing); see also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83- 39, 18 NRC 67, 69 (1983).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY; OTHER MEANS AND OTHER PARTIES TO PROTECT INTERVENORS' INTERESTS)

Relative to the first factor set forth in 10 C.F.R. s 2.714(a)(1)(i)-(v) that must be balanced in determining whether to admit a late-filed contention, lacking good cause for delay in filing a contention, a petitioner must make a compelling showing on the other four factors. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Factors two--no other means to protect the petitioner's interests in the contentions--and four--extent to which other parties can represent those interests--are, however, to be accorded less weight than factors three and five. See id. at 245.

***152** RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTION (SOUND RECORD DEVELOPMENT)

****8** Relative to the five factors set forth in 10 C.F.R. s 2.714(a)(1)(i)-(v) that must be balanced in determining whether to admit a late-filed contention, in connection with factor three--sound record development--the Commission has directed that the proponent of a late-filed contention should, with as much particularity as possible, " 'identify its prospective witnesses, and summarize their proposed testimony.' " Id. at 246 (quoting Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982)).

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

The standard for seeking a waiver of a rule or regulation in an adjudication is set forth in 10 C.F.R. s 2.758(b), which provides:

The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.

Procedurally, section 2.758(b) requires that the petition must be accompanied by an affidavit (1) identifying the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule would not serve the purposes for which it was adopted, and (2) setting forth with particularity the "special circumstances" alleged to justify the waiver or exception requested.

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS

Paragraphs (c) and (d) of section 2.758 state that a party's failure to make a prima facie showing on the section 2.758(b) rule waiver standard precludes further consideration of the matter, while a presiding officer that finds a prima facie showing has been made must certify the petition to the Commission for its consideration.

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS (SPECIAL CIRCUMSTANCES)

In connection with a 10 C.F.R. s 2.758 rule waiver petition, a petitioner seeking to establish a prima facie case that "special circumstances" exist such that the rule would not serve the purposes for which it was adopted must make three showings. First, relative to establishing the requisite "special ***153** circumstances" exist to support the waiver, the petitioner must allege facts not in common with a large class of facilities that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding for the rule sought to be waived. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 235 (1989). Put another way, the circumstances alleged must be unique to the particular facility at issue. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72-74 (1981). Speculation about future events is, however, an inadequate basis to establish the necessary "special circumstances." See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 24-26, rev'd in part on other grounds, CLI- 88-10, 28 NRC 573 (1988).

RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS (SPECIAL CIRCUMSTANCES)

****9** Also with respect to the need to demonstrate "special circumstances" in requesting a rule waiver pursuant to 10 C.F.R. s 2.758, the petitioner must show application of the rule will not serve the purposes for which it was adopted. See Seabrook, CLI-89-20, 30 NRC at 235. Explicit statements in the statement of considerations are a primary source for determining the purposes for which the rule or regulation was adopted. See, e.g., Seabrook, CLI-88-10, 28 NRC at 598-600; Seabrook, ALAB-895, 28 NRC at 12. Further, in ascertaining a rule's purposes and whether those purposes would be impaired, it is permissible to consider future events the agency logically would have anticipated in promulgating its rules. See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 59 (1983). On the other hand, in seeking to establish that the rationale for the rule has been undercut, conjectural statements that merely highlight the uncertainty surrounding future events are not, in and of themselves, sufficient. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 301, rev'd, ALAB-920, 30 NRC 121, rev'd, CLI-89-20, 30 NRC 231

(1989). Moreover, it has been established that a valid purpose for which the rule or regulation was adopted, within the meaning of 10 C.F.R. s 2.758, includes eliminating Staff case-by-case review of a generic issue in individual applications and removing such an issue from adjudication in any operating license proceeding. See Seabrook, ALAB-895, 28 NRC at 14, 16-17; see also Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 547 (1986).

*154 RULES OF PRACTICE: WAIVER OF RULES OR REGULATIONS (SIGNIFICANT SAFETY PROBLEM)

The third showing that must be made by a 10 C.F.R. s 2.758 rule waiver petition is that the circumstances involved are "unusual and compelling" such that it is evident from the petition and other allowed papers that a waiver is necessary to address the merits of a "significant safety problem" relative to the rule at issue. Seabrook, CLI-89-20, 30 NRC at 235. Justifying a waiver, therefore, requires that a petitioner establish the issue raised is a significant safety problem, even if there clearly are special circumstances that undercut the rationale for the rule. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-920, 30 NRC 121, 129 (1989). Safety issues that are "conceivable" or "theoretical" do not fulfill this requirement, however. See Seabrook, CLI-89-20, 30 NRC at 243-44. Further, any claim of significance must be viewed in the context of any other protective measures that are in place to prevent safety problems. See id. at 244.

LICENSING BOARD(S): DISCRETION IN MANAGING PROCEEDING (LEAD INTERVENORS OR PARTIES)

RULES OF PRACTICE: INTERVENTION (LEAD INTERVENORS OR PARTIES)

In accordance with 10 C.F.R. s 2.714(f)-(g), a presiding officer is authorized to control the general compass of the hearing by consolidating issues and limiting party participation to avoid the presentation of irrelevant, duplicative, or repetitive evidence. When some of a petitioner's admitted contentions challenging an application have been adopted by other intervenors, other contentions proposed by different parties challenging the application have been consolidated because of their related subject matter, and one of the parties has filed a single contention expressing general support for the application, it is appropriate to designate "lead" parties for the litigation of the various admitted contentions.

RULES OF PRACTICE: INTERVENTION (LEAD INTERVENORS OR PARTIES)

**10 The party assigned the role of lead party has primary responsibility for litigating a contention. Absent some other presiding officer directive, the party with the lead role in support of a contention is to conduct all discovery on the contention; file or respond to any dispositive or other motions regarding the contention; submit any required prehearing briefs on the issue; prepare prefiled direct testimony, conduct any redirect examination, and provide any surrebuttal *155 testimony regarding the contention; and prepare posthearing proposed findings of fact and conclusions of law on the contention. The party that has the lead role in opposing a contention has similar duties, with its hearing responsibilities including conducting witness cross-

examination and recross-examination and preparing rebuttal testimony as appropriate. For any given contention, the lead party is responsible for consulting with the other "involved" parties (i.e., any party that adopted its contention, filed a contention that has been consolidated, or has opposed the same contention) regarding litigation activities, but the ultimate litigating responsibility for the contention rests with the lead party.

RULES OF PRACTICE: DISCOVERY (INFORMAL DISCOVERY)

During an informal discovery process that includes the exchange of relevant documents and interviews with individuals with relevant information, parties are expected to be specific in their information requests and provide access to requested information and knowledgeable individuals to the maximum degree possible. Failure to participate in the informal discovery process consistent with the presiding officer's directives may result in appropriate Board sanctions.

***156** MEMORANDUM AND ORDER

(Rulings on Standing, Contentions, Rule Waiver Petition, and Procedural/Administrative Matters)

Responding to a July 21, 1997 notice of opportunity for a hearing, 62 Fed.Reg. 41,099 (1997), the State of Utah (State or Utah); three Native American entities, Ohngo Gaudadeh Devia (OGD), Confederated Tribes of the Goshute Reservation (Confederated Tribes), and Skull Valley Band of Goshute Indians (Skull Valley Band); three ranching, farming, and land investment companies, Castle Rock Land and Livestock, L.C. (Castle Rock Land), Skull Valley Co., Ltd. (Skull Valley), and Ensign Ranches of Utah, L.C. (Ensign Ranches); and one Native American individual, Confederated Tribes Chairman David Pete ***157** have filed five separate timely hearing requests/petitions to intervene that are before the Licensing Board. In addition, pending with the Board is a late-filed intervention petition submitted by the group Scientists for Secure Waste Storage (SSWS). Each Petitioner seeks to be heard on a variety of issues in connection with the June 1997 application of Private Fuel Storage, L.L.C. (PFS), for a license under 10 C.F.R. Part 72 to possess and store spent nuclear reactor fuel in an independent spent fuel storage installation (ISFSI) located on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. In addition, Petitioners Castle Rock Land/Skull Valley/Ensign Ranches have invoked the provisions of 10 C.F.R. s 2.758 seeking a waiver of the application of the Commission's rules under (1) 10 C.F.R. Part 72, as it might be applicable to the proposed PFS ISFSI facility; and (2) 10 C.F.R. s 51.23, as that rule (i) makes a generic finding of Commission confidence that a repository will be built and available to accept high-level nuclear waste (HLW) in the first quarter of the next century, and (ii) excuses the need for any discussion of ISFSI spent fuel environmental impacts following the term of the ISFSI license.
****11** For the reasons set forth below, we find Petitioners State, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and Skull Valley Band have established their standing to intervene. In addition, each of these Petitioners has presented at least one admissible contention concerning the PFS application. We thus admit these Petitioners as parties to this proceeding. On the other hand, as is explained below, Petitioners Pete and SSWS have failed to establish their standing to intervene while Ensign Ranches, although having standing, lacks an admissible contention. We therefore deny these participants' hearing requests/intervention petitions. We also conclude that,

having failed to establish a basis for waiver of 10 C.F.R. Part 72 or 10 C.F.R. s 51.23, the section 2.758 petition of Intervenors Castle Rock Land/Skull Valley/Ensign Ranches must be denied. Finally, we outline certain procedural and administrative rulings, including the designation of "lead" parties and the use of informal discovery, that will apply to the litigation of the parties' admitted contentions.

I. BACKGROUND

A. The PFS Application and Proposed ISFSI

To obtain a 20-year Part 72 license for its proposed ISFSI, in June 1997 PFS filed with the agency an application consisting of, among other things, a safety analysis report (SAR), an environmental report (ER), an emergency plan (EP), a physical security plan (PSP), and a preliminary decommissioning plan (PDP). According to its application, PFS is a limited liability corporation owned by eight American utilities. Each of these utilities has one or more operating nuclear facilities. PFS intends to obtain the funds necessary to construct, operate, ***158** and decommission the Skull Valley ISFSI through equity contributions from its owners, preshipment customer payments pursuant to service agreements that commit PFS to store customer spent fuel, and annual storage fee payments under those service agreements. See [PFS], License Application [for] Private Fuel Storage Facility at 1-1 to -4, 3-1 (rev. 0 June 1997) [hereinafter License Application].

The application also indicates that the ISFSI, which is to be on a one-quarter mile square site leased by PFS from the Skull Valley Band, will be used for aboveground dry cask storage of up to 40,000 metric tons uranium (MTU) of spent nuclear fuel from commercial nuclear plants in the United States. The spent fuel is to be loaded into canisters at the originating reactors, which are then welded shut and placed into shipping casks for transport to Utah by rail. Because the PFS facility is located some 25 miles from the existing main rail line, the shipping casks containing the canisters would be moved to the PFS facility either by truck or a newly constructed rail spur. Once at the PFS site, the canisters would be removed from the shipping casks and placed in storage casks that would be placed vertically on concrete pads in a protected area at the site. See id. at 1-1 to -4, 3-1 to -2.

B. Timely Hearing Requests/Intervention Petitions

****12** In response to the NRC Staff's July 1997 notice of opportunity for a hearing regarding this application, a number of petitioners filed requests for hearings and petitions to intervene asking that they be made a party to any adjudicatory proceeding conducted in connection with the application. First filed was the joint request of the Confederated Tribes, which seeks to intervene either as a party under 10 C.F.R. s 2.714(a) or as an interested governmental entity under section 2.715(c), and Tribal Chairman Pete, who appears both as a tribal leader and in his individual capacity. See Request for Hearing and Petition to Intervene of the Confederated Tribes of the Goshute Reservation and David Pete (Aug. 29, 1997) [hereinafter Confederated Tribes/Pete Petition]. The Confederated Tribes/Pete oppose granting the application.

Thereafter, the State, which seeks either party or interested governmental entity status, and three ranching, farming, and land investment companies, Castle Rock Land, Skull Valley, and Ensign Ranches (collectively Castle Rock), submitted hearing requests. See [State] Request for Hearing

and Petition for Leave to Intervene (Sept. 11, 1997) [hereinafter State Petition]; [Castle Rock] Request for Hearing and Petition to Intervene (Sept. 11, 1997) [hereinafter Castle Rock Petition]. The State and Castle Rock oppose the application as well.

Also seeking party status under section 2.714(a) are the Skull Valley Band and OGD. See Verified Petition for Leave to Intervene (Sept. 12, 1997) [hereinafter Skull Valley Band Petition]; [OGD] Request for Hearing and Petition to ***159** Intervene (Sept. 12, 1997) [hereinafter OGD Petition]. The Skull Valley Band is a federally recognized Indian tribe that leased tribal land to PFS for construction and operation of the proposed ISFSI. It supports the PFS application. OGD, on the other hand, is an organization that consists primarily of members of the Skull Valley Band who oppose the PFS application and its plan to construct and operate an ISFSI on reservation land.

In response to the Confederated Tribes/Pete petition, both Applicant PFS and the NRC Staff filed pleadings contesting both the standing of the Confederated Tribes and Mr. Pete to intervene as parties and the Confederated Tribes' purported status as an interested governmental entity. See Applicant's Answer to Request for Hearing and Petition to Intervene of [Confederated Tribes/Pete] (Sept. 15, 1997) [hereinafter PFS Confederated Tribes/Pete Petition Response]; NRC Staff's Response to Request for Hearing and Petition to Intervene Filed by [Confederated Tribes/Pete] (Sept. 18, 1997) [hereinafter Staff Confederated Tribes/Pete Petition Response]. In contrast, both PFS and the Staff did not contest the standing of the State, Castle Rock, OGD, and the Skull Valley Band to intervene as parties, and the Applicant asserted the Skull Valley Band also would qualify as an interested governmental entity. See Applicant's Answer to Request for Hearing and Petition to Intervene of [Utah] (Sept. 26, 1997) [hereinafter PFS State Petition Response]; Applicant's Answer to Request for Hearing and Petition to Intervene of [Castle Rock] (Sept. 26, 1997) [hereinafter PFS Castle Rock Petition Response]; Applicant's Answer to Request for Hearing and Petition to Intervene of [OGD] (Sept. 26, 1997) [hereinafter PFS OGD Petition Response]; Applicant's Answer to Petition to Intervene of [Skull Valley Band] (Sept. 29, 1997) [hereinafter PFS Skull Valley Band Petition Response]; NRC Staff's Status Report and Response to Requests for Hearing and Petitions to Intervene Filed by (1) [Utah], (2) [Skull Valley Band], (3) [OGD], (4) [Castle Rock] (Oct. 1, 1997) [hereinafter Staff Hearing Petitions Response]. Both PFS and the Staff made the point, however, that these Petitioners must present litigable contentions in order to be admitted as parties.

C. Supplements to Timely Hearing Requests/Intervention Petitions

1. Schedule for Filing Supplements

****13** In this connection, in an initial prehearing order issued September 23, 1997, the Licensing Board established an October 1997 date for these Petitioners to file supplements to their hearing/intervention requests that would include their contentions, with supporting bases. That directive also established a tentative schedule for a Board visit to the Applicant's proposed ISFSI site and a prehearing conference to entertain participant presentations on whether the Petitioners have proffered information sufficient to establish they have standing and admissible ***160** contentions. See Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) (unpublished). Within a week, however, the State filed two motions seeking to delay or suspend this schedule. In one, Utah asked that we suspend this proceeding pending the establishment of a local public document room (LPDR) and the Applicant's submission of a

"complete" application. See [Utah] Motion to Suspend Licensing Proceedings Pending Establishment of a[n LPDR] and Applicant's Submission of a Substantially Complete Application, and Request for Re-notice of Construction Permit/Operating License Application (Oct. 1, 1997). Petitioners Confederated Tribes/Pete, OGD, and Castle Rock supported both State motions. In the other motion, the State asked that the time for filing hearing request/intervention supplements be extended by 45 days. See [State] Motion for Extension of Time to File Contentions (Oct. 1, 1997).

Applicant PFS and Petitioner Skull Valley Band opposed the State's motions. The Staff opposed the State's suspension motion, but declared it had no objection to a 30-day extension of time for the filing of contentions. In an October 17, 1997 ruling, the Board denied the State's suspension request, but provided an additional 30 days to file intervention petition supplements, including contentions and supporting bases. See Licensing Board Memorandum and Order (Ruling on Motions to Suspend Proceeding and for Extension of Time to File Contentions) (Oct. 17, 1997) (unpublished). Thereafter, the Board rescheduled the site visit and prehearing conference for the week of January 26, 1998.

Then, 10 days before its petition supplement was due, the State filed a motion for a protective order to gain access to the Applicant's physical security plan and to extend the time for filing contentions relating to that plan. See [State] Motion for a Protective Order to Review and File Contentions on the Applicant's [PSP] (Nov. 14, 1997). Both PFS and the Staff filed responses declaring they had no objection to the State's protective order request. In a November 21 issuance, the Board granted the State's requests for a protective order and an extension of the filing deadline for security plan-related contentions. See Licensing Board Memorandum and Order (Ruling on [State] Motion for Protective Order) (Nov. 21, 1997) (unpublished). After obtaining a proposed order from the participants, the Board issued the protective order on December 17, 1997. See Licensing Board Memorandum and Order (Protective Order and Schedule for Filing Security Plan Contentions) (Dec. 17, 1997) (unpublished); see also Licensing Board Memorandum and Order (Protective Order Amendment) (Dec. 22, 1997) (unpublished); Licensing Board Memorandum and Order (Additional Amendments to Protective Order) (Dec. 23, 1997) (unpublished).

2. Supplemental Filings

****14** Petitioners OGD and Castle Rock filed their supplemental petition with contentions on November 24, 1997. See [OGD] Contentions Regarding the Materials ***161** License Application of [PFS] in an [ISFSI] (Nov. 24, 1997) [hereinafter OGD Contentions]; Contentions of Petitioners [Castle Rock] on the License Application for the [PFS] Facility (Nov. 24, 1997) [hereinafter Castle Rock Contentions]. In the Castle Rock filing, Petitioner Ensign Ranches indicated it was only joining in the first five contentions. See Castle Rock Contentions at 1. That same date, the State filed its non-security plan-related contentions. See [State] Contentions on the Construction and Operating License Application by [PFS] for an [ISFSI] (Nov. 24, 1997) [hereinafter State Contentions]. Petitioners Confederated Tribes/Pete filed an initial supplement on October 15 in which they addressed the standing aspects of their petition, with a second filing on November 24 that presented their contentions. See Supplemental Memorandum in Support of the Petition of [Confederated Tribes/Pete] to Intervene and for a Hearing (Oct. 15, 1997) [hereinafter Confederated Tribes/Pete First Supplemental Memorandum]; Statement of Contentions on Behalf of [Confederated Tribes/Pete] (Nov. 24, 1997) [hereinafter Confederated

Tribes/Pete Contentions]. Likewise, the Skull Valley Band submitted a supplemental petition setting forth its sole contention in support of the facility application. See Supplemental Petition to Intervene (Nov. 24, 1997) [hereinafter Skull Valley Band Contention].

This was not the end of the Petitioners' standing and contention-related pleadings, however. On December 23, 1997, the State filed a request to accept two late-filed contentions asserted to deal with proprietary material on cask seismic stability and radiation shielding. See [State] Request for Consideration of Late-Filed Contentions EE and FF (Dec. 23, 1997) [hereinafter State Contentions EE and FF). Six days later, Confederated Tribes/Pete filed a second supplemental memorandum on the matter of standing. See Further Supplemental Memorandum in Support of the Petition of [Confederated Tribes/Pete] to Intervene and for a Hearing (Dec. 29, 1997) [hereinafter Confederated Tribes/Pete Second Supplemental Memorandum]. The State then timely filed its security plan contentions on January 3, 1998. See [State] Contentions Security-A through Security-I Based on Applicant's Confidential Safeguards Security Plan (Jan. 3, 1998). The State thereafter sought admission of an additional late-filed contention in the issue of cask seismic stability, which again was asserted to be based on proprietary information. See [State] Request for Consideration of Late-Filed Contention GG (Jan. 8, 1998) [hereinafter State Contention GG].

3. Responses to Supplemental Filings

Not unexpectedly, these pleadings were the subject of various participant responses and replies. Applicant filed responses to the various Petitioners' contentions, opposing all but two of the timely filed nonsecurity contentions submitted by the Petitioners opposing the application. See Applicant's Answer to Petitioners' Contentions (Dec. 24, 1997) [hereinafter PFS Contentions Response]; ***162** Applicant's Supplemental Answer to [State] Contentions Z to DD (Jan. 6, 1997) [hereinafter PFS Supplemental Contentions Response]. [FN1] PFS also filed responses opposing the State's security plan contentions and its three late-filed contentions. See Applicant's Answer to [State] Request for Consideration of Late Filed Contentions EE and FF (Jan. 9, 1997) [hereinafter PFS State Contentions EE and FF Response]; Applicant's Answer to [State] Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan (Jan. 20, 1998); Applicant's Answer to [State] Request for Consideration of Late-Filed Contention GG (Jan. 20, 1998) [PFS State Contention GG Response]. Along with the Skull Valley Band, PFS also continued to oppose the admission of Petitioners Confederated Tribes/Pete based on lack of standing. See Applicant's Answer to [Confederated Tribes/Pete] Supplemental Memorandum in Support of Petition to Intervene and for a Hearing (Dec. 12, 1997) [hereinafter PFS Confederated Tribes/Pete First Supplemental Memorandum Response]; Response of [Skull Valley Band] to Further Supplemental Memorandum in Support of the Petition of [Confederated Tribes/Pete] to Intervene and for a Hearing (Jan. 13, 1998) [hereinafter Skull Valley Band Confederated Tribe/Pete Second Supplemental Memorandum Response].

****15** The Staff responded to the Petitioners' contentions as well, asserting that, with the exception of Ensign Ranches that joined only in the first five Castle Rock contentions, each had submitted at least one litigable contention. See NRC Staff's Response to Contentions Filed by (1) [State], (2) [Skull Valley Band], (3) [OGD], (4) [Castle Rock], and (5) [Confederated Tribes/Pete] (Dec. 24, 1997) [hereinafter Staff Contentions Response]. The Staff nonetheless opposed the admission of the State's three late-filed contentions and declared that only three of the State's nine security plan contentions were admissible in full or in part. See NRC Staff's

Response to [State] Request for Consideration of Late-Filed Contentions EE and FF (Jan. 9, 1998) [hereinafter Staff State Contentions EE and FF Response]; NRC Staff's Response to [State] Security Plan Contentions (Jan. 20, 1998) [hereinafter Staff State Security Plan Contentions Response]; NRC Staff's Response to [State] Request for Consideration of Late-Filed Contention GG (Jan. 20, 1998) [hereinafter Staff State Contention GG Response]. In addition, in response to the supplemental filings of Confederated Tribes/Pete regarding their standing, the Staff ultimately declared there was an adequate basis for admitting the tribe, but not Chairman Pete. See NRC Staff's Response to the Supplemental Memorandum Filed by [Confederated Tribes/Pete] in Support of Their Petition to Intervene (Dec. 23, 1997) [hereinafter Staff Confederated ***163** Tribes/Pete First Supplemental Memorandum Response]; NRC Staff's Response to "Further Supplemental Memorandum in Support of the Petition of [Confederated Tribes/Pete] to Intervene and for a Hearing" (Jan. 14, 1998) [hereinafter Staff Confederated Tribes/Pete Second Supplemental Memorandum Response].

Acting in response to requests from the State and Castle Rock Land/Skull Valley, the Licensing Board also permitted those participants to file replies to the PFS and Staff responses to their contentions. See Licensing Board Memorandum and Order (Granting Leave to File Reply Pleadings and Requesting Information) (Jan. 6, 1998) (unpublished). The State and Castle Rock made those filings on January 16, 1998. See [State] Reply to the NRC Staff's and Applicant's Response to [State] Contentions A Through DD (Jan. 16, 1997) [hereinafter State Contentions Reply]; Reply of Petitioners [Castle Rock] to the Responses of the NRC Staff and the Applicant (Jan. 16, 1998) [hereinafter Castle Rock Contentions Reply].

Finally, the State submitted a response to the contentions of OGD, Confederated Tribes/Pete, and Castle Rock in which it supported all these contentions and sought to adopt each as part of its contentions. See [State] Response to Contentions of [OGD, Confederated Tribes/Pete, and Castle Rock] (Dec. 19, 1997) [hereinafter State Adopted Contentions Response]. In response, PFS labeled this filing an unsupported attempt to submit late-filed contentions. See Applicant's Answer to [State] Late-Filed Contentions (Dec. 31, 1997) [hereinafter PFS State Adopted Contentions Response].

D. Late-Filed Intervention Request and Castle Rock Rule Waiver Petition

****16** To add to these filings, one week before the scheduled prehearing conference, and some four months after the period for filing timely intervention requests had expired, a group of individuals represented by Dr. Richard Wilson filed a petition to intervene. In that petition, which they acknowledged was untimely, they sought an opportunity to participate in support of the PFS application as of right under 10 C.F.R. s 2.714 or by means of limited appearance statements pursuant to section 2.715(a). See Letter from Richard Wilson to Secretary, U.S. Nuclear Regulatory Commission (Jan. 20, 1998) [hereinafter SSWS Late-Filed Intervention Petition]; see also Letter from Richard Wilson to Secretary, U.S. Nuclear Regulatory Commission (Jan. 22, 1998) [hereinafter SSWS Revised Intervention Petition]. Also, in the last week before the prehearing conference, Castle Rock submitted a petition pursuant to 10 C.F.R. s 2.758(b) asking for a waiver of two Commission rules: (1) 10 C.F.R. Part 72 to the extent it would permit the licensing of a privately operated ISFSI such as that proposed by PFS; and (2) 10 C.F.R. s 51.23, the so-called Waste Confidence Decision, under which the Commission has declared that, for purposes of preparing an ER and ***164** an environmental impact statement (EIS) relative to agency licensing actions, including a Part 72 ISFSI, it has made a generic

determination that a permanent repository will be built and available for HLW within the first quarter of the next century. See Petition of [Castle Rock] for Non-Application or Waiver of Commission Regulations, Rules, and General Determinations (Jan. 21, 1998) [hereinafter Castle Rock Waiver Petition].

E. Site Visit and Initial Prehearing Conference

On January 26, 1998, accompanied by representatives of the various participants, the Board took a bus tour of the eastern Tooele County, Utah area. This tour included views of or stops at various sites in and around Skull Valley the Petitioners had identified as potentially relevant to the issues in this proceeding. Among these were (1) Rowley Junction, the highway interchange at the intersection of Interstate 80 and Skull Valley Road where PFS would locate an intermodal transfer point (ITP) for transfer of waste transportation casks from the Union Pacific rail line to trucks or a railroad spur for transport south to the proposed Skull Valley ISFSI site; (2) the Skull Valley Band's reservation from along Skull Valley Road, the paved access road that runs approximately 35 miles south from Interstate 80 through the reservation and passes about 2 miles to the east of the proposed ISFSI; (3) the English Village at the United States Army's Dugway Proving Grounds, which is located 10 miles south of the Skull Valley Band's reservation near the end of Skull Valley Road; and (4) State Roads 199 and 36, which connect Skull Valley Road with Tooele, Utah, the Tooele County seat, and afford views of the United States Department of Defense Tooele Chemical Agent Disposal Facility and the Tooele Army Depot.
****17** Beginning the next day, the Board conducted a 3-day prehearing conference during which it heard oral presentations regarding the standing of Petitioners Confederated Tribes/Pete and the admissibility of most of the Petitioners' ninety or so contentions. To avoid any discussion of nonpublic safeguards or proprietary information, the Board limited presentations regarding the State's nine security plan contentions and three late-filed contentions to the issues of the expertise of the witness sponsoring the State's security plan contentions and whether the State satisfied the five late-filing standards of 10 C.F.R. s 2.714(a)(1), while permitting the State, PFS, and the Staff to make additional post-prehearing conference filings on the substance of those contentions' admissibility.

F. Post-Prehearing Conference Filings

Following the prehearing conference, pursuant to a Board directive, Dr. Wilson filed an intervention petition supplement that denominated the group of ***165** individuals he was representing as the Scientists for Secure Waste Storage and indicated at least one member resided in Salt Lake City, Utah. See Letter from Richard Wilson to Secretary, U.S. Nuclear Regulatory Commission (Feb. 2, 1998) [hereinafter SSWS First Intervention Petition Supplement]. The State, OGD, and the Staff filed responses opposing intervention by SSWS, while PFS and the Skull Valley Band submitted answers supporting its participation as of right or as a discretionary intervenor. See [State] Opposition to Amended Petition to Intervene (Feb. 13, 1998) [hereinafter State SSWS First Intervention Petition Supplement Response]; OGD's Response to Wilson/ALF Amended Petition and Order Dated 2/2/98 Allowing Participant Responses to Said Petition (Feb. 13, 1998) [hereinafter OGD SSWS First Intervention Petition Supplement Response]; NRC Staff's Response to Petition for Leave to Intervene Filed by Richard Wilson and [SSWS] (Feb. 13, 1998) [hereinafter Staff SSWS First Intervention Petition

Supplement Response]; Response of [Skull Valley Band] to Petition of [SSWS] (Feb. 13, 1998) [hereinafter Skull Valley Band SSWS First Intervention Petition Supplement Response]; Applicant's Answer to Amended Petition of [SSWS] (Feb. 13, 1998) [hereinafter PFS SSWS First Intervention Petition Supplement Response]. Thereafter, in accordance with a further Board directive, SSWS filed a final intervention petition supplement setting forth its "contentions" for litigation, which consisted of one "general" contention and a series of responses to other Petitioners' contentions. In addition, it provided further information concerning its Salt Lake City member and asserted that, if SSWS was not entitled to intervention as of right, it should be granted discretionary intervention status. See Amended and Supplemental Petition of [SSWS] to Intervene (Feb. 27, 1998) [hereinafter SSWS Second Intervention Petition Supplement]. The State and the Staff again opposed SSWS's participation, while PFS and the Skull Valley Band continued to support its admission. See [State] Response to [SSWS] Amended and Supplemental Petition to Intervene (Mar. 9, 1998) [hereinafter State SSWS Second Intervention Petition Supplement Response]; NRC Staff's Response to "Amended and Supplemental Petition of [SSWS]" (Mar. 9, 1998) [hereinafter Staff SSWS Second Intervention Petition Supplement Response]; Applicant's Answer to Amended and Supplemental Petition of [SSWS] (Mar. 9, 1998) [hereinafter PFS SSWS Second Intervention Petition Supplement Response]; [Skull Valley Band] Memorandum in Support of Petition of [SSWS] and the Atlantic Legal Foundation to Intervene (Mar. 9, 1998) [hereinafter Skull Valley Band SSWS Second Intervention Petition Supplement Response].

****18** Also following the prehearing conference, the State, PFS, and the Staff submitted a series of Board-approved pleadings concerning the admissibility of the State's nine security contentions and its three late-filed contentions. See [State] Reply to NRC Staff and Applicant's Responses to Utah's Security Plan Contentions Security-A Through Security-I (Feb. 11, 1998) [hereinafter ***166** State Security Plan Contentions Reply]; [State] Reply to the NRC Staff's and Applicant's Responses to [State] Contentions EE and GG, and Notice of Withdrawal of Contention FF (Feb. 11, 1998) [hereinafter State Contentions EE and GG Reply]; NRC Staff's Response to "[State] Reply to the NRC Staff's and Applicant's Responses to [State] Contentions EE and GG, and Notice of Withdrawal of Contention FF" (Feb. 23, 1998) [hereinafter Staff State Contentions EE and GG Surreply]; Applicant's Answer to [State] Reply Concerning Late-Filed Contentions EE and GG (Feb. 23, 1998) [hereinafter PFS State Contentions EE and GG Surreply]. These three participants also submitted responses to the Castle Rock rule waiver petition, with the State supporting the petition and PFS and the Staff opposing it. See [State] Response to [Castle Rock] Non-Application or Waiver of Commission Regulations, Rules and General Determinations (Feb. 18, 1998) [hereinafter State Castle Rock Waiver Petition Response]; Applicant's Answer to Castle Rock's Petition for Non-Application or Waiver of Commission Regulations, Rules, and General Determinations (Feb. 18, 1998) [PFS Castle Rock Waiver Petition Response]; NRC Staff's Response to Petition of [Castle Rock] for Non-Application of Commission Regulations, Rules, and General Determinations (Feb. 18, 1998) [hereinafter Staff Castle Rock Waiver Petition Response].

G. Designation of Separate Board to Consider Physical Security Contentions

On March 26, 1998, the Chief Administrative Judge issued a notice establishing a separate three-member Atomic Safety and Licensing Board to consider and rule on all matters concerning the PFS physical security plan. See 63 Fed.Reg. 15,900, 15,900 (1998). Under the terms of that

notice, this Board retains jurisdiction over all other issues relating to the PFS application. See id. State contentions Security-A through Security-I fall within the jurisdiction of the recently established PSP Board. As a consequence, that Board will rule on the admissibility of those nine contentions. [FN2]

With the materials described above before us, we turn to the questions of the intervening participants' standing, the admissibility of their proffered, non- PSP contentions, and the efficacy of the Castle Rock rule waiver petition.

*167 II. ANALYSIS

Longstanding agency practice requires that an individual, group, business entity, or governmental entity that wants to intervene "as of right" as a full party in an adjudicatory proceeding concerning a proposed licensing action must establish that it (1) has filed a timely intervention petition or meets the standards that permit consideration of an untimely petition; (2) has standing to intervene; and (3) has proffered one or more contentions that are litigable in the proceeding. See 10 C.F.R. ss 2.714(a)(1)-(2), (b)(2). Further, the Commission has recognized that, notwithstanding a potential party's failure to meet the elements necessary to establish its standing to intervene as of right, it is possible, as a matter of discretion, to afford that participant party status. See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976). In this instance, the different intervening participants have sought to establish they meet these requirements for party status. [FN3]

A. Late Intervention/Standing

1. Standards Governing Late Intervention and Standing

**19 At the threshold, each intervention petition must be timely filed as prescribed in the notice of opportunity for hearing issued by the agency. For a petition that is not filed on time to be accepted for consideration, the participant seeking to intervene must demonstrate that a balancing of the five factors set forth in 10 C.F.R. s 2.714(a)(1)(i)-(v) support accepting the petition. Those factors include: (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; and (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Relative to the question of standing as of right for those seeking party status, the agency has applied contemporaneous judicial standing concepts that *168 require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Further, when, as here, an entity such as the Confederated Tribes or OGD seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary elements and who has authorized the organization to represent his or her interests. Moreover, in assessing a petition to determine whether these elements are

met, which the Board must do even though there are no objections to a petitioner's standing, the Commission has indicated that we are to "construe the petition in favor of the petitioner." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

Even if a petitioner fails to comply with these requirements to demonstrate its standing as of right, it is not necessarily deprived of the opportunity to obtain party status in an agency adjudicatory proceeding. The Commission has recognized that a petitioner can be granted party status, as a matter of discretion, based upon the presiding officer's consideration of the following factors:

(a) Weighing in favor of allowing intervention--

(1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

****20** (b) Weighing against allowing intervention--

(4) The availability of other means whereby petitioner's interest will be protected.

(5) The extent to which the petitioner's interest will be represented by existing parties.

(6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Pebble Springs, CLI-76-27, 4 NRC at 616.

We apply these general guidelines in looking to each of the Petitioners' standing presentations and the argument of SSWS as to why its January 1998 petition for intervention should be accepted even though late-filed.

***169** 2. State of Utah

DISCUSSION: State Petition at 9-18; PFS State Petition Response at 1; Staff Hearing Petitions Response at 4-5.

RULING: The reservation of the Skull Valley Band upon which the PFS facility is to be constructed is located wholly within the borders of the State of Utah. The State's asserted health, safety, and environmental interests relative to its citizens living, working, and traveling near the proposed facility and in connection with its property adjoining the reservation and the proposed transportation routes to the facility are sufficient to establish its standing in this proceeding.

3. Castle Rock

DISCUSSION: Castle Rock Petition at 6-14; PFS Castle Rock Petition Response at 1; Staff Hearing Petitions Response at 4-5.

RULING: Castle Rock Land, Skull Valley, and Ensign Ranches are all business entities involved in farming and ranching in the Skull Valley area. Castle Rock owns, and Ensign Ranches leases and operates, a farm/ranch that is adjacent to the Skull Valley Band reservation less than 2000 feet from the boundary of the proposed PFS facility. Skull Valley owns, and Ensign Ranches leases and operates, a farm/ranch that is located within 4 miles of the north boundary of the Skull Valley Band reservation. These properties also are located along the

proposed road transportation route to the facility. These entities' asserted health, safety, and environmental interests relative to this property are sufficient to establish their standing in this proceeding.

4. OGD

DISCUSSION: OGD Petition at 7-17; PFS OGD Petition Response at 1; Staff Hearing Petitions Response at 4-5.
RULING: OGD is a group consisting of members of the Skull Valley Band or other Native Americans who oppose the PFS proposal. Attached to the group's petition are the affidavits of 4 members of the Skull Valley Band, each of whom states that OGD is authorized to represent his or her interests. All four reside on the Skull Valley Band reservation between 4000 feet and 2 1/2 miles from the proposed PFS facility. These individuals' asserted health, safety, and environmental interests and their agreement to permit OGD to represent their interests are sufficient to establish OGD's standing to intervene in this proceeding.

***170** 5. Confederated Tribes/Pete

****21** DISCUSSION: Confederated Tribes/Pete Petition at 5-10; PFS Confederated Tribes/Pete Petition Response at 14-20; Staff Confederated Tribes/Pete Petition Response at 8-14; Confederated Tribes/Pete First Supplemental Memorandum at 2- 5; PFS Confederated Tribes/Pete First Supplemental Memorandum Response at 4-15; Staff Confederated Tribes/Pete First Supplemental Memorandum Response at 2-9; Confederated Tribes/Pete Second Supplemental Memorandum at 1-2; Skull Valley Band Confederated Tribes/Pete Second Supplemental Memorandum Response at 1-3; Staff Confederated Tribes/Pete Second Supplemental Memorandum Response at 2-4; Tr. at 10-26.
RULING: In their initial petition, the Confederated Tribes and Mr. Pete describe the Confederated Tribes as a federally recognized sovereign entity that consists of approximately 450 members. About half its membership resides on the Tribe's reservation, which straddles the Utah/Nevada border approximately 75 miles west of their Skull Valley Band "cousins" reservation that is to be the PFS ISFSI site. Most of the remainder of Confederated Tribes members live in communities surrounding the Confederated Tribes' reservation.
In his affidavit accompanying the petition, Mr. Pete states he is Chairman of the Confederated Tribes Business Council, its governing body, and seeks admission both in his official capacity and as an individual. Mr. Pete describes a vast 7.2 million acre area that includes both the Confederated Tribes and the Skull Valley Band reservations as the Goshute's aboriginal area in which Goshutes have hunted, fished, gathered, and lived for some time. He also states that activities such as hunting, fishing, and gathering are undertaken by Confederated Tribes members, including himself, in "the vicinity" of the Skull Valley Band reservation. Confederated Tribes/Pete Petition, Affidavit in Support of Request for Hearing and Petition to Intervene of [Confederated Tribes/Pete] (Aug. 28, 1997) at 16. He asserts that his health, safety, and environmental interests as well as those of the Confederated Tribes would be adversely impacted by the planned PFS facility in Skull Valley.
In their subsequent supplemental memoranda on standing, these Petitioners provide affidavits from two additional Confederated Tribes members, Genevieve Fields and Chrissandra Reed, who describe various contacts Confederated Tribes members have with the Skull Valley Band

reservation; express concern about the health, safety, and environmental impacts of the proposed PFS facility; and authorize the Confederated Tribes and Chairman Pete to represent their interests in this proceeding. More specifically, Ms. Reed states that her 3- year-old granddaughter, who resides with her and is a member of the Confederated Tribes, visits Ms. Reed's cousins who live on the Skull Valley Band reservation approximately every other week. These visits last from one night to up to two weeks. Ms. Reed asserts that, as her granddaughter's legal guardian, ***171** she is concerned about the health and safety impacts of the facility upon her granddaughter during the child's visits. Ms. Reed further declares that she visits the Skull Valley Band reservation eight to ten times a year herself.

****22** In resolving the question of standing for Confederated Tribes and Mr. Pete, any assertion of standing based on the general interests of Confederated Tribes or its members in Goshute "aboriginal lands" is inconsistent with the congressionally recognized status of the Confederated Tribes and the Skull Valley Band as distinct entities with separate reservations. Standing must, therefore, be established based on contacts of individual Confederated Tribes members with the Skull Valley Band reservation and the PFS facility located there. Chairman Pete's assertion he engages in activities in "the vicinity" of the Skull Valley reservation is too general to provide him with standing as of right individually or in a representational capacity. [FN4] See Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426-27 (description of activities as "near," in "close proximity," or "in the vicinity" of facility in question insufficient to establish standing), aff'd, CLI-97-8, 46 NRC 21 (1997). The affidavit of Confederated Tribes member Genevieve Fields suffers from a similar deficiency because it fails to describe any recent activities she personally engages in on the Skull Valley Band reservation.

In contrast, Ms. Reed's two affidavits describe a pattern of visits onto the Skull Valley Band reservation by her and her granddaughter, for whom she acts as legal guardian, that bring one or both of them within distances of the facility we have found sufficient to provide standing for other participants. See supra p. 169. The record does contain information suggesting the visits by Ms. Reed and her granddaughter are not as frequent as she described. See PFS Confederated Tribes/Pete First Supplemental Memorandum Response, Exh. 1, at 1- 2. There also are conflicting claims about whether Ms. Reed's granddaughter will continue to visit her relatives on the Skull Valley Band reservation, albeit with the representation that such visits have not been terminated by the Skull Valley Band or any Band member. See Tr. at 23-26.

After reviewing all this information "in the light most favorable to the petitioner," we are unable to conclude that the pattern of familial association that brings Ms. Reed and her minor granddaughter onto the Skull Valley Band reservation to visit Ms. Reed's cousins has become so attenuated as to provide an insufficient basis for standing for Ms. Reed or her minor granddaughter, whose legal interests Ms. Reed represents as guardian. Having been authorized to represent Ms. Reed's interests, Confederated Tribes thus has standing to participate in this proceeding.

***172** 6. Skull Valley Band

DISCUSSION: Skull Valley Band Petition at 1-3; PFS Skull Valley Band Petition Response at 4-7; Staff Hearing Petitions Response at 4-5.

RULING: The Skull Valley Band, a federally recognized American Indian tribe, owns and will lease the land upon which the PFS facility is to be built. The Skull Valley Band's verified petition, which is signed by the three-member tribal Executive Committee that is elected by all

adult voting members of the Skull Valley Band and is authorized to conduct the tribe's daily business, declares the Band seeks to participate as a party in any proceeding that may be convened to protect its legal, health, safety, cultural, and financial interests.

**23 Standing under 10 C.F.R. s 2.714 is not predicated on the position a petitioner wishes to take vis a vis a pending licensing application. Rather, it turns on the petitioner's ability to show that it has one or more cognizable interests that will be adversely impacted if the proceeding has one outcome rather than another. See Nuclear Engineering Co. (Sheffield, Illinois, Low- Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). In this instance, the Skull Valley Band has shown it and its members residing on the reservation have cognizable interests that will be affected adversely by one of the possible outcomes of this proceeding. The Skull Valley Band therefore has established its standing.

7. SSWS

a. Late-Filing Standards

DISCUSSION: SSWS Intervention Petition at unnumbered 1; SSWS Revised Intervention Petition at unnumbered 1; SSWS First Intervention Petition Supplement at unnumbered 1; State SSWS First Intervention Petition Supplement Response at 4-8; OGD SSWS First Intervention Petition Supplement Response at unnumbered 2; Staff SSWS First Intervention Petition Supplement Response at 4- 12; SSWS Second Intervention Petition Supplement at unnumbered 21-26; State SSWS Second Intervention Petition Supplement Response at 3-8; Skull Valley Band SSWS Second Intervention Petition Supplement Response at 5; Staff SSWS Second Intervention Petition Supplement Response at 5-9.

RULING: Of the participants now before us, only SSWS filed its intervention petition out of time. Its intervention petition was submitted more than 4 months beyond the deadline specified in the agency's July 21, 1997 notice of opportunity for hearing. See 62 Fed.Reg. at 41,099. SSWS therefore must demonstrate that a balancing of the five factors in 10 C.F.R. s 2.714(a)(1)(i)- (v) weighs in favor of permitting late filing as it seeks to intervene either as of right or a matter of *173 discretion. [FN5] For the reasons outlined below, we find SSWS has failed to meet its burden in this regard.

On the first and most important factor--good cause for filing late--SSWS fails to make a convincing showing. SSWS makes no assertions regarding the adequacy of the agency's notice. This is not surprising. Putting aside the fact that Federal Register notice generally is considered constructive notice to all residents of the United States, see 44 U.S.C. s 1508, any SSWS claim regarding a lack of actual notice would be problematic in the face of the State's showing in its first responsive pleading, which SSWS does not controvert, that one of SSWS's members, as a Utah Radiation Control Board official, received a copy of the Federal Register hearing opportunity notice on the PFS application shortly after the notice was issued.

SSWS instead attempts to justify its late filing as a reasonable failure to anticipate that members of the Utah university community would not be willing to discuss the scientific merits of the PSF facility. This assertion, however, does not account for the precept that the failure of some other group to "carry the ball" does not constitute good cause for late filing. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609 (1988), reconsideration denied on other grounds, CLI-89-6, 29 NRC 348 (1989), aff'd, Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51 (5th Cir.), cert. denied, 498 U.S. 896

(1990).

**24 Thus lacking good cause for its late filing, SSWS must make a particularly strong showing on the other four factors. See, e.g., Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977) (citing cases). Regarding factor two--other means to protect the petitioner's interests--despite the general rule that the ability to file 10 C.F.R. s 2.715(a) limited appearance statements or otherwise provide a group's expertise to other participants is not pertinent because it gives insufficient regard to the value of adjudicatory participation rights, see Duke Power Co. (Amendment to Materials License SNM-1773--Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 150 & n. 7 (1979), in this instance, as the Staff points out, the existence of those outlets has more resonance given the interests SSWS purports to champion.

As is outlined below relative to SSWS's standing, the interests of SSWS and its members are not rooted in any particular concern about the health, safety, or environmental impacts of the PFS ISFSI upon those members. Instead, theirs is an academic and professional interest in bringing to bear SSWS members' *174 scientific expertise to assure that record development is "correct" and proceeds in a manner that does not "misrepresent and demean science and the scientific community." SSWS First Intervention Petition Supplement at unnumbered 2. So too, under factor four--the extent to which the petitioner's interest will be represented by other participants--while Staff interests generally are assumed not to be coextensive with those of a private petitioner, see Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB- 747, 18 NRC 1167, 1174-75 & n. 22 (1983), in this instance SSWS's interest in ensuring the Board has "an objective presentation of the scientific evidence" by those without a "financial or political interest in the outcome," SSWS Second Supplemental Petition at unnumbered 25, 28, suggests SSWS sees itself fulfilling a role that, at least in part, mirrors the Staff's general pursuits. Accordingly, these two factors, which in any event are accorded less significance in the balance, see Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165 (1993), are, at best, minor in terms of the weight they afford to the "acceptance" side of the balance.

Factor three--assistance in developing a sound record--appears initially to be the strongest item supporting late acceptance of this petition. In its "contentions" provided in its last supplemental filing, SSWS states its position with respect to a number of the pending contentions filed by other participants, identifies prospective witnesses for those issues from among its members, and provides professional qualification statements for most of those witnesses that demonstrate considerable expertise in a variety of scientific and engineering disciplines that are relevant to the issues raised in this proceeding. As the State points out, however, this SSWS showing is flawed because it all too often reflects a lack of knowledge, understanding, or concern about the particulars of the PFS application, the focal point of this proceeding. This, in turn, suggests that the group's input will not be useful in helping to resolve the issues in this proceeding, which fundamentally deal with adequacy of the PFS proposal. Thus, this factor is, at best, also minor in terms of the weight it provides in favor of accepting the petition.

**25 Finally, we look to factor five--extent to which a late petitioner's participation will broaden the issues or delay the proceeding--which, like factor three, generally is accorded more significance among the four "non-good cause" factors. At first blush, this factor too would appear to weigh in favor of accepting the late-filed application. Albeit 4 months late and filed only a week before the long-scheduled initial prehearing conference, the SSWS petition nonetheless was submitted before contentions were admitted. Consequently, the timing of the

actual litigation of this proceeding up to this point has not been substantially affected, other than the additional time it has taken this Board to rule on the SSWS petition in conjunction with those that were timely filed. Moreover, given the scope of SSWS's proffered "contentions," in which it provides its views on a ***175** number of the other Petitioners' contentions, and the group's repeated assertion it intends only to provide clarity and perspective to existing issues, its petition would not appear to "broaden" the issues, at least in the conventional sense.

At the same time, we perceive a not insubstantial risk that by the very nature of its more "academic" interest in this proceeding and its own organizational structure, SSWS will "broaden" the issues in or otherwise delay this proceeding as it goes forward. For instance, SSWS has asked to be allowed "to participate in the preparation (and peer review) of the Commission's Safety and Environmental reports to the extent consistent with this intervention." SSWS First Intervention Petition Supplement at unnumbered 3. This suggests a desire to cut a somewhat wider swath across this proceeding than simply responding to admitted contentions. SSWS also declares that in addressing any issues in the proceeding, it will prepare and circulate the proposed written comments among the twenty or so members of the group with the intent of arriving at a "group report" and circulate any oral comments by its spokesman for "subsequent checking." Id. at 1. Such "litigation by committee" could broaden or delay the proceeding by creating the potential for differing views from the same participant and by forcing the Board, if it wants the input of the "group," to set schedules that will accommodate group consultation.

Utilizing its authority to structure intervenor participation, the Board could attempt to mitigate these potential broadening and delay elements by, for instance, requiring SSWS to present only a single, organizational position under strict deadlines. But to do so may well impair SSWS's chosen "peer review" style of record development in ways that would be administratively and substantively deleterious to its stated goals. Given the uncertainty created by SSWS's own organizational structure, we conclude that factor five likewise provides little if any weight in favor of accepting the SSWS late-filed petition.

****26** Considering in sum all five factors, we find the attenuated showings under factors two, three, four, and five do not provide the type of "compelling" demonstration that is necessary to overcome the total lack of good cause for the late filing of the SSWS intervention petition. SSWS thus has failed to establish that, on balance, its late-filed intervention petition should be accepted.

b. Standing as of Right

DISCUSSION: SSWS Intervention Petition at unnumbered 2-3; SSWS Revised Intervention Petition at unnumbered 2-3; SSWS First Intervention Petition Supplement at unnumbered 2-3; State SSWS First Intervention Petition Supplement Response at 9-14; OGD SSWS First Intervention Petition Supplement Response at unnumbered 2-4; Staff SSWS First Intervention Petition Supplement Response at 16-20; State SSWS Second Intervention Petition Supplement at 8-9; Staff SSWS Second Intervention Petition Supplement Response at 9-10.

***176** RULING: Even if SSWS had established that its late-filed intervention petition should be accepted, it still would not be entitled to party status in this proceeding as of right because, as we describe below, it has failed to establish its standing to intervene.

Because it seeks representational standing, SSWS must show that one or more of its members who has authorized it to represent him or her in this proceeding has or will suffer cognizable injury in fact as a result of the proposed PFS licensing action. [FN6] Unlike the other Petitioners, however, SSWS has not alleged there is any injury in fact to any of its members by reason of

their proximity to the proposed facility. Indeed, the only PFS member listed as residing in the State of Utah lives and works in Salt Lake City, more than 50 miles from the PFS site. This is well beyond the range within which we have found impacted health, safety, or environmental interests. See supra p. 169. Nor has there been any showing that he, or any other member of SSWS, engages in recreational or other activities anywhere near the PFS site.

In fact, while expressing support for the application, SSWS has made no showing that the grant or denial of the PFS request would have any impact on any interests of its members, even financial, that are normally put forth as a basis for standing in agency proceedings. Rather, the primary interest SSWS and its members seek to espouse is the desire as "nuclear scientists and administrators" with considerable expertise and experience but without a "financial or political interest in the outcome" of this proceeding to "inform the citizens of the state [of Utah] and this licensing board" about scientific and engineering principles that may be pertinent to the matters at issue. SSWS Second Intervention Petition Supplement at unnumbered 2, 28. This interest in presenting "sound science" is laudable, but it provides no basis for SSWS's standing either as an interest cognizable for standing purposes or as one that will be the subject of actual or imminent injury upon the grant or denial of the license. See Sheffield, ALAB-473, 7 NRC at 743 (legal and nuclear organizations seeking to support low-level waste site renewal application lack standing because no showing that granting or denying application would injure any cognizable interest of either organization or its members); Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976) (when no showing of injury to cognizable interests of its individual members by licensing action, asserted ability of civil liberties organization and its members to provide information and data on civil rights issues inadequate to ***177** provide basis for standing). SSWS thus lacks standing to intervene as of right in this proceeding.

c. Discretionary Standing

****27** DISCUSSION: SSWS Intervention Petition at unnumbered 1; SSWS Revised Intervention Petition at unnumbered 1-2; SSWS First Intervention Petition Supplement at unnumbered 1-2; State SSWS First Intervention Petition Supplement Response at 15-17; OGD SSWS First Intervention Petition Supplement Response at unnumbered 4-5; Skull Valley Band SSWS First Intervention Petition Supplement Response at 3-4; PFS SSWS First Intervention Petition Supplement Response at 1- 5; SSWS Second Intervention Petition Supplement at unnumbered 26-28; State SSWS Second Intervention Petition Supplement Response at 9-12; PFS Second Intervention Petition Supplement Response at 1-9; Skull Valley Band SSWS Second Intervention Petition Supplement Response at 5; Staff SSWS Second Intervention Petition Supplement Response at 10-12.

RULING: Even without standing as of right, however, SSWS asserts it could become a party if it can fulfill the requirements for discretionary standing set out in the Commission's Pebble Springs decision. After analyzing the guidelines in that decision, we again conclude SSWS is not eligible for party status.

Of the six Pebble Springs factors for assessing a discretionary intervention request, factors one, four, five, and six are basically coextensive with last four factors of the late-filing standard of 10 C.F.R. s 2.714(a)(1), with Pebble Springs factor one--assistance in developing a sound record--having significant sway. See Pebble Springs, CLI-76-27, 4 NRC at 616-17. We assess these four individually as we did in section II.A.7.a above, likewise concluding they provide

little, if any, support for admitting SSWS as a party.

This leaves factor two--nature and extent of Petitioner's interest in the proceeding--and factor three--possible effect of any order entered on the Petitioner's interest--to be considered. In both instances, these are not positive factors relative to SSWS. As we have noted above, although expressing support for the application, the interests SSWS champions are primarily academic, tied to its concern about ensuring the dissemination of "correct" scientific and engineering information. The generalized interests of SSWS in overseeing the record simply are not of the type that support permitting discretionary intervention.

In summary, given SSWS's failure to show that its contribution to the record will be of particular value (factor one) or that its interests are of the type that this proceeding is intended to encompass or will significantly impact (factors two and three) combined with our conclusions that other means and parties may well represent and protect those interests (factors four and five) and there is the real possibility SSWS participation will inappropriately broaden or delay the ***178** proceeding (factor six), we find discretionary intervention is not appropriate in this instance. [FN7]

B. Contentions

1. Contention Admissibility Standards

a. Pleading Requirements

i. GENERAL REQUIREMENTS

****28** For a proffered legal or factual contention to be admissible, it must be pled with specificity. In addition, the contention's sponsor must provide (1) a brief explanation of the bases for the contention; (2) a concise statement of the alleged facts or expert opinion that will be relied on to prove the contention, together with the source references that will be relied on to establish those facts or opinion; and (3) sufficient information to show there is a genuine dispute with the applicant on a material issue of law or fact, which must include (a) references to the specific portions of the application (including the accompanying environmental and safety reports) that are disputed and the supporting reasons for the dispute, or (b) the identification of any purported failure of the application to contain information on a relevant matter as required by law and reasons supporting the deficiency allegation. See 10 C.F.R. s 2.714(b)(2)(i)-(iii). A contention that fails to meet any one of these standards must be dismissed, as must a contention that, even if proven, would be of no consequence because it would not entitle a petitioner to any relief. Id. s 2.714(d)(2).

From these general principles, agency case law and regulations suggest there are a number of more specific corollaries regarding contention admissibility, which can be summarized as follows:

***179** ii. CHALLENGES TO STATUTORY REQUIREMENTS/REGULATORY PROCESS/REGULATIONS

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. Philadelphia Electric Co. (Peach Bottom

Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, aff'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. See 10 C.F.R. s 2.758; Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); see also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. See Peach Bottom, ALAB-216, 8 AEC at 20- 21 & n. 33.

iii. CHALLENGES OUTSIDE SCOPE OF PROCEEDING

****29** The scope of an adjudicatory proceeding is specified by the notice of hearing or of opportunity for hearing and contentions that deal with matters outside that defined scope must be rejected. See, e.g., Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n. 6 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

iv. MATERIALITY

Any issues of law or fact raised in a contention must be material to the grant or denial of the license application in question, i.e., they must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief. See 10 C.F.R. s 2.714(d)(2)(ii); 54 Fed.Reg. 33,168, 33,172 (1989). This requirement of materiality embodies the notion that an alleged error or deficiency regarding a proposed licensing action must have some significance ***180** relative to the agency's general responsibility and authority to protect the public health and safety and the environment. See Seabrook, LBP-82-106, 16 NRC at 1656 (safety contention "must either allege with particularity that an applicant is not complying with a specified [safety] regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent" (footnote omitted)); see also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).

Agency case law further suggests this requirement of materiality mandates certain showings in specific contexts. For instance, contentions concerning alleged deficiencies in a decommissioning plan must not only allege and provide sufficient bases to show the deficiencies but also show that the purported deficiencies have "some independent health and safety significance" such that reasonable assurance of the public health and safety with respect to decommissioning is no longer assured. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75, aff'd, CLI-96-7, 43 NRC 235 (1996); see also Yankee Nuclear, CLI-96-7, 43 NRC at 258 ("Petitioners must show some specific, tangible link between the alleged errors in the plan and the health and safety impacts they invoke"). In this same vein,

when challenging the adequacy of a decommissioning funding plan cost estimate, a contention lacks materiality absent an additional showing there is not reasonable assurance the amount in dispute can be paid, thereby avoiding a mere formalistic redraft of the funding plan. See Yankee Nuclear, CLI-96-1, 43 NRC at 9. Similarly, a contention challenging whether an emergency response plan's provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures for those provisions fails to present a material issue. See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983).

v. NEED FOR ADEQUATE FACTUAL INFORMATION OR EXPERT OPINION AS CONTENTION BASIS

****30** The bald assertion that a matter ought to be considered or that a factual dispute exists so as to merit further consideration of a matter is not sufficient. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993), review declined, CLI- 94-2, 39 NRC 91 (1994); see also Connecticut Bankers Association v. Board of Governors, 627 F.2d 245, 251 (D.C.Cir.1980). Nor does mere speculation provide an adequate basis for a contention. See Yankee Nuclear, CLI-96-7, 43 NRC at 267. Instead, a petitioner must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention. See Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 ***181** NRC 281, 305, vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, aff'd in part, CLI-95-12, 42 NRC 111 (1995).

With respect to documentary or other factual information or expert opinion alleged to provide the basis for a contention, the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention. In the case of a document, the Board should review the information provided to ensure that it does indeed supply a basis for the contention. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990); see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89- 3, 29 NRC 234, 241 (1989) ("where a contention is based on a factual underpinning in a document that has been essentially repudiated by the source of that document, the contention may be dismissed unless the intervenor offers another independent source"); Yankee Nuclear, LBP-96-2, 43 NRC at 90 ("[a] document put forth by an intervenor as the basis for a contention is subject to scrutiny both for what it does and does not show"). By the same token, an expert opinion that merely states a conclusion (e.g., the application is "deficient," "inadequate," or "wrong") without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion as it is alleged to provide a basis for the contention.

vi. FAILURE PROPERLY TO CHALLENGE APPLICATION

In framing contentions regarding a proposed licensing action, the focus of a petitioner's concern should be the license application. See 10 C.F.R. s 2.714(b)(2)(iii). In this regard, a contention that fails directly to controvert the license application at issue or that mistakenly asserts the

application does not address a relevant issue is subject to dismissal. See Rancho Seco, LBP-93-23, 38 NRC at 247-48; Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 424 (1991), appeal dismissed, CLI-92-3, 35 NRC 63 (1992).

b. Scope of Contentions

31 Although licensing boards generally are to litigate "contentions" rather than "bases," it has been recognized that "[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases." See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 29 NRC 93, 97 (1988). In this instance, Applicant PFS in an effort to provide greater specificity ***182 to the various Petitioners' contentions restated them by incorporating many of the contention bases as subparts of the contentions. In a number of instances a Petitioner objected to these redrafts, but in a several other instances, often after further negotiations and revision, the changes were adopted by the Petitioner. As set forth below, the language of the Petitioners' contentions reflects those agreed-upon changes. Moreover, as is outlined below, exercising our authority under 10 C.F.R. s 2.714(f), we have acted to further define and/or consolidate contentions when the issues sought to be raised by one or more Petitioners appear related or when redrafting would clarify the scope of the contentions.

c. Adoption/Incorporation by Reference

Three of the Petitioners, Castle Rock Land/Skull Valley, the Confederated Tribes, and the State, have sought to incorporate by reference one or more of the contentions of other participants. As the Staff points out, such adoption has been permitted in other proceedings. See Staff Contentions Response at 133 n. 82 (citing cases).

We likewise will permit adoption here by Castle Rock Land/Skull Valley and the Confederated Tribes, with two caveats. First, if the language of the adopted contention was revised as a result of the process described in section II.B.1.b above, that is the language that will be considered to be adopted. [FN8] Second, as is set forth more fully in section III.A below, for any contention subject to adoption, a "lead" party is appointed with primary responsibility for marshaling the parties' case relative to that contention.

As to the State, it sought to incorporate by reference all the other participants' contentions in a filing submitted well after the November 24, 1997 deadline for filing contentions. See State Adopted Contentions Response at 2. As PFS points out, the State has not addressed the late-filing factors in seeking to add these to the list of contentions it is sponsoring. See PFS State Adopted Contentions Response at 1-2. Because we agree with the Applicant, we deny the State's late-filed contentions request.

d. Criteria for Admitting Late-Filed Contentions

Of the contentions discussed below, two (Utah EE and GG) were submitted after the time for filing intervention petition supplements had expired. As such, they must be assessed under a five-factor test to determine whether, on balance, ***183** they should be considered even though late filed. As set forth in 10 C.F.R. s 2.714(a)(1)(i)-(v), the factors that must be balanced in determining whether to admit a late-filed contention are (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in

developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding. See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1046-47 (1983).

****32** With these general precepts before us, we turn to each of the Petitioners' claims regarding their contentions.

2. State Contentions

UTAH A--Statutory Authority

CONTENTION: Congress has not authorized NRC to issue a license to a private entity for a 4,000 cask, away-from reactor, centralized, spent nuclear fuel storage facility.

DISCUSSION: State Contentions at 3-9; PFS Contentions Response at 22-25; Staff Contentions Response at 6-14; State Contentions Reply at 9-15; Tr. at 45-64.

RULING: Inadmissible in that the contention and its supporting basis impermissibly challenge the agency's existing regulatory provisions or rulemaking-associated generic determinations. See section II.B.1.a.ii above. Nothing in the language of the 10 C.F.R. Part 72 provisions describing an ISFSI and the "persons" authorized to apply for and be issued a license to construct and operate an ISFSI indicates PFS is ineligible to seek such permission. See 10 C.F.R. s 72.2(b); id. s 72.3 (definitions of "Independent spent fuel storage installation" and "Person"); id. s 72.6(a). Indeed, when adopting Part 72 in 1980 the Commission specifically contemplated the possibility of stand-alone, "away from reactor" sites as well as the possibility that there could be "large" installations. See 45 Fed.Reg. 74,693, 74,696, 74,698-99 (1980). Thereafter, when the Commission revised Part 72 following the passage of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. ss 5841, 10101-10270--the lodestone for the State's assertion the Board lacks jurisdiction--it made revisions to accommodate the statutory provisions for a monitored retrievable storage (MRS) installation to be constructed and operated by the Department of Energy (DOE). It did not, however, make changes to the original scope of Part 72 that would preclude the creation of an installation such as that now contemplated by PFS. ***184** In these circumstances, in which the Commission clearly has established the scope of Part 72, inquiry into that determination is beyond our authority. [FN9]

UTAH B--License Needed for Intermodal Transfer Facility

CONTENTION: PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point ("ITP"), in violation of 10 C.F.R. s 72.6(c)(1), in that:

1. The Rowley Junction operation is not merely part of the transportation operation but a de facto interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel for extended periods of time.

2. The anticipated volume and quantity of fuel shipments that will pass through Rowley junction is a large magnitude that is unlike the intermodal transfer operations that previously occurred with respect to shipments of spent nuclear fuel from commercial nuclear power plant sites.

3. The volume of fuel shipments will not be capable of passing directly through Rowley

Junction and some type of temporary storage of casks will be necessary at the site of the ITP, thus making Rowley Junction a spent nuclear fuel storage facility. Further PFS fails to discuss the number of heavy haul trucks that will be available to haul casks, the mechanical reliability of these units, and their performance under all weather conditions which is necessary to analyze the amount of queuing and storage that will occur at Rowley Junction.

**33 4. Because the ITP is stationary, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.

DISCUSSION: State Contentions at 10-15; PFS Contentions Response at 25-42; Staff Contentions Response at 14-19; State Contentions Reply at 15-19; Tr. at 133-63.

RULING: Paragraphs two and three of this contention are inadmissible in that they and their supporting bases impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including the provisions of 10 C.F.R. Part 71 governing transportation of spent fuel from reactor sites to the PFS facility. See section II.B.1.a.ii above. Regarding paragraphs one and four, as is relevant here, the Part 71 regulations authorize transportation of spent fuel under a general license for a Commission licensee or "carrier," which is defined as a "common, contract, or private carrier," that complies with the general controls and procedures requirements, quality assurance measures, and other provisions of Subparts A, G, and H of Part 71. 10 C.F.R. ss 71.0(d), 71.4, *185 71.12. In this instance, there is a genuine legal/factual issue that merits further inquiry as to whether the PFS scheme for operation of the Rowley Junction ITP will cause the materials delivered there to remain within the possession and control of an entity or entities that comply with the terms of the general license issued under section 71.12 or will be handled in such a way as to require specific licensing under Part 72. See State Contentions at 11 (PFS will be receiving and handling spent fuel at ITP using PFS owned and operated equipment); Tr. at 144-62.

This contention is admitted, albeit limited to paragraphs one and four. [FN10] Revised language reflecting this ruling is set forth at p. 251 of Appendix A to this Memorandum and Order.

UTAH C--Failure to Demonstrate Compliance with NRC Dose Limits

CONTENTION: The Applicant has failed to demonstrate a reasonable assurance that the dose limits specified in 10 C.F.R. s 72.106(b) can and will be complied with in that:

1. License Application uses data for HI-STORM and TranStor casks that have not been fully reviewed or approved by the NRC.

2. License Application erroneously states that the loss of confinement accident is not credible.

3. License Application makes selective and inappropriate use of data from NUREG-1536 for the fission product release fraction.

4. License Application makes selective and inappropriate use of data from SAND80-2124 for the respirable particulate fraction.

5. The dose analysis in the License Application only considers dose due solely to inhalation of the passing cloud. Direct radiation and ingestion of food and water are not considered in the analysis.

6. In the dose calculation, PFS appears to assume local residents will be evacuated until contamination is removed, although this is not expressly discussed in the License Application.

**34 7. PFS fails to calculate doses to children.

8. PFS uses the ICRP-30 dose model which is outdated and inadequate. PFS should be

required to use the new ICRP-60 dose model.
DISCUSSION: State Contentions at 16-21; PFS Contentions Response at 42-58; Staff Contentions Response at 19-23; State Contentions Reply at 20-28; Tr. at 165-203.
*186 RULING: Paragraph one of this contention is inadmissible in that it and its supporting basis impermissibly challenge the Commission's regulatory scheme, provisions, or rulemaking-associated generic determinations, which establish a separate cask design approval process under rulemaking procedures and cask design approval prior to licensing of the PFS facility. [FN11] See section II.B.1.a.ii above. Paragraph two also is inadmissible in that it and its supporting basis lack materiality; lack adequate factual and expert opinion support; and/or impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. Part 71, by seeking to litigate transportation-related sabotage matters. See section II.B.1.a.i, ii, iv, v above. Paragraph six is inadmissible in that it and its supporting basis fail to provide any support, from the application or otherwise, for its assertion there is an evacuation assumption in the PFS application. See section II.B.1.a.i, v, vi above. Finally, paragraphs seven and eight are inadmissible in that they and their supporting bases impermissibly challenge the agency's regulatory standards or rulemaking-associated generic determinations, including 10 C.F.R. Part 20, and make no showing that, even taking into account dose rates to children and/or the ICRP-60 dose model, the Part 20 standards will not be met. See section II.B.1.a.i, ii, iv, v.
Paragraphs three, four, and five are admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry. A revised contention reflecting these rulings is set forth at p. 251 of Appendix A to this Memorandum and Order.

UTAH D--Facilitation of Decommissioning

CONTENTION: The proposed ISFSI is not adequately designed to facilitate decommissioning, because PFS has not provided sufficient information about the design of its storage casks to assure compatibility with DOE repository specifications. Moreover, in the reasonably likely event that PFS's casks do not conform to DOE specification, PFS fails to provide any measures for the repackaging of spent fuel for ultimate disposal in a high level radioactive waste repository. Moreover, PFS provides no measures for verification of whether the condition of spent fuel meets disposal criteria that DOE may impose.
DISCUSSION: State Contentions at 22-26; PFS Contentions Response at 58-68; Staff Contentions Response at 23-26; State Contentions Reply at 28-33; Tr. at 189-219.
RULING: As this contention and its supporting basis allege incompatibility with DOE repository specifications, it is inadmissible because it seeks to *187 challenge the Commission's regulatory program, regulations, or rulemaking-associated generic determinations under which DOE cask criteria, admittedly incomplete at present, need only be addressed as they become available, and has not demonstrated any specific inadequacy in the application's discussion of any existing DOE specifications that creates a genuine dispute. See section II.B.1.a.i, ii, vi above. As this contention and its supporting basis assert the need for a facility "hot cell" for spent fuel canister inspection to ensure compatibility with future DOE spent fuel acceptance limits, avoid storage removal operational safety problems, or provide a fuel repackaging capability for fuel transfer to casks compatible with later DOE requirements or for transfer of degraded fuel prior to shipment to a HLW repository, the contention also is inadmissible as impermissibly challenging the agency's regulations or rulemaking-associated generic

determinations and lacking the necessary factual information or expert opinion support. See section II.B.1.a.i, ii, v.

UTAH E--Financial Assurance

**35 CONTENTION: Contrary to the requirements of 10 C.F.R. ss 72.22(e) and 72.40(a)(6), the Applicant has failed to demonstrate that it is financially qualified to engage in the Part 72 activities for which it seeks a license.
DISCUSSION: State Contentions at 27-38; PFS Contentions Response at 69-83; Staff Contentions Response at 26-27; State Contentions Reply at 34-38; Tr. at 222-32.
RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry. We note, however, that while differences between the financial qualifications requirements of 10 C.F.R. Part 50, including Appendix C, and those in 10 C.F.R. Part 72 suggest the Part 50 provisions are not applicable in toto to Part 72 applicants, we agree with the Staff that Part 50 should be used as guidance in reviewing PFS's financial qualifications. See Staff Contentions Response at 108 (citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 302 (1997)).
Because of the similarity of this contention with Castle Rock 7 and Confederated Tribes F, see infra pp. 215, 236, we consolidate those issue statements as set forth in the revised contention specified at pp. 251-52 of Appendix A to this Memorandum and Order.

UTAH F--Inadequate Training and Certification of Personnel

CONTENTION: Training and certification of PFS personnel fails to satisfy Subpart I of 10 C.F.R. Part 72 and will not assure that the facility is operated in a safe manner.
*188 DISCUSSION: State Contentions at 39-41; PFS Contentions Response at 84-91; Staff Contentions Response at 28; State Contentions Reply at 38-40; Tr. at 261-64.
RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry, with the caveat that the second portion of the contention's basis concerning physical and mental condition of operators has been resolved/withdrawn. See State Contentions Reply at 39; Tr. at 261-62.
In addition, as is noted below, see infra p. 194, the portion of Utah P (subparagraph b of paragraph seven) that deals with training for the PFS radiation protection program, is consolidated with this contention. A revised contention reflecting this ruling is set forth on p. 252 of Appendix A to this Memorandum and Order.

UTAH G--Quality Assurance

CONTENTION: The Applicant's Quality Assurance ("QA") program is utterly inadequate to satisfy the requirements of 10 C.F.R. Part 72, Subpart G.
DISCUSSION: State Contentions at 42-51; PFS Contentions Response at 92-101; Staff Contentions Response at 28-30; State Contentions Reply at 40-43; Tr. at 269-80.
RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry, but limited to its bases one and four that assert a lack of detail in the PFS QA program description and a failure to demonstrate the independence of the PFS QA program. The contention's basis two regarding inadequate QA descriptions for PFS quality control over

spent fuel canister packaging operations and materials and handling at originating reactor sites, shipping cask materials and construction, and welding on shipping casks and spent fuel canisters is inadmissible as impermissibly challenging the agency's regulatory program, standards, and/or rulemaking-associated generic determinations. See section II.B.1.a.ii above. So too, the contention's basis three concerning inconsistency between the QA program description and the SAR is inadmissible as lacking materiality. See section II.B.1.a.i, iv above.

UTAH H--Inadequate Thermal Design

**36 CONTENTION: The design of the proposed ISFSI is inadequate to protect against overheating of storage casks and of the concrete cylinders in which they are to be stored in that:

1. Storage casks used in the License Application are not analyzed for the PFS maximum site design ambient temperature of 110 <<degrees>> F.

*189 2. The maximum average daily ambient temperatures for unnamed cities in Utah nearest the site do not necessarily correspond to the conditions in Skull Valley; PFS should provide information on actual temperatures at the Skull Valley site.

3. PFS's projection that average daily temperatures will not exceed 100 << degrees>> F fails to take into account the heat stored and radiated by the concrete pad and storage cylinders.

4. In projecting ambient temperatures, PFS fails to take into consideration the heat generated by the casks themselves.

5. PFS fails to account for the impact of heating the concrete pad on the effectiveness of convection cooling.

6. PFS has not demonstrated that the concrete structure of the TranStor cask is designed to withstand the temperatures at the proposed ISFSI.

7. PFS has not demonstrated that the concrete structure of the HI-STORM cask is designed to withstand the temperatures at the proposed ISFSI.

DISCUSSION: State Contentions at 52-59; PFS Contentions Response at 101-20; Staff Contentions Response at 30; State Contentions Reply at 43-47; Tr. at 280- 90.

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.

UTAH I--Lack of a Procedure for Verifying the Presence of Helium in Canisters

CONTENTION: The design of the proposed ISFSI fails to satisfy 10 C.F.R. ss 72.122(f) and 10 C.F.R. s 72.128(a), and poses undue risk to the public health and safety, because it lacks a procedure, or any evidence of a procedure, for verifying the presence of helium inside spent fuel canisters.

DISCUSSION: State Contentions at 60-62; PFS Contentions Response at 121-31; Staff Contentions Response at 30-31; State Contentions Reply at 47-49; Tr. at 291-300.

RULING: Inadmissible in that the contention and its supporting bases impermissibly challenge agency regulations or rulemaking-associated generic determinations, including those concerning the need for canister inspection and testing; and/or lack adequate factual information or expert opinion support. See section II.B.1.a.i, ii, v above.

UTAH J--Inspection and Maintenance of Safety Components, Including Canisters and Cladding

CONTENTION: The design of the proposed ISFSI fails to satisfy 10 C.F.R. ss 72.122(f) and 72.128(a), and poses undue risk to the public health and safety, because it lacks a hot cell or other facility for opening casks and inspecting the condition of spent fuel.
*190 DISCUSSION: State Contentions at 63-71; PFS Contentions Response at 131-46; Staff Contentions Response at 32-33; State Contentions Reply at 49-53; Tr. at 204-19.
**37 RULING: Inadmissible in that the contention and its supporting bases impermissibly challenge agency regulations or rulemaking-associated generic determinations, including those concerning canister inspection and repair; and/or lack adequate factual information or expert opinion support. See section II.B.1.a.i, ii, v above.

UTAH K--Inadequate Consideration of Credible Accidents

CONTENTION: The Applicant has inadequately considered credible accidents caused by external events and facilities affecting the ISFSI, intermodal transfer site, and transportation corridor along Skull Valley Road, including the cumulative effects of the nearby hazardous waste and military testing facilities in the vicinity.
DISCUSSION: State Contentions at 72-79; PFS Contentions Response at 146-65; Staff Contentions Response at 32-33; State Contentions Reply at 54-58; Tr. at 300-17.
RULING: Relative to the State's assertions regarding the impact on the PFS facility of accidents involving materials or activities at or emanating from the Tekoi Rocket Engine Test facility, Dugway Proving Ground, Salt Lake City International Airport, Hill Air Force Base, and the Utah Test and Training Range, this contention is admitted as supported by bases establishing a genuine material dispute sufficient to warrant further inquiry. Further, this contention is admitted as supported by bases establishing a genuine material dispute sufficient to warrant further inquiry regarding the State's assertions concerning the impact on the Rowley Junction ITP of accidents involving (1) materials or activities at or emanating from the facilities specified above, or (2) hazardous materials that pass through Rowley Junction from the Laidlaw APTUS hazardous waste incinerator, the Envirocare low-level radioactive and mixed waste landfill, or Laidlaw's Clive Hazardous Waste Facility and Grassy Mountain hazardous waste landfill. [FN12] Finally, in connection with the State's assertions regarding lack of consideration of accidents involving trucks or railcars transporting spent fuel casks as they travel to the ITP facility from reactor sites and thereafter along Skull Valley Road, these are inadmissible as impermissibly challenging the basic structure of the agency's regulatory processes, requirements, or rulemaking-associated generic determinations, including 10 C.F.R. Part 71, which places *191 such matters within the ambit of DOT regulation and control. [FN13] See section II.B.1.a.ii above.
A revised contention reflecting this ruling, as well as the consolidation of this contention with Castle Rock 6 and a related portion of Confederated Tribes B, see infra pp. 214, 235, is set forth at p. 253 of Appendix A to this Memorandum and Order.

UTAH L--Geotechnical

CONTENTION: The Applicant has not demonstrated the suitability of the proposed ISFSI site because the License Application and SAR do not adequately address site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading.

**38 DISCUSSION: State Contentions at 80-95; PFS Contentions Response at 165-68; Staff Contentions Response at 33-34; State Contentions Reply at 58-59; Tr. at 331-33.
RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry. [FN14]

UTAH M--Probable Maximum Flood

CONTENTION: The application fails to accurately estimate the Probable Maximum Flood (PMF) as required by 10 C.F.R. s 72.98, and subsequently, design structures important to safety are inadequate to address the PMF; thus, the application fails to satisfy 10 C.F.R. s 72.24(d)(2).

1. The Applicant's determination of the PMF drainage area to be 26 sq. miles is inaccurate because the Applicant has failed to account for all drainage sources that may impact the ISFSI site during extraordinary storm events.

2. In addition to design structures important to safety being inadequate to address the PMF, the consequence of an inaccurate PMF drainage area may negate the Applicant's assertion that the facility area is "flood dry."

DISCUSSION: State Contentions at 96-97; PFS Contentions Response at 168-69; Staff Contentions Response at 34; State Contentions Reply at 59; Tr. at 333-34.
*192 RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.

UTAH N--Flooding

CONTENTION: Contrary to the requirements of 10 C.F.R. s 72.92, the Applicant has completely failed to collect and evaluate records relating to flooding in the area of the intermodal transfer site, which is located less than three miles from the Great Salt Lake shoreline.
DISCUSSION: State Contentions at 98-99; PFS Contentions Response at 169-72; Staff Contentions Response at 34-35; State Contentions Reply at 59-60; Tr. at 334-39, 350.
RULING: Admitted as supported by bases establishing a genuine material dispute sufficient to warrant further inquiry. [FN15]

UTAH O--Hydrology

CONTENTION: The Applicant has failed to adequately assess the health, safety and environmental effects from the construction, operation and decommissioning of the ISFSI and the potential impacts of transportation of spent fuel on groundwater, as required by 10 C.F.R. ss 72.24(d), 72.100(b) and 72.108, with respect to the following contaminant sources, pathways, and impacts:

1. Contaminant pathways from the applicant's sewer/wastewater system, the retention pond, facility operations and construction activities.

2. Potential for groundwater and surface water contamination.

3. The effects of applicant's water usage on other well users and on the aquifer.

4. Impact of potential groundwater contamination on downgradient hydrological resources.

DISCUSSION: State Contentions at 100-08; PFS Contentions Response at 172-86; Staff Contentions Response at 35-36; State Contentions Reply at 59-60; Tr. at 339-60.
RULING: Except as it seeks to litigate the groundwater impacts of spent fuel shipments on

transportation routes, which is inadmissible as an impermissible challenge to the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. Part 71, see section II.B.1.a.ii above, this *193 contention is admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry. [FN16]

**39 In addition, as is noted below, see infra pp. 216, 217, the similarity of this contention and Castle Rock 8 and 10 warrants consolidating this contention and its supporting bases with those issue statements. The consolidated contention is set forth at p. 254 of Appendix A to this Memorandum and Order.

UTAH P--Inadequate Control of Occupational and Public Exposure to Radiation

CONTENTION: The Applicant has not provided enough information to meet NRC requirements of controlling and limiting the occupational radiation exposures to as low as reasonably achievable (ALARA) and analyzing the potential dose equivalent to an individual outside of the controlled area from accidents or natural phenomena events in that:

1. The Applicant has failed to provide detailed technical information demonstrating the adequacy of its policy of minimizing exposure to workers as a result of handling casks, nor does it describe the design features that provide ALARA conditions during transportation, storage and transfer of waste. Specifically, if the design has incorporated ALARA concepts, the storage casks used at the ISFSI should have the lowest dose rate.

2. The Applicant has failed to provide an analysis of alternative cask handling procedures to demonstrate that the procedures will result in the lowest individual and collective doses.

3. The Applicant has failed to adequately describe why the Owner Controlled Area boundaries were chosen and whether the boundary dose rates will be the ultimate minimum values compared to other potential boundaries.

4. The Applicant has failed to indicate whether rainwater or melted snow from the ISFSI storage pads will be collected, analyzed, and handled as radioactive waste.

5. The Applicant has failed to provide design information on the unloading facility ventilation system to show that contamination will be controlled and workers will be protected in a manner compatible with the ALARA principle. In addition, procedures to maintain and ensure filter efficiency and replace components are not provided.

6. The Applicant has failed to provide adequate or complete methods for radiation protection and failed to provide information on how estimated radiation exposures values to operating personnel were derived to determine if dose rates are adequate.

7. The Applicant has failed to describe a fully developed radiation protection program that ensures ALARA occupational exposures to radiation by not adequately describing:

a. the management policy and organizational structure to ensure ALARA;

*194 b. a training program that insures all personnel who direct activities or work directly with radioactive materials or areas are capable of evaluating the significance of radiation doses;

c. specifics on personnel and area, portable and stationary radiation monitoring instruments, and personnel protective equipment, including reliability, serviceability, equipment limitation specifications;

**40 d. a program for routine equipment calibration and testing for operation and accuracy;

e. a program to effectively control access to radiation areas and movement of radiation sources;

f. a program to maintain ALARA exposures of personnel servicing leaking casks;

g. a program for monitoring and retaining clean areas and monitoring dose rates in radiation zones to ensure ALARA; and

h. specific information on conducting formal audits and review of the radiation protection program.

8. The Applicant has completely failed to include an analysis of accident conditions, including accidents due to natural phenomena, in accordance with 10 C.F.R. ss 72.104 and 72.126(d).

9. The Applicant has failed to control airborne effluent which may cause unacceptable exposure to workers and the public, Contention T, Basis 3(a) (Air Quality) is adopted and incorporated by reference.

DISCUSSION: State Contentions at 109-13; PFS Contentions Response at 187-206; Staff Contentions Response at 37-39; State Contentions Reply at 61-66; Tr. at 367-80.

RULING: Inadmissible as to all paragraphs except subparagraph b of paragraph seven in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including the applicable ALARA provisions; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, iv, v, vi above. With regard to subparagraph b of paragraph seven, this portion of the contention is admitted as supported by a basis establishing a genuine material dispute adequate to warrant further inquiry and is incorporated into Utah F, which deals generally with PFS training program adequacy. See supra p. 188. The revised contention is set forth at p. 252 of Appendix A to this Memorandum and Order.

***195** UTAH Q--Adequacy of ISFSI Design to Prevent Accidents

CONTENTION: The Applicant has failed to adequately identify and assess potential accidents, and, therefore, the Applicant is unable to determine the adequacy of the ISFSI design to prevent accidents and mitigate the consequences of accidents as required by 10 C.F.R. 72.24(d)(2).

DISCUSSION: State Contentions at 114-15; PFS Contentions Response at 207-15; Staff Contentions Response at 39-40; State Contentions Reply at 66; Tr. at 390- 94.

RULING: Inadmissible in that this contention and its supporting bases fail to establish with specificity any genuine material dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, iii, v, vi above. [FN17]

UTAH R--Emergency Plan

CONTENTION: The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site, at the transfer facility, or offsite during transportation in that:

****41** 1. PFS has not adequately described the facility, the activities conducted there, or the area in sufficient detail to evaluate the adequacy and appropriateness of the emergency plan, nor has PFS considered specific impediments to emergency response such as flooding, ice, snow, etc.

2. PFS has not identified adequate emergency and medical facilities and equipment to respond to an onsite emergency.

a. Tooele County capabilities and equipment are not addressed adequately.

b. No provision for extra onsite preparedness giving time for Tooele County to respond, particularly in adverse weather conditions.

3. The plan was not adequately coordinated with the State or other government (local, county, state, federal) agencies.

a. PFS has not supported its claim regarding absence of extremely hazardous substances and that no assistance will be required external to Tooele County.

b. PFS does not address transportation accidents or accidents at the intermodal transfer point.

*196 4. PFS has not adequately described means and equipment for mitigation of accidents, because it:

a. Does not address how it would procure a crane within 48 hours for a tip over cask accident.

b. Does not adequately support capability to fight fires.

5. The Emergency Plan does not provide adequate detail to meet provisions of Reg. Guide 3.67, s 5.4.1 regarding equipment inventories and locations.

DISCUSSION: State Contentions at 116-22; PFS Contentions Response at 215-36; Staff Contentions Response at 40-49; State Contentions Reply at 66-69; Tr. at 792-803.

RULING: Admitted with regard to paragraph one and subparagraph b of paragraph three as they relate to the Rowley Junction ITP and subparagraph b of paragraph four relating to onsite firefighting capabilities as supported by bases establishing a genuine material dispute adequate to warrant further inquiry. [FN18] Inadmissible as to all other portions of paragraph one, paragraph two, subparagraph a of paragraphs three and four, and paragraph five in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including Commission determinations relating to the need for offsite emergency response plans for ISFSIs; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, iv, v, vi above.

A revised contention reflecting this ruling is set forth at p. 254 of Appendix A to this Memorandum and Order.

UTAH S--Decommissioning

CONTENTION: The decommissioning plan does not contain sufficient information to provide reasonable assurance that the decontamination or decommissioning of the ISFSI at the end of its useful life will provide adequate protection to the health and safety of the public as required by 10 C.F.R. s 72.30(a), nor does the decommissioning funding plan contain sufficient information to provide reasonable assurance that the necessary funds will be available to decommission the facility, as required by 10 C.F.R. s 70.3(b).

**42 DISCUSSION: State Contentions at 123-30; PFS Contentions Response at 236-56; Staff Contentions Response at 49-52; State Contentions Reply at 69-74; Tr. at 394-409.

RULING: Admitted as it is supported by bases one, two, four, five, ten, and eleven, which are sufficient to establish a genuine material dispute adequate *197 to warrant further inquiry, [FN19] with the caveat that for the decommissioning cost estimates at issue under basis four, the costs of nonradiological solid and hazardous waste disposal are a consideration only to the extent necessary for license termination, see 53 Fed.Reg. 24,018, 24,019 (1988). Inadmissible as to the

matters specified in bases three, six, seven, eight, and nine provided in support of this contention, which fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. s 51.23; lack materiality; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i, ii, iv, v above.

Because of the similarity of the issues raised in this contention and Castle Rock 7, see infra p. 215, the portions of that contention and their supporting bases that specifically relate to decommissioning (i.e., paragraphs c and f) are hereby consolidated with this contention, which is revised as set forth at p. 255 of Appendix A to this Memorandum and Order.

UTAH T--Inadequate Assessment of Required Permits and Other Entitlements

CONTENTION: In derogation of 10 C.F.R. s 51.45(d), the Environmental Report does not list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the PFS ISFSI License Application, nor does the Environmental Report describe the status of compliance with these requirements in that:

1. The Applicant has failed to show that it is entitled to use the land for the ISFSI site and if it does have such right whether there are any legal constraints imposed on the use and control of the land: the NRC must require the Applicant to fully disclose all provisions of the Applicant's lease with the Skull Valley Band in order to fully evaluate under what conditions that Applicant is entitled to use and control the site.

2. The Applicant has shown no proof of entitlement to build a transfer facility at Rowley Junction or right to use the terminal there; nor has it identified the number of casks expected on each shipment, or explained the effects of rail congestion or whether Rowley Junction has the capacity of handling the expected number of casks; nor has it shown that Union Pacific is willing and capable to handle shipments to Rowley Junction.

3. The Applicant has shown no ability or authority to build a rail spur from the rail head at Rowley Junction to the proposed ISFSI site.

4. The Applicant has shown no basis that it is entitled to widen Skull Valley Road or that the proposed 15-foot roadway would satisfy health, safety and environmental concerns nor does the application describe and identify State and local permits or approvals that are required.

****43 *198** 5. The Applicant's air quality analysis does not satisfy the requirements of 10 C.F.R. s 51.45 in that the Applicant has failed to adequately analyze whether it will be in compliance with the health-based National Ambient Air Quality Standards, whether it is subject to section 111 of the Clean Air Act, and whether it is a major stationary source of air pollution requiring a Prevention of Significant Deterioration permit; the Applicant's analysis of air quality impacts in ER 4.3.3 is inadequate; and a state air quality approval order under Utah Code Ann. s 19-2-108 will be required.

6. The Applicant has not addressed the requirement to obtain a Utah groundwater discharge permit.

7. The Applicant's analysis of other required water permits lacks specificity and does not satisfy the requirements in that the Applicant merely states that it "might" need a Clean Water Act Section 404 dredge and fill permit for wetlands along the Skull Valley transportation corridor and that it will be required to consult with the State on the effects of the intermodal transfer site on the neighboring Timpie Springs Wildlife Management Area.

8. The Applicant must show legal authority to drill wells on the proposed ISFSI site and that

its water appropriations will not interfere with or impair existing water rights and identify and describe state approvals that are required.
DISCUSSION: State Contentions at 131-43; PFS Contentions Response at 256-82; Staff Contentions Response at 52-53; State Contentions Reply at 74-83; Tr. at 467-94.
RULING: Admissible as to paragraphs two through eight and their supporting bases, which are sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the approvals and entitlements properly at issue under these allegations are limited to those involving appropriate governmental (as opposed to nongovernmental/private) entities. [FN20] Inadmissible as to paragraph one and its supporting basis, which fail to establish with specificity any genuine dispute and impermissibly challenge the Commission's regulatory processes, regulations or rulemaking-associated generic determinations, including those relating to site ownership. [FN21] See section II.B.1.a.i, ii above.
A revised contention reflecting this ruling, as well as the consolidation of all or parts of Castle Rock 10, 12, and 22, see infra pp. 217, 218, 224, is set forth at pp. 255-56 of Appendix A of this Memorandum and Order.

*199 UTAH U--Impacts of Onsite Storage Not Considered

CONTENTION: Contrary to the requirements of NEPA and 10 C.F.R. 51.45(c), the Applicant fails to give adequate consideration to reasonably foreseeable potential adverse environmental impacts during storage of spent fuel on the ISFSI site.
DISCUSSION: State Contentions at 142-43; PFS Contentions Response at 282-92; Staff Contentions Response at 53-54; State Contentions Reply at 83-84; Tr. at 525-50.
**44 RULING: Admissible as to basis one, which is sufficient to establish a genuine material dispute adequate to warrant further inquiry. [FN22] Inadmissible as to bases two, three, and four proffered in support of this contention, which fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including those involving canister inspection and repair and transportation sabotage; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, v, vi above.

UTAH V--Inadequate Consideration of Transportation-Related Radiological Environmental Impacts

CONTENTION: The Environmental Report ("ER") fails to give adequate consideration to the transportation-related environmental impacts of the proposed ISFSI in that:
1. In order to comply with NEPA, PFS and the NRC Staff must evaluate all of the environmental impacts, not just regional impacts, associated with transportation of spent fuel to and from the proposed ISFSI, including preparation of spent fuel for transportation to the ISFSI, spent fuel transfers during transportation to the ISFSI, transferring and returning defective casks to the originating nuclear power plant, and transfers and transportation required for the ultimate disposal of the spent fuel.
2. PFS's reliance on Table S-4 is inappropriate and inadequate. 10 C.F.R. s 51.52 applies only to light-water-cooled nuclear power plant construction permit applicants, not to offsite ISFSI applicants. Even if 10 C.F.R. s 51.52 applied, PFS does not satisfy the threshold conditions for using Table S-4, and its reliance on NUREG-1437 is misplaced. Since the conditions specified in

10 C.F.R. s 51.52(a) for use of Table S-4 are not satisfied, the PFS must provide "a full description and detailed analysis of the environmental effects of transportation of fuel and wastes to and from the reactor" in accordance with 10 C.F.R. s 51.52(b).

3. The SAR is inadequate to supplement Table S-4 in that:

a. The Applicant fails to adequately address the intermodal transfer point in that the analysis utilizes unreasonable assumptions regarding rail shipment volume and its associated effects.

***200** b. The Applicant fails to calculate impacts of the return of substandard or degraded casks to the originating nuclear power plant licensees, including additional radiation doses to workers and the public.

c. The Applicant fails to address the environmental impacts of any necessary intermodal transfer required at some of the originating nuclear power plants due to lack of rail access or inadequate crane capability.

4. New information shows that Table S-4 grossly underestimates transportation impacts in that:

a. WASH-1238, which is the basis for Table S-4, uses poor and outdated data, and hence the Applicant's reliance on WASH-1238 and Table S-4 is inadequate to demonstrate compliance with NEPA;

****45** b. WASH-1238 does not quantify the risks of spent fuel transportation. 10 C.F.R. s 51.45(c) requires that, to the extent practicable, the cost and benefits of a proposal should be quantified;

c. WASH-1238 does not address accidents caused by human error or sabotage;

d. WASH-1238 does not include up-to-date analyses of maximum credible accidents;

e. WASH-1238 does not address the potential for degradation of fuel cladding caused by dry fuel storage;

f. WASH-1238 does not address the greater release fraction from severe accident consequences demonstrated in recent analyses;

g. WASH-1238 does not address specific regional characteristics of impacts on the environment from transportation and therefore is inadequate to satisfy 10 C.F.R. s 72.108;

h. WASH-1238 does not address circumstances and consequences of a criticality event of a representative rail transportation cask with a large capacity (capacity greater than a critical mass of fuel);

i. WASH-1238 does not contain information from the more recent and more accurate dose modeling RADTRAN computer program;

j. WASH-1238 does not address a representative transportation distance for the shipment of spent fuel from the originating nuclear power plants. WASH- 1238 assumes an approximate distance of 1000 miles. The PFS acknowledges that the distance may be more than twice that amount. ER at 4.7-3.

DISCUSSION: State Contentions at 144-61; PFS Contentions Response at 292-310; Staff Contentions Response at 54-63; State Contentions Reply at 84-88; Tr. at 551-93, 600-03.

RULING: Admissible as to paragraph two and its supporting basis as it alleges the weight for a loaded PFS shipping cask is outside the parameters of 10 C.F.R. s 51.52 (Summary Table S-4), which is sufficient to establish a genuine material dispute adequate to warrant further inquiry. Inadmissible as to paragraph ***201** one, the balance of the assertions in paragraph two, and paragraphs three and four and their supporting bases, [FN23] which fail to establish with specificity any genuine dispute; impermissibly challenge the applicable Commission regulations or rulemaking-associated generic determinations, including 10 C.F.R. ss 51.52, 72.108, and

"Environmental Survey of Transportation of Radioactive Materials to and from Nuclear Power Plants," WASH-1238 (Dec. 1972), as supplemented, NUREG-75/038 (Supp. 1 Apr. 1975); lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, v, vi above.

A revised version of this contention that incorporates this ruling is set forth at p. 256 of Appendix A to this Memorandum and Order.

UTAH W--Other Impacts Not Considered

CONTENTION: The Environmental Report does not adequately consider the adverse impacts of the proposed ISFSI and thus does not comply with NEPA or 10 C.F.R. s 51.45(b) in that:

1. The Applicant has not discussed the cumulative impacts of this facility in relationship to hazardous and industrial facilities/activities located in the region of the ISFSI site and the intermodal transfer point.

**46 2. The Applicant has not evaluated the potential for accidents from the heavy haul trucks that could make up to 400 trips per year along the Skull Valley Road, a secondary two-way paved road.

3. The Applicant has not considered the impact of flooding on its facility or the intermodal transfer point.

4. The Applicant has not adequately discussed the degradation of air quality and water resources due to construction, operation, and maintenance of the ISFSI.

5. The Applicant has not fully assessed the environmental impact of placing 4,000 casks over a site with such complex seismicity, capable of faults and potentially unstable soils.

6. The Applicant has not adequately considered the cost of the visual impact of the proposed ISFSI and of the transportation of spent fuel by heavy haul trucks along Skull Valley Road on the public's use and enjoyment of the area.

DISCUSSION: State Contentions at 162-64; PFS Contentions Response at 310-23; Staff Contentions Response at 63-64; State Contentions Reply at 88-89; Tr. at 604-21.

*202 RULING: Admissible as to paragraph three as it asserts a failure to consider the impact of flooding at the Rowley Junction ITP, which is sufficient to establish a genuine material dispute adequate to warrant further inquiry. [FN24] Inadmissible as to paragraphs one and two, paragraph three as it relates to the PFS facility, and paragraphs four, five, and six in that they and their supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, v, vi above.

A revised contention reflecting this ruling is set forth at p. 256 of Appendix A to this Memorandum and Order.

UTAH X--Need for the Facility

CONTENTION: The Applicant fails to demonstrate there is a need for the facility as is required under NEPA.

DISCUSSION: State Contentions at 165-66; PFS Contentions Response at 323-30; Staff Contentions Response at 64-65; State Contentions Reply at 89-90; Tr. at 652-57.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; and/or lack adequate factual and expert opinion

support. See section II.B.1.a.i, ii, v above.

UTAH Y--Connected Actions

CONTENTION: The Applicant fails to adequately discuss the link between this proposal and the national high level waste program, a connected action, as is required under NEPA.
DISCUSSION: State Contentions at 167-68; PFS Contentions Response at 330-35; Staff Contentions Response at 65-68; State Contentions Reply at 90-95; Tr. at 122-33.
RULING: Inadmissible in that this contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. ss 51.23, 51.61; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i., ii., v above.

*203 UTAH Z--No Action Alternative

**47 CONTENTION: The Environmental Report does not comply with NEPA because it does not adequately discuss the "no action" alternative.
DISCUSSION: State Contentions at 169-70; PFS Supplemental Contentions Response at 2-13; Staff Contentions Response at 68; State Contentions Reply at 95-96; Tr. at 658-64.
RULING: Admissible as supported by a basis sufficient to establish a genuine material dispute adequate to warrant further inquiry.

UTAH AA--Range of Alternatives

CONTENTION: The Environmental Report fails to comply with the National Environmental Policy Act because it does not adequately evaluate the range of reasonable alternatives to the proposed action.
DISCUSSION: State Contentions at 172-74; PFS Supplemental Contentions Response at 13-20; Staff Contentions Response at 69; State Contentions Reply at 96-98, Tr. at 675-84.
RULING: Admissible as supported by a basis sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the scope of the contention is limited to the issue of the adequacy of the PFS alternative site analysis.
As is explained below, this contention is consolidated with a portion of Castle Rock 13. See infra p. 219. The revised contention is set forth at p. 256 of Appendix A to this Memorandum and Order.

UTAH BB--Site Selection and Discriminatory Effects

CONTENTION: The Applicant's site selection process does not satisfy the demands of the President's Executive Order No. 12,898 or NEPA and the NRC staff must be directed to conduct a thorough and in-depth investigation of the Applicant's site selection process.
DISCUSSION: State Contentions at 175-77; PFS Supplemental Contentions Response at 20-32; Staff Contentions Response at 69; State Contentions Reply at 98-99; Tr. at 693-707, 716-29.
RULING: Inadmissible, in that the contention and its supporting bases seek to litigate the issue of "discrimination in the site selection process," State Contentions at 177, which is not a cognizable subject for agency licensing proceedings relative to compliance with NEPA. See

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 101-06 (1998).

*204 UTAH CC--One-Sided Cost-Benefit Analysis

CONTENTION: Contrary to the requirements of 10 C.F.R. s 51.45(c), the Applicant fails to provide an adequate balancing of the costs and benefits of the proposed project, or to quantify factors that are amenable to quantification in that:

1. Applicant's Environmental Report makes no attempt to objectively discuss the costs of the project.

2. Applicant fails to weigh the numerous adverse environmental impacts discussed, for example, in Contentions H through P, against the alleged benefits of the facility.

3. Applicant fails to compare the environmental costs of the proposal with the significantly lower environmental costs of the no-action alternative.

4. Applicant fails to weigh the benefits to be achieved by alternatives that could reduce or mitigate accidents, environmental contamination, and decommissioning costs, such as inclusion of a hot cell in the facility design.

**48 5. Applicant makes no attempt to quantify the costs associated with the impacts of the facility, many of which are amenable to quantification in that:

a. costs related to accidents and contamination may be quantified in terms of health effects and dollar costs;

b. decommissioning impacts can be quantified;

c. visual impacts can be quantified in terms of lost tourist dollars; and

d. emergency response costs can be quantified based on the cost of those services.

DISCUSSION: State Contentions at 178-79; PFS Supplemental Contentions Response at 32-43; Staff Contentions Response at 70-71; State Contentions Reply at 99- 101; Tr. at 739-45.

RULING: Inadmissible as the contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, v, vi above.

UTAH DD--Ecology and Species

CONTENTION: The Applicant has failed to adequately assess the potential impacts and effects from the construction, operation and decommissioning of the ISFSI and the transportation of spent fuel on the ecology and species in the region as required by 10 C.F.R. ss 72.100(b) and 72.108 and NEPA in that:

1. The License Application does not discuss the long term impacts of construction activities on the overall ecological system in Skull Valley.

2. The License Application fails to address adverse impacts of contaminated ground or surface waters on various species, and fails to provide for sampling of the retention pond for contaminants.

*205 3. The License Application fails to include both protective and mitigation plans in conjunction with appropriate authorities for Horseshoe Springs, Salt Mountain Springs, Timpie Springs Waterfowl Management Area, and raptor nests.

4. The License Application has not estimated potential impacts to ecosystems and "important species" in that:

a. The License Application does not discuss the importance of the variety of species found in the Skull Valley ecological system, including aquatic organisms, and does not discuss the interdependence of various species on one another or impact on the ecological system as a whole.

b. The License Application fails to assess the individual and collective impacts on various species, including wetland species, aquatic organisms, plants, fish, and birds from additional traffic, fugitive dust, radiation and other pollutants.

c. The License Application fails to address all possible impacts on federally endangered or threatened species, specifically the peregrine falcon nest in the Timpie Springs Waterfowl Management Area.

d. The License Application fails to include information on pocket gopher mounds which may be impacted by the proposal.

e. The License Application fails to determine whether "culturally or medically (scientific) significant" plant species may be impacted by the PFSF.

****49** f. The License Application fails to identify aquatic plant species which may be adversely impacted by the proposed action.

g. The License Application has not adequately identified plant species that are adversely impacted or adequately assessed the impact on those identified, specifically the impact on two "high interest" plants, Pohl's milkvetch and small spring parsley.

h. License Application does not identify, nor assess the adverse impacts on, the private domestic animal (livestock) or the domestic plant (farm produce) species in the area.

5. License Application fails to assess the potential impacts on Horseshoe Springs, Timpie Springs Waterfowl Management Area, the Great Salt Lake, and Salt Mountain Springs.

6. License Application fails to include the results of detailed site- specific surveys and analyses to determine species in the vicinity of the PFSF. 10 C.F.R. ss 72.100(b) and 72.108 require that detailed surveys of species plus mitigation or prevention plans be prepared now.

DISCUSSION: State Contentions at 180-87; PFS Supplemental Contentions Response at 43-70; Staff Contentions Response at 71-75; State Contentions Reply at 101- 04; Tr. at 766-83.

RULING: Admissible as to subparagraphs c, d, g, and h of paragraph four, which are sufficient to establish a genuine material dispute adequate to warrant further inquiry. Inadmissible as to paragraphs one through three, subparagraphs ***206** a, b, e, and f of paragraph four, and paragraphs five and six in that these paragraphs and their supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, v, vi above.

A revised contention reflecting this ruling, as well as the consolidation of this contention with a portion of Castle Rock 16 that raises similar issues, see infra p. 221, is set forth at pp. 256-57 of Appendix A to this Memorandum and Order.

UTAH EE--Failure to Demonstrate Cask-Pad Stability During Seismic Event

CONTENTION: The Applicant has failed to demonstrate that storage casks and pads will remain stable during a seismic event. Accordingly, the Applicant fails to satisfy 10 C.F.R. ss 72.122(b)(2) and 72.128(a) in that:

1. The Holtec analysis is inadequate to support the safety of Applicant's proposed design during a seismic event at the PFS facility.

a. The Applicant has not provided enough information about inputs to the model to support

the credibility of the analysis.

b. The Holtec analysis is not based on an adequate inquiry into site conditions and how they affect the stability of the casks.

2. It is impossible to verify from the Holtec Seismic Report if the three independent components of seismic time histories have been properly and conservatively evaluated such that three statistically independent time histories were used in the Holtec report.

**50 3. The Applicant's cask-pad model oversimplifies the behavior of the dynamic loads at the PFS facility, by failing to sufficiently consider the potential for bending, structural deterioration of the concrete surface, translation, and rotation of the pad.

a. In the Holtec report, the Applicant has not considered the effects of simultaneous rotation and translation of the pad, in conjunction with the movement of the casks in the Holtec report.

b. In the Holtec report, the Applicant, by assuming that the casks move uniformly in the same direction oversimplifies or ignores the phenomena that the casks may move in different directions and at different speed from each other as a result of the differences in movement of the pad and casks.

c. In the Holtec report, the Applicant did not consider that the coefficient of friction (i.e., the resistance of the surface of the pad to movement of the casks) may vary over the surface of the pad. There is no indication that the shift from the static friction case to the kinetic case was considered.

d. The assumption that the 30' x 64' pad will remain rigid is unreasonable and oversimplified. Thus, in the Holtec report, the Applicant failed to provide sufficient information about the soil structure and characteristics at the PFS facility site to rule out the potential for differential upheaval and subsidence *207 of the soil beneath the concrete which may cause the pad to bend, crack, and possibly spall.

e. In the Holtec report, the Applicant failed to consider the effects of the embedment of the pad in the compacted granular soil on the site or its destabilizing effect on the casks.

4. In the Holtec report, the Applicant fails to adequately consider site- specific soil characteristics.

a. A reliable seismic analysis should be based on more comprehensive knowledge of soil types; soil features; such as stratigraphy; and measurements of each soil type's ability to respond to dynamic loading, such as dynamic passive resistance, damping, Young's modulus, and Poisson's ratio.

b. In the Holtec report, the Applicant fails to account for the differences in strata beneath the pad, or the impacts on the cask/pad system of different acceleration rates and directional movements for each of the different strata.

c. In the Holtec report, the Applicant fails to account for the potential for cemented and/or collapsible soil on the site, which may also have an effect on the rate and direction of movement of the cask/pad system.

d. State Contention L (Geotechnical) whose basis 4, Soil Stability and Foundation Loading, regarding the failure to consider collapsible soils, is adopted and incorporated herein by reference.

5. In the Holtec analysis, the Applicant does not consider the impact of dynamic loads on the structural integrity of the pad which may cause damage to the concrete surface, including cracking, spalling, and crushing of the concrete which may become a contributing factor to instability of the casks.

**51 6. In the Holtec report, it does not appear that the Applicant performed uncertainty or

sensitivity analyses on the various soil-pad interaction aspects of its seismic analysis.

7. In the Holtec report, the Applicant's earthquake analysis for the Canister Transfer Building is inadequate. The report does not contain any analysis of the seismic response of the cask, transfer cask, and overhead bridge crane. The Applicant must provide an analysis of earthquake impacts on this facility, under postulated accident conditions.

8. It is impossible to evaluate the adequacy of the computer codes used in the Holtec analysis unless the codes are adequately identified.

DISCUSSION regarding Late-Filing Standards: State Contentions EE and FF at 1- 3; PFS State Contention EE and FF Response at 1-8; Staff State Contentions EE and FF Response at 3-6; State Contentions EE and GG Reply at 2-9, 11-13; PFS State Contentions EE and GG Surreply at 2-20; Staff State Contentions EE and GG Surreply at 3-6; Tr. at 419-44.

RULING: We dismiss this contention, which concerns the site-specific seismic stability of one of the two PFS-designated cask systems that is to be used ***208** at the PFS facility, for failure to meet the late-filing requirements of 10 C.F.R. s 2.714(a)(1). Concerning the first factor--good cause for failing to file on time--the State's assertion that good cause exists for late filing because it needed to await receipt of the proprietary information is misplaced. The State acknowledges it received a nonproprietary version of Holtec International's cask-pad seismic stability report for its HI-STORM 100 system on September 22, 1997. It nonetheless maintains two proprietary portions of the report not available to it until mid-November were integral to its contention preparation so as to justify filing Utah EE in late December, nearly a month late. See State Contentions EE and GG Reply at 8-9 (citing Holtec Int'l, Multi- Cask Seismic Response at the PFS ISFSI for PFS, Holtec Report No. HI-971631 (Proprietary Version) (May, 19, 1997) Fig. 4-1 (Hi-Storm 100 Dynamic Model); id. Attach. A (Theoretical Equations of Motion for a Single Cask)). After reviewing both documents and the pertinent nonproprietary materials timely available to the State, we conclude neither proprietary document was necessary to the development of Utah EE, in whole or in part, such that the delay was justified. See Catawba, CLI-83-19, 17 NRC at 1043, 1045 (if contention's factual predicate otherwise available, unavailability of document does not constitute good cause for late filing); see also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

Lacking good cause for the one-month delay in filing Utah EE, the State must make a compelling showing on the other four factors. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). It fails to do so, however. Factors two and four support the late- filing in that there appear to be no other means to protect the State's interests in this contention or other parties to represent those interests. This duo are, however, to be accorded less weight than factors three and five. See id. at 245.

****52** And as to these two elements, factor three--sound record development-- and factor five--broadening and delaying the proceeding--provide, at best, only lukewarm support for late-admission. In connection with factor three, notwithstanding the Commission's directive that the proponent of a late-filed contention should, with as much particularity as possible, " 'identify its prospective witnesses, and summarize their proposed testimony,' " id. at 246 (quoting Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982)), the State has done little more than point to the two affiants supporting the contention, without providing any real clue about what they would say to support the contention beyond ***209** the minimal information they provide for admitting the contention.

[FN25] Further, regarding factor five, while submitted before contentions have been admitted and having some alleged relationship to admitted issue Utah L so as not to portend a protracted delay in the proceeding, as the Staff points out, this contention involves the use of proprietary information so that litigation on its merits carries the likelihood of some delay simply because of the additional procedures that must be utilized to ensure nondisclosure. [FN26] Accordingly, while the other four factors all support late-filed admission, whether taken individually or in concert, we do not find them sufficiently compelling to warrant the admission of Utah EE given the lack of good cause for its late filing.

UTAH FF--Inadequate Analysis of Radiation Shielding

CONTENTION: PFS has not demonstrated satisfaction of NRC dose limits at 10 C.F.R. s 72.104, because its analysis of radiation shielding for the proposed PFS facility is inadequately documented or explained.
DISCUSSION: State Contentions EE and FF at 13-17; PFS State Contentions EE and FF Response at 45-66; Staff State Contentions EE and FF Response at 7-11; State Contentions EE and GG Reply at 1.
RULING: This contention was withdrawn by the State. See State Contentions EE and GG Reply at 1.

***210** UTAH GG--Failure to Demonstrate Cask-Pad Stability During Seismic Event for TranStor Casks

CONTENTION: The Applicant has failed to demonstrate that the TranStor storage casks and the pads will remain stable during a seismic event, and thus, the application does not satisfy 10 C.F.R. ss 72.122(b)(2) and 72.128(a) in that:
1. The Sierra Nuclear site-specific analysis gives inadequate consideration to site-specific soil characteristics.
2. Insufficient information is provided about the input to the model of the PFS site soil characteristics to support the credibility of the analysis.
3. Sierra Nuclear's analysis demonstrates there is a potential stability problem with the casks during a design basis seismic event. Applicant's conclusion that the cask will not topple is inconsistent with Sierra Nuclear's recommendation that the possibility of tipover should be analyzed using the ANSYS finite element code.
****53** 4. The conclusion reached in the Sierra Nuclear Report demonstrates that the Holtec analysis is not based on an adequate inquiry into the vertical acceleration of the casks, tipover analysis, and soil site conditions and how these factors affect the stability of the casks.
5. Sierra Nuclear's consultant, Advent Engineering Services, Inc. did not consider that the coefficient of friction may vary over the surface of the pad and did not consider the shift from the static case to the kinetic case when considering momentum of the moving casks.

a. Late-Filing Standards

DISCUSSION: State Contention GG at 1-3; PFS State Contention GG Response at 2- 4; Staff State Contention GG Response at 4; State Contentions EE and GG Reply at 2-7, 9-13; PFS State Contentions EE and GG Surreply at 21-25; Staff State Contentions EE and GG Surreply at 1-2;

Tr. at 419-44.
RULING: Relative to Utah GG, the State has identified two proprietary reports, see State Contention GG at 1 (citing Sierra Nuclear Corp., Soil-Structure Interaction Analysis for Evaluation of TranStor (R) Storage Cask Se[i]smic Stability, SNC No. PFS01-10.02.04 (Proprietary) (rev. 0 July 1997); Sierra Nuclear Corp., TranStor (R) Storage Cask Seismic Stability Analysis for PFS Site, SNC No. PFS01-10.02.05 (Proprietary) (rev. 0 July 1997)), it timely sought and did not receive until some 3 weeks after the November 24, 1997 contention-filing deadline. We conclude those documents are relevant to the development of paragraphs three, four, and five so as to provide good cause for the delay in filing these portions of the contention less than a month later. In contrast, after reviewing the two proprietary documents and the germane nonproprietary documents timely available to the State, we conclude neither proprietary report was necessary to the development of paragraphs one and two, in whole or in part, ***211** such that the 7-week delay in submitting these concerns was justified. See supra p. 208 (citing cases).
As to the other four factors, our analysis parallels that we outlined in connection with Utah EE in which we concluded these elements support late- filing, albeit only moderately so. See supra pp. 208-09. In the case of paragraphs three, four, and five, in light of the good cause for late filing, the overall balance clearly favors further consideration, late-filing notwithstanding. For paragraphs one and two, however, these factors are not sufficient to provide the compelling showing needed to offset the lack of good cause for the filing delay. See Braidwood, CLI-86-8, 23 NRC at 244. We thus conclude that balancing the five late-filing standards only sanctions further consideration of the admissibility of paragraphs three, four, and five, which we do below. [FN27]

b. Admissibility

DISCUSSION: State Contention GG at 4-8; PFS State Contention GG Response at 5- 13; Staff State Contention GG Response at 6-9; State Contentions EE and GG Reply at 27-32.
****54** RULING: Regarding paragraphs three, four, and five of this late-filed contention, the admissibility of which we have concluded appropriately can be considered, we find paragraphs three and four inadmissible because these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; lack adequate factual and expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, v, vi above. Paragraph five is admitted as supported by a basis establishing a genuine material dispute adequate to warrant further inquiry. The contention as revised to reflect this ruling is set forth at p. 257 of Appendix A to this Memorandum and Order.

3. Castle Rock Contentions

CASTLE ROCK 1--Absence of NRC Authority

CONTENTION: The Application is defective because NRC does not have authority to license a large-scale, off-site facility for the long-term storage of spent nuclear fuel such as the proposed PFSF.
***212** DISCUSSION: Castle Rock Contentions at 2-10; PFS Contentions Response at 336-40; Staff Contentions Response at 99; Castle Rock Contentions Reply at 7-17; Tr. at 65-86.

RULING: For the reasons given in our discussion regarding Utah A, see supra p. 183, we find this contention inadmissible in that the contention and its supporting basis impermissibly challenge the agency's regulatory provisions or rulemaking-associated generic determinations. See also section II.B.1.a.ii above.

CASTLE ROCK 2--Noncompliance with Regulations

CONTENTION: PFS's Application is defective because it seeks a license for an ISFSI pursuant to 10 C.F.R. Part 72. However, the proposed storage installation is not an ISFSI and is otherwise not licensable under 10 C.F.R. Part 72 in that:

a. In order to harmonize the NRC regulations with the NWPA and Atomic Energy Act, the regulation defining ISFSI must be interpreted to exclude the proposed PFSF.

b. NRC regulations must be construed to require PFS to demonstrate maximization of the use of existing storage capability at reactor sites.

c. NRC regulations must be construed to require PFS to demonstrate that DOE has exhausted all means for providing off-site storage capacity.

d. NRC regulations must be construed to require a showing that DOE has attempted to establish a cooperative program for on-site storage under 42 U.S.C. s 10198.

DISCUSSION: Castle Rock Contentions at 10-15; PFS Contentions Response at 340- 43; Staff Contentions Response at 99-101; Castle Rock Contentions Reply at 17- 19; Tr. at 65-86.

RULING: Inadmissible in that the contention and its supporting bases impermissibly challenge the agency's regulatory structure, provisions, or rulemaking-associated generic determinations. See section II.B.1.a.ii above.

CASTLE ROCK 3--Conflict with DOE Duties and Prerogatives

CONTENTION: The Application must be denied because the proposed PFSF interferes with DOE duties and prerogatives under the NWPA.

**55 DISCUSSION: Castle Rock Contentions at 15-18; PFS Contentions Response at 343-46; Staff Contentions Response at 102-04; Castle Rock Contentions Reply at 19-20; Tr. at 65-85.

RULING: Inadmissible in that the contention and its supporting basis fails to establish with specificity any genuine dispute; impermissibly challenge the agency's regulatory structure, provisions, or rulemaking-associated generic determinations; *213 and/or lack adequate factual or expert opinion support. See section II.B.1.a.i, ii, v above.

CASTLE ROCK 4--Attempts to Evade the Requirements of the NWPA

CONTENTION: The status of the Application suggests that DOE has either tacitly or directly agreed with PFS and its member utilities to allow the Application to proceed in an attempt to evade the statutory mandates of the NWPA.

DISCUSSION: Castle Rock Contentions at 18-22; PFS Contentions Response at 346- 49; Staff Contentions Response at 104-05; Castle Rock Contentions Reply at 20- 22; Tr. at 77-86.

RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i, ii, v above.

CASTLE ROCK 5--Application for Permanent Repository

CONTENTION: The proposed PFSF is properly characterized as a de facto permanent repository, and the Application fails to comply with the licensing requirements for a permanent repository in that:

a. no repository or other storage facilities capable of absorbing the 40,000 MTU of spent fuel to be stored at the PFSF exist, or likely will exist at the time PFS proposed to decommission the PFSF; the PFSF will function as a de facto permanent repository and must be licensed as such; the Application is defective because it does not meet the requirements of a permanent repository.

b. even if a permanent repository is operational at the time the PFSF is proposed to be decommissioned, such repository will not be able to absorb 40,000 MTU at once or at a rate that will permit decommissioning of the PFSF; the PFSF will function as a de facto permanent repository and must be licensed as such; the Application is defective because it does not meet the requirements of a permanent repository.

DISCUSSION: Castle Rock Contentions at 22-26; PFS Contentions Response at 349- 53; Staff Contentions Response at 105-07; Castle Rock Contentions Reply at 22- 29; Tr. at 100-19.

RULING: Inadmissible in that the contention and its supporting basis impermissibly challenge the agency's regulatory provisions or rulemaking- associated generic determinations. See section II.B.1.a.ii above.

*214 CASTLE ROCK 6--Emergency Planning and Safety Analysis Deficiencies

CONTENTION: The Application does not provide for reasonable assurance that the public health and safety will be adequately protected in the event of an emergency affecting the PFSF.

**56 DISCUSSION: Castle Rock Contentions at 26-30; PFS Contentions Response at 353-66; Staff Contentions Response at 107-08; Castle Rock Contentions Reply at 29-33; Tr. at 317-25, 686-87.

RULING: Relative to the Castle Rock's assertions regarding the impact on the PFS facility of fires in Skull Valley or accidents involving materials or activities at or emanating from the Dugway Proving Ground, the Department of Defense Chemical Weapons Incinerator, the Tooele Army Depot, Wendover Air Force Bombing Range, Hill Air Force Bombing Range, APTUS Hazardous Waste Incinerator, Laidlaw Hazardous Waste Incinerator and Landfill, and Envirocare of Utah Low Level Waste Disposal Facility, this contention is admitted as supported by bases establishing a genuine material dispute sufficient to warrant further inquiry. The contention's basis regarding the effect of the 2002 Olympic Winter Games was withdrawn. See Tr. at 686-87.

Because of the similarity of this contention and its supporting bases to Utah K, which Castle Rock Land/Skull Valley have adopted by reference, and a portion of Confederated Tribes B dealing with wildfires, see supra p. 191, infra p. 235, this contention and its bases are consolidated with Utah K and Confederated Tribes B, as is specified at p. 253 of Appendix A to this Memorandum and Order.

CASTLE ROCK 7--Inadequate Financial Qualifications

CONTENTION: The Application does not provide assurance that PFS will have the necessary funds to cover estimated construction costs, operating costs, and decommissioning costs, as

required by 10 C.F.R. s 72.22(e) in that:

a. PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed PFSF, and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license;

b. the Application does not adequately account for possible shortfalls in revenue if customers become insolvent, default on their obligations, or otherwise do not continue making payments to the proposed PFSF;

c. the Application does not provide assurance that PFS will have sufficient resources to cover nonroutine expenses, including without limitation the costs of a worst case accident in transportation, storage, or disposal of the spent fuel;

*215 d. the Application fails to provide enough detail concerning the limited liability company agreement between PFS's members, the Service Agreements to be entered with customers, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS;

**57 e. the Application fails to describe the legal obligations of the Skull Valley Band of Goshute Indians and provide assurance that third parties will have adequate legal remedies if injured as a result of its acts or omissions; and

f. the Application fails to itemize cost estimates and otherwise provide enough detail to permit evaluation of the tenability of such estimates.

DISCUSSION: Castle Rock Contentions at 30-40; PFS Contentions Response at 366- 77; Staff Contentions Response at 108; Castle Rock Contentions Reply at 33-40; Tr. at 232-38.

RULING: Admissible with regard to paragraphs a through d and f in that these portions of the contention and their supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry. Inadmissible as to paragraph e in that this portion of the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. s 72.22; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i, ii, v above.

As we noted above, see supra pp. 187, 197, because of the similarity of the admitted portions of this contention to Utah E and Utah S, both of which Castle Rock Land/Skull Valley have incorporated by reference, the Board will consolidate some aspects of this contention with those issue statements. In the case of Utah E, which concerns financial assurance generally, at pp. 251-52 of Appendix A to this Memorandum and Order the Board has set forth a revised contention that incorporates the issues raised by Castle Rock in paragraphs a through d and f. With regard to Utah S, which concerns decommissioning, the Board finds that the specific concerns expressed in paragraphs c and f of Castle Rock 7 relating to decommissioning costs are covered in bases four and five of Utah S, and thus should be litigated in conjunction with that contention as it is set forth at p. 255 of Appendix A to this Memorandum and Order.

CASTLE ROCK 8--Groundwater Quality Degradation

CONTENTION: The Application, including the ER, is defective and therefore raises the issue

of risk to public health and safety because the proposed site of the PFSF will not, or cannot, be adequately protected against ground water contamination due to facility design, its location, contaminants it will generate, and the nature of the soils and bedrock of the area.
*216 DISCUSSION: Castle Rock Contentions at 40-41; PFS Contentions Response at 377-81; Staff Contentions Response at 109; Castle Rock Contentions Reply at 40-41; Tr. at 360-66.
RULING: Admissible in that this contention and its supporting basis are sufficient to establish a genuine material dispute adequate to warrant further inquiry.
As we noted above, see supra p. 193, because of the similarity of this contention to Utah O, which Castle Rock Land/Skull Valley have incorporated by reference, the Board will consolidate this contention and its supporting basis into that issue statement. The Board sets forth the consolidated contention at p. 254 of Appendix A to this Memorandum and Order.

CASTLE ROCK 9--Regional and Cumulative Environmental Impacts

**58 CONTENTION: The Application fails to adequately discuss the regional and cumulative environmental impacts of the proposed PFSF, as required by 10 C.F.R. ss 72.98(b) & (c) and 72.100, and NEPA, in that:
a. the SAR and ER fail to address the cumulative regional health and safety impact of the ISFSI and other dangerous facilities in Tooele County, including without limitation issues regarding the cumulative impact to the regional environment and population;
b. the SAR and ER fail to address the cumulative quantitative risk to the public of numerous dangerous facilities in one area and the interrelated transportation, sabotage, and accident risks arising from concentration of such facilities.
DISCUSSION: Castle Rock Contentions at 41-44; PFS Contentions Response at 381- 86; Staff Contentions Response at 109-11; Castle Rock Contentions Reply at 41- 43; Tr. at 621-34.
RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. s 72.122; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, v, vi above.

CASTLE ROCK 10--Retention Pond

CONTENTION: The Application, including the ER, is defective and therefore raises public health and safety risks because it does not adequately address the potential of overflow and groundwater contamination from the retention pond and the environmental hazards created by such overflow, in that
a. The ER fails to discuss potential for overflow and therefore fails to comply with 10 C.F.R. Part 51.
*217 b. ER is deficient because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond in violation of 10 C.F.R. s 51.45(b) and s 72.126(c) & (d).
c. The ER should address the applicability of the Utah Groundwater Protection Rules, which apply specifically to facilities such as the retention pond and generally require that such ponds be lined.
DISCUSSION: Castle Rock Contentions at 44-45; PFS Contentions Response at 386- 90; Staff

Contentions Response at 111; Castle Rock Contentions Reply at 43-44; Tr. at 360-66.
RULING: Admissible in that this contention and its supporting basis are sufficient to establish a genuine material dispute adequate to warrant further inquiry.
Because of the similarity of this contention to Utah O, which Castle Rock Land/Skull Valley have incorporated by reference, with one exception the Board consolidates this contention and its supporting basis into that issue statement. See supra p. 193. The exception is paragraph c, which is consolidated into Utah T, also incorporated by reference by Castle Rock Land/Skull Valley. See supra p. 198. The Board has set forth the consolidated contentions at pp. 254 and 255-56 of Appendix A to this Memorandum and Order.

CASTLE ROCK 11--Radiation and Environmental Monitoring

**59 CONTENTION: The Application poses undue risk to the public health and safety and fails to comply with 10 C.F.R. s 72.24, s 72.122(b)(4), and s 72.126 because it fails to provide for adequate radiation monitoring necessary to facilitate radiation detection, event classification, emergency planning, and notification, including systematic baseline measurements of soils, forage, and water either near the PFSF site, or at Petitioners' adjoining lands in that:
a. PFS has taken no background radiological samples of nearby vegetation and groundwater.
b. PFS has provided no radioactive effluent monitoring system to detect radioactive contamination in surface runoff water that collects in a retention pond on the PFSF site.
DISCUSSION: Castle Rock Contentions at 45-47; PFS Contentions Response at 390- 96; Staff Contentions Response at 112-13; Castle Rock Contentions Reply at 44; Tr. at 381-85, 388.
RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i, ii, v above.

*218 CASTLE ROCK 12--Permits, Licenses, and Approvals

CONTENTION: The Application violates NRC regulations and NEPA because the ER fails to address adequately the status of compliance with all Federal, State, regional and local permits, licenses and approvals required for the proposed PFSF facility (see, e.g., 10 C.F.R. ss 51.45(d) and 51.71(d)) in that:
a. The ER does not contain a list of all permits, etc. which must be obtained as required by 10 C.F.R. s 51.45(d).
b. The ER fails to include a discussion of the status of compliance with applicable environmental quality standards and requirements as required by 10 C.F.R. s 51.45(d) in that:
i. the discussion of the Army Corps of Engineers permitting requirements for construction along the new corridor is inadequate;
ii. the discussion of requirements at the Site is inadequate; and
iii. the conclusory sentence that no air quality permitting requirements apply is inadequate.
c. Section 9.2 of the ER discussing Utah permitting requirements is inadequate.
d. Sections 4.1.3 and 4.2.3 of the ER concerning Utah air quality permits are inadequate.
e. ER discussion of widening Skull Valley Road is inadequate.
DISCUSSION: Castle Rock Contentions at 47-50; PFS Contentions Response at 397- 407; Staff Contentions Response at 114; Castle Rock Contentions Reply at 44-45; Tr. at 494-503.

RULING: Admissible in that the contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the approvals and entitlements properly at issue under these allegations are limited to those involving appropriate governmental (as opposed to nongovernmental/private) entities.

**60 As we noted above, see supra p. 198, because of the similarity of this contention to Utah T, which Castle Rock Land/Skull Valley have incorporated by reference, the Board consolidates this contention and its supporting bases into that issue statement. The Board has set forth the consolidated contentions at pp. 255-56 of Appendix A to this Memorandum and Order.

CASTLE ROCK 13--Inadequate Consideration of Alternatives

CONTENTION: The Application violates NRC regulations and NEPA because the ER fails to give adequate consideration to alternatives, including alternative sites, alternative technologies, and the no-action alternative, see 10 C.F.R. s 51.45(c), in that:

a. There is no discussion in the ER on the required topics of environmental effects and impacts, economic, technical and other costs and benefits of the alternatives.

*219 b. The evaluation and comparison of the no build or no action alternative is inadequate.

. c. The analyses of alternatives ignores every potential negative factor with respect to the PFSF. Such an analysis must include:

i. the environmental and safety benefits associated with maintaining and expanding a decentralized, onsite storage system;

ii. the environmental and safety impacts and risks associated with the proposed privately operated, centralized system;

iii. the state-by-state, plant-by-plant facts which create the need PFS asserts is present for moving the spent fuel to another location;

iv. the environmental impacts and safety hazards associated with moving so many casks from various locations across the country to a centralized location; and

v. the environmental benefits of a combination of expanded onsite storage and regional ISFSIs.

DISCUSSION: Castle Rock Contentions at 50-52; PFS Contentions Response at 407- 19; Staff Contentions Response at 114-15; Castle Rock Contentions Reply at 45- 47; Tr. at 684-89, 692-93.

RULING: Admissible as to paragraph a, in that this portion of the contention and its supporting basis are sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the scope of this portion of the contention is limited to the issue of the adequacy of the PFS alternative site analysis. Inadmissible as to paragraphs b and c in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, v, vi above. We also note that the lack of any ER discussion of a HLW storage legislative solution and the 2002 Winter Olympic games as bases were withdrawn. See Tr. at 684-85, 686-87.

As we noted above, see supra p. 203, because of the similarity of the admitted portion of this contention to Utah AA, which Castle Rock Land/Skull Valley have incorporated by reference, the Board consolidates the admitted portion of this contention and its supporting basis into that issue statement. The Board has set forth the consolidated contention at p. 256 of Appendix A to

this Memorandum and Order.

CASTLE ROCK 14--Inadequate Consideration of Impacts

**61 CONTENTION: The Application violates NRC regulations and NEPA because the ER fails to give adequate consideration to the adverse impacts of the proposed PFSF, including the risk of transportation accidents, the risks of contamination of human and livestock food sources, the risks of contamination of water sources (including ground water *220 contamination arising from leaching of contaminated soils), the risks of particulate emissions from construction and cement activities and similar risks (10 C.F.R. s 72.100) in that:

a. Section 5.2 discussing transportation accidents contains no site specific information on the "effects on populations in the region" as required by the rule.

b. Chapter 4 of the ER contains no meaningful evaluation of impact of unlined retention pond and other PFSF operations on surrounding subsoils and ground water.

c. The ER fails to give adequate consideration to the adverse impacts of the PFSF, including the risks of contamination of human and livestock food sources.

d. The ER fails to give adequate consideration to the adverse impacts of the PFSF, including the risks of particulate emissions from construction and cement activities.

DISCUSSION: Castle Rock Contentions at 52-53; PFS Contentions Response at 420- 25; Staff Contentions Response at 115-16; Castle Rock Contentions Reply at 47; Tr. at 621-34.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, v, vi above.

CASTLE ROCK 15--Cost-Benefit Analysis

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not contain a reasonable and legitimate comparison of costs and benefits, 10 C.F.R. s 51.45(c), in that:

a. ER Chapter 7 cost-benefit analysis is overly simplistic and fails to account for the true environmental, safety, social and economic costs associated with the proposed PFSF in Skull Valley.

b. Cost-benefit analysis fails to account for the "loss of property values, economic opportunities and other business and economic losses" imposed by mere existence of PFSF.

c. Chapter 7 of the ER fails to discuss applicant's financial arrangements with the Skull Valley Band which is essential to the cost-benefit analysis.

d. The Castle Rock Petitioners intend to offer evidence on true costs of the proposed facility.

DISCUSSION: Castle Rock Contentions at 53; PFS Contentions Response at 425-30; Staff Contentions Response at 116-17; Castle Rock Contentions Reply at 47; Tr. at 745-50.

*221 RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i, v above.

CASTLE ROCK 16--Impacts on Flora, Fauna, and Existing Land Uses

**62 CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately address the impact of the proposed PFSF upon the agriculture, recreation, wildlife, endangered or threatened species, and land quality of the area, see 10 C.F.R. s 72.100(b), in that:

a. the ER fails to evaluate both usual and unusual site characteristics throughout all of Northwestern Utah;

b. the ER fails to provide sufficient facts to enable one to understand the true impacts of the PFS on the environment, including without limitation information from a survey of endangered or threatened species in the area (including small spring parsley, Pohl's milkvetch, peregrine falcon, and the Skull Valley Pocket gopher);

c. the precise transportation corridor has not been identified, and thus the Application does not contain specific information about affected species in the transportation corridor.

DISCUSSION: Castle Rock Contentions at 54-55; PFS Contentions Response at 430- 37; Staff Contentions Response at 117-18; Castle Rock Contentions Reply at 47- 48; Tr. at 783-90.

RULING: Admissible as to paragraph b in that this portion of the contention and its supporting basis is sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that it is limited to the small spring parsley, Pohl's milkvetch, and pocket gopher. Inadmissible as to paragraphs a and c in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i, v above.

As we noted above, see supra p. 206, because of the similarity of the admitted portions of this contention to portions of Utah DD, which Castle Rock Land/Skull Valley have incorporated by reference, the Board consolidates the admitted portion of this contention and its supporting bases into that issue statement. The Board has set forth the consolidated contention at pp. 256-57 of Appendix A to this Memorandum and Order.

CASTLE ROCK 17--Inadequate Consideration of Land Impacts

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of the facility upon such critical matters as future economic and residential development in the vicinity, potential differing land uses, property values, the tax base, and the loss of revenue and opportunity for agriculture, recreation, beef and dairy production, residential and commercial development, and investment opportunities, *222 all of which have constituted the economic base and future use of Skull Valley and the economic interests of Petitioners, or how such impacts can and must be mitigated, see, e.g., 10 C.F.R. ss 72.90(e), 72.98(c)(2) and 72.100(b), in that:

a. the ER does not recognize the potential use of the areas surrounding the PFSF for residential or commercial development;

**63 b. the ER paints a misleading picture of the area population by ignoring a majority of the Salt Lake Valley;

c. the ER fails to consider the effect of the PFSF on the present use of Castle Rock's lands for farming, ranch operations and residential purposes or the projected use of such lands for dairy operations, residential development, or commercial development;

d. the ER provides no, or inaccurate, information on the economic value of current agricultural/ranching operations conduct on Castle Rock's lands; and

e. the ER fails to discuss the impact of placing a spent fuel storage facility near a national

wilderness area.
DISCUSSION: Castle Rock Contentions at 56-58; PFS Contentions Response at 437- 48; Staff Contentions Response at 118-19; Castle Rock Contentions Reply at 48- 50; Tr. at 634-44.
RULING: Admissible in that this contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

CASTLE ROCK 18--Impacts on Public Health

CONTENTION: The Application violates NRC regulations and NEPA because the Environmental Report (ER) does not adequately consider the impact of the proposed PFSF upon the production of the agricultural products for human consumption by Petitioners, their tenants and others in the area (see 10 C.F.R. s 72.98(b)) in that:

a. The ER fails to analyze, evaluate, or consider the potential impacts on the regional population associated with potential contamination of plants or animals destined for human consumption.

b. The ER provides no detailed description at all of the coordinated ranching, farming, and livestock production activities currently carried on by Petitioners.

DISCUSSION: Castle Rock Contentions at 58; PFS Contentions Response at 448-55; Staff Contentions Response at 119; Castle Rock Contentions Reply at 50; Tr. at 634-44.
RULING: Inadmissible in that this contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, v, vi above.

*223 CASTLE ROCK 19--Septic Tank

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of a septic tank system on the ground water and ecology of the area and the related potential of this system to injure Petitioners (see 10 C.F.R. ss 72.98(b) and 72.100(b)), in that:

a. The ER contains very little information on how sewage wastes will be managed at the proposed facility during both the construction and operation of the facilities.

b. The ER fails to discuss in detail how the septic system will be designed so as to eliminate the risk of contamination to groundwater and Petitioner's property.

DISCUSSION: Castle Rock Contentions at 58-59; PFS Contentions Response at 455- 57; Staff Contentions Response at 120; Castle Rock Contentions Reply at 51; Tr. at 360-66.
**64 RULING: Inadmissible in that this contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, v, vi above.

CASTLE ROCK 20--Selection of Road or Rail Access to PFSF Site

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe the considerations governing selection of either the Skull Valley Road or the rail spur access alternative over the other and the implications of such selection in light of such considerations. See 10 C.F.R. ss 51.45(c) and 72.100(b), in that:

a. The ER is deficient because it fails to properly analyze the transportation alternatives.

b. The ER is incomplete because investigations and studies have not been performed which will have a direct bearing on the environmental effects of the alternative selected.

c. The ER is defective because PFS is considering a third option not discussed in the ER.

d. The ER fails to mention some significant environmental effects of the transportation alternatives such as increased traffic and noise.

DISCUSSION: Castle Rock Contentions at 59-60; PFS Contentions Response at 457- 60; Staff Contentions Response at 120; Castle Rock Contentions Reply at 51; Tr. at 518-22.

RULING: Admissible in that this contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

*224 CASTLE ROCK 21--Exact Location of Rail Spur

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe in detail the route of the potential rail spur, property ownership along the route, and property rights needed to construct and operate the rail spur (see 10 C.F.R. s 72.90(a)), in that:

a. The ER fails to provide any detail concerning location of the rail spur and impact on property rights along the route.

b. Upon information and belief, ER is defective because PFS is considering two locations for the rail spur.

DISCUSSION: Castle Rock Contentions at 60-61; PFS Contentions Response at 460- 62; Staff Contentions Response at 120-21; Castle Rock Contentions Reply at 51- 52; Tr. at 518-22.

RULING: Admissible in that this contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

CASTLE ROCK 22--Road Expansion Authorizations

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe adequately the nature and ownership of right-of-way that would permit PFS's contemplated improvements of the Skull Valley Road and what permits and approval from, or agreements with, the owner or owners thereof are needed for such improvements. See 10 C.F.R. s 72.90(a).

DISCUSSION: Castle Rock Contentions at 61-62; PFS Contentions Response at 462- 64; Staff Contentions Response at 121; Castle Rock Contentions Reply at 52; Tr. at 518-22.

**65 RULING: Admissible in that this contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry, with the caveat that the approvals properly at issue under these allegations are limited to those involving appropriate governmental (as opposed to nongovernmental/private) entities.

As we noted above, see supra p. 198, because of the similarity of this contention to a portion of Utah T, which Castle Rock has incorporated by reference, the Board consolidates this contention and its supporting bases into that issue statement. The Board has set forth the consolidated contentions at pp. 255-56 of Appendix A to this Memorandum and Order.

CASTLE ROCK 23--Existing Land Uses

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe with particularity, using appropriate maps, land use patterns and ownership as to lands

in the vicinity of the proposed PFSF and along the 24-mile access route, including *225 without limitation, homes, outbuildings, corrals and fences, roads and trails, pastures, crop producing areas, water wells, tanks and troughs, ponds, ditches and canals. See 10 C.F.R. ss 72.90(a) & (c), 72.98(b), in that:

a. PFS fails to discuss in detail the various impacted property rights and owners around the site and along the 24-mile transportation corridor.

b. PFS fails to discuss the legal basis for the right of way along the 24- mile transportation corridor.

c. PFS fails to identify existing structures that would be impacted by the ISFSI and the various transportation corridors suggested by PFS.

d. PFS fails to discuss impacts to existing grazing patterns and rights that would be impacted by the ISFSI and the various transportation corridors proposed by PFS.

e. PFS fails to discuss all impacts to those living near to the ISFSI and the proposed transportation corridors.

f. The PFS application has "other deficiencies."

DISCUSSION: Castle Rock Contentions at 62-63; PFS Contentions Response at 464- 73; Staff Contentions Response at 122-23; Castle Rock Contentions Reply at 52- 53; Tr. at 523-25.

RULING: Inadmissible in that this contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, v, vi above.

CASTLE ROCK 24--Adoption by Reference

CONTENTION: Petitioners Castle Rock and Skull Valley Co. by this reference adopt in its entirety each and every contention filed by the State of Utah and incorporate each herein by this reference.

DISCUSSION: Castle Rock Contentions at 63; PFS Contentions Response at 473-74; Staff Contentions Response at 123; Castle Rock Contentions Reply at 53; Tr. at 89-93.

**66 RULING: Inadmissible in that this is an inappropriate subject for a contention. As is outlined in section II.B.1.c above, the Board will permit Castle Rock to incorporate the State's contentions, some of which we have found inadmissible, subject to the restrictions described in section III.A below.

*226 4. OGD Contentions

OGD A--Lack of Sufficient Provisions for Prevention of and Recovery from Accidents

CONTENTION: The license application poses undue risk to public health and safety because it lacks sufficient provisions for prevention of and recovery from accidents during storage resulting from such causes as sabotage, fire, cask drop and bend, lid drop damage and/or improper welds.

1. The license application does not address the full range of accidents which could occur.

2. The license application does not adequately address the accident impacts of human error or intentional human actions.

3. The license application does not include a "hot cell" and the associated remote fuel handling equipment to safely unload, replace or reload a damaged fuel canister.

4. The ever present risk of accidents will adversely impact members of OGD.
DISCUSSION: OGD Contentions at 1-5; PFS Contentions Response at 474-86; Staff Contentions Response at 76-78; Tr. at 219-22.
RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. [FN28] See section II.B.1.a.i, ii, v, vi above. Moreover, to the extent this contention seeks to introduce the issue of "psychological stress," it does not have a cognizable basis. See Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772-79 (1983).

OGD B--Emergency Plan Fails to Address the Safety of Those Living Outside of the Facility

CONTENTION: The license application, specifically the emergency plan submitted with the license application fails to address the safety provisions made for those individuals living outside of the facility within a five mile radius of the facility. The emergency plan addresses only those measures that pertain to employees and have not addressed the provisions that would apply to those people living around the facility. The emergency plan does not address a warning system such as would be implemented to put the residents on notice of an accident.
1. Adequate backup means for offsite communications for notification of emergencies or requests for assistance are not included in the license application.
***227** 2. Means for compliance with the Emergency Planning and Community Right-To-Know Act of 1986, Title III, Pub.L. 99-499 is lacking in the license application.
3. The license application fails to meet all the requirements of 10 C.F.R. s 72.32(a)(8).
****67** DISCUSSION: OGD Contentions at 6; PFS Contentions Response at 486-93; Staff Contentions Response at 78-79; Tr. at 803-09.
RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, v, vi above.

OGD C--License Application Lacks Sufficient Provisions for Protection Against Transportation Accidents

CONTENTION: The license application poses undue risk to public health and safety because it lacks sufficient provisions for protection against transportation accidents, including a criticality accident.
1. The license application fails to provide sufficient protection against transportation accidents because of the design of the shipping cask.
2. The license application lacks sufficient measures for protection of shipping casks during harsh summers and sub-zero temperatures of winter.
3. The license application fails to consider the historical record and consequences of spent nuclear fuel transportation accidents and incidents as well as the number of incidents that might occur given that record.
4. The license application fails to provide sufficient information about the radiological characteristics of the spent fuel to be shipped to fully evaluate the impacts and risks of spent

nuclear fuel transportation to PFS.

5. The license application fails to provide sufficient detail about the anticipated shipment characteristics necessary for evaluation of transportation impacts and risks.

6. The license application ignores the potentially severe consequences of a successful terrorist attack against a spent fuel shipping cask using a high energy explosive device or an anti-tank weapon.

7. The license application ignores the significant radiation exposures which members of OGD and other residents of Skull Valley may receive as a result of gridlock traffic incidents and other routine transportation activities.

DISCUSSION: OGD Contentions at 6-16; PFS Contentions Response at 493-514; Staff Contentions Response at 79-82; Tr. at 593-600.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the ***228** Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. s 51.52 (Summary Table S-4) and 10 C.F.R. Parts 71 and 73; raise issues beyond the scope of this proceeding; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, iii, v, vi above. Moreover, to the extent this contention seeks to include consideration of "psychological stress" as an environmental impact under NEPA, it does not have a cognizable basis. See Metropolitan Edison Co., 460 U.S. at 772-79.

OGD D--License Application Lacks Procedures for Returning Damaged Casks to the Generating Reactor

****68** CONTENTION: The license application poses undue risk to public health and safety because it has not provided procedures for returning casks to the generating reactor. The SAR indicates that the casks will be inspected for damage prior to "accepting" the cask and before it enters the Restricted Area. SAR p. 5.1-4. If the casks are damaged or do not meet the criteria specified in LA AP. A, p. TS-19 there is no provision for housing the casks prior to shipping the cask back to the generating reactor.

DISCUSSION: OGD Contentions at 16; PFS Contentions Response at 514-21; Staff Contentions Response at 82-83; Tr. at 254-58.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; raise issues beyond the scope of this proceeding; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, iii, v, vi above.

OGD E--License Application Fails to Provide Information and a Plan to Deal with Casks That May Leak or Become Contaminated During the 20 to 40 Year Storage Period

CONTENTION: The License Application poses undue risk to the public health and safety because it fails to provide information and a plan to deal with casks that may leak or become contaminated during the 20 to 40 year storage period. Sending such casks back to the generating reactor may not be an option for several reasons, such as: PFS does not have the facilities to repackage contaminated canisters, the casks may be too contaminated to transport, or the nuclear power plant from which the fuel originated may have been decommissioned, and there are no

assurances that the storage will be only "interim". The license application provides no assurance that there will be an alternative location to which canisters and/or casks can be shipped if they become defective while in storage at PFS.

1. The license application provides very little procedure for dealing with defective canisters and/or casks that may leak or become contaminated.

*229 2. No alternative location is designated in the license application should a canister become defective while in storage especially if the reactor that originally shipped the canister is decommissioned.

3. The license application does not adequately address the uncertainties about the suitability of Yucca Mountain as a repository site, and if ever, spent fuel stored at PFS should be shipped to Yucca Mountain.

DISCUSSION: OGD Contentions at 17-18; PFS Contentions Response at 521-29; Staff Contentions Response at 83-84; Tr. at 258-61.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. s 51.23; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, iv, v, vi above.

OGD F--License Application Fails to Make Clear Provisions for Funding of Estimated Construction Costs, Operating Costs, and Decommissioning Costs

**69 CONTENTION: The license application fails to make clear provisions for funding of estimated construction costs, operating costs, and decommission costs. It also fails to make clear as part of the construction costs who the contractors will be.

1. The license application does not demonstrate that PFS "either possesses the necessary funds, or ... has reasonable assurance of obtaining the necessary funds" as required by 10 C.F.R. s 72.22(e).

DISCUSSION: OGD Contentions at 18-19; PFS Contentions Response at 529-33; Staff Contentions Response at 84; Tr. at 241.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, v, vi above.

OGD G--License Application Fails to Provide for Adequate Radiation Monitoring

CONTENTION: The license application poses undue risk to public health and safety because it fails to provide for adequate radiation monitoring to protect the health of the public and workers. It also fails to provide for adequate radiation monitoring necessary to facilitate radiation detection, event classification, emergency planning and notification.

1. The license application does not meet the requirements of 10 C.F.R. s 72.32(6).

2. The license application does not address releases outside of the ISFSI site.

*230 DISCUSSION: OGD Contentions at 19-20; PFS Contentions Response at 533- 44; Staff Contentions Response at 85-86; Tr. at 385-88.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with

specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, v, vi above.
The Board also notes that Petitioner's request for onsite radiation monitoring measures as specified in paragraphs A-D of its contention was withdrawn. See Tr. at 385-86.

OGD H--The License Application Poses Undue Risk to Public Health and Safety Because It Fails to Provide Adequate Protection of the Site Against Intruders

CONTENTION: The license application poses undue risk to public health and safety because it fails to provide adequate protection of the ISFSI against intruders. The site is in such a remote area that it would take at least two (2) hours for access to the [site] to be made by emergency personnel.
DISCUSSION: OGD Contentions at 20-22; PFS Contentions Response at 544-56; Staff Contentions Response at 86-89; Tr. at 465.
RULING: As is reflected in the record, see Tr. at 465, this contention was withdrawn by Petitioner OGD.

OGD I--The Cask Design Is Unsafe and Untested for Long Periods of Time

**70 CONTENTION: The license application poses undue risk to public health and safety because it calls for use of a cask whose design is unsafe and untested for long periods of time and which has not been certified for either transportation or long term storage.
1. The license application fails to meet the requirements of 10 C.F.R. s 72.22(e) because the cask design is not certified.
2. No meaningful EIS under NEPA can be completed until the cask design is certified.
DISCUSSION: OGD Contentions at 22; PFS Contentions Response at 556-62; Staff Contentions Response at 89-90; Tr. at 290-91.
RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; and/or lack adequate factual or expert opinion support. See section II.B.1.a.i, ii, v above.

*231 OGD J--The License Application Fails to Address the Status of Compliance with All Permits, Licenses, and Approvals for the Facility

CONTENTION: The license application violates NRC regulations because the ER fails to address the status of compliance with all permits, licenses and approvals required for the facility.
DISCUSSION: OGD Contentions at 23-24; PFS Contentions Response at 562-70; Staff Contentions Response at 90-91; Tr. at 510-18.
RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual and expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, v, vi above. Moreover, to the extent this contention is footed in a purported "trust responsibility" owed to individual members of a Native American tribe by a federal regulatory agency exercising its undifferentiated statutory responsibility to protect the public health and safety and the environment, it lacks a

litigable basis.
We also note that OGD revised this contention to withdraw any portion of the contention that deals with OGD A. See Tr. at 510.

OGD K--There Are No Provisions for Paying for Casks That May Need to Be Returned to the Generating Facility

CONTENTION: The license application poses undue risk to public health and safety because it does not address how the facility will deal with paying for or returning casks that may prove unsafe should the generating reactor have been decommissioned.
DISCUSSION: OGD Contentions at 24-25; PFS Contentions Response at 570-78; Staff Contentions Response at 91-92; Tr. at 418-19.
RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, v, vi above.

OGD L--Operators Will Not Be Trained for the Specific Job When Hired and Operators Will Undergo On-the-Job Training
**71 CONTENTION: The license application poses undue risk to public health and safety because it provides that operators will not be trained for the specific job when hired and that operators will undergo on-the-job training, and classroom training leading to certification. The license application states that "of necessity, the first individuals certified may have to improvise in certain situations to complete the practical factors." See, License Application, LA Chapter 7 p. 7.1. This doesn't protect public health and safety in any manner.
*232 1. The license application does not meet the requirements of 10 C.F.R. s 72.32, in that persons being trained on the job will not be able to carry out their responsibilities under 10 C.F.R. s 72.32(a)(7).
DISCUSSION: OGD Contentions at 25-26; PFS Contentions Response at 578-83; Staff Contentions Response at 92-93; Tr. at 264-68.
RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, v, vi above.

OGD M--No Provisions for Transportation Accidents Are Made

CONTENTION: The license application poses undue risks to public health and safety because it makes no provisions for transportation accidents that might occur.
1. The license application does not adequately address the requirements of 10 C.F.R. s 72.32(a)(2) by failing to address transportation accidents near the site.
DISCUSSION: OGD Contentions at 26-27; PFS Contentions Response at 583-87; Staff Contentions Response at 93-94; Tr. at 328-31.
RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; raise issues beyond the scope of this proceeding; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS

application. See section II.B.1.a.i, ii, iii, v, vi above.

OGD N--There May Be a Leak That Contaminates the Present Water System

CONTENTION: The license application poses undue risk to public health and safety because it fails to address the possibility of a leak occurring that might contaminate the present water system that members of the community rely on. The application admits that several wells are going to have to be built to meet the demand that will be presented by the facility. Neither contingencies to deal with contamination nor lowering of the present water table are discussed.
DISCUSSION: OGD Contentions at 27; PFS Contentions Response at 587-91; Staff Contentions Response at 94-95; Tr. at 366-67.
RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, v, vi above. Moreover, to the extent this contention is rooted in a purported "trust responsibility" owed to individual members ***233** of a Native American tribe by a federal regulatory agency exercising its undifferentiated statutory responsibility to protect the public health and safety and the environment, it lacks a litigable basis.

OGD O--Environmental Justice Issues Are Not Addressed

****72** CONTENTION: The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In, Executive Order 12898, 3 C.F.R. 859 (1995) issued February 11, 1994, President Clinton directed that each Federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States." It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty- five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Utah Test and Training Range South, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, APTUS Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North.
DISCUSSION: OGD Contentions at 27-36; PFS Contentions Response at 591-611; Staff Contentions Response at 95-97; Tr. at 664-70, 707-16.
RULING: Admissible as supported by bases establishing a genuine material dispute adequate to warrant further inquiry, with the caveat that the contention is limited to the disparate impact matters outlined in bases one, five, and six. Moreover, basis six is limited to the effects of the PFS facility on property values in and around the Skull Valley Goshute community as a component in the "environmental justice" assessment of any disparate impacts suffered by minority and low-income communities. It also is not admissible to permit consideration of "psychological stress" as an environmental impact under NEPA, which is not a cognizable basis for the contention. See Metropolitan Edison Co., 460 U.S. at 772-79. Bases two, three, and four do not support admission of this contention because the facility cost-benefit issues they seek to raise are not relevant to this contention.

OGD P--Members of OGD Will Be Adversely Impacted by Routine Operations of the Proposed Storage Facility and Its Associated Transportation Activities

CONTENTION: The ability of OGD members to pursue the traditional Goshute life style will be adversely impacted by the routine operations at the storage facility. Obvious impacts resulting from the physical presence of the facility are: visual intrusion, noise, worker and visitor traffic to and from the storage site, and presence of strangers in the community. Those impacts that are not as obvious but nonetheless serious are: individual and collective social, psychological, and cultural impacts such as a sense of loss of well-being because of ***234** the dangerous wastes that are being stored near their homes, in their community, and on their ancestral lands.

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

DISCUSSION: OGD Contentions at 36-37; PFS Contentions Response at 612-29; Staff Contentions Response at 97-99; Tr. at 644-52.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, v, vi above. Moreover, to the extent this contention seeks consideration of "psychological stress" as an environmental impact under NEPA, it does not have a cognizable basis. See Metropolitan Edison Co., 460 U.S. at 772-79.

5. Confederated Tribes Contentions

CONFEDERATED TRIBES A--Decommissioning Plan Deficiencies

CONTENTION: PFS has not provided reasonable assurance that the ISFSI can be cleaned up and adequately restored upon cessation of operations.

DISCUSSION: Confederated Tribes Contentions at 2-3; PFS Contentions Response at 619-29; Staff Contentions Response at 124-26; Tr. at 409-18.

RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, iv, v, vi above.

CONFEDERATED TRIBES B--Lack of Protection Against Worst Case Accidents

CONTENTION: PFS has violated both NRC regulations and NEPA requirements by not adequately dealing with certain reasonably foreseeable accidents and failing to fully evaluate their potential impacts on health and the environment, to protect against them in an adequate manner, or to provide adequate emergency response measures.

DISCUSSION: Confederated Tribes Contentions at 3-4; PFS Contentions Response at 630-43;

Staff Contentions Response at 126-28; Tr. at 327-28.
*235 RULING: Admitted as supported by the basis in paragraph five regarding wildfires, which establishes a genuine material dispute adequate to warrant further inquiry. Inadmissible as to its other supporting bases in that the contention and these supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; raise issues beyond the scope of this proceeding; lack adequate factual and expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, iii, v, vi above.
**74 Because of the similarity of the admitted portion of this contention with Utah K and Castle Rock 6, see supra pp. 191, 214, the Board consolidates that portion of this contention and its supporting basis with those issue statements. The Board has set forth the consolidated contention at p. 253 of Appendix A to this Memorandum and Order.

CONFEDERATED TRIBES C--Inadequate Assessment of Costs under NEPA

CONTENTION: PFS has not adequately described or weighed the environmental, social, and economic impacts and costs of operating the ISFSI. Indeed, there is no adequate benefit-cost analysis which even demonstrates a need for the ISFSI. On the whole, Petitioners contend that the costs of the project far outweigh the benefits of the proposed action. See, e.g., Public Service Co. of New Hampshire, 6 NRC 33, 90 (1977).
DISCUSSION: Confederated Tribes Contentions at 5-7; PFS Contentions Response at 643-54; Staff Contentions Response at 128-30; Tr. at 750-64.
RULING: Inadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, ii, v, vi above.

CONFEDERATED TRIBES D--Inadequate Discussion of No-Action Alternative

CONTENTION: PFS has failed to satisfy the requirements of NEPA because it does not adequately discuss the alternatives to the proposed action.
DISCUSSION: Confederated Tribes Contentions at 7; PFS Contentions Response at 654-58; Staff Contentions Response at 130-31; Tr. at 669-75.
RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i, v, vi above.

*236 CONFEDERATED TRIBES E--Failure to Give Adequate Consideration to Adverse Impacts on the Historic District

CONTENTION: PFS has failed to comply with NEPA in that it has not adequately discussed the impacts upon the historic district and the archeological heritage of the area.
DISCUSSION: Confederated Tribes Contentions at 7-8; PFS Contentions Response at 658-62; Staff Contentions Response at 131-32; Tr. at 790-92.
RULING: Inadmissible in that the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail

properly to challenge the PFS application. See section II.B.1.a.i, v, vi above.

CONFEDERATED TRIBES F--Failure to Adequately Establish Financial Qualifications

CONTENTION: PFS has failed to demonstrate that it is financially qualified to build and operate the ISFSI.
DISCUSSION: Confederated Tribes Contentions at 8-9; PFS Contentions Response at 662-71; Staff Contentions Response at 132; Tr. at 239-40.
**75 RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry.
Because of the similarity of this contention and its supporting bases to portions of contentions Utah E and Castle Rock 7, see supra pp. 187, 215, the Board consolidates this contention and its supporting bases with those issue statements. The Board has set forth the consolidated contention at pp. 251-52 of Appendix A to this Memorandum and Order.

CONFEDERATED TRIBES G--Adoption by Reference of Specified Castle Rock Contentions

CONTENTION: The Goshute Tribe hereby adopts and incorporates by reference the following Contentions and the Bases stated by Castle Rock Land & Livestock, L.C.:
1. Absence of NRC Authority. The Application is defective because NRC does not have authority to license a large-scale, off-site facility for the long- term storage of spent nuclear fuel such as the proposed ISFSI.
2. Non-Compliance with Regulations. PFS's Application is defective because it seeks a license for an ISFSI pursuant to 10 C.F.R. Part 72. However, the proposed storage installation is not an ISFSI and is otherwise not licensable under 10 C.F.R. Part 72.
3. Application for Permanent Repository. The proposed PFSF is properly characterized as a de facto permanent repository, and the Application fails to comply with the licensing requirements for a permanent repository.
*237 4. Inadequate Financial Qualifications. The Application does not provide assurance that PFS will have the necessary funds to cover estimated construction costs, operating costs, and decommissioning costs, as required by 10 C.F.R. s 72.22(e).
5. Regional and Cumulative Environmental Impacts. The Application fails to adequately discuss the regional and cumulative environmental impacts of the proposed PFSF, as required by 10 C.F.R. ss 72.98(b) & (c), NEPA.
DISCUSSION: Confederated Tribes Contentions at 10; PFS Contentions Response at 672; Staff Contentions Response at 132-33; Tr. at 89-93.
RULING: Inadmissible in that this is an inappropriate subject for a contention. As is outlined in section II.B.1.C above, however, the Board will permit Confederated Tribes to incorporate these five Castle Rock contentions, all of which we have found inadmissible, subject to the restrictions described in section III.A below.

CONFEDERATED TRIBES H--Adoption by Reference of Specified State Contentions

CONTENTION: The Goshute Tribe hereby adopts and incorporates by reference the Contentions and the Bases stated by the State of Utah including without limit the following:
A. Statutory Authority. Congress has not authorized NRC to issue a license to a private entity

for 4,000 cask, away-from reactor, centralized, spent nuclear fuel storage facility.

B. License Needed for Intermodal Transfer Facility. PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point, in violation of 10 C.F.R. s 72.6(c)(1).

**76 DISCUSSION: Confederated Tribes Contentions at 10-11; PFS Contentions Response at 672; Staff Contentions Response at 134; Tr. at 89-93.

RULING: Inadmissible in that this is an inappropriate subject for a contention. As is outlined in section II.B.3 above, however, the Board will permit Confederated Tribes to incorporate these two State contentions, of which we have found only Utah B admissible, subject to the restrictions described in section III.A below.

6. Skull Valley Band Contention

CONTENTION: The License Application for the Private Fuel Storage facility filed by Private Fuel Storage, LLC is meritorious and should be granted.

DISCUSSION: Skull Valley Band Contention at 1-3; PFS Contentions Response at 20-21; Staff Contentions Response at 134-36; Tr. at 179-80.

*238 RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry. See Sheffield, ALAB-473, 7 NRC at 743. As is noted in section III.A below, the Skull Valley Band will be required to specify which of the admitted contentions of the other Intervenors it wishes to contest and will be subject to the limitation that, absent some other agreement with the Applicant, PFS is designated to serve as the "lead" party for litigation of all Intervenor issues that challenge the PFS application.

C. Castle Rock 10 C.F.R. s 2.758 Petition to Waive Commission Rules

1. Standards Governing Rule Waiver Petitions

Although, as we have previously observed, agency rules are not subject to challenge in adjudicatory proceedings, see section II.B.1.a.ii above, the Commission nonetheless has provided a procedure whereby a party to an agency hearing can seek a waiver of a regulation it believes should not be applicable. The standard for seeking such a waiver is set forth in 10 C.F.R. s 2.758(b), which provides:

The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.

Procedurally, section 2.758(b) requires that the petition must be accompanied by an affidavit (1) identifying the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule would not serve the purposes for which it was adopted, and (2) setting forth with particularity the "special circumstances" alleged to justify the waiver or exception requested. Further, paragraphs (c) and (d) of section 2.758 state that a party's failure to make a prima facie showing on the section 2.758(b) standard precludes further consideration of the matter, while a presiding officer that finds a prima facie showing has been made must certify the petition to the Commission for its consideration.

In defining the scope and application of this rule, the Commission has further explained that a

Petitioner seeking to establish a prima facie case must make three showings. First, relative to establishing the requisite "special circumstances" exist to support the waiver, the petitioner must allege facts not in common with a large class of facilities that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding for the rule sought to be waived. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 235 (1989). Put another way, the circumstances alleged must be unique to the particular facility at issue. See ***239** Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72-74 (1981). Speculation about future events is, however, an inadequate basis to establish the necessary "special circumstances." See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 24-26, rev'd in part on other grounds, CLI- 88-10, 28 NRC 573 (1988).

****77** Also with respect to the need to demonstrate "special circumstances," the Petitioner must show application of the rule will not serve the purposes for which it was adopted. See Seabrook, CLI-89-20, 30 NRC at 235. Explicit statements in the statement of considerations are a primary source for determining the purposes for which the rule or regulation was adopted. See, e.g., Seabrook, CLI-88-10, 28 NRC at 598-600; Seabrook, ALAB-895, 28 NRC at 12. Further, in ascertaining a rule's purposes and whether those purposes would be impaired, it is permissible to consider future events the agency logically would have anticipated in promulgating its rules. See Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-83-37, 18 NRC 52, 59 (1983). On the other hand, in seeking to establish that the rationale for the rule has been undercut, conjectural statements that merely highlight the uncertainty surrounding future events are not, in and of themselves, sufficient. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-10, 29 NRC 297, 301, rev'd, ALAB-920, 30 NRC 121, rev'd, CLI-89- 20, 30 NRC 231 (1989). Moreover, it has been established that a valid purpose for which the rule or regulation was adopted, within the meaning of 10 C.F.R. s 2.758, includes eliminating Staff case-by-case review of a generic issue in individual applications and removing such an issue from adjudication in any operating license proceeding. See Seabrook, ALAB-895, 28 NRC at 14, 16-17; see also Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB- 837, 23 NRC 525, 547 (1986).

The third showing that must be made by a rule waiver petition is that the circumstances involved are "unusual and compelling" such that it is evident from the petition and other allowed papers that a waiver is necessary to address the merits of a "significant safety problem" relative to the rule at issue. Seabrook, CLI-89-20, 30 NRC at 235. Justifying a waiver, therefore, requires that a Petitioner establish the issue raised is a significant safety problem, even if there clearly are special circumstances that undercut the rationale for the rule. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-920, 30 NRC 121, 129 (1989). Safety issues that are "conceivable" or "theoretical" do not fulfill this requirement, however. See Seabrook, CLI-89-20, 30 NRC at 243-44. Further, any claim of significance must be viewed in the context of any other protective measures that are in place to prevent safety problems. See id. at 244.

***240** With this background, we consider Castle Rock's request that we grant rule waivers in connection with two regulatory provisions--10 C.F.R. Part 72 and 10 C.F.R. s 51.23, often referred to as the Waste Confidence Decision--as they otherwise might apply to the licensing of the PFS facility.

2. Waiver of Authority to License PFS Facility Under 10 C.F.R. Part 72

**78 DISCUSSION: Castle Rock Waiver Petition at 4-17; State Castle Rock Waiver Petition Response at 2-5; PFS Castle Rock Waiver Petition Response at 12-41; Staff Castle Rock Waiver Petition Response at 4-10.

RULING: Putting aside the question of whether this portion of the petition, which is rooted in a lack of agency statutory authority to license the PFS facility under Part 72, see Castle Rock Waiver Petition at 17, even constitutes a legitimate section 2.758 waiver request, we find it must be denied for failing to meet the three-pronged test outlined above.

On the factor of whether special circumstances have been established by showing facts that apply uniquely to the PFS facility that were not considered in promulgating Part 72, as we observed in our analysis regarding Utah A, there was consideration of PFS-type circumstances as part of that rulemaking process. See supra pp. 183-84. Moreover, contrary to Castle Rock's assertions, we find nothing in the NWPA that supports the conclusion its provisions undercut the rationale for Part 72 so as to provide the requisite special circumstances. Among other things, the passage of NWPA section 135(h), 42 U.S.C. s 10155(h), the principal provision Castle Rock relies upon to support its conclusion the Commission is statutorily precluded from licensing a private, offsite ISFSI like that proposed by PFS, did not repeal or otherwise affect the Commission's preexisting AEA authority to license a private ISFSI, but simply indicated that nothing in the NWPA impacted on that AEA authority.

Finally, Castle Rock has failed to demonstrate there is a significant safety problem relative to the application of Part 72 to the PFS licensing request. Castle Rock declares that licensing the PFS facility under Part 72 raises questions about transportation risks, PFS financial stability, and the ultimate removal of spent fuel from the facility. See Castle Rock Waiver Petition at 3 n. 2. Putting aside the hypothetical nature of these asserted problems, as our various rulings in section II.B above indicate, these are all matters addressed in the context of existing protective measures, including 10 C.F.R. Part 71 dealing with transportation and various provisions of 10 C.F.R. Part 72 concerned with financial qualifications and facility decommissioning. As such, these claims do not provide the type of "significant safety problems" that support the grant of Castle Rock's waiver petition.

*241 3. Waiver of Waste Confidence Decision Embodied in 10 C.F.R. s 51.23

DISCUSSION: Castle Rock Waiver Petition at 18-24; State Castle Rock Waiver Petition Response at 6-8; PFS Castle Rock Waiver Petition Response at 41-52; Staff Castle Rock Waiver Petition Response at 10-22.

RULING: This portion of the Castle Rock petition challenges the continued applicability of the 1990 Commission generic determination in 10 C.F.R. s 51.23(a) that (1) reactor spent fuel can be safely stored without significant environmental impacts for at least 30 years beyond any current reactor's licensed operating life (as extended), and (2) at least one mined HLW geologic repository will be available within the first quarter of the twenty-first century and sufficient capacity for storage of spent fuel from operating reactors will be available at such facilities within the same 30-year "beyond operating life" time period. It also seeks a waiver of the rule's generic determination in section 51.23(b) that, in light of these findings, in a licensing proceeding such as this one there need be no EIS discussion of the impacts of ISFSI spent fuel storage following the term of the ISFSI license. In both instances, however, Castle Rock again fails to meet the three-pronged test set forth above.

**79 Castle Rock alleges various "significant" and "unexpected" technical events provide the

necessary "special circumstances" needed to support its request for a waiver of the Commission's generic repository determinations under section 51.23(a), including a 1992 earthquake near the proposed Yucca Mountain, Nevada HLW repository site and questions about Yucca Mountain groundwater percolation rates and groundwater contamination in areas surrounding the site. It also puts forth a variety of legal or policy matters, such as DOE's failure to meet mandatory NWPA deadlines, pending legislation that would provide for interim storage at the Yucca Mountain site, and official opposition from the State of Nevada. These considerations, however, are either inappropriately rooted in speculation about future events (e.g., the passage of pending legislation) or fail to present PFS-specific matters that were not considered, either explicitly or by implication, in the rulemaking proceeding for the Waste Confidence Decision, see 55 Fed.Reg. 38,474, 38,486 (1990) (tectonic uncertainties); id. at 38,488 (hydrology complexities); id. at 38,494-95 (DOE schedule slippage and unavailability of Yucca Mountain site); id. at 38,495-97 (Nevada opposition); id. at 38,498, 38506-07 (funding adequacy). Castle Rock also fails to make its case in connection with the "special circumstances" second prong as it requires a showing the rule will not serve the purposes for which it was adopted. The Commission has made clear the rule's generic approach was adopted to avoid just the kind of case-by-case adjudication PFS seeks. See 49 Fed.Reg. 34,658, 34,666 (1984). Castle Rock also does not fulfill the third prong because it does not establish a "significant safety problem" with the requisite concreteness.

***242** To secure a waiver of the EIS analysis provision of section 51.23(b), Castle Rock asserts the inability of the proposed HLW repository to absorb the PFS fuel in a timely manner provides the requisite factor one unique "special circumstances." Again, however, this purported circumstance is either inappropriately rooted in speculation, which seemingly is incorrect, about the rate at which PFS stored fuel can be transferred to the repository, see PFS Castle Rock Waiver Petition Response at 46-48, or fails to present a PFS- specific matter that was not considered, either explicitly or by implication, in the rulemaking proceeding for the rule, see 55 Fed.Reg. at 38,501-04. And, as with its challenge to the repository determinations portion of the rule, Castle Rock fails to show this section of the rule will not serve the "generic rather than case-by-case resolution" purpose for which it was adopted. Finally, Castle Rock's claim that the repository's inability to absorb the PFS stored fuel until "at least" the last quarter of the twenty-first century increases fuel removal and decommissioning costs, extends environmental impacts, and may cause funding shortfall-related safety problems, is insufficient to establish the requisite "significant safety problem" in light of the Commission's own Waste Confidence Decision pronouncement that spent fuel can be safely stored without significant environmental impact for "at least" 100 years, if necessary, see 55 Fed.Reg. at 38,513.

III. PROCEDURAL/ADMINISTRATIVE MATTERS

****80** As the foregoing discussion indicates, five Intervenors--the State, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and the Skull Valley Band--are admitted as parties to this proceeding because they have standing and have presented at least one admissible contention. Below, we provide procedural guidance regarding further litigation of the admitted matters by these parties, taking into account the parties' request they be provided an opportunity to present the Board with suggestions on a further schedule for litigation. See Tr. at 809-10.

A. Lead Parties

In accordance with 10 C.F.R. s 2.714(f)-(g), a presiding officer is authorized to control the general compass of the hearing by consolidating issues and limiting party participation to avoid the presentation of irrelevant, duplicative, or repetitive evidence. In this instance, as we have indicated above, some of the State's admitted contentions challenging the PFS application have been adopted by other Intervenors, while other contentions proposed by different parties challenging the application have been consolidated because of their related subject matter. In addition, one of the parties, the Skull Valley Band, ***243** has filed a single contention expressing general support for the PFS application. In these circumstances, we find it appropriate to designate "lead" parties for the litigation of the various admitted contentions.

The party assigned the role of lead party has primary responsibility for litigating a contention. Absent some other Board directive, the party with the lead role in support of a contention is to conduct all discovery on the contention; file or respond to any dispositive or other motions regarding the contention; submit any required prehearing briefs on the issue; prepare prefiled direct testimony, conduct any redirect examination, and provide any surrebuttal testimony regarding the contention; and prepare posthearing proposed findings of fact and conclusions of law on the contention. The party that has the lead role in opposing a contention has similar duties, with its hearing responsibilities including conducting witness cross-examination and recross-examination and preparing rebuttal testimony as appropriate. For any given contention, the lead party is responsible for consulting with the other "involved" parties (i.e., any party that adopted its contention, filed a contention that has been consolidated, or has opposed the same contention) regarding litigation activities, but the ultimate litigating responsibility for the contention rests with the lead party. [FN29]

The party that proffered an admitted contention challenging the PFS application is the lead party for that contention if it has not been consolidated with another party's contention. Accordingly, for each of the admitted State contentions adopted by Castle Rock Land/Skull Valley and Confederated Tribes, the State is the lead party. Further, for those contentions that have been consolidated with the contentions of other parties, we suggest that the following parties serve as the "lead":

UTAH E/CASTLE ROCK 7/CONFEDERATED TRIBES F--Financial Assurance: Confederated Tribes

UTAH K/CASTLE ROCK 6/CONFEDERATED TRIBES B--Inadequate Consideration of Credible Accidents: State

UTAH O/CASTLE ROCK 8 and 10--Hydrology: State

UTAH S/CASTLE ROCK 7--Decommissioning: State

UTAH T/CASTLE ROCK 10, 12, and 22--Inadequate Assessment of Required Permits and Other Entitlements: State

UTAH AA/CASTLE ROCK 13--Range of Alternatives: Castle Rock

UTAH DD/CASTLE ROCK 16--Ecology and Species: State

**81 *244 If, after consultation between the lead party and all involved parties, the parties agree that a party other than the one we have suggested should be the lead party for a contention, they jointly should seek Board approval for this change in the "lead" designation in accordance with the schedule set forth below.

In the case of the Skull Valley Band, as part of the schedule set out below we require that it provide us with a statement indicating which of the admitted contentions it wishes to contest. In addition, we designate PFS as the lead party in opposition to all admitted contentions that are contested by PFS and the Skull Valley Band, subject to any joint request by PFS and the Skull Valley Band to designate the Skull Valley Band as the lead party in opposition to one or more of the contentions the Skull Valley Band wishes to oppose.

In recognition of its independent status, the Staff is not the subject of a lead party designation in connection with any contention.

B. Summary Disposition/Discovery

As part of the schedule set forth below, we request that the parties provide us with their views on which, if any, of the admitted contentions are subject to summary disposition either before or after discovery, and an appropriate schedule for filing such motions. In addition, we request that the parties provide us with their views on a schedule for discovery, taking into account any prediscovery dispositive motions, the timing of the Staff's Safety Evaluation Report (SER) and Final Environmental Impact Statement (FEIS), [FN30] and the time needed for the following two-step discovery process:

1. An initial informal discovery process during which lead parties and the Staff are to:

a. Provide opposing lead parties and/or the Staff with a description of the specific types of information, including documents, data compilations, and tangible things, to which they wish to have access as being relevant to the admitted contentions and their supporting bases.

b. Make available to opposing lead parties and/or the Staff a copy of all documents, data compilations, and tangible things in the possession, custody, or control of the lead party, other involved parties, and/of the Staff that have been requested by the opposing lead party and/or the Staff pursuant to paragraph 1.a above.

c. Make available to opposing lead parties and/or the Staff for interviews those individuals, particularly those persons whom it is anticipated may provide evidentiary hearing testimony on behalf of a lead party or the Staff, that have information relevant to the admitted contentions and their supporting bases.

*245 2. A formal discovery process during which lead parties and the Staff are subject to the following requirements:

a. Without prior leave of the Board or written stipulation, for each admitted contention:

i. the lead party supporting the contention may serve on the lead party challenging the contention and the Staff,

**82 ii. the lead party challenging the contention may serve on the lead party supporting the contention and the Staff, and

iii. the Staff may serve upon the lead party challenging the contention and the lead party supporting the contention not more than ten interrogatories per responding lead party or the Staff, including all discrete subparts, and not more than three deposition notices per responding lead party or the Staff.

b. As part of any motion for protective order/motion to compel filed by a lead party or the

Staff in connection with a formal discovery request, counsel for the moving party shall provide a certification that he or she previously has:

i. provided counsel for the lead party or the Staff to whom the motion is directed a clear and concise written statement of the asserted deficiencies or objections and the requested action relative to the discovery request, and

ii. after providing this statement, consulted with lead counsel or Staff counsel in an attempt to resolve all the disputed matters without Board action.

If counsel are able to resolve a potential objection on the basis of the presubmission conference, that resolution should be reduced to writing with copies provided to each counsel involved.

The Board expects that in the informal discovery process all parties will be specific in their information requests and provide access to requested information and knowledgeable individuals to the maximum degree possible. The Board anticipates monitoring the informal discovery process through a series of status reports and/or conferences. Failure to participate in the informal discovery process consistent with the outline set forth above will result in appropriate Board sanctions. In addition, the lead party is expected to coordinate informal or formal discovery requests in connection with a particular contention with all involved parties to ensure the discovery response includes all relevant materials from all parties with interests relating to the contention.

C. Joint Status Report, Other Filings, and Prehearing Conference

As was noted above, during the January 1998 prehearing conference, the parties indicated that once a determination on standing and contentions was issued, they would try to reach some agreement about future scheduling they would present to the Board. To this end, on or before Wednesday, May 6, 1998, the parties should file with the Board a joint status report that reflects their discussions regarding scheduling in light of this issuance.

***246** In that report, the parties should discuss scheduling for dispositive motions and discovery in light of the requirements set forth in section III.B above. They also should provide estimates of how long will be needed to try each of the admitted contentions if those issues go to hearing. [FN31] Further, they should discuss the status of any settlement negotiations relative to the admitted contentions, and indicate whether a "settlement judge" would be of assistance in connection with one or more of the admitted contentions. If the parties are unable to agree on any of these matters, separate views may be included as part of the report.

****83** In addition to this status report, in accordance with section III.A above, on or before Wednesday, May 6, 1998, the Skull Valley Band should file its designation of contested issues. Also by that date, any requests should be submitted for revision of the lead party designations set forth in section III.A.

With these filings and the joint status report in hand, the Board will conduct an additional prehearing conference to discuss scheduling and other matters. That conference will be held in the Atomic Safety and Licensing Board Hearing Room, Room T-3B45, Third Floor, Two White Flint North Building, 11545 Rockville Pike, Rockville, Maryland, on Tuesday, May 19, 1998, beginning at 1:00 p.m. EDT (11:00 a.m. MDT). The Board anticipates the prehearing conference will last no more than 2 hours. For this prehearing conference, counsel may appear in person or, assuming there is sufficient interest, participate by videoconference from Room 212 in Milton Bennion Hall on the University of Utah campus in Salt Lake City, Utah. [FN32] Counsel for

each party should advise the Board in writing on or before Wednesday, April 29, 1998, whether they intend to appear in person in Rockville or by videoconference from Salt Lake City.

D. Other Administrative Rulings

Previously, the Board has issued directives concerning same day submission of courtesy copies of filings (e.g., e-mail or facsimile transmission); a ten-page limitation on motions and responses; and requests for leave to extend a filing date, exceed the ten-page limit, or file a reply pleading. See Licensing Board Memorandum and Order (Memorializing Initial Prehearing Conference Directives) (Feb. 2, 1998) at 3-5 (unpublished); Licensing Board Memorandum and Order (Additional Guidance on Service Procedures) (Nov. 19, 1997) at ***247** 1-3 (unpublished); Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 5-7 (unpublished). The parties are reminded of these requirements and the Board's expectation they will be complied with.

In this connection, the filings provided for in section III.C of this Memorandum and Order should be served on the Board, the Office of the Secretary, and counsel for the other parties by e-mail, facsimile transmission, or other means that will ensure receipt by close of business (4:30 p.m. EDT) on the day of filing.

IV. CONCLUSION

For the reasons set forth above, we find that Petitioners State of Utah, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and the Skull Valley Band, have established their standing to intervene and have put forth at least one litigable contention so as to be entitled to party status in this proceeding. The text of their admitted contentions is set forth in Appendix A to this decision. We also conclude the intervention petitions of David Pete, SSWS, and Ensign Ranches should be dismissed, the first having failed to establish his standing to intervene as of right, the second having failed to show it was entitled to either standing as of right or discretionary intervention, and the third having failed to put forth an admissible contention. Finally, we deny the request of Castle Rock for a waiver of 10 C.F.R. Part 72 and 10 C.F.R. s 51.23 as they are applicable to the PFS application, concluding Castle Rock has not made a prima facie showing that meets the standards set forth in 10 C.F.R. s 2.758 for obtaining a rule waiver.

****84** For the foregoing reasons, it is this twenty-second day of April 1998, ORDERED,

1. Relative to the contentions specified in paragraph three below, the State, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and the Skull Valley Band requests for a hearing/petitions to intervene are granted and these Petitioners are admitted as parties to this proceeding.

2. The requests for a hearing/petitions to intervene of David Pete, SSWS, and Ensign Ranches are denied.

3. The following intervenor contentions are admitted for litigation in this proceeding: Utah B (paragraphs one and four), Utah C (paragraphs three, four, and five), Utah E (as consolidated with portions of Castle Rock 7 and Confederated Tribes F), Utah F (as consolidated with a portion of Utah P), Utah G (bases one and four), Utah H, Utah K (in part, as consolidated with Castle Rock 6 and a portion of Confederated Tribes B), Utah L, Utah M, Utah N, Utah O (bases one, two (in part), three, and four, as consolidated with Castle Rock 8 ***248** and a portion of Castle Rock 10), Utah P (subparagraph b of paragraph seven, as consolidated with Utah F), Utah

R (paragraph one (in part) and subparagraph b of paragraphs three and four), Utah S (bases one, two, four, five, ten, and eleven, as consolidated with a portion of Castle Rock 7), Utah T (paragraphs two through eight, as consolidated with a portion of Castle Rock 10 and Castle Rock 12 and 22), Utah U (basis one), Utah V (paragraph two (in part)), Utah W (paragraph three (in part)), Utah Z, Utah AA (as consolidated with a portion of Castle Rock 13), Utah DD (subparagraphs c, d, g, and h of paragraph four, as consolidated with a portion of Castle Rock 16), Utah GG (paragraph five), Castle Rock 6 (as consolidated with portions of Utah K and Confederated Tribes B), Castle Rock 7 (paragraphs a through d, and f, as consolidated with Utah E and a portion of Utah S), Castle Rock 8 (as consolidated with a portion of Utah O), Castle Rock 10 (as consolidated with portions of Utah O and T), Castle Rock 12 (as consolidated with a portion of Utah T), Castle Rock 13 (paragraph a, as consolidated with Utah AA), Castle Rock 16 (paragraph b, as consolidated with Utah DD), Castle Rock 17, Castle Rock 20, Castle Rock 21, Castle Rock 22 (as consolidated with a portion of Utah T), OGD O (bases one, five, and six), Confederated Tribes B (basis five, as consolidated with portions of Utah K and Castle Rock 6), Confederated Tribes F (as consolidated with Utah E and a portion of Castle Rock 7), and the Skull Valley Band contention. [FN33]

4. The following Intervenor contentions are rejected as inadmissible for litigation in this proceeding: Utah A, Utah B (paragraphs two and three), Utah C (paragraphs one and two, paragraph six, and paragraphs seven and eight), Utah D, Utah G (bases two and three), Utah I, Utah J, Utah K (in part), Utah O (basis two (in part)), Utah P (paragraphs one through six, subparagraphs a and c through h of paragraph seven, and paragraphs eight and nine), Utah Q, Utah R (paragraphs one and two (in part), subparagraph a of paragraphs three and four, and paragraph five), Utah S (paragraph three and paragraphs six through nine), Utah T (paragraph one), Utah U (bases two through four), Utah V (paragraphs one and two (in part), paragraphs three and four), Utah W (paragraphs one and two, paragraph three (in part), and paragraphs four through six), Utah X, Utah Y, Utah BB, Utah CC, Utah DD (paragraphs one through three (in part), subparagraphs a, b, e, and f of paragraph four, and paragraphs five and six), Utah EE, Utah GG (paragraphs one through four), Castle Rock 1, Castle Rock 2, Castle Rock 3, Castle Rock 4, Castle Rock 5, Castle Rock 7 (paragraph e), Castle Rock 9, Castle Rock 11, Castle Rock 13 (paragraphs b and c), Castle Rock 14, Castle Rock 15, Castle Rock 16 (paragraphs a and c), Castle Rock 18, Castle Rock 19, Castle Rock 23, Castle Rock 24, OGD A, OGD B, OGD C, OGD D, OGD E, OGD F, OGD G, OGD I, OGD J, OGD K, OGD L, ***249** OGD M, OGD N, OGD O (bases two through four), OGD P, Confederated Tribes A, Confederated Tribes B (bases one through four), Confederated Tribes C, Confederated Tribes D, Confederated Tribes E, Confederated Tribes G, and Confederated Tribes H.

****85** 5. The December 19, 1997 State request to adopt the contentions of the other Petitioners opposing the PFS application is denied.

6. The January 21, 1998 petition of Castle Rock for waiver of the Commission's rules in 10 C.F.R. Part 72 and 10 C.F.R. s 51.23 is denied.

7. The parties are to make the filings required by section III.C above in accordance with the schedule established therein.

8. Motions for reconsideration of this Memorandum and Order must be filed on or before Monday, May 4, 1998, and are subject to the ten-page limitation described in section III.D above.

9. In accordance with the provisions of 10 C.F.R. s 2.714a(a), as it rules upon intervention petitions, this Memorandum and Order may be appealed to the Commission within 10 days after

it is served.
THE ATOMIC SAFETY AND LICENSING BOARD [FN34]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE
Rockville, Maryland
April 22, 1998

***250** Dissenting Opinion of Judge Lam on Denial of Discretionary Intervention to Petitioner Scientists for Secure Waste Storage

I join in this Memorandum and Order in all respects except the Board's denial of discretionary intervention to Petitioner Scientists for Secure Waste Storage (SSWS). After considering the arguments of the various Petitioners, Applicant Private Fuel Storage, L.L.C., and the NRC Staff, I conclude that (1) the broad knowledge and experience of the members of SSWS in nuclear science and technology would make a significant contribution to the development of a sound record; and (2) SSWS's intervention would not broaden the issues to be heard or inappropriately delay the proceeding because SSWS seeks to intervene only on issues already raised. Based on the Commission's guidelines in its Pebble Springs decision, see Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976), and the Appeal Board's Sheffield ruling, see Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743- 44 (1978), I would have granted SSWS discretionary intervention in this proceeding.

***251** APPENDIX A

ADMITTED CONTENTIONS

1. UTAH B--License Needed for Intermodal Transfer Facility

CONTENTION: PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point ("ITP"), in violation of 10 C.F.R. s 72.6(c)(1), in that the Rowley Junction operation is not merely part of the transportation operation but a de facto interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel. Because the ITP is an interim spent fuel storage facility, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.

2. UTAH C--Failure to Demonstrate Compliance with NRC Dose Limits

**86 CONTENTION: The Applicant has failed to demonstrate a reasonable assurance that the dose limits specified in 10 C.F.R. s 72.106(b) can and will be complied with in that:

1. License Application makes selective and inappropriate use of data from NUREG-1536 for the fission product release fraction.

2. License Application makes selective and inappropriate use of data from SAND80-2124 for the respirable particulate fraction.

3. The dose analysis in the License Application only considers dose due solely to inhalation of the passing cloud. Direct radiation and ingestion of food and water are not considered in the analysis.

3. UTAH E/CASTLE ROCK 7/CONFEDERATED TRIBES F--Financial Assurance

CONTENTION: Contrary to the requirements of 10 C.F.R. ss 72.22(e) and 72.40(a)(6), the Applicant has failed to demonstrate that it is financially qualified to engage in the Part 72 activities for which it seeks a license in that:

1. The information in the application about the legal and financial relationship among the owners of the limited liability company (i.e., the license Applicant PFS) is deficient because the owners are not explicitly identified, nor are their relationships discussed. See 10 C.F.R. ss 50.33(c)(2) and 50.33(f) and Appendix C, s II of 10 C.F.R. Part 50.

2. PFS is a limited liability company with no known assets; because PFS is a limited liability company, absent express agreements to the contrary, PFS's members are not individually liable for the costs of the proposed PFSF, and PFS's members are not required to advance equity contributions. PFS has not produced any documents evidencing its members' obligations, and thus, has failed to show that it has a sufficient financial base to assume all obligations, known and unknown, incident to ownership and operation of the PFSF; also, PFS may be subject to termination prior to expiration of the license.

*252 3. The application fails to provide enough detail concerning the limited liability company agreement between PFS's members, the business plans of PFS, and the other documents relevant to assessing the financial strength of PFS. The Applicant must submit a copy of each member's Subscription Agreement, see 10 C.F.R. Part 50, App. C., s II, and must document its funding sources.

4. To demonstrate its financial qualifications, the Applicant must submit as part of the license application a current statement of assets, liabilities and capital structure, see 10 C.F.R. Part 50, Appendix C, s II.

5. The Applicant does not take into account the difficulty of allocating financial responsibility and liability among the owners of the spent fuel nor does it address its financial responsibility as the "possessor" of the spent fuel casks. The Applicant must address these issues. See 10 C.F.R. s 72.22(e).

6. The Applicant has failed to show that it has the necessary funds to cover the estimated costs of construction and operation of the proposed ISFSI because its cost estimates are vague, generalized, and understated. See 10 C.F.R. Part 50, App. C, s II.

**87 7. The Applicant must document an existing market for the storage of spent nuclear fuel and the commitment of sufficient number of Service Agreements to fully fund construction of the proposed ISFSI. The Applicant has not shown that the commitment of 15,000 MTUs is sufficient to fund the Facility including operation, decommissioning and contingencies.

8. Debt financing is not a viable option for showing PFS has reasonable assurance of obtaining

the necessary funds to finance construction costs until a minimum value of service agreements is committed and supporting documentation, including service agreements, are provided.

9. The application does not address funding contingencies to cover on-going operations and maintenance costs in the event an entity storing spent fuel at the proposed ISFSI breaches the service agreement, becomes insolvent, or otherwise does not continue making payments to the proposed PFSF.

10. The Application does not provide assurance that PFS will have sufficient resources to cover non-routine expenses, including without limitation the costs of a worst case accident in transportation, storage, or disposal of the spent fuel.

4. UTAH F/UTAH P--Inadequate Training and Certification of Personnel

CONTENTION: Training and certification of PFS personnel, including radiation protection training, fails to satisfy Subpart I of 10 C.F.R. Part 72 and will not assure that the facility is operated in a safe manner.

5. UTAH G--Quality Assurance

CONTENTION: The Applicant's Quality Assurance ("QA") program is utterly inadequate to satisfy the requirements of 10 C.F.R. Part 72, Subpart G.

*253 6. UTAH H--Inadequate Thermal Design

CONTENTION: The design of the proposed ISFSI is inadequate to protect against overheating of storage casks and of the concrete cylinders in which they are to be stored in that:

1. Storage casks used in the License Application are not analyzed for the PFS maximum site design ambient temperature of 110 <<degrees>> F.

2. The maximum average daily ambient temperatures for unnamed cities in Utah nearest the site do not necessarily correspond to the conditions in Skull Valley; PFS should provide information on actual temperatures at the Skull Valley site.

3. PFS's projection that average daily temperatures will not exceed 100 << degrees>> F fails to take into account the heat stored and radiated by the concrete pad and storage cylinders.

4. In projecting ambient temperatures, PFS fails to take into consideration the heat generated by the casks themselves.

5. PFS fails to account for the impact of heating the concrete pad on the effectiveness of convection cooling.

6. PFS has not demonstrated that the concrete structure of the TranStor cask is designed to withstand the temperatures at the proposed ISFSI.

7. PFS has not demonstrated that the concrete structure of the HI-STORM cask is designed to withstand the temperatures at the proposed ISFSI.

7. UTAH K/CASTLE ROCK 6/CONFEDERATED TRIBES B--Inadequate Consideration of Credible Accidents

**88 CONTENTION: The Applicant has inadequately considered credible accidents caused by external events and facilities affecting the ISFSI and the intermodal transfer site, including the

cumulative effects of the nearby hazardous waste and military testing facilities in the vicinity and the effects of wildfires.

8. UTAH L--Geotechnical

CONTENTION: The Applicant has not demonstrated the suitability of the proposed ISFSI site because the License Application and SAR do not adequately address site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading.

9. UTAH M--Probable Maximum Flood

CONTENTION: The application fails to accurately estimate the Probable Maximum Flood (PMF) as required by 10 C.F.R. s 72.98, and subsequently, design structures important to safety are inadequate to address the PMF; thus, the application fails to satisfy 10 C.F.R. s 72.24(d)(2).

1. The Applicant's determination of the PMF drainage area to be 26 sq. miles is inaccurate because the Applicant has failed to account for all drainage sources that may impact the ISFSI site during extraordinary storm events.

*254 2. In addition to design structures important to safety being inadequate to address the PMF, the consequence of an inaccurate PMF drainage area may negate the Applicant's assertion that the facility area is "flood dry."

10. UTAH N--Flooding

CONTENTION: Contrary to the requirements of 10 C.F.R. s 72.92, the Applicant has completely failed to collect and evaluate records relating to flooding in the area of the intermodal transfer site, which is located less than three miles from the Great Salt Lake shoreline.

11. UTAH O/CASTLE ROCK 8 and 10--Hydrology

CONTENTION: The Applicant has failed to adequately assess the health, safety and environmental effects from the construction, operation, and decommissioning of the ISFSI and the ITP, as required by 10 C.F.R. ss 72.24(d), 72.100(b) and 72.108, with respect to the following contaminant sources, pathways, and impacts:

1. Contaminant pathways from the Applicant's sewer/wastewater system; facility operations, including firefighting activities; and construction activities.

2. Contaminant pathways from the Applicant's retention pond in that:

a. The ER fails to discuss potential for overflow and therefore fails to comply with 10 C.F.R. Part 51.

b. ER is deficient because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond in violation of 10 C.F.R. s 51.45(b) and s 72.126(c) & (d).

3. Potential for groundwater and surface water contamination.

4. The effects of Applicant's water usage on other well users and on the aquifer.

5. Impact of potential groundwater contamination on downgradient hydrological resources.

spent fuel on the ecology and species in the region as required by 10 C.F.R. ss 72.100(b) and 72.108 and NEPA in that the License Application has not estimated potential impacts to ecosystems and "important species" as follows:

1. The License Application fails to address all possible impacts on federally endangered or threatened species, specifically the peregrine falcon nest in the Timpie Springs Waterfowl Management Area.

2. The License Application fails to include information on pocket gopher mounds which may be impacted by the proposal.

***257** 3. The License Application has not adequately identified plant species that are adversely impacted or adequately assessed the impact on those identified, specifically the impact on two "high interest" plants, Pohl's milkvetch and small spring parsley.

4. The License Application does not identify, nor assess the adverse impacts on, the private domestic animal (livestock) or the domestic plant (farm produce) species in the area.

21. UTAH GG--Failure to Demonstrate Cask-Pad Stability During Seismic Event for TranStor Casks

****91** CONTENTION: The Applicant has failed to demonstrate that the TranStor storage casks and the pads will remain stable during a seismic event, and thus, the application does not satisfy 10 C.F.R. ss 72.122(b)(2) and 72.128(a), in that Sierra Nuclear's consultant, Advent Engineering Services, Inc., used a nonconservative "nonsliding cask" tipover analysis that did not consider that the coefficient of friction may vary over the surface of the pad and did not consider the shift from the static case to the kinetic case when considering momentum of the moving casks.

22. CASTLE ROCK 17--Inadequate Consideration of Land Impacts

CONTENTION: The Application violates NRC regulations and NEPA because the ER does not adequately consider the impact of the facility upon such critical matters as future economic and residential development in the vicinity, potential differing land uses, property values, the tax base, and the loss of revenue and opportunity for agriculture, recreation, beef and dairy production, residential and commercial development, and investment opportunities, all of which have constituted the economic base and future use of Skull Valley and the economic interests of Petitioners, or how such impacts can and must be mitigated, see, e.g., 10 C.F.R. ss 72.90(e), 72.98(c)(2) and 72.100(b), in that:

a. the ER does not recognize the potential use of the areas surrounding the PFSF for residential or commercial development;

b. the ER paints a misleading picture of the area population by ignoring a majority of the Salt Lake Valley;

c. the ER fails to consider the effect of the PFSF on the present use of Castle Rock's lands for farming, ranch operations and residential purposes or the projected use of such lands for dairy operations, residential development, or commercial development;

d. the ER provides no, or inaccurate, information on the economic value of current agricultural/ranching operations conduct on Castle Rock's lands; and

e. the ER fails to discuss the impact of placing a spent fuel storage facility near a national wilderness area.

23. CASTLE ROCK 20--Selection of Road or Rail Access to PFSF Site

CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe the considerations governing selection of either the Skull Valley Road or the rail *258 spur access alternative over the other and the implications of such selection in light of such considerations. See 10 C.F.R. ss 51.45(c) and 72.100(b), in that:

a. The ER is deficient because it fails to properly analyze the transportation alternatives.

b. The ER is incomplete because investigations and studies have not been performed which will have a direct bearing on the environmental effects of the alternative selected.

c. The ER is defective because PFS is considering a third option not discussed in the ER.

d. The ER fails to mention some significant environmental effects of the transportation alternatives such as increased traffic and noise.

24. CASTLE ROCK 21--Exact Location of Rail Spur

**92 CONTENTION: The Application violates NRC regulations and NEPA because it fails to describe in detail the route of the potential rail spur, property ownership along the route, and property rights needed to construct and operate the rail spur (see 10 C.F.R. s 72.90(a)), in that:

a. The ER fails to provide any detail concerning location of the rail spur and impact on property rights along the route.

b. Upon information and belief, ER is defective because PFS is considering two locations for the rail spur.

25. OGD O--Environmental Justice Issues Are Not Addressed

CONTENTION: The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In, Executive Order 12898, 3 C.F.R. 859 (1995) issued February 11, 1994, President Clinton directed that each Federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States." It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Utah Test and Training Range South, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, APTUS Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North.

26. SKULL VALLEY BAND CONTENTION

CONTENTION: The License Application for the Private Fuel Storage facility filed by Private Fuel Storage, LLC is meritorious and should be granted.

FN1 The Board granted PFS leave to file a supplemental answer regarding the last six State contentions because PFS apparently was served inadvertently with a copy of the State's

12. UTAH R--Emergency Plan

CONTENTION: The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site or the transfer facility in that:

**89 1. PFS has not adequately described the ITP, the activities conducted there, or the area near the ITP in sufficient detail to evaluate the adequacy and appropriateness of the emergency plan.

2. PFS does not address response action, emergency information dissemination, or emergency response training programs for accidents at the ITP.

3. PFS has not adequately described the means and equipment for mitigation of accidents because it does not have adequate support capability to fight fires onsite.

*255 13. UTAH S/CASTLE ROCK 7--Decommissioning

CONTENTION: The decommissioning plan does not contain sufficient information to provide reasonable assurance that the decontamination or decommissioning of the ISFSI at the end of its useful life will provide adequate protection to the health and safety of the public as required by 10 C.F.R. s 72.30(a), nor does the decommissioning funding plan contain sufficient information to provide reasonable assurance that the necessary funds will be available to decommission the facility, as required by 10 C.F.R. s 72.22(e).

14. UTAH T/CASTLE ROCK 10, 12, and 22--Inadequate Assessment of Required Permits and Other Entitlements

CONTENTION: In derogation of 10 C.F.R. s 51.45(d), the Environmental Report does not list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the PFS ISFSI License Application, nor does the Environmental Report describe the status of compliance with these requirements in that:

1. The Applicant has shown no proof of entitlement to build a transfer facility at Rowley Junction or right to use the terminal there.

2. The Applicant has shown no authority to build a rail spur from the rail head at Rowley Junction to the proposed ISFSI site.

3. The Applicant has shown no basis that it is entitled to widen Skull Valley Road in that the application does not describe and identify State and local permits or approvals that are required.

4. The Applicant's air quality analysis does not satisfy the requirements of 10 C.F.R. s 51.45 in that the Applicant has failed to adequately analyze whether it will be in compliance with the health-based National Ambient Air Quality Standards, whether it is subject to section 111 of the Clean Air Act, and whether it is a major stationary source of air pollution requiring a Prevention of Significant Deterioration permit; the Applicant's analysis of air quality impacts as it relates to Utah air quality permits in ER sections 4.1.3 and 4.2.3 is inadequate; and a state air quality approval order under Utah Code Ann. s 19-2-108 will be required.

5. The Applicant has not addressed the requirement to obtain a Utah Groundwater Discharge Permit or the applicability of the Utah Groundwater Protection Rules, which apply specifically to facilities such as the retention pond and generally require that such ponds be lined.

6. The Applicant's analysis of other required water permits lacks specificity and does not satisfy the requirements of 10 C.F.R. s 51.45 in that the Applicant merely states that it "might"

need Army Corps of Engineers and State approvals in connection with any Clean Water Act (CWA) Section 404 dredge and fill permit for wetlands along the Skull Valley transportation corridor; PFS provides an inadequate discussion of Site requirements relative to the Skull Valley Band of Goshute's CWA permitting authority; and PFS will be required to consult with the State on the effects of the intermodal transfer site on the neighboring Timpie Springs Wildlife Management Area.

**90 *256 7. The Applicant must show legal authority to drill wells on the proposed ISFSI site by identifying and describing the State approvals that are required.

15. UTAH U--Impacts of Onsite Storage Not Considered

CONTENTION: Contrary to the requirements of NEPA and 10 C.F.R. 51.45(c), the Applicant fails to give adequate consideration to reasonably foreseeable potential adverse environmental impacts during storage of spent fuel on the ISFSI site.

16. UTAH V--Inadequate Consideration of Transportation-Related Radiological Environmental Impacts

CONTENTION: The Environmental Report ("ER") fails to give adequate consideration to the transportation-related environmental impacts of the proposed ISFSI in that PFS does not satisfy the threshold condition for weight specified in 10 C.F.R. s 51.52(a) for use of Summary Table S-4, so that the PFS must provide "a full description and detailed analysis of the environmental effects of transportation of fuel and wastes to and from the reactor" in accordance with 10 C.F.R. s 51.52(b).

17. UTAH W--Other Impacts Not Considered

CONTENTION: The Environmental Report does not adequately consider the adverse impacts of the proposed ISFSI and thus does not comply with NEPA or 10 C.F.R. s 51.45(b) in that the Applicant has not considered the impact of flooding on the intermodal transfer point.

18. UTAH Z--No Action Alternative

CONTENTION: The Environmental Report does not comply with NEPA because it does not adequately discuss the "no action" alternative.

19. UTAH AA/CASTLE ROCK 13--Range of Alternatives

CONTENTION: The Environmental Report fails to comply with the National Environmental Policy Act because it does not adequately evaluate the range of reasonable alternatives to the proposed action.

20. UTAH DD/CASTLE ROCK 16--Ecology and Species

CONTENTION: The Applicant has failed to adequately assess the potential impacts and effects from the construction, operation and decommissioning of the ISFSI and the transportation of

contentions that did not contain those six contentions. See Licensing Board Order (Granting Leave to File Response to Contentions and Schedule for Responses to Late-Filed Contentions) (Dec. 31, 1997) (unpublished).

FN2 Currently pending with the Chief Administrative Judge is a PFS motion seeking reconsideration of his action creating the new PSP Board. See Applicant's Request for Reconsideration of Establishment of a Separate Licensing Board for Security Plan Matters (Apr. 6, 1998).

FN3 In addition, agency rules of practice afford states, counties, and municipalities that do not seek or qualify for full party status the opportunity to participate in proceedings in which they have an interest. As interested governmental entities, they are afforded the opportunity to introduce evidence or interrogate witnesses, albeit without any requirement to take a position regarding any of the issues that are the subject of litigation. See id. s 2.715(c).

FNBoth Confederated Tribes and the Skull Valley Band have argued, in the alternative, they are entitled to participate as an interested governmental entity. See Confederated Tribes/Pete Petition at 2; Skull Valley Band Petition at 2-3. Because we find both the Confederated Tribes and the Skull Valley Band have standing, and neither has expressed any interest in participating regarding any issue without taking a position on that issue, we see no reason to reach the issue whether, as a federally recognized Native American tribe, either is entitled to interested governmental entity status under section 2.715(c).

FN4 Chairman Pete has made no attempt to seek discretionary intervention status.

FN5 Although there apparently is no definitive authority on whether a filing seeking discretionary intervention submitted beyond the deadline for filing intervention petitions must meet the late-filing standards, we find nothing in the general terms of 10 C.F.R. s 2.714 governing intervention petitions that would exempt a discretionary intervention request from its late-filing provisions.

FN6 The State makes the point that the SSWS petition, as supplemented, is not accompanied by any affidavits of members declaring the organization has the right to represent their interests. The closest thing, the State asserts, is a February 3, 1998 affidavit of Robert J. Hoffman that appoints SSWS spokesman Wilson as his representative and was not timely filed. See State SSWS First Intervention Petition Supplement Response at 3 n. 1. Because we find SSWS has failed to demonstrate any of its members has the requisite injury in fact to provide it with organizational standing as of right, we need not determine whether this affidavit is adequate.

FN7 Both PFS and SSWS seek to support SSWS's discretionary admission by reference to the Appeal Board's decision in Sheffield, ALAB-473, 7 NRC at 743- 44, remanding to the Licensing Board the petition of a local chapter of the American Nuclear Society (ANS) for consideration of whether it should be afforded discretionary intervention. This intervenor subsequently was admitted to the proceeding. See Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-494, 8 NRC 299, 300 n. 1 (1978). Although there is no published opinion providing the basis for the Licensing Board's ruling admitting the local ANS

chapter, SSWS has quoted a portion of the Board's unpublished decision in its final intervention petition supplement. See SSWS Second Intervention Petition Supplement at unnumbered 30.

FNBesides being of questionable significance as an unpublished decision, the quoted portion of the Licensing Board's Sheffield ruling tells us nothing about the Board's analysis of the Pebble Springs factors. Lacking any knowledge of the exact basis for that Board's determination on remand, we simply note that any number of factors, such as a further showing about the nature of the organization's interest, may have counseled a different result there. See Sheffield, ALAB-473, 7 NRC at 741 & n. 3 (many of local ANS organization's members assertedly involved in work utilizing the facility in question and whether they would be harmed by license termination or conditions would depend on nature of work and availability of other similar facilities).

FN8 Applicant PFS apparently did have discussions with the Confederated Tribes concerning language changes in contentions it had adopted and was told the Confederated Tribes would advise the Board on its position. See Applicant's Response to Revised Contentions and Proposed Transcript Corrections (Feb. 17, 1998) at 3. We, however, have heard nothing from the Confederated Tribes in this regard.

FN9 Although we agree with Petitioner Confederated Tribes' point that an adjudicatory body generally has the authority to consider its own jurisdiction, see Tr. at 100, in this instance we do not find sufficient ambiguity in the Commission's regulatory declaration of its jurisdiction (and concomitantly ours) to permit further inquiry into that question consistent with the dictates of 10 C.F.R. s 2.758.

FN10 Although PFS suggests the issue of license authority over the Rowley Junction ITP is outside the scope of this proceeding, see PFS Contentions Response at 158-59, this seemingly runs contrary to the Staff's apparent belief that it may, in the context of acting on the PFS license, exert regulatory authority relative to PFS activities at Rowley Junction, see Staff Contentions Response at 19 n. 29.

FN11 In discussing this paragraph of the contention, the State asserts that a central concern is that any Part 72 license not be issued until the certification process is completed for the storage casks PFS proposes to use at its facility. See State Contentions Reply at 20-21. The Staff agrees that this will not happen. See Tr. at 174-75, 183-84. As a consequence, we find nothing to litigate regarding this paragraph.

FN12 In admitting this contention, we note that further litigation on its merits may be subject to any merits disposition of Utah B.

FN13 In considering this contention, we agree with the Staff that the State has not provided any basis for challenging the PFS determination that its facility is sufficiently far from Skull Valley Road that an explosion involving Dugway military ordinance being transported on the road will not exceed the 1 pound per square inch (psi) overpressure requirement at the facility. See Staff Contentions Response at 33. Further, although the Staff observes that portions of the bases for Utah K could be construed as a challenge to the discussion of transportation accident risk in the

PFS ER, see id., we do not interpret it that way. Even if it is, however, that same issue is considered below in the context of Utah V.

FN14 In response to a Staff concern regarding a portion of the basis for this contention, the State agreed that its contention should not be construed as asking for evaluation of faults other than "capable faults" as they are defined in 10 C.F.R. Part 100, App. A. See Tr. at 332.

FN15 In admitting this contention, we note that further litigation on its merits may be subject to any merits disposition of Utah B.

FN16 In admitting this contention, we include its bases relating to construction-related groundwater impacts and groundwater impacts relative to the Rowley Junction ITP. We note, however, that further litigation on this contention's merits relative to the ITP may be subject to any merits disposition of Utah B.

FN17 Some of the bases for this contention rely upon the possibility of accidents at the Rowley Junction ITP, which we have found to be a permissible subject for other State contentions. In this instance, however, the basis for the contention concerns purported accidents involving storage casks rather than shipping casks, the latter being the casks that would be handled at the ITP.

FN18 In admitting this contention as it relates to the Rowley Junction ITP, we note that further litigation on its merits may be subject to any merits disposition of Utah B.

FN19 Further litigation on the merits of this contention relative to basis eleven regarding the ITP may be subject to any merits disposition of Utah B.

FN20 Further litigation on the merits of this contention relative to paragraph two regarding the ITP may be subject to any merits disposition of Utah B. In this regard, however, we are unable to find admissible the language of paragraph two that relies on rail shipment volume as a basis for the contention. As with Utah B, see supra p. 184, we consider this an insufficient basis to merit the admission of paragraph two. Accordingly, we appropriately revise paragraph two of Utah T, which is set forth at p. 255 of Appendix A to this Memorandum and Order.

FN21 Regarding this contention, the Board also notes that an allegation concerning compliance with the requirements of 10 C.F.R. Part 75 was withdrawn. See Tr. at 486-87.

FN22 Further litigation on the merits of this contention relative to basis one regarding the ITP may be subject to any merits disposition of Utah B.

FN23 Notwithstanding our admission of Utah B dealing with the need for licensing of the Rowley Junction ITP and our general agreement with the State's observation that "where the intermodal transfer facility constitutes part of the storage facility for purposes of compliance with safety regulations, its environmental impacts must nevertheless be addressed by the Applicant and the NRC," State Contentions Reply at 88, we are unable to find that paragraph 3.a of this contention is admissible because it relies on rail shipment volume, a consideration we consider insufficient to support the admission of Utah B or this contention.

FN24 Further litigation on the merits of this contention relative to paragraph three regarding the ITP may be subject to any merits disposition of Utah B.

FN25 In this regard, while our decision to reject Utah EE as late-filed means we need not address its admissibility, we note that based on our review of the parties' submissions, see State Contentions EE and FF at 4-12; PFS State Contentions EE and FF Response at 8-45; Staff State Contentions EE and FF Response at 7; State Contentions EE and GG Reply at 13-27, even if timely filed, the bases for the contention, as supported by the witness affidavits, would have been sufficient to gain admission only for portions of the contention, in particular, subparagraph d of paragraph three and paragraph seven. The other portions (paragraphs one and two, subparagraphs a through c and e of paragraph three, paragraphs four through six, and paragraph eight) would have been inadmissible as failing to establish with specificity any genuine dispute; impermissibly challenging the Commission's regulations and/or generic rulemaking-associated determinations; lacking adequate factual and expert opinion support; and/or failing properly to challenge the PFS application. See section II.B.1.a.i, ii, v, vi above.

FN26 While not requiring the same level of protection that must be afforded the safeguards information involved in the contentions that are before the PSP Licensing Board, dealing with proprietary information nonetheless requires the use of separate, closed hearing sessions, and potentially separate, public and nonpublic versions of any Board issuances.

FNIn this regard, responding to our inquiry, the parties have advised us that the terms of Utah EE and Utah GG do not include proprietary information. See Letter from Ernest L. Blake, Counsel for PFS, to Licensing Board 1 (Mar. 18, 1998); NRC Staff's Response to Memorandum and Order (Request for Information Regarding Contentions Involving Proprietary and Safeguards Material) Dated March 9, 1998 (Mar. 18, 1998) at 1 n. 1; see also [State] Response to the Board's Request for Information Regarding Contentions Involving Proprietary and Safeguards Information (Mar. 18, 1998) at 1-2.

FN27 Although we need not reach the issue, we note that paragraphs one and two would have been inadmissible as failing to establish with specificity any genuine dispute; lacking adequate factual and expert opinion support; and/or failing properly to challenge the PFS application. See section II.B.1.a.i, v, vi above.

FN28 Although this contention seeks to litigate issues involving the Rowley Junction ITP, we find it inadmissible because those issues, whether raised in connection with the PFS facility or the ITP, lack a sufficient basis.

FN29 The Board anticipates that consultation between the lead party and any involved parties will ensure involved parties' litigation interests and concerns regarding any particular contention are accommodated. If an instance arises when such discussions fail to yield a resolution, the involved parties may request Board consideration of the matter. Such a request must be in writing, on the record, and presented in a time frame that will allow for Board resolution without requiring the extension of any outstanding schedules.

FN30 During the January prehearing conference, the Board discussed the status of the Staff's

preparation of its SER and FEIS and the potential impact of those activities on the litigation schedule for this proceeding. See Tr. at 812-15. We anticipate that the status of these Staff activities, including any Staff decision on segmentation of the SER, would be reflected in any schedules proposed by the parties as part of the filing requested below, see supra section III.C.

FN31 With regard to Utah T/Castle Rock 10, 12, and 22, concerning the assessment of required permits and other entitlements, in describing any schedule for the litigation of this contention the parties should provide their views about the propriety and efficiency of seeking an opinion/judgment in some other judicial forum relative to questions such as the scope of State regulatory authority on tribal lands. Compare Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 896 (at behest of Licensing Board, intervenors sought state court declaratory judgments on validity of state statutory limitations on utility emergency plan responses), aff'd, ALAB-818, 22 NRC 651, rev'd on other grounds, CLI-86-13, 24, NRC 22 (1985).

FN32 This is the same room that was used for the videoconferencing demonstration during the January 1998 prehearing conference.

FN33 The language of these admitted contentions is set forth in Appendix A to this Memorandum and Order.

FN34 Copies of this Memorandum and Order were sent this date to counsel for the Applicant PFS, and to counsel for Petitioners Skull Valley Band, OGD, Confederated Tribes/Pete, Castle Rock, SSWS, and the State by Internet e-mail transmission; and to counsel for the Staff by e-mail through the agency's wide area network system.
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