CASE SCHEDULED FOR ORAL ARGUMENT APRIL 24, 2007

In The

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 05-1419, 05-1420 and 06-1087 (Consolidated)

OHNGO GAUDADEH DEVIA, et al.,
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA
Respondents, and

PRIVATE FUEL STORAGE, L.L.C. and
SKULL VALLEY BAND OF GOSHUTE INDIANS
Intervenors-Respondents.

On

Petition to Review a Final Decision of the
United States Nuclear Regulatory Commission

SUPPLEMENTAL BRIEF OF INTERVENORS PRIVATE FUEL STORAGE, L.L.C. AND SKULL VALLEY BAND OF GOSHUTE INDIANS

TIM VOLLMANN
3301-R Coors Road, N.W., #302
Albuquerque, NM 87120
Telephone: (505) 792-9168
Facsimile: (505) 792-9251
Attorney for Skull Valley Band of Goshute Indians

JAY E. SILBERG
PAUL A. GAUKLER
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037
Telephone: (202) 663-8000
Facsimile: (202) 663-8007
Attorneys for Private Fuel Storage, L.L.C.

Dated: March 23, 2007

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE ISSUES 2

A. The NRC License 2
B. The Lease 2
C. The Rights-of-Way 3

III. APPLICABLE STATUTE OF LIMITATIONS FOR APPEALING THE INTERIOR DEPARTMENT'S DECISIONS 4

IV. THE INTERIOR DEPARTMENT DECISIONS AND THE FY 2006 NATIONAL DEFENSE AUTHORIZATION ACT AFFECT NEITHER THE RIPENESS OF THIS CASE NOR THE STANDING OF THE PETITIONERS 5

A. This Case is Ripe for Judicial Review 5
B. The Petitioners Have Standing 8

TABLE OF AUTHORITIES

Cases **Page**

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 5

*Bullcreek v. NRC, 359 F.3d 536 (D.C. Cir. 2004) 8,9

City of Orrville v. FERC, 147 F.3d 979 (D.C. Cir. 1998) 10

*Daingerfield Island Protective Soc'y v. Babbitt, 40 F.3d 442 (D.C. Cir. 1994) 4

*Felter v. Kempthorne, 473 F.3d 1255 (D.C. Cir. 2007) 4

Gros Ventre Tribe v. United States, 469 F.3d 801 (9th Cir. 2006) 4

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 9

Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803 (2003) 5,7,8

*Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998) 5,6,7,8,9

Pfizer Inc. v. Shalala, 182 F.3d 975 (D.C. Cir. 1999) 6

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142 (1998) 9,10

Reytblatt v. NRC, 105 F.3d 715 (D.C. Cir. 1997) 8,9

*Rio Grande Pipeline Co. v. FERC, 178 F.3d 533 (D.C. Cir. 1999) 6,7

Skull Valley Band v. Nielson, 376 F.3d 1223 (10th Cir. 2004) 5

Toca Producers v. FERC, 411 F.3d 262 (D.C. Cir. 2005) 5,6

Town of Stratford v. FAA, 292 F.3d 251 (D.C. Cir. 2002) 7

United States v. Los Angeles & S.L.R. Co., 273 U.S. 299 (1928) 6,9

Worth v. Jackson, 451 F.3d 854 (D.C. Cir. 2006) 5,6

Statutes

5 U.S.C. § 706(2)(a) 4

28 U.S.C. § 2344 8

28 U.S.C. § 2401(a) 4

*Authorities upon which we chiefly rely are marked with asterisks.

National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163,
119 Stat. 3136 (2006).....3,4,5

Other Authorities

Record of Decision Addressing Right-of-Way Applications U 76985 and U 76986 to Transport Spent Nuclear Fuel to the Reservation of the Skull Valley Band of Goshute Indians, signed by Chad Calvert, Acting Assistant Secretary, Land and Minerals Management,
U. S. Department of the Interior (Sept. 7, 2006)..... 3-4

Record of Decision for the Construction and Operation of an Independent Spent Fuel Storage Installation (ISFSI) on the Reservation of the Skull Valley Band of Goshute Indians (Band) in Tooele County, Utah, signed by James E. Cason, Associate Deputy Secretary,
U. S. Department of the Interior (Sept. 7, 2006) 2-3

SUPPLEMENTAL BRIEF OF INTERVENORS PRIVATE FUEL STORAGE, L.L.C. AND SKULL VALLEY BAND OF GOSHUTE INDIANS

I. INTRODUCTION

The Court has ordered the parties to file supplemental briefs "addressing the issue of whether the revocation of the conditional lease approval, the disapproval of the right of way application, or passage of the National Defense Authorization Act for FY 2006, together or individually call into question either the ripeness of this case to be decided or the standing of the Petitioners to bring the case." Per Curiam Order (March 16, 2007). The Order also directs the Intervenors Private Fuel Storage, L.L.C. ("PFS") and the Skull Valley Band of Goshute Indians (the "Band") "to identify the statutes of limitations" that "govern their prospective appeals" of the Department of Interior decisions. The Intervenors submit this Supplemental Brief in response to the Court's Order.

As set forth herein, the Interior Department's decisions and the National Defense Authorization Act for FY 2006 affect neither the ripeness of this case nor the standing of the Petitioners. The Nuclear Regulatory Commission ("NRC" or "Commission") has issued a fully effective and enforceable license for the Private Fuel Storage Facility ("PFSF") after a licensing process that extended over more than eight years. Both Petitioners participated at every step in the licensing process. Like any complex project, multiple approvals are required for the PFS project. However, the fact that multiple approvals may be required does not mean that each individual final agency approval is not final or ripe for judicial review. Indeed, if all agency approvals were required to be in place before judicial appeals could run their course, a "Catch-22" situation would arise where a complex project requiring multiple approvals could never become final. Neither the doctrines of ripeness nor standing require the creation of legal

gridlock. To the contrary, where an agency has acted and issued a fully effective license, the legal rights established by that license constitute the concreteness and immediacy necessary for standing and ripeness.

II. STATEMENT OF THE ISSUES

A. The NRC License

As set forth in Intervenors' and Respondents' briefs, PFS filed its license application in June 1997. A lengthy licensing proceeding ensued in which numerous issues were litigated and extensive hearings were held. See JA0001-0986. On February 21, 2006, after denying the State of Utah's motion to reopen the closed evidentiary record, the NRC issued License No. SNM-2513 authorizing construction and operation of the PFSF. This license authorizes PFS to receive, possess and store spent nuclear fuel at the PFSF to be located on the Band's Reservation subject to the conditions and requirements of the license.[1]

B. The Lease

On September 7, 2006, the Associate Deputy Secretary of the U.S. Department of the Interior issued the Record of Decision for the Bureau of Indian Affairs ("BIA") disapproving the Band's 1997 amended lease of Reservation land to PFS for the construction and operation of the PFSF.[2] That lease had been conditionally approved on May 23, 1997 by the local Superintendent for the BIA. This conditional approval, however, was expressly conditioned upon completion of the Environmental Impact Statement ("EIS"), the NRC's issuance of the license for the PFSF, and the incorporation into the lease of appropriate mitigation measures.

---

[1] A copy of the license is included in the Addendum to this Supplemental Brief.

[2] Record of Decision for the Construction and Operation of an Independent Spent Fuel Storage Installation (ISFSI) on the Reservation of the Skull Valley Band of Goshute Indians (Band) in Tooele County, Utah, signed by James E. Cason, Associate Deputy Secretary, U. S. Department of the Interior (Sept. 7, 2006) ("BIA ROD"). The BIA ROD appears in the Addendum to OGD's Opening Brief at pages 22-50.

BIA ROD at 5. Thus, the conditional approval did not constitute final BIA action. Id. at 13.[3] All of these conditions, however, have been met.

In disapproving the lease, the Associate Deputy Secretary determined that he was not bound by the Superintendent's 1997 conditional approval of the lease and that the Superintendent's action was not a final action for the Department. However, he expressly stated that the BIA ROD constituted the "final action of the Department" on the lease. BIA ROD at 29.

C. The Rights-of-Way

On August 28, 1998, PFS applied to the Bureau of Land Management ("BLM") for two separate rights-of-way to provide transportation routes from the main Union Pacific rail line to the proposed PFSF site. The preferred route was a rail line across BLM land along the base of the Cedar Mountains on the western side of Skull Valley. The alternate route was the development of an Inter-modal Transfer Facility ("ITF") on BLM land next to the main Union Pacific rail line at which the spent fuel casks would be transferred from railcars to heavy-haul vehicles and transported to the proposed PFSF site via the Skull Valley Road. Both alternatives were fully evaluated in the FEIS for the PFSF. Final EIS at § 5 (JA2339-2413). It should be noted, however, that the regulations governing spent fuel transportation do not require that the transfer of the spent fuel casks from a truck to a railcar take place at any particular, segregated location, such as the ITF, and could occur without such a dedicated facility.

On September 7, 2006, the Acting Assistant Secretary for Land and Minerals Management of the U.S. Department of the Interior issued the Record of Decision for the denial of the requested rights-of-way.[4] The right-of-way for the rail-line was denied because Section

---

[3] See also Final EIS at § 1.5.2 (JA2132).

[4] Record of Decision Addressing Right-of-Way Applications U 76985 and U 76986 to Transport Spent Nuclear Fuel to the Reservation of the Skull Valley Band of Goshute Indians, signed by Chad Calvert, Acting Assistant

384 of the National Defense Authorization Act for FY 2006[5] had established the Cedar Mountain Wilderness Area which included lands described in PFS's application for the rail line right-of-way. BLM ROD at 8-10, 18. The right of way application for the ITF was denied not based upon the FY 2006 National Defense Authorization Act, but rather as "contrary to the public interest". Id. at 10-12, 16.

III. APPLICABLE STATUTE OF LIMITATIONS FOR APPEALING THE INTERIOR DEPARTMENT'S DECISIONS

The Band and PFS are planning to challenge the disapproval of the lease and the denial of the rights-of-way applications. This challenge would seek judicial review of those decisions to set them aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", among other grounds, as provided by the Administrative Procedure Act. 5 U.S.C. § 706(2)(a). The statute of limitations which applies to such a lawsuit is 28 U.S.C. § 2401(a), which imposes a six year limitation period on "every civil action commenced against the United States."

This Court has held that 28 U.S.C. § 2401(a) applies to APA-type challenges of Interior Department actions. Daingerfield Island Protective Soc'y v. Babbitt, 40 F.3d 442, 444-45 (D.C. Cir. 1994). Thus, challenges to final BIA and BLM action fall within the ambit of 28 U.S.C. § 2401(a). Felter v. Kempthorne, 473 F.3d 1255, 1259 (D.C. Cir. 2007) (holding that the District Court correctly found that none of the Department of Interior BIA actions challenged by Petitioner occurred within the six year limitation contained in 28 U.S.C. § 2401(a), but remanding on other grounds); Gros Ventre Tribe v. United States, 469 F.3d 801, 814 (9th Cir.

Secretary, Land and Minerals Management, U. S. Department of the Interior (Sept. 7, 2006) ("BLM ROD"). The BLM ROD appears in the Addendum to OGD's Opening Brief at pages 3-19.

[5] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006) ("National Defense Authorization Act").

2006) (holding that the six year limitation contained in 28 U.S.C. § 2401(a) applied to a challenge of a BLM Record of Decision).

IV. THE INTERIOR DEPARTMENT DECISIONS AND THE FY 2006 NATIONAL DEFENSE AUTHORIZATION ACT AFFECT NEITHER THE RIPENESS OF THIS CASE NOR THE STANDING OF THE PETITIONERS

Intervenors have not challenged the ripeness of Petitioners' claims or their standing because both are well established under controlling precedent. Furthermore, neither is affected by the Interior Department's decisions or the National Defense Authorization Act.

A. This Case is Ripe for Judicial Review

Federal courts determine whether a case or controversy is ripe for review in order "'to protect [federal] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 807-08 (2003) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967)). Determining whether an administrative action is ripe for judicial review, requires an evaluation of "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." Nat'l Park Hospitality Ass'n, 538 U.S. at 808 (quoting Abbott, 387 U.S. at 149); see also Worth v. Jackson, 451 F.3d 854, 861 (D.C. Cir. 2006); Toca Producers v. FERC, 411 F.3d 262, 265 (D.C. Cir. 2005); Skull Valley Band v. Nielson, 376 F.3d 1223, 1237-39 (10th Cir. 2004).

The NRC's action at issue here – the granting of the PFS license – is undoubtedly fit for judicial decision. Judicial review will not "inappropriately interfere with further administrative action," nor will the circumstances here "benefit from further factual development." Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998). The NRC has acted and no further administrative action is pending before the NRC. Nor do any further facts remain to be developed. Rather, the NRC has granted PFS a "formal legal license." Ohio Forestry Ass'n, 523

U.S. at 733 (paraphrasing United States v. Los Angeles & S. L. R. Co., 273 U.S. 299, 309-10 (1927) (Brandeis, J.)). Unlike the situation in Ohio Forestry Association, where the forestry plan at issue did "not give anyone a legal right to cut trees," the NRC has granted PFS a license – after more than eight years of licensing review and adjudication – to construct and operate an interim spent fuel storage facility. Thus, the case at hand squarely "presents a concrete legal dispute" requiring "no further factual development . . . to clarify the issues" with "'no doubt whatever that the challenged [agency action] has 'crystallized' sufficiently for purposes of judicial review.'" Rio Grande Pipeline Co. v. FERC, 178 F.3d 533, 540 (D.C. Cir. 1999) (quoting Payne Enters., Inc. v. United States, 837 F.2d 486, 492-93 (D.C. Cir. 1988).

Therefore, the instant case is not one where the agency action is merely "the first step in the agency's approval process." Pfizer Inc. v. Shalala, 182 F.3d 975, 978 (D.C. Cir. 1999) (holding petitioner's challenge to the FDA's action – accepting an application for processing – as unripe because the FDA had not approved the application). Nor is this a case where another ongoing adjudication before the agency could resolve the issues raised by Petitioners' appeals of the NRC's license authorizing PFS to construct and operate an ISFSI. Compare Toca Producers, 411 F.3d at 265-66 (holding petitioners' challenge to FERC's action as unripe because there was presently before FERC a separate proceeding in which the petitioners had also intervened that could result in the relief petitioners sought).

Nor is this a case involving "a facial challenge to an [administrative agency's] unwritten policy that by definition has no face" requiring this Court to apply its "'powers of imagination' to ascertain" the contours of the agency action at issue here. Worth, 451 F.3d at 862. The PFS license application underwent over 8 years of agency review and protracted adjudication that generated more than 70 published NRC decisions. JA0910. The grant of the PFS license is the

culmination of a massive regulatory and adjudicatory effort that is sufficiently concrete for purposes of judicial review.

Moreover, contrary to the circumstances in Town of Stratford v. FAA, 292 F.3d 251 (D.C. Cir. 2002), this is not a case where the validity of the agency action at issue is dependent on the action of another agency. In Town of Stratford, it appears that the validity of the FAA's Master Plan was contingent upon the Army's disposal of property under its control that was part of the plan. 292 F.3d at 252. Here, the NRC license is valid notwithstanding the disapproval of the lease between PFS and the Band or denial of the requested rights-of-way.

Indeed, in terms of the fitness of the NRC issues for judicial review, nothing has been changed by the Interior Department's September 7, 2006 decisions. The NRC's license remains as valid and effective today as it was prior to September 7, 2006. PFS could not proceed then to construct and operate the PFSF because it lacked approval of the lease. See Skull Valley Band, 376 F.3d at 1238. The same is true now. The only difference now is that PFS and the Band must challenge the Secretary's decision, which they plan to do.

The second prong of the ripeness doctrine, "hardship," is not "an independent requirement divorced from the consideration of the institutional interests of the court and agency." Rio Grande Pipeline, 178 F.3d at 541 (quoting Payne Enters., 837 F.2d at 493). Thus, where, as here, "there is no doubt whatever" that an agency decision is fit for judicial review, a petition should not be dismissed even absent a showing of hardship. Rio Grande Pipeline, 178 F.3d at 540.

Moreover, under the hardship inquiry, "'adverse effects of a strictly legal kind'" are sufficient to establish hardship. Nat'l Park Hospitality Ass'n, 538 U.S. at 809 (quoting Ohio Forestry Ass'n, 523 U.S. at 733.). That is precisely the case here. Unlike the circumstances in

National Park Hospitality Association and Ohio Forestry Association, the NRC has granted PFS a "formal legal license" and "authority" to construct and operate an ISFSI, over the rigorous challenges advanced by Petitioners. Nat'l Park Hospitality Ass'n, 538 U.S. at 809 (quoting Ohio Forestry Ass'n, 523 U.S. at 733.). Thus, it is clear that Petitioners have suffered "adverse effects of a strictly legal kind" and are "harmed" by the NRC's grant of the PFS license and will continue to be "harmed" pending judicial review of that licensing action. And PFS and the Band suffer hardship so long as the NRC license remains under challenge in this Court pending action on other approvals. Uncertainty resulting from unresolved judicial challenges necessarily increases the uncertainty as to the viability of the PFSF, notwithstanding the status of other approvals.

B. The Petitioners Have Standing

Pursuant to the Hobbs Act, 28 U.S.C. § 2344, only parties "aggrieved" by the NRC's licensing actions may petition the Court of Appeals for review. Thus, parties must have participated in the underlying NRC proceeding and must meet the requirements of constitutional and prudential standing. Bullcreek v. NRC, 359 F.3d 536, 540 (D.C. Cir. 2004); Reytblatt v. NRC, 105 F.3d 715, 720 (D.C. Cir. 1997).

Both Petitioners participated in the NRC adjudication which ultimately authorized the issuance of the PFS license. Thus, the first part of the standing test is met. See Bullcreek, 359 F.3d at 540 (holding that the State of Utah had standing to challenge the NRC's denial of a petition to institute a rulemaking in part because it had participated in the proceeding below).

Second, both Petitioners meet the requirements of prudential standing. The "relevant inquiry in this context is whether the injury is arguably within the zone of interests to be protected or regulated by the statute in question." Reytblatt, 105 F.3d at 721. Here, that statute is the Atomic Energy Act ("AEA"). Both Petitioners have shown that they are "persons whose

'interests are sufficiently congruent with those of the intended beneficiaries'" of the AEA. Reytblatt, 105 F.3d at 721. The AEA regulates the use of nuclear material to protect the public health and safety and accomplishes this purpose, in part, by encouraging public participation in the administrative process. Reytblatt, 105 F.3d at 721 (citation omitted). As reflected in the record below, Petitioners asserted numerous health, safety, and environmental interests, which the AEA aims to protect. See, e.g., Bullcreek, 359 F.3d at 540 (holding that Utah satisfied the prudential standing requirements to challenge the NRC's denial of a petition to institute a rulemaking) (citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 169 (1998) (JA0019)). Thus, both Petitioners satisfy the prudential standing requirements.

Lastly, both Petitioners satisfy the constitutional standing requirements. For constitutional standing, the relevant questions are whether (1) Petitioners have suffered actual or imminent injury that is concrete and particularized; (2) the injury is fairly traceable to the challenged action; and (3) it is likely to be redressed by a favorable decision. Reytblatt, 105 F.3d at 721 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). First, the Petitioners' injury is the NRC's issuance of the license for PFS to construct and operate an interim spent fuel storage facility. It is true that PFS has not yet begun construction of the facility, nor can it do so until it obtains a favorable decision on the lease. Nevertheless, the NRC has granted PFS a "formal legal license," which has "create[d] adverse effects of a strictly legal kind," contrary to Petitioners' interests, that traditionally "have qualified as harm" Ohio Forestry Ass'n, 523 U.S. at 733 (paraphrasing Los Angeles & S. L. R. Co., 273 U.S. at 309-10 (Brandeis, J.). Second, the harm is directly traceable to the challenged action: the NRC's issuance of the PFS license. And third, this Court can redress the harm by a decision in

Petitioners' favor. Thus, Petitioners meet the constitutional standing requirements to have standing to challenge the PFS license. See Bullcreek, 359 F.3d at 540 (holding that Utah met the requirements of constitutional standing) (citing Private Fuel Storage, LBP-98-7, 47 N.R.C. at 169 (JA0019)).

City of Orrville v. FERC, 147 F.3d 979 (D.C. Cir. 1998) is not to the contrary. In Orrville, this Court held that petitioner Pike Island Hydro Associates ("PIHA") did not have standing to challenge a FERC order amending another entity's license because PIHA's interest was too attenuated, and thus its injury too speculative to satisfy the constitutional requirements of standing. Id. at 986. According to PIHA, in approving the license amendment, FERC failed to consider the adverse consequences that would result to the potential development project PIHA was pursuing. Id. at 984. PIHA, however, neither possessed nor had applied for a license for the potential development project. Id. at 987. In the instant case, PFS has applied for and obtained a license from the NRC, which gives it a legal right to construct and operate the spent fuel storage facility. Petitioners opposed the license that the NRC has granted PFS and, as previously discussed, have interests protected under the AEA that are directly harmed by the issuance of the license. Thus, Orrville is inapposite here.

Respectfully submitted,

Tim Vollmann
Attorney for Skull Valley Band of
Goshute Indians

Jay E. Silberg
Paul A. Gaukler
Pillsbury Winthrop Shaw Pittman LLP
Attorneys for Private Fuel
Storage, L.L.C.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OHNGO GAUDADEH DEVIA, et al., Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, Respondents, and PRIVATE FUEL STORAGE, L.L.C. and SKULL VALLEY BAND OF GOSHUTE INDIANS, Intervenors.	)	Nos. 05-1419, 05-1420, and 06-1087 (consolidated)

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Supplemental Brief of Intervenors Private Fuel Storage, L.L.C. and Skull Valley Band of Goshute Indians were served upon the following by United States mail, first class, postage prepaid, and where indicated by asterisk by electronic mail as agreed to by the parties, on this 23rd day of March, 2007:

*John F. Cordes, Jr., Esq.
Solicitor
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Alberto Gonzales, Esq.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 20530

*Tim Vollmann, Esq.
Skull Valley Band of Goshute Indians
3301-R Coors Road, N.W., Suite 302
Albuquerque, NM 87120

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

*Paul EchoHawk, Esq.
EchoHawk Law Offices
151 North 4th Avenue, Suite A
P.O. Box 6119
Pocatello, ID 83205-6119

*Roy T. Englert, Jr.
Noah A. Messing
Robbins, Russell, Englert, Orseck & Untereiner, LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006

*Martin G. Malsch
Egan, Fitzpatrick, Malsch & Cynkar, PLLC
8300 Boone Boulevard, Suite 340
Vienna, VA 22182
Attorney for Appellants

Mark L. Shurtleff, Attorney General
Denise Chancellor, Assistant. Attorney General
Fred G. Nelson, Assistant. Attorney General
James R. Soper, Assistant. Attorney General
Connie Nakahara, Special Asst. Attorney General
Attorneys for the State of Utah
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114-0873

*Michael A. Bauser
Nuclear Energy Institute
1776 I Street, N.W., Suite 400
Washington, DC 20006-3708
Amici Curiae

Dated: March 23, 2007

Jay E. Silberg

400547607

Addendum

ADDENDUM

5 U.S.C. § 706(2)(a) A-1

28 U.S.C. § 2344 ..... A-2

28 U.S.C. § 2401(a) A-3

National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 § 384 (2006) A-4

NRC License No. SNM-2513, License for Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste (Feb. 21, 2006) A-5

5 U.S.C.A. § 706

C

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 7--JUDICIAL REVIEW

➡§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 1009(e)	June 11, 1946, ch. 324, § 10(e), 60 Stat. 243.

Current through P.L. 110-14 approved 03-21-07

28 U.S.C.A. § 2344

C

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI--PARTICULAR PROCEEDINGS
CHAPTER 158--ORDERS OF FEDERAL AGENCIES; REVIEW

→§ 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 1034	Dec. 29, 1950, c. 1189, § 4, 64 Stat. 1130.

Current through P.L. 110-14 approved 03-21-07

END OF DOCUMENT

28 U.S.C.A. § 2401

C

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI--PARTICULAR PROCEEDINGS
CHAPTER 161--UNITED STATES AS PARTY GENERALLY

→§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Current through P.L. 110-14 approved 03-21-07

END OF DOCUMENT

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006

and Management Act of 1976 (43 U.S. C. 1712) for Federal lands located in the Utah Test and Training Range in consultation with the Secretary of Defense. As part of the required consultation in connection with a proposed revision of a land use plan, the Secretary of Defense shall prepare and transmit to the Secretary of the Interior an analysis of the military readiness and operational impacts of the proposed revision within six months of a request from the Secretary of the Interior.

SEC. 384. DESIGNATION AND MANAGEMENT OF CEDAR MOUNTAIN WILDERNESS, UTAH.

National Wilderness Preservation System. 16 USC 1132 note.

(a) DESIGNATION.—Certain Federal lands in Tooele County, Utah, as generally depicted on the map entitled "Cedar Mountain Wilderness" and dated March 7, 2004, are hereby designated as wilderness and, therefore, as a component of the National Wilderness Preservation System to be known as the Cedar Mountain Wilderness Area.

(b) WITHDRAWAL.—Subject to valid existing rights, the Federal lands in the Cedar Mountain Wilderness Area are hereby withdrawn from all forms of entry, appropriation, or disposal under the public land laws, from location, entry, and patent under the United States mining laws, and from disposition under all laws pertaining to mineral and geothermal leasing, and mineral materials, and all amendments to such laws.

(c) MAP AND DESCRIPTION.—

(1) TRANSMITTAL.—As soon as practicable after the date of the enactment of this Act, the Secretary of the Interior shall transmit a map and legal description of the Cedar Mountain Wilderness Area to the Committee on Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate.

(2) LEGAL EFFECT.—The map and legal description shall have the same force and effect as if included in this Act, except that the Secretary of the Interior may correct clerical and typographical errors in the map and legal description.

(3) AVAILABILITY.—The map and legal description shall be on file and available for public inspection in the office of the Director of the Bureau of Land Management and the office of the State Director of the Bureau of Land Management in the State of Utah.

(d) ADMINISTRATION.—Subject to valid existing rights and this subtitle, the Cedar Mountain Wilderness Area shall be administered by the Secretary of the Interior in accordance with the provisions of the Wilderness Act, except that any reference in such provisions to the effective date of the Wilderness Act (or any similar reference) shall be deemed to be a reference to the date of the enactment of this Act.

(e) LAND ACQUISITION.—Any lands or interest in lands within the boundaries of the Cedar Mountain Wilderness Area acquired by the United States after the date of the enactment of this Act shall be added to and administered as part of the Cedar Mountain Wilderness Area.

(f) FISH AND WILDLIFE MANAGEMENT.—As provided in section 4(d)(7) of the Wilderness Act (16 U.S.C. 1133(d)(7)), nothing in this subtitle shall be construed as affecting the jurisdiction of the State of Utah with respect to fish and wildlife on the Federal lands located in that State.

(g) GRAZING.—Within the Cedar Mountain Wilderness Area, the grazing of livestock, where established before the date of the enactment of this Act, shall be permitted to continue subject to such reasonable regulations, policies, and practices as the Secretary of the Interior considers necessary, as long as such regulations, policies, and practices fully conform with and implement the intent of Congress regarding grazing in such areas, as such intent is expressed in the Wilderness Act, section 101(f) of Public Law 101–628 (104 Stat. 4473), and appendix A of the Report of the Committee on Interior and Insular Affairs to accompany H.R. 2570 of the 101st Congress (H. Rept. 101–405).

(h) BUFFER ZONES.—Congress does not intend for the designation of the Cedar Mountain Wilderness Area to lead to the creation of protective perimeters or buffer zones around the wilderness area. The fact that nonwilderness activities or uses can be seen or heard within the wilderness area shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area.

(i) RELEASE FROM WILDERNESS STUDY AREA STATUS.—The lands identified as the Browns Spring Cherrystem on the map entitled "Proposed Browns Spring Cherrystem" and dated May 11, 2004, are released from their status as a wilderness study area, and shall no longer be subject to the requirements of section 603(c) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1782(c)) pertaining to the management of wilderness study areas in a manner that does not impair the suitability of those areas for preservation of wilderness.

SEC. 385. RELATION TO OTHER LANDS.

Nothing in this subtitle shall be construed to affect any Federal lands located outside of the covered wilderness or the management of such lands.

TITLE IV—MILITARY PERSONNEL AUTHORIZATIONS

SUBTITLE A—ACTIVE FORCES

Sec. 401. End strengths for active forces.
Sec. 402. Revision in permanent active duty end strength minimum levels.
Sec. 403. Additional authority for increases of Army and Marine Corps active duty end strengths for fiscal years 2007 through 2009.

SUBTITLE B—RESERVE FORCES

Sec. 411. End strengths for Selected Reserve.
Sec. 412. End strengths for reserves on active duty in support of the reserves.
Sec. 413. End strengths for military technicians (dual status).
Sec. 414. Fiscal year 2006 limitation on number of non-dual status technicians.
Sec. 415. Maximum number of reserve personnel authorized to be on active duty for operational support.

SUBTITLE C—AUTHORIZATION OF APPROPRIATIONS

Sec. 421. Military personnel.
Sec. 422. Armed Forces Retirement Home.

Subtitle A—Active Forces

10 USC 115 note.

SEC. 401. END STRENGTHS FOR ACTIVE FORCES.

(a) IN GENERAL.—The Armed Forces are authorized strengths for active duty personnel as of September 30, 2006, as follows:

NRC FORM 588
(10-2000)
10 CFR 72

U. S. NUCLEAR REGULATORY COMMISSION

LICENSE FOR INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974 (Public Law 93-438), and Title 10, Code of Federal Regulations, Chapter 1, Part 72, and in reliance on statements and representations heretofore made by the licensee, a license is hereby issued authorizing the licensee to receive, acquire, and possess the power reactor spent fuel and other radioactive materials associated with spent fuel storage designated below; to use such material for the purpose(s) and at the place(s) designated below; and to deliver or transfer such material to persons authorized to receive it in accordance with the regulations of the applicable Part(s). This license shall be deemed to contain the conditions specified in Section 183 of the Atomic Energy Act of 1954, as amended, and is subject to all applicable rules, regulations, and orders of the Nuclear Regulatory Commission now or hereafter in effect and to any conditions specified herein.

Licensee		
1. Private Fuel Storage, Limited Liability Company	3. License No.	SNM-2513
	Amendment No.	0
2. Private Fuel Storage Facility 1 Oniqui Road Reservation of the Skull Valley Band of Goshute Indians Grantsville, UT 84029	4. Expiration Date	February 21, 2026
	5. Docket or Reference No.	72-22

6. Byproduct, Source, and/or Special Nuclear Material	7. Chemical and/or Physical Form	8. Maximum Amount That Licensee May Possess at Any One Time Under This License
A. Spent nuclear fuel elements from commercial nuclear utilities licensed pursuant to 10 CFR Part 50 and associated radioactive materials related to the receipt, transfer, and storage of that spent nuclear fuel.	A. Intact fuel assemblies, damaged fuel assemblies, and fuel debris as allowed by Certificate of Compliance No. 1014, Amendment 0, for the HI-STORM 100 Storage Cask System, modified as described in paragraph 9 below.	A. 40,000 Metric Tons of Uranium in the form of intact spent fuel assemblies, damaged fuel assemblies, and fuel debris. In addition, the cumulative amount of material received and accepted during the licensed term of the facility may not exceed 40,000 Metric Tons of Uranium.

9. Authorized Use: The material identified in 6.A and 7.A above is authorized for receipt, possession, storage, and transfer in the Private Fuel Storage Facility (PFSF), as described in the PFSF Safety Analysis Report (SAR) dated June 20, 1997, as revised or supplemented through Revision 22 dated November 21, 2001, and as may be further supplemented and amended in accordance with 10 CFR 72.70 and 10 CFR 72.48. Storage is authorized only in casks designed in accordance with Certificate of Compliance No. 1014, Amendment 0, for the HI-STORM 100 Storage Cask System, modified to incorporate the lid shims and weld modifications described in Holtec Report HI-2033134, as revised (PFS Hearing Exh. 257, pp. 7-14 through 7-16, 8-28, and Figures 26A and 26B).

10. Authorized Place of Use: The licensed material is to be received, possessed, transferred, and stored at the PFSF, on the Reservation of the Skull Valley Band of Goshute Indians geographically located within Tooele County, Utah.

11. The Technical Specifications contained in the Appendix attached hereto are incorporated into the license. The licensee shall operate the installation in accordance with the Technical Specifications in the Appendix. The Appendix contains Technical Specifications related to environmental protection to satisfy the requirements of 10 CFR 72.44(d)(2).

12. The licensee shall comply with the "Environmental Conditions" specified in Section 9.4.2, Mitigation Measures, of the "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 (December 2001)

13. The licensee shall submit a Final Safety Analysis Report within 90 days from the date of this license that incorporates the accident analyses and commitments provided by PFS in the U.S. Nuclear Regulatory Commission's (NRC's) adjudicatory proceeding on the PFS license application, concerning aircraft crash and munitions impact events.

14. The design, construction, and operation of the ISFSI shall be accomplished in accordance with the NRC's regulations specified in Title 10 of the *Code of Federal Regulations*. All commitments to applicable Commission Regulatory Guides and to applicable engineering and construction codes shall be met.

15. Pursuant to 10 CFR 72.7, the licensee is hereby exempted from the provisions of 10 CFR 72.102(f)(1) regarding the seismic design criteria of 10 CFR Part 100, Appendix A. The exemption to 10 CFR 72.102(f)(1) allows the licensee to use a Probabilistic Seismic Hazards Analysis methodology to calculate the design earthquake values to be used in the facility design.

16. The licensee shall follow the approved Private Fuel Storage Quality Assurance Program Description, dated August 30, 1996, as supplemented by Chapter 12, Quality Assurance, of the Safety Analysis Report. Changes to the plan are subject to Commission approval in accordance with 10 CFR Part 72, Subpart G.

17. The licensee shall follow the "Emergency Plan, Private Fuel Storage Facility," Revision 11 dated March 30, 2001, and as further supplemented and revised in accordance with 10 CFR 72.44(f).

18. The licensee shall:

    (1) follow the "Physical Protection Plan, Private Fuel Storage Facility," Revision 2 dated June 8, 1999, as it may be further amended under the provisions of 10 CFR 72.44(e) and 72.186;

    (2) follow the "Safeguards Contingency Plan, Private Fuel Storage Facility," Revision 1 dated June 8, 1999, as it may be further amended under the provisions of 10 CFR 72.44(e) and 72.186; and

    (3) follow the "Security Training and Qualification Plan, Private Fuel Storage Facility," Revision 1 dated June 8, 1999, as it may be further amended under the provisions of 10 CFR 72.44(e) and 72.186.

19. Construction of the PFSF shall not commence before funding (equity, revenue, and debt) is fully committed, that is adequate to construct a facility with the initial capacity as specified by the licensee to the NRC. Construction of any additional capacity beyond the initial capacity amount shall commence only after funding is fully committed that is adequate to construct such additional capacity.

20. The licensee shall not commence operation of the PFSF unless it has in place pass-through service contracts with its customers in substantially the form submitted to and approved by the Atomic Safety and Licensing Board, covering all costs relating to the customers' spent fuel, including common expenses of the PFSF, throughout the storage term for all spent fuel accepted at the PFSF.

21. The licensee shall:

    (1) include in its service contracts provisions requiring customers to retain title to the spent fuel stored, and allocating legal and financial liability among the licensee and the customers;

    (2) include in its service contracts provisions requiring customers to provide periodically credit information, and, where necessary, additional financial assurances such as guarantees, prepayment, or payment bond;

    (3) include in its service contracts a provision requiring the licensee not to terminate its license prior to furnishing the spent fuel storage services covered by the service contract; and

    (4) obtain onsite and offsite insurance coverage in the amounts committed to by PFS in the adjudicatory proceedings on the PFS license application.

22. The licensee shall:

(1) Simulated Stuck Lid Removal of HI-STORM 100 (Rev. 0) Cask Lids With Shims.

Before the initial receipt of spent nuclear fuel at the facility, the licensee shall perform an operational test using the cranes specified in the licensee's SAR, and such other necessary or appropriate ancillary equipment, to demonstrate that it is capable of removing the HI-STORM 100 storage cask lid under conditions which simulate resistance to movement between the cask lid shims and the overpack inner shell. The licensee shall provide notice to the NRC staff 15 days prior to the conduct of this test, and the results of the test shall be documented and available for inspection by the NRC staff.

(2) Assurance of Fit of HI-STORM 100 (Rev. 0) Cask Lids With Shims.

Prior to inserting a multipurpose canister (MPC) containing spent fuel into each new or re-used HI-STORM 100 storage cask at the facility, the licensee shall conduct a test (although not necessarily in the Canister Transfer Building) of each new or re-used cask to assure the fit of the spent fuel storage cask lid with shims. The licensee shall fully insert the concrete and steel storage cask lid into the particular concrete and steel storage cask intended to be used with each such lid, in the configuration in which the lid and cask will be used to store spent fuel, release the lifting mechanism of the crane, re-attach it, and then remove the lid from the cask. The capacity of the crane used to insert and remove the cask lid shall not exceed that of the cranes located in the Canister Transfer Building used to perform lid placement or removal. The results of each such test shall be documented and available for inspection by the NRC staff.

23. The licensee shall submit a Startup Plan to the NRC at least 90 days prior to receipt and storage of spent fuel at the facility.

24. Prior to removing the shipping cask closure lid, the gas inside the shipping cask shall be sampled to verify that the canister confinement boundary is intact.

25. This license is effective as of the date of issuance shown below.

FOR THE NUCLEAR REGULATORY COMMISSION

William H. Ruland

William H. Ruland, Deputy Director
Licensing and Inspection Directorate
Spent Fuel Project Office
Office of Nuclear Material Safety
and Safeguards

Date of Issuance February 21, 2006

Attachment: Appendix A - Technical Specifications