ORAL ARGUMENT SCHEDULED FOR APRIL 24, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 05-1419, 05-1420, and 06-1087

OHNGO GAUDADEH DEVIA, and
STATE OF UTAH,
Petitioners,

v.

U.S. NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

ON PETITIONS TO REVIEW ORDERS OF AND LICENSE ISSUED BY THE
U.S. NUCLEAR REGULATORY COMMISSION

SUPPLEMENTAL REPLY BRIEF FOR PETITIONER STATE OF UTAH

ROY T. ENGLERT, JR.
NOAH A. MESSING
Robbins, Russell, Englert, Orseck &
Untereiner LLP
1801 K Street, NW
Suite 411
Washington, DC 20006
(202) 775-4500
March 28, 2007

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* - Authorities on which we chiefly rely are marked with asterisks.

There is virtual unanimity among the parties and intervenors that have responded to this Court's March 16, 2007, order. No one urges dismissal of any of the petitions for review on either standing or ripeness grounds. No one disputes that this case will be moot if the BLM and BIA decisions remain in effect. With respect to the possibility of holding this case in abeyance, both Utah and OGD urge that course of action, NRC expressly states that it would not oppose holding this case in abeyance, and PFS takes no express position. It can perhaps be inferred, however, that PFS opposes holding the case in abeyance.

Utah will reply briefly, therefore, to the points PFS makes that could be construed as opposing deferral of judicial review. Utah will also reply briefly to NRC's suggestion (NRC Br. 7 n.5) that Utah lacks standing to advance health and safety interests, although the point is largely academic since all parties including NRC agree that Utah has standing on other grounds.

ARGUMENT

I. HOLDING THIS CASE IN ABEYANCE WOULD NOT CREATE A CATCH-22 OR RESULT IN GRIDLOCK.

We agree with NRC and PFS that judicial review should not be routinely delayed just because two or more agencies must approve a project. Here, however, the problem is not that the PFS project is *awaiting* BIA and BLM approval. It is that both BIA and BLM have *disapproved* the PFS project. As all agree, *each* of those two dis-

approvals independently suffices to preclude PFS from exercising its site-specific NRC license.

PFS has not even initiated the process for seeking judicial review of either decision, and PFS claims that it has until September 2012 to initiate that process. No one can know the outcome of that process with certainty. But the overwhelming *likelihood* is that at least one of those two decisions will be upheld under the deferential standards governing judicial review of agency action. See also NRC Supp. Br. 9.

To defer review of NRC's decision in this case, therefore, would not set a precedent for delaying review of one of two or more necessary agency approvals when a project is "on track." Rather, the precedent this Court would set is simply to defer review of one agency's approval of a project that is (at best) on life support because of other agencies' disapprovals.

We agree with NRC that the decision whether to defer review is ultimately discretionary with this Court. Furthermore, we stand ready to proceed with oral argument on April 24, 2007. We respectfully submit, however, that this Court has better things to do with its time than consider very dense and technical (yet important) challenges to decisions that underlie approval of the PFS project when NRC's own Commissioner Jaczko has recently stated that "the end result of years of regulatory work is the same as if the license had been rejected." Utah Supp. Br. Addendum 4.

II. UTAH HAS STANDING TO ADVANCE HEALTH AND SAFETY INTERESTS.

NRC agrees that Utah has standing because of its "ownership of property near the proposed site," NRC Supp. Br. 6, but rejects "Utah's additional claim to standing based on representing the health and safety interests of its citizens." *Id.* at 7 n.5. There is no dispute that Utah has standing. Any disagreement is academic: NRC disputes *one* of the many theories that give Utah standing to bring the current case.[1]

Nevertheless, NRC's position would unreasonably curtail the right of States to bring actions, so Utah must respond briefly NRC's argument. NRC itself previously held that Utah's "health, safety, and environmental interests * * * are sufficient to establish its standing in this proceeding." JA19. And "[i]t has been settled at least since 1900 that 'if the health and comfort of the inhabitants of a State are threatened,

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[1] In addition to ownership of more than 20,000 acres of school trust lands, granted to the State at statehood, located in close proximity to PFS's proposed transfer facility and proposed storage site, the State also owns a 784-acre wetland refuge for nongame fish, waterfowl, shorebirds and migratory birds, near PFS's proposed transfer facility. The State's proprietary rights also extend to the bed, exposed shorelands, and meander line of the Great Salt Lake, which lie in close proximity to the proposed ISFSI and transportation route. Furthermore, the State has the right to protect its interests as trustee for all the surface and groundwater in the State, Utah Code Ann. § 73-1-1 ("All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof:); *J.J.N.P. Co. v. State Division of Wildlife Resources*, 655 P.2d 1133, 1136 (Utah 1982) ("The State regulates the use of the water, in effect, as trustee for the benefit of the people."), and as the recognized natural resources trustee for damage recovery actions under CERCLA, 42 U.S.C. § 9607(f).

the State is the proper party to represent and defend them.'" *Massachusetts v. Laird*, 400 U.S. 886, 891 (1970) (quoting *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)).

NRC relies on an exception to the proposition that States may protect their citizens' health and safety: "A State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Co. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982). But Utah is not suing in a *parens patriae* capacity; it is asserting its own injuries, including injuries to the State that result from threats to the health and safety of Utah residents. As this Court held in the case on which NRC relies, Utah may challenge actions of federal agencies that "cause[] injury to the states as states." *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). This Court has used a generous measure to assess whether States and municipalities incur an injury. *Id.*; *City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002).

An accident at the proposed transfer facility or the ISFSI would likely threaten the health and safety of Utah first responders, firefighters, police, and other emergency workers, and also increase demands on the State's resources for medical, law enforcement, and emergency services and long-term care. Additionally, because PFS's ISFSI would be located under a military operating area used to access the Utah Test and Training Range (operated by Hill Air Force Base), it is reasonably foreseeable that, to avoid potential liability, the military would be forced voluntarily to re-

strict or eliminate military training activities currently authorized over the area proposed for the ISFSI. In addition to a decrease in military readiness and threat to national security, this action would result in socioeconomic impacts to the State, its communities, and its citizens who rely on employment at and benefits from the test and training range and the Air Force base.

Without the full use of the training range, Hill Air Force Base has the potential of becoming just another Air Force base, potentially subject to closure under the Base Closure and Realignment Act. Therefore, the test and training range is important to the vitality of Hill Air Force Base primarily because of the use of UTTR as the largest overland active combat-ready training zone in the continental United States. Hill Air Force Base is Utah's largest basic employer.[2] Reductions in its operations would have widespread negative socioeconomic impacts on Utah.

Additionally, constant nuclear shipments through Salt Lake City and storage of nuclear waste beside I-80 and at the Reservation would brand Utah as a dumping ground for nuclear waste and be detrimental to Utah's economic prosperity and its two-billion-dollar tourism industry. Utah also suffered an injury to its procedural

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[2] In 2000, Hill Air Force Base employed 11,628 civilians, 4,619 military personnel, 1,112 reservists, and 3,718 contractors for a total of 21,077 positions. An additional 12,351 jobs are estimated to be attributable to the its operations.

rights because NRC ignored the obligations that NEPA and 10 C.F.R. § 72.106(b) impose on the agency. *See Hodges v. Abraham*, 300 F.3d 432, 444 (4th Cir. 2002).

As all agree, Utah has standing in this case. Neither Utah's overall standing, nor its ability to pursue any particular issue it has briefed in this Court, has ever been questioned by any party to this proceeding.

CONCLUSION

This case should not be dismissed, but, for prudential reasons, the Court should hold this case in abeyance until the BIA and BLM decisions are overturned. If judicial review of those decisions is not sought, or they are upheld on judicial review, NRC's actions in this case should be vacated as moot.

Respectfully submitted,

Roy T. Englert/ANM

Roy T. Englert, Jr.
Noah A. Messing
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411L
Washington, D.C. 20006
(202) 775-4500

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 Assistant Attorney General
Utah Attorney General's Office
160 East 300 South
5th Floor
P.O. Box 140873
Salt Lake City, UT 84114-0873
(801) 366-0286

March 28, 2007

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B): It is proportionally spaced, has a typeface of 11 points or more, and, in accordance with the Court's Order of March 16, 2007, does not exceed 6 pages (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2)).

March 28, 2007

Noah Messing

Noah A. Messing

CERTIFICATE OF SERVICE

I hereby certify that prior to 4:00pm on March 28, 2007, a copy of the Supplemental Reply Brief For Petitioner State of Utah was served by electronic mail to counsel for the parties listed below. Additionally, two copies of the Supplemental Reply Brief For Petitioner State of Utah were served by first class mail upon the following:

John F. Cordes, Jr., Esq., Solicitor
Grace H. Kim, Esq.
Sherwin E. Turk, Esq.
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Counsel for respondent Nuclear Regulatory Commission

Michael Gray, Esq.
Attorney, Appellate Section
Environment & Natural Resources Division
Department of Justice
P.O. Box 23795 L'Enfant Station
Washington, D.C. 20026
Counsel for respondent United States

Jay E. Silberg, Esq.
Paul A. Gaukler, Esq.
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037-8007
Counsel for intervenor Private Fuel Storage, LLC

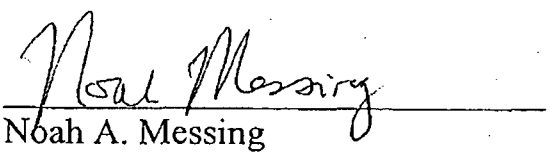
Larry EchoHawk, Esq.
Paul C. EchoHawk, Esq.
Mark A. EchoHawk, Esq.
EchoHawk Law Offices
151 North 4th Avenue, Suite A
P.O. Box 6119
Pocatello, ID 83205-6119
Counsel for petitioner Ohngo Gaudadeh Devia

Tim Vollmann, Esq.
3301-R Coors Road N.W. # 302
Albuquerque, NM 87120
Counsel for intervenor Skull Valley Band of Goshute Indians

Ellen C. Ginsberg, Esq.
Michael A. Bauser, Esq.
Anne W. Cottingham, Esq.
Nuclear Energy Institute
1776 I Street, N.W., Suite 400
Washington, D.C. 20006
Counsel for amicus curiae Nuclear Energy Institute

Joseph R. Egan, Esq.
Robert J. Cynkar, Esq.
Charles J. Fitzpatrick, Esq.
Martin G. Malsch, Esq.
2001 K Street, N.W.
Suite 400
Washington D.C. 20006
Counsel for amicus curiae State of Nevada

George Chanos, Esq., Attorney General
Marta A. Adams, Esq., Senior Deputy Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701
Counsel for amicus curiae State of Nevada



Noah A. Messing