UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	
INTERNATIONAL URANIUM (USA) CORPORATION (source material license amendment, Ashland 2 material)	Docket No. 40-8681-MLA-4 ASLBP No. 98-748-03-MLA June 28, 1999

STATE OF UTAH'S REPLY TO NRC STAFF'S AND INTERNATIONAL URANIUM (USA)CORPORATIONS' BRIEFS IN OPPOSITION TO STATE OF UTAH'S APPEAL OF LBP-99-5

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The State files this Brief pursuant to the Commission's Order, CLI-99-13 (April 26, 1999) in reply to International Uranium (USA) Corporation's ("IUC") Reply to the State of Utah's Brief on Appeal of LBP-99-5 and Envirocare of Utah, Inc.'s Amicus Curiae Brief in Support of the State ("IUC Brief") and NRC Staff Opposition to State of Utah Appeal of LBP-99-5 ("Staff Brief") filed on June 14, 1999.

Neither the Staff Brief nor the IUC Brief provide an answer to resolve the issue raised by the Alternate Feed Guidance, as well as by the State, that sham processing may occur at a uranium mill if there are no curbs on what may be introduced into the mill as alternate feed material.[1] The Staff and LBP 99-5 rely solely on the intent of the mill operator to extract some uranium. In its Brief, IUC focuses on the legislative history of the Uranium Mill Tailings Radiation Control Act of 1978 ("UMTRCA") to

[1]Proposed Position and Guidance on the Use of Uranium Mill Feed Material Other Than Natural Ores, 57 Fed. Reg. 20,525, 20,533 (1992); Final Position and Guidance on the Use of Uranium Mill Feed Materials Other Than Natural Ores, 60 Fed. Reg. 49296, 49,297 ("Alternate Feed Guidance").

advance its position, while the Staff primarily focuses on the broad definition of "ore." Neither position, however, prevents sham processing and disposal.

Contrary to the Staff and IUC's assertions, the State is not advocating a "financial test." Rather there must be objective documentation to substantiate that material is being "processed primarily for the recovery of uranium and for no other primary purpose." Alternate Feed Guidance 60 Fed. Reg. at 49,297. The Staff, IUC and LBP 99-5 have not shown how the record supports a conclusion that IUC's primary purpose is for the extraction of uranium; instead, the record supports the conclusion that IUC's primary purpose is disposal.

The State's Reply Brief addresses the legislative history of UMTRCA and IUC's so-called "presumption," the use of the Alternative Feed Guidance and financial tests, and the problems associated with uranium mills becoming a subterfuge for waste disposal facilities.

ARGUMENT

I. The Guidance is Still the Most Effective Means to Evaluate the Ashland 2 Amendment Because UMTRCA Did Not Address Alternate Feed Material, Nor Did It Create Any "Presumption" as to Processing Alternate Feed Material.

The State and IUC are in general agreement that the central issue before the Commission is whether, as required under the Alternate Feed Guidance, IUC demonstrated that the Ashland 2 material would be "processed primarily for its source material content and for no other primary purpose." IUC Brief at 5. IUC argues that

the legislative history of UMTRCA provides a clear cut answer to this question because the language "processed primarily for its source material content" comes from UMTRCA's amendment to the definition of "byproduct material." However, a close look at UMTRCA reveals that "processed primarily for" as it relates to alternate feed material does not provide the answer IUC or LBP 99-5 seeks to impose on the Commission.

In Kerr-McGee Chemical Co. v. U.S. Nuclear Regulatory Comm'n, 903 F.2d 1, (D.C. Cir. 1990), the Court of Appeals for the D.C. Circuit opined:

> A construction of 11(e)(2) is not acceptable if it will orphan mill tailings having a source material content of less than the 0.05% threshold ... [or] would exclude the offsite wastes from coverage by the regulations promulgated pursuant to Title II [of UMTRCA] that are designed to protect the public health against the hazards created by mill tailings produced in the course of the nuclear fuel cycle.

Id. at 8. IUC convolutes the discussion in Kerr-McGee and the legislative history of UMTRCA into a "presumption" that "processed primarily for" means that when IUC processes any ore (as broadly defined) in the White Mesa Mill for the extraction of uranium, it meets the definition of 11e.(2) byproduct material because the mill is part of the uranium fuel cycle. IUC Brief at 10-11. However, the concerns that the court faced in Kerr McGee and that Congress addressed under UMTRCA are absent in the case of the Ashland 2 alternate feed material. The Ashland 2 material from the Tonawanda Formerly Utilized Sites Remedial Action Plan ("FUSRAP") site is not orphaned or unregulated waste. It is already subject to the remedial scheme created by

UMTRCA.

When Congress enacted UMTRCA in 1978 there was no thought of using off-site active uranium mills to process and dispose of industrial cleanup waste from FUSRAP sites that may contain a small amount of dispersed tailings that were created over 50 years ago. Rather, the purpose of UMTRCA was twofold: (1) to provide a comprehensive remedial program at inactive mill sites in order to stabilize and control uranium mill tailings; and (2) to develop a program to regulate mill tailings at active uranium mill sites. *See* 42 U.S.C. § 7901(b)(1)-(2).

In order to accomplish the remedial purposes of UMTRCA, Congress granted the Department of Energy ("DOE") broad authority to designate inactive sites containing uranium mill tailings and to regulate the stabilization of uranium mill tailings at those sites. *See* 42 U.S.C. §§ 7912, 7918. Those remedial purposes apply to inactive mills, such as the Tonawanda FUSRAP site. Thus, DOE has adequate authority under UMTRCA to conduct the remedial actions necessary to protect the public health from the hazards associated with the Tonawanda site. Furthermore, transporting the Ashland 2 material to the White Mesa mill for disposal does not further UMTRCA's goal of protecting the public health and the environment from the hazards created by mill tailings produced half a century ago. *See* State's Brief at 13-14 (contrasting the more stringent requirements under RCRA and 10 CFR Part 61 with those for mill impoundments under 10 CFR Part 40, Appendix A).

To accomplish the second purpose of UMTRCA, Congress amended the definition of byproduct material, thereby granting NRC authority to regulate uranium mill tailings at active mill sites. 42 U.S.C. §§ 2014(e); 42 U.S.C. §§ 2111-2114. Prior to UMTRCA's change in the definition of byproduct material, uranium mill tailings were generally considered not to be classified as source material, and thus were beyond the regulatory reach of NRC. Kerr-McGee, 903 F2d. at 2-3.

An initial proposal considered under the UMTRCA legislation was to define byproduct material to be "tailings or wastes produced by the extraction or concentration of uranium or thorium from source material." Kerr-McGee, 903 F.2d at 6 (*quoting* H.R. 13382, 95th Cong., 2d Sess. § 1 (1978)). During hearings on UMTRCA, then NRC Chairman Dr. Hendrie expressed concern that the proposed definition would preclude NRC from regulating uranium tailings resulting from the processing of low grade feedstock because NRC regulations defined source material as excluding ores containing less than 0.05% of uranium or thorium. *See* 10 C.F.R. § 40.4 (1999). To guard against regulatory gaps in NRC jurisdiction, Congress amended the definition by substituting "any ore processed primarily for its source material content," for the words "source material."[2] *See* 42 U.S.C. §2014(e)(2).

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[2]*Uranium Mill Tailings Radiation Control Act of 1978: Hearings on H.R. 11698, H.R. 12229, H.R. 12938, H.R. 12535, H.R. 13049 and H.R. 13650 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce,* 95th Cong. 343-44 (1978)(statement of Joseph M. Hendrie, Chairman, NRC)("*Hearings*"). *See* exchange between Congressman Dingell and Dr. Hendrie whereby Dr. Hendrie noted that the Environmental Protection Agency should retain jurisdiction over mill tailings outside the nuclear fuel cycle and Dr. Hendrie affirmed that the "processed primarily for" change "would not leave any crevasse between the [EPA and NRC] authorities." Id. Congressman

IUC argues that the purpose for replacing the words "source material" with "any ore processed primarily for its source material content," was to limit NRC's authority to the nuclear fuel cycle and exclude tailings containing uranium, produced as a side stream of an operation primarily intended to extract a mineral other than uranium or thorium, from being considered 11(e)(2) byproduct material. *See* IUC Brief at 8-10; *see also* Staff Brief at 12. From this starting premise IUC leaps to the conclusion that Congress created a "presumption" that "ores are 'processed primarily for their source material content' so long as they are processed for the extraction of uranium in a licensed uranium mill that is part of the nuclear fuel cycle." IUC Brief at 10. There is no basis in the legislative history of UMTRCA to support IUC's proposition.

Under UMTRCA Congress was attempting to balance two objectives with respect to active mills: granting NRC authority to regulate mill tailings and avoid dual regulation of secondary uranium processing not associated with the uranium fuels cycle. There is ample evidence in the legislative history that disposal of certain wastes, such as those from phosphate ore processing, would be left for EPA to regulate under RCRA and other authorities and that the Commission desired to avoid overlapping regulatory authority. *See Hearing* at p. 342-43; IUC Brief at 8-9. Instead of the "presumption" IUC attempts to create, a more logical explanation of why Congress

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Dingell shared the same view. Id.

limited NRC's jurisdiction to the nuclear fuels cycle was to avoid overlapping and dual regulation between the EPA and the NRC. Ironically, the position taken in LBP-99-5 and by IUC on alternate feed materials present the potential for overlapping and dual regulation under 10 CFR Part 40, 10 CFR Part 61, RCRA and other waste disposal regulatory schemes that the legislation under UMTRCA was designed to prevent.

The legislative history of UMTRCA does not provide the definitive basis for determining the scope of "processed primarily for" in the definition of by-product material as it relates to alternate feed material. Furthermore, it is disingenuous of IUC to argue a congressional "presumption" because neither UMTRCA nor its legislative history addressed the use of alternate feed materials. Thus, something more than the legislative history is needed to determine whether the Ashland 2 material should be processed through the White Mesa mill. The more appropriate vehicle to make this determination is the Commission's Alternate Feed Guidance.

II. The Alternate Feed Guidance Provides an Appropriate Method to Determine Whether Alternate Feed Material May be Processed in a Licensed Uranium Mill.

The Alternate Feed Guidance instructs the Staff on how to determine whether an alternate feed material request, if processed through a licensed uranium mill, will meet the definition of 11(e)(2) byproduct material.[3] Part of this determination

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[3]To approve an alternate feed request, the Staff must determine whether the alternate feed material: (1) meets the definition of "ore"; (2) contains no listed hazardous waste; and (3) will be "processed primarily for its source material content." Id. The "primarily processes for" step has two test, the co-disposal test; and the Licensee certification and justification test. 60 Fed. Reg. at 49,296-97.

includes the licensee certification test, which the record shows that IUC, the Staff, and Presiding Officer relied upon for the Ashland 2 request.[4] To satisfy the certification test "[t]he licensee must certify under oath or affirmation that the feed material is to be processed primarily for the recovery of uranium and for no other primary purpose. The licensee must also justify, with reasonable documentation, the certification." Alternate Feed Guidance at 60 Fed. Reg. at 49,297 (*emphasis added*).[5] Clearly, the certification test shows that an inquiry into purpose of the licensee's request to process alternate feed material is necessary. IUC and the Staff argue that an inquiry into the purpose or "motive" for processing alternate feed material is inappropriate based on the legislative history of UMTRCA. IUC Brief at 15 ("the *only* question to be answered is whether it is reasonable to expect that the ore will, *in fact*, be processed for the extraction of uranium." (*emphasis in original*)); Staff Brief at 5 and 13. However, a thorough analysis of UMTRCA and its legislative history reveals that the purpose for processing the ore is critical to the determination of whether the resulting tailings are 11(e)(2) byproduct material.

As discussed in section I above, and as IUC makes clear in its Brief, one of the reasons Dr. Hendrie proposed the revision to UMTRCA's definition of 11(e)(2)

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[4]There is some confusion in the Staff's position with respect to the co-disposal test. *See* Staff Brief at 14, n.18; Technical Evaluation Report at 6. The Staff eventually concludes "the co-disposal test for non-11e(2) material was inapplicable to UISA's request." Staff Brief at 14.

[5]"The justification can be based on financial considerations, the high uranium content of the feed material, or other grounds." Id.

byproduct material was to limit the NRC's jurisdiction to the nuclear fuel cycle. IUC Brief at 8-9. Congressman Dingell, recognizing that some processing facilities outside of the nuclear fuel cycle recover uranium in amounts equivalent to licensed uranium mills, asked Mr. Hendrie why Congress should not give the NRC authority to regulate the resulting mill tailings from those facilities. *Hearings* at 344. Dr. Hendrie replied, "to keep NRC's regulatory authority primarily in the field of the nuclear fuel cycle. Not to extend this out into such things as phosphate mining . . ." *Hearings* at 344. As IUC has recognized, if ore is processed for the purpose of recovering phosphate, the mill tailings would not be considered 11(e)(2) byproduct material, even if uranium was also extracted. IUC Brief at 9-10. Thus, as Dr. Hendrie's response makes clear, the critical question in determining whether mill tailings resulting from the extraction of uranium or thorium are 11(e)(2) byproduct material, is the purpose for which the ore is processed.

In sum, not only is it appropriate to inquire into the licensee's purpose for processing alternate feed material, it is also necessary to do so in order to determine whether the resulting mill tailings qualify as 11(e)(2) byproduct material. As clearly illustrated by the State, the only reasonable conclusion that can be made from the record is that IUC's primary purpose of applying for the license amendment was to receive a four million dollar disposal fee rather than processing the Ashland 2 material for its source material content. *See* State of Utah's Brief on Appeal of LBP-99-5 at 19.

III. While the State is Not Advocating a "Financial Test" There are no Other Grounds, Other Than a Financial Disposal Incentive, to Substantiate the Primary Purpose of Processing the Ashland 2 Material.

The Staff and IUC erroneously claim that the State is advocating a "financial test." IUC Brief at 12-13; Staff Brief at 15. Rather, the State is advocating that there must be some objective documentation to substantiate that the alternate feed material is being "processed primarily for extraction of source material and for no other primary purpose." Alternate Feed Guidance 60 Fed. Reg. at 49, 297. The Staff and IUC have not shown how the record supports a conclusion other than IUC's primary purpose of processing the Ashland 2 material is for disposal, not the extraction of uranium.

The State's position is that when there is a huge disparity between the disposal fee paid to a mill operator for receipt of cleanup waste and the concentration of uranium content in the waste is extremely low (*e.g.*, an average of 0.008%), then there should be a presumption that licensee is engaged in sham processing and disposal is the primary purpose for processing the waste. To say that the State calls for a "detailed financial review" misses the point.[6] Staff Brief at 15. Rather, a simple computation of the licensee's proof in the license amendment submittal of the uranium content in the alternate feed material and the current value of yellow cake will give the Staff an

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[6] Had the State not presented evidence to show the projected value of uranium in the Ashland 2 material, and the methodology it used to arrived at its conclusions, IUC and the Staff, no doubt, would have claimed that the State had provided no basis for its assertions as to the value of uranium in the Ashland 2 material.

indication whether there is a wide disparity between the disposal fee and any uranium value to be extracted from the waste.

Furthermore, there is no merit in IUC's argument that fluctuations in the market price of uranium would lead to the material being regulated by NRC one day and by RCRA on another. IUC Brief at 13-14. A look at the facts in this case shows otherwise. The disposal fee received by IUC for the receipt of the Ashland 2 material is almost 60 times the value of uranium recovery.[7] In other words, the price of uranium would have to skyrocket between the time of license approval and actual processing in order for IUC's contention to even conceivably occur.

IUC inappropriately attempts to prop up its position by introducing evidence into the record during this appeal. IUC Brief at Exh. 1.[8] The affidavit appended to IUC Brief is an attempt to show that IUC may have extracted 8,000 lbs of uranium from the Ashland 2 materials.[9] However, a close look at the wording of the Affidavit

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[7] This ratio is based on the recovery of 8,000 lbs of uranium. *See* IUC Brief, Exhibit 1 (Robert's Affidavit). However, the ratios would be higher if the amount of uranium actually extracted is less than 8,000 pounds and the milling and disposal costs were subtracted from the uranium value. *See* discussion in following two paragraphs of this brief. In fact, IUC may not make any money at all from the uranium extracted from the Ashland 2 material when mill overhead, processing, operating and disposal costs are taken into account.

[8] On appeal, the Presiding Officer's Initial Decision should be judged in light of the record on which the Presiding Officer's decision was based. *See* Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 36 (1981); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 720 n.51 (1985).

[9] In any event, the value of 8,000 lbs of uranium oxide in today's market is worth only $85,000 based on the latest UX report shows uranium oxide (U_3O_8) at $10.65 per pound (8,000 lbs x $10.65 = $85,200). From this must be deducted mill operating costs and processing, handling and disposal costs.

shows otherwise. Mr. Roberts testifies as follow:

> Approximately 8,000 pounds of uranium has been extracted from the Ashland 2 materials, as a result of processing of those materials at the Mill, some of which uranium has been dried and packaged as of this date [June 14, 1999] and the remainder of which remains in the Mill circuit in solution and will continue to be recovered during the continued processing of other alternate feed materials and conventional ores at the Mill. (*emphasis added).*

It should be noted that Mr. Roberts has not testified as to the quantity of yellow cake that IUC dried and packaged from the Ashland 2 material; a figure readily available to IUC but surprisingly absent in the affidavit. Instead, IUC obliquely implies that it extracted at least 8,000 lbs of uranium from the Ashland 2 material. The statement in the affidavit is misleading. IUC operates a batch process. Any uranium in solution in the mill circuit prior to processing the Ashland 2 material would have been picked up in processing the Ashland 2 material. Likewise, any Ashland 2 material in solution in the circuit will be picked up during the processing of the next batch of alternate feed material. Thus, IUC may be "double counting" the uranium in solution in the mill circuit. What the affidavit suggests is that IUC did not even obtain its lowest estimate of 8,000 lbs of uranium from the Ashland 2 material.

The Alternate Feed Guidance requires an inquiry into the purpose for which the alternate feed material will be processed. And one of those purposes listed in the Guidance is "financial." If a financial purpose can justify part of the certification under the Guidance, then, likewise, financial evidence that leads to the conclusion that

disposal is the primary purpose is also appropriate. In this case, the four million dollar financial reward of running alternate feed material through a uranium mill leads to the conclusion that disposal is the primary purpose, not processing for uranium recovery. The State agrees that a "financial test" is not the definitive means by which the Ashland 2 material should be judged. However, neither IUC, nor the Staff, nor LBP 99-5 provide any basis under other grounds to justify a conclusion other than disposal is IUC's primary purpose.

The Staff argues that to require more documentation from the Applicant to satisfy the "other grounds" test under the Guidance would lead to exclusion of low grade feed stock from the Commission's revised definition of "ore." Staff Brief at 14. With all due respect, the State believes that the Staff is refusing to deal with the very real potential of converting active uranium mills into disposal facilities. Simply because NRC may have the regulatory authority to regulate low grade ores to be processed in uranium mills, does not mean that NRC is compelled to exercise that authority. Where disposal is the primary purpose and there is overlapping regulatory jurisdiction and concern that cleanup waste may contain hazardous waste, not to mention the fact that mill tailings impoundments do not meet disposal standards, there comes a time when NRC Staff should turn down a licensee's request to process wastes primarily for receipt of a disposal fee. The State maintains that the record shows that the Ashland 2 material fits this mold.

IV. Uranium Mills Will Become Subterfuges for Waste Disposal Facilities if LBP-99-5 is Allowed to Stand.

The Alternate Feed Guidance endeavored to balance two competing and conflicting objectives: (1) under the new expansive definition of ore, allow almost any material to be processed in a licensed uranium mill; and (2) prevent sham processing by placing safeguards on mills becoming a subterfuge to disguise waste disposal facilities.

The balance under the Guidance is destroyed if the Commission follows LBP 99-5 and the path IUC recommends. There is no need for a uranium mill to operate efficiently if profit from waste disposal fee is the driving force.[10] Consequently, the arguments of IUC and the Staff about mill efficiency used to support "other grounds" under the licensee certification test are not credible. Furthermore, uranium mill tailings impoundments fail to meet the disposal standards imposed on other facilities under RCRA or other disposal schemes.[11]

UMTRCA was designed to protect public health and the environment from the mess that was created from the past processing of uranium ores. There is a very real

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[10] This concern is amplified under the circumstances of this case because IUC agreed to rebate a portion of the "recycling" fee depending on the uranium content of the Ashland 2 material. Therefore, IUC has a disincentive to efficiently process the Ashland 2 material.

[11]The State agrees with IUC that 10 CFR Part 61 and 10 CFR Part 40, Appendix A are intended "to address different types of materials." IUC Brief at n. 29. The same holds true for hazardous and mixed waste to be disposed of under RCRA. That is precisely the State's point: uranium mills tailings impoundments are not designed to be the ultimate repository for low level radioactive waste, hazardous materials, mixed waste, PCB, etc., etc. The performance standards and the technology of the 1970's and early 1980's used in the design of uranium mill tailings impoundments under Part 40, Appendix A, have been surpassed under waste disposal schemes by requirements such as groundwater modeling, double liners, and more rigorous performance standards. *See* State's Brief on Appeal of LBP 99-5 at 20-22.

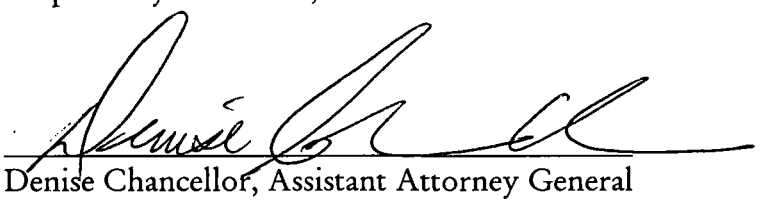
concern that if the Commission sanctions active uranium mills as subterfuges for waste disposal facilities, the remedial concerns that UMTRCA was designed to address will be re-visited upon us. Given the ubiquitous nature of uranium present in earthen materials, IUC's proposal that processing alternate feed through a uranium mill will only be considered a sham if it is unreasonable to expect that no uranium will be extracted affords no protection against sham processing. IUC Brief at 15, 25. The Presiding Officer in LBP-99-5 takes the same tack by suggesting that if milling the alternate feed will occur, it is not a sham. LBP 99-5 at 6. The Staff, IUC and the Presiding Officer do not make the claim that NRC must approve alternate feed amendment requests in order to fill regulatory gaps. Simply put, there are no regulatory gaps in established programs designed to protect the public health and environment from the land disposal of cleanup waste. Instead, IUC and LBP 99-5 strive to lead the Commission down the path of regulatory overlap, concurrent jurisdiction and relaxed environmental standards.

CONCLUSION

For the foregoing reasons, the Commission should not uphold LBP 99-5 or the Staff's approval of the IUC Ashland 2 license amendment request.

Dated this 28th day of June, 1999.

Respectfully submitted,



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I hereby certify that a copy of STATE OF UTAH'S REPLY TO NRC STAFF'S AND INTERNATIONAL URANIUM (USA) CORPORATION'S BRIEFS IN OPPOSITION TO STATE OF UTAH'S APPEAL OF LBP-99-5, dated June 28, 1999, was served on the persons listed below by U. S. Mail, first-class, postage prepaid, and by e-mail (unless otherwise noted) this 28th day of June, 1999.

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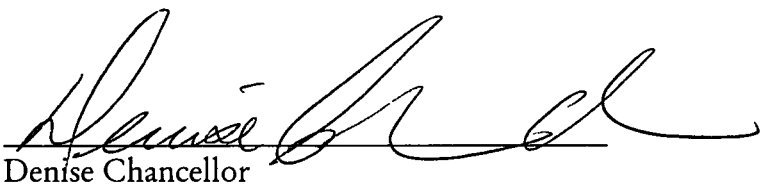

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