

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket No. 72-22-ISFSI
	)	
PRIVATE FUEL STORAGE, LLC	)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel	)	
Storage Installation)	)	January 5, 1998

**STATE OF UTAH'S RESPONSE TO CASTLE ROCK'S  
NOTICE OF WITHDRAWAL**

The State files this response pursuant to Castle Rock Land and Livestock, L.C., and Skull Valley Company, Ltd.'s, ("Castle Rock") notice of withdrawal and the Board's December 22, 1998, Order (Schedule for Responses to Notice of Withdrawal).

In its April 22, 1998 Memorandum and Order, the Licensing Board consolidated eight of Castle Rock's contentions with Utah contentions and Confederated Tribes of the Goshute Reservation ("Confederated Tribes") contentions. Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP 98-7, 47 NRC 142, 182 (1998). The Board also admitted three other Castle Rock contentions that were not consolidated with other contentions.

The State wishes to pursue all facets of the consolidated contentions and two of Castle Rock unconsolidated contentions, Castle Rock 17 and 20. Most of the Castle Rock contentions are inextricably intertwined with the State's Contentions. To the extent that Castle Rock raises issues independent of State issues, the State meets the late-filed contention criteria for seeking to adopt them now.

## **I. FACTUAL DISCUSSION**

Castle Rock originally submitted its contentions on November 24, 1997. *See* Contentions of Petitioners Castle Rock, et al. Upon reviewing Castle Rock's contentions, and during the time permitted by the Board to respond to other intervenors' conventions, the State sought to adopt them as its own.<sup>1</sup> State's Response to Contentions of other parties (December 19, 1998). *See also* Board's Order of October 17, 1997.

In LBP-98-7, the Board admitted part or all of eleven contentions filed by Castle Rock. Eight of Castle Rock's contentions were consolidated with contentions filed by other parties.<sup>2</sup> 47 NRC at 251-257 (Appendix A). In consolidating the contentions, the

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<sup>1</sup>At the pre-hearing conference the State articulated its concern about adopting contentions if a party were to drop out of the proceeding. Tr. at 89 (January 27-29, 1998).

<sup>2</sup> These eight contentions were consolidated as follows:  
Part of Castle Rock 7 (Inadequate Financial Qualifications) consolidated with both Utah E (Financial Assurance) and Confederated Tribes F while another part of Castle Rock 7 was consolidated with Utah S (Decommissioning);

Castle Rock 6 (Emergency Planning and Safety Analysis) consolidated with both Utah K (Inadequate Consideration of Credible Accidents) and Confederated Tribes B;

Castle Rock 8 (Groundwater Quality Degradation) consolidated with Utah O (Hydrology);

Castle Rock 10 (Retention Pond) consolidated with Utah O;

Castle Rock 12 (Permits, Licenses and Approvals) consolidated with Utah T (Permits);

Castle Rock 13 (Inadequate Consideration of Alternatives) consolidated with Utah AA (Range of Alternatives);

Castle Rock 16 (Impacts on Flora Fauna and Existing Land Uses) consolidated with Utah DD (Ecology and Species); and

Castle Rock 22 (Road Expansion Authorization) consolidated with Utah T.

Board blended language from contentions submitted by the State, Castle Rock, and the Confederated Tribes, into eight single contentions.

The Board also admitted three Castle Rock contentions (17, 20 and 21), which were not consolidated. In addition, the Board allowed Castle Rock to adopt all of Utah's admitted contentions as worded in Appendix A. 47 NRC at 182. In its November 23, 1997 "Statement of Contentions," the Confederated Tribes adopted some of the Castle Rock's contentions and bases, including Castle Rock's Inadequate Financial Qualifications contentions. The Board allowed Confederated Tribes to adopt Castle Rock's contentions but the Board denied the State's request to adopt Castle Rock's contentions, on the ground that the State had not addressed the late-filing standard. Id.

In LBP-98-7, the Board assigned the State of Utah the lead on five contentions,<sup>3</sup> and later approved the State as the lead on the other two.<sup>4</sup> The State has vigorously pursued all of those contentions through the process of informal discovery.

On December 21, 1998, Castle Rock notified the Board and parties of its intention

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<sup>3</sup>The five contentions assigned to the State as lead are:

1. Utah K/Castle Rock 6/Confederated Tribes B - Inadequate Consideration of Credible Accidents;
  2. Utah O/Castle Rock 8 and 10 - Hydrology;
  3. Utah S/Castle Rock 7 - Decommissioning;
  4. Utah T/Castle Rock 10, 12, and 22 - Inadequate Assessment of Required Permits and Other Entitlements; and
  5. Utah DD/Castle Rock 16 - Ecology and Species.
- 47 NRC at 243.

<sup>4</sup>The other two are (1) Utah E/Castle Rock 7/Confederated Tribes F - Financial Assurance, where the lead was initially assigned to Confederated Tribes and (2) Utah AA/Castle Rock 12 - Range of Alternatives, where the lead was initially assigned to Castle Rock (47 NRC at 243). See Memorandum and Order, May 20, 1998, and Order, November 27, 1998.

to voluntarily withdraw from the proceeding with prejudice. Castle Rock gave no other grounds for its withdrawal request.

## **II. ARGUMENT**

In general, where there is more than one intervenor in a case, one intervenor's withdrawal serves to remove from litigation the withdrawing party's contentions that are not being co-sponsored by the remaining intervenors. Houston Lighting & Power Co. (South Texas Project, Units 1 & 2) ALAB-799, 21 NRC 360 (1985); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2) LBP-86-22, 24 NRC 103 (1986). To adopt such contentions, an intervenor must essentially meet the late filed standards in 10 CFR § 2.714(a). To the extent that Castle Rock's consolidated and unconsolidated contentions differ from the State's they meet the late-filed contention standard.

### **A. Consolidated Contentions**

The majority of Castle Rock's contentions are consolidated contentions whose admitted wording is encompassed by or extremely similar to contentions sponsored by the State of Utah or the Confederated Tribes. To the extent that the wording of these contentions is minimally different, expansion of the contention is warranted under the late-filed contention standard.

The language for the following admitted contentions is identical to Utah's admitted contentions: Decommissioning (Utah S, part of Castle Rock 7), Range of Alternatives (Utah AA, Castle Rock 13) and Ecology and Species (Utah DD, Castle Rock

16). Also, Inadequate Consideration of Credible Accidents (Castle Rock 6) is identical to Utah K with the exception of the phrase "the effects of wildfires," whose source is Confederated Tribes Contention B. 47 NRC at 235.

The remaining consolidated contentions, Financial Assurance (Utah E, Castle Rock 7, Confederated Tribes F), Hydrology (Utah O, Castle Rock 8 and 10) and Permits (Utah T, Castle Rock 10, 12 and 22) contain language primarily from the State's contentions. However, parts of each contention reflect the interweaving of language submitted by the State, Castle Rock, and/or the Confederated Tribes.

To the slight extent that Castle Rock's contribution to these consolidated contentions differs from the State's, the State meets the late-filed contention standard for adopting them. First, the State has good cause for adopting them now because Castle Rock's recent notice of its intention to withdraw from the proceeding constitutes the first formal notice the State has received that Castle Rock will not pursue the issues it has raised in this proceeding. The State had no reason to believe, prior to Castle Rock's recent filing, that Castle Rock would not pursue the issues with vigor.

The State also has good cause because of the nature of the Board's decision to consolidate the contentions. The language of the admitted consolidated contentions weaves together the issues raised by various intervenors, such that they are inextricably intertwined.<sup>5</sup> It would be virtually impossible, without completely rewriting the

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<sup>5</sup>The Board recognized this congruence of contentions when it consolidated Castle Rock's contentions with Utah's contentions. A typical statement by the Board in consolidating contentions is: "Because of the similarity of this contention [e.g., Castle Rock 8] and its supporting bases to Utah [O],

contention, to parse out any solitary contribution to the contention from Castle Rock. In sub-contention five of the Permits Contention, for example, the reference to the requirements to obtain a Utah Groundwater Discharge Permit comes from the State's contention T, while the specific reference to Utah Groundwater Protection Rules comes from Castle Rock Contention 10(c). To obtain a Utah Groundwater Discharge Permit, however, a permit applicant must comply with Utah's Groundwater Protection Rules. This is indicative of how Castle Rock's contribution to the contention is contained within Utah's contention and bases. Moreover, this illustrates an incorrect perception that may be attributed to any action the Board takes to reconstruct the contentions as written in Appendix A. For example, were the Board to carve out the reference to Utah's Groundwater Protection Rules, there may be an incorrect implication that this issue is not part of Utah's bases.

Similarly, all wording in the Hydrology Contention comes from Utah Contention O with the exception of subpart 2 (a), (b). However, Utah Contention O deals with contaminant sources, pathways, and impacts from the Applicant's unlined retention pond and specifically references the ER as part of the bases for the contention. Again, any discrete part of the Hydrology contention attributed to Castle Rock is contained in Utah O and to rewrite the contentions otherwise would be misleading and confusing.

The Financial Assurance contention is similarly difficult to parcel out to specific

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which Castle Rock Land/Skull Valley have adopted by reference, the Board will consolidate this contention and its supporting basis into that issue statement. The Board sets forth the consolidated contention at page [254] of Appendix A to this memorandum and order." See 47 NRC at 216.

intervenors because it is an amalgamation of three parties' contentions and bases. For example, parts two and three of the contention can be derived from all three parties' contentions and bases. See 47 NRC at 251-252. Neither Utah nor the Confederated Tribes accepted the Applicant's rewrite of their financial assurances contentions. See State's Reply to NRC Staff's and Applicant's Response to State's Contentions (January 16, 1998) at 38; and Tr. at 821 and 827 (January 27-29, 1998). Furthermore, the Confederated Tribes adopted part of Castle Rock's Financial Assurance contention. Therefore, to attribute certain portions of the financial assurance contention solely to Castle Rock would require a dissection of each party's contentions and bases.

The most likely portion of the Financial Assurance contentions that could be attributed to Castle Rock is sub-contention 10.<sup>6</sup> However, this sub-contention comes within the general issues raised by the State, especially in light of the State's discussion in its contention to the use of 10 CFR Part 50 and Appendix C as guidance for financial assurance. Moreover, as discussed below, case law provides that the Board may allow new bases to admitted contentions when the issues are significant. Here, the issues are significant because PFS is a newly formed limited liability company without any independent assets and no known track record. In addition, PFS's ability to timely cover non-routine expenses could be detrimental to the safe operation of the ISFSI.

In Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-

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<sup>6</sup> Subcontention 10 states, "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." 47 NRC at 252.

22, 40 NRC 37 (1994), the Licensing Board held that once a contention has been admitted, the test to determine whether a new basis should be admitted is “whether the motion was timely and whether it presents important information regarding a significant issue.” Georgia Power, 40 NRC. at 39 (quoting Consumers Power Co. (Midland Plant, Units 1 and 2), 19 NRC 1285, 1296 (1984)). The Board should look to Georgia Power before dismissing any portion of a contention attributable solely to Castle Rock because the dismissed Castle Rock portion would form a new basis to the State or Consolidated Tribes portion of the contention. By admitting the consolidated contentions, the Board recognized the significance of the issues that were timely raised. Moreover, in some instances, the Board rewrote a contention, especially when the intervenors did not accept the Applicant’s rewrite of a contention. Thus, under Georgia Power, any sub-contention that may be viewed as new bases to the State’s admitted contentions should remain as written in Appendix A.

The State also has good cause to adopt Castle Rock’s consolidated contentions because, having been given the lead on all of the contentions, the State has an interest equivalent to co-sponsorship.<sup>7</sup> Seabrook, 24 NRC 103 (1986). In Seabrook, the

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<sup>7</sup> The Board appointed a lead party “with primary responsibility for marshaling the parties’ case” relative to a particular contention. 47 NRC at 182. *See also* 47 NRC at 243 (“The party assigned the role of lead party has primary responsibility for litigating a contention.”). As described by the Board, a lead party is responsible for conducting discovery, filing or responding to motions, preparing testimony and conducting examination of witnesses. *Id.* In addition, “[f]or 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 litigating activities, but the ultimate litigating responsibility for the contentions rests with the lead party. *Id.*



Licensing Board ruled that where one joint intervenor wishes to withdraw, the remaining intervenor and co-sponsor of a contention could take up the wording of the contention as written by the withdrawing intervenor.<sup>8</sup> Consistent with its lead intervenor responsibility, the State has vigorously pursued discovery on all of the issues raised by the contentions, regardless of who initially sponsored them. The State has also invested substantial resources in hiring experts and developing expertise for each admitted contention, including all parts of the consolidated contentions; in investigation and research; and in document review, document production, and document control. Thus, the structure of this case has given the State significant responsibility and sponsorship with respect to each and every aspect of the consolidated contentions, which the State has duly exercised and relied upon. The State submits that it would be unfair at this late stage for the Board to conduct a microscopic examination of each party's bases to determine whether fractional parts of the contentions or bases are affected by Castle Rock's withdrawal.

Finally, the State submits that it has good cause to adopt Castle Rock's contentions now, because such adoption would preserve the status quo. All parties have been on notice, since the Board's April 22, 1998 ruling, as to the scope of Castle Rock's admitted contentions. The State is now in the midst of discovery on all contentions. To

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<sup>8</sup>In Seabrook, Seacoast Anti-Pollution League (SAPL), was permitted to participate with the State as a joint intervenor in a particular contention. When the State withdrew from the proceeding because all of its safety issues had been addressed, the Board permitted the State's wording of the contention to replace SAPL's supplemental contention. Seabrook, 24 NRC at 106. One difference in this case is that there is no indication that Castle Rock wishes to withdraw from the proceeding because all of its litigable issues have been satisfied. Thus, it is important that all litigable issues in the consolidated contentions are heard by the Board.

change the structure of the proceeding now would create discord, confusion and undermine the process. The long discussion at the prehearing conference about rewriting contentions and the interrelationship between a contention and its bases is indicative of the issues that would arise if the Board attempted to balkanize the contentions at this stage. See Tr. at 34-44 (January 27, 1998). Accordingly, if Castle Rock is permitted to withdraw, all of the consolidated contentions should remain as written.

The State meets the second late filed factor because it has no means, other than in this proceeding, to protect its interests. Also, the State will assist in developing a sound record because the State has already retained and identified experts and knowledgeable persons for all portions of the consolidated contentions. Finally, the State's continuance as lead party for the consolidated contentions as written will not broaden or delay the proceeding. The Board's schedule already accounts for litigating all the issues described in the consolidated schedule.

#### **B. Unconsolidated Contentions**

The State submits that in seeking to adopt Castle Rock unconsolidated contentions 17 (Inadequate Consideration of Land Impacts)<sup>9</sup> and 20 (Selection of Road or

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<sup>9</sup>Castle Rock 17, 47 NRC at 257 (App. A) reads:

CONTENTION: The Applicant violated 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:

a. the ER does not recognize the potential use of the areas surrounding the PFSF for residential or commercial development;

Rail Access to PFSF Site),<sup>10</sup> it meets the late-filed contention standard.

First, the State has good cause for adopting these contentions now because, as discussed on page 5, the State had no reason to believe, prior to Castle Rock's recent filing, that Castle Rock would not vigorously pursue Contentions 17 and 20, thereby protecting the State's interests in the issues. In addition, the issues raised in these two contentions are of grave concern to the State and its citizens and are within the State's expertise to litigate.

The adjudication of the Applicant's inadequate consideration of the impact its facility will have on land use, the tax base, and the development potential of the Skull Valley area are of vital concern to the State and other political subdivisions of the State.

Instead of traditional State and local interests, the PFS facility as licensed by the NRC

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- 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 effects 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[ed] 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.

<sup>10</sup>Castle Rock 20, 47 NRC at 257-258 (App. A) reads:

CONTENTION: The Applicant violated 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. §§ 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.

The State does not wish to pursue sub-contentions (c) about a third option.

will shape the future potential land use and property values in Skull Valley, including commercial, residential, agricultural, recreational and wilderness uses and values. The significance of these issues cannot be overlooked in light of the shortcomings in the Environmental Report. For example, the ER has misleading and inaccurate population description and projected population growth. The two page account of "Population Distribution and Trends" and "Population Within 50 Miles" in the ER at 2.2-4 to 7, does not address the rapidly increasing population and the spread of the population to areas surrounding the Salt Lake valley. A recent article in the Salt Lake Tribune, attached hereto as Exhibit 1, is illustrative of the continued importance to the citizens and governing bodies of this State of the growth rate, land development potential and land use along the Wasatch Front (*i.e.* the populous corridor north and south of the Salt Lake City metropolitan area). Likewise, the ER's two page account of land use fails to describe the future residential and commercial real estate potential of the Skull Valley area nor does the ER mention the facility's proximity to, and impacts upon, recreational uses in the nearby Deseret Peak National Wilderness Area. ER at 2.2-2 to 4.

Other State interests that will not be protected if these Castle Rock contentions are dismissed include the State's landholding interests in the area. *See State's Request for Hearing and Petition to Intervene* at 10. Some of these lands have development potential as well as use for grazing and livestock grazing and food production.

Another State interest is the requirement that the Applicant "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 Castle Rock Contention 20. The State as the owner of Skull Valley Road is directly affected by the Applicant's choice between the alternatives. Also, the environmental effects and increased traffic and noise from the alternative selected are concerns usually regulated by the State but in this instance the State must turn to the NRC proceeding to protect its interests.

Second, there is no other forum other than this proceeding where regulation of the facility's radioactive hazards and the implications those activities have on the surrounding area can be adjudicated and controlled. The State recognizes that it cannot regulate the Applicant's activities though the NRC proceeding but the State can protect its interests in these issues through the NRC proceeding.

Protection of the State's interests includes pursuing issues before the NRC that are usually regulated by the State. Typical governmental functions such as the regulation of land use, and zoning; protection of the tax base; and control of traffic, noise and environmental effects, will be harmed if the Board does not permit the State to take up Castle Rock Contentions 17 and 20. The State as a land owner in the area and as the governmental entity with overall responsibility for resource development and protection will be harmed by this licensing action if the Board disallows the State to go forward with Castle Rock's contentions. Furthermore, the State's interests were being protected by the

two Castle Rock Contentions but if these contentions are ruled out of this proceeding then the State has no other means of protecting its interests.

Third, the State's pursuit of these contentions will assist in developing a sound record. Some of the issues raised in Contention 20 can be accommodated by already identified experts. For example, Dr. Marvin Resnikoff will be one of the experts to testify about for the transportation alternatives. Also, the State intends to present the testimony of knowledgeable experts within State government whose jobs and expertise deal with projections and planning for land use, population dynamics, traffic and noise, environmental considerations, etc.

Experts within State government will assist in reviewing documents developing and presenting testimony for both contentions. For example, the Governor's Office of Budget and Planning has economists, planners, and budget and demographic analysts whose work routinely involves census data collection and analysis, population growth and demographic trends; fiscal data, revenue projections and infrastructure needs; and integration of comprehensive planning among State and local governments.<sup>11</sup> The State Tax Commission takes appeals of property tax assessments and is knowledgeable about property values and the tax base. Traffic patterns and density, road and highway planning and building, and traffic noise are daily issues that are addressed by the Utah Department of Transportation. The State Department of Agriculture has experts knowledgeable in the

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<sup>11</sup>An example of the type of expertise on these issue can be found at the Office of Planning and Budget web page, [www.governor.state.ut.us/gopb](http://www.governor.state.ut.us/gopb) and on the Demographic and Economic Analysis web page, [www.governor.state.ut.us](http://www.governor.state.ut.us) (n.b. "Projections").

production of livestock and farm produce. On such short notice, the State is not in a position to name specific individuals who may offer testimony on the contentions at issue but it has an ample range of experts to assist in developing a sound record.

Fourth, the State's adoption of Castle Rock 17 and 20 will not broaden or delay the proceeding. All parties have been on notice for almost a year as to the scope of the issues before the Board. The issues in this proceeding are already broad. The Board's schedule already takes into account litigating these two contentions and all the consolidated contentions.

### III. CONCLUSION

The withdrawal of Castle Rock from this proceeding should not disturb any of the consolidated contentions and, for the reasons stated above, Utah should be permitted to adopt Castle Rock Contentions 17 and 20.

DATED this 5th day of January, 1999.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that copies of STATE OF UTAH'S RESPONSE TO CASTLE ROCK'S NOTICE OF WITHDRAWAL were served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class (unless otherwise noted), this 5th day of January, 1999:

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