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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

APPLICANT'S RESPONSE TO STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED CONTENTION UTAH SECURITY J – LAW ENFORCEMENT

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the "State of Utah's Request for Admission of Late-Filed Contention Utah Security J," filed April 13, 2001 ("State Req."). Contention Utah Security J ("Security-J") alleges that the Physical Security Plan for the Private Fuel Storage Facility is deficient because the PFS contract with the designated local law enforcement authority ("LLEA") purportedly has been voided by legislation enacted by the State of Utah ("State") and signed into law by the Governor on March 15, 2001. As an initial matter, Security-J is a disingenuous attempt by the State to obstruct the Commission's legitimate licensing process and should be rejected as such by the Board. Further, the State's request must be denied as a matter of law because Security-J: (1) challenges the Commission's realism policy; (2) would not be material to the grant or denial of the license application; and (3) fails to satisfy the Commission's substantive standards for the admission of late-filed contentions.

I. BACKGROUND

In June 1997, Tooele County, the Bureau of Indian Affairs ("BIA"), and the Skull Valley Band of Goshutes ("the Band") entered into a Cooperative Law Enforcement

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Agreement ("CLEA") providing the Tooele County sheriff's office with the authority and responsibility to provide law enforcement services on the Skull Valley Goshute Reservation. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 71 (1998). The same parties entered into a revised CLEA on August 7, 1998. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-31, 50 NRC 147, 152 (1999). The revised CLEA was approved and authorized by written resolution of the Tooele County Board of Commissioners on September 1, 1998 and executed by the Chairman of the Board of Commissioners on September 2, 1998, in compliance with applicable state law. Id. at 152-53.

On August 27, 1999, this Licensing Board found that the revised CLEA was effective and "by its terms provides the Tooele County sheriff's office with law enforcement authority on the Skull Valley Goshute Reservation." Id. at 153. As a result, the Board determined that issues raised by the State regarding PFS compliance with 10 C.F.R. Part 72 and 73 requirements for liaison with the local law enforcement agency ("LLEA") were, "for all practical purposes, now moot." Id. at 153.

On March 15, 2001, the Governor of Utah signed legislation that, inter alia, purports to prohibit the execution or implementation of "any agreement or contract to provide goods and services to any storage facility or transfer facility for high-level nuclear waste." Utah Code Ann. § 17-27-102(2) (as amended). The new legislation states that county governments purportedly may not "provide, contract to provide, or agree in any manner to provide municipal-type services," including "law enforcement" to such facilities. Id. §§ 17-34-1(3)(a), 19-3-303(6)(j). Indeed, the State has made criminal the "facilitation" of a violation of these extraordinary restrictions and requirements. Id. §§ 19-3-312.

On April 19, 2001, the Skull Valley Band of Goshute Indians and PFS filed suit in the United States District Court, District of Utah, Central Division challenging this and several other recent State enactments aimed solely at blocking the Private Fuel Storage Facility ("PFSF") as "grossly unconstitutional" and "preempted by federal statutes that mandate comprehensive federal regulation in the field of nuclear energy" and seeking declaratory and injunctive relief. See Complaint ¶¶ 1, 23 (attached as Exhibit 1).[1]

II. ARGUMENT

The Board should not admit Security-J because it represents a disingenuous attempt by the State to obstruct the Commission's legitimate licensing process, which should be rejected as such by the Board. Further, the State's request must be denied as a matter of law because Security-J: (1) challenges the Commission's realism policy; (2) would not be material to the grant or denial of the license application; and (3) fails to satisfy the Commission's substantive standards for the admission of late-filed contentions. PFS demonstrates below that, for all these reasons, Security-J should not be admitted.

A. The State's Request Is A Disingenuous Attack on the Commission's Licensing Process

Unwilling to abide by the results of adjudication on the merits pursuant to the Commission's long-established rules, the State has defiantly set out to create its own rules for determining the outcome of this licensing proceeding. Not content to let the federal regulatory process take its course, the State, through its Legislature is now endeavoring to make good the Governor's vow to create a "moat" around the Skull Valley

[1] One interesting provision in the recent legislation is a declaration that " [n]either the Atomic Energy Act nor the Nuclear Waste policy Act provides for siting a large privately owned high-level nuclear waste . . . storage . . . facility away from the vicinity of the reactors." Utah Code Ann. § 19-3-302(b)(2). The State apparently failed to accept the Board's specific rejection of this same assertion in Contention Utah A – Statutory Authority. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 183 (1998); see also id. at 240.

Reservation by "putting up as many hurdles as we can think up." Complaint ¶¶ 53, 54. Despite instigating what the Governor has called "a steady and continued assault" on this Commission's licensing process, Id. ¶ 61, including creating the basis for the instant contention from whole cloth, the State now audaciously seeks to invoke the benefits of the very process it seeks to undermine to justify late-filed admission of Security-J.

Despite its sole responsibility for creating the situation, the State shamelessly argues that concern for the safety and security of its residents forces it to seek admission of this late-filed contention.

> The State has significant concerns about the unreasonable risk to public health and safety if PFS cannot provide assurance of the availability of law enforcement assistance to the PFS facility.

State's Req. at 10. This is analogous to a child who is arrested for killing his parents throwing himself on the court's mercy as an orphan. The Board must not reward such outrageous behavior with the very benefit it was calculated to create and should dismiss the contention.

B. The Contention is Not Material to the Grant or Denial of the License Application

The State fails to raise any issues in Security-J that, even if decided by the Board, would impact the outcome of the licensing proceeding. Any issues of law raised in a contention "must be material to the grant or denial of the license application in question, i.e., they must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief." LBP-98-7, 47 NRC at 179; see also 10 C.F.R. § 2.714(d)(2)(ii); 54 Fed. Reg. 33,168, 33,172 (1989). As set forth below, Security-J is not material to this proceeding and should not be admitted by the Board.

1. Only the Pending Federal Action Will Make a Difference in the Outcome of the Licensing Proceeding

Any issues of law decided by the Board relative to Security-J will not make a difference in the outcome of the PFSF licensing proceeding. It is beyond dispute that final orders of the Board are ultimately subject to federal court review. Atomic Energy Act of 1954 (as amended) § 189.b; see also Commonwealth Edison Company (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 95-6 (2000). The State has passed legislation that, inter alia, prohibits storage of spent fuel "within the exterior boundaries of Utah," requires a five million dollar application fee, sets a two billion dollar cash bond for State licensing of storage and transfer of spent fuel, subjects all individuals to "unlimited strict liability," designates dirt trails near the Goshute reservation as state roads to bar rail access, purports to void all contracts for goods and services to the PFSF, and criminalizes the "facilitation" of spent fuel storage.[2] Complaint ¶¶ 54 - 70. It is ultimately the federal court decision regarding the constitutionality of these state statutes that will be resolve the issues raised in Security-J.

PFS is confident that this egregious over-reaching by the State will be overturned by the federal courts, in which case Security-J will be moot. However, the reality is that should the State substantively prevail in federal court, PFS would not, as a practical matter, be able to complete this licensing proceeding or construct or operate the proposed facility. Thus, the Board's ruling(s) on the efficacy of the issues raised in Security-J will have no practical legal effect. The Board, therefore, should not admit the contention.

[2] The broad language in the State's enactments may even be read as criminalizing, inter alia, PFS's engagement of counsel. See Utah Code Ann. § 19-3-312(5) ("Any person or organization who knowingly acts to facilitate a violation of this part regarding the regulation of high-level nuclear waste or greater than Class C radioactive waste is guilty of a Class A misdemeanor and is subject to a fine of up to $10,000 per day.").

2. The State's Obstructionist Action Challenges the Commission's Realism Doctrine

Further, the Commission, supported by the federal courts, has already rejected the kind of purely obstructionist position adopted by the State here. It is well-established that a contention that "attacks a Commission rule" or "advocate[s] stricter requirements than agency rules impose or that otherwise seek[s] to litigate a generic determination established by a Commission rulemaking" is inadmissible. LBP-99-7, 47 NRC at 179; see also 10 C.F.R. § 2.758; Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2) ALAB-218, 8 AEC 79, 85, 89 (1974). Here, the purely obstructionist approach adopted by the State runs afoul of the Commission's realism doctrine adopted in the Shoreham and Seabrook cases.

PFS has entered into an agreement with the appropriate LLEA for security services, which the Board found met all the Commission's requirements for an acceptable security plan. See LBP-99-31, 50 NRC 153-54. The State has now essentially sought to ban state and local authorities from performing their roles in the security plan. As with emergency planning during the startup of the Shoreham plant, "in the past, what was reasonable and feasible in a given case depended on the cooperative planning efforts of the [applicant] and State and local governments." Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 30 (1986). Indeed, in the Shoreham case, the local county also went so far as to criminalize activities related to the startup of a nuclear facility (participation in emergency exercises). Long Island Lighting Co. v. County of Suffolk, 628 F.Supp. 654, 659 (1986). The federal court enjoined and restrained that law and PFS is confident of a similar outcome here.

The Commission refused to tolerate such posturing by the State of New York and county governments impeding lawfully authorized activities. As reasoned by the Commission, if the facility

> were to go into operation and there were to be a serious accident requiring consideration of protective actions for the public, the State and County officials would be obligated to assist, both as a matter of law and as a matter of discharging their public trust. Thus in evaluating the [applicant's] plan we believe that we can reasonably assume some 'best effort' State and County response in the event of an accident. We also believe that their 'best effort' would utilize the [applicant's] plan as the best source for emergency planning information and options. After all, when faced with a serious accident, the State and County must recognize that the [applicant's] plan is clearly superior to no plan at all.

Shoreham, CLI-86-13, 24 NRC at 31 (internal citations omitted), aff'd, Commonwealth of Massachusetts v. US, 856 F.2d 378 (1988); see generally 52 Fed. Reg. 42,078 (1987) (explaining that the Commission adheres to the "realism doctrine" in emergency planning); see also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 331 (1991) (finding "no error in the Licensing Board's reliance upon" local police resources to respond "in emergency situations" in applying the realism rule).[3] In its request to admit Security-J, the State provided no justification as to why this Commission policy does not apply in the instant proceeding. The Board should not sua sponte create such an argument for the State.[4]

Viewed realistically, Tooele County officials will respond to an actual emergency to protect the health and safety of the public. Notwithstanding the State's implication that County (and State) law enforcement officials would sit on their hands and do nothing in the face of potential danger to their citizens, State's Req. at 8 – 9, common sense dic-

[3] Just prior to the startup of the Seabrook reactor, the State of Massachusetts made a "dramatic change" from its adamant refusal to participate in emergency planning when a new Governor "encouraged" cooperation with the facility. Id. at 309-10.

[4] While the "realism doctrine" was subsequently incorporated in the regulations governing the licensing of nuclear power reactors, see 10 C.F.R. § 50.47(c)(1), the policy reasons embodied in the rule applies equally to this facility. See 52 Fed. Reg. 42,078, 42,081 (1987) (the "rule is generic in the sense that it is of general applicability and future effect, covering future plants as well as existing plants").

tates otherwise.[5] The State provides no basis for any speculation that the County will not meet its obligations under the CLEA.

Under the "realism doctrine," the LLEA would be expected to respond and to rely on the Physical Security Plan – even if the CLEA were deemed "illegal" – if an actual security incident occurred because it is the most reasonable and effective means of ensuring public safety. Thus, the contention is simply a challenge to the Commission's realism policy. The Board should, therefore, dismiss the contention as not material to the issue of PFSF security response.

C. The State Does Not Satisfy the Criteria for a Late-Filed Contention

The disingenuous and unconstitutional nature of the contention notwithstanding, the State fails to demonstrate that late-filed Security-J would be admissible under a balancing of the Commission's late-filing factors. As the State's numerous attempts to secure admission for late-filed contentions have provided the Board and the parties ample opportunity to familiarize themselves with the Commission's requirements for admission of late-filed contentions, the relevant legal standards will not be repeated here. See 10 C.F.R. §§ 2.714(a)(1)(i)-(v). PFS demonstrates below that, applying the late-filing factors, Security-J should be dismissed.

[5] Indeed, in depositions held with respect to Security Contention C, both the Tooele County Sheriff and the State's witness, the former Commander of the Utah Highway Patrol for Tooele County, confirmed this common sense notion that law enforcement officials will respond as necessary to emergency situations. See Deposition of Frank Scharmann, Tooele County Sheriff (Feb. 8, 2000) at 47-48, 82-83 (Tooele County law enforcement would respond to terrorist attack at the PFSF notwithstanding issues raised by State concerning applicability of the current CLEA to the PFSF); Deposition of Roy A. Mackey, Commander, Section 8, Utah Highway Patrol (Feb. 9, 2000) at 18 ("the law enforcement job" is to "go where you are needed"); Id. at 40, 46 (Utah Highway Patrol would respond to request from Tooele County for law enforcement assistance with respect to events on the Skull Valley Reservation; Id. at 47 (Commander Mackay has never "known the Governor of Utah to veto State [law enforcement] resources in the case of an emergency").

1. The Board Should Not Ascribe "Good Cause" To An Orchestrated Attempt To Create A Contention Through Improper Use of the Sovereign Power

The State should not be permitted to use its sovereign powers to artificially create "good cause" for late-filed contentions, which is the first factor considered for admitting a late-filed contention. 10 C.F.R. § 2.714(a)(1)(i). The State, with a straight face, argues that the Board should find "good cause for late filing" Security-J" because the contention was filed within 30 days of the State's own action that created the purported basis for its assertions. State's Req. at 9-10. Even as it argues for "good cause," the State admits that the Board "did not accept" its previous substantive arguments regarding concerns with Tooele County law enforcement services. Id. at 10. Now, the State boasts, "under the new law" the Board must find that "the State has good cause for now filing this contention." Id. The Board should summarily reject the State's use of its sovereign power to orchestrate a perversion of the Commission's licensing process as "good cause." Other than the State's disingenuous and artificial creation, no new circumstances exist to trigger good cause for the late filing of Security-J.

2. The Federal Proceeding Will Determine the Extent of the State's Interests

With regard to other means of protecting the State's interests, 10 C.F.R. § 2.714(a)(1)(ii), the federal proceeding provides a forum for full adjudication and determination of each party's interests. As discussed above, PFS is confident that the State's actions, including purportedly voiding the CLEA, will be overturned by the federal courts. PFS will then continue to license, construct, and operate the PFSF. However, should the challenged State laws be substantively upheld, PFS, as a practical matter, would be forced to abandon the project. Whatever the result in the federal forum, the State's interests, as far as constitutionally cognizable, will be protected. No action by the Board, would (or could) better protect the State's interests.

3. A Sound Record Will Be Developed in the Federal Proceeding

The federal proceeding covers the full spectrum of legal issues regarding the State's ill-based attempt to outlaw the Commission's licensing of the PFSF. Therefore, the third factor concerning the development of a sound record, 10 C.F.R. § 2.714(a)(1)(iii), clearly tilts towards rejecting admission of Security-J. The Complaint challenges the constitutionality of all of the offending Utah enactments as violative of the Supremacy Clause, Commerce Clause, Preeminent Federal authority over nuclear safety matters, Indian affairs, Indian Commerce Clause, Treaty Clause, federal Indian law, Indian Sovereignty Doctrine, Contract Clause, and the First, Sixth, and Fourteenth Amendments of the United States Constitution. Complaint ¶¶ 81- 95. The federal proceeding simply leaves nothing relevant for the Board to develop in a licensing proceeding.

4. The State Is Well Represented in the Federal Proceeding

The Governor, Attorney General Executive Director of the Department of Environmental Quality, Executive Director of the Department of Transportation, and the Commissioners of the Department of Transportation are named defendants in their official capacities in the pending federal proceeding. Therefore, the extent to which the State's interests are represented, 10 C.F.R. § 2.714(a)(1)(iv), could not be more in favor of rejecting Security-J. A suit against a state officer in their official capacity should be evaluated as if it is a suit against the state. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269 (1997). Thus, the interests of each of these defendants are indistinguishable from the State. The State's interests, therefore, are fully represented in the federal forum.

5. Board Action On Security-J Before Resolution of the Federal Questions Raised by PFS Would Unnecessarily Broaden and Delay the Licensing Proceeding To No Legal Effect

The final factor in determining whether to admit a late-filed contention is the extent to which the licensing proceeding would be delayed or existing issues broadened. 10 C.F.R. § 2.714(a)(1)(v). Here, the federal courts will ultimately decide whether the State's actions to void the CLEA are legally effective or not. Thus, the Board, which normally develops the record and initially decides such matters, is not in such a position here. Proceedings before the Board regarding this contention would necessarily require a determination of the constitutionality of the new state laws and interpretation of the corresponding regulations. These adjudicatory functions will be performed as a part of the federal proceeding. There is simply no need to broaden and delay this proceeding to resolve the issues raised by the State's assertions.

Further, whatever result the Board might reach, after extensive briefing and argument of issues not otherwise within the scope of this proceeding, they will be subjugated to the ultimate federal court decision. Not only will this proceeding be broadened and delayed by hearing this contention, no lasting legal effect can result. The Board, therefore should not devote its scarce available resources to a complex and contentious adjudication to reach an essentially moot result at the expense of other issues ripe for resolution. See Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2) LBP-83-75A, 18 NRC 1260, 1263 (1983) (rejecting an otherwise admissible contention under the late-filing factors because "any attempt to litigate the [contention] would be both endless and fruitless").

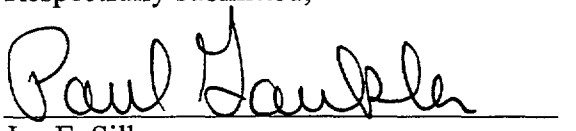
In summary, the State has failed to show that the balance of the Commission's criteria favor admission of this late-filed contention. The State has disingenuously created the entire contention and should not benefit from "good cause" under such circumstances. Further, even if the Board should find that the State technically meets the time-

liness factor, all of the other four admission criteria favor PFS. No practical purpose would be served by litigation of Security-J given the pending federal court litigation and the Board, therefore, should deny admission of late-filed Security-J.

III. CONCLUSION

For all the foregoing reasons, the Board should not admit late-filed Security-J.

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Response to State of Utah's Request for Admission of Late-Filed Contention Utah Security J – Law Enforcement" were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 27th day of April, 2001.

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * *

THE SKULL VALLEY BAND OF GOSHUTE INDIANS and PRIVATE FUEL STORAGE, L.L.C.

Plaintiffs,

vs.

MICHAEL O. LEAVITT, in his official capacity as Governor of the State of Utah; MARK L. SHURTLEFF, in his official capacity as Attorney General of the State of Utah; DIANNE R. NIELSON, in her official capacity as Executive Director of the Utah Department of Environmental Quality; THOMAS WARNE, in his official capacity as Executive Director of the Utah Department of Transportation; GLEN EDWARD BROWN, STEPHEN M. BODILY, HAL

COMPLAINT

Case No. 2:01 C V 00270 C

Judge _____

MENDENHALL CLYDE, DAN R. EASTMAN, SHERI L. GRIFFITH, JAMES GREY LARKIN, and TED D. LEWIS, in their official capacities as Commissioners of the Utah Department of Transportation,

Defendants.

* * * * * * *

1. This is an action for declaratory relief pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and the United States Constitution, for the purpose of determining a question of actual controversy between the parties, as more fully appears below. Plaintiffs also seek injunctive relief pursuant to Fed. R. Civ. P. 65.

2. Plaintiff Private Fuel Storage, L.L.C. seeks to construct and operate a temporary spent nuclear fuel storage facility on lands leased from Plaintiff Skull Valley Band of Goshute Indians. The State of Utah has enacted several pieces of legislation in an effort to stop the project. These new laws are unconstitutional and otherwise preempted by federal and tribal law, and are intended to block the project. Plaintiffs bring this suit seeking declaratory and injunctive relief from the operation of these laws.

PARTIES

3. Plaintiff Skull Valley Band of Goshute Indians ("Skull Valley Band") is a sovereign, federally recognized Indian tribe with governmental authority over the Skull Valley Reservation within the boundaries of the State of Utah.

4. Plaintiff Private Fuel Storage, L.L.C., ("PFS") is a limited liability company organized and existing under the laws of Delaware. PFS is registered and authorized to transact business in the State of Utah.

5. The acts of Defendants alleged in this Complaint were not undertaken in Defendants' individual capacities. At all relevant times, Defendants acted under the color of the laws of the State of Utah, in their official capacity, and pursuant to their authority as officers of the State. Plaintiffs seek only prospective relief in the form of a declaratory judgment and an injunction. Plaintiffs also seek attorneys' fees in this action pursuant to 42 U.S.C. § 1988, as an adjunct to declaratory and injunctive relief. The Defendants are named because of their responsibility for enforcement of the legislation at issue in this case.

6. Defendant Michael O. Leavitt is the Governor of the State of Utah.

7. Defendant Mark L. Shurtleff is the Attorney General of the State of Utah.

8. Defendant Dianne R. Nielson is the Executive Director of the Utah Department of Environmental Quality.

9. Defendant Thomas Warne is Executive Director of the Utah Department of Transportation.

10. Defendants Glen Edward Brown, Stephen M. Bodily, Hal Mendenhall Clyde, Dan R. Eastman, Sheri L. Griffith, James Grey Larkin and Ted D. Lewis are Commissioners of the Utah Department of Transportation.

JURISDICTION AND VENUE

11. Subject matter jurisdiction of this action is based on 28 U.S.C. §§ 1362 and 1331 because it is brought by an Indian tribe and the matter in controversy concerns federal questions arising under the United States Constitution, 42 U.S.C. § 1983, 28 U.S.C. § 1343(a)(3), and various other federal statutes and treaties of the United States, including the Atomic Energy Act, the Energy Reorganization Act, the Price-Anderson Act, the Hazardous Materials Transportation Act, the Nuclear Waste Policy Act, the Interstate Commerce Commission Termination Act, the Railway Safety Act, the Indian Long-Term Leasing Act, the Indian Self-Determination Act, and the 1864 Treaty with the Shoshoni-Goship.

12. Venue of this action is proper in the District of Utah, Central Division, based on 28 U.S.C. § 1391. All Defendants reside in the State of Utah. At least one Defendant resides in the District of Utah, Central Division, and the events giving rise to the claims occurred in the District of Utah, Central Division.

GENERAL ALLEGATIONS

Introduction

13. This case involves the temporary storage of spent nuclear fuel, a serious and growing problem of national scope and importance. Congress has passed legislation that fully occupies the field of nuclear safety regulation, including spent fuel storage and its transportation, leaving no room for state interference.

14. Congress by statute has required the U.S. Department of Energy ("DOE") to build a repository and take permanent possession of the spent fuel for its ultimate disposal. Due to delays in the permanent federal spent fuel repository program, utilities operating nuclear power

plants face pressing storage problems, including the potential for premature shut down of reactors in the future. The importance of nuclear power plants is re-emphasized by the country's current energy problems.

15. Beginning in 1987, DOE, through the Office of Nuclear Waste Negotiator, was authorized to administer a financial assistance program for Indian tribes and other local communities to consider the storage of spent fuel on Indian lands or other lands. In 1992, the Skull Valley Band, along with other tribes, received a DOE grant under the federal program known as Monitored Retrievable Storage. In 1994, the General Council of the Band authorized the Band's Executive Committee to enter into negotiations for the building of a storage facility for spent nuclear fuel.

16. In an effort to find a temporary solution to the storage problem until the federal repository is built, several utilities jointly created PFS to construct and operate a temporary spent fuel storage facility. After diligent search, it was determined the facility should be located within the Skull Valley Reservation, on sovereign trust lands of the Skull Valley Band, located within the State of Utah. In 1997 PFS entered into a lease with the Skull Valley Band for the use of land on which to build and operate the storage facility. As required by federal law, the lease has been approved by the authorized representative of the Secretary of the Interior, subject to certain conditions set forth in the lease, including issuance by the U.S. Nuclear Regulatory Commission ("NRC") of a license to build and operate the temporary facility.

17. PFS has applied to the NRC, the body authorized by Congress to exercise exclusive regulatory authority over civilian use of nuclear energy, for the license. The State is an

active party in the NRC license proceedings and has participated fully therein. If the NRC grants the license (a decision is anticipated in 2002), and if PFS complies with all applicable federal regulations and receives other required approvals, then PFS and the Skull Valley Band should be able to proceed with the temporary storage project under federal oversight, free of unconstitutional state interference.

18. Utah's Governor and Legislature reacted to the temporary storage project by passing legislation directed at PFS and the Skull Valley Band, requiring PFS to post a two billion dollar cash bond, obtain various peculiar state permits, and otherwise comply with onerous state requirements that on their face purport to promote nuclear safety, but that are in reality intended to kill the project outright.

19. Utah's Governor and Legislature passed legislation to block access to the Skull Valley Indian Reservation and to assert state regulatory authority over reservation lands.

20. Legislation was also passed to indiscriminately strip PFS's officers, directors and its equity interest holders of any limitations on their liability for any and all debts and obligations of PFS. Indeed, the Utah legislation reaches far beyond state boundaries and purports to remove any limitation on the liability of any stockholders of the utilities who are members of PFS, no matter where those utilities are incorporated or where the individual shareholder resides.

21. The State has also enacted a statute barring the storage of spent fuel within the State and voiding private contracts and contracts with public entities if they are related to the potential storage of spent fuel. The statute also broadly criminalizes conduct not ordinarily

criminalized, including conduct requisite to planning for the possibility of storing spent fuel in Utah.

22. The state legislation also has the effect of interfering with contracts made, or to be made, by and with the Skull Valley Band for the provision of municipal-type services to reservation lands, including contracts for law enforcement, health care (including life support and paramedic services), fire protection, and other vital governmental services, by voiding such contracts and purporting to impose civil fines and criminal penalties on persons who enter into such contracts.

23. Utah's attack on PFS and the Skull Valley Band is grossly unconstitutional. It constitutes a serious challenge to our nation's core principles of federalism, to federal and tribal sovereignty in general, and to national nuclear and energy policy in particular. The attack is preempted by federal statutes that mandate comprehensive federal regulation in the field of nuclear energy, as well as federal preeminence in the field of Indian affairs. Besides being preempted, the Utah statutes violate the Commerce and Contracts Clauses of the Constitution, as well as other constitutional provisions.

The Need For Temporary Fuel Storage

24. Congress has encouraged the widespread civilian use of nuclear energy through a series of laws, commencing with the Atomic Energy Act of 1954. Under current law, civilian nuclear energy use is regulated by the NRC, while the transportation of nuclear materials is regulated by both the NRC and the U.S. Department of Transportation ("DOT"). There are

presently 110 licensed commercial reactors in 32 states generating approximately 20 percent of the electricity used in the United States.

25. Commercial nuclear reactors are fueled with uranium in the form of small ceramic-like pellets contained in zirconium tubes or rods. Groups of these rods are bound into assemblies about 12 feet long. A reactor must be periodically refueled and the spent fuel removed.

26. Spent fuel has continued to accumulate, generally in water-filled pools that are part of reactor complexes. Most of these pools were designed for short-term storage, but must now be put to longer term use. Currently, there are approximately 38,500 metric tons of spent fuel in temporary storage at the reactor sites, increasing at about the rate of 2000 metric tons per year. The currently licensed reactors are expected to generate more than 70,000 metric tons of spent fuel over their commercial lifetimes. The ability to expand the amount of spent fuel that can be stored in a spent fuel pool at a reactor site is subject to physical limitations, and in some cases, legal restrictions.

27. Congress attempted to address this problem in the Nuclear Waste Policy Act of 1982 ("NWPA"). The NWPA required the Department of Energy to construct a repository for the permanent disposal of spent fuel. The NWPA mandates that, in return for payment of fees by the utilities, the Department of Energy must take title to the spent fuel as expeditiously as practicable following commencement of operation of a repository and, beginning not later than January 31, 1998, dispose of such spent fuel. Pursuant to the terms of the NWPA, DOE entered into contracts with each utility to accept spent fuel beginning not later than January 31, 1998.

Also pursuant to the NWPA, utilities owning reactors have paid DOE more than nine billion dollars to pay for all costs of disposing of spent fuel.

28. Utilities, including several members of PFS, have pursued litigation to enforce DOE's contractual obligation to begin disposing of utilities' spent fuel. Notwithstanding the statutory and contractual deadline of January 31, 1998, the DOE currently estimates that a permanent repository will not be ready to receive spent fuel until 2010, at the earliest. Yucca Mountain, Nevada is currently being investigated as the site for the permanent repository.

29. Several years ago, a group of utilities began searching for a temporary solution to the spent fuel storage problem pending completion of the federal repository. The plan that these utilities developed led to the creation of PFS and the planned construction of a temporary spent fuel storage facility. The current members of PFS are Consolidated Edison Company of New York, Inc.; Florida Power and Light Company; Genoa Fueltech, Inc.; GPU Nuclear, Inc.; Indiana Michigan Power Company; Southern California Edison Company; Southern Nuclear Operating Company, Inc.; and Xcel Energy, Inc., successor to Northern States Power Company. These companies or their parents or affiliates operate nuclear reactors that serve a population of more than 60 million, from New York in the east to California in the west and from Minnesota in the north to Florida in the south. These utilities own and/or operate 21 reactors of which three have already been shut down but continue to store spent fuel.

30. The building of a temporary storage facility is an issue of national importance. As described in greater detail below, the proposed facility is governed by comprehensive federal legislation and regulations, which leave no room for interference by the State of Utah.

Plans For a Temporary Fuel Storage Facility

31. After extensive study and deliberation, including numerous discussions on the safety of the tribal community, the Skull Valley Band, by General Council Resolution No. 97-12A, dated December 7, 1996, authorized leasing of tribal reservation lands to PFS for the construction and operation of a temporary storage facility for spent nuclear fuel. The lease was executed on May 20, 1997, and then approved by the Superintendent of the Uintah and Ouray Agency, the duly authorized representative of the Secretary of the Interior, pursuant to the Indian Long-Term Leasing Act, after extensive review by the Bureau of Indian Affairs ("BIA"). The lease requires the issuance of an NRC license before operations may be commenced.

32. On June 20, 1997, PFS submitted a license application to the NRC to construct and operate a temporary Independent Spent Fuel Storage Installation ("ISFSI") on a tract of land within the reservation of the Skull Valley Band located within Tooele County, Utah. The proposed site for the Private Fuel Storage Facility ("PFSF") is approximately 27 miles west-southwest of Tooele City in the center of Skull Valley, 1.5 miles west of Skull Valley Road.

33. PFS seeks an NRC license to receive, transfer and possess spent fuel on a temporary basis in accordance with the requirements of the NRC regulations in 10 C.F.R. Part 72. A decision on licensing is expected in April 2002. Current estimates are that, if the license is granted, construction will start in 2002, with pre-operational testing to allow operations to begin sometime in 2003.

34. As currently planned, the PFSF will receive sealed shipments of spent fuel. The reactor licensee will place the spent fuel assemblies in specially designed, stainless-steel

canisters licensed by the NRC. Each canister will then be vacuumed dry, filled with inert gas, welded shut, and placed in a 132 ton steel transportation cask which also will be licensed by the NRC. The transportation cask is then sealed.

35. The sealed transportation casks will be transported to Skull Valley by rail. The transportation casks will either arrive at the PFSF site by rail via a new railroad line that will connect the PFSF directly to the railroad main line, or the transportation casks will be off-loaded at a transfer point adjacent to the railroad main line and loaded onto heavy haul tractor/trailers for transporting to the PFSF via the Skull Valley Road (SR 196).

36. The NRC license for the PFSF will not allow spent fuel to be removed from the canisters at the facility. Operations at the facility will be strictly limited to the handling and storage of sealed canisters.

37. Once the canister is accepted at the PFSF, it will be transferred to an NRC licensed storage cask. These storage casks measure 20 feet high and 11 feet in diameter, have walls over two feet thick composed of 26.75 inches of concrete and 2.75 inches of steel, and weigh 170 tons when loaded. The storage casks will then be moved onto concrete pads three feet thick. The storage system is totally passive, with no pumps, valves, motors, operating systems, or other moving parts. The storage system is designed so that cooling is accomplished by passive convection.

38. Handling operations at the PFSF have been specifically designed and limited such that the NRC is expected to determine (as part of the ongoing licensing process) that there is no credible accident that would breach the stainless-steel canisters that contain the spent fuel at the

facility. The NRC's emergency planning regulations for ISFSIs recognize that the potential for significant offsite consequences where spent fuel always remains sealed inside canisters is extremely low.

39. Each element of the temporary storage project will be licensed and regulated by the NRC. For example, the transportation casks are certified by the NRC pursuant to 10 C.F.R. Part 71; the storage cask system is approved by the NRC pursuant to 10 C.F.R. Part 72, Subpart K; and the facility itself will be approved by the NRC pursuant to 10 C.F.R. Part 72, Subparts A-I. Part of the NRC's regulatory responsibility includes a determination of the adequacy of PFS's financial qualifications to construct, operate and decommission the PFSF, as well as PFS's emergency response capabilities. The federal Price-Anderson Act fully governs third-party liability of entities engaged in the generation, transportation, and storage of spent fuel.

Federal Oversight of the Project

40. Development and operation of the PFSF is subject to stringent federal regulatory oversight. A National Environmental Policy Act ("NEPA") review is presently being undertaken by the NRC acting as lead agency, and with the BIA, Bureau of Land Management, and the Surface Transportation Board as cooperating agencies.

41. The study will result in the preparation of an environmental impact statement ("EIS"). The Draft EIS was published in June 2000. The State of Utah and other individuals filed extensive comments on the Draft EIS. The NRC has currently scheduled the completion of the Final EIS by July 2001. Following completion of the EIS and adequate hearings, a licensing decision by the NRC will be made pursuant to applicable regulatory and statutory criteria. The

State of Utah is participating extensively in the NRC licensing process including the adjudicatory hearings. The State has taken full advantage of its involvement in the licensing process to inform the NRC of its concerns relating to the storage of spent fuel. The approval of other federal agencies will also be required.

42. If the PFSF is licensed, its construction, operation, and decommissioning will be conducted under stringent federal oversight. Similarly, the transportation of spent fuel to the facility will be conducted under tight federal supervision by both NRC and DOT. For example, the transportation will be conducted with continuous armed escorts, surveillance of the spent fuel, and a continuously staffed communications center where progress of the shipment will be followed under the supervision of DOT.

43. The NRC and other federal agencies will authorize (or decline to authorize), permit (or decline to permit), and otherwise thoroughly regulate all aspects of the PFSF from initial permitting and licensing through decommissioning.

The Skull Valley Band of Goshute Indians

44. On October 12, 1863, the United States entered into a treaty with the Shoshoni-Goship Indians, which, at that time, included among them the Goshutes of Skull Valley. This Treaty was ratified by the U.S. Senate in 1864. Article 5 of the Treaty recognized the Indians' claims to the West Desert of what is now the State of Utah. In Article 6 the Indians agreed to later remove themselves to reservations made for their use by the President of the United States. By executive orders in 1917 and 1918, President Woodrow Wilson reserved land for the Skull Valley Band of Goshute Indians, which continues as their reservation to this day.

45. The Skull Valley Band is a sovereign, federally recognized Indian Tribe with inherent jurisdiction over its reservation of approximately 18,000 acres, its members, and non-members entering into contractual relationships with the Band. The Skull Valley Band has a traditional form of government with a Tribal General Council comprised of all the members 18 years of age and older and an Executive Committee that is responsible for the day-to-day business of the Band. The Skull Valley Band is responsible for the health, education and welfare of its members.

46. Under the Indian Long-Term Leasing Act, 25 U.S.C. § 415, Congress has provided a mechanism for all Indian tribes including the Skull Valley Band to enter into leases of tribal lands subject to approval by the Secretary of the Interior. Tribal lands are subject to the Band's sovereign rights and jurisdiction, subject only to federal authority, including the BIA's supervisory powers in furtherance of its trust responsibilities to the Band in approving a lease.

47. After many months of negotiation, on May 20, 1997, the Skull Valley Band and PFS entered into a 25 year lease, renewable for a second term of 25 years, for the purpose of the development, construction and operation of the PFSF. The lease covers an 820 acre site for the PFSF, certain easements and rights-of-way, and a 3,020 acre buffer zone around the facility site.

48. The lease also recognizes that the PFSF will provide economic and employment benefits to the Band. The facility would generate approximately 130 temporary construction jobs and more than 40 jobs that would last for the lifetime of the project. These jobs would provide much needed employment to members of the Band.

49. Under the lease, and pursuant to the Band's governmental authority, provisions must be made for municipal services to the reservation to accommodate increased commercial activity. This includes provisions for contracts for law enforcement, fire protection, solid waste removal, health emergencies, and environmental protection.

50. The State of Utah has no authority to interfere with the Skull Valley Band's sovereign rights or to regulate the lands of the Skull Valley Reservation, except insofar as permitted by Congress. As evidenced by Utah's Enabling Act and other federal laws, Congress has not permitted Utah to interfere in tribal matters, including the Skull Valley Band's lease with PFS.

51. Federal regulation of the PFSF applies on the reservation. If the facility is permitted, built and operated, it will only be as approved and regulated by the NRC. Further, under the lease, the Skull Valley Band has agreed that NRC regulations will control.

Reaction of Utah's Governor and Legislature to the Planned Facility

52. Not content to let the federal regulatory process take its course, Governor Leavitt commenced an all-out war designed to prevent construction of the PFSF. On April 14, 1997, shortly after the proposal was publicly announced, the Governor announced his opposition. He vowed to oppose the PFSF in every way possible, and he even established a special multi-agency task force (named the Office of High Level Nuclear Waste Storage Opposition) for the express purpose of blocking the proposed storage of spent fuel. The Governor also subsequently established a "High-Level Nuclear Waste Opposition Coordinating Council" to coordinate the efforts of citizen and government groups opposed to the storage plan.

53. In conjunction with the formation of the special multi-agency task force, the Governor publicly warned that PFS could expect court challenges and endless appeals if it tried to move forward with the PFSF, and he vowed to "use all the resources of the state" and "every avenue of influence to make sure that waste does not come to Utah." In 2001, the Governor and Legislature budgeted $1.1 million to further fund legal challenges to PFS. The Governor has called the idea of storing spent fuel in Utah an "over-my-dead-body issue." In his 1999 State of the State address, the Governor vowed to create a "moat" around the Skull Valley Reservation in order to deny PFS access to the Reservation and block the PFSF.

54. In 1998, 1999, and 2001, the Utah Legislature passed, and the Governor signed into law, six pieces of legislation designed to prevent the construction of the PFSF. These are Senate Bills 78 and 196 (passed in 1998), Senate Bills 66, 164, and 177 (passed in 1999), and Senate Bill 81 (passed in 2001). Copies of the legislation are attached hereto and incorporated by reference. Each of these pieces of legislation is a part of the State of Utah's effort to block construction of the PFSF. As a key legislator put it, the Legislature's intent was to "close the door for the state of Utah" for the storage of spent fuel. Said another legislator, "We're putting up as many hurdles as we can think up . . . to keep them from bringing (nuclear waste) in."

55. S.B. 78, passed in 1998, designates SR 196 (the Skull Valley Road), the only road access to the Skull Valley Reservation and the PFS site, as a state highway, taking control of it away from Tooele County, which supports construction of the PFSF. (S.B. 78 makes permanent an earlier action by the State's Transportation Commission.) S.B. 78, Master Road—State Highway List, ch. 330, 1998 Utah Laws 1237 (codified as amending UTAH CODE ANN. §§ 27-12-

31.1, 27-12-44.1, 27-12-47.1, 27-12-50.1, 27-12-60.1) (effective March 21, 1998); renumbered by L. 1998, ch. 270 as 72-4-106, 72-4-119, 72-4-122, 72-4-125, 72-4-135 (effective March 21, 1998). Governor Leavitt has made clear his intention to use state control of the road to ban transport over the road of spent fuel. The Governor himself unveiled a sign on the road announcing the transportation ban. The Governor and other state officials have made clear their intention never to issue a permit to transport the spent fuel over the road.

56. S.B. 196, the High Level Nuclear Waste Disposal Act, enacted in 1998, places various restrictions on the transportation or storage of spent fuel within the State. It requires the Governor's approval for the transfer or storage of spent fuel within the State, declares the transfer or storage of spent fuel to be an ultra-hazardous activity, and requires state licensing for storage or transfer of spent fuel. S.B. 196, High Level Nuclear Waste Disposal Act, ch. 348, 1998 Utah Laws 1292 (codified as amending UTAH CODE ANN. § 19-3-302; and enacting UTAH CODE ANN. §§ 19-3-302 through 317) (effective May 4, 1998). S.B. 196 prohibits the issuance of such a license unless the applicant posts a two billion dollar cash bond, all individual persons participating in the project accept "unlimited strict liability," and the applicant pays a five million dollar application fee over and above the cost of actually considering the application. The issuance of such a license requires the concurrence of the Governor and Legislature. S.B. 196 also requires a separate, state-issued license for the transportation, as opposed to storage, of spent fuel. The Senate Majority Leader acknowledged that the legislature "push[ed] the limit" of what was constitutionally defensible with S.B. 196.

57. S.B. 196 also purports to authorize state environmental permitting and approval process on Indian reservation lands. Such state regulation on Indian reservations is preempted by federal and tribal law.

58. Other than transport over the Skull Valley Road, the only access to the Skull Valley Reservation and the PFSF site would be by rail. S.B. 164, enacted in March 1999, provides for state control of two groups of gravel and dirt roads and trails near the reservation, seeking to enable the State to bar any rail line from crossing them and reaching the site as well as potentially blocking all access to the Reservation. S.B. 164, State Roads Designated, ch. 188, 1999 Utah Laws 717 (codified as enacting UTAH CODE ANN. § 72-3-301) (effective May 3, 1999). As one legislator put it: "We all know this bill isn't about roads. It's about the railroad crossings (being put under) state control, to stop high-level nuclear waste [from] coming [by way of] a railroad spur."

59. The State has no intention of permitting any rail crossings over the trails and roads. In his 1999 State of the State address, Governor Leavitt stated that it was his intention to "form a 'moat' around the Goshute 'island.' The drawbridge will be raised to the waste storage utilities and permission to cross refused . . . no matter what the price." Governor Leavitt emphatically stated that "permission will not be granted for rail crossings in the area where operation requires state approval." In an egregious affront to the Skull Valley Band's sovereignty, the Governor further claimed the Band's reservation was only land "controlled currently by the Goshute Indians."

60. S.B. 66, also enacted in 1999, alters procedures for the designation of state highways. Among these changes is a new provision providing for the designation of rural roads as state highways if the State determines that they serve a so-called "compelling statewide public safety interest." S.B. 66, Statewide Highway Criteria, ch. 72, 1999 Utah Laws 274 (codified as amending UTAH CODE ANN. §§ 72-1-303, 72-4-102, 72-7-513; and enacting UTAH CODE ANN. § 72-4-102.5) (effective July 1, 1999).

61. The three statutes that concern road and rail access to the PFSF site, S.B. 78, 164 and 66, and the actions taken pursuant to them, are designed to block the development of the PFSF and to interfere with interstate and tribal commerce. They are an integral part of what Governor Leavitt calls "a steady and continued assault" on the plan to license and build a temporary storage facility on tribal lands. He explained that legislation concerning the roads was a "critical part of our strategy" to block PFS and isolate the Skull Valley Reservation.

62. S.B. 177, the High Level Nuclear Waste Act, enacted in 1999, purports to impose joint-and-several and strict liability on PFS's members and on the shareholders of PFS's members. In other words, every individual shareholder of every utility that is a member of PFS is, under the new statute, fully liable for the debts and obligations of PFS. S.B. 177, High Level Nuclear Waste Act, ch. 190, 1999 Utah Laws 719 (codified as amending UTAH CODE ANN. §§ 19-3-315, 54-4-15, 78-34-6; and enacting UTAH CODE ANN. § 19-3-318) (effective May 3, 1999).

63. S.B. 177 also requires state approval before spent fuel is shipped and permits the imposition of fees for each shipment. In order to block transport of the spent fuel, S.B. 177

prohibits the granting of easements to cross lands within the State for the transportation of spent fuel.

64. S.B. 177 was passed and signed with only one purpose: to stop PFS from building the PFSF without regard to whether the PFSF otherwise complies with the comprehensive federal regulations and license requirements. The Governor himself made this abundantly clear when he forwarded a copy of the newly enacted statute to PFS shortly after its passage. The Governor's March 18, 1999 cover letter to PFS's chairman transmitting a copy of S.B. 177 said that "Utah opposes the location of a storage facility for high level nuclear waste within its boundaries" and that "the proposed storage facility is contrary to state policy." The letter ignores that the PFSF is to be located on the sovereign lands of the Skull Valley Band. The letter further states that "Utah will continue to vigorously challenge the proposed 'temporary' facility and its associated activities."

65. Attorney Gary Doxey of the Governor's office testified concerning S.B. 177 when it was before the Utah Senate Health and Environment Standing Committee. He made clear that the bill was an effort to find a way to regulate in the nuclear field that would be constitutionally acceptable, since that is an area of law ordinarily preempted by federal law. Mr. Doxey said: "It is, of course, a conflict with the folks who'd like to store high level waste in Utah. . . . For the most part, nuclear waste is generally a federal law subject. And there are federal constitutional considerations about interstate commerce that are stacked against us. . . . One of the areas of state law that we do control is this notion of limited liability. [Limited liability] is a privilege

granted to companies, to attract the capital of those companies and this is simply not an activity we want to attract capital for."

66. S.B. 81, Provisions Relating to High Level Nuclear Waste, enacted in 2001, revises the High Level Nuclear Waste Disposal Act of 1998 (enacted by S.B. 196) and amends various other portions of the code. S.B. 81, Provisions Relating to High Level Nuclear Waste (codified as amending UTAH CODE ANN. §§ 17-27-102 et seq., 19-3-301 et seq., 34-38-3, and 73-4-1; and enacting UTAH CODE ANN. §§ 17-27-308, 17-34-6, and 19-3-319) (effective March 13, 2001). S.B. 81 bans outright the storage of spent fuel in the State, sets up additional state regulatory obstacles to the storage of spent fuel, and prevents the provision of services by a county or any other state governmental entity to any area being considered for the storage of spent fuel. Such prohibited services include ordinary fundamental governmental services such as police, fire and emergency medical protection. These prohibited services were specifically guaranteed to PFS by Tooele County in a May 23, 2000 contract. In addition, these prohibited services would include law enforcement and detention services provided by Tooele County to the Skull Valley Reservation under a June 5, 1997 Cooperative Agreement among Tooele County, the BIA, and the Skull Valley Band pursuant to section 5 of the Indian Law Enforcement Reform Act of 1990.

67. S.B. 81 also purports to void contracts to provide goods or services to an organization attempting to engage in the placement of spent fuel within the State. This provision applies equally to public and private contracts. Thus, S.B. 81 not only purports to void Plaintiffs' agreements with Tooele County, it also purports to void agreements PFS has for the

provision of services by engineers, scientists, contractors, suppliers of any sort, attorneys and spokespersons, among others. S.B. 81 imposes confiscatory fees on persons providing goods or services to PFS, and it contains a provision criminalizing the "facilitation" of a violation of the High Level Nuclear Waste Disposal Act so that, broadly construed, S.B. 81 criminalizes any attempt to store spent fuel within the boundaries of the State and may even be interpreted to criminalize the provision of any type of public or private services to PFS.

68. S.B. 81 is part of a coordinated, ongoing effort to unconstitutionally exclude spent fuel from within the boundaries of Utah. While S.B. 81 was under consideration, Governor Leavitt declared that "I fully endorse [S.B. 81], which will outlaw these companies' use of our resources [and] keep them from getting services. . . . There will be no compromise here." When he signed S.B. 81, the Governor explained that it was part of his commitment to "block" the storage of spent fuel in Utah. One legislator called S.B. 81 another "roadblock" to the movement of spent fuel to Utah.

69. The State's justification for passing the foregoing statutes and opposing the PFSF is supposedly to protect the safety and health of Utah residents. Governor Leavitt explained his motive as the fear of potentially "endangering the public safety and health of the rest of the state. We're talking about the health and safety of 2 million people . . .". The Governor's website claimed that "Utah and the Skull Valley Reservation are not safe places to store lethal radioactive waste fuel rods." Safety and health are important goals, but legislation and regulation in these areas, where nuclear fuel is concerned, are squarely within exclusive federal jurisdiction. The

State has been active in the NRC proceedings concerning the PFSF, and it has an adequate opportunity in that appropriate context to make its concerns known.

Impact on Plaintiffs

70. The foregoing actions by the State of Utah have harmed PFS and the Skull Valley Band. The State has made clear that its actions are intended to threaten the viability of the entire PFSF project. Utah has placed PFS in the position of having to plan for the licensing, construction and operation of a facility whose total costs will be $3 billion and which requires years of advance planning under the specter of the state enactments that are clearly unconstitutional. These statutes raise the questions (1) whether transportation to the PFSF on state roads or over railroad crossings of newly designated state roads will be legal, permitted, or even physically possible, (2) whether PFS will have to comply with state regulatory requirements intended to be impossible to fulfill, (3) whether it will have to post a two billion dollar "cash" bond, (4) whether it will need to commence a state permitting process that the Governor has made clear PFS cannot successfully complete, including the payment of a five million dollar application fee over and above the actual costs of considering the application, (5) whether any of its agreements remain in effect, including its agreement with Tooele County, (6) whether it may enter into any enforceable contracts, (7) whether it will risk criminal liability for itself if it continues to engage in the federal licensing procedure, and (8) whether it will risk criminal liability if it continues to obtain goods and services in accordance with its existing agreements. These and other potential factors imposed by the State, if permitted to stand, would completely

block the purpose of PFS by making it impossible to proceed with the project on sovereign tribal lands.

71. The State has also imposed substantial hardships on PFS, which does not know whether proceeding with the PFSF will result in the imposition of unlimited liability for the debts and obligations of PFS upon the members of PFS and even upon the shareholders of the members. Here again the State's actions are designed to make it impossible for PFS to proceed with the project on sovereign tribal lands.

72. The State's actions have harmed the Skull Valley Band by purporting to deprive it of the property rights of free access to its Reservation and by denying it any benefit to be derived from its lease with PFS and related economic development. These property rights are guaranteed by the 1864 Treaty with the Shoshoni-Goship and federal executive orders, and by federal laws enacted pursuant to the Treaty, Supremacy, and Indian Commerce Clauses of the United States Constitution.

73. The State's actions are also an impermissible infringement upon the Skull Valley Band's inherent tribal sovereignty, which is protected from these types of state actions by the federal trust responsibility, general federal Indian policy, and various federal laws enacted pursuant to the Supremacy and Indian Commerce Clauses of the U.S. Constitution.

74. As alleged in the foregoing paragraphs, the actions of the State have directly impacted PFS and the Skull Valley Band by concrete injury both actual and imminently threatened. Plaintiffs reasonably apprehend that additional harm will occur. The issues presented are fit for judicial review. Delay in judicial consideration will not advance the ability

of the Court to deal with the legal issues presented by this case, nor will it otherwise serve to sharpen the dispute.

75. It is not necessary to await the imposition of penalties (including criminal penalties) and harm pursuant to the unconstitutional laws in order to rule on the validity of these laws. Indeed, a declaratory judgment is necessary now to eliminate the unconstitutional aspects of the statutes so that PFS can know its legal and financial liabilities and can continue with the assurance that its investments are made in legally sound ventures. The Skull Valley Band further requires a declaratory judgment to clarify and limit the applicability of state laws within its reservation lands and to clarify and confirm its own sovereign authority over these lands. Both Plaintiffs require the certainty of a decision striking down the statutes now because Plaintiffs continue to expend money on the project.

Responsibility of Defendant Officials

76. Defendant Michael O. Leavitt, Governor of the State of Utah, has general enforcement authority for S.B. 66, S.B. 78, S.B. 81, S.B. 164, S.B. 177, and S.B. 196 pursuant to UTAH CONST. Article VII, Section 5, and specific enforcement authority for S.B. 81 (to be codified at UTAH CODE ANN. §§ 19-3-301, -3-312), S.B. 177 (§§ 19-3-315(4)); 54-4-15(4); 78-34-6(5)), and S.B. 196 (§§ 19-3-301, -304(1), -311(2), -3-312). Defendant Leavitt has repeatedly threatened to enforce Utah's unconstitutional legislation against Plaintiffs.

77. Defendant Mark Shurtleff, Attorney General of the State of Utah, has general enforcement authority for S.B. 66, S.B. 78, S.B. 81, S.B. 164, S.B. 177, and S.B. 196 pursuant to UTAH CONST. Article VII, Section 16, and specific enforcement authority for S.B. 196 (UTAH

CODE ANN. § 19-3-312). Defendant Shurtleff has threatened to enforce Utah's unconstitutional legislation against Plaintiffs.

78. Defendant Dianne R. Nielson, Executive Director of the Utah Division of Environmental Quality, has specific enforcement authority for S.B. 81 (to be codified at UTAH CODE ANN. §§ 19-3-301, -3-319, 74-4-1), and S.B. 196 (§§ 19-3-304(1), -3-304(2), -3-304(3), -312; 19-3-315(3)). Defendant Nielson has threatened to enforce Utah's unconstitutional legislation against Plaintiffs.

79. Defendant Thomas Warne, Executive Director of the Utah Department of Transportation, has specific enforcement authority for S.B. 66 (UTAH CODE ANN. §§ 72-1-303, -4-102, -4-102.5, -7-513), S.B. 78 (§§ 72-4-106, -119, -122, -125, -135), S.B. 164 (§ 72-3-301), S.B. 177 (§ 19-3-315), and S.B. 196 (§ 19-3-315(1), -3-315(2)).

80. Defendants Glen Edward Brown, Stephen M. Bodily, Hal Mendenhall Clyde, Dan R. Eastman, Sheri L. Griffith, James Grey Larkin and Ted D. Lewis, Commissioners of the Utah Department of Transportation, have specific enforcement authority for S.B. 66 (UTAH CODE ANN. § 72-4-102(1)(b), 102(2)); and S.B. 177 (§ 54-4-15(4)).

Alternative Grounds for Relief

81. Based on the foregoing facts, Plaintiffs request declaratory and injunctive relief to protect them from the application of S.B. 78, 196, 66, 164, 177 and 81 and conduct of state officials pursuant thereto. These statutes and conduct are unconstitutional and otherwise illegal under applicable federal law insofar as they are used or intended to stop or interfere with the PFSF. Plaintiffs hereby invoke all protections available to them under the Constitution of the

United States and other federal law. Subsequently in this litigation, Plaintiffs will argue many legal grounds upon which relief may be granted. Among these grounds to be argued hereafter are the following.

Count I
Declaratory Judgment – Supremacy Clause, Preemption

82. Plaintiffs incorporate herein the allegations of paragraphs 1-81 above as if fully set forth herein.

83. Plaintiffs bring this claim for relief pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and 42 U.S.C. § 1983 for a judgment declaring that S.B. 78, 196, 66, 164, 177 and 81 are unconstitutional insofar as they are used or intended to stop or interfere with the PFSF. These statutes and/or the actions taken pursuant to them violate the Supremacy Clause of the Constitution of the United States (Article VI, Clause 2), because they legislate in areas expressly or impliedly occupied by federal legislation, and they are designed to thwart the purposes of the federal legislation, including the Atomic Energy Act, the Energy Reorganization Act, the Price-Anderson Act, the Hazardous Materials Transportation Act, the Nuclear Waste Policy Act, the Interstate Commerce Commission Termination Act, the Railway Safety Act, the Federal Land Policy and Management Act, the Indian Long-Term Leasing Act, and the Indian Self-Determination Act.

Count II
Declaratory Judgment – Commerce Clause

84. Plaintiffs incorporate herein the allegations of paragraphs 1-83 above as if fully set forth herein.

85. Plaintiffs bring this cause of action pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and 42 U.S.C. § 1983 for a judgment declaring that S.B. 78, 196, 66, 164, 177 and 81 are unconstitutional insofar as they are used or intended to stop or interfere with the PFSF. These statutes and/or the actions taken pursuant to them violate the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3), because, considered individually and together, they discriminate against interstate commerce and create an undue burden on interstate commerce.

Count III
Declaratory Judgment – Preeminent Federal Authority Over Indian Affairs, Indian Commerce Clause, Treaty Clause, Supremacy Clause

86. Plaintiffs incorporate herein the allegations of paragraphs 1-85 above as if fully set forth herein.

87. Plaintiffs bring this cause of action pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and 42 U.S.C. § 1983 for a judgment declaring that S.B. 78, 196, 66, 164, 177 and 81 are unconstitutional insofar as they are used or intended to stop or interfere with the PFSF. These statutes and/or the actions taken pursuant to them violate the Indian Commerce Clause (Article I, Section 8, Clause 3), the Treaty Clause (Article II, Section 2, Clause 2), and the Supremacy Clause (Article VI, Clause 2) of the Constitution of the United States because, considered individually and together, they impinge on the preeminent federal authority to regulate Indian affairs, including leasing of Indian lands, and create an undue burden on the rights of the Skull Valley Band and PFS to enter into and fulfill a lease agreement.

Count IV
Declaratory Judgment – Federal Indian Law / Indian Sovereignty Doctrine

88. Plaintiffs incorporate herein the allegations of paragraphs 1-87 above as if fully set forth herein.

89. Plaintiffs bring this cause of action pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and 42 U.S.C. § 1983 for a judgment declaring that S.B. 78, 196, 66, 164, 177 and 81 are unconstitutional insofar as they are used or intended to stop or interfere with the PFSF. These statutes and/or the actions taken pursuant to them are preempted by the extensive federal laws and regulations and the federal trust responsibility applicable to the Skull Valley Band and its Reservation lands. These statutes and actions also violate the sovereignty and rights of self-government of the Skull Valley Band.

Count V
Declaratory Judgment – Contract Clause

90. Plaintiffs incorporate herein the allegations of paragraphs 1-89 above as if fully set forth herein.

91. Plaintiffs bring this cause of action pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and 42 U.S.C. § 1983 for a judgment declaring that S.B. 78, 196, 66, 164, 177 and 81 are unconstitutional insofar as they are used or intended to stop or interfere with the PFSF. These statutes and/or the actions taken pursuant to them violate the Contracts Clause of the Constitution of the United States (Article I, Section 10, Clause 1), because, considered individually and together, they substantially and unreasonably impair PFS's lease agreement with the Skull Valley Band, PFS's agreement with Tooele County, PFS's agreements

with private persons and entities for the provision of goods and services, the Skull Valley Band Cooperative Agreement with Tooele County and the BIA, and other inter-governmental and private agreements into which the Skull Valley Band has entered.

Count VI
Declaratory Judgment – Deprivation of Property

92. Plaintiffs incorporate herein the allegations of paragraphs 1-91 above as if fully set forth herein.

93. Plaintiffs bring this cause of action pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and 42 U.S.C. § 1983 for a judgment declaring that S.B. 78, 196, 66, 164, 177 and 81 are unconstitutional insofar as they are used or intended to stop or interfere with the PFSF. These statutes and/or the actions taken pursuant to them violate the prohibition on deprivation of property without due process of law, as set forth in the Fourteenth Amendment of the Constitution of the United States, because, considered individually and together, they purport to deprive Plaintiffs of economic and property rights, including but not limited to, the benefits of the various agreements set forth above. These deprivations of contract rights and other property rights are imposed by the State without due process.

Count VII
Declaratory Judgment –First, Sixth and Fourteenth Amendments

94. Plaintiffs incorporate herein the allegations of paragraphs 1-93 above as if fully set forth herein.

95. Plaintiffs bring this cause of action pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and 42 U.S.C. § 1983 for a judgment declaring S.B. 81 to be

unconstitutional to the extent that it purports to deprive Plaintiffs of the assistance of counsel by voiding Plaintiffs' agreements with counsel. Any attempt by the Utah Governor and Legislature to discourage or prevent Plaintiffs from obtaining legal assistance violates the First Amendment (freedom to associate, freedom to petition the government), the Sixth Amendment (right to assistance of counsel) and the Fourteenth Amendment (right to due process of law) of the Constitution of the United States. Plaintiffs also request a judgment declaring S.B. 177, 196, and 81 to be unconstitutional to the extent that they impinge on the right of PFS to exercise its rights to free speech and to associate with suppliers of goods and services and other persons essential to the carrying on of its lawful business, in violation of the First Amendment's protection of speech and the freedom of association.

Count VIII
Injunction

96. Plaintiffs incorporate herein the allegations of paragraphs 1-95 above as if fully set forth herein.

97. Plaintiffs bring this cause of action for an injunction prohibiting Defendants from further enforcing the unconstitutional aspects of S.B. 78, 196, 66, 164, 177 and 81.

98. Defendants contend that S.B. 78, 196, 66, 164, 177 and 81 are constitutional and insist that they will continue to enforce them against PFS, its officers, directors, member utilities, and the shareholders of the members. Indeed, the public record is clear that the Governor and Legislature passed the above statutes solely for the specific purpose of enforcing them against PFS, the Skull Valley Band, and related parties.

99. Plaintiffs have no adequate remedy at law in that an action for damages would not compensate Plaintiffs for the loss of their constitutional, contractual, and property rights as set forth in this Complaint. Plaintiffs will continue to suffer irreparable harm absent an injunction. The public interest favors issuance of an injunction enforcing constitutional, contractual, and property rights, and the State of Utah will suffer no harm through enforcement of the Constitution and of Plaintiffs' other rights.

WHEREFORE, Plaintiffs pray for judgment as follows:

1. A declaration that S.B. 78, 196, 66, 164, 177 and 81 are unconstitutional and void insofar as they block or are intended to impede the construction and operation of the PFSF;

2. An injunction prohibiting Defendants from further enforcing S.B. 78, 196, 66, 164, 177 and 81 against PFS or otherwise using any of the statutes in a manner calculated to impede the construction and operation of the PFSF;

3. An injunction prohibiting Defendants from taking any action inconsistent with PFS's rights under any license issued to it from the NRC or under the lease with the Band;

4. A declaration that the PFSF is a project regulated by federal authority pursuant to federal law and that attempted state regulation of the project is unconstitutional;

5. An award of Plaintiffs' attorney's fees and costs in this action pursuant to 42 U.S.C. § 1988; and

6. Such other and further relief the Court deems proper.

DATED this 19th day of April, 2001.

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