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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

THE SKULL VALLEY BAND OF  
GOSHUTE INDIANS, et al.,

Plaintiffs,

vs.

MICHAEL O. LEAVITT, et al.,

Defendants.

Counterclaim

(1) UTAH'S MOTION FOR LEAVE TO  
FILE ITS PROPOSED  
"SECOND AMENDED AND  
SUPPLEMENTAL COUNTERCLAIM";  
(2) SUPPORTING MEMORANDUM;  
AND  
(3) THE PROPOSED PLEADING

Civil No. 2:01CV00270C  
Judge Tena Campbell

MOTION

Utah moves for leave to file its proposed "Second Amended and Supplemental Counterclaim" ("the proposed pleading"). A copy of that proposed pleading is attached. Utah makes this motion pursuant to Rule 15(a) and (c), Federal Rules of Civil Procedure, and bases this motion on the following supporting Memorandum, on all pleadings and papers on file in this action, and on such oral argument as the Court may allow.

## MEMORANDUM OF POINTS AND AUTHORITIES

### **Background**

In a prior filing, we set forth the basis for half of what we are doing here with this current motion. That filing was Utah's 4 March 2002 "Reply re Utah's Suggestion of Lack of Jurisdiction" ("the Reply"). At pages 20-23, it reads<sup>1</sup>:

The "lawfulness" issue – whether Congress prohibited a privately owned, away-from-reactor, spent nuclear fuel storage facility – constitutes a pure legal question. To answer that question "yes" or "no" is to resolve **no** practical issue; it is simply to answer a pure legal question. The answer, of course, may then be **applied** in the process of resolving another and a practical issue, indeed, any number of practical issues. Here are three such practical issues (there are more):

1. As a result of the challenged Utah statutes, has PFS suffered an actual injury to a legally protected interest so as to give PFS standing to attack those statutes?
2. Are the challenged Utah statutes in harmony with the federal law governing the storage and disposal of spent nuclear fuel (so as to be immune to any preemption attack)?
3. Will a license that the NRC may issue in the future for the Skull Valley facility be an invalid license because issued for a facility prohibited by Congress?

Now here is the important point: This Court has before it now the first of those three practical issues – whether PFS has a legally protected interest and thus standing. The Court can rule on that practical issue only by answering the "lawfulness" issue. If this Court resolves the first practical issue, the standing issue, in favor of PFS, then this Court will have before it the second of the three practical issues – whether the challenged Utah statutes are in harmony or conflict with the relevant federal law – and this Court's prior resolution of the "lawfulness" issue will come into service again. And please note this: If this Court does not resolve the "lawfulness" issue in the standing context, it will have to resolve it in the context of PFS's (not Utah's) summary judgment motions

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<sup>1</sup> The "lawfulness" issue is whether Congress authorized or prohibited a privately owned, away-from-reactor, spent nuclear fuel storage facility, the kind of facility PFS is pushing for Skull Valley.

because those motions rely heavily on pre-emption by federal law and other purported conflicts with federal law.

Importantly, this Court has no need to resolve the third practical issue – whether any future NRC license for the Skull Valley facility will be valid or invalid. This Court will not be adjudicating any claim in this action requiring resolution of that third practical issue. . . .

. . . . To the extent Utah’s counterclaim on the “lawfulness” issue speaks of the validity of any NRC license, we misspoke; that counterclaim is intended to seek a declaration that governing federal law prohibits and thereby makes unlawful PFS’s proposed Skull Valley facility. The Court may deem that counterclaim so amended pursuant to Rule 15(b), Federal Rules of Civil Procedure, or Utah will file a Second Amended Counterclaim.

We also noted the process by which we came to the conclusion that Utah’s counterclaim ought to be amended:

The idea that the answer to a pure legal question – the “lawfulness” issue – is conceptually separate from the use of that answer in resolving any number of practical issues is really quite simple. Yet although simple, the idea came to us only after a long time in that process of analytical refinement and further refinement that a lawyer goes through while working on a complex legal matter. . . .

*Id.* at p. 23 n. 12.

Thus, the proposed pleading replaces references to the scope of NRC’s licensing authority with language going only to the pure legal question, the “lawfulness” issue, that is, whether Congress authorized or prohibited the kind of nuclear waste dump PFS is promoting for Skull Valley.

That same process of analytical refinement noted above explains the other half of what we are doing with this motion. In analyzing PFS’s summary judgment motions, we clarified that two key Utah statutes attacked by PFS are in force and effect, or not, depending on a final

determination of the “lawfulness” issue. See Utah’s 7 March 2002 Response to Plaintiffs’ Joint Motion for Summary Judgment, at pp. 9-10. Accordingly, the proposed pleading adds a second claim for declaratory relief.

That second claim recites that the Complaint challenges the constitutionality of U.C.A. §§ 19-3-301(1) and 19-3-301(10)(a); that section 301(1) flatly prohibits the placement of any nuclear waste “within the exterior boundaries of Utah”; that this prohibition is based on the Legislature’s well-founded conclusion that federal law prohibited the storage of nuclear waste in privately owned, away-from-reactor facilities; that section 301(10)(a) does not impose a tax on lawful activity but rather imposes a fine on unlawful activity; and that this section, like section 301(1), applies to PFS **only if** federal law renders the proposed Skull Valley facility unlawful. All this is so because a fair reading of sections 301(1) and 301(10)(a) reveals that, if a court determines that the Legislature is wrong about the federal law – that is, if a court determines that Congress somehow did not prohibit privately owned, away-from-reactor, SNF storage facilities –, then the rules of the game in Utah change. In that event, other provisions of Utah law authorize the Governor, with the concurrence of the Legislature, to “specifically approve the placement” of nuclear waste in the state, subject to certain conditions. U.C.A. § 19-3-301(2). Section 301(1)’s prohibition is thus no longer in force, nor is section 301(10)(a), with its fine assessed to enforce that prohibition.

On the basis of those assertions, the second claim asserts that, relative to sections 301(1) and 301(10)(a), Utah contends that those sections are in full force and effect because federal law prohibits a privately owned, away-from-reactor, SNF storage facility, while PFS and the Band

contend that federal law does not prohibit but rather authorizes such a facility. Consequently, an actual controversy exists between Utah, on one hand, and PFS and the Band, on the other hand, and that controversy is the proper subject of a declaratory judgment.

Finally, there is the matter of the *supplemental* part of the proposed pleading. The proposed pleading adds allegations regarding events occurring since the filing of the First Amended Counterclaim in August 2001. Those events are the additional Utah requests to the NRC to resolve the “lawfulness” issue.

(Other changes constitute minor corrections or clarifications of background information.)

### **Argument**

This Court should freely grant the requested leave to file the proposed pleading. In the circumstances, such leave will be fair and will promote the “just, speedy, and inexpensive determination of” this action. Rule 1, Federal Rules of Civil Procedure.

Rule 15(a) governs amendment of pleadings and provides that, when leave to amend is required, “leave shall be freely given when justice so requires.” Rule 15(d) governs supplemental pleadings and provides that this Court “may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.”

This important action has required (and will continue to require) a sorting through of complex and challenging issues. The analysis leading to the proposed amendment of Utah’s

counterclaim developed as quickly as reasonably possible. That analysis is well-founded and is now properly before this Court for adjudication. In short, this is a case where justice requires leave to amend and supplement.

Accordingly, Utah respectfully requests that this Court grant leave for the filing of the proposed pleading.

Dated: 26 March 2002

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MICHAEL O. LEAVITT, et al.,

Counterclaimants,

vs.

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

Counterdefendants.

**(PROPOSED)**

**UTAH'S  
SECOND AMENDED AND  
SUPPLEMENTAL  
COUNTERCLAIM**

Civil No. 2:01CV00270C

Judge Tena Campbell

For their Second Amended and Supplemental Counterclaim against counterdefendants  
Private Fuel Storage, L.L.C., and the Skull Valley Band of Goshute Indians, counterclaimants

Michael O. Leavitt, in his official capacity as Governor of the State of Utah, and Mark L. Shurtleff, in his official capacity as Attorney General of the State of Utah, both on behalf of the State of Utah and its citizens (collectively “Utah”), allege and pray as follows:

### **GENERAL ALLEGATIONS**

1. In its Complaint, plaintiff Private Fuel Storage, L.L.C. (“PFS”) – alleging both that it is on the verge of receiving a valid license from the Nuclear Regulatory Commission to operate a high-level nuclear waste dump and that it is party to a valid lease with the Skull Valley Band of Goshute Indians (“the Band”) for the siting of that dump – challenges the constitutionality of six Utah statutes it sees as impediments to its plans. The plaintiffs’ Complaint, however, fails on five key and independent threshold issues (issues necessarily raised by the Complaint itself), as well as on the constitutional challenge.

First, governing federal law, the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101, *et seq.*, prohibits a privately owned, away-from-reactor, spent nuclear fuel storage facility, which is exactly the kind of facility plaintiffs are proposing for Skull Valley.

Second, any federal action allowing for the dump will necessarily violate requirements of the National Environmental Protection Act and therefore be invalid.

Third, the Band has not validly, properly, and lawfully approved the lease.

Fourth, the Bureau of Indian Affairs’ conditional approval of the lease occurred in violation of governing laws and rules.

Fifth, any Bureau of Indian Affairs approval of the lease (conditional or otherwise) will be invalid as a breach of the United States’ trust obligations to the Band.



1A. The following paragraphs in this General Allegations section demonstrate the fatal flaws in the plaintiffs' position, as alleged in their own Complaint, and therefore demonstrate the basis for the declaratory relief sought by this Second Amended Counterclaim.

### **The Nation's Commercial Nuclear Power Industry**

2. This Nation embarked on development of a commercial nuclear power industry ("the industry") with passage of the Atomic Energy Act of 1954 ("the AEA"), 42 U.S.C. § 2011 *et seq.*, which directed the Atomic Energy Commission ("the AEC"), among other things, to encourage development of the industry. Development of the industry, however, ultimately depended on development of a politically acceptable method of disposing of the high-level nuclear waste created in the industry's processes. This was so because such high-level nuclear waste ("SNF" for "spent nuclear fuel") is highly toxic to life and remains toxic for tens of thousands of years, and thus SNF disposal presents complex technical, social, and political problems. (For present purposes, "SNF" refers only to the waste created by the industry, not to the waste created by the military or other federal activities.)

3. Because of this complexity, Congress has consistently mandated that disposal of SNF is not an endeavor to be left to private industry but is a matter for federal action. Yet in discharging its responsibility to safely dispose of SNF, the federal government ("the Government") has had only two options: storage or reprocessing. From the very beginning of the industry, the Government did not regard storage as a feasible and acceptable method of SNF disposal and therefore took no steps to develop the storage option. This was the case until 1977, when reprocessing was effectively suspended by judicial actions and presidential dictates.

4. With the Energy Reorganization Act of 1974, Congress eliminated the AEC and gave its responsibilities relative to the industry to the newly created Nuclear Regulatory Commission (“the NRC”). The NRC is authorized to address issues of radiological hazards but not to mandate the siting of commercial nuclear facilities. The States retain substantial power over the siting of commercial nuclear facilities and regulation of the related economic and social impacts.

4A. By the time President Carter in 1977 eliminated reprocessing as an option for SNF disposal, the NRC or its predecessor had licensed 64 commercial nuclear power plants. (The NRC has issued no construction license since 1978 for a currently operating commercial reactor.) The industry presently creates approximately 2,000 metric tons of SNF a year at its 103 operating reactors. The present SNF accumulation totals more than 41,000 metric tons. That SNF is stored on-site at or adjacent to the nuclear power plants that created it, either in large pools (“wet storage”) or in above-ground storage casks (“dry storage”). No one site has in dry storage more than 490 metric tons of SNF.

#### **The Government’s Efforts Relative to SNF Storage**

5. Until 1971, the Government had never given any thought even to an experimental program for storage of SNF. The AEC made a stab in that year at developing an experimental storage depository in Kansas. But three developments ended that effort: an intense political attack on the program, technical flaws in the site, and U. S. Environmental Protection Agency criticism that the program was a potential *de facto* permanent repository. Failure likewise greeted the Government effort to site SNF storage in Michigan in 1976, in Tennessee in 1985, and in New Mexico in 1993. Political opposition played a key role in ending all these efforts.

6. During this period, the industry began asserting that it would soon run out of storage capacity at its nuclear power plants (“on-site storage”) and threatening that, without alternative disposal available, the industry would begin shutting down those plants. These assertions and threats are of dubious validity.

7. In the Nuclear Waste Policy Act of 1982 (“the original NWPA”), Congress directed clearly and exclusively the means by which the industry’s SNF would be managed. The original NWPA (and this continued true through all subsequent amendments) prohibited a privately owned, away-from-reactor, SNF storage facility (such as plaintiffs now propose). Rather, the original NWPA (and this is unchanged in all amendments) mandated three means of management. First, it provided for “disposal” in a “repository,” that is, placement in a “permanent deep geologic” site, “with no foreseeable intent of recovery.” 42 U.S.C. § 10101 (9) & (18). Second, the original NWPA provided for an “interim storage program” requiring SNF storage on-site in expanded facilities at the civilian nuclear power reactors or, to a very limited extent (1,900 metric tons), at an already owned federal facility – but in no event authorizing “the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not [already] owned by the” Government. *Id.* at § 10155(h). Third, the original NWPA provided for study of a “monitored retrievable storage program,” a program where the Government (and no one else) constructs and runs a “long-term” (that is, something between “permanent” and “interim”) storage facility. Unlike the first solution (“disposal” with no intent to recover the SNF), the second and third solutions called

for “storage,” that is, placement “with the intent to recover [the SNF] for subsequent use, processing, or disposal.” *Id.* at § 10101(25).

8. For all three of its mandated programs, the original NWPA provided substantial procedural and substantive protections for the peoples and institutions in the States where the Government might investigate either a repository (permanent disposal) or interim or monitored retrievable storage and even greater protections for the peoples and institutions in a State actually chosen for such a facility. Those protections included repeated notices to the State, repeated public hearings near the site, continuing federal provision of information to and consultation and cooperation with the State, much federal money to fund both independent State testing and evaluations of a proposed site and State information campaigns, and – perhaps most protective of all – the State’s right to veto a site (subject to override only by a joint resolution of Congress).

9. Also in the original NWPA, the Government renewed to the industry a promise that the Government, through the AEC, had first made in 1957: in the absence of reprocessing, the Government will be responsible for the SNF. In the original NWPA, the Government even gave itself a deadline to begin disposing of the industry’s SNF, 31 January 1998. Based on those particular provisions, the Government entered into contracts with the industry to begin disposing of the industry’s SNF by the 31 January 1998 deadline.

10. In 1987, Congress “redirected” the repository program with amendments to the original NWPA (those amendments commonly being referred to as the “Screw Nevada Bill”), which limited to Yucca Mountain, Nevada, Government efforts to find and create a permanent repository. The amendments, however, did not go so far as to strip Nevada of its power under

the original NWPA to veto a repository (subject to override only by a joint resolution of Congress). Even before 1987, but especially since, Nevada and its political leaders have waged a consistently energetic campaign to prevent creation of the permanent repository in that state. That campaign, along with the recurring discovery of technical problems with the Yucca Mountain site, have at least delayed creation of a permanent repository.

11. Also during those years, the Government began efforts to achieve one of the storage solutions provided for in NWPA, the monitored retrievable storage program ("MRS"). After the Government's 1985 MRS effort in Tennessee foundered and after certain 1987 amendments to the NWPA (which authorized progress towards a Government-owned and operated MRS, subject to substantial protections for the local populations), the Government focused its MRS efforts on Indian tribes and reservations. The more promising of those efforts centered on the Mescalero Apache reservation in New Mexico. But then in 1993, Congress enacted legislation cutting-off advanced levels of MRS grant monies to Indian tribes unless the surrounding local and state government officials gave their approval. This legislation (together with the 1995 lapsing of the position of Nuclear Waste Negotiator) effectively killed the MRS concept.

12. Because of these delays and set-backs, as 31 January 1998 approached (the date the Government had promised to begin disposing of the industry's SNF), it became evident that the Government would not be able to keep its promise. That development led to litigation between the industry and the Government. The utilities won on liability; the litigation is now moving on to address remedies, including money damages. In other words, the Government is on the hook for the adverse consequences of its delay in developing an off-site storage facility. Nevertheless,

the industry claims to be under large operational and local political pressures to reduce or remove their SNF from their on-site storage facilities. The industry makes this claim despite the Government's recent offer to assume responsibility, on-site at the power plants, for the industry's SNF – an offer the industry has rejected. Moreover, PFS makes this same claim even though at least five of its eight member utilities have no genuine and pressing need for off-site storage.

13. Thus, for almost fifty years, the best minds and most powerful people in the Government – with access to virtually unlimited resources (work on Yucca Mountain alone having cost to date over \$6 billion) – have not been able to implement an effective, workable solution to the SNF problem.

#### **The Foreign Utilities' Scheme**

14. A. In this situation, a consortium of foreign utilities – nearly all located in the East and Midwest – hit upon a bold scheme, one that promises huge financial rewards. That scheme is to create a private, supposedly “interim” storage facility, to put some of the consortium's own member's SNF there, and to charge (what will presumably be monopoly prices) for the Nation's other utilities to do the same (with the Government on the hook to pay the bill).

B. The scheme's two key ideas were and are: (1) buy the sovereignty and use of the land of a small, poor Indian tribe in the West and (2) get the NRC to license a private, for-profit SNF dump on that land.

C. The scheme's facility itself would consist of open concrete slabs and, set on but not secured to those slabs, 4,000 storage casks, each holding 10 metric tons of SNF. In other

words, where now no one site contains more than 490 metric tons of SNF in dry storage, the foreign utilities' scheme would aggregate in one place 40,000 metric tons of the poison.

**a. The scheme's NRC component**

15. Because Congress in the NWPA stated the exclusive means for disposal of SNF, reaffirmed the Government's role to create and operate the contemplated disposal and/or storage facilities, and expressly prohibited a privately owned, away-from-reactor, SNF storage facility, the scheme is unlawful. Still, the scheme's promoters pushed ahead with efforts to secure an NRC license, perhaps emboldened by the reality that the NRC has long since become (like the AEC before it became) a compliant tool of the industry. At the outset of the NRC licensing proceeding, Utah contended that the NWPA prohibited the proposed Skull Valley facility. More recently, Utah has sought through two other procedures NRC resolution of the legal issue whether the NWPA prohibits that facility. Those two procedures are a petition for rulemaking and a suggestion of lack of jurisdiction. But to date the NRC has not grappled with and not resolved whether the NWPA prohibits such a facility as is now proposed for Skull Valley.

16. In its licensing process, the NRC has, by use of a fiction, cut off any effective assessment of the long-term environmental impacts of granting a license for a private, for-profit, off-site SNF dump. That fiction is called "the waste confidence decision," which dates back to 1984 and which states as fact a mere prediction: when needed, there will be an adequate permanent repository (or repositories) to which all the SNF located in off-site "interim" dumps can and will be moved. History has already put the lie to the NRC's waste confidence decision, and each passing day further undermines it. Yet the NRC continues to use its fiction to prevent

any assessment of environmental impacts beyond the supposed twenty or forty year existence of the scheme's SNF dump. This is so even though both the arithmetic of the industry's past and on-going production of SNF and the reality of the Government's on-going failure to create adequate Government-operated repositories assure that, once moved to the scheme's SNF dump in Skull Valley, the contemplated 40,000 tons of SNF will be there for many generations and probably indefinitely. Indeed, even if the repository at Yucca Mountain opened in 2015 (the earliest possible date), the SNF at the scheme's SNF dump will remain there indefinitely, making that dump a *de facto* permanent repository, yet without the environmental and other protections afforded a *de jure* permanent repository.

**b. The scheme's Indian reservation component**

17. Regarding the Indian reservation component of their scheme, the foreign utilities first engaged the Mescalero Apache reservation in New Mexico. That effort began in December 1993. The foreign utilities formed, as a consortium, Mescalero Fuel Storage Limited Liability Corporation and "won" the support of the tribe's powerful, long-entrenched tribal chairman. But in a referendum in January 1994, a strong majority of the tribe voted against negotiations with the consortium. The political machine of the tribal chairman then redoubled its efforts, bringing about another vote just six weeks later. The relationship between the tribal chairman and the strong core of tribal members opposed to the proposed SNF dump became contentious, and opponents alleged intimidation and other foul play by tribal leadership, including opponents losing their on-reservation jobs. In the second referendum, the vote went the other way, in favor



of the project. But by April 1996, negotiations had broken off between the Mescalero and the consortium.

18. The consortium had started with 33 foreign utilities. By June 1995, the consortium had shrunk to 23 utilities; by April 1996 (when the Mescalero venture collapsed), to eleven. But some opportunists among the industry would not be daunted. Most active among the foreign utilities has been Xcel Energy (formerly Northern States Power Co.) of Minnesota, which has succumbed to political pressures in its host state to get its SNF out and, in the process, has not challenged Minnesota's statute that – contrary to the NWPA's mandate to expand on-site storage – prohibits such expansion.

#### **c. Private Fuel Storage, L.L.C. and the Leon Bear faction**

19. In 1996, the persisting utilities began a direct relationship with Leon Bear of the Skull Valley Band. To exploit the emerging Skull Valley opportunity, the consortium of (now eight) utilities created Private Fuel Storage, a Delaware limited liability company ("PFS"), gave it no substantial capital, but instead put it on a "pay just enough into it as it goes" basis.

20. The Skull Valley Band of Goshute Indians ("the Band") has a reservation of approximately 18,000 acres only fifty miles west, southwest (upwind) from the center of Salt Lake City. The Band has 124 members (including children), less than 20 of whom live on the reservation, and is one of the poorest and smallest federally recognized Indian tribes.

21. The Band has no written constitution. It has traditionally conducted its business through a General Council, which is composed of all adult members of the Band, and through a

three-member executive unit (Chairman, Vice-Chair, and Secretary), which is elected by the General Council and charged with carrying out its directions.

22. On 20 May 1997, Leon Bear and two others, purporting to act on behalf of the Band, signed a lease agreement with PFS leasing reservation land to PFS for its SNF dump (“the lease” or “the 1997 lease”). On 23 May 1997, an employee of the Department of the Interior’s Bureau of Indian Affairs (“BIA”), after a perfunctory review and after otherwise failing to comply with governing rules and regulations, conditionally approved the lease.

23. At least 18 members of the Band’s General Council have challenged the validity of the lease and the validity of BIA’s conditional approval of the lease. Members of the General Council have filed an administrative appeal with BIA and two federal lawsuits raising these issues. On information and belief, Utah alleges what members of the General Council – by sworn affidavit or otherwise in the context of the administrative appeal and the lawsuits – have alleged:

A. Leon Bear, who claims to be the Band’s Chairman, has been and continues to be PFS’s chief operative in the Band and, at times, has claimed to be employed by PFS. He has been acting unlawfully as an officer of the Band since January 1994, when the General Council by vote recalled the tribal administration of which he was a part. Leon Bear wrongfully claims to have been elected Chairman in November 1995 to a four-year term. When his term expired in November 1999, Leon Bear nevertheless continued to act as Chairman until a new election was held in November 2000. At the November 2000 election, Leon Bear, promising PFS money to

those who supported him and no PFS money to those who opposed him, was “re-elected” as tribal Chairman. (Secret balloting is not used.) Leon Bear made good on his promises.

B. During his tenure as a tribal officer, Leon Bear has violated the Band’s traditions and rules to arrogate to himself control over all tribal funds, to avoid an accounting for those funds, to effectively replace the Band’s General Council mode of government with unreviewable government by the executive unit, to block from participation in tribal affairs enrolled tribal members who do not support him or the SNF dump, and to deflect effective, remedial federal agency review and action.

C. Leon Bear has used his arrogated powers to make and keep the Band ostensibly a party to the 1997 lease with PFS for the SNF dump and to enrich himself and his close associates in the venture.

1. In this context, Leon Bear and PFS have never fully disclosed the contents of the 1997 lease to the tribal members, have never otherwise fully informed them of the risks and purported benefits of that lease, and have never advised them of or accounted for the monies (tribal or otherwise) flowing from PFS to Leon Bear and his close associates, but have provided some tribal funds to those who support Leon Bear and the SNF dump, while withholding tribal funds from those who oppose him or that project.

2. Also in this context, Leon Bear has never sought nor received General Council approval for the lease but has relied instead on a spurious “resolution” ostensibly signed at times over many weeks by a thin majority of the General Council members. (It appears that a

majority of the General Council presently oppose the lease and PFS's proposed SNF dump, but Leon Bear refuses to honor the majority's wishes.)

3. Also in this context, PFS and Leon Bear delivered the lease to the BIA for the statutorily required BIA approval. An agency employee gave conditional approval after a cursory review and without determining whether the lease had been validly approved by the Band, whether the SNF would be removed at the end of the lease term, and what the long-term implications are for the Band's reservation lands when the SNF is not timely removed.

24. The BIA's approval of the lease was conditioned on final environmental review. The BIA, the NRC, and PFS presently intend to rely on a final environmental impact statement (EIS) arbitrarily cut short by the NRC's waste confidence decision. For the BIA to grant final, unconditional approval of the lease on the basis of such a final EIS will constitute a serious breach of the Government's trust obligations to the Band. That is so because (i) the reasonable assurance now is that, once the SNF is on the reservation, it will not be removed within the promised twenty or forty years but rather will remain for many, many generations thereafter; (ii) the waste confidence decision has no valid basis in reality and can be explained only as an NRC effort to facilitate the industry; (iii) a full and fair EIS, one unrestricted by the waste confidence rule and thus one that evaluates the SNF dump for the *de facto* permanent repository it truly is, would doom the dump; (iv) the presence of the SNF on the reservation for generations beyond the promised twenty or forty years will both violate, in an irremedial way, the terms of the lease and destroy the trust purposes of the reservation lands. (Likewise, in

approving the lease for the SNF dump, the BIA violates its statutory obligations to persons and the environment off the reservation.)

25. Thus, the purported 1997 lease between PFS and the Band for the dump is invalid for any one and all of the following reasons:

A. The Band has never approved the lease in a manner valid under the Band's form of government;

B. The Band's "approval" of the lease resulted and continues to result from wrongful and unlawful use of tribal assets and from economic and other forms of coercion and duress;

C. The BIA has never properly and lawfully approved the lease, and the BIA approval purportedly given results from violations of governing rules and laws, including the Government's trust obligations to the Band.

D. The events made conditions to the full effectiveness of the lease neither have occurred nor will occur, including compliance with NEPA.

#### **Legal Implications of the SNF Dump Scheme**

26. The foreign utilities' private, for-profit scheme to "solve" the intractable SNF problem fails and must fail (even without regard to the fact that Utah's statutes attacked in the Complaint are fully valid), for each one of five independent and threshold reasons:

First, governing federal law, the NWPA, prohibits a privately owned, away-from-reactor, spent nuclear fuel storage facility, which is exactly the kind of facility plaintiffs are proposing for Skull Valley.

Second, any federal action allowing for the dump will necessarily violate NEPA and therefore be invalid. That is so because (i) any federal action allowing the dump must rest necessarily and squarely on the NRC's waste confidence decision, which arbitrarily operates to cut-off any assessment of the environmental impacts of the SNF dump beyond the twenty or forty years of its now-promised use; (ii) such an assessment, if done, would doom the SNF dump; and (iii) the reasonable assurance now is that, once the SNF is on the reservation, it will not be removed within the promised twenty or forty years but rather will remain for many, many generations thereafter.

Third, the Band has not validly, properly, and lawfully approved the lease.

Fourth, the BIA's conditional approval of the lease occurred in violation of governing laws and rules.

Fifth, any BIA approval of the lease (conditional or otherwise) will be invalid as a breach of the Government's trust obligation to the Band inasmuch as the Skull Valley SNF dump will be a *de facto* permanent repository and thereby destroy the trust purposes of the land.

27. In their Complaint, PFS and the Band have invoked this Court's jurisdiction and thereby sought a declaration of their rights and other legal relations relative to Utah and the SNF dump. But because PFS's scheme for its SNF dump fails and must fail on the threshold issues raised by the plaintiffs' own Complaint, the declaratory judgment resulting from the plaintiffs' own Complaint must be adverse to them and favorable to Utah. With its Second Amended and Supplemental Counterclaim, Utah seeks to assure full resolution (through declaratory judgment) of all issues necessarily put in issue by both PFS and the Band.

### **JURISDICTION AND JUSTICIABILITY**

28. This Court has subject matter jurisdiction over this Second Amended and Supplemental Counterclaim on the same basis and to the same extent as this Court has jurisdiction relative to the Complaint, except that, unlike the Complaint, this Second Amended and Supplemental Counterclaim is not barred by the eleventh amendment to the federal constitution (properly understood and applied).

29. This Second Amended and Supplemental Counterclaim is justiciable on the same basis and to the same extent as is the Complaint.

### **STATUS OF THE COUNTERCLAIMANTS**

30. Governor Leavitt and Attorney General Shurtleff assert this Second Amended and Supplemental Counterclaim on behalf of the State of Utah and, *parens patriae*, on behalf of its citizens. PFS's activities, present and promised, threaten the social, cultural, economic, environmental, and physical interests of Utah's citizens, who, generally speaking, are not in a position to protect themselves against PFS. Utah has a quasi-sovereign interest in protecting those threatened interests of its citizens.

### **FIRST CLAIM FOR DECLARATORY JUDGMENT**

31. Relative to PFS's scheme and actions to locate the SNF dump inside this state, Utah asserts that the dump cannot come here, for at least five reasons:

First, governing federal law, the NWSA, prohibits a privately owned, away-from-reactor, spent nuclear fuel storage facility, which is exactly the kind of facility plaintiffs are proposing for Skull Valley.

Second, any federal action allowing for the dump will necessarily violate NEPA and therefore be invalid. That is so because (i) any such federal action must rest necessarily and squarely on the NRC's waste confidence decision, which arbitrarily operates to cut-off any assessment of the environmental impacts of the SNF dump beyond the twenty or forty years of its now-promised use; (ii) such an assessment, if done, would doom the SNF dump; and (iii) the reasonable assurance now is that, once the SNF is on the reservation, it will not be removed within the promised twenty or forty years but rather will remain for many, many generations thereafter.

Third, the Band has not validly, properly, and lawfully approved the lease.

Fourth, the BIA's conditional approval of the lease occurred in violation of governing laws and rules.

Fifth, any BIA approval of the lease (conditional or otherwise) will be invalid as a breach of the Government's trust obligation to the Band inasmuch as the Skull Valley SNF dump will be a *de facto* permanent repository and thereby destroy the trust purposes of the land.

32. PFS and the Band deny each of these assertions and continue to take action to bring about PFS's scheme.

33. Consequently, an actual controversy exists between Utah, on one hand, and PFS and the Band, on the other hand. That controversy is the proper subject of a declaratory judgment issued pursuant to 28 U.S.C. §§ 2201 and 2202.



34. Because Utah is right in its assertions and PFS and the Band are wrong in their denials, this Court should enter a judgment in favor of Utah and against PFS and the Band, declaring that:

First, governing federal law, the NWPA, prohibits a privately owned, away-from-reactor, spent nuclear fuel storage facility, which is exactly the kind of facility plaintiffs are proposing for Skull Valley.

Second, any federal action allowing for the dump will necessarily violate NEPA and therefore be invalid. That is so because (i) any such federal action must rest necessarily and squarely on the NRC's waste confidence decision, which arbitrarily operates to cut-off any assessment of the environmental impacts of the SNF dump beyond the twenty or forty years of its now-promised use; (ii) such an assessment, if done, would doom the SNF dump; and (iii) the reasonable assurance now is that, once the SNF is on the reservation, it will not be removed within the promised twenty or forty years but rather will remain for many, many generations thereafter.

Third, the Band has not validly, properly, and lawfully approved the lease.

Fourth, the BIA's conditional approval of the lease occurred in violation of governing laws and rules.

Fifth, any BIA approval of the lease (conditional or otherwise) will be invalid as a breach of the Government's trust obligation to the Band inasmuch as the Skull Valley SNF dump will be a *de facto* permanent repository and thereby destroy the trust purposes of the land.

## SECOND CLAIM FOR DECLARATORY JUDGMENT

35. In their Complaint, PFS and the Band challenge the constitutionality of various Utah statutes pertaining to SNF storage, including U.C.A. §§ 19-3-301(1) and 19-3-301(10)(a).

36. Section 301(1) flatly prohibits the placement of any nuclear waste “within the exterior boundaries of Utah.” The prohibition is based on the Legislature’s well-founded conclusion that federal law prohibited the storage of nuclear waste in privately owned, away-from-reactor facilities. U.C.A. § 19-3-302(2). The prohibition is a reiteration at the state level of the prohibition that exists at the federal level.

37. Section 301(10)(a) does not impose a tax on lawful activity but rather imposes a fine on unlawful activity. That section applies to PFS **only if** federal law renders the proposed Skull Valley facility unlawful. Indeed, section 301(10)(a) was adopted to enforce section 301(1)’s prohibition. In other words, the fee assessed by section 301(10)(a) is in support of, and dependent on, section 301(1)’s flat prohibition.

38. A fair reading of sections 301(1) and 301(10)(a) reveals that if a court determines that the Legislature is wrong about the federal law – that is, if a court determines that Congress somehow did not prohibit privately owned, away-from-reactor, SNF storage facilities – then the rules of the game in Utah change. In that event, other provisions of Utah law authorize the Governor, with the concurrence of the Legislature, to “specifically approve the placement” of nuclear waste in the state, subject to certain conditions. U.C.A. § 19-3-301(2). Section 301(1)’s prohibition is thus no longer in force, nor is section 301(10)(a), with its fine assessed to enforce that prohibition.

39. Relative to sections 301(1) and 301(10)(a), Utah contends that those sections are in full force and effect because federal law prohibits a privately owned, away-from-reactor, SNF storage facility, while PFS and the Band contend that federal law does not prohibit but rather authorizes such a facility.

40. Consequently, an actual controversy exists between Utah, on one hand, and PFS and the Band, on the other hand. That controversy is the proper subject of a declaratory judgment issued pursuant to 28 U.S.C. §§ 2201 and 2202.

41. Because Utah is right in its position and PFS and the Band are wrong in their position, this Court should enter a judgment in favor of Utah and against PFS and the Band, declaring that sections 301(1) and 301(10)(a) are in full force and effect because federal law prohibits a privately owned, away-from-reactor, SNF storage facility.

**WHEREFORE**, relative to its Second Amended and Supplemental Counterclaim, Utah prays that this Court:

A. enter a declaratory judgment in favor of Utah on the basis of the five points set out in paragraph 34;

B. enter a declaratory judgment in favor of Utah declaring that sections 301(1) and 301(10)(a) are in full force and effect because federal law prohibits a privately owned, away-from-reactor, SNF storage facility;

C. award Utah its costs, expenses, and attorneys' fees incurred in connection with its Second Amended and Supplemental Counterclaim; and

D. grant Utah such other relief as is just and proper.

**DEMAND FOR JURY TRIAL**

42. Utah demands trial by jury on all claims and issues.

Dated:

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**CERTIFICATE OF SERVICE BY MAIL**

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