

No. 23-60377

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UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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FASKEN LAND AND MINERALS, LTD., and  
PERMIAN BASIN LAND AND ROYALTY OWNERS,  
*Petitioners,*  
v.  
NUCLEAR REGULATORY COMMISSION and  
UNITED STATES OF AMERICA,  
*Respondents.*

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On Petition for Review of Action by the  
Nuclear Regulatory Commission

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**MOTION TO DISMISS OR TRANSFER THE  
PETITION FOR REVIEW OF FASKEN LAND AND MINERALS  
AND PERMIAN BASIN LAND AND ROYALTY OWNERS**

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## **CERTIFICATE OF INTERESTED PERSONS**

Case No. 23-60377

FASKEN LAND AND MINERALS, LTD., and  
PERMIAN BASIN LAND AND ROYALTY OWNERS,  
*Petitioners,*  
v.

NUCLEAR REGULATORY COMMISSION and  
UNITED STATES OF AMERICA,  
*Respondents.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2. have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Petitioners
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  - b. Permian Basin Land and Royalty Owners
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5. Licensee/Proposed Intervenor

- a. Holtec International

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....iv

INTRODUCTION ..... 1

BACKGROUND .....2

    A. Legal background .....2

    B. Factual background.....3

ARGUMENT .....6

    I. The Petition for Review should be dismissed for lack of jurisdiction. ....6

        A. Fasken is not a “party aggrieved” under the Hobbs Act and  
            therefore cannot directly challenge the Holtec license. ....6

        B. The judicial review provisions of the Atomic Energy Act, not  
            the Nuclear Waste Policy Act, govern this Petition.....13

    II. Alternatively, the Petition for Review should be transferred to the  
        D.C. Circuit, where Fasken is already pursuing a jurisdictionally  
        proper challenge to the NRC’s licensing proceeding.....15

CONCLUSION .....18

CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

### Cases

<i>Alaska v. FERC</i> , 980 F.2d 761 (D.C. Cir. 1992).....	8, 9
<i>Am. Newspaper Publishers Ass’ns v. U.S. Postal Service</i> , 789 F.2d 1090 (5th Cir. 1986) .....	17
<i>Am. Trucking Ass’ns v. ICC</i> , 673 F.2d 82 (5th Cir. 1982) .....	7, 8, 9, 11
<i>Balderas v. NRC</i> , 59 F.4th 1112 (10th Cir. 2023).....	6, 12, 13
<i>Baros v. Texas Mexican R.R. Co.</i> , 400 F.3d 228 (5th Cir. 2005) .....	10
<i>Bullcreek v. NRC</i> , 359 F.3d 536 (D.C. Cir. 2004).....	3, 14
<i>In re Chicago, Milwaukee, St. Paul &amp; Pac. R.R.</i> , 799 F.2d 317 (7th Cir. 1986) .....	6, 10
<i>City of Benton v. NRC</i> , 136 F.3d 824 (D.C. Cir. 1998).....	7
<i>Don’t Waste Michigan v. NRC</i> , No. 21-1048, 2023 WL 395030 (D.C. Cir. Jan. 25, 2023).....	5, 7, 9, 13, 14
<i>Ecology Action v. Atomic Energy Comm’n</i> , 492 F.2d 998 (2nd Cir. 1974) .....	8
<i>Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.</i> , 167 F.3d 111 (2nd Cir. 1999) .....	10
<i>Merchants Fast Motor Lines, Inc. v. ICC</i> , 5 F.3d 911 (5th Cir. 1993) .....	11

*Nat’l Ass’n of State Util. Consumer Advocates v. FCC*,  
457 F.3d 1238 (11th Cir. 2006) .....10

*Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*,  
461 U.S. 190 (1983).....3

*Skull Valley Band of Goshute Indians v. Nielson*,  
376 F.3d 1223 (10th Cir. 2004) .....3, 14

*Thermal Ecology Must Be Preserved v. Atomic Energy Comm’n*,  
433 F.2d 524 (D.C. Cir. 1970).....8

*Wales Transp., Inc. v. ICC*,  
728 F.2d 774 (5th Cir. 1984) .....6, 9

**Adjudicatory Decisions of the Nuclear Regulatory Commission**

*In the Matter of Holtec International* (HI-STORE Consolidated Interim Storage Facility),

CLI-20-4, 91 NRC 167 (2020) .....4

CLI-21-4, 93 NRC 119 (2021) .....4

CLI-21-7, 93 NRC 215 (2021) .....4

LBP-19-4, 89 NRC 353 (2019) .....11

**Statutes**

28 U.S.C. § 1404.....17

28 U.S.C. § 2321 .....9

28 U.S.C. § 2342.....6, 9

28 U.S.C. § 2343 .....17

28 U.S.C. § 2344.....4, 6, 7, 9

42 U.S.C. § 2073 .....2

42 U.S.C. § 2092 .....2

42 U.S.C. § 2093 .....2

42 U.S.C. § 2111 .....2

42 U.S.C. § 2239 .....6, 15

42 U.S.C. § 10139 .....13, 15

Pub. L. No. 93-584, 88 Stat. 1917 (1975).....10

**Regulations**

10 C.F.R. Part 2.....2, 3

**Federal Register Notices**

Final Rule, Licensing Requirements for the Storage of Spent Fuel in an  
Independent Spent Fuel Storage Installation,  
45 Fed. Reg. 74,693 (November 12, 1980) .....2

## INTRODUCTION

Respondents Nuclear Regulatory Commission (“NRC”) and the United States move to dismiss the Petition for Review of Fasken Land and Minerals, Limited, and Permian Basin Land and Royalty Owners (together, “Fasken”). Counsel for Respondents contacted all parties concerning this motion. Fasken opposes this motion and will file a response. Holtec International (“Holtec”), which has filed an unopposed motion to intervene, supports the requested relief.

This Petition concerns an Atomic Energy Act (“AEA”) license that the NRC issued to Holtec to construct and operate a facility in New Mexico for the storage of spent nuclear fuel. As provided by the AEA, the NRC offered interested parties an opportunity to participate in an adjudicatory hearing concerning issuance of the license, and Fasken sought leave to intervene, but the NRC denied Fasken party status. Dissatisfied with that result, Fasken filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, which remains pending.

Yet Fasken *also* seeks relief before this Court, purporting to challenge the terms of the license itself, even though it was denied admission to the adjudication over the license. This form of duplicative action is barred by the text of the Hobbs Act and by the chorus of circuit courts holding that when a person is denied admission as a party to an NRC licensing proceeding, that person’s *sole* avenue for



judicial review is through a challenge to the NRC's decision denying that person party status. Fasken is pursuing that avenue before the D.C. Circuit, so its Petition to this Court should be dismissed for lack of subject-matter jurisdiction. In the alternative, the Petition should be transferred to the D.C. Circuit.

## **BACKGROUND**

### **A. Legal background**

The NRC issues licenses for the storage of spent nuclear fuel pursuant to authority conferred upon it by Congress pursuant to the AEA—specifically, pursuant to its authority to issue licenses for the possession of source, byproduct, and special nuclear material under 42 U.S.C. §§ 2073, 2092, 2093, 2111. In 1980, the NRC implemented its statutory authority in its regulations at 10 C.F.R. Part 72. *See* Final Rule, Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 45 Fed. Reg. 74,693, 74,694, 74,699, 74,700-01 (November 12, 1980) (promulgating Part 72 and explaining that the agency licenses the possession of NRC-regulated materials at fuel storage sites pursuant to its AEA authority).

Both the D.C. Circuit and Tenth Circuit—which encompasses New Mexico, the site of the Holtec facility—have confirmed that Congress conferred the authority upon the NRC in the AEA to license the storage of spent nuclear fuel and did not repeal that authority through passage of the Nuclear Waste Policy Act

(“NWPA”) in 1982. *Bullcreek v. NRC*, 359 F.3d 536, 542 (D.C. Cir. 2004); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004). See generally *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 206, 217 (1983) (explaining that the Atomic Energy Commission, the NRC’s predecessor, “was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials” and recognizing, in the course of describing the NRC’s authority under the AEA, that the NRC “has promulgated detailed regulations governing storage and disposal [of spent fuel] away from the reactor” (citing 10 C.F.R. Part 72)).

## **B. Factual background**

In March 2017, Holtec filed an application with the NRC for a license to construct and operate a spent fuel storage facility in Lea County, New Mexico. Fasken moved to dismiss the license application, asserting that issuance of the license would be inconsistent with the NWPA because it contemplated the storage of fuel for which the Department of Energy would be responsible. Several putative intervenors, including Fasken, also requested a hearing before the agency by filing “contentions” in accordance with the agency’s adjudicatory procedures set forth at 10 C.F.R. Part 2. In October 2018, the NRC referred Fasken’s motion to dismiss into its adjudicatory process (along with a similar motion filed by another intervenor). Exhibit 1. Over the next three years, the NRC issued a series of

rulings denying admission of the various contentions that the putative intervenors, including Fasken, had raised and ultimately denying their petitions to intervene.<sup>1</sup>

Fasken and three other groups of petitioners filed petitions for review in the D.C. Circuit, challenging the Commission's adjudicatory decisions denying them intervenor status. Those petitions were consolidated by the D.C. Circuit and remain pending before that court. *See Beyond Nuclear v. NRC*, No. 20-1187 (consolidated with No. 20-1225 (*Don't Waste Michigan v. NRC*), No. 21-1104 (*Sierra Club v. NRC*), and No. 21-147 (*Fasken v. NRC*)).

On May 9, 2023, the NRC issued a license to Holtec to store spent fuel at the proposed facility. Exhibit 2. Fasken timely filed the instant Petition on July 7, 2023. *See* 28 U.S.C. § 2344.

This Petition is not the first one that Fasken has raised in this Court challenging the issuance of a license for a fuel storage facility. In 2021, Fasken filed a petition for review in this Court, which was consolidated with a petition

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<sup>1</sup> *In the Matter of Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC 167 (2020) (affirming Licensing Board's denial of admission of contentions raised by Fasken, Sierra Club, Beyond Nuclear, Inc, and a group of Joint Intervenors, including Don't Waste Michigan, and remanding additional contentions to Licensing Board for further consideration); CLI-21-4, 93 NRC 119 (2021) (affirming denial of admission of Sierra Club's additional contentions); CLI-21-7, 93 NRC 215 (2021) (affirming denial of Fasken's motion to reopen the record to admit new contention).

filed by the State of Texas, challenging another license for a spent fuel storage facility, this one issued to Interim Storage Partners, LLC (“ISP”) for a facility in Texas. *Texas v. NRC*, No. 21-60743 (5th Cir.). As here, Fasken sought to intervene in the licensing proceeding, and the NRC denied Fasken’s petition to be admitted as a party. The NRC and the United States moved to dismiss the challenges filed in this Court, asserting that the Court lacks jurisdiction (a) over Texas’s petition because Texas did not participate at all in the adjudicatory proceedings before the agency; and (b) over Fasken’s petition because the sole remedy for persons who are denied party status in NRC proceedings is to seek review of the decision denying party status. The Court carried the NRC’s motions with the case, and the matter has been briefed, argued, and submitted.

Since then, the courts of appeals have continued to confirm the proper course for participating in NRC’s licensing proceedings and seeking judicial review of those decisions. In January 2023, the D.C. Circuit upheld the NRC’s decision not to admit Fasken as a party to the proceedings concerning the ISP license. *Don’t Waste Michigan v. NRC*, No. 21-1048, 2023 WL 395030 at \*3 (D.C. Cir. Jan. 25, 2023) (unpublished per curiam judgment). In that same decision, the D.C. Circuit also held that it lacked jurisdiction to consider another petitioner’s direct challenge to the ISP license because that petitioner was denied leave to intervene and thus did not qualify as a “party aggrieved” by the NRC’s

order issuing the license. *Id.* (relying on *Ohio Nuclear-Free Network v. NRC*, 53 F.4th 236, 239 (D.C. Cir. 2022)). Then, in February 2023, the Tenth Circuit dismissed the State of New Mexico’s direct challenge to the ISP license. *Balderas v. NRC*, 59 F.4th 1112 (10th Cir. 2023).

## ARGUMENT

### **I. The Petition for Review should be dismissed for lack of jurisdiction.**

#### **A. Fasken is not a “party aggrieved” under the Hobbs Act and therefore cannot directly challenge the Holtec license.**

Fasken’s Petition for Review should be dismissed because this Court lacks jurisdiction to hear a direct challenge to the Holtec license by an entity that unsuccessfully sought intervention in the NRC’s adjudicatory proceedings. The sole remedy for an entity denied intervenor status is to challenge the decision denying intervention, and that entity cannot get a second bite at the apple by seeking judicial review of the final order issuing the license.

Section 189 of the AEA, 42 U.S.C. § 2239(a), (b), and the Hobbs Act, 28 U.S.C. §§ 2342, 2344, permit a “party aggrieved” by a final order issued in an NRC licensing proceeding to seek judicial review of that order in the federal courts of appeals. Only a party aggrieved is permitted to seek such relief. *Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 (5th Cir. 1984); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-35 (7th Cir. 1986) (Hobbs Act “limits review to petitions filed by parties, and that is that.”). When an intervenor is admitted to an

NRC proceeding for the issuance of a license, it becomes a “party” and is permitted to file a petition for review challenging the NRC’s decision to issue license in the court of appeals within 60 days of the issuance of the license. *See* 28 U.S.C. § 2344. Indeed, this is the “ordinar[y]” scenario in which the “final order” that triggers Hobbs Act jurisdiction is the issuance of the license. *City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998).

But if the NRC denies a person intervention, the putative intervenor is *not* a “party aggrieved” as to the license that may result from the proceeding. Rather, the putative intervenor is a “party aggrieved” only as to the independent NRC order that denied it permission to intervene. In that situation, the putative intervenor’s *sole* judicial remedy is to challenge the agency’s final decision denying it party status. As this Court explained in *American Trucking Ass’n v. ICC*, 673 F.2d 82, 85 (5th Cir. 1982), those “who would intervene but are denied permission to do so are not without remedies.” Their judicial remedy is to “take an immediate appeal from that denial within the agency and, if necessary, to the Court of Appeals.” *Id.*

Other courts of appeals agree with this Court’s longstanding interpretation of the party aggrieved requirement of the Hobbs Act. *See, e.g., Don’t Waste Michigan*, 2023 WL 395030 at \*3 (“Because Beyond Nuclear was denied leave to intervene in the NRC’s licensing proceeding, it does not qualify as a ‘party

aggrieved’ by the order issuing the license.”); *Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992) (“Having failed to achieve the status of a party to the litigation, the putative intervenor could not later seek review of the final judgment on the merits.”); *Ecology Action v. Atomic Energy Comm’n*, 492 F.2d 998, 1000 (2nd Cir. 1974) (order denying intervention is immediately appealable as final order even if license has not yet issued); *Thermal Ecology Must Be Preserved v. Atomic Energy Comm’n*, 433 F.2d 524, 526 (D.C. Cir. 1970) (“An order denying intervention would be reviewable . . .”).

Fasken followed the path charted by these precedents in its litigation in the D.C. Circuit. Along with three other groups of petitioners who unsuccessfully sought to intervene before the NRC, Fasken has challenged the NRC’s adjudicatory decisions denying it party status by filing a petition for review in the D.C. Circuit. *See Beyond Nuclear v. NRC*, No. 20-1187 (D.C. Cir.) (consolidated with Nos. 20-1225, 21-1104, and 21-1147). And Respondents have not contested the D.C. Circuit’s jurisdiction over those petitions for review. But this Court lacks jurisdiction over Fasken’s new Petition for Review challenging the license because Fasken never obtained intervenor status in the NRC’s adjudicatory proceedings. Under these circumstances, Fasken’s sole remedy under the Hobbs Act is to pursue its challenge to the NRC’s denial of its admission as a party to the proceedings, as it has already done in the D.C. Circuit. *American Trucking*, 673 F.2d at 85; *see*

*also Don't Waste Michigan v. NRC*, 2023 WL 395030 at \*3; *Alaska*, 980 F.2d at 763. Fasken's Petition for Review before this Court of its claims directly challenging the Holtec license should therefore be dismissed.

We note that Fasken's Petition for Review does not specify the arguments it intends to raise before this Court. *But see* 28 U.S.C. § 2344(3) (directing that a petition for review "shall contain a concise statement of," among other things, the "grounds on which relief is sought"). We expect that Fasken will raise arguments contesting the authority of the NRC to issue a license for the storage of spent fuel under the AEA. And, to be sure, when addressing review of orders by the Interstate Commerce Commission ("ICC") under the Hobbs Act,<sup>2</sup> this Court in dicta in *American Trucking* identified "two rare instances a person may appeal an agency action even if not a party to the original agency proceeding": (1) "if the agency action is 'attacked as exceeding the power of the Commission'"; or (2) "if a person, not a party to the agency proceeding, challenges the constitutionality of the statute conferring authority on the agency." *American Trucking*, 673 F.2d 82, 85 n.4 (5th Cir. 1982); *see also Wales Transportation*, 728 F.2d at 776 n.1 (5th Cir. 1984) (relying on "*ultra vires*" exception to review petition against ICC).

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<sup>2</sup> The functions of the ICC have since been assigned to the Surface Transportation Board, the rules, regulations, and final orders of which are reviewable under the Hobbs Act. *See* 28 U.S.C. §§ 2321, 2342.



But the *ultra vires* exception is inapplicable here. As an initial matter, and as this Court has observed, the exception has been “squarely rejected” by other courts. *Baros v. Texas Mexican R.R. Co.*, 400 F.3d 228, 238 n.24 (5th Cir. 2005); *see also Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 167 F.3d 111, 112-13 (2nd Cir. 1999); *In re Chicago*, 799 F.2d at 334-35; *Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1249 (11th Cir. 2006). And for good reason. This Court explained in *Baros* that the underlying rationale for *American Trucking*’s *ultra vires* exception in ICC cases was the Court’s apparent misapprehension that decisions of the ICC were *not* subject to the Hobbs Act (and its “party aggrieved” requirement). *See Baros*, 400 F.3d at 238 n.24 (noting that *American Trucking* had relied on two cases decided before 1975). In fact, decisions of the ICC became subject to the Hobbs Act in 1975, *id.* (citing *Erie-Niagara*, 167 F.3d at 113); Pub. L. No. 93-584, §§ 3, 4, 88 Stat. 1917 (1975), and the exception that this Court recognized in *American Trucking* and applied in *Wales Transportation* rests on a flawed understanding of the non-applicability of the Hobbs Act, and the “party aggrieved” requirement, to ICC cases. That apparent error need not be (and has not been) extended to this Court’s review under the Hobbs Act of decisions by other agencies. There is no justification for extending a suspect exception to the plain text in the Hobbs Act to decisions of the NRC.

And even as to ICC orders, this Court has held that the “exception to the requirement that one seeking review must be an aggrieved party is exceedingly narrow.” *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 922 (5th Cir. 1993). Thus, in *Merchants Fast*, this Court held that the exception did *not* apply to a challenge to the ICC’s authority where the agency had the authority to decide the issue being raised in the first instance—in that case, whether the commerce at issue was interstate in character. *Id.* at 922; *see also American Trucking*, 673 F.2d at 84 (noting that “it is incumbent ‘upon an interested person to act affirmatively to protect himself’ in administrative proceedings” (quoting *Nader v. NRC*, 513 F.2d 1045, 1054 (D.C. Cir. 1975))).

So here. The NRC has the authority to adjudicate arguments relating to the scope of its authority under the AEA. In fact, the agency’s authority to issue the Holtec license is being challenged in the D.C. Circuit by petitioners who *did* assert before the agency that the agency lacks authority to issue licenses for the storage of spent fuel. *See, e.g., Holtec International*, LBP-19-4, 89 NRC 353, 383 (2019) (adjudicating Sierra Club’s contention that “any away-from-reactor interim storage facility is necessarily unlawful under the AEA and/or the NWSA”). Yet Fasken has chosen not to pursue the avenue that Congress specified for asserting such arguments in court (i.e., by raising them in a hearing conducted pursuant to Section 189a of the AEA and seeking judicial review within 60 days of being denied

intervenor status). Fasken cannot evade the plain requirements of the Hobbs Act by filing a freestanding and belated challenge to the license here.

Indeed, earlier this year, the Tenth Circuit correctly applied these principles when it rejected New Mexico's invocation of the *ultra vires* exception to challenge the ISP license. *Balderas*, 59 F.4th at 1124. In *Balderas*, the court not only rejected the legal basis for the *ultra vires* exception but also concluded that, even if the exception were legally sound, it would be inapplicable because New Mexico had the opportunity to raise arguments concerning the NRC's authority in the licensing proceeding. *Id.* (recognizing *American Trucking's* reliance on "the need for affirmative action to protect oneself"). The same requirement applies to any challenge by Fasken in this Court to the NRC's authority to issue a license for the away-from-reactor storage of spent fuel — Fasken *could have* raised these arguments in the form of a contention before the agency and, if dissatisfied with the result, *could have* sought review of the agency's decision not to permit it to intervene on this basis. Fasken simply chose not to do so.<sup>3</sup> Thus, even if the *ultra vires* exception were applicable to decisions of the NRC, this case does not present

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<sup>3</sup> To the extent Fasken may claim that its petition for review in the D.C. Circuit *does* raise arguments that go to the agency's legal authority, it is obviously free to make those assertions before that court. But it is not entitled to a second judicial forum within which to raise such a challenge.

the “exceedingly narrow” circumstances where its invocation would be appropriate.

**B. The judicial review provisions of the Atomic Energy Act, not the Nuclear Waste Policy Act, govern this Petition.**

Fasken also invokes in its Petition for Review the judicial review provision of the NWPA, 42 U.S.C. § 10139, which, unlike the Hobbs Act, does not contain a “party aggrieved” requirement. However, this provision is inapplicable to this case. Section 10139 of the NWPA provides for judicial review of actions of the President, the Department of Energy, or NRC taken under “this part,” which is a reference to actions undertaken pursuant to Part A of U.S. Code Title 42, Chapter 108, Subchapter 1, 42 U.S.C. §§ 10131-10145. And those actions all pertain to licenses issued to the Department of Energy, not to private parties.

The Tenth Circuit expressly reached this conclusion in *Balderas*, holding that Section 10139 of the NWPA is inapplicable when the NRC issues a license for temporary storage of spent fuel to a *private party*, like it did here, rather than a license to the Department of Energy for a permanent federal repository for spent fuel or a federally licensed temporary storage facility. 59 F.4th at 1122-23 (“We lack jurisdiction under the Nuclear Waste Policy Act because it does not govern Interim Storage’s license.”); *see also Don’t Waste Michigan*, 2023 WL 395030 at \*1 (distinguishing between storage of spent fuel under the AEA and disposal in a permanent repository under the NWPA).

The NRC made clear when it issued the license to Holtec that it was doing so pursuant to the AEA, not the NWPA. The very first paragraph of the license plainly so states. *See* Exhibit 2 at 1 (invoking agency authority under “the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974 (Public Law 93-438), and Title 10, Code of Federal Regulations, Chapter 1, Part 72, and in reliance on statements and representations heretofore made by the licensee”). And it is well-settled that the Commission has authority under the AEA (not the NWPA) to license and regulate the storage of such fuel by private parties. *See Bullcreek v. NRC*, 359 F.3d at 542 (In enacting NWPA, “Congress did not intend to repeal or supersede the NRC's authority under the AEA to license and regulate private use of private away-from-reactor spent fuel storage facilities.”); *Don't Waste Michigan*, 2023 WL 395030 at \*1 (quoting *Bullcreek* and observing that the AEA grants the NRC authority to license and regulate the storage and disposal of spent nuclear fuel); *see also Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004) (endorsing the D.C. Circuit's decision in *Bullcreek* concerning the scope of NRC's authority under the AEA and agreeing that passage of the NWPA did not affect NRC's preexisting authority).

In short, the NWPA's judicial review provision relates solely to review of agency action taken pursuant to the NWPA, not the AEA. And the NWPA authorizes judicial review of agency action related to the issuance of a license *to*

*the Department of Energy* to construct and operate a spent fuel storage or disposal facility. *See* 42 U.S.C. § 10139. The license at issue in this case was issued pursuant to the AEA to a private party, Holtec, not to the Department of Energy; and it is the judicial review provision applicable to the AEA (i.e., AEA § 189b, 42 U.S.C. § 2239(b), invoking review under the Hobbs Act) that governs Fasken's challenge.

**II. Alternatively, the Petition for Review should be transferred to the D.C. Circuit, where Fasken is already pursuing a jurisdictionally proper challenge to the NRC's licensing proceeding.**

If this Court declines to dismiss Fasken's Petition for Review, it should transfer the Petition to the D.C. Circuit. Transfer is in the interests of justice, promotes efficient use of judicial and party resources, and avoids the potential for conflicting decisions involving the same parties.

In August 2021, Fasken filed a petition for review in the D.C. Circuit that challenges the NRC's denial of intervention in the Holtec licensing proceedings. Fasken also *could* have filed its subsequent petition for review challenging the Holtec license in the D.C. Circuit (even if there is no independent jurisdictional basis for the court to review the license itself, as discussed above). Instead, Fasken repeated the same approach that it pursued in the *Texas* litigation, filing a second petition for review of the license in this Court. Fasken's decision to bifurcate judicial review of the related actions by the NRC between two federal courts of

appeals could lead to conflicting judicial opinions. For instance, if the D.C. Circuit were to hold that the NRC properly denied Fasken intervention in the ISP proceedings, then this Court's review of Fasken's challenge to the Holtec license would directly conflict with that decision.

Moreover, the D.C. Circuit has consolidated several petitions for review of the NRC's orders denying intervention in the Holtec licensing proceeding. If this Court does not transfer Fasken's Petition, Fasken would be participating in briefing in two courts of appeals raising issues related to the same license. This is an improper and inefficient use of judicial and party resources that creates a risk of conflicting opinions by two courts of appeals related to the same order (the Holtec license) and the same parties (Fasken, Respondents, and Holtec).

Fasken also appears likely to raise issues in this Court that substantially overlap with the issues that it or other parties intend to pursue in the D.C. Circuit, including the agency's authority to issue licenses for the storage of spent nuclear fuel under either the AEA or the NWPAA. Fasken should not be permitted to pursue similar issues before multiple courts of appeals, especially when the resulting overlap is the result of its unilateral decision to file petitions in both courts. Moving forward with the Petition for Review in this Court that raises similar issues to those that will be raised in the D.C. Circuit would undermine a sister circuit's

case management efforts and needlessly complicate the litigation for all involved, including the courts.

To the extent this Court has jurisdiction over Fasken’s Petition for Review (and it plainly does not), it is empowered to transfer the Petition to the D.C. Circuit, where Fasken could have filed the Petition. *See* 28 U.S.C. § 2343; *Am. Newspaper Publishers Ass’ns v. U.S. Postal Service*, 789 F.2d 1090, 1092 (5th Cir. 1986) (transferring case to Fourth Circuit). And, in this case, the interests of justice—with respect to conserving judicial resources, the undesirability of inconsistent decision from different circuits, and the discouragement of forum-shopping—strongly militate in favor of transfer here. *Cf.* 28 U.S.C. § 1404(a) (permitting transfer of district court actions in the interest of justice).



## CONCLUSION

Respondents respectfully request that this Court dismiss Fasken's Petition for Review for lack of subject-matter jurisdiction, or in the alternative, transfer the Petition to the United States Court of Appeals for the D.C. Circuit.

Respectfully submitted,

/s/ Justin D. Heminger

TODD KIM

Assistant Attorney General

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July 28, 2023

**CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)**

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 4,151 words, excluding the parts of the of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Andrew P. Averbach

Andrew P. Averbach

Counsel for Respondent  
U.S. Nuclear Regulatory Commission

## CERTIFICATE OF SERVICE

I certify that on July 28, 2023, I served a copy of the foregoing **MOTION TO DISMISS OR TRANSFER THE PETITION FOR REVIEW OF FASKEN LAND AND MINERALS AND PERMIAN BASIN LAND AND ROYALTY OWNERS** upon counsel for the parties in this action by filing the document electronically through the CM/ECF system.

/s/ Andrew P. Averbach

Andrew P. Averbach

Counsel for Respondent

U.S. Nuclear Regulatory Commission

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

_____	)	
In the Matters of	)	
	)	
HOLTEC INTERNATIONAL	)	Docket No. 72-1051
	)	
(HI-STORE Consolidated Interim Storage	)	
Facility)	)	
	)	
INTERIM STORAGE PARTNERS LLC	)	Docket No. 72-1050
	)	
(WCS Consolidated Interim Storage Facility)	)	
	)	
_____	)	

**ORDER**

On July 16, 2018, the NRC provided notice in the *Federal Register* of Holtec International's application to construct and operate a consolidated interim storage facility for spent nuclear fuel.<sup>1</sup> Separately, on August 29, 2018, the NRC provided notice in the *Federal Register* of Interim Storage Partners' application to construct and operate a consolidated interim storage facility for spent nuclear fuel.<sup>2</sup>

On September 14, 2018, Beyond Nuclear, Fasken Land and Minerals, and Permian Basin Land and Royalty Owners filed motions to dismiss both the Holtec and Interim Storage Partners applications.<sup>3</sup> These groups argue that the NRC cannot, as a threshold matter, issue

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<sup>1</sup> Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

<sup>2</sup> Interim Storage Partner's Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018), corrected, 83 Fed. Reg. 44,608 (Aug. 31, 2018) (noting that the correct deadline to file intervention petitions is October 29, 2018). Interim Storage Partners is a joint venture of Orano USA and Waste Control Specialists.

<sup>3</sup> Beyond Nuclear filed its own motion to dismiss. *Beyond Nuclear, Inc.'s Motion to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act* (Sept. 14,

licenses to Holtec or Interim Storage Partners because both applications are contrary to the Nuclear Waste Policy Act (NWPAct). Specifically, the groups argue that both applications contemplate the storage of Department of Energy-titled spent fuel in violation of various NWPAct provisions.

The NRC's regulations allow interested persons to file petitions to intervene and requests for hearing in which they can raise concerns regarding a particular license application. These regulations do not, however, provide for the filing of threshold "motions to dismiss" a license application; instead, interested persons must file petitions to intervene and be granted a hearing. I therefore deny both motions to dismiss on procedural grounds, without prejudice to the underlying merits of the legal arguments embedded within the motions.

Beyond Nuclear also filed hearing petitions in the Holtec and Interim Storage Partners proceedings that incorporated by reference the NWPAct arguments that it raised in its motion to dismiss and identified those arguments as proposed contentions.<sup>4</sup> I am separately referring these hearing requests—as well as other hearing requests challenging the applications—to the Atomic Safety and Licensing Board Panel (ASLBP) for the establishment of a Board to consider *all* hearing requests in accordance with the hearing procedures set forth in 10 C.F.R. §2.309. And, in accordance with 10 C.F.R. § 2.346(i), I am referring the motion from Fasken Land and

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2018) (ADAMS Accession No. ML18257A318). Fasken Land and Minerals joined with Permian Basin Land and Royalty Owners to file a motion to dismiss that is substantially similar to Beyond Nuclear's motion. *Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility* (Sept. 14, 2018) (ML18257A330). Both the NRC Staff and respective applicants filed oppositions to the motions, and Beyond Nuclear, Fasken Land and Minerals, and Permian Basin Land and Royalty Owners then filed replies.

<sup>4</sup> *Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene* (Sept. 14, 2018) (ML18257A324) (Holtec docket); *Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene* (Oct. 3, 2018) (ML18276A242) (Interim Storage Partners docket). Fasken Land and Minerals and Permian Basin Land and Royalty Owners have not filed related hearing petitions in either docket.

- 3 -

Minerals and Permian Basin Land and Royalty Owners to the ASLBP for consideration under § 2.309.

This Order is issued under my authority in 10 C.F.R. § 2.346(c), (g), (i), and (j).

IT IS SO ORDERED.

For the Commission

**NRC SEAL**

**/RA/**

---

Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 29<sup>th</sup> day of October 2018

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	Docket No. 72-1051
	)	
HOLTEC INTERNATIONAL	)	
	)	
	)	
(HI-STORE Consolidated Interim Storage Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER OF THE SECRETARY** have been served upon the following persons by Electronic Information Exchange (EIE).

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Docket No. 72-1051

**ORDER OF THE SECRETARY**

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[Original signed by Brian Newell]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 29<sup>th</sup> day of October, 2018



**NRC FORM 588**  
(10-2000)  
10 CFR 72

**U. S. NUCLEAR REGULATORY COMMISSION**

PAGE 1 OF 3 PAGES

## LICENSE FOR INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974 (Public Law 93-438), and Title 10, Code of Federal Regulations, Chapter 1, Part 72, and in reliance on statements and representations heretofore made by the licensee, a license is hereby issued authorizing the licensee to receive, acquire, and possess the power reactor spent fuel and other radioactive materials associated with spent fuel storage designated below; to use such material for the purpose(s) and at the place(s) designated below; and to deliver or transfer such material to persons authorized to receive it in accordance with the regulations of the applicable Part(s). This license shall be deemed to contain the conditions specified in Section 183 of the Atomic Energy Act of 1954, as amended, and is subject to all applicable rules, regulations, and orders of the Nuclear Regulatory Commission now or hereafter in effect and to any conditions specified herein.

This license is conditioned upon fulfilling the requirements of 10 CFR Part 72, as applicable, the attached Appendix A (Technical Specifications), and the conditions specified below.

Licensee

- |  |   |
|--|---|
| <p>1. <b>Holtec International</b></p>  | <p>3. License No. <b>SNM-2516</b><br/>Amendment No. <b>0</b></p>  |
| <p>2. <b>Holtec Technology Center</b><br/><b>1 Holtec Blvd</b><br/><b>Camden, NJ 08104</b></p>   | <p>4. Expiration Date <b>May 9, 2063</b></p>  |
| <p>6. Byproduct, Source and/or Special Nuclear Material</p>  | <p>5. Docket or Reference No. <b>72-1051</b></p>  |
| <p>A. Spent nuclear fuel elements from commercial nuclear utilities licensed pursuant to 10 CFR Part 50 and associated radioactive materials related to the receipt, transfer, and storage of that spent nuclear fuel.</p>   | <p>7. Chemical and/or Physical Form</p> <p>A. Undamaged fuel assemblies, damaged fuel assemblies, and fuel debris, as allowed by Certificate of Compliance No. 1040, Amendments 0, 1, and 2, for the HI-STORM UMAX Canister Storage System, and described in Paragraph 9 below.</p> |
| <p>9. Authorized Use: The material identified in 6.A and 7.A above is authorized for receipt, possession, storage, and transfer in the HI-STORE Consolidated Interim Storage (CIS) Facility, as described in the HI-STORE CIS Facility Final Safety Analysis Report (FSAR). Storage is authorized only in casks designed in accordance with Certificate of Compliance No. 1040, Amendments 0, 1, and 2, for the HI-STORM UMAX Canister Storage System.</p> | <p>8. Maximum Amount That Licensee May Possess at Any One Time Under This License</p> <p>A. 8,680 Metric Tons of Uranium (500 loaded canisters) in the form of undamaged fuel assemblies, damaged fuel assemblies, and fuel debris.</p>   |
| <p>10. Authorized Place of Use: The licensed material is to be received, possessed, transferred, and stored at the HI-STORE CIS Facility located in Lea County, New Mexico.</p>  |   |
| <p>11. The Technical Specifications contained in the Appendix attached hereto are incorporated into the license. The licensee shall operate the HI-STORE CIS Facility in accordance with the Technical Specifications in the Appendix.</p>   |   |
| <p>12. The design, construction, and operation of the HI-STORE CIS Facility shall be accomplished in accordance with the NRC's regulations specified in Title 10 of the Code of Federal Regulations. All commitments to applicable Commission Regulatory Guides and to applicable engineering and construction codes shall be met.</p>   |   |

NRC FORM 588A

(10-2000)  
10 CFR 72

U. S. NUCLEAR REGULATORY COMMISSION

PAGE 2 OF 3 PAGES

**LICENSE FOR INDEPENDENT STORAGE OF SPENT NUCLEAR  
FUEL AND HIGH-LEVEL RADIOACTIVE WASTE  
SUPPLEMENTARY SHEET**

License No.

SNM-2516

Amendment No.

0

Docket or Reference No.

72-1051

13. The licensee shall follow the "Holtec International & Eddy Lea Energy Alliance (ELEA) Underground Consolidated Interim Storage Facility -- Emergency Response Plan," HI-2177535, Revision 5, dated November 17, 2022, and as further supplemented and revised in accordance with 10 CFR 72.44(f).
14. The licensee shall:
- (1) follow the "Holtec International & Eddy Lea Energy Alliance (ELEA) Underground Consolidated Interim Storage Facility - Physical Security Plan," HI-2177559, Revision 3, dated March 2, 2020, as it may be further amended under the provisions of 10 CFR 72.44(e) and 72.186;
  - (2) follow the "Holtec International & Eddy Lea Energy Alliance (ELEA) Underground Consolidated Interim Storage Facility - Safeguards Contingency Plan," HI-2177560, Revision 3, dated March 2, 2020, as it may be further amended under the provisions of 10 CFR 72.44(e) and 72.186; and
  - (3) follow the "Holtec International & Eddy Lea Energy Alliance (ELEA) CISF Security Training and Qualification Plan," HI-2177561, Revision 2, dated March 30, 2019, as it may be further amended under the provisions of 10 CFR 72.44(e) and 72.186.
  - (4) follow the "Additional Security Measures for the Physical Protection of Dry Independent Spent Fuel Storage Installations," dated September 28, 2007.
  - (5) follow the "Additional Security Measures for Access Authorization and Fingerprinting at Independent Spent Fuel Storage Installations," dated February 4, 2016.
15. In accordance with 10 CFR 72.22, the construction program will be undertaken only after a definitive agreement with the prospective customer for storing the used fuel at the HI-STORE CIS Facility has been established. Construction of any additional capacity beyond the initial capacity of 500 canisters shall commence only after funding is fully committed that is adequate to construct such additional capacity.
16. The licensee shall:
- (1) include in its service contracts provisions requiring customers to retain title to the spent fuel stored, and allocating legal and financial liability among the licensee and the customers;
  - (2) include in its service contracts provisions requiring customers to provide periodically credit information, and, where necessary, additional financial assurances such as guarantees, prepayment, or payment bond;
  - (3) include in its service contracts a provision requiring the licensee not to terminate its license prior to furnishing the spent fuel storage services covered by the service contract.
17. The licensee shall submit a Startup Plan to the NRC at least 90 days prior to receipt and storage of spent fuel at the HI-STORE CIS Facility.

NRC FORM 588A

(10-2000)  
10 CFR 72

U. S. NUCLEAR REGULATORY COMMISSION

PAGE 3 OF 3 PAGES

**LICENSE FOR INDEPENDENT STORAGE OF SPENT NUCLEAR  
FUEL AND HIGH-LEVEL RADIOACTIVE WASTE  
SUPPLEMENTARY SHEET**

License No.

SNM-2516

Amendment No.

0

Docket or Reference No.

72-1051

18. The licensee shall have insurance coverage as specified in "Holtec International & Eddy Lea Energy Alliance (ELEA) Underground CISF - Financial Assurance & Project Life Cycle Cost Estimates," HI-2177593, Revision 2, effective 30 days before first fuel arrival.
19. Prior to receipt of the material identified in sections 6.A and 7.A of this license, the Licensee shall have a decommissioning financial assurance instrument, in a form of one or more of the methods described in 10 CFR 72.30(e), reflecting the current decommissioning cost estimate.
20. This license is effective as of the date of issuance shown below.

FOR THE NUCLEAR REGULATORY COMMISSION

*Shana R. Helton*Signed by Helton, Shana  
on 05/09/23

Shana R. Helton, Director  
Division of Fuel Management  
Office of Nuclear Material Safety  
and Safeguards

Date of Issuance: May 9, 2023

Attachment: Appendix A - Technical Specifications for the HI-STORE Consolidated Interim Storage  
(CIS) Facility

