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

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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, et  
al.,

Defendants.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' JOINT MOTION FOR  
SUMMARY JUDGMENT**

Case No. 2:01CV00270C

Judge Tena Campbell

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## SCOPE OF MOTION AND RELIEF SOUGHT { TC \L "1" }

Plaintiffs, the Skull Valley Band of Goshute Indians (the “Skull Valley Band” or “Band”) and Private Fuel Storage, L.L.C. (“PFS”), pursuant to Federal Rule of Civil Procedure 56, submit this Memorandum in Support of their Motion for Summary Judgment. In addition to joining in the filing of the instant Motion, Plaintiff Skull Valley Band is also filing a separate motion for summary judgment based on principles of federal Indian law (the “Band’s Motion”).

Over the past four years, in an admitted effort to prevent the construction of a temporary spent nuclear fuel storage facility to be located on the Skull Valley Reservation and to prevent the shipment of spent fuel to that facility, the Utah Legislature has enacted five pieces of legislation: Senate Bill (“S.B.”) 78 and S.B. 196 (passed in 1998), S.B. 164 and S.B. 177 (passed in 1999), and S.B. 81 (passed in 2001). These acts are the subject of the Complaint and this Motion. The acts are submitted herewith as Attachment 1. The sections of the Utah Code amended by these acts are Attachment 2.

Three of these acts amend Utah’s Radiation Control Act (Chapter 3 of Title 19, Utah Code Ann. §§ 19-3-101 through 19-3-205 ) through the addition of a “Part 3” (§§ 19-3-301 through 19-3-319) (also referred to herein as the “State Licensing Scheme”).<sup>1</sup> Part 3 is the heart of the State’s attack on the PFS spent fuel storage project. It seeks to regulate high level radioactive waste first by imposing an outright ban on placement of spent fuel in Utah, including on Indian reservations. However, recognizing the “possibility” that such placement may occur “pursuant to a license from the federal government . . . in violation of this state law,” § 19-3-302(1), (i.e. in the event the outright ban proves unconstitutional), Part 3 contains an impossibly burdensome backup licensing scheme that the

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<sup>1</sup> The Acts are S.B. 196, S.B. 177, and S.B. 81. S.B. 196 is codified as Utah Code Ann. §§ 19-3-301 to 317; S.B. 177 is codified as §§ 19-3-315, 19-3-318, 54-4-15, 78-34-6; S.B. 81 is codified as §§ 17-27-102, 301, 303; 17-34-1, 3; 19-3-301 et seq.; 34-38-3; 73-4-1.

Legislature intentionally designed to render the storage or transportation of spent fuel within Utah impossible. Plaintiffs also challenge the constitutionality of the other newly passed provisions that do not form part of Part 3 (the “Additional Provisions”), but like Part 3 are intended to prevent the storage of spent nuclear fuel within Utah. Plaintiffs therefore ask the Court to enter an order of summary judgment declaring unconstitutional the following sections of the Utah Code: §§ 19-3-301 through 19-3-319 (Part 3), as well as §§ 17-27-102(2), 17-27-301(3), 17-27-303(4), (5)(b) and (7), 17-27-308, 17-34-1(1) and (3), 17-34-6, 34-38-3(2), 54-4-15(4), 72-3-301, 72-4-125(4), 73-4-1(2) and 78-34-6(5). The Band’s Motion asks this Court to declare that the State’s statutes may not be applied to prevent or regulate the storage or transportation of spent nuclear fuel on the Skull Valley Reservation.

Plaintiffs’ Motion only challenges the constitutionality of the Utah statutes at issue. Plaintiffs do not seek in this lawsuit authorization to construct or operate the temporary storage facility. Such authorization, as explained below, can only be granted by the United States Nuclear Regulatory Commission (“NRC”) in separate proceedings that are currently underway. Nor do Plaintiffs ask the Court to authorize the transportation of spent fuel, which is also subject to the regulation of the NRC and United States Department of Transportation.<sup>2</sup>

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<sup>2</sup> Defendants Michael Leavitt and Mark Shurtleff filed an answer and counterclaim. They also filed a Motion for Judgment on the Pleadings, asking the Court to grant judgment on the portion of their counterclaim seeking a ruling that the NRC does not have statutory authority to license an away-from-reactor temporary spent fuel storage facility. Plaintiffs have opposed the Motion for Judgment on the Pleadings, and have moved to dismiss the remainder of the Counterclaim. These motions should not deter the Court from granting summary judgment on Plaintiffs’ claims because the Counterclaim does not raise the same legal issues raised by Plaintiffs’ Motion for Summary Judgment. The Counterclaim, in addition to challenging the NRC’s authority, also raises questions about the validity of the lease execution and subsequent lease review process. Plaintiffs’ claim challenges the constitutionality of Utah’s legislative efforts to block the storage of spent nuclear fuel in Utah. See, e.g., *Carpenters Local No. 971 v. Clyne*, 580 F. Supp. 1256, 1258 (D. Nev. 1984) (“The pendency of Defendant’s counterclaim does not preclude the granting of a partial summary judgment in favor of Plaintiffs.”).

## SUMMARY OF ARGUMENT

The Utah Legislature and Governor have responded to Plaintiffs' proposed spent fuel storage facility in a manner that is not tolerable under the United States Constitution. They have brazenly erected unconstitutional state legislative roadblocks to the construction and operation of this temporary storage facility, seeking to insulate the State of Utah from the pressing national problem of spent fuel storage. The state legislative enactments at issue take many forms, including an outright ban on the storage of spent fuel anywhere within the state, confiscatory taxes on contracts with any company seeking to establish a spent nuclear fuel storage facility, the outright criminalization of any efforts or "facilitation" of efforts to establish a spent nuclear fuel storage facility, imposing exorbitant bonding requirements, voiding past, present and future contracts related to establishing a spent nuclear fuel storage facility, establishing "Catch-22" requirements that are impossible to satisfy, and banning transportation over certain routes, specifically those providing access to the Skull Valley Reservation. Part 3 goes so far as to declare that placement of spent fuel in Utah, even pursuant to a federal license, violates State law. These "not in my backyard" attempts by the Utah Legislature offend several Constitutional rights and guarantees. The Court should reject Utah's transparent efforts to subvert these longstanding principles.

As explained in detail below, Part 3 and the Additional Provisions are an affront to the Constitution for a variety of reasons. First, the Utah legislation is preempted by pervasive federal regulation of the nuclear industry under the Atomic Energy Act. Congress has established a broad arena in which only federal authorities may regulate nuclear facilities and materials. Federal courts have been swift to invalidate state attempts to regulate in this arena. The courts have also decided

some of the specific issues presented in this case, holding that state action to ban the storage of spent fuel is preempted.

Second, Part 3 and the Additional Provisions violate the Commerce Clause of the Constitution because their legislative history shows that they have the purpose of discriminating against interstate commerce, they have the effect of unduly burdening interstate commerce, and the State has no compelling purpose adequate to survive the strict scrutiny applied in Commerce Clause cases.

Third, Part 3 and the Additional Provisions impair existing contract obligations in violation of the Contracts Clause of the Constitution. Part 3 contains specific provisions that expressly void Plaintiffs' agreements with each other and with various third parties. Other provisions of the new laws indirectly have the same effect. Such interference with contract rights cannot withstand scrutiny because Defendants cannot demonstrate that the new statutes are essential to the accomplishment of any legitimate objective.

Significantly, any one of the foregoing constitutional infirmities, standing on its own, is sufficient to invalidate Part 3 and each of the Additional Provisions that Plaintiffs challenge. In addition, there are several other grounds for invalidating certain sub-groups of the statutes. First, Part 3 and certain of the additional provisions relating to roads and railroads are preempted by the Hazardous Materials Transportation Act ("HMTA") insofar as they affect the transportation of spent fuel. One of the principal purposes of HMTA is to eliminate patchwork state laws and replace them with uniform national regulation governing the transportation of hazardous materials, including nuclear materials. Part 3 and the road/railroad statutes is inconsistent with HMTA because they ban, directly and by various indirect methods, transportation of spent fuel to Utah.

Second, portions of Part 3 undermine the First, Sixth and Fourteenth Amendment rights to freedom of association, freedom of speech, and to petition government.

Third, Part 3 contains civil and criminal penalty provisions that are unconstitutionally vague. These penalties turn on whether a person “facilitates” a violation of Part 3. The broad reach of other provisions of Part 3, working in conjunction with the penalty provision based on “facilitation” of a violation of “any” provision of Part 3, do not reasonably alert the public as to the nature of the prohibited conduct and grant impermissibly broad enforcement authority.

Fourth, the tax provision of Part 3 is an unconstitutional abuse of the taxing power, as the 75% tax on gross proceeds is confiscatory.

Fifth, as addressed by the Band’s Motion, the State statutes may not be applied to prohibit or regulate tribal lands on the Skull Valley Reservation set aside pursuant to a treaty with the United States, or to prohibit or regulate a lease of those tribal lands, which is subject to federal approval and governed by federal law.

Part 3 and the Additional Provisions are an assault on a clearly articulated federal policy and the Constitution. Plaintiffs are entitled to have this Court make that determination before the Defendants can attempt to further interfere with their rights.

**STATEMENT OF ISSUES** TC \L "1" }

1. Do the Utah statutes violate the Constitution’s Supremacy Clause because the Atomic Energy Act preempts them?

2. Do the Utah statutes violate the Constitution’s Commerce Clause because they reflect a legislative purpose to discriminate against interstate commerce, and/or will have a discriminatory effect on interstate commerce?

3. Do the Utah statutes violate the Constitution's Contracts Clause because they substantially and retroactively interfere with, impair, and nullify contracts already executed between Plaintiffs and others?

4. Do Part 3 and the statutes related to roads and railroads violate the Constitution's Supremacy Clause because they are preempted by the Hazardous Materials Transportation Act?

5. Does Part 3 violate the First, Sixth, and Fourteenth Amendments to the Constitution by preventing Plaintiffs from associating with counsel and other persons necessary to conduct Plaintiffs' business and affairs and advance Plaintiffs' interests?

6. Is Part 3 unconstitutionally vague under the Fourteenth Amendment to the Constitution because its penalty provisions provide government agents with impermissibly broad enforcement discretion and fail to provide reasonable notice of what conduct is prohibited?

7. Does the tax provision of Part 3 violate the Constitution as an abuse of the taxing power?

### **BACKGROUND INFORMATION**{ TC \L "1" }

Plaintiffs provide the background information in part A to acquaint the Court with the historical context of this lawsuit. The information is unnecessary for a ruling on this Motion or the Band's Motion. The facts necessary for both Motions are set forth below in the Statement of Undisputed Material Facts, which begins on page 15. Part B summarizes the Utah legislation passed with the intention of stopping the PFS project.

#### **A. Plaintiffs' Conduct and the Federal Regulatory Scheme.**{ TC \L "2" }

This case involves the temporary storage of spent nuclear fuel, a serious and growing problem of national scope and importance. Plaintiff PFS is pursuing a license with the NRC to construct and

operate a temporary facility to store spent nuclear fuel within the Skull Valley Reservation (the “Facility”), on sovereign trust lands of Plaintiff Skull Valley Band, located within the State of Utah.

Congress encouraged the widespread civilian use of nuclear energy through a series of laws, commencing with the Atomic Energy Act of 1954. 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% of the electricity used in the United States.

The fuel for commercial nuclear reactors consists of uranium in the form of small, ceramic-like pellets contained in metal tubes or rods. A reactor must be periodically refueled and the spent fuel removed. Spent fuel has continued to accumulate, generally in water-filled pools that are part of reactor complexes. Currently, 45,000 metric tons of spent fuel are stored at reactor sites, increasing at about the rate of 2,000 metric tons per year. The ability to expand the storage capacity available at reactor sites is subject to physical, and in some cases, legal restrictions.

Congress attempted to address this problem in the Nuclear Waste Policy Act of 1982 (“NWPA”). The NWPA requires the Department of Energy to construct a repository for the permanent disposal of spent fuel. The NWPA mandates that, in return for the utilities’ payment of fees, the Department of Energy must take title to the spent fuel as expeditiously as practicable following commencement of operation of a repository and, beginning no later than January 31, 1998, to 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 almost eleven billion dollars to pay for all costs of disposing of spent fuel.

Utilities, including several members of PFS, pursued litigation to enforce DOE's statutory and 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.

Given the delay, a group of utilities sought a solution to the spent fuel storage problem pending completion of a federal permanent repository. This led a consortium of utilities to create PFS and plan construction of a temporary spent fuel storage facility. The companies that comprise PFS, or their parents or affiliates, own or operate 21 nuclear reactors serving 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.

On May 20, 1997, Plaintiff Skull Valley Band and Plaintiff PFS entered into a lease of tribal reservation lands to allow Plaintiff PFS to construct and operate a temporary storage facility for spent nuclear fuel. Thereafter, the Bureau of Indian Affairs conditionally approved the lease pursuant to the Indian Long-Term Leasing Act. The lease requires the issuance of an NRC license (as does the Atomic Energy Act) before PFS may commence construction and operations.

PFS has applied to the NRC, the body Congress authorized to exercise exclusive regulatory authority over civilian use of nuclear energy, for the license. If the NRC grants the license, PFS and the Skull Valley Band will proceed with the Facility under strict federal oversight.

As proposed, the Facility will receive sealed shipments of spent fuel from nuclear reactor sites. Before leaving the reactor sites, the spent fuel assemblies will be placed in specially designed, stainless-steel canisters licensed by the NRC. Each canister is vacuumed dry, filled with inert gas, and welded shut. The canister will then be placed into and sealed in a 132-ton steel transportation cask

(also subject to NRC licensing) for shipment to the Facility. The NRC license will strictly limit operations at the Facility to the handling and storage of sealed canisters; no removal of spent fuel from the canisters will be allowed.

**B. The State’s Regulatory Attempts.**{ TC \l "2"}

Utah’s Governor and Legislature reacted to the temporary storage project by passing five pieces of legislation directed at stopping Plaintiffs’ plans for the construction and operation of the Facility. Parts of three of these acts (S.B. 196, 177, and 81) form Part 3 of Utah’s Radiation Control Act—the State Licensing Scheme, which also includes a total ban on spent fuel storage and transportation. Part 3 contains the following features:

- § 19-3-301(1) prohibits the placement and transportation of spent fuel anywhere “within the exterior boundaries of Utah;” subsection (2) states that “[n]otwithstanding [s]ubsection (1)” such placement may occur only with specific approval by the Governor and Legislature, final judicial approval of the federal license, and the satisfaction of additional criteria; the section also prohibits “foreign” operators from registering to do business in Utah; prohibits counties and other municipalities from contracting to provide municipal services to spent fuel storage facilities; declares “void from inception” any contract to provide goods, services or municipal services to any spent fuel storage or transfer facility; and, in the event the contracts are not voided, imposes an annual transaction fee of 75% on the gross value of all contracts, a portion of which fees are earmarked for those Utah tribes who reject the siting of spent nuclear fuel facilities on their reservations.
- § 19-3-302 declares that the State enacted Part 3 “to prevent the placement of any high-level nuclear waste” in Utah, and states that any placement of spent fuel in Utah, even pursuant to a federal license, violates State law; and that such activities on Indian reservations are “subject to state jurisdiction.”
- § 19-3-303 supplies definitions for the interpretation of Part 3.
- § 19-3-304 prohibits the construction and operation of a spent fuel storage facility in Utah without a license from the State Department of Environmental Quality (DEQ) and additional approval from the Governor and the Legislature; DEQ receives authority to make rules governing the construction, installation and operation of spent fuel.

- § 19-3-305 establishes state licensing criteria and requires the applicant to produce studies identifying groundwater assessments, transportation routes, environmental and economic impacts, engineering plans, cost estimates, funding sources, a security plan, geologic, geotechnical and other “site suitability” studies, technological qualifications for staff, environmental and health risk assessments, and monitoring programs.
- § 19-3-306 prohibits the issuance of a construction and operation license unless the application demonstrates the adequacy of available emergency services; that there will be no increased mortality or illness; the public benefits of the facility, including lack of other available sites and storage methods; that a party has irrevocably agreed to accept the spent fuel following the temporary storage period; that the applicant is not a limited liability company; that the applicant has the ability to post a cash bond of at least \$2 billion; and that the applicant and its officers and directors accept unlimited strict liability.
- § 19-3-307 establishes “siting criteria” that include, among many restrictions, prohibitions on storage facilities within “scientifically significant” natural areas, prime farmland or 100-year flood plains, or within five miles of any “habitable structures,” “historic structures” or “surface waters, including intermittent streams.”
- § 19-3-308 requires an initial nonrefundable application fee of \$5 million over and above the costs of reviewing the application, and further requires additional annual fees (assessed on a per-ton basis) to fund state oversight and inspection of waste transfer and storage facilities and to establish state infrastructure.
- § 19-3-309 establishes that fees collected under § 308 will be deposited into specific accounts to fund the State’s “duties” under Part 3.
- § 19-3-310 requires the applicant to enter into a “benefits agreement” with the DEQ to “offset adverse environmental public health, social, and economic impacts.”
- § 19-3-311 limits the term of a license to 20 years, which may be extended only by approval of the Governor, Legislature, and DEQ.
- § 19-3-312 authorizes civil and criminal penalties for those who violate or “facilitate” violations of “any provision” of Part 3, excepting Utah-based nonprofit trade associations.
- § 19-3-313 prohibits the transportation or storage of spent fuel in Utah if the state of origin prohibits storage of the spent fuel.
- § 19-3-314 provides that the State’s political subdivisions may establish additional requirements to supplement Part 3.

- § 19-3-315 prohibits the transportation of spent fuel in Utah without approval from the State Department of Transportation (Utah DOT), allows the Utah DOT to assess per-shipment fees, and prohibits easements in favor of certain rail lines that might be used for the transport or storage of spent fuel, unless expressly authorized by both the Governor and the Legislature.
- § 19-3-316 requires a permittee to indemnify the State or its political subdivisions for any damages or expenses they may incur as a result of a release from the facility.
- § 19-3-317 states that if any provision of Part 3 is held invalid, the remainder of Part 3 “is not affected and remains in full force.”
- § 19-3-318 revokes statutory and common-law limited liability with respect to any officer or director of the operator and any holder of an equity interest in the operator.
- § 19-3-319 requires a permittee to pay to the State an amount equal to at least 75% of the “unfunded potential liability” of the project, which payment is due in the form of cash or cash equivalents within 30 days after the license is granted; the section also creates an additional annual licensing fee to fund medical and death benefits.

It is clear from the face of Part 3 that the regulatory scheme it sets forth is a sham and not truly intended to license and regulate spent fuel storage. Instead, its purpose is to doom Plaintiffs’ project. It is merely the State’s fall-back means of killing the project in the event the outright ban on the project proves legally ineffective. The Legislature expressly memorialized this objective in the “Legislative Intent” section of the statute: “The state of Utah enacts this part to prevent the placement of any high-level nuclear waste . . . in Utah.” § 19-3-302(1).

Part 3 contains several provisions in the nature of a “Catch 22.” For example, under § 19-3-306(8), the Facility cannot be licensed unless a third party has irrevocably agreed to accept the spent fuel following the temporary storage period at the Facility, while § 19-3-301(9) voids any such agreement. Similarly, § 19-3-306 requires the applicant to demonstrate the availability of appropriate emergency services, but § 19-3-301(6)-(8) prohibits the provision of such services.

Other requirements are flatly impossible to meet, such as the requirement to demonstrate the “lack of other available sites” for the storage of spent fuel. § 19-3-306(5). There will always be some

other storage site that might arguably be “available.” Into the impossible category would also fall burdensome financial requirements. For example, Part 3 requires the applicant to post a show-stopping two billion dollar cash bond (an amount that can even be increased by administrative rule). § 19-3-306(10). The statute also imposes other potentially enormous fees including: a fee payable in “cash or cash equivalents” covering the “unfunded potential liability” (publicly claimed by the State to be up to \$313 billion<sup>3</sup>), §§ 19-3-301(5), 19-3-319(3)(a); a \$5 million dollar application fee, § 19-3-308(1); all expenses of the state’s review of the application, id.; annual oversight and implementation fees established by regulation, id.; and annual fees on all contracts in the amount of 75% of the gross value of the contract, § 19-3-301(10).

As if saddling the applicant with these impossible burdens were not enough, Part 3 proceeds to give unfettered discretion to the Governor and Legislature to withhold the storage permit even when the applicant has met all requirements. § 19-3-304.<sup>4</sup> Part 3 also imposes numerous practical obstacles

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<sup>3</sup> The estimates by the State for the “unfunded potential liability” have varied from \$14 billion up to \$313 billion. See Attachment 3, Hearings on S.B. 81 before the Energy, Natural Resources and Agriculture Standing Comm., Utah State Sen., Feb. 15, 2001 at 15 (Statement of Dianne Nielson, Executive Director of the Utah Department of Environmental Quality) (S.B. 81 is intended to protect against accident liability “between \$14 and \$313 billion”).

Press reports provide even larger estimates:

“Gov. Mike Leavitt has vowed to use any means possible to block the project proposed by PFS and the Goshutes. He is pushing legislation [S.B. 81], sponsored by Sen. Terry Spencer, R-Layton, which would require an estimated \$150 billion in upfront cash payments by PFS and would also levy a 75 percent tax on businesses supplying goods or services to the facility.” See Attachment 4, Dan Harrie, Panel Grills Waste-Plan Supporters, The Salt Lake Tribune, Feb. 13, 2001.

“S.B. 81 would impose a \$325 billion upfront tax on nuclear utilities and 75 percent tax on companies that provide goods and services for the storage site.” See Attachment 5, Dennis Rombo, Anti-waste bill opposed by handful, Deseret News, Feb. 20-21, 2001.

“The bill [S.B. 81] also increases liability for accidents from \$9 billion to \$200 billion. Hansen and Leavitt say it’s just one of many tactics they’re using to block the nuclear waste site. ‘There are a lot of ways to skin this cat,’ says Hansen.” See Attachment 6, Mary Dickson, Nukes for Goshutes?, City Weekly, Sept. 14, 2000.

<sup>4</sup> There is no question that the Governor will not exercise such discretion in favor of the project. He has publicly expressed his intention to withhold the approvals required for the issuance of a license under the State Licensing

to the construction and operation of a storage facility, such as stripping equity interest holders in PFS of limited liability protection, § 19-3-318(3); voiding any contract entered into by any organization seeking to store spent fuel in Utah, § 19-3-301(9); prohibiting contracting to provide any public services to any site under consideration for the storage of spent fuel, § 19-3-301(6); and imposing civil and criminal penalties for an undefined “facilitat[ion]” of a violation of Part 3, § 19-3-312. (Indeed, counsel’s mere filing of this Motion, “facilitat[ing]” Plaintiffs’ objectives as it does, is arguably a criminal act.)

Aside from Part 3, Utah has also enacted other provisions that can be divided into two groups: (1) provisions isolating the site geographically by giving the State control over all transportation corridors to Skull Valley, and (2) provisions imposing a political and economic isolation of the proposed site by barring any political subdivision of the State from providing municipal services to the site and otherwise mandating unusual planning requirements on the part of the political subdivision in whose jurisdiction a proposed storage facility may be located. These provisions are as follows:

**Imposing Geographic Isolation:**

- § 27-12-50.1(4) (amendment by S.B. 78 to the list of state highways) (later codified at § 72-4-125(4), and hereafter referred to as such), removes control of Skull Valley Road (the only road access to the Skull Valley Reservation and the Facility) from Tooele County, by designating it as a state highway. See Attachment 8 (map).
- § 72-3-301 (amendment by S.B. 164 to the Highway Jurisdiction and Classification Act) designates certain county gravel and dirt roads and trails near the Skull Valley Reservation as “statewide public safety interest highways;” however, roads are to be considered county roads for purposes of distribution of State funds and maintenance obligations. These roads and trails effectively form a “moat” around the proposed site for the temporary storage Facility.
- § 54-4-15(4) (amendment by S.B. 177 to the Public Utilities code) gives the Governor and Legislature effective power to veto any decision of the Utah Department of

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Scheme: “I guarantee they’ll never get a permit to move waste over our borders.” See Attachment 7, Ogden Standard Examiner, May 26, 2000.

Transportation granting permission to build a railroad across a public road or highway to be used to transport spent nuclear fuel. This amendment would effectively prevent Plaintiff PFS from constructing a railroad to cross the “moat” established by S.B. 164’s amendment of § 72-3-301.<sup>5</sup> Thus, considered with S.B. 78’s amendment of § 72-4-125(4), the State effectively forecloses both the road and rail access to the proposed Facility site.

- § 78-34-6(5) (amendment by S.B. 177 to Eminent Domain code) alters procedures for the exercise of eminent domain to obtain a right of way, such that if the right of way is sought for the transportation of spent nuclear fuel, the applicant must have the permission of the Governor and concurrence of the Legislature.

### **Municipal Services Provisions:**

- §§ 17-27-102(2), 17-27-301(3), 17-27-303(4), (5)(b) and (7) (amendments by S.B. 81 to County Land Use Development and Management Act) provide that if a proposed storage facility is planned to be located within or contiguous to a county, the county as part of its land use development planning, may adopt an ordinance rejecting all facilities for the storage of spent nuclear fuel in lieu of providing the same information required by a license applicant under Part 3, §§ 19-3-305 and 19-3-307(2), and in lieu of detailing efforts to mitigate the effects of the storage of spent nuclear fuel and to “guarantee the health and safety” of the citizens of Utah, and providing for public hearings and comment before plan adoption.
- §§ 17-27-308 and 17-34-6 (amendments by S.B. 81 to County Land Use Development and Management Act and Municipal-Type Services codes) provide that the State will indemnify any county for refusing to site a spent nuclear fuel storage facility or for refusing to supply municipal-type services to the facility.
- §§ 17-34-1(1) and (3) (amendment by S.B. 81 to the Municipal-Type Services codes) provide that a county may not provide municipal-type services to any area under consideration for a spent nuclear fuel storage facility.<sup>6</sup>

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<sup>5</sup> This veto works as follows: The state Department of Transportation is charged with prescribing the manner in which a rail crossing may be constructed across a road, and the Department may also abolish such a crossing or restrict the type of traffic using the crossing “in the interest of public safety.” § 54-4-15(2). Any person aggrieved by a decision of the Department may raise a dispute by “petition.” § 54-4-15(4)(a). Before the amendment, the Commissioners of the Department of Transportation retained jurisdiction to decide the resolution of the dispute. With the amendment, however, if the person filing the petition is engaged in the shipment of spent nuclear fuel, the Commission’s decision to allow a crossing requires the concurrence of the Governor and Legislature. Given the likelihood that the Department of Transportation will deny any attempt by Plaintiff PFS to build a rail crossing, and the further likelihood that the Commission, Governor, and Legislature would deny any petition, the amendment effectively ensures that no permission would ever be granted to Plaintiffs to construct a rail crossing.

<sup>6</sup> Plaintiffs also challenge the constitutionality of two stand-alone provisions:

These Additional Provisions lay bare, if it was not already blatant, the State's stop-at-nothing approach to the proposed Facility. The transportation provisions use every way imaginable to isolate and block physical access to the proposed site. They repossess from Tooele County the only road to the site, and take control of a "moat" made up of trails and roads around the site to block any rail transport. The municipal services provisions attack the Facility from yet another angle, on the one hand preventing Tooele County or any other state subdivision from providing services to the proposed site, and, on the other hand, encouraging Tooele County to back out of its contract with PFS by offering indemnification for any legal problems it may run into for doing so. As demonstrated in the Argument below, these provisions lack any semblance of constitutionality.

**STATEMENT OF UNDISPUTED FACTS**

1. Plaintiff PFS is pursuing a license with the United States Nuclear Regulatory Commission to construct and operate a facility for the temporary storage of spent nuclear fuel to be located within the Skull Valley Reservation, on tribal lands of Plaintiff Skull Valley Band, held in trust by the United States Department of the Interior, and located within the State of Utah. Amended Counterclaim ¶¶ 14, 22; Memorandum in Support of Defendants' Motion for Judgment on the Pleadings, dated September 20, 2001, at 3.

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§ 34-38-3(2) (amendment to the Labor Code enacted by S.B. 81) provides for mandatory drug and alcohol testing program for all employees of an entity engaged in the transportation or storage of spent nuclear fuel.

§ 73-4-1(2) (amendment to the Water and Irrigation Code by S.B. 81) provides for executive director of the Department of Environmental Quality, with the concurrence of the Governor, to cause the state engineer to initiate litigation (or expand existing litigation) to determine any water rights for any area under consideration for use as a spent fuel storage or transfer facility.

These provisions are unconstitutional because, as developed below, they were enacted as part of acts motivated by an intent to discriminate against interstate commerce.

2. Part 3 purports to invalidate contracts entered into by “any organization engaging in, or attempting to engage in the placement” of spent fuel within Utah’s borders. § 19-3-301(9)(a)(i). Plaintiffs have the following contracts or groups of contracts that are important to the development of the PFS project and that would be rendered invalid by the foregoing language if it is enforceable:

- The Amended and Restated Business Lease between the Skull Valley Band of Goshute Indians and Private Fuel Storage, L.L.C., dated May 20, 1997 (the “Skull Valley Band-PFS Lease”). Amended Counterclaim ¶ 22.
- The Agreement between Private Fuel Storage L.L.C. and Tooele County dated May 23, 2000 (the “PFS-Tooele County Agreement”), which provides that Tooele County will provide essential services to the Facility such as road maintenance, law enforcement, fire response, public health, public safety and telecommunications support. Declaration of John Parkyn ¶ 4b, Attachment 9.
- The Cooperative Law Enforcement Agreement between Tooele County, the Bureau of Indian Affairs and the Skull Valley Band of Goshute Indians dated June 3, 1997 (the “Tooele County-BIA-Goshute Agreement”), in which the County agreed to provide “law enforcement and detention services” to the Band. Declaration of Leon D. Bear ¶ 3a, Attachment 10. Declaration of John Parkyn ¶ 5, Attachment 9.
- The Agreement between Stone & Webster Engineering Corporation and PFS dated November 13, 1995 by which PFS hired Stone & Webster as an experienced contractor to provide licensing, design, engineering and related services for the development of a storage facility. Declaration of John Parkyn ¶ 4a, Attachment 9.
- Various agreements and commercial arrangements with vendors and suppliers, including those providing rail-related services and equipment, transportation casks and canisters, technical assistance, legal services, and communications support.

3. All of the spent nuclear fuel to be stored at the PFS Facility will be transported to the Facility from outside Utah. See Defendants’ Memorandum in Support of Motion for Judgment on the Pleadings, dated September 20, 2001, at 3.

### **LEGISLATIVE HISTORY**{ TC \L "1" }

The content of legislative history is not a factual issue, but rather a legal one. See Oklahoma v. Weinberger, 741 F.2d 290, 291 (10th Cir. 1983) (“questions of statutory construction and legislative

history . . . present legal questions properly resolved by summary judgment”); Union Pac. Land Resources Corp. v. Moench Inv. Co., Ltd., 696 F.2d 88, 93 n.5 (10th Cir. 1982) (same).

The Utah Legislature initially enacted Part 3 by means of Senate Bill (“S.B.”) 196 (enacted in 1998). The Legislature later amended Part 3 through S.B. 177 (enacted in 1999), and S.B. 81 (enacted in 2001). The Legislature enacted the Additional Provisions, which are not part of Part 3, through S.B. 78 (enacted in 1998), S.B. 164 (enacted in 1999) S.B. 177, and S.B. 81. A review of the legislative history of each of these acts and the related public pronouncements demonstrates the State’s intended protectionism. The review is primarily relevant to the State’s violation of the Interstate Commerce Clause, Part II of the Argument below.

#### **A. Legislative History of Part 3.**{ TC \l "2"}

Governor Leavitt previewed the restrictive legislation that would come to embody Part 3 when he offered the following public statements in December, 1997 and January, 1998:

- “The bottom line is we just don’t want it. They [other states] need to keep it. If it’s so safe, they ought to just keep it where it is. We just don’t want it here.” Interview with Governor Leavitt (NBC Channel 5 television station, Dec. 2, 1997). Attachment 11.
- “I am asking the Legislature this year to make a clear statement to out-of-state utility companies that want to dump nuclear waste in the west desert, near a military compound where cruise missiles sometimes get lost. Our policy is simple: we don’t want it [spent fuel]!” Governor Michael O. Leavitt, State of the State Address (Jan. 19, 1998). Attachment 12.
- “I intend to use every avenue of influence to make sure that waste does not come to Utah.” Utah Officials Join N-Opposition, Deseret News, Jan. 27, 1998. (quoting Governor Michael O. Leavitt). Attachment 13.

On February 2, 1998, Senator Craig A. Peterson introduced S.B. 196 in the State Senate and made the following statements to promote the bill:

- “Those who derive the benefits of nuclear fuel ought to, also, derive the negative side of nuclear fuel which is the remaining unspent nuclear fuel rods. . . .We don’t want the

stuff [spent nuclear fuel] here, I'll be candid with you." Floor debate of S.B. 196 before the Utah State Senate, Feb. 24, 1998 (statement of Sen. Craig A. Peterson). Attachment 14.

- "[T]his is the bill that says we really don't want nuclear waste in the state at a high level." Floor Debate of S.B. 196 before the Utah State Senate, Feb. 24, 1998 (statement of Sen. Craig A. Peterson). Attachment 15.

S.B. 196 then passed in the Senate on February 25 and in the House on March 3; the Governor signed it on March 21, 1998.

In the 1999 legislative session, the Legislature passed S.B. 177 with the same exclusionary purpose. The sponsor of S.B. 177, Senator Leonard M. Blackham, offered these remarks before the Utah State Senate shortly after introducing the legislation on February 1, 1999:

- "Currently, limited liability is a privilege that is granted from the state to try to attract capital into business and it's a state's right to grant that for the creation of the business climate and the business environment and to draw that capital in so that we can have a lot of good jobs and an economy that's thriving. . . . Well, here's an industry that comes in, that we've clearly identified, that we do not want in the State of Utah. So the question comes is [sic] why would we extend to them that same limited liability and the answer obviously is, we wouldn't want to do that." Floor debate of S.B. 177 before the Utah State Senate, Feb. 22, 1999 (statement of Sen. Leonard M. Blackham). Attachment 16.
- When asked by Senator Allen, "Senator Blackham, is this the water for the moat that we created this morning [S.B. 164 granting the state control of highways to preclude transportation of spent fuel]?" Senator Blackham replied that "[S.B. 177] eliminates the bridge over the moat." Floor debate of S.B. 177 before the Utah State Senate, Feb. 22, 1999 (statements of Sens. Allen and Leonard M. Blackham). Attachment 16.

After the House and Senate passed S.B. 177 in early March 1999, and the Governor signed the legislation into law on March 18, 1999, the Governor included the following remarks in a letter to

PFS:

- "Limited liability is a privilege, not a right, that the Legislature grants to foster commerce and other activities the state considers beneficial to citizens. Since the proposed storage facility is contrary to state policy, the state can no longer continue to protect directors, officers, and equity interest holders of Private Fuel Storage and its

parent organizations from liabilities incurred in Utah.” Letter from Michael O. Leavitt, Governor, State of Utah, to John D. Parkyn, Chairman, Private Fuel Storage, L.L.C. (Mar. 18, 1999). Attachment 17.

The Governor’s office and legislators were aware when the Legislature was considering S.B. 196 and S.B. 177 that their attempts to block the temporary placement of spent fuel in Utah faced constitutional impediments under the Commerce Clause, and they considered how it might be possible to avoid that problem:

- “We have to be realistic because at the present time the Interstate Commerce Clause of the Constitution prohibits us from outright prohibiting high-level nuclear waste from entering, transporting through, or being stored in the State of Utah.” Hearings on S.B. 196 before the Health and Environment Standing Comm., Utah State Sen., Feb. 19, 1998 (statement of Sen. Craig A. Peterson). Attachment 18.
- I think it will be eventually in the courts—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 to those companies and this is simply not an activity we want to attract capital to.” Hearings on S.B. 177 before the Health and Environment Standing Comm., Utah State Sen., Feb., 18 1999 (statement of Gary Doxey, attorney with the Governor’s Office). Attachment 19.

On January 4, 2001, Governor Leavitt reiterated his objectives on the eve of the introduction of S.B. 81—the last amendment to Part 3:

- “And let it be known that there is another poison Utah will not tolerate: high level nuclear waste. We don’t produce it, we don’t benefit from it, and we refuse to store it for those who do.” Governor Michael O. Leavitt, The Inaugural Address (Jan. 4, 2001). Attachment 20.

After S.B. 81 was introduced in the Senate on January 29, 2001, the bill’s sponsor, Senator Terry R. Spencer, made numerous statements highlighting the exclusionary purpose of the legislation:

- “We have looked at everything that we can possibly do—looking at the issue of constitutionality and looking at what the state can do in putting this bill together. We have put in everything that we could think of. We prohibit this waste from coming

here. I think that's only legitimate, given the testimony of the military folks, given testimony of DEQ, [we] don't want somebody else's garbage here and I would ask for your support on this bill." Hearings on S.B. 81 before the Energy, Natural Resources, and Agriculture Standing Comm., Utah State Sen., Feb. 15, 2001 (statement of Sen. Terry R. Spencer). Attachment 5.

- "It makes it clear that Utah has a public policy of not accepting high level nuclear waste. Any attempts to bring high level waste to Utah are a violation of that policy. It prohibits the formulation of any business entity such as a corporation or limited liability company to deal with high level waste, therefore making each individual who works for a corporation or has anything to do with any entity dealing with that waste, personally liable. It makes it illegal for any corporation or person or business entity to bring the materials to Utah or even assist in providing goods or services to any proposed disposal site and there are both criminal and civil penalties for the violation of these new statutes. It makes each person involved in the transportation of high level nuclear waste personally liable, including any employee, company, or even shareholder of the company." Floor Debate of First Substitute Senate Bill 81 before the Utah State Senate, Feb. 19, 2001 (statement of Sen. Terry R. Spencer). Attachment 21.
- "This just simply says, if you generate the waste somewhere else, let it stay somewhere else. You're the one benefiting from that energy now. We don't want your garbage here." Floor Debate of First Substitute Senate Bill 81 before the Utah State Senate, Feb. 19, 2001 (statement of Sen. Terry R. Spencer). Attachment 21.
- "... Utah has a public policy of not accepting these kinds of waste and any party's attempt to bring it to Utah violates that policy." Fight Intensifies against High-Level Nuclear Waste Storage, News Release, Utah State Senate, Feb. 2, 2001 (statement of Sen. Terry R. Spencer). Attachment 22.
- "I don't want to see garbage coming from Massachusetts or Minnesota or other places." Waste Not, Want Not: Lawmakers Target Company, Goshutes, The Salt Lake Tribune, Feb. 22, 2001 (quoting Sen. Terry R. Spencer). Attachment 23.
- "'We have tried to find everything that we could possibly find to stop this from coming in, and we have put it in nice handy bill form,' said sponsoring Republican Sen. Terry Spencer." Waste Not, Want Not: Lawmakers Target Company, Goshutes, The Salt Lake Tribune, Feb. 22, 2001. Attachment 23.
- "The Layton resident [Sen. Spencer] is sponsoring three bills this session to fight the proposed storage of high-level nuclear waste in Utah: S.B. 81—Provisions Relating to High Level Nuclear Waste. . . . In the event the federal government overrules Utah's public policy plan, Spencer said they have developed the following backup plan: 1. Make any person or business, who wishes to bring these materials to Utah, deposit a cash amount equal to any potential liability from a nuclear waste accident –

currently estimated at about \$150 billion. . . .” Fight Intensifies against High-Level Nuclear Waste Storage, News Release, Utah State Senate, Feb. 2, 2001. Attachment 22.

Promoting S.B. 81 before the House, Representative Stephen H. Urquhart echoed the discriminatory comments made by Senator Spencer:

- “We should act today to put roadblocks in the way of this material coming to be permanently sited in this state.” Floor Debate of Second Substitute Senate Bill 81 before the Utah House of Representatives, Feb. 28, 2001 (statement of Rep. Stephen H. Urquhart). Attachment 24.
- “The bill takes three actions—first, in case there is any question, it clearly states that we do not want this material within the state and we prohibit it. Second, should we lose on that blunt statement of our position, the bill challenges the authority of the Nuclear Regulatory Commission to license a private entity to move and store this waste within our state. Third, should we lose the licensing battle, the bill creates a licensing process.” Floor Debate of Second Substitute Senate Bill 81 before the Utah House of Representatives, Feb. 28, 2001 (statement of Rep. Stephen H. Urquhart). Attachment 24.

Finally, after the House and Senate passed S.B. 81 in February 2001, the Governor signed S.B. 81 on March 13 and punctuated the event by reiterating his legislative objectives:

- “‘The bills I sign today represent our commitment to block the storage of high-level nuclear waste in Utah,’ Leavitt said while signing the bill.” Does Leavitt’s N-waste bill break county vows?, Tooele Bulletin, Mar. 15, 2001. Attachment 25.
- “‘For the last 20 years we’ve been saying no to nuclear waste,’ Leavitt said before signing the bill [S.B. 81]. ‘We intend today to take another step forward to make sure that message is heard even more loudly and with further clarity.’” Court fight looms over nuclear waste, Ogden Standard Examiner, Mar. 14, 2001. Attachment 26.

## **B. Legislative History of the Additional Provisions.**{ TC \l "2"}

As noted, the Additional Provisions were enacted in S.B. 78, S.B. 164, S.B. 177, and S.B. 81. (The history of S.B. 177 and S.B. 81 is discussed above.)

On March 21, 1998, the Governor signed S.B. 78 into law which, with S.B. 164, enable the State to prevent spent fuel from arriving at the Band’s Reservation and the Facility via road or rail.

With S.B. 78, Defendants took control of the main road entering the Skull Valley, by designating the road a “state highway,” to block the transportation and temporary placement of spent nuclear fuel at the Facility on the Band’s property. The following remarks by the Governor and an unidentified legislator demonstrate the State’s purpose behind S.B. 78:

- “Controlling the road [with S.B. 78] ‘is not a silver bullet that will kill the PFS project,’ said Leavitt. ‘But we’ll do what we can and [designating the Skull Valley Road a state road] is a critical part of our strategy.’” Leavitt Again pushes Skull road plan, Deseret News, Feb. 6, 1998 (quoting Governor Michael O. Leavitt). Attachment 27.
- “Signing these bills [including S.B. 78 and S.B. 196] will add substantially to our ability as a state to protect the health and safety of our citizens against the storage of high-level nuclear waste.” New road sign to Skull Valley a show of force, Deseret News, Mar. 22, 1998 (quoting Governor Michael O. Leavitt). Attachment 28.

Similarly, with S.B. 164, Defendants took control of certain gravel and dirt roads and trails near the Skull Valley Reservation, effectively forming a “moat” around the proposed facility site by designating these roads and trails as “public safety interest highway[s]” and then preventing rail spurs from crossing the “public safety interest highway[s],” thus blocking any rail access to the proposed site. The sponsor of S.B. 164, Peter C. Knudson, together with the Governor, made the following remarks regarding S.B. 164 and how it would be used to block the transportation and temporary placement of spent nuclear fuel at the Facility on the Band’s property:

- “[This bill] will put, under the jurisdiction of the state, these roads, [and] highways that would enter into Skull Valley and . . . the Department [of Transportation] has jurisdiction and control over all statewide public interest highways. . . . The effect of this would be to preclude the establishment of railroad spurs into the Skull Valley. To get to the point, there is a desire on the part of some outside the State of Utah to establish a repository for spent nuclear rods. This would prevent bringing those rods by railroad into Skull Valley as the state would have jurisdiction over these highways.” Floor Debate of S.B. 164 before the Utah State Senate, Feb. 19, 1999 (statement of Sen. Peter C. Knudson). Attachment 29.

- “The commission acted on a request from the Governor’s office to consider taking some highways off the state system and as a means of keeping the spent fuel rods from coming toward the Indian reservation in Skull Valley. . . . So what this bill does, as Senator Knudson said, it designates, it defines statewide public safety highways and then it defines several highways in the Skull Valley area. . . . The other thing that the law does then is if you turn to the second page, line 38 under number 3, it says the department has jurisdiction and control over these highways. . . . So in all reality, the physical condition, the physical makeup of the way these roads are maintained and the way the counties would get funding for these roads does not change under this bill. It only allows for us to control whether or not a railroad would cross it and keeps the county from abandoning it. That’s the purpose of the bill.” Hearings on S.B. 164 before the Senate Transportation and Public Safety Standing Comm., Utah State Sen., Feb. 16, 1999 (statement of Clint Topham, Deputy Director, Utah Department of Transportation). Attachment 30.
- When asked by an unidentified Senator, “Senator Knudson, is this the moat that the Governor talked about in his State of the State [address]?” Senator Knudson replied, “This is the moat.” Floor Debate of S.B. 164 before the Utah State Senate, Feb. 19, 1999 (statements of an unidentified Senator and Sen. Peter C. Knudson). Attachment 29.
- “Some have referred to this as the ‘moat’ around Skull Valley and the purpose of this bill is to put under state control these public safety interest highways to preclude rail spurs traversing across them.” Floor Debate of S.B. 164 before the Utah State Senate, Feb. 22, 1999 (statement of Sen. Peter C. Knudson). Attachment 31.
- “I’d like to announce that permission will not be granted for rail crossings in the area where operation requires State approval.” Governor Michael Leavitt, State of the State Address (Jan. 18, 1999) (speaking of the proposal to store spent nuclear fuel on the Band’s reservation). Attachment 32.
- “We are not going to grant them the right to cross our roads or build a rail line to transport this stuff.” Utah Resisting Tribe’s Nuclear Dump, The Washington Post, Mar. 2, 1999 (quoting Governor Michael O. Leavitt). Attachment 33.
- “We intend to take possession of the roads they would have to cross in order to move the waste. We will not permit access.” Atomic Chickens Home to Waste Utah and the West, Salt Lake Observer July 2-15, 1999 (quoting Governor Michael O. Leavitt). Attachment 34.

The Governor continues to reiterate the exclusionary intent behind the State’s legislation:

- “I am shooting every bullet I can muster, at every target I can find when it comes to this matter. We’re going to use every legislative tool, every political tool, every environmental tool, every litigation tool that we can find to keep this high

level nuclear waste out of our state. It remains hot for ten thousand years. We don't want it here. We don't want it here now. We don't want it here in the future. We don't ever want it here." Skull Valley: Radioactive Waste and the American West (KUED television broadcast, July 11, 2001) (quoting Governor Michael O. Leavitt). Attachment 35.

- "We don't want it here. We'll do everything we have to to prevent it." Skull Valley: Radioactive Waste and the American West (KUED television broadcast, July 11, 2001) (quoting Governor Michael O. Leavitt). Attachment 36.
- "We don't produce it. We don't benefit from it, and we don't want to store it for those who do." Skull Valley: Radioactive Waste and the American West (KUED television broadcast, July 11, 2001) (quoting Governor Michael O. Leavitt). Attachment 37.
- "I'm prepared to do all I can to block the capacity of a local government to offer services to anyone who would bring high level nuclear fuel rods to this state." Interview by Ken Verdoia, KUED Producer, with Michael O. Leavitt, Governor, State of Utah, Salt Lake City, Utah (quoting Governor Michael O. Leavitt) (visited Aug. 27, 2001) <<http://www.kued.org/skullvalley/documentary/interviews/leavitt.html>>. Attachment 38.

### **ARGUMENT; TCAL "1"**

This Court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Pursuant to DUCivR 56-1(c), all material facts set forth with particularity by the movant shall be deemed admitted, unless specifically controverted by the opposing party. Plaintiffs' Motion presents straightforward issues of federal constitutional law, addresses clear facial constitutional defects in the state statutes at issue, and is accordingly unencumbered by any material factual controversy. "Summary judgment is especially appropriate where the issues in dispute are purely legal, such as in" deciding preemption of state law by federal statute. Brown v. Medtronic, Inc., 852

F. Supp. 717, 718 (D. Ind. 1994). See also Oklahoma v. Weinberger, 741 F.2d 290, 291 (10th Cir. 1983) (“questions of statutory construction and legislative history . . . present legal questions properly resolved by summary judgment”); Union Pac. Land Resources Corp. v. Moench Inv. Co., Ltd., 696 F.2d 88, 93 n.5 (10th Cir. 1982) (same); WKB Enters., Inc. v. Ruan Leasing Co., 838 F. Supp. 529, 532 (D. Utah 1993) (same).

The first three arguments below apply to all provisions of law challenged by Plaintiffs. The remaining arguments (IV – VII) apply to specified provisions, as set forth within each argument.

**I. THE FIRST INDEPENDENT BASIS FOR SUMMARY JUDGMENT ON PART 3 AND THE ADDITIONAL PROVISIONS: PREEMPTION UNDER THE ATOMIC ENERGY ACT.**

The Atomic Energy Act (42 U.S.C. §§ 2011 et seq.) preempts Part 3 and the Additional Provisions. In 1954 Congress passed the Atomic Energy Act to allow for the production and use of nuclear materials by private industry. The Atomic Energy Act grants the Atomic Energy Commission (now the Nuclear Regulatory Commission) “exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials.” Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n, 461 U.S. 190, 206-07 (1983). Pursuant to its authority under the Atomic Energy Act, the NRC has issued extensive and complex regulations governing away-from-reactor spent fuel storage installations. See 10 C.F.R. Part 72.

“The Supremacy Clause of Article VI of the Constitution provides Congress with the power to preempt state law.” Colorado Pub. Util. Comm’n v. Harmon, 951 F.2d 1571, 1575 (10th Cir. 1991). Preemption exists in three independent circumstances, each of which, by itself, will render a state law unconstitutional and void:

[S]tate law is pre-empted under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, in three circumstances. First, Congress can define

explicitly the extent to which its enactments pre-empt state law [express preemption;] . . . [s]econd, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively [field preemption; or third,] . . . state law is pre-empted to the extent it actually conflicts with federal law [conflict preemption].

English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990) (quotations and citations omitted); see also

DeCanas v. Bica, 424 U.S. 351, 353-64 (1976). The Supreme Court has further elaborated on conflict analysis as follows:

If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

California Coastal Comm'n v. Granite Rock, 480 U.S. 572, 581 (1987) (internal citations omitted).

Only field preemption and conflict preemption are at issue here.

The Supreme Court summarized the history of federal regulation of nuclear energy in English v. General Electric Co., 496 U.S. 72 (1990), making it clear that no significant regulatory or licensing role was contemplated for the states:

Until 1954, the use, control and ownership of all nuclear technology remained a federal monopoly. The Atomic Energy Act of 1954, [42 U.S.C. § 2011 et seq.] . . . stemmed from Congress' belief that the national interest would be served if the Government encouraged the private sector to develop atomic energy for peaceful purposes under a program of federal regulation and licensing. The Act implemented this policy decision by opening the door to private construction, ownership, and operation of commercial nuclear-power reactors under the strict supervision of the Atomic Energy Commission (AEC). . . . The AEC was given exclusive authority to license the transfer, delivery, receipt, acquisition, possession, and use of all nuclear materials. As was observed in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 550, 55 L. Ed. 2d 460, 98 S. Ct. 1197, 1215 (1978): "The [Federal Government's] prime area of concern in the licensing context . . .

[was] national security, public health, and safety.” With respect to these matters, no significant role was contemplated for the States. . . .

In 1974, Congress passed the Energy Reorganization Act, 88 Stat. 1233, 42 U.S.C. §§ 5801 et seq. (1982 ed.), which abolished the AEC and transferred its regulatory and licensing authority to the NRC. § 5841(f). The 1974 Act also expanded the number and range of safety responsibilities under the NRC’s charge.

Id. at 80-81 (emphasis added).

Supreme Court and lower court precedents unambiguously establish that the Atomic Energy Act and its implementing regulations preempt legislation such as Part 3 and the Additional Provisions. In Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983), the Supreme Court conducted a field preemption analysis and considered the constitutionality of a California statute purporting to prevent the construction of any new nuclear power plants until such time as a long-term solution to the problem of storing spent fuel had been reached. The Court held that “the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.” 461 U.S. at 212.<sup>7</sup> The Court also held that Congress had intended that only “the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant.” 461 U.S. at 205. Finally, the Court held that there was “no role” for the states “to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials.” 461 U.S. at 207.

After stating the parameters of federal preemption, the Court held that the statute at issue was not preempted, explaining that Congress had reserved to the states their traditional role as regulators of utilities. The Court examined the legislative history of California’s act and found that the legislature’s

motivation was economic and not safety related. 461 U.S. at 213-14. The Court noted that a similar “state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field.” 461 U.S. at 213. Likewise, the Tenth Circuit in applying the Pacific Gas decision recognized that under the Atomic Energy Act “[h]azards arising from atomic radiation were made a particularly federal concern, as to which the states had no authority to regulate. Accordingly, with very few exceptions, state attempts to regulate in this area are preempted.” Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1503 (10th Cir. 1997) (citations omitted).

English v. General Electric Co., 496 U.S. 72 (1990), elaborated upon and clarified the holding in Pacific Gas, noting that although “part of the pre-empted field is defined by reference to the purpose of the state law in question, . . . another part of the field is defined by the state law’s actual effect on nuclear safety.” 496 U.S. at 84. Thus, even if the motive for state action is economic regulation of utility, the Atomic Energy Act would still preempt the state action if it had some effect on nuclear safety. In this case, the State Licensing Scheme’s “actual effect” unquestionably falls in the preempted nuclear safety area.<sup>8</sup>

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<sup>7</sup> This “exception” allowing a possible role for state involvement in nuclear regulation does not apply to regulation of spent fuel because 42 U.S.C. § 2021(c) specifically excludes the states from regulating special nuclear material, which includes spent nuclear fuel.

<sup>8</sup> In an apparent attempt to come within the realm of acceptable state action demarcated in Pacific Gas, the “Legislative Intent” section of Part 3 states that Utah has “environmental and economic interests which do not involve nuclear safety regulation” and that “[a]n additional primary purpose . . . is to ensure protection of the state from nonradiological hazards.” See §§ 19-3-302(3)-(4). The actual operative provisions of the statute, however, belie the Statement of Intent. Many of Part 3’s provisions squarely address the nuclear safety aspects of the storage facility and potential threats to public health and safety. The Statement of Intent itself expresses concern for “contamination of surface water” and includes a finding that storage of spent fuel “is an ultra-hazardous activity which carries with it the risk that any release of waste may result in enormous economic and human injury.” § 19-3-302(5), (8). The legislative history also establishes that the true motivation of the legislature and governor was to regulate radiological and safety concerns.

Moreover, even if the state were acting to further permissible non-safety concerns, the statute would still be preempted if its actual effect intrudes into the NRC’s regulatory domain. “[S]tate regulation of matters directly affecting the radiological safety of nuclear-plant construction and operation, ‘even if enacted out of nonsafety

The decisions of lower federal courts also fully support the conclusion that the Atomic Energy Act preempts the State Licensing Scheme. In Illinois v. General Electric Co., 683 F.2d 206 (7th Cir. 1982), the court held that the Atomic Energy Act preempted a state statute designed to prevent the storage of out-of-state spent fuel:

Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd without opinion, 405 U.S. 1035, 92 S. Ct. 1307, 31 L. Ed. 2d 576 (1972), holds that the Atomic Energy Act, in the words of a subsequent Supreme Court decision, "created a pervasive regulatory scheme, vesting exclusive authority to regulate the discharge of radioactive effluents from nuclear power plants in the [NRC], and pre-empting the States from regulating such discharges." Train v. Colorado Public Interest Research Group, 426 U.S. 1, 16, 96 S. Ct. 1938, 1945, 48 L. Ed. 2d 434 (1976). The analysis of the structure and legislative history of the Act in Northern States compels the conclusion that the Act equally preempts state regulation of the storage, and shipment for storage, interstate and intrastate alike, of spent nuclear fuel.

683 F.2d at 215 (emphasis added). Similarly, in Jersey Central Power & Light Co. v. Township of Lacey, 772 F.2d 1103 (3d Cir. 1985), the court invalidated an ordinance prohibiting the importation of spent nuclear fuel or other radioactive waste for storage within the township. Id. at 1104. The court held that the NRC has exclusive jurisdiction to license the possession and use of nuclear materials, and that "[t]his jurisdiction includes . . . the authority to regulate the shipment and storage of radioactive materials. Upon these subjects, no role was left for the states." Id. at 1111 (emphasis added). The court further held that it is "beyond dispute" that Congress intended "that federal law should regulate

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concerns, would nevertheless [infringe upon] the NRC's exclusive authority.'" English, 496 U.S. at 84 (quoting Pacific Gas, 461 U.S. at 212).

the radiological safety aspects of the nuclear power industry, including the storage and shipment of spent fuel.” Id. at 1112 (emphasis added).<sup>9</sup>

Other courts have also concluded that there is no role for state prohibitions or regulation with respect to the shipment and storage of spent fuel. See United States v. Kentucky, 252 F.3d 816, 822-25, 828 (6th Cir. 2001) (Atomic Energy Act preempted state attempt to regulate disposal of radioactive material); Washington State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 629 (9th Cir. 1982) (parties conceded that “regulation of the disposal of high-level radioactive waste has been preempted by the federal government and that this area is therefore not susceptible to regulation by the states”). This Court should follow this unanimous body of case law and invalidate Part 3 and the Additional Provisions. Utah’s express prohibition of the transportation and storage of spent fuel, together with its permitting and regulatory scheme, fall squarely within the preempted areas described by the Supreme Court in Pacific Gas.<sup>10</sup>

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<sup>9</sup> Defendants argue in their Motion for Judgment on the Pleadings filed September 20, 2001, that there is no preemption because the NRC is not authorized by federal law to license a private, away-from-reactor spent fuel storage facility, thus leaving the state free to legislate in this area. This theory is also set forth in Part 3’s “Legislative intent” section. Section 19-3-302(2). The Court should reject this argument for the reasons outlined in Plaintiffs’ Memorandum in Opposition to Defendants’ Motion for Judgment on the Pleadings filed November 8, 2001. In sum, spent fuel contains “special nuclear material,” “source material” and “byproduct material.” See 42 U.S.C. §§ 2014(e),(z) and (aa). The Atomic Energy Act authorizes the NRC to issue licenses to “transfer, deliver, acquire, possess, own, receive possession of or title to, import, or export . . . special nuclear material.” 42 U.S.C. §§ 2073(a), 2077. The NRC has similar licensing authority over the receipt, ownership and possession of byproduct material. 42 U.S.C. § 2111. See also 42 U.S.C. § 2201(b) (granting authority to issue rules governing use of special nuclear and byproduct material). The NRC has authority to issue licenses for source material for any use that is “an aid to science or industry.” 42 U.S.C. § 2093(a)(4). Both the Seventh and Third Circuits have explicitly held that the NRC has the exclusive authority to regulate spent fuel. See Illinois v. Gen. Elec. Co., 683 F.2d at 214-15 (“the state does not, and could not, . . . question the Commission’s authority to regulate the storage of spent nuclear fuel”); Jersey Cent. Power & Light Co., 772 F.2d at 1112 (“pervasive scheme of federal regulation” covers “storage and shipment of spent fuel”). As such, the Atomic Energy Act clearly grants the NRC authority to license and regulate the spent fuel storage facility proposed by PFS.

<sup>10</sup> Significantly, the overall regulatory scheme seeks indirectly to accomplish the same prohibition by requiring, on the one hand, exactly what is prohibited on the other. For instance, a license applicant must “demonstrate conclusively” that an “identified party has irrevocably agreed to accept the waste at the end of the temporary storage period,” while all contracts or agreements “whether formal or informal” are declared void. Compare §§ 19-3-301(9) and 19-3-306(8).

Utah has also explicitly ventured into the prohibited realm of “radiological safety concerns” and has attempted to usurp “jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials,” as the statutory language and the legislative history clearly show. The Atomic Energy Act preempts Part 3 because Part 3 goes to the very heart of the NRC’s regulatory jurisdiction. 461 U.S. at 205, 207. Part 3’s licensing requirements in some respects duplicate those of the NRC, as set forth in 10 C.F.R. Part 72. It is also clear that Utah designed its statute to regulate the public health and safety aspects of the storage facility, the core area reserved for exclusive NRC jurisdiction. For example, Part 3 authorizes the issuance of regulations “necessary for the protection of the public health,” including “rules for safe and proper construction, . . . use, and operation of . . . storage . . . facilities.” § 19-3-304(3)(a). An applicant for a state license must provide analyses of groundwater conditions, which are obviously intended to address the risks of radiological contamination. §§ 19-3-305(1), 19-3-307(2). The requirements for a security plan, § 19-3-305(7); health risk assessments, § 19-3-305(10); a quality assurance program, § 19-3-305(12); radiation safety program, § 19-3-305(12); and an emergency plan, § 19-3-305(13); obviously purport to address the need to protect the public from radiological hazards. The applicant must even demonstrate to the state that the spent fuel in the facility “will not cause or contribute to an increase in mortality, an increase in illness, or pose a present or potential hazard to human health or the environment.” § 19-3-306(3). In short, the Utah statute clearly intrudes upon the “safety” and “nuclear” aspects of constructing and operating nuclear facilities—matters subject to the “complete control” and “exclusive authority” of the federal government. Pacific Gas, 461 U.S. at 212. Thus as a matter of field preemption the Utah statutes must be found to be unconstitutional.

In addition to the field preemption analysis, Part 3 is preempted because it conflicts with the Atomic Energy Act. If a conflict exists between the NRC's authority under the Atomic Energy Act and Part 3, the NRC's authority prevails. See Kerr-McGee Chem. Corp. v. City of West Chicago, 914 F.2d 820, 826 (7th Cir. 1990) ("Where it can be established that an actual conflict exists between the NRC's authority and the [government's] regulation, the NRC must prevail.") (internal quotations and emphasis omitted). By its own terms, Part 3's requirements are applicable even after the NRC issues a license for the PFS facility. § 19-3-301. Thus, even in the face of express federal permission for the project, the State Licensing Scheme will purport to prohibit storage and require PFS to obtain a second, state-issued license. The Atomic Energy Act clearly and absolutely preempts such state interference after an NRC licensing decision. See Kerr-McGee Chem. Corp., 914 F.2d at 827 (NRC licensing decisions are part of federal regulatory scheme and are not subject to state veto or interference).

Moreover, the patently unreasonable requirement to post a cash bond of at least \$2 billion, the voiding of Plaintiffs' contracts, the Catch-22 requirements incapable of being satisfied, the erasure of limited liability protections, and the prohibition on municipal services all show that the purpose of the State regulatory scheme is to block spent fuel storage facilities, not merely to regulate them. Part 3 thus stands as an impermissible obstacle to accomplishing the purposes of the Atomic Energy Act, which preempts Part 3 for that reason as well. See English, 496 U.S. at 79; United Nuclear Corp. v. Cannon, 553 F. Supp. 1220, 1224-25, 1229-32 (D. R.I. 1982) (Atomic Energy Act preempted state law requiring \$10 million bond for nuclear fuel reprocessing facility).

Finally, the Atomic Energy Act preempts the Additional Provisions because those provisions are nothing more than blatant attempts to ban or otherwise impede the construction and operation of a

spent fuel storage facility in the event the NRC licenses it. The Additional Provisions effectively bar both road and rail transportation to the site of the proposed Facility, they isolate the site of the proposed Facility and prevent Tooele County from providing necessary (and contractually guaranteed) services to the site, they promise an inducement (indemnification) to Tooele County to refuse to honor its contract with Plaintiff PFS, and they establish other tools that will be used to harass Plaintiffs, such as new procedures for counties to approve the siting of a spent fuel storage facility, drug testing and expanded water rights litigation. These Additional Provisions, if permitted to stand, will constitute literal and effective roadblocks to the proposed Facility if the NRC licenses it, and as such the provisions are impermissible obstacles to accomplishing the purposes of the Atomic Energy Act. See English, 496 U.S. at 79; Jersey Central Power & Light, 772 F.2d at 1111, 1112 (NRC “jurisdiction includes . . . the authority to regulate the shipment and storage of radioactive materials. Upon these subjects, no role was left for the states.” . . . “[F]ederal law should regulate the radiological safety aspects of the nuclear power industry, including the storage and shipment of spent fuel.”).

**II. THE SECOND INDEPENDENT BASIS FOR SUMMARY JUDGMENT ON PART 3 AND THE ADDITIONAL PROVISIONS: VIOLATION OF THE INTERSTATE COMMERCE CLAUSE DUE TO FACIAL DISCRIMINATION AGAINST INTERSTATE COMMERCE, DISCRIMINATORY PURPOSE, AND DISCRIMINATORY EFFECT ON INTERSTATE COMMERCE.**

Part 3 and the Additional Provisions violate the Interstate Commerce Clause, which provides that “Congress shall have Power . . . To regulate commerce with foreign nations, and among the several States . . .” U.S. Const. art. I, § 8, cl. 3. The Interstate Commerce Clause has a “dormant” or “negative” aspect that prevents the states from imposing undue restraints on interstate commerce, even in the absence of congressional action. See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Resources, 504 U.S. 353, 359 (1992).

Under the Commerce Clause, “‘a virtually per se rule of invalidity’ applies where state law discriminates facially, in its practical effect, or in its purpose.” Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 785 (4th Cir. 1996), cert. denied, 521 U.S. 1103 (1997) (quoting Wyoming v. Oklahoma, 502 U.S. 437 (1992) quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)). See also SDDS, Inc. v. South Dakota, 47 F.3d 263, 267-68 (8th Cir. 1995) (stating that statute may discriminate in three ways—on its face, in purpose or in effect), cert. denied 521 U.S. 1103 (1997)). Where the challenged legislation discriminates against interstate commerce in any one of the three identified ways, “it is subject to the strictest scrutiny, and the burden shifts to the governmental body to prove both the legitimacy of the purported local interest and the lack of alternative means to further the local interest with less impact on interstate commerce.” Dorrance v. McCarthy, 957 F.2d 761, 763, 765 (10th Cir. 1992).

Applying this strict scrutiny, the Supreme Court has consistently invalidated state laws impeding the movement of waste among the states. In Philadelphia, 437 U.S. 617, the Court addressed a New Jersey law banning the importation of “solid or liquid waste which originated or was collected outside the territorial limits of the State.” 437 U.S. at 618. The Court began by articulating the basic principle of the Commerce Clause that “our economic unit is the Nation” and that “states are not separable economic units.” Id. at 623. No state may attempt “to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.” Id. at 628. Observing that it has “consistently found parochial legislation of this kind to be constitutionally invalid,” the Court held the restriction on solid waste invalid under the Commerce Clause. Id.; see also Chemical Waste Mgmt. v. Hunt, 504 U.S. 334, 341-45 (1992) (disposal fee imposed on out-of-state waste violated Commerce Clause). Lower courts that have

addressed Commerce Clause challenges in cases involving the storage of radioactive waste have reached similar conclusions. The Seventh Circuit held that an Illinois law violated the Commerce Clause by banning importation of spent fuel destined for storage at an Illinois storage facility. Illinois v. Gen. Elec. Co., 683 F.2d 206, 214 (7th Cir. 1982). Similarly, the Ninth Circuit held that a statute restricting the importation of low-level radioactive waste violated the Commerce Clause. Washington State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 630-31 (9th Cir. 1982).

**A. The Governor’s and Legislators’ Statements Demonstrate the Discriminatory Purpose Behind Part 3 and the Additional Provisions.**

Part 3 and the Additional Provisions are invalid under the strict scrutiny standard because the purpose of the statutes is discriminatory. “State legislation may be found to be discriminatory on the basis of its purpose.” Chambers Med. Tech. of S.C. v. Bryant, 52 F.3d 1252, 1259 (4th Cir. 1995). See also Philadelphia, 437 U.S. at 624, 626 (holding that protectionist legislation is virtually per se invalid, and that “the evil of protectionism can reside in legislative means as well as legislative ends.”); SDDS, 47 F.3d at 268 (“[T]he presence of a discriminatory purpose is one of three ways to trigger strict scrutiny.”); Eastern Kentucky Resources v. Fiscal Ct. of Magoffin County, 127 F.3d 532, 540 (6th Cir. 1997) (discriminatory purpose triggers strict scrutiny); National Solid Waste Mgmt. v. Williams, 877 F. Supp. 1367, 1379 (D. Minn. 1995) (“In light of the discriminatory purpose behind [the statute], the court applies the strictest scrutiny.”).

Courts assessing the purpose behind legislation challenged as violating the Commerce Clause look to the statements of lawmakers supporting the legislation, including statements made outside the traditional legislative setting. See Waste Mgmt. Holdings v. Gilmore, 87 F. Supp. 2d 536, 545 (E.D. Va. 2000) (Governor’s public statements showed discriminatory motive behind

landfill restrictions), aff'd in part, vacated in part 252 F.3d 316, 336-40 (8th Cir. 2001) (same); National Solid Waste Mgmt. v. Williams, 877 F. Supp. 1367, 1378 (D. Minn. 1995) (legislative history was “brimming with protectionist rhetoric”); Northeast Sanitary Landfill v. South Carolina Dep’t of Health & Env’tl. Control, 843 F. Supp. 100, 106 & n.12 (D. S.C. 1992) (examining statements made during meeting of Board of Health and Environmental Control).

In this case, the history of each of the five pieces of legislation at issue is certainly “brimming with protectionist rhetoric.” Williams, 877 F. Supp. at 1378. Indeed, it is impossible to imagine a more obvious case of discriminatory legislative purpose. As demonstrated in the Legislative History section, each of the bills that enacted Part 3 was passed with the stated intent of preventing the movement of spent fuel to Utah. See Attachment 15 (“this is the bill [S.B. 196] that says we really don’t want nuclear waste in the state”); Attachment 16 (S.B. 177 used to avoid an industry “that we do not want in the State of Utah”); Attachment 5 (“We have tried to find everything we could possibly find to stop this from coming in, and we have put it in nice handy bill form [S.B. 81].”). Similarly, the bills enacting the Additional Provisions were intended to prevent the movement of spent fuel to Utah. See Attachment 27 (S.B. 78 “is not a silver bullet” but “is a critical part of our strategy”); Attachment 29 (S.B. 164 is intended to prevent transportation of fuel rods by railroad to thwart the “desire on the part of some outside the State of Utah to establish a repository for spent nuclear rods”). Summing up the attitude of the State Government, the Governor stated, “We don’t produce it [spent nuclear fuel]. We don’t benefit from it, and we don’t want to store it for those who do.” Attachment 37. He added: “I am shooting every bullet I can muster. . . . We’re going to use every legislative tool . . . to keep this high level nuclear waste out of our state.” Attachment 35. The passage of each of the five

pieces of legislation was clearly motivated by the intent, repeatedly stated with rhetorical flourish, to keep spent nuclear fuel from entering Utah for storage. For this reason alone, each piece of legislation triggers strict scrutiny and, without an overriding, legitimate local interest, as demonstrated below, the acts are unconstitutional. SDDS, 47 F.3d at 268 (“discriminatory purpose is one of three ways to trigger strict scrutiny”); Eastern Kentucky Resources, 127 F.3d at 549 (same).

In their Answer, Defendants do not deny the discriminatory motivation that Plaintiffs alleged in their Complaint. Instead, Defendants decry Plaintiffs’ “bad motivation” alleging that Plaintiffs’ challenge to Part 3 is “irrelevant, impertinent, and immaterial and should be stricken.” Answer ¶ 62. On the contrary, the “bad motivation” of Utah’s Legislature and Governor is profoundly relevant to the constitutional issues raised in Plaintiffs’ Complaint, particularly the interstate commerce issues.

**B. Part 3 and the Additional Provisions Will Have a Severely Discriminatory Effect on Interstate Commerce Because They Predominantly Affect Persons Outside Utah.**

Part 3 and the Additional Provisions violate the Commerce Clause because, as is clear from the face of the statutes, they will have a severely discriminatory effect on interstate commerce. As noted, Part 3 bans entirely the importation of spent fuel or, failing that, regulates its storage in such an onerous manner as to make it impossible. The Additional Provisions attempt the same thing by blocking road and rail access to the site of the proposed facility and otherwise isolating the site from municipal services and in other ways. In similar contexts, courts have found discriminatory effects where a restriction on the importation of waste or other articles of commerce predominantly affect persons outside the state, even where the express language of the statute does not facially distinguish

between in-state and interstate commerce. In SDDS, Inc. v. South Dakota, 47 F.3d 263 (8th Cir. 1995), the court addressed an initiative that required legislative approval of any large-scale solid waste facility in the state. 47 F.3d at 265-66. Although the initiative was facially non-discriminatory, the court found a discriminatory effect because 90-95% of the subject waste would originate from outside of South Dakota. Id. at 270-71. Accordingly, the court applied strict scrutiny to the measure and held it invalid. Id.; see also Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 340, 351-54 (1986) (facially neutral apple-labeling statute found to have discriminatory effect where 100% of burden fell out of state); Chambers Med. Tech. of S.C. v. Jarrett, 841 F. Supp. 1402, 1414-16 (D. S.C. 1994) (facially neutral waste-shipping law had discriminatory effect where 98-99% of subject medical waste came from out-of-state).

Here there is no question that the entire prohibitory and regulatory burdens of Part 3 and the Additional Provisions fall entirely on out-of-state interests. All of the spent fuel to be stored at the PFS Facility will be transported from outside Utah, see Undisputed Facts Section supra at 16, Fact 3,<sup>11</sup> causing the burdens imposed by the Act to fall entirely on out-of-state interests. By effectively closing Utah's doors to spent fuel, Part 3 and the Additional Provisions are precisely the type of discriminatory legislation that courts have consistently held unconstitutional.

**C. Defendants Cannot Satisfy Their Burden of Justifying Part 3 and the Additional Provisions Because Their Pervasive and Blatant Discrimination Unlawfully Frustrates the National Interest in the Safe Transportation and Storage of Spent Nuclear Fuel.**

Given the pervasive discrimination against interstate commerce by Part 3 and the Additional Provisions, strict scrutiny applies and the burden of proof shifts to Defendants to

prove that less discriminatory alternatives are not available to serve their asserted local interests—in this case purported interests in radiological health and safety. See Hunt, 432 U.S. at 353. In a case such as this, however, where the doctrines of federal preemption apply, less restrictive means are always available because the State can always simply not legislate and allow its health and safety interests to be protected by the applicable federal regulation. The doctrines of preemption and interstate commerce hold that states are not entitled to defend local interests at the expense of the national interest. The Ninth Circuit in Spellman made this point:

The New Jersey statute, like the Washington initiative, protected the health of the individual state’s citizens while ignoring the nationwide problem of waste disposal. The Supreme Court found the measure “blocks the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey’s remaining landfills. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution.”

Spellman, 684 F.2d at 631-32 (quoting Philadelphia, 437 U.S. at 629). Thus, in the case of spent fuel, Utah may not exercise its purported interest in health and safety at the expense of the national interest in safe transportation and storage of spent fuel in accordance with a properly issued NRC license.

### **III. THE THIRD INDEPENDENT BASIS FOR SUMMARY JUDGMENT ON PART 3 AND THE ADDITIONAL PROVISIONS: VIOLATION OF THE CONTRACTS CLAUSE DUE TO RETROACTIVE AND MATERIAL IMPAIRMENT AND INTERFERENCE WITH PLAINTIFFS’ CONTRACTS.**

Part 3 and the additional provisions violate the Contracts Clause of the United States Constitution by (1) expressly voiding Plaintiffs’ valid and preexisting contracts relating to the PFS facility and (2) establishing a regulatory scheme and regulatory hurdles that entirely preclude performance of Plaintiffs’ existing agreements. Specifically, Part 3 nullifies (past,

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<sup>11</sup> As the Governor himself has noted, “None of these are local utilities. . . . [T]hese are out-of-state companies that want to move their waste here.” See Attachment 39, Interview with Governor Leavitt (KSL 1160 radio station, May

present or future) “[a]ny contract or agreement to provide any goods, services, or municipal-type services to any organization engaging in, or attempting to engage in the placement” of spent fuel in Utah. Utah Code Ann. § 19-3-301(9).<sup>12</sup> This section of Part 3 nullifies virtually all the agreements in existence at the time of passage entered into by Plaintiffs that directly or indirectly relate to the PFS facility. By doing so, the section blatantly violates the Contracts Clause of the Constitution. The State Licensing Scheme further violates the Contracts Clause by establishing a regulatory process that makes performance and enforcement of Plaintiffs’ contracts impossible.

The Contracts Clause provides: “No state shall . . . pass any . . . law impairing the obligation of contracts.” U. S. Const. art. I, § 10, cl. 1. The State Licensing Scheme and the Additional Provisions violate the Contracts Clause because they substantially and retroactively interfere with three classes of contracts: (1) The Goshute-PFS Lease dated May 20, 1997; (2) the Tooele County-BIA-Goshute Agreement dated June 3, 1997 and the PFS-Tooele County Agreement dated May 23, 2000; and (3) numerous service, supply, and land agreements that PFS has executed in connection with the development of the Facility, including, as an example, the November 3, 1995, Stone & Webster Agreement. See supra Undisputed Facts Section at 16, Fact 2.

The Supreme Court has established a three-part test to determine the constitutionality of state legislation under the Contracts Clause. First, “[t]he threshold inquiry is ‘whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.’” Energy Reserves Group, Inc. v. Kansas Power & Light, 459 U.S. 400, 411 (1983) (quoting Allied

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25, 2000).

Structural Steel v. Spannaus, 438 U.S. 234, 244 (1978)); accord Walker v. Mather, 959 F.2d 894, 899 (10th Cir. 1992). If this threshold is met, the burden shifts to the state to prove both (1) “a significant and legitimate public purpose behind the regulation,” and (2) that the legislation is based upon “reasonable conditions and [is] of a character appropriate to the public purpose justifying the legislation’s adoption.” Energy Reserves, 459 U.S. at 412 (citations and internal punctuation omitted). See also Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307, 323 (6th Cir. 1998) (burden of proof shifts to state); Andrews v. Anne Arundel County, 931 F. Supp. 1255, 1266 (D. Md. 1996) (defendants had burden of proof).

**A. The State Licensing Scheme Substantially and Retroactively Impairs Plaintiffs’ Contracts.**

There can be no question that the State Licensing Scheme acts as a substantial impairment to Plaintiffs’ contracts because it expressly voids the contracts in their entirety. In determining whether there is a substantial impairment of contractual obligations, the Court considers the severity of interference with performance obligations and the contracting parties’ expectations. See Spannaus, 438 U.S. at 245-47 (finding that a statute that “nullifies express terms of the company’s contractual obligations and imposes a completely unexpected liability in potentially disabling amounts” violates the Contracts Clause).<sup>13</sup>

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<sup>12</sup> See also §19-3-301(6) (prohibiting state agencies from entering into any contracts or agreements with any organization engaged in the transportation of spent fuel prior to meeting all the requirements of Part 3); § 17-34-1(3) (prohibiting counties from contracting to provide services to any area being considered for the storage of spent fuel).

<sup>13</sup> See also McDonald’s Corp. v. Nelson, 822 F. Supp. 597, 606 (S.D. Iowa 1993) (new law severely impaired parties’ ability to perform existing franchise agreements, and parties’ “expectations played an integral role in the pricing of the licenses”); Ross v. Berkeley, 655 F. Supp. 820, 828 (N.D. Cal. 1987) (“It can hardly be suggested that the nullification of this [commercial lease] term by the operation of the ordinance comports with the reasonable expectations of the parties.”).

The Supreme Court has “appeared to assume that an impairment is substantial at least where the right abridged was one that induced the parties to contract in the first place.” Baltimore Teachers Union v. Mayor and City Council of Baltimore, 6 F.3d 1012, 1015 (4th Cir. 1993), cert denied, 510 U.S. 1141 (1994). The State Licensing Scheme clearly acts as a substantial impairment to Plaintiffs’ contracts because it completely destroys the Plaintiffs’ contractual expectations by making performance of the contracts impossible. See Energy Reserves, 459 U.S. at 411 (“Total destruction of contractual expectations is not necessary for a finding of substantial impairment.”).

PFS and the Band have entered into numerous contractual relationships relating to the Facility and these relationships existed prior to the enactment of Part 3. There is no doubt that Part 3 not only substantially impairs these relationships, but given the express language of § 19-3-301(9)(a), extinguishes them. These contracts include:

- The Skull Valley Band-PFS Lease of May 27, 1997. Amended Counterclaim ¶ 22.
- The PFS-Tooele County Agreement of May 23, 2000, which provides that Tooele County will provide essential services to the Facility such as road maintenance, law enforcement, fire response, public health, public safety, and telecommunications support. Declaration of John Parkyn ¶ 4b, Attachment 9.
- The Tooele County-BIA-Goshute Agreement of June 3, 1997, by which the County agreed to provide services to the Band. Declaration of Leon D. Bear ¶ 3a, Attachment 10.
- The December 1995 Stone & Webster Agreement, by which PFS (when it was known as Mescalero Fuel Storage LLC) engaged an experienced contractor for the development of a storage facility. Declaration of John Parkyn ¶ 4a, Attachment 9.
- Various agreements and commercial arrangements with vendors and suppliers, including those providing rail-related services and equipment, transportation casks and canisters, technical assistance, and legal services.

By declaring void any agreement for goods and services relating to the storage of spent fuel, Part 3 nullifies each of these contracts under state law. § 19-3-301(9)(a).

In addition to the aspects of Part 3 that directly nullify the private agreements of PFS and the Band, the remaining provisions of Part 3 and the Additional Provisions violate the Contract Clause by establishing a regulatory scheme and regulatory hurdles that would entirely preclude performance of the agreements. Part 3 and the Additional Provisions further prohibit Tooele County from providing any services to the Facility, thus making the entire subject matter of the agreements with Tooele County illegal under Utah law. § 17-34-1(1) and (3). The \$2 billion cash bond requirement, the additional “financial assurance” requirement estimated by the State to be \$14 billion or more, the 75% contract surcharge (passed under the guise of a tax), the preclusive “siting criteria,” the transportation barriers, and the efforts to cause Tooele County to repudiate its agreement with Plaintiff PFS are all examples of a regulatory scheme designed to make performance of the PFS and Tribal contracts impossible. In addition, Part 3 arguably subjects the contracting parties to criminal sanctions for “facilitat[ing]” the storage of spent fuel. § 19-3-312(4)-(5).

Part 3 and the Additional Provisions completely nullify the expectations of PFS and the Band. Courts examining expectations under the Contracts Clause look to the terms of the subject contract and the regulatory framework that existed when the parties executed the contracts. See Spannaus, 438 U.S. at 245-46 (“Here, the company’s contracts of employment with its employees . . . satisfied the [then] current federal income tax code and was subject to no other legislative requirements.”); Whirlpool Corp. v. Ritter, 929 F.2d 1318, 1323 (8th Cir. 1991) (individual devising estate plan “was entitled to expect that his wishes regarding insurance

proceeds, as ascertained pursuant to then-existing law, would be effectuated.”); Empire Sanitary Landfill Inc. v. Dept. of Environmental Resources, 684 A.2d 1047, 1059 (Pa. 1996) (holding that contract between hauler and landfill operator was protected from new ordinance by the Contract Clause: “The laws that are in force at the time parties enter into a contract are merged with the other obligations that are specifically set forth in the agreement.”).

When the Band and PFS entered into their initial agreements, there was not the extraordinary legislative declaration that now exists, declaring past, present, and future contracts void.<sup>14</sup> Further, the State of Utah is attempting to regulate in an area—the transfer and storage of high-level nuclear waste—that it has never before regulated and that is exclusively regulated by the federal government. See Spannaus, 438 U.S. at 250 (holding that a state law violated the Contracts Clause because the law “did not operate in an area already subject to state regulation at the time the company’s contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State.”); Pacific Gas, 461 U.S. at 212 (“the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.”). Thus, the State Licensing Scheme destroys the legitimate and reasonable expectations of the Plaintiffs. See Citizens for Lee County v. Lee County, 416 S.E.2d 641, 646 (S.C. 1992) (holding that ordinance undermined the “intent and expectations of parties” by limiting landfill operators to accepting less than 5% of the waste they anticipated); Empire

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<sup>14</sup> The Goshute-PFS Lease, the Tooele County-BIA-Goshute Agreement, and the Stone & Webster Agreement were each entered into before the State commenced its legislative assault on the Band and PFS in 1998. Contracts such as the PFS-Tooele County Agreement executed after 1998 are also subject to protection from the application of the 1998-1999 legislation because hampering these later agreements would substantially impair the objectives of the initial contracts (i.e., the PFS-Goshute Lease and the Stone & Webster Agreement) that gave rise to the project. Of course, the State purported to declare all of these agreements “void from inception” in 2001 with the enactment of S.B. 81. § 19-3-301(9)(a)(ii). Declaration of John Parkyn ¶ 4a, 8, Attachment 9.

Sanitary Landfill, 684 A.2d at 341 (contracting parties “could not anticipate, at the time of contracting, the specific changes” to landfill ordinances).

**B. The State of Utah Cannot Justify the Nullification of the Contracts Entered Into by the Plaintiffs.**

Defendants cannot meet their burden of proving that the State Licensing Scheme (1) has a significant and legitimate public purpose, and (2) sets forth reasonable conditions that are appropriate to support its purpose. Because Part 3 and the Additional Provisions severely interfere with contractual obligations, the burden of proof shifts to the Defendants to demonstrate the nature and necessity of the legislation, which the Court must ascertain through “careful examination.” Spannaus, 438 U.S. at 245. “The severity of the impairment measures the height of the hurdle the state legislation must clear.” Id.; see also Energy Reserves, 459 U.S. at 411 (“The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected.”); Toledo, 154 F.3d at 325 (“because obliterating these terms constitutes a very severe impairment, we must carefully scrutinize [the legislation]”); Kendall-Jackson Winery v. Branson, 82 F. Supp. 2d 844, 872 (N.D. Ill. 2000) (“the level of scrutiny . . . increases in proportion to the severity of the impairment”). Where the contractual impairment is severe, as it is in this case, the Court must “consider whether the ordinance is essential and whether the [State’s] objectives could be achieved by less drastic alternatives.” Lee County, 416 S.E.2d at 646; Andrews, 931 F. Supp. at 1267 (impairment must be “narrowly tailored” and “[the] least drastic available”); Ross, 655 F. Supp. at 835 (“other municipalities have responded to the problem . . . with measures more closely tailored to the objective of regulating bad faith evictions.”).

In a case closely analogous to this one, Citizens for Lee County, Inc. v. Lee County, 416 S.E.2d 641 (S.C. 1992), a contractor had entered into an agreement with a county for the construction and operation of a solid waste landfill. 416 S.E.2d at 643. Subsequently, a referendum was passed that severely limited the size and intake capacity of a landfill. See id. at 644. Instead of taking in 3,500 tons per day, as contemplated by the contracting parties, the landfill could only accept 150 tons. See id. at 644, 646. Based on these facts, the court held that the ordinance “both technically and substantially impair[ed] the contract” by making performance of the contracts “virtually impossible.” Id. at 646. Next, the court found that the ordinance failed to employ the “least restrictive alternative” because the operator could not operate the landfill economically in compliance with the requirements of both the EPA and the new ordinance. Id. Moreover, the capacity limitations were “unnecessary because proper design and management of the landfill” served the ordinance’s environmental objectives. Id. at 646. Accordingly, the court declared the ordinance invalid under the Contracts Clause as it pertained to landfill operation. See id.

The court in Lee County recognized that a state must not advance its putative interests by making compliance with federal permitting requirements virtually impossible. 416 S.E.2d at 646. The holding in Lee County illustrates that laws having the effect of impairing contractual relationships are just as offensive as those that expressly nullify private agreements. 416 S.E.2d at 644, 646. Although the ordinance in that case did not squarely purport to void existing landfill contracts, the court held that the permitting and waste-volume restrictions imposed by the ordinance violated the Contract Clause by rendering “the objective of operating a regional waste disposal and recycling facility virtually impossible.” Id.; see also Empire, 684 A.2d at 1047,

1059 (Contract Clause protects private landfill contracts from effective impairment by county's new waste control ordinance).

The State of Utah does not have a legitimate purpose because it is attempting to undermine the federal government's authority to license and regulate spent nuclear fuel. The State Licensing Scheme attempts to prevent compliance with a federally-issued license from the NRC to store spent nuclear fuel at the PFS facility. The express intent of Part 3 is "to prevent the placement of any high-level nuclear waste . . . in Utah" that may be brought to Utah "pursuant to a license from the federal government, or by the federal government itself, in violation of this state law." § 19-3-302. Significantly, the provision that expressly voids all past, present and future contracts (§ 19-3-301(19)(a)) was not passed as part of the original legislation, but rather, as an afterthought in the 2001 amendments (S.B. 81) that were intended to put "everything that we could possibly find" in a bill to stop the storage of nuclear waste in Utah. See Attachment 23, Statement of S.B. 81 Sponsor, Sen. Terry Spencer, Waste Not, Want Not: Lawmakers Target Company, Goshutes, The Salt Lake Tribune, Feb. 22, 2001. Attempting to undermine the well-established authority of the federal government to license an away-from-reactor spent fuel storage facility in Utah is not a legitimate public purpose.

The State Licensing Scheme's conditions are wholly unreasonable and not appropriately tailored to support a legitimate purpose. Part 3 completely voids any and all contracts relating to the storage of spent fuel in Utah. As previously discussed, \$2 billion cash bonds, 75% contract surcharges, overly broad criminal penalties, and the assortment of other "conditions" required by the State Licensing Scheme cannot be interpreted as "reasonable" under even the most liberal of

definitions. Defendants simply cannot meet their burden to prove that the State Licensing Scheme sets forth reasonable conditions in support of a legitimate public purpose.

#### **IV. THE FOURTH INDEPENDENT BASIS FOR SUMMARY JUDGMENT: PREEMPTION UNDER THE HAZARDOUS MATERIALS TRANSPORTATION ACT.**

The federal Hazardous Materials Transportation Act (“HMTA”), 49 U.S.C. §§ 5101-5127, preempts portions of Part 3 and the Additional Provisions<sup>15</sup> because they interfere with the transportation of spent fuel.<sup>16</sup> Congress enacted HMTA in 1975 to “replace[] a patchwork of state and federal laws and regulations concerning the transportation of hazardous materials with a scheme of uniform national regulations.” Colorado Pub. Util. Comm’n v. Harmon, 951 F.2d 1571, 1574 (10th Cir. 1991) (reversing district court and holding that state radioactive materials licensing scheme, which contained permit and fee requirements, among others, stood as an obstacle to and was preempted by HMTA).<sup>17</sup> Pursuant to HMTA, the U.S. Department of Transportation (“DOT”) “promulgated the Hazardous Materials Regulations (“HMR”), which categorize and classify hazardous materials and impose various requirements on shippers and

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<sup>15</sup> HMTA preempts the following provisions: 19-3-301(1)-(10); 19-3-302(1)-(5), (7), (8); 19-3-303(12), (13); 19-3-304; 19-3-305; 19-3-306; 19-3-307(1), (2); 19-3-308(1), (2), (4), (5); 19-3-310; 19-3-311; 19-3-312(1)-(5); 19-3-313; 19-3-315; 19-3-318; 19-3-319(3), (4); §§ 54-4-15, 72-3-301, 72-4-125(4), 78-34-6. HMTA would also preempt any other provision of Part 3 or the Additional Provisions if such provisions are used as, or otherwise present, an obstacle to the transportation of spent fuel.

<sup>16</sup> It is clear that Part 3 regulates transportation of spent fuel, not just its storage. See § 19-3-301(2)(b) and (4)(a) (requiring the federal government itself to transport the waste under certain circumstances); § 19-3-301(5)(a) and (5)(c) (“unfunded potential liability” depends in part on possible accidents during transportation of spent fuel); § 19-3-304(1)(a) (state license required for “waste transfer” facility), § 19-3-305(2) (transportation routes and plans must be submitted prior to state issuance of license); § 19-3-306(1) (license cannot be issued unless certain conditions applicable to “areas involved in the transport of wastes” are met); § 19-3-306(12) (license cannot be issued unless certain financial conditions are met on the part of persons or entities “which send wastes to a facility”).

<sup>17</sup> Harmon cites to the old HMTA code section, see Harmon, 951 F.2d at 1577-83, which Congress recodified in 1994 as part of the overall recodification of HMTA. See 49 U.S.C. § 1811(a) (1993) (recodified at 49 U.S.C. § 5125(a) (1994)); 49 U.S.C. § 5125(a) (1994). Congress has also amended HMTA several times. See Pub.L. 94-474, 90 Stat. 2068 (1976); Pub.L. 101-615, 104 Stat. 3244 (1990); Pub.L. 103-311, 108 Stat. 1673 (1994).

carriers for shipping papers, marking, labeling, transport-vehicle placarding, and packaging of hazardous materials.” Id.

Congress amended HMTA with the Hazardous Materials Transportation Uniform Safety Act of 1990 (“HMTUSA”). When Congress amended HMTA with HMTUSA, “it expressly specified the standard for determining whether the statute or its implementing regulations preempt state regulations that regulate in the same area. Congress also strongly reaffirmed that uniformity was the linchpin in the design of the statute.” Harmon, 951 F.2d at 1575.

As currently in force, HMTA expressly preempts state law where:

- (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or
- (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

49 U.S.C. § 5125(a) (emphasis added).<sup>18</sup>

These HMTA provisions preempt the above-cited provisions of Part 3. As noted, Part 3 contains an outright ban on the transportation to, and storage of waste in, Utah. See § 19-3-301(1) (“The placement, including transfer, storage, decay in storage, treatment, or disposal, within the exterior boundaries of Utah of high-level nuclear waste . . . is prohibited.” (emphasis

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<sup>18</sup> Additionally, apart from the express preemption analysis of this section, the DOT interprets HMTA, as applied to radioactive materials transportation, as “almost completely occup[ying] the field” of radioactive materials transportation regulation. DOT Inconsistency Ruling IR-21, 52 Fed. Reg. 37072, 37074 (1987); see also DOT Inconsistency Ruling IR-15 (Appeal), 52 Fed. Reg. 13062, 13063 (1987) (“[i]n light of the virtual total occupation of the field of radioactive materials transportation by the HMTA and the HMR, State or local provisions requiring approval or authorization constitute unauthorized prior restraints on shipments that are presumptively safe based on their compliance with the HMTA and HMR”); Southern Pac. Transp. Co. v. Public. Serv. Comm’n of Nevada, 909 F.2d 352, 355-56, 359 (9th Cir. 1990) (holding that district court did not give sufficient deference to DOT inconsistency ruling); Harmon, 951 F.2d at 1579 (courts defer to DOT’s assessment that state regulations overlap with HMTA); Udall v. Tallman, 380 U.S. 1, 16 (1965) (“When faced with a problem of statutory construction, this

added)). HMTA preempts state bans on transportation. In Jersey Central Power and Light Co. v. Township of Lacey, 772 F.2d 1103 (3d Cir. 1985), the court held that HMTA expressly preempted a municipal ordinance that prohibited the transportation to, and storage of spent fuel in, the township because “on its face” the ordinance “affects transportation of large-quantity radioactive materials in its literal language and by natural implication and application.”<sup>19</sup> Id. at 1113. In the present case, as in Jersey Central, the State’s Licensing Scheme would “affect” the Plaintiffs’ transportation of spent fuel by prohibiting it altogether.

There are several additional grounds on which HMTA preempts the identified provisions of Part 3 and the Additional Provisions (supra n.15). First, Part 3 contains a scheme for the issuance of a state license. This scheme is merely a pretense that will permanently prohibit transportation of spent fuel to Utah. The face of the statute and the legislative history make it abundantly clear that there is no chance that a license to construct and operate a storage facility will ever be issued. For example, Part 3 contains contradictory requirements, such as that the applicant must “demonstrate[] the availability and adequacy of emergency services,” § 19-3-306(1), while at the same time prohibiting state and local governments and private entities from providing such services. §§ 19-3-301(6) and (7), 19-3-301(8). Part 3 also contains many other requirements that are flatly impossible to satisfy, such as proof that there are no alternative sites available. § 19-3-306(5). Even if such requirements could be satisfied, the issuance of the license would depend on the whim of the Governor and Legislature.

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Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.”) (emphasis added).

<sup>19</sup> The finding in Jersey Central is fully applicable here because the specific HMTA provisions relied on in that case are substantively still in effect. See 772 F.2d at 1113. The court relied on regulations currently found at 49 U.S.C. § 5125, 49 C.F.R. § 107.202(b), and 49 C.F.R. § 397.203(a), (then found at 49 U.S.C. § 1811(a) and 49 C.F.R. § 107.209(c)); the routing regulations for hazardous materials of H.M. 164, currently found at 49 C.F.R. §§ 397.101 and 397.103, (then found at 49 C.F.R. § 177.825); and the policy statement prohibiting delay in hazardous materials

Similarly, §§ 54-4-15(4), 72-3-301, 72-4-125(4) and 78-34-6(5) of the Additional Provisions effectively ban the transportation of spent fuel because they block all means of transportation to the proposed site of the Facility.

Moreover, for purposes of HMTA preemption, Part 3 and the specified Additional Provisions should be construed as virtual bans on transportation of spent fuel to Utah, with the analysis of the foregoing paragraph fully applicable. See New Hampshire Motor Transp. Ass'n v. Town of Plaistow, 836 F. Supp. 59, 64 (D. N.H. 1993) (“when deciding an express preemption case, the court is charged with the duty to discover any conflict between the statutes, not as written on their face, but as interpreted and applied”); United States v. Connecticut, 566 F. Supp. 571, 577 n.7 (D. Conn. 1983); aff'd 742 F. 2d 1443 (2d Cir. 1983), aff'd 465 U.S. 1014 (1984) (preemption under another statute (not HMTA) applied to “scheme of burdensome regulation that could only have the effect of achieving by an accumulation of petty irritations what [a state cannot] achieve through outright prohibition”); Rollins Env. Serv. v. Parish of St. James, 775 F.2d 627, 634-35 (5th Cir. 1985) (where town ordinance banned use of solvents in certain areas in an attempt to prevent toxic waste disposal firm from conducting business in town, court labeled ordinance “sham” and held it was preempted because town’s true purpose was to avoid federal Toxic Substances Control Act and prevent waste disposal firm from operating in town).

Second, HMTA preempts Part 3 because it provides broad discretion to state authorities to approve or deny hazardous materials transportation and storage. See Southern Pac. Transp. Co. v. Public Serv. Comm'n of Nevada, 909 F.2d 352, 358-59 (9th Cir. 1990) (finding that grant of broad discretion to state authorities violates HMTA’s obstacle test); Northern States Power Co. v. Prairie

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transportation, currently found at 49 C.F.R. § 177.800(d) (substantively the same as the policy statement then found

Island Mdwakanton Sioux Indian Community, 991 F.2d 459, 461-62 (8th Cir. 1993) (finding that grant of broad discretion to tribal authorities violates HMTA’s obstacle test); Union Pac. R.R. Co. v. City of Las Vegas, 747 F. Supp. 1402, 1402-04 (D. Nev. 1989) (finding that grant of broad discretion to local authorities violates HMTA’s obstacle test); DOT Inconsistency Ruling IR-18, 52 Fed. Reg. 200, 203 (1987) (“fatal defects” of county code included “virtually unfettered discretion” and “open ended authority” granted to county to affect transportation of radioactive materials); DOT Inconsistency Ruling IR-20, 52 Fed. Reg. 24396, 24399-400 (1987) (similar). In the present case, Part 3 grants the Governor and State Legislature complete discretion to deny a transportation permit, even after the NRC has issued its license.<sup>20</sup> See § 19-3-301. This factor invalidates the State Licensing Scheme under the foregoing case law.

Finally, HMTA preempts state bonding or indemnity requirements. The DOT has ruled that HMTA preempts such indemnity or insurance provisions because they cause confusion or vary from federal financial responsibility requirements. See DOT Inconsistency Ruling IR-10, 49 Fed. Reg. 46645, 46646-47 (1984), as corrected by 50 Fed. Reg. 9939 (1985) (preempting indemnity requirement for radioactive materials transportation); DOT Inconsistency Ruling IR-11, 49 Fed. Reg. 46647, 46649 (1984) (same); DOT Inconsistency Ruling IR-15, 49 Fed. Reg. 46660, 46663-65 (1984) (preempting \$5 million bond requirement for radioactive materials transportation); DOT Inconsistency Ruling IR-18, 52 Fed. Reg. 200, 204 (1987) (“indemnification requirements for

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in the definition of “[r]outing rule” in Appendix A of Part 177 to 49 C.F.R.).

<sup>20</sup> The Governor has expressly stated he will use his discretion to deny approval of Plaintiffs’ project: “I guarantee they’ll never get a permit to move waste over our borders.” See Attachment 7. Ogden Standard Examiner, May 26, 2000. The Governor recently reiterated his intent to use every available tool to stop the PFS project. “I am shooting every bullet I can muster, at every target I can find when it comes to this matter. We’re going to use every legislative tool, every political tool, every environmental tool, every litigation tool that we can find to keep this high level nuclear waste out of our state.” See Attachment 35, Skull Valley: Radioactive Waste and the American West (KUED television broadcast, July 11, 2001) (quoting Governor Michael O. Leavitt).

transporting radioactive materials differing from, or in addition to, Federal requirements are inconsistent with the HMTA and the HMR”); cf. United Nuclear Corp. v. Cannon, 553 F. Supp. 1220, at 1224-25, 1230-31 (D. R.I. 1982) (holding that, under Atomic Energy Act, state requirement for \$10 million bond is preempted because federal government has not given states authority to regulate “radiation hazards”).

In the present case, the State Licensing Scheme requires a bond of two billion dollars (§ 19-3-306(10)), an additional payment of up to \$313 billion based on the state-determined “unfunded potential liability,” see §§ 19-3-301(5); 19-3-319(3) and supra n.3, and abrogates limited liability for organizations transporting or storing spent fuel within Utah. See § 19-3-318. These financial restrictions create an obstacle to Plaintiffs’ transportation and storage activity, greatly exceed the federal requirements, and dwarf the \$5 million bond requirement that DOT held preempted in Inconsistency Ruling IR-15, see 49 Fed. Reg. at 46663-65.

**V. THE FIFTH INDEPENDENT BASIS FOR SUMMARY JUDGMENT: PART 3 VIOLATES PLAINTIFFS’ FREEDOM OF ASSOCIATION WITH PERSONS NECESSARY TO ADVANCE THEIR BUSINESS AND LEGAL POSITIONS IN VIOLATION OF THE FIRST, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.**

**A. Portion of Part 3 Violates the First Amendment.**

Part 3 violates Plaintiffs’ First Amendment freedom of association by (1) prohibiting Plaintiffs from contracting with each other and with other persons necessary to plan for, build, and operate the Facility; (2) denying those in association with plaintiffs the normal protections and rights afforded to others doing business in the State of Utah; and (3) imposing civil and criminal penalties for violating or “facilitat[ing]” the violation of any portion of Part 3. These requirements were imposed with an articulated intent of “prevent[ing] the placement of high-level Nuclear Waste,” § 19-3-302.

The freedom of association is a constitutionally protected right derived from the First Amendment rights of freedom of speech and assembly.<sup>21</sup> See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958). See also Bates v. City of Little Rock, 361 U.S. 516, 522-28 (1960) (recognizing freedom of association found in First amendment); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91 (1982) (same). The freedom of “‘expressive association’ . . . [is] the right of individuals to associate for the purposes of engaging in activities protected by the First Amendment, such as speech, assembly, the exercise of religion, or petitioning for the redress of grievances.” Sanitation and Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 996 (2d Cir. 1997) (finding that political activity of trade association is expressive association). See also Roberts v. United States Jaycees, 468 U.S. 609, 622-25 (1984) (stating expressive association includes rights “to speak, to worship, and to petition the government” and holding that Jaycee’s “civic, charitable, lobbying, [and] fundraising” activities involve expressive association); Boy Scouts of America v. Dale, 530 U.S. 640, 648-660 (2000) (stating that expressive association is “engag[ing] in some form of expression, whether it be public or private” and holding association for purpose of teaching “system of values” to others is expressive association).

Freedom of association also includes the constitutionally protected right to associate to further business and economic purposes. See Roberts, 468 U.S. at 622 (freedom of association includes association for “a wide variety of political, social, economic, educational, religious, and cultural ends”) (emphasis added); California Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972) (recognizing that groups have right of access to courts, guaranteed by rights of association and

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<sup>21</sup> The First Amendment, applied to the states by incorporation through the Fourteenth Amendment, precludes state interference with freedom of association. See Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 121 (1981).

petition, to promote their business and economic interests); NAACP, 357 U.S. at 460-61 (holding that freedom of association includes association “for the advancement of . . . political, economic, religious or cultural matters”) (emphasis added).

Courts analyze freedom of association violations under a test that balances the state’s interests against a person’s right to associate. See Roberts, 468 U.S. at 622-25 (applying balancing test); Boy Scouts, 530 U.S. at 647-660 (same); Sanitation, 107 F.3d at 996-1000 (same). Under this balancing test, when a state law interferes with the freedom of “expressive association,” courts strike down the law unless the state can advance “compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms.” Roberts, 468 U.S. at 623 (applying less-restrictive means/compelling state interest test to state law interfering with expressive association); Boy Scouts, 530 U.S. at 648 (same); Sanitation, 107 F.3d at 997 (same).

In the present case, Plaintiffs are engaged in an expressive association in furtherance of the PFS project because Plaintiffs have engaged, and will continue to engage, public affairs consultants, expert witnesses in the NRC licensing proceedings, attorneys, scientists and others to exercise Plaintiffs’ First Amendment expressive rights to associate for the purposes of planning, permitting and/or constructing the Facility.

The collective operation of numerous provisions of Part 3, the stated intent of which is to ban the placement of spent fuel in Utah, see § 19-3-302, infringes upon Plaintiffs’ right of association. These provisions are: (1) the provisions voiding contracts entered into for the purpose of obtaining goods, services or governmental services by any entity “engaging in or attempting to engage in the placement” of spent fuel within Utah’s borders, § 19-3-301(6), 19-3-301(7), 19-3-301(8), 19-3-301(9); (2) the provision prohibiting the “execut[ion] within the state” of such agreements,

§ 19-3-301(9)(b)(i); the formation of private organizations, § 19-3-301(8)(a), (c), and the registration of foreign corporations, § 19-3-301(8)(b), (c) for the purpose of obtaining goods, services or governmental services; and (3) the civil and criminal penalty provision, § 19-3-312.

The contract-voiding provisions of Part 3, § 19-3-301(9)(a)(i), (ii), (b)(ii), purport to prevent Plaintiffs from forming associations by contract to further their lawful purposes. PFS would almost certainly qualify as an organization “attempting to engage in the placement” of spent fuel within Utah, § 19-3-301(9)(a)(i), and the Band would also qualify as such. Consequently, Plaintiffs would be prevented from engaging the services of public affairs consultants, scientists, expert witnesses in the licensing proceeding, and lawyers, as well as engineers, accountants, contractors, suppliers of any sort, or others to advance their interests before administrative, judicial and legislative authorities. Indeed, Plaintiffs would be prevented from entering into any contracts at all, §§ 19-3-301(6)(a), (b); 19-3-301(9)(b)(i), or even petitioning courts. § 19-3-312(4), (5). These identified provisions of Part 3 clearly impinge on Plaintiffs’ freedom to associate.

Similarly, the prohibitions on the formation of private organizations, § 19-3-301(8)(a), (c), and the registration of foreign corporations, § 19-3-301(8)(b), (c) would also prevent Plaintiffs from forming associations to further their lawful purposes. As with the contract voiding provisions noted above, Plaintiffs would be prevented from engaging the services of various entities necessary for advancing their lawful purposes.

The civil penalty provision punishes persons who violate any provision of the State Licensing Scheme and “[a]ny person or organization acting to facilitate a violation of” the State Licensing Scheme. §§ 19-3-312(2), 19-3-312(4) (imposing fine of up to \$10,000 per day). Similarly, the criminal penalty punishes persons who “knowingly” violate any provision and “[a]ny person or

organization who knowingly acts to facilitate a violation of” Part 3. §§ 19-3-312(3), 19-3-312(5) (imposing penalty of class A misdemeanor<sup>22</sup> and fine of up to \$10,000 per day). The wording of the penalty provisions expands the prohibited conduct to the mere “facilitation” of the violation of the State Licensing Scheme. This effectively penalizes a very broad range of conduct. For example, under the State Licensing Scheme, it is a crime to “facilitate” the placement of waste in the state (potentially covering a wide range of conduct, including an engineer preparing plans for the project, a spokesperson publicly expressing the Band’s view of the desirability of the project, or counsel’s preparation of this brief);<sup>23</sup> it is a crime to “execute” a contract to provide any goods or services to PFS<sup>24</sup> (the State Licensing Scheme does not say whether “execute” means to enter into, to carry out, or both); and arguably it is a crime to act in accordance with a contract to provide goods or services to PFS.<sup>25</sup>

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<sup>22</sup> In addition to Part 3’s \$10,000/day fine, a class A misdemeanor is punishable by up to one year imprisonment and a \$2,500 fine. Utah Code Ann. §§ 76-3-204(1); 76-3-301(1)(c).

<sup>23</sup> It is particularly well-settled that state prohibitions that prevent association with counsel violate the freedom of association. In United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971), the Court reversed an injunction preventing plaintiff’s members from securing attorneys for representation based on a statute preventing solicitation for legal representation. 401 U.S. at 586. The Court held that it was “common sense” that the First Amendment protected the ability to associate with counsel. The Court reversed because, “[g]iven its broadest meaning, this [Michigan statute] would bar the Union’s members, officers, agents, or attorneys from giving any kind of advice or counsel” to its members. Id. at 580. Furthermore, the Court refused to give the offending provision a liberal reading to avoid conflict with the First Amendment because there would be no guarantees that the state would give the provision the same reading when enforcing it. See id. at 581. See also NAACP v. Button, 371 U.S. 415, 428-29 (1963) (holding state’s action that effectively denied group right to employ attorneys violated First Amendment freedom of association); United Mine Workers v. Illinois State Bar Ass’n, 389 U.S. 217, 221-25 (1967) (reversing lower court injunction that effectively denied party the right to employ attorneys). The Tenth Circuit, in DeLoach v. Bevers, 922 F.2d 618 (10th Cir. 1990), has explicitly recognized this associational right, stating that “[t]he right to retain and consult with an attorney, however, implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech.” DeLoach, 922 F.2d at 620.

<sup>24</sup> In the eyes of the State, PFS would almost certainly be considered an “organization . . . attempting to engage in the placement” of spent fuel in Utah. § 19-3-301(9)(a)(i).

<sup>25</sup> This appears to have been the legislative intent. When asked by Representative, Dave N. Cox “will [S.B. 81 (which contained the contract-voiding provisions)] make those private companies that enter into those kinds of contracts to provide those kind of services, criminals because they then do business under contract [with], in this example, out in west desert, with, for example, Private Fuel Storage?” Representative Stephen H. Urquhart replied,

Part 3 violates Plaintiffs' right of association under the freedom of association balancing test, as clearly demonstrated above. The State cannot meet the next prong of the balancing test by advancing "compelling state interests . . . that cannot be achieved through means significantly less restrictive of associated freedoms." Roberts, 468 U.S. at 623 (emphasis added). The State Licensing Scheme cannot serve a compelling state interest because, as shown previously,<sup>26</sup> the exclusion of spent nuclear fuel is unconstitutional and therefore cannot qualify as a compelling state interest. Cf. Environmental Technologies Council v. State of South Carolina, 901 F. Supp. 1026, 1035 (D. S.C. 1995) (discrimination violating the Commerce Clause against out-of-state hazardous waste cannot be a valid purpose for state regulatory scheme). In addition, in the face of an extensive federal regulatory scheme designed to cover all aspects of the production, transportation, and storage of spent nuclear fuel, the state cannot make a rational argument that Part 3, with its ban on contracts and broad civil and criminal provisions, meets the second prong of the test as the least restrictive means available to regulate transportation and storage of spent nuclear fuel, even if the State were entitled to regulate in those areas. The least restrictive means in these circumstances would be to allow the applicable federal regulation to take its course.

#### **B. Portions of Part 3 Violate the Sixth Amendment.**

Interference with the right to hire counsel also violates the Sixth Amendment right to counsel in criminal matters, which may be implicated given the expansive and vague criminal

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"Yes." See Attachment 24, Floor Debate of Second Substitute Senate Bill 81 before the Utah House of Representatives, Feb. 28, 2001 (statements of Reps. Dave N. Cox and Stephen H. Urquhart).

The State of Utah recognized that Part 3 was infringing upon freedom of association rights. In a transparent attempt to avoid the impact of its infirmities, the Utah legislature stated "[i]t is the intent of the Legislature that this part does not prohibit or interfere with a person's exercise of the rights under the First Amendment. . . ." § 19-3-301(12). The legislature also provided an exception for "Utah-based" nonprofit trade associations from the penalties based solely on the actions of their members. § 19-3-312(6). The state inexplicably limited this exception, however, to "Utah-based" trade associations for the acts of their members. See id.

provision of Part 3 contained at § 19-3-312(3) and (5). See Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (mandating right to counsel for any criminal offense whether “petty, misdemeanor, or felony”); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (same); Deloach, 922 F.2d at 620 (recognizing that criminal investigation and charges may implicate both First and Sixth Amendment rights to counsel). If the state brought a criminal action, pursuant to §§ 19-3-312(3) or (5), for violations of Part 3, the accused person’s attorney could also be subject to the penalty provisions of § 19-3-312 because that section may be read broadly to encompass the actions of the attorney in defending the accused. See § 19-3-312(5) (punishing those who “knowingly act[] to facilitate a violation” of Part 3). This would violate the accused person’s Sixth Amendment right to counsel.

**C. Portions of Part 3 Violate the Fourteenth Amendment.**

Similar to the First Amendment violations demonstrated above, Part 3 also infringes Plaintiffs’ Fourteenth Amendment right to counsel. Unlike the First Amendment right outlined above, however, the Fourteenth Amendment right Defendants have violated pertains only to Plaintiffs’ right to obtain assistance of counsel. The complexity of the regulatory, prohibitory, and penalty provisions of Part 3 triggers that right to counsel in civil cases guaranteed by the due process clause of the Fourteenth Amendment. See Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (recognizing that in many civil suits right to be represented by counsel is of paramount importance and stating “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel”); cf. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-34 (1982) (holding arbitrary refusal to allow access to courts to redress grievances

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<sup>26</sup> See supra Parts I, II, III, and IV (demonstrating unconstitutionality of Part 3).

violates due process clause); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 311-13 (1950) (holding that state law that effectively removed party's ability to seek redress in court violated due process clause). The Goldberg rationale that in complex civil cases the assistance of an attorney is of paramount importance highlights the due process violation resulting from Part 3. In the present case, the state has enacted an onerous regulatory scheme calculated to deprive those most in need of the assistance of counsel of the right to that counsel, since legal assistance to those contemplating the storage of spent fuel in Utah could easily be considered the facilitation of the storage of spent fuel and, therefore, a crime.

In summary, this Court should declare the identified portions of Part 3 unconstitutional because they deprive Plaintiffs of their rights of association and counsel.

**VI. THE SIXTH INDEPENDENT BASIS FOR SUMMARY JUDGMENT: THE PENALTY PROVISIONS OF PART 3 ARE UNCONSTITUTIONALLY VAGUE AND VIOLATE THE DUE PROCESS CLAUSE BECAUSE THEY DO NOT PROVIDE SUFFICIENT NOTICE OF THE CONDUCT PROHIBITED AND THEY ALLOW ARBITRARY AND DISCRIMINATORY ENFORCEMENT AUTHORITY.**

By imposing criminal and civil penalties for any conduct that “facilitates” a violation of any of its provisions, §§ 19-3-312(4) and (5), the State Licensing Scheme establishes an unconstitutionally vague penalty scheme. Under the Due Process Clause of the U.S. Constitution, “[v]agueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.” City of Chicago v. Morales, 527 U.S. 41, 52 (1999) (emphasis added); see Jane v. Bangerter, 61 F.3d 1493, 1500-02 (10th Cir. 1995) (finding phrase “used for experimentation” in criminal prohibition on fetal testing unconstitutionally vague), rev'd on other grounds, 518 U.S.

137 (1996); Ronald D. Rotunda & John E. Nowak, 3 Treatise on Constitutional Law, 2001 Supp. § 17.8, p. 6 (setting forth Morales standard). Civil laws that fail to provide reasonable notice concerning the type of conduct prohibited also violate Due Process. See Bass Plating Co. v. Winsor, 639 F. Supp. 873, 880-81 (W.D. Mich. 1986) (restriction on placing “soupy” or “runny” waste in landfill held unconstitutionally vague because language required persons to guess at its meaning).

A court’s inquiry into vagueness must be particularly stringent where the challenged law “threatens to inhibit the exercise of constitutionally protected rights.” Hoffman Estates v. Flipside, 455 U.S. 489, 499 (1982); see also Wright v. Georgia, 373 U.S. 284, 293 (1963) (“[A] generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague.”); Constitutional Law, § 17.8, p. 105 (stating that “the degree of notice provided by a statute to individuals” must be most precise when “a statute regulates fundamental constitutional rights”). Because the penalty provisions of the State Licensing Scheme purport to criminalize and otherwise restrict the exercise of constitutional rights, such as the right to move waste in interstate commerce (see supra Part II) and to perform contracts without retroactive interference by the government (see supra Part III), the court must stringently examine the penalty provisions under the vagueness standard set forth in Morales.

Section 19-3-312(5) of the State Licensing Scheme provides:

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.

(emphasis added). Section 19-3-312(4) similarly provides that anyone “acting to facilitate a violation of any provision of this part” is subject to a civil penalty of up to \$10,000 per day.<sup>27</sup>

By hinging liability on whether a person or organization “facilitates” a violation, the criminal and civil penalty provisions of the State Licensing Scheme fail to reasonably alert the public as to what type of conduct the statute prohibits. The legislation makes no attempt to define “facilitate” in a manner that would allow persons to know whether their activities are lawful. See Morales, 527 U.S. at 57 (holding that vagrancy ordinance was “doomed” under the vagueness doctrine where it failed to explain “what loitering is covered by the ordinance and what is not.”).

In similar fashion, the State Licensing Scheme provides government agents with enforcement discretion that is unconstitutionally arbitrary. Legislation fails to provide sufficiently explicit standards when it “delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis.” Chatin v. Coombe, 186 F.3d 82, 89 (2d Cir. 1999) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)). Under § 19-3-312(5), the State Licensing Scheme arguably could require the arrest of any Tooele County employee who processes a payment for municipal services made pursuant to the PFS-Tooele County Agreement if that employee is deemed to have facilitated a violation of Part 3. The vague reach of the statute could also be construed as penalizing municipalities for providing fundamental fire-response and public safety services, such as those set forth in the contract between PFS and Tooele County. The result is that law enforcement officers are left with

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<sup>27</sup> Subsection (6) provides narrow exceptions only for Utah-based nonprofit trade associations and their members, which serve to illustrate how broad the legislature intended the penalties to stretch. See supra pg. 10.

inappropriate discretion to determine, on an *ad hoc* basis, whether to penalize such potentially valuable activities or classes of activities.

**VII. THE SEVENTH INDEPENDENT BASIS FOR SUMMARY JUDGMENT: UTAH'S IMPOSITION OF A 75% TAX ON THOSE WHO TRANSACT BUSINESS WITH PFS IS AN UNCONSTITUTIONAL ABUSE OF THE TAXING POWER.**

Despite Chief Justice Marshall's admonition that "the power to tax involves the power to destroy," McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819), yet one more tactic adopted by the State is to use the power of taxation to destroy the PFS project. Specifically, Part 3 of the Radiation Control Act states, "The placement, including transfer, storage, decay in storage, treatment, or disposal, within the exterior boundaries of Utah of high-level nuclear waste or greater than class C radioactive waste is prohibited." Utah Code Ann. § 19-3-301(1). To enforce this policy of isolating Utah from the nation's spent nuclear fuel issue, § 19-3-301(10)(a) imposes a 75% "sales tax" on anyone transacting business with "the storage facility or transfer facility or transportation entity":

All contracts and agreements under Subsection (10)(b) are assessed an annual transaction fee of 75% of the gross value of the contract to the party providing the goods, services, or municipal-type services to the storage facility or transfer facility or transportation entity. The fee shall be assessed per calendar year, and is payable on a prorated basis on or before the last day of each month in accordance with rules established under Subsection (10)(d), and as follows:

- (i) 25% of the gross value of the contract to the department; and
- (ii) 50% of the gross value of the contract to the Department of Community and Economic Development, to be used by the Utah Division of Indian Affairs as provided in Subsection (11).

(emphasis added). In turn, § 19-3-303(12) defines "[s]torage facility" as "any facility which stores, holds, or otherwise provides for the emplacement of waste regardless of the intent to recover that waste for subsequent use, processing, or disposal." It is obviously intended that the 75% tax be

imposed on anyone doing business with PFS. Section 19-3-303(12) is so arbitrary, abusive, and punitive that it violates the Fifth and Fourteenth Amendments. A. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934) (Due Process is violated “only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.”).

**A. The United States Constitution Forbids States from Imposing Taxes That are in Reality Punitive Measures and Taxes that are Disguised Attempts to Confiscate a Taxpayer’s Business.**

The United States Constitution forbids taxing jurisdictions from confiscating taxpayers’ property under the guise of legitimate taxation. Textbook discussions of this subject start with one of the most famous cases in American jurisprudence—Chief Justice John Marshall’s opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), in which the Court articulated a compelling policy reason for insisting upon constitutional restraints against such governmental abuse: “[T]he power to tax involves the power to destroy.” McCulloch, 17 U.S. (4 Wheat.) at 43. Consistent with that concept, the Court’s modern jurisprudence has reaffirmed that “a taxing statute may be judicially disapproved if it is ‘so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property.’” Commonwealth Edison Co. v. Montana, 453 U.S. 609, 627 n.17 (1981) (citations omitted). The Court has further refined the constitutional restraint against abusive taxation by recognizing that a so-called tax loses its legitimacy as a tax and becomes instead a penalty “where the statute prohibits the doing of an act and as a sanction imposes a pecuniary punishment for violating the act.” Consumers & Producers Ass’n v. Oklahoma, 1981 WL

1833, \*2 (E.D. Okla. 1981) (quoting Child Labor Tax Case, 259 U.S. 20, 21-22 (1922)); see also Montana Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 779 (1994).

The United States Supreme Court and the Utah Supreme Court have consistently invalidated state or local taxes where there is an obvious abuse of the taxing power. In Montana Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994), the United States Supreme Court struck down Montana's Dangerous Drug Tax Act because, in reality, the act did not impose a tax, but was a punitive measure against targeted taxpayers. The Act imposed a tax on the "possession and storage of dangerous drugs," and under the law then in effect, could be collected only after any state or federal fines had been paid. The taxpayers operated a farm on which they cultivated and sold marijuana. The taxpayers were convicted and sentenced in criminal proceedings, but in a separate proceeding, the Montana Department of Revenue attempted to collect almost \$900,000 in taxes on the drugs.

Based upon an aggregate of factors, the Court held Montana's so-called tax was not a tax but instead was an unconstitutional punitive measure. The tax rate was imposed at a remarkably high rate, eight times the market value of the drugs. The tax was intended to deter people from possessing marijuana. The tax was conditioned on the commission of a crime, and levied on goods the taxpayer neither owned nor possessed when the tax was imposed, even though the tax was characterized as a type of property tax. In striking down Montana's tax, the Court held, "[t]aken as a whole, this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard [property] tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis." Id. at 783. The tax in Kurth was held to constitute a punishment and thus to have violated the Double Jeopardy Clause (not an issue here). Kurth nonetheless expressly reaffirms prior cases that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character

as such and becomes a mere penalty with the characteristics of regulation and punishment." A. Magnano Co., 292 U.S. 40, 46 (citing Child Labor Tax Case, 259 U.S. 20, 38 (1922)).

The Utah Supreme Court adopted a similar approach in Continental Bank & Trust Co. v. Farmington City, 599 P.2d 1242 (Utah 1979), in invalidating a “crippling” gross revenues tax of 2% imposed on “amusements” within the city—a tax targeted essentially against one city taxpayer. The issue in Farmington was “whether or not the licensing ordinance passed by Farmington and assessed against Lagoon [an amusement park in Farmington] represent[ed] such an improper classification that its operation [became] discriminatory, arbitrary, and an abuse of the taxing power.” Id. at 1245. Though Farmington had disingenuously characterized the tax as applying to almost any type of amusement, entertainment, recreational facility or business, the court found it “abundantly clear that the tax was, from the outset, intended for, and tailored to, Lagoon alone.” Id. at 1244. Targeting a single taxpayer was significant to the Utah Supreme Court, as it should be to this Court, since “[w]henver a class is singled out for taxation, the amount of which is unduly burdensome, the question of abuse of taxing power is raised.” Id. at 1246 (citing Ogden City v. Crossman, 17 Utah 66, 53 P. 985 (1898); Salt Lake City v. Christensen Co., 34 Utah 38, 95 P. 523 (1908); Matthews v. Jensen, 21 Utah 207, 61 P. 303 (1900)).

In its analysis, the Utah Supreme Court recognized that a valid tax “must bear a reasonable relation to the purposes to be accomplished by the act.” Id. at 1245; see also Complete Auto Transit v. Brady, 430 U.S. 274 (1977) (holding that for a state tax to pass constitutional muster it must be “fairly related to the services provided by the State,” in addition to satisfaction of three other tests not applicable here). The Utah Supreme Court held that Farmington City abused its taxing power by imposing “a potentially crippling tax on a single business for the benefit of the community as a whole,

coupled with vague promises of improved services which the business has not been guaranteed, and to a large extent, does not need.” Farmington, 599 P.2d at 1246.

Utah’s 75% tax imposed under Section 19-3-301(10) is, on its face, an unconstitutional abuse of the taxing power under either analysis. It is tantamount to legalized theft. As in Kurth, Utah’s 75% tax, taken as a whole, is “a concoction of anomalies too far-removed in crucial respects from standard tax assessment to escape characterization as a punishment” inflicted on Utah businesses under the guise of legitimate taxation. Farmington is even more compelling than Kurth because there are no material distinctions between Farmington’s tax and Utah’s present abuse of Utah taxpayers under Section 19-3-301(10), except that current abuses are far more egregious. As demonstrated below, the Utah tax is crippling, was meant to be crippling, and its relationship to the purported purpose of raising revenue for the Utah Department of Environmental Quality and Utah Indian tribes is a sham. These conclusions are unassailable from an analysis of § 19-3-301.

**B. Section 19-3-301(10)’s Numerous Oppressive Provisions Offend Constitutional Restraints Against Abusive and Confiscatory Taxation.**

As cited above, § 19-3-301(10) of Part 3 of the Radiation Control Act assesses “an annual transaction fee of 75% of the gross value of the contract to the party providing the goods, services, or municipal-type services to the storage facility or transfer facility or transportation entity.” In turn, § 19-3-303(4) defines “[g]ross value” as the “totality of the consideration received for any goods, services, or municipal type services delivered or rendered in the state without any deduction for expense paid or accrued with respect to it.”

These words are not ambiguous. Section 19-3-301(10) imposes a 75% tax on the gross income of specifically targeted Utah taxpayers, i.e., those who dare do business with Plaintiffs in Utah. This tax is outrageous in many respects:

First, no other Utah taxpayer faces such an onerous tax burden on income derived from sales of goods and services. The rate under Utah's Corporate Franchise Tax on income derived from the sale of goods and services as imposed on all taxpayers doing business in Utah, except taxpayers transacting business with PFS, is 5%. In comparison, the 75% rate imposed by § 19-3-301(10) is 1,500% higher than taxes Utah taxpayers pay on income derived from their sale of goods and services to anyone but PFS, even though sales and services generating income taxed at the 5% rate may be substantially similar, if not identical, to sales and services generating income taxed at 75%. § 59-7-104(2).

Second, § 19-3-301(10) forecloses any deductions for operating expenses, just like the abusive tax in Farmington. This is unlike federal and state income taxes that are imposed only on income left after subtracting operating expenses. Such expenses are subtracted from gross income before the tax rate is applied even for income taxed at the highest legal rate under state or federal law.<sup>28</sup> As a result, the effective rate of Utah's 75% tax on Utah taxpayers doing business with PFS is significantly higher than 75% of their income and is totally confiscatory.

To illustrate, suppose a taxpayer's margin of profit is 10% after subtracting operating expenses. If such a business generates \$1,000 of gross revenue based upon business with PFS, the tax under federal and state income tax laws would be on \$100 of taxable income, which would yield \$38 in federal taxes and \$5 in state taxes. If the same business, or even a portion of the business, is taxed at 75% of the gross value of its contracts with PFS under Utah's anti-PFS statute, the total tax burden would be \$750 in this example, or seven and a half times higher than the taxpayer's entire net profits.

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<sup>28</sup> For 2000, the highest corporate tax rate was 38% imposed on "taxable income," which is gross income less "trade or business" expenses necessarily incurred in carrying on the taxpayer's trade or business, and other adjustments.

Third, the 75% tax is assessed annually on the “gross value of the contract,” that is, 75% of the “totality of the consideration received.” §§ 19-3-301(10)(a) and 19-3-303(4). The “totality of the consideration received” means the value of the contract, irrespective of when the contract was performed (i.e., over one year or several). Nonetheless, the 75% tax is assessed “annually” on the gross value of the contract. The 75% tax thus functions as if it were an annual property tax assessed on the fair market value of the taxpayer’s property. See § 59-2-103 (imposing an annual property tax on the fair market value of tangible property in Utah). The 75% tax has a much broader application than Utah’s property tax. Unlike Utah’s property tax, which is imposed only on “tangible property,” Utah Code Ann. § 59-2-103(1), the 75% tax is imposed on goods and services, which means tangible and intangible property are taxable.

Even more egregious, the 75% rate is imposed at the astronomically high rate of 75% as compared to an average aggregate rate of 1.4%, which Utah’s jurisdictions impose on assessed value. Hence, anyone doing business with PFS subjects itself not only to confiscation of all its profits, as explained above, but will likely find itself penalized in an amount far in excess of its gross income from the PFS contract. To illustrate, a three-year contract with PFS having a total value of \$10,000 requires payment of an annual tax of 75% of the gross value of the contract or \$7,500, which tax is imposed each year for the three-year duration of the contract. Yielding a total tax of \$22,500, that is \$12,500 more in taxes than the entire value of the contract. The effective tax rate on this contract with PFS is not 75%, but many times that rate, in this illustration 225%. Obviously the longer the term of the contract, the more extreme the effective tax rate would be.

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I.R.C. § 162 (2000). Utah’s corporate tax is based upon federal unadjusted income. Utah Code Ann. § 59-7-101(27).

In summary, imposition of the 75% tax is a ruse. It will raise no money and help no one. The tax is simply a pretextual confiscation of property aimed at stopping Plaintiffs from building a nuclear waste facility pursuant to federal law on the Goshute Indian Reservation. There is simply no doubt that conclusion is accurate. Section 19-3-302(1)(a) expressly discloses that the legislative intent of the Act is not to raise revenue through legitimate taxation, but “to prevent the placement of any high-level nuclear waste or greater than class C radioactive waste in Utah.” The United States Constitution forbids Utah from indulging in such abusive taxation.

### **CONCLUSION{ TC \L "1"}**

In their single-minded zealotry to prevent the temporary storage of spent nuclear fuel on the Skull Valley Band’s reservation, Utah’s Governor and Legislature proposed and passed a series of acts resulting in the codification of Part 3 and the Additional Provisions. These provisions blatantly violate the Constitution, and the Court should accordingly declare them invalid. Plaintiffs request an order declaring that the following sections of the Utah Code are unconstitutional and unenforceable: §§ 19-3-301 through 19-3-319, §§ 17-27-102(2), 17-27-301(3), 17-27-303(4), (5)(b) and (7), 17-27-308, 17-34-1(1) and (3), 17-34-6, 34-38-3(2), 54-4-15(4), 72-3-301, 72-4-125(4), 73-4-1(2) and 78-34-6(5).

DATED this 12th day of December, 2001.

/S/

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 12th day of December, 2001, I caused to be hand delivered a true and correct copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT**, to:

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