QA: NA

AGENCY: Bureau of Indian Affairs

ACTION: Record of Decision for the Construction and Operation of an Independent Spent Fuel Storage Installation (ISFSI) on the Reservation of the Skull Valley Band of Goshute Indians (Band) in Tooele County, Utah

SUMMARY: The Bureau of Indian Affairs (BIA) is issuing the Record of Decision (ROD) for a proposed lease of tribal trust lands between Private Fuel Storage, L.L.C. (PFS) and the Band. The BIA analyzed the impacts of the proposed lease on the quality of the human environment under the National Environmental Policy Act (NEPA). The BIA issued a draft environmental impact statement (EIS) in June 2000, and the final EIS (FEIS) in December 2001.

The FEIS analyzes the effects of the construction and operation of an ISFSI for two distinct proposed sites on land held in trust by the United States for the benefit of the Band on its reservation, two different methods of transporting the spent nuclear fuel (SNF) from an existing Union Pacific rail line 39 km (24 miles) north of the proposed sites, and one alternate site in Wyoming. The Nuclear Regulatory Commission (NRC) is the lead agency; the Bureau of Land Management (BLM), the Surface Transportation Board (STB) and the BIA are cooperating agencies for the EIS. Each agency participated in the NEPA process within the scope of its respective responsibility. In this Record of Decision (ROD), the BIA is announcing its decision to disapprove the proposed lease and choose the no action alternative.

The BIA decision is based on review of the draft EIS; the FEIS; comments received from the public, other Federal agencies, and State and local governments; consideration of the required factors under the Indian Long-term Leasing Act and implementing regulation; and discussion of all the alternatives with the cooperating agencies.

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SUPPLEMENTARY INFORMATION

The Skull Valley Band of Goshute Indians

The Band is a federally recognized Tribe with 125 enrolled members. The Band's reservation consists of 18,540 acres in Tooele County, Utah, about 70 miles West of Salt Lake City. As of the date of this ROD, approximately 30 Band members live on the reservation.

Spent Nuclear Fuel

SNF consists mainly of intact fuel rods removed from a nuclear reactor. The rods contain pellets of uranium, each about the size of a pencil eraser, that are the source of heat inside a reactor vessel. While in the reactor, the uranium is used up and fission by-products accumulate and degrade the efficiency of the fuel rods until they can no longer effectively power the reactor. When removed from reactors, the uranium pellets stay in

the fuel rods, which remain highly radioactive and must be stored in specially constructed pools of water ("wet storage") or in specially designed containers cooled by natural airflow ("dry storage") until the radioactivity decreases to safer levels, a process that can take thousands of years.

The NRC has statutory authority to license both wet and dry SNF storage facilities. As of the date of this ROD, NRC has licensed 42 ISFSI facilities across the United States. Most of these are located with the nuclear reactors where the SNF is generated. The NRC has commented that the SNF is safely stored at the locations where it is currently located.[1] The proposed ISFSI at the Goshute Reservation is the first large, away from point-of-generation repository of its type to be licensed by the NRC.

The Proposed ISFSI

The ISFSI proposed for the Goshute Reservation would be operated by PFS, a private, non-governmental entity composed of eight NRC-licensed nuclear power generators.[2] Under its proposed plan, PFS would accept SNF under contract from its constituent members and other NRC-licensed nuclear power generators across the country. SNF would be shipped by rail or by rail and heavy haul truck (as discussed in the FEIS analysis below) to the proposed ISFSI from all parts of the United States. The generators would retain title to the SNF while in transit to the proposed ISFSI and while it is stored there. At the proposed ISFSI, the stainless steel shipping containers that hold the SNF would be placed in DOE-designed, NRC-licensed steel and concrete storage

[1] See FEIS Response to Comments, Section G.3.2.1; G.3.5.1.4.
[2] Those generators are: Indiana-Michigan Power Company (American Electric Power); Entergy Corporation; GPU Nuclear Corporation; Xcel Energy; Florida Power and Light Company; Southern Nuclear Operating Company; Southern California Edison Company; Genoa Fuel Tech, Inc.

casks. The casks would then be placed on concrete pads in the open air inside the secure portion of the ISFSI. The SNF would remain highly radioactive throughout its stay at the ISFSI on the Goshute Reservation and would generate large amounts of heat as the fuel pellets continue to decay. This heat would be dissipated by the natural flow of air around the storage casks.

On February 21, 2006, the NRC issued a license to PFS for the construction and operation of the proposed ISFSI.[3] Under the license, PFS may store up to 40,000 metric tons of SNF at the proposed ISFSI on the Goshute Reservation. The license term is 20 years, with an option that allows PFS to apply for renewal for an additional 20 years. The NRC has stated in response to comments to the Draft EIS that it would not grant a renewal that would extend beyond the term of the proposed lease.[4] PFS may not begin construction, however, until it has met several other NRC requirements, and until the BIA takes action on the proposed lease.

The Proposed Lease

In May 1997, the Band and PFS signed the First Amended and Restated Lease ("first lease") for the proposed ISFSI. Under the first lease, PFS would construct and operate the NRC-licensed ISFSI on a site consisting of 820 acres of trust land on the northwest corner of the reservation. The first lease would be for an initial term of 25 years, with PFS having the irrevocable option to renew for an additional term of 25 years. PFS would pay the Band rent and other costs throughout the term of the lease.

[3] NRC Materials License No. SNM-2513, Docket No. 72-22.
[4] See FEIS Response to Comments G.3.2.1.

On May 23, 1997, the Superintendent of the BIA Uintah and Ouray Agency (the BIA agency with jurisdiction over the Band) signed a "conditional approval" of the first lease that would allow PFS to begin ISFSI construction after the Secretary of the Interior certified that the following conditions were met:

1. The NRC and the BIA complete the EIS;
2. The EIS is issued;
3. The NRC issues its license; and
4. The proposed lease is modified to incorporate mitigation measures identified in the ROD, if any.

In January 2002, the Band and PFS entered into a Second Amended and Restated Lease ("second lease"). The BIA has taken no action to approve or disapprove the second lease. The FEIS analysis is based on the terms of the first lease, but the current relationship between PFS and the Band is governed by the second lease. The material terms of the two leases are essentially the same. Therefore, except for the discussion below concerning the effect of the BIA's 1991 conditional approval policy on the first lease, all of the statements in this ROD concerning the "first lease" or the "second lease" apply equally to both, and for clarity we refer to them collectively as the "proposed lease."

Before the end of the licensed life of the proposed ISFSI (a maximum of 40 years), the NRC believes SNF would be shipped to a permanent geologic repository (currently proposed for Yucca Mountain in the state of Nevada) or back to the utility

operators from which it came for storage at their NRC-licensed sites.[5] Under the NRC license and the proposed lease, upon termination of the lease, or upon termination of the license, whichever comes first, PFS would be responsible for complete radiological and non-radiological decommissioning of the ISFSI.

In letters dated May 17, 2006, and April 21, 2006, to James E. Cason, Associate Deputy Secretary of the Interior, the Band has asked that the Department of the Interior take immediate action on the proposed lease. The Band has also made numerous phone calls to Department officials demanding immediate action.

The Final EIS

Construction and operation of the proposed ISFSI would require the following actions by four different federal agencies:

- NRC issuance to PFS of a license to receive, transfer, and possess SNF. This is required under the Atomic Energy Act and the Nuclear Waste Policy Act for any facility of this type.
- BIA approval of a business lease for the proposed facility on tribal trust land. This is required under 25 USC 415 because the proposed facility would be on the reservation.
- BLM approval of a PFS right-of-way (ROW) application to construct either:
    - a new rail spur (off of the interstate rail line) from Skunk Ridge along the base of the Cedar Mountains on the western side of Skull Valley to the ISFSI, or

[5] See FEIS Response to Comments G.3.2.1.

- an Intermodal Transfer Facility (ITF) near Timpie, Utah (to transfer the incoming SNF from the interstate rail line to heavy-haul trucks for transport down Skull Valley Road to the ISFSI).[6]

These approvals would be required under the Federal Land Policy and Management Act because PFS's proposed transportation options would cross federal land controlled by the BLM.

- STB approval of the proposed new rail spur. This approval is required for construction of any new rail line under 49 U.S.C. 10901.

To assess under NEPA the impacts of the full range of possible federal approvals and alternatives on the quality of the human environment, the four agencies could have prepared four separate EISs, one for each agency. However, following the policy expressed in the Council on Environmental Quality regulations that NEPA review is intended to reduce paperwork and eliminate duplication,[7] the four agencies decided to prepare one EIS and created alternatives for analysis in the FEIS that combined the four approvals in different ways, as follows:

Alternative	Description in FEIS	Federal Approvals Analyzed as part of Alternative
Proposed Action – Alternative 1 (designated in the FEIS as the preferred alternative)	Construction and operation of the proposed ISFSI at the proposed location (Site A) on the Reservation and the new rail spur.	NRC—issue license BIA—approve lease BLM—approve rail spur STB—approve rail spur
Alternative 2:	Construction and operation of the proposed ISFSI at an	NRC—issue license for Site B

[6] The BLM approval would be only for construction and operation of the ITF; there would be no federal approval necessary for the transportation of the SNF down Skull Valley Road.
[7] 40 C.F.R. §§ 1500.2(b) and 1500.4.

	alternative location (Site B) on the Reservation, with the rail spur as described under alternative 1.	BIA—approve lease, conditioned on change to Site B BLM—approve rail spur STB—approve rail spur
Alternative 3	Construction and operation of the proposed ISFSI at Site A, and construction and operation of the new ITF with the use of heavy-haul vehicles to move SNF down the existing Skull Valley Road.	NRC—issue license BIA—approve lease BLM—approve ITF STB—no federal action
Alternative 4:	Construction and operation of the proposed ISFSI at Site B, with the same ITF as described under alternative 3.	NRC—issue license for Site B BIA—approve lease, conditioned on change to Site B BLM—approve ITF STB—no federal action
Wyoming Alternative	Construction and operation of the proposed ISFSI in Fremont County, Wyoming	NRC—analysis required under NRC NEPA procedures to determine if another site is obviously superior to the proposed site. BIA—no federal action (not analyzed as a reasonable alternative because of the government-to-government relationship with the Band) BLM—no federal action STB—no federal action
No Action Alternative:	PFS would not construct or operate the proposed ISFSI	NRC—disapprove license BIA—disapprove lease BLM—disapprove rail spur and ITF STB—disapprove rail spur

Even though the four agencies analyzed the alternatives as a whole in the FEIS, the intent of the agencies was that all of the decisions would be independently justified and that, generally, one agency's action would not prejudice or foreclose the others, consistent with the Council on Environmental Quality regulations at 40 C.F.R. § 1506.1. The agencies provided in the FEIS that each agency will have the full range of decisions available to it by specifying that the NRC would make its licensing decision first, followed, if the license is issued, by BIA's decision on the lease (this ROD), followed, if the license and the lease are approved, by the BLM and STB decisions.[8] Thus, even if one agency chose the Proposed Action or another action alternative, any of the other agencies in the process could still choose the No Action alternative. Although, as noted below, that order has changed slightly since its contemplation in the FEIS, none of the decisions by other agencies have prejudiced the BIA's alternatives, and the BIA still retains full discretion to approve or disapprove the proposed lease.

Under 40 C.F.R. § 1505.2, an agency must identify in its ROD the alternative it considers to be the environmentally preferable alternative. All of the action alternatives analyzed in the FEIS have some environmental impacts from construction and operation of the ISFSI. The BIA considers the environmentally preferable alternative to be the no action alternative. The potential environmental impacts of constructing and operating the proposed ISFSI on the Reservation would not occur under this alternative. Positive economic benefits from tax revenues, local payroll, and other expenditures would not be

[8] See, e.g., Section 9.4.3 of the FEIS. The agencies agreed upon this order because certain decisions would render other decisions moot. First, because issuance of the NRC license was a condition of the BIA lease approval, if NRC decided to not issue the license, BIA's action would be moot. Similarly, if BIA were to disapprove the lease, there would be no need for the rail spur or the ITF, so BLM's and STB's decisions would be moot. This articulated order is not binding, however.

available to the Band, but the Band would be free to pursue other uses and economic development opportunities for its land.

Status of Other Federal Actions

Since the issuance of the FEIS in December, 2001, several of the federal actions described above have occurred or become moot. As noted above, on February 21, 2006, the NRC issued a license to PFS to receive, transfer, and store SNF on the Reservation. The license is very specific, limiting not only the capacity and other operational aspects of the facility, but also the location of the facility to the site analyzed in the FEIS as "Site A" (which is also the site designated in the proposed lease). Thus, if the BIA were to select the area analyzed as Site B in the FEIS, this selection would require the Band and PFS to amend the proposed lease (as noted in the FEIS) and require PFS to apply for, and the NRC to approve, a modification to the license.

Furthermore, in Section 384 of Public Law 109-163, the National Defense Authorization Act for Fiscal Year 2006, Congress created the Cedar Mountain Wilderness Area in Tooele County, Utah, through which a portion of the proposed rail spur would be built. In the legislation, Congress specifically withdrew the Cedar Mountain Wilderness Area from "all forms of entry, appropriation, or disposal under the public land laws." STB and BLM approval of the PFS applications regarding the proposed rail spur are therefore precluded by this legislation.

Finally, concurrent with this ROD, BLM is issuing a ROD disapproving the PFS application for the ROW for the proposed ITF and rail spur. Therefore, if BIA were to approve the proposed lease, PFS would have to find some other method for transporting

SNF to the proposed facility. In the absence of a proposal from PFS for an alternative transportation system, BIA cannot predict whether that alternative system would require a federal action and NEPA review.

The Scope of the BIA Decision

Since the other federal actions are complete or moot, the sole remaining agency action is the Secretary of the Interior's approval or disapproval of the proposed lease. As noted above, the Superintendent of the Uintah and Ouray Agency conditionally approved the proposed lease in May 1997. The Secretary's decision in this ROD is not constrained by that conditional approval.

The Conditional Approval was outside the Scope of the Superintendent's Authority.

On August 28, 1991, the Assistant Secretary-Indian Affairs (AS-IA) issued a memorandum to all Area Directors with the subject line: "Conditional Lease Restriction." This memorandum specifically instructs employees that that there will be no conditional approval of leases for waste facilities in the future.[9] This policy was still in effect on the date the Superintendent conditionally approved the proposed lease.

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[9] As the August 28, 1991 AS-IA memo is largely relevant to central issues in this ROD the brief memo is stated herein in its entirety:

> It has come to my attention that conditional lease approvals have been granted for proposed waste facilities in the past. The potential environmental impacts of these projects result in intense public and tribal attention which demand that the Bureau of Indian Affairs (BIA) act objectively during the review of the leases for these types of activities.
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> The most public of these processes is the preparation of the Environmental Impact Statement under the National Environmental Policy Act (NEPA), which must be completed before any decision regarding the lease can be made. While I have no doubt that all BIA officers intend to fully comply with our obligations under NEPA, the conditional approval of a lease for such a land disruptive activity may create the appearance that some of these obligations are not taken seriously.
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> Therefore, to help ensure that BIA is not only acting in an objective manner but is perceived as acting in an objective manner, there will be no conditional approvals for waste facilities in the future.

The Secretary of the Interior has authority to approve leases under the Indian Long-Term Leasing Act.[10] The Secretary has the authority to manage Indian Affairs and to delegate that authority.[11] This authority to delegate allows subordinate officers to make determinations and issue policies in accordance with laws and implementing regulations prescribed by the Secretary. Considerable deference is accorded to the Secretary's construction of a statutory scheme that he is entrusted to administer.[12] Though the Superintendent had delegated authority to approve or disapprove leases, including waste facilities leases, the Superintendent acted beyond the scope of his authority by *conditionally* approving the 1997 lease in violation of BIA policy.

The Secretary is not bound by the Superintendent's 1997 conditional approval of the proposed lease. The 1991 policy removed delegated authority from all officers to conditionally approve waste facility leases.[13] The Superintendent acted outside the scope of his delegated authority and in violation of BIA policy when he conditionally approved the 1997 lease. The Superintendent did not have authority or delegation to act contrary to BIA policy,[14] and the Secretary is not bound by the *ultra vires* acts of his officers.[15]

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[10] 25 U.S.C. § 415. *See also*, 25 CFR § 162 et. seq. (regulations implementing Section 415).

[11] 25 U.S.C.§ 2 ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of Interior, and agreeably to such regulations and the President may prescribe, have the management of all Indian affairs and all matters arising out of Indian relations.") *See also*, 25 USC § 1(a).

[12] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[13] 25 U.S.C. § 1a states in pertinent part. "The Secretary or the Commissioner, as the case may be, may at any time revoke the whole or any part of a delegation made pursuant to this Act."

[14] See Department Manual at 200 DM 1.8 Exercise of Authority:

> An officer or employee who is delegated or redelegated authority must exercise it in conformity with any requirements that the person making the delegation would be called upon to observe.

The Conditional Approval Was an Expression of Intent and Not Final BIA Approval.

The Superintendent's action on the proposed lease was not a final action for the Department of the Interior,[16] and the Secretary may now review it *de novo*. The four conditions in the proposed lease require more than ministerial acknowledgment by the Secretary. They are essential components of the body of information the Secretary must consider in order to make an informed decision to approve or disapprove the proposed lease.[17] The content of the NRC license informs the Secretary's statutory consideration

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Delegated authority must be exercised in accordance with relevant polices, standards, programs, organization and budgetary limitations, and administrative instructions prescribed by officials of the Office of the Secretary or bureau.

[15] *See Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (holding that the government is not bound when its agent enters into an agreement that falls outside the agent's Congressionally delegated authority.); *United States v. Stewart*, 311 US 60, 70 (1940) (The Government is not bound by the unauthorized acts of its agent even if within the scope of the agent's apparent authority.); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Gray v. Johnson*, 395 F.2d 533, 537 (10thCir.), *cert. denied*, 392 U.S. 906 (1968) ("agent of the government must act within the bounds of their authority; and one who deals with them assumes the risk that they are so acting."); *Saulque v. U.S.*, 663 F.2d 968, 975 (9th Cir. 1981); *Laguna Gatuna Inc., v. United States* 50 Fed.Cl. 336, 342 (2001)("The federal government will not be held liable for acts of its agents which are ultra vires.")

[16] *See Abby Bullcreek et. al. v. Western Regional Director, Bureau of Indian Affairs*, 40 IBIA 196 discussing this proposed lease:

> . . . By now it is well-established that BIA's approval of the lease was conditional, did not constitute final approval of the proposed storage facility, and did not authorize PFS to take possession or commence construction of the facility. *See Utah v. United States*, 210 F.3d 1193, 1195, (Superintendent conditionally approved the lease);*Utah* 32 IBIA at 170 n.1, (BIA's decision to approve the lease was conditional, and not final). It is entirely conceivable that no action at all may be taken in the future to store spent nuclear fuel on the Band's reservation, because no construction or operation of the facility can commence without further BIA evaluation to ensure that the conditions set forth in the lease have been met. If one or more of the requisite conditions are not met, the Secretary will not issue the necessary certification which, in effect, gives final approval to the lease, and the facility will never be constructed. See generally *Hayes v. Anadarko Area Director*, 25 IBIA 50 (1993) (appeal dismissed as premature when no final determination had been made by BIA). Appellants have not suffered, and may never suffer, any concrete adverse effects.

[17] Indeed, the Department Manual at 516 DM 5 provides "supplementary instructions for implementing those portions of the CEQ regulations pertaining to Decision Making. See 516 DM 5.3 D-F:

of health and safety,[18] and the completion and consideration of the EIS is not only a statutory prerequisite to making a decision under NEPA,[19] but is also the basis of his analysis of environmental impacts under the leasing statute.[20]

Congress declared in NEPA that the policy of the federal government is to "use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[21] To carry out that policy, Congress instructed federal agencies that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter"[22] (In that same section, Congress also imposed the requirement for environmental impact statements.) In one of the first NEPA cases, the Court of Appeals for the District of Columbia Circuit noted that:

D. Relevant environmental documents, comments, and responses will accompany proposals through existing review processes so that Departmental officials use them in making decisions.

E. The decision maker will consider the environmental impacts of the alternatives described in any relevant environmental document and the range of these alternatives must encompass the alternatives considered by the decision maker.

F. To the extent practicable, the decision maker will consider other substantive and legal obligations beyond the immediate context of the proposed action.

[18] Section 415(a), *supra*.

[19] 42 USC 4332(2)(c)

[20] *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972).

[21] 42 U.S.C. § 4331(a).
[22] 42 U.S.C. § 4332(1).

> NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. [Each federal agency] is not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require [federal] agencies to *consider* environmental issues just as they consider other matters within their mandates.[23]

The BIA must consider environmental issues concerning the proposed lease. This consideration, to be consistent with the spirit and letter of NEPA, must extend to all of the effects of the proposed lease on the quality of the human environment, and must include the possibility of disapproval.[24]

The Statutory and Regulatory Standards for Approval of Leases

Under the Indian Long-Term Leasing Act, 25 U.S.C. § 415(a) (Section 415), the Indian owner of trust or restricted land may lease the land "with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes." Leases made pursuant to this section can, in most cases, last for a term of 25 years, subject to renewal for one additional term of 25 years (50 years total), and are subject to "such terms and regulations as may be prescribed by the Secretary of the Interior."

In 1970 Congress amended Section 415 to require the Secretary, "prior to approval of any lease or extension of an existing lease pursuant to this section," to "first

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[23] *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (emphasis in original).

[24] Id., at 1114 ("[The alternatives] requirement, like the "detailed statement" requirement, seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance.")

satisfy himself that *adequate consideration* has been given (emphasis added)" to five specific factors:

1. the relationship between the use of the leased lands and the use of neighboring lands;
2. the height, quality, and safety of any structures or other facilities to be constructed on such lands;
3. the availability of police and fire protection and other services;
4. the availability of judicial forums for all criminal and civil causes arising on the leased lands; and
5. the effect on the environment of the uses to which the leased lands will be subject.

Numerous Federal Courts have interpreted this statute. While "there are provisions in the statute pertaining to the approval process which require that certain steps be taken by the Secretary before any decision can be made," the Secretary "[is] not subject to any specific, mandatory directives derived from regulations or statutes, and all decisions regarding [a lease are] subject to the Secretary's subjective discretion."[25] The 1970 amendments to Section 415 allow the Secretary broad discretion in reviewing leases. The statute directs the Secretary to "satisfy himself that adequate consideration has been given" to these factors, but does not "give any guidance whatsoever as to what the Secretary should do in that regard." Consequently, the "statute allows wide judgment

[25] *Webster v. United States*, 823 F. Supp. 1544, 1549-50 (D. Mont. 1992).

on the part of the Secretary to determine when he is satisfied, what constitutes "adequate consideration" and who will be responsible for giving "adequate consideration."[26]

However, Congress did not grant the Secretary limitless discretion in deciding whether to approve or disapprove leases under Section 415. Aside from the statute's mandate that the Secretary consider the five enumerated factors when making a decision, courts have held that Secretarial decisions under Section 415 must conform to the fiduciary standard normally placed upon the United States when acting as trustee for the Indians. By "Congress' having placed effective control over commercial leasing of allotted lands in the Secretary of the Interior [under Section 415], which must be exercised for their benefit according to the implementing regulations, the government has assumed an enforceable fiduciary obligation to Indian [landowners] respecting commercial leasing."[27] "The Secretary's actions will be analyzed not merely under an abuse of discretion standard, but under the more stringent standards demanded of a fiduciary," which includes a duty to administer the trust exercising "such care and skill as a man of *ordinary prudence would exercise in dealing with his own property* (emphasis added)."[28]

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[26] *Id.*

[27] *Brown v. U.S.*, 86 F.3d. 1554, 1556 (Fed. Cir. 1996).

[28] *Brown v. United States*, 42 Fed. Cl. 538, 563 (1998). See also, *Utah v. Department of the Interior*, 45 F. Supp. 2d 1279, 1283 (D. Utah 1999) (In ruling on the standing of the State to intervene in the approval process of this proposed lease, the court stated "in approving or rejecting leases pursuant to § 415, the Secretary acts in a trust or fiduciary capacity. The legal attributes of such a relationship include a duty on the part of the trustee to act solely in the best interests of the trust beneficiary.").

Decision

Having concluded above that the BIA agency superintendent's 1997 action on the first lease is *ultra vires*, that the "conditional approval" of that lease does not bind the Secretary, and that the BIA to date has taken no action on the second lease, we now discuss why we have decided to disapprove the proposed lease and to choose the no action alternative.

Basis for Decision

The Secretary acknowledges the thoroughness of the NRC's inquiry into the nuclear safety aspects of the proposed ISFSI, and does not endeavor to second guess the methods or conclusions of the Commission that are by statute solely within its purview. The Secretary of the Interior's inquiry is fundamentally different from that of the Commission. As trustee-delegate, the Secretary has the complex task of weighing the long-term viability of the Skull Valley Goshute reservation as a homeland for the Band (and the implications for preservation of Tribal culture and life) against the benefits and risks from economic development activities proposed for property held in trust by the United States for the benefit of the Band. In making this inquiry, the Secretary is guided by the five factors enumerated by Congress in Section 415, by the additional guidance provided by the statute's implementing regulation at 25 CFR 162, and by the common law, which can inform our decisions as trustee-delegate.

We see nothing in the statute, regulations, or the common law that *requires* us to approve the proposed lease. We see our primary duty as trustee-delegate, under the law regarding this and other proposed leases, to be the protection of the trust *res* as a future

homeland and productive land base for the Band through the prudent exercise of informed discretion after considering all relevant factors.

We are cognizant of and have carefully considered the economic impact to the Band in making this decision. We are aware of the income the proposed lease would provide the Band, and that economic benefit has weighed heavily in our consideration of the proposed lease. Upon weighing the benefits to the Band against the significant uncertainties and other factors discussed below, we conclude that it is not consistent with the conduct expected of a prudent trustee to approve a proposed lease that promotes storing SNF on the reservation. In reaching this conclusion, we emphasize that the decision to disapprove the proposed lease and choose the no action alternative in this ROD does not foreclose other economic development activities that the Band could pursue.

The decision to disapprove the proposed lease is the result of our concern that adequate consideration has not been given to the factors the Secretary is required to consider under the statute; that the PFS proposal removes the Secretary's ability to effectively police the lessee's activities on the trust property as contemplated by the regulation; and that years-long delays in construction of a permanent SNF repository, reflected in the Waste Confidence Decisions of the NRC, provides no firm basis to determine when and under what circumstances SNF might be taken away from trust land if the proposed ISFSI is built.

Adequacy of environmental analysis.

Two events have occurred in the immediate vicinity of the Goshute reservation since the PFS EIS was completed in December, 2001. First, in 2004, the Band began accepting baled municipal solid waste from Salt Lake City and other Utah communities into a Tekoi balefill landfill operation built on Reservation land leased to the CR Group, LLC, with the approval of the BIA.[29] Then, in 2006, the U.S. Congress created the Cedar Mountain Wilderness Area near the Goshute Reservation in Tooele County.[30] Neither of these events, of course, was analyzed in December, 2001 PFS EIS.

The landfill generates about 130-160 heavy truck trips per day to the Reservation along the rural, two-lane Skull Valley Road. The proposed PFS facility would contribute additional traffic on Skull Valley Road in the form of slow-moving, 150 foot-long heavy haul trucks traveling with a frequency of about two per week. Each heavy-haul round trip to the ISFSI would take about four hours. Road wear and tear under such extraordinary volume and loads, interference with the truck traffic destined for the landfill, and other environmental impacts have not been analyzed and therefore are not available to the Secretary in making a decision on the proposed lease.

Impacts on the Cedar Mountain Wilderness Area, whether from construction and operation of the ISFSI, transportation of SNF to the Goshute site, or truck traffic to and from the landfill, have also not been analyzed. While the landfill EIS did include a cumulative impacts analysis of the projected impacts of truck traffic associated with the

[29] The BIA published a Record of Decision on balefill operation EIS (the "balefill EIS") for this activity in May, 2004.
[30] P.L. 109-163

PFS facility, both the landfill and PFS traffic were *estimated* at the time that analysis was completed. The impacts on the wilderness area from the proposed ISFSI, in combination with now quantifiable *actual* impacts from existing activities such as the landfill, have not been adequately analyzed and therefore are not available to inform the Secretary's decision regarding the proposed lease.

Further, the PFS EIS analyzes in detail the transport of SNF *to* the Goshute reservation, but fails to adequately address the impacts of transportation of SNF *away from* the PFS facility to the permanent geological repository or back to the utility operators. In fact, the first page of the PFS EIS describes the focus of the document as evaluating "...the potential environmental effects of the ISFSI proposed by PFS, including construction and operation of new transportation facilities that would provide access *to* the proposed ISFSI ... (emphasis added)"[31] The document contains many references to transport to the Goshute Reservation,[32] but very few that discuss the effects of transport away from the site before the end of the license term or upon completion of a permanent repository at Yucca Mountain.

Finally, recent federal case law creates significant uncertainty surrounding the adequacy of analysis in the PFS EIS. In *San Luis Obispo Mothers for Peace, et al. v. United States,*[33] the Ninth Circuit Court of Appeals reversed an NRC decision to grant a

[31] PFS EIS, Section 1.1, p1-1, December, 2001

[32] See, e.g., sections 1.5.3.1 (p. 1-17); 2.1.2.1 (p. 2-18); 2.2.4.2 (p. 2-40, 2-43, 2-47); 5 (p. 5-1); 5.4 (p. 5-15); 5.6.2 (p. 5-34); 5.7.2 (p. 5-39); 5.7.2.2 (p. 5-42); 5.7.2.3 (p. 5-44); 5.7.2.4 (p. 5-49); 5.7.2.5 (p. 5-51); 5.7.2.6 (p. 5-53); 5.7.2.9 (p. 5-58, 5-60, 5-61, 5-62); 5.8.3.2 (p. 5-71); 5.8.4 (p. 5-72); 6 (p. 6-1); 6.1.4.3 (p. 6-10); 6.1.5.3 (p. 6-12, 6-13, 6-14); 6.1.8.3 (p. 6-20); 9.3 (p. 9-2); 9.4.3 (p. 9-16); Appendix A Scoping Report (p. 12); Appendix A Supplemental Scoping Report (p. 13); Appendix C (p. C-1); Appendix D (p. D-20); and Appendix G (p. G-9).

[33] No.03-74628, 2006 U.S. App. Lexis 13617

license to the owner of the Diablo Canyon nuclear power plant in San Luis Obispo, California, to construct and operate an SNF dry cask storage facility technically similar to the one PFS proposes. In internal proceedings that preceded issuing the Diablo Canyon license, the NRC decided categorically that NEPA does not require consideration of the environmental effects of potential terrorist attacks. NRC based its decision on four factors it used earlier in considering and rejecting the State of Utah's contention that the environmental effects of terrorism should be analyzed in the PFS EIS.[34] The Ninth Circuit reviewed each factor for reasonableness and concluded that, individually or collectively, they do not support the NRC's decision not to consider the environmental effects of a terrorist attack in the Diablo Canyon EA.

The court's sweeping rejection of the same factors NRC relied on in rejecting the State of Utah's contention in the PFS licensing proceedings leaves us distinctly unsatisfied at best that the effects of a terrorist-initiated event have been given adequate consideration, and prudent cognizance of the uncertainty surrounding this type of analysis highlighted by the *San Luis Obispo* decision counsels disapproval of the proposed lease and selection of the no action alternative.

Relationship of leased lands to neighboring lands.

As noted above, the BLM had to decide whether to approve or disapprove two ROW applications submitted by PFS. The first of these applications would have supported construction of a rail spur across public land to the ISFSI on the Reservation;

[34] The four factors are: (1) the possibility of terrorist attack is too far removed from the natural or expected consequences of agency action; (2) because the risk of a terrorist attack cannot be determined, the analysis is likely to be meaningless; (3) NEPA does not require a "worst case" analysis; and (4) NEPA's public process is not an appropriate forum for sensitive security issues.

the second would have supported construction of an ITF on BLM land at which SNF shipping canisters would be transferred to heavy haul trucks for the trip down Skull Valley Road to the ISFSI. Citing many of the same concerns about the completeness of the PFS EIS that BIA has identified, BLM has decided to disapprove both ROW applications, concluding that intervening events not analyzed in the EIS compel it to determine that the ROWs are not in the public interest.

In reviewing the relationship of the use of leased lands to the neighboring lands, as Section 415 instructs that we must, we are influenced by the consequences of BLM's determination that the ROWs are not in the public interest. After NRC issued its license restricting construction of the ISFSI to Site A (foreclosing analyzed alternatives that involve construction of the ISFSI on Site B), and after Congress created the Cedar Mountain Wilderness Area (effectively foreclosing alternatives that involved rail spur transport into the Reservation), only alternative 3 - construction on Site A and transport by rail and truck via the ITF - among the alternatives analyzed in the PFS EIS remained viable. BLM's determination that the ITF ROW is not in the public interest has effectively eliminated the last viable analyzed alternative for transportation of SNF to the Reservation, and PFS has formally proposed no additional alternative method of transport. The BLM determination that ROWs across public lands that would support an essential component of the ISFSI – transportation corridors – are not in the public interest, we are not satisfied that construction and operation of the facility is compatible with neighboring lands.

Availability of Police Protection.

The NRC has given exhaustive consideration to *security* at the proposed ISFSI. The Secretary of the Interior, however, is responsible for *law enforcement* on the Goshute Reservation and throughout all of Indian Country. The BIA, the Band, and the Tooele County Sheriff's Department do not have resources to provide adequate law enforcement support for the proposed ISFSI. The Band does not have a P.L. 93-638 contract for law enforcement with the BIA.[35] In the absence of a contract, the BIA Office of Law Enforcement Services (OLES), through its District III in Phoenix, Arizona has primary law enforcement jurisdiction on the Goshute Reservation. Efforts to staff the Goshute Reservation have consistently proven unsuccessful, and the BIA currently has no officers assigned there. The closest BIA Law Enforcement Officers are assigned to the BIA's Uintah and Ouray Agency in Ft. Duchesne, Utah, approximately 4 ½ hours drive from the Goshute Reservation.

The Tooele County Sheriff's Department has jurisdiction within the county surrounding the Reservation. The County Sheriff has no jurisdiction over crimes committed by or against Indians in Indian country because Utah is not a "Public Law 280" state.[36] There is currently no reimbursable agreement between the BIA and the County under which the latter would provide law enforcement services to the Reservation, and the County Sheriff's Deputies are not currently cross-deputized by the BIA and therefore have no jurisdiction over the Indian residents on the Reservation. The

[35] Under P.L. 93-638, the Indian Self Determination and Education Assistance Act, 25 USC 450 *et seq.*, the Secretary can contract with Tribes that want to provide for their members the services the BIA normally provides. With the contract come the funding the Secretary would have used to provide such services.
[36] *See* 18 USC 1151

Tooele County Sheriff's Department has a maximum normal shift manning of five Deputies to cover the 7000 square-mile county; response times to incidents on the Reservation could vary greatly depending on the location of Deputies in this large area. Even if the appropriate agreements were in place, Tooele County could not provide the round-the-clock law enforcement services required due to additional traffic and other activities on the Reservation as a result of the proposed ISFSI.

As trustee-delegate for approximately 56 million acres of trust and restricted lands, the Secretary of the Interior is funded to train and equip 400 BIA law enforcement officer positions. Law enforcement resources in Indian Country are spread extremely thin; on some Reservations the BIA can field only one trained officer for many hundreds of square miles. BIA OLES managers estimate that seven full-time law enforcement officers and two support staff would be required to adequately provide law enforcement services to the Reservation if the ISFSI were built. With limited resources to meet law enforcement responsibilities throughout the rest of Indian Country, it would be imprudent to approve leases that allow an activity that the Secretary does not have the resources to support.

The Secretary has no specialized resources with which to monitor the tenant's activities.

The highly technical nature of the proposed ISFSI effectively eliminates the Secretary's ability to inspect the tenant's activities and enforce the lease. The Secretary retains the authority to enter the leased premises "... to protect the interests of the Indian landowners and ensure that the tenant is in compliance with the operating requirements of

the lease."[37] The Secretary may also, after consultation with the Band, cancel a lease for non-compliance and order the tenant to vacate.[38] The Secretary controls no independent specialized technical resources of the type required to assess compliance of so specialized a tenant as PFS. The BIA employs no nuclear scientists or technicians nor other specialty skills that would be required to adequately monitor the lease. An order to vacate issued to PFS would have no practical effect because of the extensive infrastructure and investment at the facility, and the logistics, expense, and national consequences of the displacement of SNF stored there. The ISFSI, once constructed, has qualities of permanence that render the trustee-delegate's ultimate regulatory means of protecting the Indian landowner unworkable, and it is not prudent to approve a lease that has this consequence.

The Secretary cannot ascertain when SNF might leave trust land.

Despite the efforts of the Department of Energy (DOE) toward establishing a permanent geologic repository for SNF at Yucca Mountain, Nevada, the timing of licensing and constructing that facility remains uncertain. Prudent cognizance of that uncertainty counsels disapproval of the proposed lease.

The Nuclear Waste Policy Act of 1982 (NWPA), as amended,[39] established the process for locating, constructing, operating and closing a national permanent geologic repository for high level radioactive waste and SNF. Under NWPA, the DOE is responsible for obtaining a license from the NRC, then constructing and operating the

[37] 25 CFR 162.617
[38] 25 CFR 162.619
[39] 42 U.S.C. 10101 *et seq.*

repository.[40] Following the requirements of the NWPA, the DOE Secretary recommended Yucca Mountain to the President as the site of the nation's permanent SNF disposal facility. The President then recommended Yucca Mountain to the Congress, which approved that site by joint resolution in 2002.[41] While Yucca Mountain is clearly the intended site of the permanent repository, the date Yucca Mountain will begin receiving SNF remains uncertain.

That uncertainty is enshrined in the public record in the NRC's Waste Confidence Decisions. In 1984, two years after Congress passed the NWPA, NRC issued its first Waste Confidence Decision.[42] The purpose of that decision was to "assess its degree of confidence that radioactive wastes produced by nuclear facilities will be safely disposed of, to determine when such disposal would be available, and whether such wastes can be safely stored until they are safely disposed of."[43] After a hearing and notice and comment rulemaking, the NRC issued five findings,[44] including a finding that one or more permanent disposal repositories for such waste would be available by the years 2007 – 2009. Acknowledging that its conclusions on waste confidence could change due to any number of unexpected intervening events, the NRC committed to review its Decision every five years until a permanent repository for high-level radioactive waste and SNF became available.

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[40] 42 U.S.C. 2011 *et seq.*
[41] *See* Yucca Mountain Development Act, Pub. L. No. 107-200, 116 Stat. 735 (2002)
[42] 49 FR 34658. The 1984 Waste Confidence Decision was issued as the result of a remand to the NRC from the U.S. Court of Appeals for the D.C. Circuit after an appeal from NRC's 1977 decision to deny a petition for rulemaking to determine whether radioactive wastes generated in nuclear power reactors can be disposed of without undue risk to pubic health and safety and to refrain from granting pending or future requests for reactor operating licenses until such finding of safety was made.
[43] 49 FR 38472
[44] These five findings were codified, after issuance of a final rule, at 10 CFR 51.23.

The NRC issued its next Waste Confidence Decision in 1990, affirming or changing only slightly four of the five findings from the 1984 Decision. Regarding the likelihood and timing of a permanent geological repository, however, the NRC significantly revised its earlier assessment that such a facility would be available in the years 2007 - 2009:

> The Commission finds reasonable assurance that at least one mined geologic repository will be available within *the first quarter of the 21st century*...(emphasis added)[45]

The Commission also extended the cycle of review from every five years to every ten years. The rational for this extension was that "... predictions of repository availability are best expressed in terms of *decades* rather than years (emphasis added)."[46]

The Commission's 1999 Waste Confidence Decision restated the 1990 prediction that a permanent facility might be available sometime within the first quarter of the 21st Century, but cited no compelling additional support for that contention.[47]

As of the date of this ROD, fully seven years after the 1999 Waste Confidence Decision predictions, the DOE has not submitted a license application for the permanent facility to the NRC.

[45] 55 FR 38474, Sep. 18, 1990
[46] *Id.*
[47] 64 FR 68005, Dec. 6, 1999

A prudent trustee-delegate can derive no confidence from the public record. Construction of Yucca Mountain could be indefinitely delayed by any number of factors, including protracted litigation (after all, NRC acknowledges that "decades" are the most relevant unit of time for predicting the completion date). Current legal structures that prevent additional license renewals could be amended to provide for SNF storage at the proposed ISFSI beyond the term of the current license and authorized renewal period. This uncertainty concerning when the SNF might *leave* trust land, combined with the Secretary's practical inability to remove or compel its removal once deposited on the reservation, counsel disapproval of the proposed lease.

Conclusion

For the reasons above, we disapprove the proposed lease and choose the no action alternative.

Because this decision is issued by the Associate Deputy Secretary of the Department of the Interior fulfilling the functions of the Assistant Secretary-Indian Affairs, it is the final action of the Department and effective immediately, under 25 C.F.R. § 2.20(c).

James E Cason

SEP 07 2006

James E. Cason

Associate Deputy Secretary