

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

HOLTEC INTERNATIONAL

(HI-STORE Consolidated Interim
Storage Facility)

Docket No. 72-1051

NRC STAFF ANSWER IN OPPOSITION TO FASKEN OIL AND RANCH, LTD.
AND PERMIAN BASIN LAND AND ROYALTY OWNERS' MOTION TO FILE A NEW
CONTENTION

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and Royalty Owners' Motion to File a New Contention

Introduction

The U.S. Nuclear Regulatory Commission Staff (Staff) submits this answer opposing the motion of Fasken Oil and Ranch, Ltd.¹ and Permian Basin Land and Royalty Owners (collectively, Fasken) to admit proposed new Contention 2.² For the reasons set forth below, the Commission should deny the proposed new contention because it fails to meet the requirements of 10 C.F.R. §§ 2.309(c)(1) and 2.326 and is therefore inadmissible.

Background

On March 30, 2017, Holtec submitted an application, including a Safety Analysis Report (SAR), Environmental Report (ER), and proposed license, requesting that the NRC grant a license to Holtec for the construction and operation of a CISF for spent nuclear fuel.³ The

¹ The petitioners have submitted this filing using the name "Fasken Oil and Ranch, Ltd." Fasken identified itself as "Fasken Land and Minerals, Ltd." in its previous filings before the Commission and the Atomic Safety and Licensing Board (Board) regarding Holtec's HI-STORE Consolidated Interim Storage Facility (CISF) application. It is not clear to the Staff whether "Fasken Oil and Ranch, Ltd." is a different corporate entity, for whom standing has not necessarily been demonstrated.

² *Fasken Oil and Ranch, Ltd. and Permian Basin Land and Royalty Owners Motion for Leave to File a New Contention* (Aug. 1, 2019) (ADAMS Accession No. ML19213A171) (Fasken Motion).

³ Holtec's application materials are available at: <https://www.nrc.gov/waste/spent-fuel-storage/cis/holtec-international.html>. Unless otherwise specified, all the NRC Staff's citations to the

proposed CISF would be located in Lea County, New Mexico. In its license application, Holtec requests authorization to store up to 8,680 metric tons of uranium in up to 500 canisters for a license period of 40 years.⁴

On March 19, 2018, the NRC published a notice in the *Federal Register* regarding the acceptance and docketing of Holtec's CISF license application.⁵ The NRC subsequently published a *Federal Register* notice of opportunity to request a hearing and to petition for leave to intervene.⁶ Rather than filing a petition to intervene, Fasken instead filed before the Commission a motion to dismiss the proceeding, arguing that the NRC lacked jurisdiction over the application.⁷ The Secretary of the Commission denied the motion, stating that

[t]he NRC's regulations allow interested persons to file petitions to intervene and requests for hearing in which they can raise concerns regarding a particular license application. These regulations do not, however, provide for the filing of threshold "motions to dismiss" a license application; instead, interested persons must file petitions to intervene and be granted a hearing.⁸

The Secretary then referred Fasken's motion to the Board for consideration under 10 C.F.R. § 2.309.⁹ Multiple other petitioners also filed hearing requests and petitions to

ER are to Revision 6 (ML19163A146), all citations to the SAR are to Revision 0H (ML19163A062), and all citations to the proposed license are to Revision 0A (ML17310A223) (Proposed License).

⁴ Proposed License at 1.

⁵ Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 12,034 (Mar. 19, 2018).

⁶ Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

⁷ *Motion of Fasken to Dismiss Licensing Proceedings for HI-STORE CISF and WCS CISF* (Sept. 14, 2018), at 1–8 (ML18257A330).

⁸ *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility) and *Interim Storage Partners, LLC* (WCS Consolidated Interim Storage Facility), Order of the Secretary (Oct. 29, 2018), at 2 (unpublished) (ML18302A328).

⁹ *Id.*

intervene.¹⁰ On May 7, 2019, the Board denied all petitions and terminated the proceeding.¹¹

Regarding Fasken, the Board held that Fasken had demonstrated standing but had not submitted a proposed contention that met the requirements of 10 C.F.R. § 2.309(f)(1).¹²

Fasken's appeal of the Board's decision is now pending with the Commission.¹³

On June 19, 2019, New Mexico Commissioner of Public Lands Stephanie Garcia Richard issued a letter to Holtec President and CEO Krishna Singh regarding Holtec's CISF application.¹⁴ The letter was served on the docket of this proceeding via Electronic Information Exchange on July 2, 2019, and Fasken filed its new proposed Contention 2 on August 1, 2019.

Discussion

I. Applicable Legal Standards

A. Standards for New Contentions

New contentions submitted after the initial date for hearing requests must meet the requirements of 10 C.F.R. § 2.309(c)(1). To do so, a party must demonstrate good cause by showing that the following three conditions are met:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

¹⁰ The other petitioners are: Alliance for Environmental Strategies; Beyond Nuclear, Inc.; NAC International Inc.; Sierra Club; and a group of joint petitioners led by Don't Waste Michigan.

¹¹ *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, 89 NRC ___ (May 7, 2019) (slip op. at 135–37).

¹² *Id.* at 135–36.

¹³ See *Fasken and PBLRO Notice of Appeal and Petition for Review of LBP-19-4* (June 3, 2019) (ML19154A455). See also *NRC Staff Answer in Opposition to Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners' Appeal of LBP-19-4* (June 28, 2019) (ML19179A221).

¹⁴ Letter from Stephanie Garcia Richard, Comm'r, N.M. State Land Office, to Krishna Singh, President and CEO, Holtec (June 19, 2019) (ML19183A429).

The petitioner has the burden of demonstrating that any new contention meets the standards in 10 C.F.R. § 2.309(c)(1).¹⁵

B. Reopening Standards

Pursuant to 10 C.F.R. § 2.326(a), a petitioner seeking to open a closed record must show that its motion (1) is timely; (2) addresses a significant safety or environmental issue; and (3) demonstrates that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.¹⁶ Additionally, 10 C.F.R. § 2.326(b) requires supporting affidavits from experts or otherwise competent individuals accompany the motion “that set forth the factual and/or technical bases for the movant’s claim that the criteria of [§ 2.326(a)] have been satisfied. The affidavits must address each criterion of § 2.326(a) “separately ... with a specific explanation of why it has been met.”¹⁷ Commission rules of practice also make it clear that the reopening standards, as well as the standards to file a new contention after the deadline, must be met when an entirely new issue is sought to be introduced after the proceeding has been terminated.¹⁸

C. Legal Requirements for Contention Admissibility

10 C.F.R. § 2.309(f)(1) establishes the “basic criteria that all contentions must meet in order to be admissible.”¹⁹ The Commission has strictly applied these contention admissibility

¹⁵ *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260–61 (2009).

¹⁶ 10 C.F.R. § 2.326(a).

¹⁷ 10 C.F.R. § 2.326(b).

¹⁸ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009) (citing 10 C.F.R. § 2.326(d)).

¹⁹ 10 C.F.R. § 2.309(f)(1)(i)–(iv); *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572 (2006). *See also USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 436–37 (2006) (stating that the Commission “will reject any contention that does not satisfy the requirements”).

requirements in NRC adjudications.²⁰ Failure to comply with any one of these criteria is grounds for the dismissal of a contention.²¹ The requirements are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”²² The hearing process is reserved “for genuine, material controversies between knowledgeable litigants.”²³

II. Fasken Fails to Meet the Standards of 10 C.F.R. § 2.309(c)

A. Fasken’s filing is based on statements in the Public Lands Commissioner’s letter that do not provide new information

Fasken fails to satisfy 10 C.F.R. § 2.309(c)(1)(i) because the information on which the new contention is based was previously available in the ER and in the applicant’s responses to Staff requests for additional information (RAIs). Fasken asserts, referencing the Commissioner’s letter, that Holtec’s ER or its other submissions to the NRC fail to disclose the State Land Office’s authority over the proposed CISF site’s mineral rights.²⁴ However, information that Holtec provided in an RAI response and that was made public on April 9, 2019, states “[t]he mineral rights for Section 13 [the CISF site] and certain adjacent areas are held in trust by the New Mexico Commissioner of State Lands.”²⁵ The ER in Section 3.1.2 “Surrounding Land Use” also states that “the subsurface mineral rights are owned by the state

²⁰ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002)).

²¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). *See also Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

²² Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

²³ *Id.* (quoting *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 219 (2003)).

²⁴ Fasken Motion at 4 (citing Ex. 5 at 2).

²⁵ Holtec License Application Responses to Requests for Supplemental Information (Apr. 9, 2019) (ML19081A083) Attachment 9, Potash Mining Lease Partial Relinquishment Agreement (Oct. 5, 2016), at 1 (ML19081A080). Fasken does not acknowledge or dispute this pertinent RAI.

of New Mexico.”²⁶ These statements show that Fasken’s new contention is based on information that was available months or years ago in Holtec’s application materials and its public submissions to the NRC.

B. Fasken fails to demonstrate that its claim about impacts of abandoned wells on site stability due to oil and gas drilling is based on new or materially different information as required by 10 C.F.R. § 2.309(c)(1)(i)–(ii)

In its new proposed Contention 2, Fasken asserts that Holtec fails to evaluate the effect of abandoned and orphaned wells on site stability.²⁷ Fasken states that “[o]il and gas extraction activities can majorly influence the integrity of improperly abandoned and orphaned wells.”²⁸ Fasken supports these claims with a declaration from petroleum geologist Stonnie Pollock, who describes the number of active, abandoned, or orphaned wells on or near the site and potential integrity issues.²⁹ Fasken also relies on commercially-available Petra GIS software to provide information about oil and gas activity in the area.³⁰ However, Fasken does not show how these assertions are based on new information in the Commissioner’s letter. Rather, these data were available when Fasken filed its original petition. A petitioner’s reliance on an assertedly “new” document does not show good cause for a new contention if the information it contains was previously available. New contentions must be based on new facts not previously available.³¹ Without having demonstrated that these data about oil and gas activity were unavailable prior to the Commissioner’s letter, Fasken fails to meet 10 C.F.R. § 2.309(c)(1)(i).

²⁶ ER at 3-2. (This statement has appeared in all versions of the ER. For past versions, see <https://www.nrc.gov/waste/spent-fuel-storage/cis/hi/hi-app-docs.html>.)

²⁷ Fasken Motion at 8–10.

²⁸ *Id.* at 8.

²⁹ *Id.* at 8–9 (citing Ex. 1, Declaration of Stonnie Pollock (July 31, 2019), at 2–3).

³⁰ Fasken Motion, Ex. 1 at 1.

³¹ 10 C.F.R. § 2.309(c)(1)(i).

Nor does Fasken show that its claims about potential site instability associated with oil and gas extraction are based on materially different information as required by 10 C.F.R. § 2.309(c)(1)(ii). Holtec's application includes several references to oil and gas activity near the site³² and discusses the presence of abandoned wells near the site.³³ Even more notably, the Board denied a contention proffered by Don't Waste Michigan and other petitioners that raised similar concerns about the potential for oil and gas extraction near Holtec's proposed site.³⁴ Accordingly, Fasken fails to show how these assertions about abandoned wells and site stability in its proposed Contention 2 are based on information about oil and gas activity (in the Commissioner's letter or otherwise) that is materially different from what was previously available.

For these reasons, Fasken has not met the requirements of 10 C.F.R. § 2.309(c)(1)(i) and (ii), which is sufficient grounds to deny Fasken's motion for failure to show good cause.

C. Fasken does not demonstrate that its new proposed contention was timely filed based on the availability of the information, as required by 10 C.F.R. § 2.309(c)(1)(iii)

To demonstrate good cause, "a petitioner must show that the information on which the new contention is based was not *reasonably available to the public* [earlier], not merely that the *petitioner* recently found out about it."³⁵ The determination of whether a motion to admit a new contention is submitted in a timely fashion thus depends on whether it was timely filed after the event giving rise to the contention (and when the information about that event was reasonably

³² See, e.g., SAR at 2-12, 2-39; ER at 3-120.

³³ ER at 2-3; SAR at 2-3.

³⁴ *Holtec*, LBP-19-4, 89 NRC at __ (slip op. at 105–108).

³⁵ *Millstone*, CLI-09-5, 69 NRC at 126.

available to the *public*). As Fasken admits, thirty days from the triggering event is the “‘specific presumptive time period’ for timeliness of contentions filed after the initial deadline.”³⁶

Fasken’s new proposed Contention 2 is based on the June 19, 2019, letter from New Mexico Public Lands Commissioner Stephanie Garcia Richard to Holtec President and CEO Krishna P. Singh that discusses alleged misrepresentations in Holtec’s application regarding the control of mineral rights on the proposed CISF site.³⁷ Fasken asserts that its motion is timely because it was filed thirty days from July 2, 2019, the date the letter was served on participants in *Holtec* and published in ADAMS.³⁸ However, on the same day the letter was issued (June 19), it was widely publicized in national and statewide news outlets and on social media.³⁹ The letter’s contents were immediately publicly shared through a series of tweets by Commissioner Garcia Richard from the State Land Office’s official Twitter account.⁴⁰ That same day, Beyond Nuclear, another petitioner in the Holtec proceeding, also issued a press release about the letter.⁴¹ In short, the letter’s broad distribution and exposure beginning on June 19, 2019,

³⁶ Fasken Motion at 3 n.6 (quoting *Shaw AREVA MOX Servs. (Mixed Oxide Fuel Fabrication Facility) LBP-08-11*, 67 NRC 460, 493 (2008)).

³⁷ Fasken Motion, Ex. 5, New Mexico Public Lands Commissioner Letter (June 19, 2019), at 2–4.

³⁸ Fasken Motion at 2–3.

³⁹ See, e.g., Rebecca Moss, *Citing Safety Concerns, Garcia Richard Challenges Holtec Nuke Waste Site*, SANTA FE NEW MEXICAN, June 19, 2019, https://www.santafenewmexican.com/news/local_news/citing-safety-concerns-garcia-richard-challenges-holtec-nuke-waste-site/article_df3f1798-ef23-5b0d-a502-d510a0553ef8.html (last visited Aug. 15, 2019); Susan Montoya Bryan, *New Mexico Land Boss Concerned With Nuclear Waste Proposal*, ASSOCIATED PRESS, June 19, 2019, <https://www.apnews.com/f624bacbc34077bddc52b07ea55e68> (last visited Aug. 15, 2019); Adrian C. Hedden, *New Mexico State Land Office: Holtec Misled Federal Government on Nuclear Waste Site Near Carlsbad*, ALBUQUERQUE JOURNAL, June 20, 2019, <https://www.abqjournal.com/1330808/new-mexico-state-land-office-holtec-mislead-federal-government-on-nuclear-waste-site-near-carlsbad.html> (last visited Aug. 15, 2019).

⁴⁰ Commissioner Garcia Richard (@NMLandOffice), TWITTER, (June 19, 2019, 5:16 PM), <https://twitter.com/NMLandOffice/status/1141499923709345792>.

⁴¹ Press Release, New Mexico Commissioner of Public Lands Stephanie Garcia Richard: Holtec Int’l Misrepresentations Raise Serious Safety Concerns for Proposed Nuclear Storage Facility, Beyond Nuclear (June 19, 2019), <http://www.beyondnuclear.org/centralized-storage/2019/6/20/new-mexico-commissioner-of-public-lands-stephanie-garcia-ric.html> (last visited Aug. 15, 2019). In this

indicates that it was reasonably available to the public forty-three days before Fasken submitted its proposed Contention 2. Accordingly, Fasken has not demonstrated that its motion was timely as required by 10 C.F.R. § 2.309(c)(1)(iii).

III. Fasken Fails to Meet the Reopening Standards

The motion must also be denied because Fasken fails to mention, let alone demonstrate that it satisfies, the applicable standards to reopen a closed record under 10 C.F.R. § 2.326. Under the Commission's longstanding practice, proceedings terminate, and the record is thereby closed, once all contentions have been decided.⁴² In *Holtec*, the Board decided that Fasken, as well as the other petitioners, failed to submit an admissible contention and denied their intervention petitions.⁴³ Accordingly, that ruling served to close the record of the proceeding, notwithstanding the subsequent appeals by the petitioners. In a licensing proceeding at the same procedural juncture as this one, in which a petitioner proffered new contentions pending its appeal of the Board's decision to deny its intervention petition, the Commission determined that "[t]he appropriate mechanism ... for [petitioner] to have sought to raise a new issue where, as here, the record of the proceeding had closed upon the Board's disposition of [petitioner's] original contentions was to address the reopening standards contemporaneously with a late-filed intervention petition."⁴⁴ The Commission held that the contentions were not litigable because the petitioner failed to address or meet the reopening standards.⁴⁵

proceeding, Fasken aligned itself with Beyond Nuclear, basing its lone original contention on Beyond Nuclear's contention. See *Holtec*, LBP-19-4, 89 NRC at ___ (slip op. at 125).

⁴² See, e.g., *Virginia Elec. & Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 699–700 (2012); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 140–41 (2012); *Millstone*, CLI-09-5, 69 NRC at 124.

⁴³ *Holtec*, LBP-19-4, 89 NRC ___ at (slip op. at 135).

⁴⁴ *Millstone*, CLI-09-5, 69 NRC at 124, *aff'd*, LBP-08-9, 67 NRC 421 (2008).

⁴⁵ *Id.* at 124–25.

Consistent with that precedent, upon rejecting all the petitioners' contentions, the *Holtec* Board declared that "[t]his proceeding is terminated."⁴⁶ Under well-established Commission rules of practice, when subsequently moving to admit a new contention, Fasken was obligated to show that it meets the reopening standards.⁴⁷ The Commission has strictly enforced this rule, emphasizing that it "consider[s] reopening the record for any reason to be 'an 'extraordinary' action."⁴⁸ However, Fasken neither acknowledges nor addresses those standards in its motion. It also fails to include affidavits, as required by 10 C.F.R. § 2.326(b), that address each of the 10 C.F.R. § 2.326(a) criteria separately "with a specific explanation of why it has been met."⁴⁹ The sole declaration that Fasken provides to support its new contention does not mention 10 C.F.R. § 2.326(a) nor separately specify how Fasken satisfies each of its three criteria.⁵⁰

In sum, because Fasken does not address the 10 C.F.R. § 2.326 reopening standards, Fasken's proposed new Contention 2 must be denied on this basis alone.

IV. The Proposed Contention Would Meet the Standards of 10 C.F.R. § 2.309(f)(1) In Part

For the reasons discussed above, Fasken's motion must be denied. For completeness, the Staff has nevertheless also considered whether the proposed contention would otherwise meet the threshold contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) and concludes that the contention would be admissible in part.

⁴⁶ *Holtec*, LBP-19-4, 89 NRC ___ at (slip op. at 137).

⁴⁷ "The burden of satisfying the reopening requirements is a heavy one, and proponents of a reopening motion bear the burden of meeting all of [these] requirements." *Oyster Creek*, CLI-09-7, 61 NRC at 287 (2009) (quoting *Public Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 221 (1990); *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986)).

⁴⁸ *Tennessee Valley Auth.* (Watts Bar Unit 2), CLI-15-19, 82 NRC 151, 156 (2015) (quoting *Entergy Nuclear Vt. Yankee LLC* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 337–38 (2011)).

Contention No. 2:

Statements in Holtec’s Safety Analysis Report (SAR) and Facility Environmental Report (FER) regarding “control” over mineral rights below the site are materially misleading and inaccurate. Reliance on these statements nullifies Holtec’s ability to satisfy the NRC’s siting evaluation factors.

Fasken references six sentences in the SAR and ER which state that future mineral extraction will not occur at the site and that future oil drilling will not occur or will only occur below a certain depth.⁵¹ Fasken argues that these statements asserting “control” over mineral rights are materially misleading and inaccurate.⁵² Fasken asserts that these statements “may not be used to support and satisfy the requirements of [P]art 72”⁵³ and that, as a result, the application fails to satisfy the requirements of 10 C.F.R. §§ 72.11(a),⁵⁴ 72.90(b),⁵⁵ and 72.103(a)(1).⁵⁶ Fasken also asserts that the application is incomplete because Table 1.4.1 of the ER does not include the New Mexico State Land Office.⁵⁷ The contention is supported by a

⁵¹ Fasken Motion at 4–5 (quoting SAR at 2-10 “As previously stated in Section 2.6.4 of the SAR, with regard to potential future drilling on the Site, Holtec has an agreement with Intrepid Mining LLC (Intrepid) such that Holtec controls the mineral rights on the Site and Intrepid will not conduct any potash mining on the Site.”; ER at 2-19 “By agreement with the applicable third parties, the oil drilling and phosphate extraction activities have been proscribed at and around the site and would not affect the activities at the site.”; SAR at 2-112 “With regard to potential future drilling on the Site, Holtec has an agreement with Intrepid Mining LLC (Intrepid) such that Holtec controls the mineral rights on the Site and Intrepid will not conduct any potash mining on the Site.” (internal citation omitted); *id.* “Additionally, any future oil drilling or fracking beneath the Site would occur at greater than 5,000 feet depth, which ensures there would be no subsidence concerns.” (internal citation omitted); ER at 8-1 “Economic mineral resources located beneath the CIS Facility would be unavailable for exploitation during the life of the project.”; *id.* at 3-2 “With regard to potential future drilling on the Site, Holtec has an agreement with Intrepid Mining LLC (Intrepid) such that Holtec controls the mineral rights on the Site and Intrepid will not conduct any potash mining on the Site.”).

⁵² Fasken Motion at 3.

⁵³ *Id.* at 5.

⁵⁴ *Id.* at 4–6.

⁵⁵ *Id.* at 6–8.

⁵⁶ *Id.* at 8–10.

⁵⁷ *Id.* at 5.

declaration and resume of Stonnie Pollock⁵⁸; a site radius map⁵⁹; wellbore count tables⁶⁰; and the June 19, 2019 letter from the State of New Mexico Commissioner of Public Lands.⁶¹

The Staff agrees that Contention 2 would be admissible in part. To the extent that Fasken challenges the application's description of Holtec's control of mineral rights, including oil and gas extraction, underneath the site, it has proffered an admissible contention.⁶²

Specifically, by identifying what it asserts are material inconsistencies and potential inaccurate statements in the application that directly bear on the analyses required under 10 C.F.R. §§ 72.90 and 72.103, Fasken has provided the necessary threshold support for its dispute with Holtec's purported ability to control and limit future oil drilling and mining beneath the site.

However, to the extent Contention 2 raises other challenges, in particular to the application's consideration of existing well bores, the contention would be inadmissible. Fasken asserts that "[c]ontrary to part [sic] 72.103 requirements, Holtec has failed to identify the regional presence of 425 well bores within a five-mile radius of the site."⁶³ Yet Fasken fails to explain how this raises a genuine dispute with the applicant on a material issue of law or fact. Fasken states that oil and gas extraction activities "can majorly influence the integrity of improperly abandoned and orphaned wells. . . . 'caus[ing] surface disruptions.'"⁶⁴ However, the SAR discussed the potential for subsidence and Fasken does not identify, let alone controvert those findings. Section 2.6.4, "Stability of Subsurface Materials" states "[t]here are no

⁵⁸ Fasken Motion, Exs. 1 and 4, Resume of Stonnie L. Pollock.

⁵⁹ Fasken Motion, Ex. 2, Site Radius Map for Holtec International HI-STORE CISF.

⁶⁰ Fasken Motion, Ex. 3, Wellbore Count Tables.

⁶¹ Fasken Motion, Ex. 5.

⁶² Staff understands this claim within the contention as encompassing, among other things, whether Intrepid's mining rights at the site have in fact been secured by Holtec.

⁶³ Fasken Motion at 8.

⁶⁴ *Id.* at 8–9 (quoting Ex. 1, at 3).

indications of lowering of the surface by dissolution There are no surface, drillhole, or mining indications that subsidence and collapse chimneys occur at the Site or surrounding area.”⁶⁵ In short, the application discusses oil, gas, and mineral extraction activities in the area surrounding the site, and Fasken does not explain in what way the applicant’s analysis and conclusion does not already account for the well bores described as the basis for this portion of the contention.⁶⁶ “Any contention that fails directly to controvert the application . . . or mistakenly asserts the application does not address a relevant issue, will be dismissed.”⁶⁷ Moreover as discussed above, this portion of the contention is not based on any new information. The existence of and potential impacts from existing well bores on site stability could have been raised previously and Fasken has not explained how those concerns derive from any new information in the New Mexico Commissioner of Public Lands’ letter.

Finally, insofar as Contention 2 seeks to challenge Holtec’s character,⁶⁸ this portion of the contention is also inadmissible. Contrary to 10 C.F.R. § 2.309(f)(1)(vi), Fasken has put forward insufficient information to show that a genuine dispute exists with the applicant. Fasken asserts that “Holtec intended to be covert, and potentially deliberate in its misidentification of mineral ownership.”⁶⁹ As support, Fasken asserts that Holtec did not give notice to the State Land Office when it provided notice to over 60 elected and appointed government officials of its

⁶⁵ SAR at 2-111. See also ER at 4-5 (“Risks from landslides, liquefaction, subsidence, and volcanism are considered to be low.”).

⁶⁶ See, e.g., SAR at 2-7 to 2-12, ER at 3-2 to 3-3.

⁶⁷ *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-15-1, 81 NRC 15,37 (2015) (citing *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 557 (2009); *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 462–63 (2006)).

⁶⁸ Fasken asserts that Contention 2 is material insofar as 10 C.F.R. § 72.12 applies. Fasken Motion at 10–11. In a footnote, Fasken also asserts that “Holtec should be subject to an enforcement action pursuant to 10 C.F.R. § 72.12 in accordance with the procedures found in 10 C.F.R. part 2 subpart B.” *Id.* at 11 n.44; see also *id.* at 12. Such a request for enforcement action is not within the scope of this licensing proceeding; Fasken may choose to file a petition under 10 C.F.R. § 2.206.

⁶⁹ *Id.* at 10.

filing of its initial license application, and it describes Holtec's omission of the State Land Office from Table 1.4.1 of the ER.⁷⁰ However, these claims fall far short of the support needed for an admissible contention regarding the applicant's character. Fasken offers only generalized speculation concerning the applicant's "covert" intent regarding notice to the State Land Office and whether the State Land Office is mentioned in Table 1.4.1 of the ER; such assertions do not rise to the level of specificity the Commission and Boards have found to be a sufficient basis for such a contention.⁷¹ As such, this portion of the contention is inadmissible.

In conclusion, to the extent Contention 2 challenges the application's description of Holtec's control of mineral rights underneath the site, the contention is admissible. To the extent the contention challenges the application's consideration of existing well bores or Holtec's character, the contention is inadmissible.

Conclusion

For the reasons set forth above, the Commission should deny admission of Fasken's new proposed Contention 2.

⁷⁰ *Id.* at 10–11.

⁷¹ See, e.g., *Ga. Inst. of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 121 (1995) (affirming the admission of a character contention in which a deliberate violation of a safety regulation was alleged and supported by an NRC inspection and investigation reports, the SAR, newspaper articles, and an expert witness); *Hous. Lighting & Power Co.* (South Texas Project, Units 1 and 2), CLI-80-32, 12 NRC 281, 291 (1980) (directing the licensing board to consider character issues in an adjudicatory hearing where there were 12 separate NRC investigations over a two and a half year period, five immediate action letters, and substantiated allegations of harassment, intimidation and threats to quality assurance personnel and apparent false statements in a final SAR); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2) LBP-10-15, 72 NRC 257, 337 (2010), *aff'd in part and rev'd in part*, CLI-11-11, 74 NRC 427 (2011) ("The line of cases under [the Atomic Energy Act, as amended] § 182 (often dealing with license transfers or initial applications) establish a relatively high threshold for the admission of contentions alleging that the applicant, or its management, lack integrity or are guilty of improprieties such that the license being sought should not be granted.").

Respectfully submitted,

/Signed (electronically) by/

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Dated in Rockville, MD
this 26th day of August 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

HOLTEC INTERNATIONAL

(HI-STORE Consolidated Interim
Storage Facility)

Docket No. 72-1051

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing “NRC Staff Answer in Opposition to Fasken Oil and Ranch, Ltd. and Permian Basin Land and Royalty Owners' Motion to File a New Contention,” dated August 26, 2019, have been served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding, this 26th day of August 2019.

/Signed (electronically) by/

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