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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO
EASTERN DIVISION**

BUTTE COUNTY, a unit of local
government in the State of Idaho

Plaintiff,

v.

JENNIFER MULHERN GRANHOLM, in
her official capacity as SECRETARY, U.S.
DEPARTMENT OF ENERGY; and the U.S.
DEPARTMENT OF ENERGY

Defendants.

Civil Action No. 4:23-cv-93

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. The Plaintiff challenges the Department of Energy's actions and omissions regarding the federal interim storage capacity being utilized, now and in the future, for spent nuclear fuel at the Idaho National Laboratory within the jurisdictional boundaries of Butte County, Idaho.

2. Congress has expressly recognized that storage and disposal of spent nuclear fuel, which is highly radioactive waste, poses a risk to human health and the environment. Because of these

risks, storage and disposal of spent nuclear fuel, as well as storage and disposal related activities, have a negative social and economic impact on communities where these activities occur.

3. The Department of Energy provides interim storage capacity for approximately 325 metric tons of spent nuclear fuel at the Idaho National Laboratory, which is a Department of Energy installation.

4. The Nuclear Waste Policy Act of 1982 places continuing obligations on the Department of Energy regarding storage and disposal activities. Specifically, the continuing obligation to administer Part B of Subtitle I of the Nuclear Waste Policy Act of 1982, which is the only general statutory framework authorizing and regulating federal interim storage of spent nuclear fuel.

5. The Nuclear Waste Policy Act of 1982 also establishes a right for states or units of local government, or both, to receive impact assistance for the social and economic impacts occasioned by the establishment and subsequent operation of *any* interim storage capacity within the jurisdictional boundaries of such state or local government.

6. The Department of Energy has yet to recognize this statutory right or take any steps to implement the impact assistance provision despite the Department of Energy's plan to continue providing federal interim storage capacity, including continuing to increase the capacity and the quantity of spent nuclear fuel on an annual basis at the Idaho National Laboratory.

7. Plaintiff now seeks judicial review to challenge the Department of Energy's failure to perform statutorily mandated annual duties under the Nuclear Waste Policy Act of 1982 as well as to end unlawfully providing interim storage capacity of spent nuclear fuel, which the Department of Energy intends to provide indefinitely in the future.

8. The federal interim storage of spent nuclear fuel has ongoing social and economic impacts to Butte County as well as social and economic impacts that have yet to occur.

II. JURISDICTION AND VENUE

9. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 (federal question) because this action rises under the laws of the United States and their implementing regulations, including Subchapter I, Part B of Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10151–10157 (NWPA); the Department of Energy Organization Act, 42 U.S.C. §§ 7201 et seq. (DEA); the Atomic Energy Act, 42 U.S.C. § 2201 et seq. (AEA); the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. (APA); the Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq., and Article I of the United States Constitution.

10. An actual, justiciable controversy now exists between Plaintiff and Defendants. The challenged actions are final and subject to judicial review pursuant to 42 U.S.C. §§ 7191–7192, and 5 U.S.C. §§ 702, 704 and 706. The requested relief is proper under 28 U.S.C. §§ 2201–2202 and 5 U.S.C. §§ 701–706.

11. Venue is proper under 28 U.S.C. § 1391(e) because Plaintiff Butte County, Idaho is a unit of local government in this district. Defendant, the Department of Energy (DOE), is an executive agency of the United States and administers the Idaho National Laboratory (INL) and interim storage capacity at INL. The events or omissions giving rise to the claims herein occurred and continue to occur with this district.

12. The federal government has waived sovereign immunity under 5 U.S.C. § 701 and 42 U.S.C §§ 7191–7192.

III. PARTIES

13. Plaintiff Butte County is a unit of local government, as defined by the NWPA, 42 U.S.C. § 10156(e)(6) and 42 U.S.C. § 7191(d)(A) and is exclusively involved in providing and administering public services under the Constitution and laws of the State of Idaho.

14. Under Article XVIII of the Idaho Constitution and Idaho Code Title 31, Plaintiff Butte County administers, among many other required responsibilities and services, community planning for transportation, infrastructure, law enforcement and public safety, emergency management, 911 service, emergency medical services, fire protection services, search and rescue, support for the Idaho Judiciary, zoning, building construction regulation, elections, indigent care, and support to other local government entities such as hospitals, schools and health district. Butte County also levies and collects property taxes on real and personal property.

15. Plaintiff Butte County, located in the State of Idaho, was established in 1917 and was named after the Big Southern Butte, which rises dramatically above the Snake River Plain and forms the southwestern flank of the INL.

16. Butte County has a rich human history revolving around its natural beauty, agriculture, mining, and science. Butte County enjoys vast areas where unique naturally occurring conditions can still be found, such as the other-worldly landscape and ecosystem of Craters of the Moon National Monument, which is contrasted by stunning pristine alpine areas rising over twelve thousand feet above sea level.

17. Butte County also has a dynamic scientific community. Butte County's seat, the City of Arco, was the first civilian community to be powered by nuclear power when the Borax III reactor came online in 1956.

18. Butte County's culture and economic livelihood is now inextricably linked to the INL. Butte County has always been and continues to be a staunch supporter of INL and its mission, except for the challenges herein presented.

19. Butte County, as required by Idaho law, levies and collects taxes on real property within its jurisdictional boundaries. These tax revenues are vital to funding public services required by Idaho law.

20. INL is operated by a private contractor and the contract is administered and supervised by DOE. All land, buildings, and most materials and equipment at INL are owned by DOE, but utilized by the contractor, and are exempt from local taxation.

21. Defendant Jennifer Granholm is the Secretary of Energy. She is sued in her official capacity and for the acts or omissions of her predecessors.

22. Defendant DOE is a federal agency headquartered in Washington D.C. DOE administers the programs of Nuclear Waste Policy Act, specifically all federal interim storage capacity at INL, which is the subject of this action.

23. DOE and Butte County share overlapping and concurrent jurisdiction over the portion of INL within Butte County's jurisdictional boundaries for each governmental entities' respective responsibilities.

24. For brevity and clarity, Plaintiff will use "INL" as that portion of the Idaho National Laboratory within the jurisdictional boundaries of Butte County and shall include all former names of INL.

IV. DEPARTMENT OF ENERGY'S RELEVANT GOVERNING LEGISLATION & STATUTORY FRAMEWORK

The Atomic Energy Act of 1954

25. The Atomic Energy Act was originally enacted in 1949 but did not at that time contain the provisions regulating civilian nuclear energy. The original Atomic Energy Act simply established the Atomic Energy Commission and provided for administration of the government's nuclear energy activities, communities, and facilities generated from the Manhattan Project.

Many of these provisions were included in the dramatically revised Atomic Energy Act of 1954, which established the regulatory framework for nuclear energy for civilian and commercial uses.

26. The Atomic Energy Act of 1954 (AEA) was enacted to authorize, promote, and regulate the civilian use of various aspects of nuclear energy. However, the AEA did not address nor even contemplate the disposal of spent nuclear fuel from civilian power reactors. Until the late 1970s, spent nuclear fuel was reprocessed to separate and recover usable fissile material, such as enriched uranium. The reprocessing industry had its own environmental problems leaving an unfortunate legacy. The Carter Administration effectively ended the reprocessing industry in the U.S. which increased the demand for storage and disposal of spent nuclear fuel.

27. The AEA authorizes the Atomic Energy Commission and its successor DOE to acquire "special nuclear materials" pursuant to § 2076. The difference between special nuclear material and spent (or used) nuclear fuel is, among other things, the level of radioactivity. Special nuclear material is only mildly radioactive while spent nuclear fuel is highly radioactive and far more dangerous. These statutory terms also have different regulatory objectives. The term special nuclear material in the AEA refers to material containing plutonium, uranium 233, and enriched uranium containing the isotopes 233 or 235—these materials not having yet been irradiated as

fuel in a reactor becoming highly radioactive. Special nuclear materials are also the materials used to create nuclear explosives (weapons).

28. The section of the AEA, 42 U.S.C. § 2076, authorizing the Atomic Energy Commission to acquire special nuclear material and regulate its possession, was not intended to be related to disposal of high-level radioactive waste such as spent nuclear fuel. Stated differently, 42 U.S.C. § 2076 did not and does not authorize DOE to provide federal storage or disposal of spent nuclear fuel.

29. The term spent nuclear fuel in § 2014(dd) of the AEA is defined by referring directly to the section of the NWPA providing a definition for such term. 42 U.S.C. § 10101 (as an amendment to the AEA).

30. The AEA contains no express or implied provisions authorizing or directly regulating federal interim storage capacity. However, the AEA, among other things, does authorize the Nuclear Regulatory Commission (NRC) to process applications and issue licenses for storage of spent nuclear fuel.

31. This NRC authority is limited to regulating the appropriate environmental standards and safety concerns for the storage and disposal of spent nuclear fuel.

32. NRC has promulgated rules for administering this regulatory authority, which include the definitions of spent nuclear fuel and special nuclear materials. These definitions are based upon the statutory definitions, but also provide additional context. For example, the NRC definition states that special nuclear material is included in spent nuclear fuel, but that spent nuclear fuel is never treated as special nuclear material, providing the vital difference that spent nuclear fuel is highly radioactive and requires extraordinary handling and containment methods.

33. Congress' commitment to addressing federal impacts to local communities is also found in several provisions of the AEA. One such provision, § 2208, provides authority to the Atomic Energy Commission to offset impacts to local communities. This provision calls for the Atomic Energy Commission to make payments to local communities "where special burdens have been cast upon the State or local government by activities of the Commission." 42 U.S.C. § 2208. While DOE has never utilized this authority, this provision dates back over seventy years demonstrating the enduring understanding of Congress that federal activities have unintended impacts and disruptions to local communities. Unfortunately, the lack of development of this discretionary authority by DOE also demonstrates the unwillingness of DOE to acknowledge impacts to local communities.

10 CFR Part 72 – NRC Rules Governing Independent Spent Fuel Storage Installations

34. 10 CFR § 72.1, sets forth the purpose of Part 72 as follows: "The regulations in this part establish requirements, procedures, and criteria for the issuance of licenses to receive, transfer, and possess power reactor spent fuel, power reactor-related Greater than Class C (GTCC) waste, and other radioactive materials associated with spent fuel storage in an independent spent fuel storage installation (ISFSI) and the terms and conditions under which the Commission will issue these licenses. The regulations in this part also establish requirements, procedures, and criteria for the issuance of licenses to the Department of Energy (DOE) to receive, transfer, package, and possess power reactor spent fuel, high-level radioactive waste, power reactor related GTCC waste, and other radioactive materials associated with the storage of these materials in a monitored retrievable storage installation (MRS). The term Monitored Retrievable Storage Installation or MRS, as defined in § 72.3, is derived from the Nuclear Waste Policy Act (NWPA) and includes any installation that meets this definition. The regulations in this part also establish

requirements, procedures, and criteria for the issuance of Certificates of Compliance approving spent fuel storage cask designs.”

35. Nothing in Part 72 provides a process or authority for NRC, which is a semi-autonomous division of DOE, to review the statutory basis for which DOE asserts authority to acquire commercial spent nuclear fuel and provide interim storage or disposal. The authority to approve or deny licenses merely extends to the required safety and environmental standards for such facility.

36. 10 CFR § 72.54 requires licensees of an ISFSI to prepare decommissioning plan for the ISFSI to be approved by NRC.

The Department of Energy Organization Act of 1977, *Codified at 42 U.S.C. §§ 7101–7386.*

37. The Department of Energy was created and established by the Department of Energy Organization Act of 1977 (DEA). DOE assumed the functions of the Atomic Energy Commission from the AEA.

38. However, the Act carefully provided that the newly created DOE would have no new authorities other than those already provided by existing laws. Until the enactment of the NWPA, DOE had no general statutory authority to provide federal storage or disposal of spent nuclear fuel from civilian power reactors.

39. Managing nuclear waste storage and disposal facilities are among the enumerated duties of DOE in the DEA. Again, the DEA does not independently authorize DOE to acquire spent nuclear fuel for interim storage or disposal. The DEA generally provides the responsibility to DOE to carry out “functions transferred, or delegated to, or vested in the Secretary...,” such as the later enacted duties under the Nuclear Waste Policy Act of 1982. 42 U.S.C. § 7133.

However, because of the limiting provision at the end of § 7133(a)(8):

...nothing in this section shall be construed as granting to the Department regulatory functions presently within the Nuclear Regulatory Commission, or *any additional functions than those already conferred by law*. (emphasis added).

40. “Function” is a defined term: “...any duty obligation, power, *authority*, responsibility, right, privilege, and activity or the plural thereof, as the case may be...” 42 U.S.C. § 7101(b)(1) (emphasis added).

41. The duties owed to a “unit of local government” under § 7191 include when the effects of a DOE rule, order, or regulation are confined to a unit of local government, geographic area, or state. When this occurs, DOE is required to afford an opportunity for a hearing or the oral presentation of views “within the boundaries of the unit of local government.” 42 U.S.C. § 7191(d)(A).

42. The Department of Energy Organization Act also allows for judicial review of agency (i.e. Department of Energy) actions. 42 U.S.C. § 7192.

The Nuclear Waste Policy Act of 1982, *Codified at 42 U.S.C. §§ 10101–10270.*

43. The NWPA was intended to be a national solution to the problem arising from the rapid accumulation of spent nuclear fuel from civilian power reactors. The primary goal of the NWPA was to establish one or more deep geological repositories to provide for permanent disposal of spent nuclear fuel as well as interim storage solutions. 42 U.S.C. § 10131(a)(2).

44. The NWPA defines spent nuclear fuel as “fuel that has been withdrawn from a nuclear reactor *following irradiation*, the constituent elements of which have not been separated by reprocessing. 42 U.S.C. § 10101(23), (emphasis added).

45. The key feature of spent nuclear fuel, as emphasized above, is that spent or used nuclear fuel is highly radioactive and requires extraordinary handling and containment to protect human health and the environment.

46. The high level of radioactivity, which makes spent (or used or irradiated) nuclear fuel far more dangerous than other nuclear materials, requires specialized regulation under the NWPA; no other statutory framework expressly authorizes and regulates storage and disposal of highly radiative nuclear materials.

47. The NWPA's statutory scheme has five subchapters. Subchapters I, II, and III have many provisions which are interwoven, complimentary and corresponding in both timing and function. These provisions should be read together to bring the intent of the timing of the storage and disposal goals of the NWPA into purview.

Subchapter I, Part A *Codified at 42 U.S.C. §§ 10131–10145.*

48. Subchapter I sets forth three primary storage and disposal methods; Part A provides for siting, constructing and operating one or more deep geologic repositories for permanent disposal; Part B provides for an interim storage program for short term, temporary storage, to be utilized if needed prior to the operation of a repository; and, Part C provides for Monitored Retrievable Storage (MRS) for longer term, temporary storage to be utilized prior to or in conjunction with a repository.

49. Part A begins with § 10131 by declaring:

“(a)The Congress finds that—

1. radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;
2. a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;
3. Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;
4. while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

5. the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this chapter;
6. State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel; and
7. high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.

50. These policy objectives provide a foundation for all the duties and obligations of the NWPA.

51. In 1987, Congress amended the NWPA to formally select Yucca Mountain, Nevada as the site of a repository. The Department of Energy (DOE) was directed to site and construct the repository at Yucca Mountain. The 1987 amendment also prohibited DOE from constructing other storage facilities, such as a monitored retrievable storage facility (MRS) until the repository was completed. 42 U.S.C. § 10133.

52. Part A establishes a means by which DOE would coordinate with and provide robust impact assistance to states, tribes, and units of local government where a repository was sited, constructed or operated. Congress appropriated funds from the Nuclear Waste Fund to DOE for payments to the State of Nevada and affected units of local government in Nevada based upon the siting and construction of the Yucca Mountain repository, even though Yucca Mountain has never become operational and contains no spent nuclear fuel. This is in addition to the Payment Equal to Taxes paid to Nye County, Nevada, pursuant to 42 U.S.C. § 10136(3)(A) each year without Yucca Mountain ever receiving a kilogram of spent nuclear fuel. Congress understood and intended to mitigate the impacts of simply being associated with this activity on a local community. 42 U.S.C. § 10136.

Subchapter I, Part B, Codified at 42 U.S.C. §§ 10151–10157.

53. Part B of Subchapter I, entitled “Interim Storage Program” contains provisions regulating interim storage of spent nuclear fuel, predominately at the site of the power reactors generating the respective spent nuclear fuel.

54. However, Part B also contains provisions authorizing and regulating the *only* federal interim storage program available to be administered by DOE, either expressly or impliedly, under *any* statute.

55. Under Part B, the owners and operators of power reactors had the primary responsibility to provide interim storage of spent nuclear fuel at the site of the power reactor. However, Part B required and authorized DOE to provide a limited amount of interim storage capacity at one or more DOE facility, if needed, for a period not to exceed three years after the opening of the repository.

56. DOE was mandated to provide “not more than 1,900 metric tons of capacity for the storage of spent nuclear fuel...” 42 U.S.C. § 10155(a)(1). This capacity was required to be made available through “one or more of the following methods, used in any combination by the Secretary to be appropriate:” *Id.* These methods are broadly defined as “use of capacity at one or more facilities owned by the Federal Government on January 7, 1983, including the modification and expansion of any such facilities...” 42 U.S.C § 10155(a)(1)(A).

57. Under § 10156(a), DOE was required to establish fees to be charged for federal interim storage, on an annual basis.

58. This federal interim storage program was to be administered by the “Interim Storage Fund.” Utilities were to be charged fees to cover the cost of the interim storage program and that

were to be deposited into the Interim Storage Fund. 42 U.S.C. § 10156. The uses and expenditures of the Storage Fund are enumerated in § 10156(d).

59. The Storage Fund is designed to operate in a very similar format as the Waste Fund in Part A, albeit on a much smaller scale and for a shorter period.

60. In the event funds were insufficient for DOE to carrying out the functions of the Interim Storage Fund, which include the cost of impact assistance, the Secretary of Energy was directed to borrow from the US Treasury the necessary funds to achieve the goals expressly enumerated in 42 U.S.C. § 10156. 42 U.S.C. § 10156(f)(5).

61. Part B also contains several limitations and restrictions for the use of federal interim storage capacity. One such restriction, entitled “Limitations” is 42 U.S.C. § 10156(b). Under this section, military spent nuclear fuel utilizing storage capacity at a DOE facility is required to contribute to the cost of federal interim storage in the same method and amount as private utilities, i.e., full cost recovery for all DOE obligations under the federal interim storage program.

62. Thus, all requirements for setting fees and costs annually under § 10156(a) for utilities would also necessarily apply to military spent nuclear fuel, such as US Navy spent nuclear fuel.

63. Creating a comprehensive statutory scheme was not an easy task for Congress. The overarching and recurring debate in Congress involved how these federal activities would be coordinated with states, tribes and communities. Some proposals provided for states to have a veto over the location of a repository. Congress was careful to expressly acknowledge the role of states, tribes, and communities as well as carefully providing for mitigating measures against the impacts of these projects. (Joint Hearings Before the Committee on Energy and Natural

Resources and the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works, U.S. Senate, 97th Congress, First Session, October 5, 1981).

64. Assistant Secretary of Energy, Shelby Brewer, serving from 1981–1984, appeared and testified several times before Congress to discuss DOE’s position on various aspects of the proposed Senate and House bills. Id.

65. Dr. Shelby Brewer was appointed by President Reagan as Assistant Secretary of Nuclear Energy for DOE. Assistant Sec. Brewer was the chief administrator of DOE’s Nuclear Energy division and was considered President Reagan’s “Nuclear Czar” as the highest ranking official in the Reagan administration for all things nuclear. Dr. Shelby Brewer was also a nuclear engineer with a Masters of Science in Nuclear Engineering as well as a Ph.D. in Nuclear Engineering from the Massachusetts Institute of Technology. Prior to being appointed Assistant Secretary of Energy, Dr. Brewer was the President and CEO of ABB-Combustion Engineering Nuclear Power, one of the world’s leading nuclear energy companies in the 1970s. (Joint Hearings Before the Committee on Energy and Natural Resources and the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works, U.S. Senate, 97th Congress, First Session, October 5, 1981).

66. Assistant Secretary Brewer’s advice and input was very influential in drafting the NWPA. Assistant Secretary Brewer, on behalf of DOE, recommended to Congress that a federal interim storage program be included in the NWPA if a power generator was unable to provide suitable interim storage at the site of the reactor until the repository was operational. Id.

67. Before the NWPA was enacted, several bills were introduced to address nuclear waste disposal. Throughout the legislative history of competing proposed nuclear waste disposal bills, many members of Congress were flatly opposed to the idea of DOE providing any interim

storage capacity. The concerns were that temporary storage would inevitably become default permanent storage. Also, members of Congress were hesitant to saddle a state, tribe or community with the risks as well as being identified with radioactive waste. *Id.*

68. The debate and compromises leading to the inclusion of Part B invariably intended to address these concerns. Senators James McClure from Idaho and Strom Thurmond from South Carolina represented states where DOE operated sites with storage capacity (INL and Savannah River). (Cong. Rec.–Daily Digest, December 20, 1982, D821; Cong. Rec.–Senate, December 20, 1982.)

69. In 1981 a bill was introduced in the Senate, S.1662, entitled the “National Nuclear Waste Policy Act,” sponsored by Senator James McClure of Idaho. But, it was House bill H.3809 that eventually became law as the Nuclear Waste Policy Act of 1982. *Id.*

70. Senator Thurmond proposed an amendment to S.1662 on April 29, 1982 to include, among other things, impact assistance to states and communities for federal interim storage capacity.

71. On December 20, 1982, Senator Thurmond, proposed the same amendment, offered up by Senator McClure, this time to H.3809, borrowing the language from S.1662. *Id.*

72. Senator Thurmond explained the purpose of the impact assistance amendment:

Mr. President, the Senate committee substitute to the house nuclear waste bill provides for impact assistance to States and localities in which monitored retrievable storage facilities and deep geologic repositories are located. However, the legislation does not provide such assistance to States and localities in which interim, away-from-reactor storage facilities may be located. This is a serious omission, one that should be corrected before any legislation, such as that presently before us, is passed...This amendment corrects this omission and provides that impact assistance be made available to States and localities which host an AFR (i.e., away-from-reactor) facility.

Cong. Rec.–Daily Digest, December 20, 1982, D821; Cong. Rec.–Senate, December 20, 1982, 3521–35572.

73. The amendment passed the Senate and was passed by the House the next day. President Reagan signed the bill into law on January 7, 1983 and the amendment is now codified at 42

U.S.C § 10156(e) as follows:

(e) Impact Assistance

(1) Beginning the first fiscal year which commences after January 7, 1983, the Secretary shall make annual impact assistance payments to a State or appropriate unit of local government, or both, in order to mitigate social or economic impacts occasioned by the establishment and subsequent operation of any interim storage capacity within the jurisdictional boundaries of such government or governments and authorized under this part: *Provided, however*, That such impact assistance payments shall not exceed (A) ten per centum of the costs incurred in paragraphs (1) and (2), or (B) \$15 per kilogram of spent fuel, whichever is less;

74. Under this provision in Part B, DOE was required to determine the need for impact assistance and make payments to mitigate such impacts to states or units of local government or both.

75. A county government is a unit of local government under § 10156(e)(6).

76. This determination must be made *each year* independently from the previous year to account for changes in the impact, the quantities of spent nuclear fuel, and the changing minimum payment analysis.

77. Potential changes to impact assistance could occur for various reasons, the most important being an increase in the quantity of capacity provided and the quantity of spent nuclear fuel utilizing that capacity. 42 U.S.C. § 10156(e).

78. DOE was also required to promulgate necessary regulations to achieve the goals of § 10156(e).

79. DOE has not promulgated any rules or regulations, nor made any effort in any way to implement the requirements of § 10156(e). 42 U.S.C. § 10156(e)(3).

80. For purposes of this suit, the most important aspect of Part B within the statutory scheme of the NWPA is that § 10156(e) was intended to operate for the benefit of a state or local government or both, independent of any other actions or omission by DOE in the administration of Part B or any other provisions of the NWPA—this ongoing obligation is triggered only by the criteria in section 10156(e) of “establishing and subsequently operating any interim storage capacity...”. As argued by Senator Thurmond on behalf of including this provision, DOE’s obligation to determine mitigating benefits for a unit of local government only becomes necessary when the specified activities occur within the local government’s jurisdictional boundaries.

81. The plain language and the clear intent of § 10156(e) to address social and economic impacts demonstrates that DOE’s obligations are not dependent upon any other actions by DOE or any other provisions of the NWPA. This statutory obligation serves as a guarantee to local communities that are subject to these impacts regardless of whether DOE acts, omits or fails to comply with any other provisions of law.

82. In addition to the plain language, the intent of this provision was also made abundantly clear by the argument of Senator Thurmond to amend and include this statutory protection for a local government.

83. Subsection (a), or § 10156(a), provides the framework for DOE to offer federal interim storage fees. These fees must be determined by DOE to cover the costs of federal interim storage as set forth in § 10156(a). Then, § 10156(e)(4) follows this determination stating that impact assistance to a unit of local government is “made available solely from the fees determined in subsection (a),” which refers to the fees DOE would charge for federal interim storage. The vital

distinction to be recognized is that fees “determined” is different than fees collected. Subsection (a)(1) states that fees are to be “determined” by DOE “in accordance with this section.”

84. Subsection (a)(2), then, mandates that DOE undertake a study to determine and establish payment charges for federal interim storage. DOE performed this study and published the fee schedule each year beginning in 1984 until 1990. The fee schedule, based upon the study, provided for a sliding fee scale premised on the amount of storage needed. This was in part due to the requirement to account for the appropriate amount of impact assistance to be collected to comply with § 10156(e). Under this statutory framework, the fee collected does not excuse or serve as a limitation to DOE’s obligation under § 10156(e) without otherwise entirely undermining the sole purpose of the mandate.

85. Thus, the payment to be determined is to be made available by the fees determined and is in no way dependent on fees collected, consistent with the “Use of the Storage Fund,” which specifically enumerates impact assistance as a cost of interim storage. 42 U.S.C. § 10156(c)(5). This is further consistent with the mandate that the Secretary borrow money from the Treasury to “enable the Secretary to discharge his responsibilities under this part.” 42 U.S.C. § 10156(f)(5).

86. The Congressional intent and acknowledgement of offsetting impacts by the “payment equal to tax” provision in § 10136(3)(A) in Part A also makes an appearance in Part B in § 10156(e)(2)(B).

87. This provision sets very broad limits on how communities are allowed to use impact assistance funds. More specifically, § 10156(e)(2)(B)(iv) provides that a unit of local government may utilize impact assistance funds as if these funds were, hypothetically, derived from tax revenue.

88. This is an express acknowledgment of Congress' concerns to formally offset the impacts of the federal facility by providing revenue that is available to communities with at-reactor facilities.

89. The Federal Interim Storage Program set forth in Part B also included a sunset provision restricting DOE from "entering into contracts" to provide interim storage after January 1, 1990 to coincide with the opening of the repository in 1998. Federal Interim Storage was also required to end not later than three years after the opening of the repository.

90. Under Section 10156(f), DOE is assigned several ongoing statutory obligations similar to the annual obligations set forth in 10156(e). For example, § 10156(f)(2) requires DOE to submit a budget for the Interim Storage Fund triennially.

91. Part B is effectively unchanged since January 7, 1983.

Subtitle I, Part C, *Codified at 42 U.S.C. §§ 10161–10169.*

92. Part C authorized an alternative long term storage solution known as Monitored Retrievable Storage (MRS).

93. Similar to Part A and Part B, Part C's MRS has authorizing language, regulation and a requirement for impact assistance to local governments.

94. The authorization to construct an MRS was restricted by Congress in the 1987 amendment to the NWPA (Subtitle I, Part E), until the Yucca Mountain repository becomes operational.

Subchapter II, *Codified at 42 U.S.C. §§ 10191–10204.*

95. Subchapter II entitled "Research, Development and Demonstration Regarding Disposal of High-Level Radioactive Waste and Spent Nuclear Fuel," was intended, as the title suggests, to

convey authority to DOE to conduct research to improve storage and transportation methods of spent nuclear fuel. DOE was also authorized to construct a disposal demonstration facility.

96. DOE has not publicly acknowledged that any of the research activities expressly described under the NWPA are occurring. However, DOE has conducted research on storage containers and casks for several decades. The Plaintiff will need to propound discovery on this issue to illuminate whether DOE activities at INL have come under Subchapter II of the NWPA. 42 U.S.C §§ 10191–10204.

97. Subchapter II activities also require DOE to determine impacts on states, tribes or units of local government. DOE is required to offer agreements with affected communities, which include impact assistance payments like the impact assistance provisions in Subchapter I, Part A and B. 42 U.S.C. § 10199.

Subtitle III, *Codified at 42 U.S.C. §§ 10221–10226.*

98. An express target date for the repository to begin accepting spent nuclear fuel no later than 1998 was set by 42 U.S.C. § 10222, which required this target date to be included in the contracts DOE entered into for disposal with civilian power utilities.

99. Subchapter III established the Office of Civilian Radioactive Waste Management (OCRWM) within DOE, headed by a director who would be appointed by the President. This director would be responsible for carrying out many of the functions of the NWPA for the Secretary of Energy. 42 U.S.C. § 10224.

100. The OCRWM was tasked with the Yucca Mountain repository project. DOE closed the OCRWM in 2010 along with the Yucca Mountain project and its remaining functions were rolled into the divisions of DOE known as Nuclear Energy and Environmental Management.

101. Section 302 of Subchapter III, codified at 42 U.S.C. § 10222, required power generators to enter into contracts with DOE to participate in the disposal program. These contracts are known as the “standard contract” developed and implemented by DOE under 10 CFR 961 and is currently administered by the Department of Energy’s Office of Standard Contract Management within DOE’s Office of General Counsel.

102. The 1998 target date for the repository to begin accepting spent nuclear fuel was required to be a provision of the standard contract. 42 U.S.C. § 10222. It is this contract term which has created DOE’s multi-billion-dollar liability to the power utilities for failing to accept spent nuclear fuel under the contract.

103. The standard contract was the primary method to accomplish the full-cost recovery goal for the disposal program. Under the standard contract, utilities were required to charge ratepayers a fixed amount that would be paid into the Nuclear Waste Fund. The Nuclear Waste Fund was the administrative fund established by § 10222 to finance the siting, construction, and operation of the repository, similar to the Interim Storage Fund in Part B of Subchapter I for the interim storage program.

104. For spent nuclear fuel generated prior to January 7, 1983, the effective date of the NWPA, the standard contract provided for a one-time fee to be paid into the Nuclear Waste Fund.

105. The Yucca Mountain repository siting and construction was effectively terminated in 2010, when DOE attempted to withdraw its Yucca Mountain license application with NRC. Subsequently, utilities are no longer required to contribute to the Nuclear Waste Fund pursuant to the standard contract. *National Ass’n of Regulatory Utility. Com’rs v. US Dept. of Energy*, 736 F.3d 517 (D.C. Cir. 2013).

106. NRC rejected DOE’s motion to withdraw the license application and instead approved Yucca Mountain as a permanent repository with a 1,000,000-year lifespan.

107. Currently, the United States has paid out over Eight Billion Six Hundred Million (\$8,600,000,000.00) U.S. Dollars from the judgment fund to utilities for interim storage costs as a remedy to DOE’s breach of the standard contract provisions for disposal. DOE has estimated that its liability for failing to accept spent nuclear fuel to be as high as Thirty-Nine Billion Two Hundred Million (\$39,200,000,000.00) U.S. Dollars. *See* <https://sgp.fas.org/crs/misc/RL33461.pdf>

108. DOE has stated publicly and in reports to Congress, that the “specificity” of Subtitle I, Part B of the NWPA restricts DOE from providing federal interim storage for spent nuclear fuel and that legislation is required to authorize DOE to initiate and provide federal interim storage.¹

109. Therefore, DOE’s position on accepting spent nuclear fuel has been clear and unchanged since DOE first indicated in 1995 that the repository would not be ready to accept fuel by 1998—DOE has no authority to accept spent nuclear fuel except under the provision of the NWPA.

V. HISTORY AND STATEMENT OF FACTS

110. While DOE publicly maintains it is working towards a goal of disposing of the thousands of metric tons of spent nuclear fuel across the U.S., DOE has made no progress towards accepting spent nuclear fuel. To the contrary, DOE spent billions of dollars siting and constructing Yucca Mountain and now has essentially abandoned this statutory mandate. The Nuclear Waste Fund has a current balance of approximately \$45 Billion, with approximately

¹See https://www.energy.gov/sites/default/files/edg/media/ES_Interim_Storage_Report_120108.pdf

\$1.5 Billion added in interest annually. See <https://www.energy.gov/sites/default/files/2021-12/FY21%20-%20NWF%20Annual%20Financial%20Report%20Summary.pdf>

Post Yucca DOE Actions.

111. DOE has recently begun outreach for what DOE calls “consent-based siting” for interim storage activities as well as siting a new repository. This concept is nowhere to be found in any current authorizing legislation, except that Congress recently allocated funds to DOE for “interim storage activities.” DOE has offered funding to communities who are merely willing to participate in a discussion about hosting an interim storage facility, which DOE has no current statutory authority to establish or operate. The irony and hypocrisy of this effort is not lost on Butte County. P. L. 117–103, Mar. 15, 2022.

112. Here is a sample of DOE describing this approach:

“The Department of Energy is ultimately responsible for the management of the nation’s nuclear waste. This includes finding sites to store and dispose of the spent nuclear fuel. DOE is committed to a consent-based approach to siting and a waste management system that enables broad participation and centers equity and environmental justice. We believe that a consent-based approach, driven by community well-being and community needs, is both the right thing to do and our best chance for success.

Consent-based siting is an approach to siting facilities that focuses on the needs and concerns of people and communities. Communities participate in the siting process by working carefully through a series of phases and steps with the Department (as the implementing organization). Each step and phase helps a community determine whether and how hosting a facility to manage spent nuclear fuel is aligned to the community’s goals. By its nature, a consent-based siting process must be flexible, adaptive, and responsive to a community’s concerns. Thus, the phases and steps are intended to serve as a guide, not a prescriptive set of instructions.

Working through the consent-based siting process collaboratively builds a mutual trust relationship between DOE and a potential host community. Potential outcomes from the consent-based siting process could include either a negotiated consent agreement or a determination that after exploring the option in good faith, the community is not, in fact, interested in serving as a host. Both are successful outcomes.”

See <https://www.energy.gov/ne/consent-based-siting>

113. The Blue Ribbon Commission on America’s Nuclear Future (BRC) was formed by the Secretary of Energy at the request of the President to conduct a comprehensive review of policies

for managing the back end of the nuclear fuel cycle and recommend a new strategy. *See*

<https://www.energy.gov/ne/articles/blue-ribbon-commission-americas-nuclear-future-report-secretary-energy>

114. The Blue Ribbon Commission report attributes the difficulty in finding a willing host community to the negative public perception of nuclear waste, but this misses the fact that DOE lacks credibility with states, tribes and local governments. For example, Butte County sent correspondence to DOE headquarters weeks prior to filing this Complaint offering to informally discuss and compromise on Butte County’s concerns under 42 U.S.C. § 10156(e) as an alternative to filing this action—DOE headquarters did not respond. While DOE espouses the virtues of consent-based siting as being “driven by community well-being and community needs,” DOE ignores the plain language and clear intent of current mandates under 42 U.S.C. § 10156(e), suggesting that DOE’s attempts to “build a mutual trust relationship” with a host community are disingenuous.

115. In 2021, the Government Accounting Office released a report to Congress entitled “Congressional Action Needed to Break Impasse and Develop a Permanent Disposal Solution” regarding spent nuclear fuel. The report specifically recommended that Congress amend the NWPA to authorize “consent-based siting” for consolidated interim storage and restructuring the current Nuclear Waste Fund to allow expenditures for interim storage. *See*

<https://www.gao.gov/products/gao-21-603>

116. DOE has no actual statutory authority to engage in storage or disposal aside from the NWPA, with consent of a state or otherwise. DOE efforts have been completely stymied by social and political influences. By granting the relief requested by Butte County in this

Complaint, Congress will be more likely to take action to break the impasse and authorize a new plan for DOE.

Interim Storage of Spent Nuclear Fuel at INL

117. DOE provides interim storage capacity for approximately 325 metric tons of spent nuclear fuel at the INL within Butte County.

118. Butte County is aware of spent nuclear fuel from at least two sources, as outlined herein below, that are subject to the NWPA for which DOE has no other authority to provide federal interim storage capacity at INL.

Spent Nuclear Fuel from the US Navy

119. DOE provides interim storage capacity for over 27 metric tons of US Navy (military) spent nuclear fuel at INL. A Memorandum of Agreement between DOE and the Navy whereby the Navy agreed to pay DOE full cost recovery for the storage and disposal as is required by the NWPA, including 42 U.S.C. § 10156(b). *See*

<https://www.nrc.gov/docs/ML0923/ML092360011.pdf>

120. However, DOE has failed to account for the costs of the obligations enumerated in 42 U.S.C. § 10156(d).

121. This type of Memorandum of Agreement is not unusual between the divisions of DOE. As an example, DOE's office of Environmental Management executed a similar agreement with DOE's Office of Civilian Radioactive Waste Management for storage and disposal of DOE owned spent nuclear fuel as recently as 2007. *See*

<https://www.nrc.gov/docs/ML0923/ML092360009.pdf>

122. The Memorandum of Agreement with the Navy was originally entered into in 1998 between DOE and the Navy and has been renewed at least once. *Id.*

123. The Memorandum of Agreement between DOE and the Navy expressly states that the NWPA authorizes the agreement and the activities performed under the agreement, specifically storage and disposal. *Id.*

124. DOE required the Navy to enter into the “standard contract” under section 10222 of the NWPA for disposal, the same as would be required for any other commercial nuclear power utility. *Id.*

125. The Navy has annually contributed to the Nuclear Waste Fund pursuant to the terms standard contract like any other utility. *See* <https://www.energy.gov/sites/default/files/2021-12/FY21%20-%20NWF%20Annual%20Financial%20Report%20Summary.pdf>

126. The Naval Nuclear Propulsion Program (NNPP) may be a joint program between the Navy and DOE, but all the functions of the NNPP at INL are under Secretary of DOE. The Navy performs no activities at INL without DOE’s consent or outside of DOE’s overall INL management plan. Spent nuclear fuel from the Navy is being stored in capacity provided by DOE’s INL installation in Butte County. No part of the INL is a military reserve, nor is any part of the INL under control of any federal agency except DOE. P.L. 106–65.

127. The Naval Reactor Facility at INL is operated and managed, currently, by Fluor Marine Propulsion LLC. Fluor manages the facility pursuant to a contract award from DOE. *See* [https://www.usaspending.gov/award/CONT_AWD_89233018CNR000004_8900_-NONE-_-NONE-](https://www.usaspending.gov/award/CONT_AWD_89233018CNR000004_8900_-NONE_-_-NONE-)

128. DOE has not deposited any funds from the US Navy into the Interim Storage Fund to administer the costs of DOE providing interim storage capacity.

129. 42 U.S.C. § 10156(b) entitled “Limitations” restricts DOE from providing interim storage capacity at a DOE owned facility (INL) for US Navy spent nuclear fuel unless the terms of this section are followed:

“No spent nuclear fuel generated or owned by any department of the United States referred to in [section 101](#) or [102 of Title 5](#) {US Military} may be stored by the Secretary in any storage capacity provided under this part unless such department transfers to the Secretary, for deposit in the Interim Storage Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such spent nuclear fuel were generated by any other person.”

130. 42 U.S.C. § 10156(b) along with the other provisions of Part B show the similarities to the Part A disposal program and the Part C MRS program. All programs require payment into an administrative fund for participation. All programs have an express method of funding. All programs require engaging, cooperating, and providing assistance to states and local communities. All programs, by their specificity, restrict these activities from occurring, except under the terms of each respective part of NWPA.

131. In 1995, the State of Idaho brought an action against DOE under the National Environmental Policy Act regarding storage activities at INL. As a result, Idaho and DOE entered into a Settlement Agreement. Under the Idaho Settlement Agreement, DOE is required to remove all US Navy spent nuclear fuel from Idaho by 2035. However, DOE has no intention of complying with this deadline and has made no plans for removal and has made this intent public. DOE is expanding INL's storage capacity through 2060. 81 Fed. Reg. 87912. *See* <https://www.govinfo.gov/content/pkg/FR-2016-12-06/pdf/2016-29203.pdf>

132. In the interim period prior to the promised removal, the Settlement Agreement required DOE to remove US Navy spent nuclear fuel from wet storage to dry storage at INL. DOE has met this obligation but has yet to reveal any plan whatsoever for removal from Idaho and has only increased its plans for permanent storage in Idaho.

133. DOE and the Navy have transported, via multiple annual rail shipments, over one metric ton of Navy spent nuclear fuel on average every year since the Idaho Settlement Agreement in 1995 to be placed in interim storage at INL and intends to increase the total quantity of spent nuclear fuel within the jurisdictional boundaries of Butte County, annually.

134. The Navy anticipates transporting approximately 1.8 metric ton of spent nuclear fuel by eight rail shipments to INL for interim storage in Butte County in 2023. DOE and the Navy intend to continue these transports each year.

135. DOE and the Navy rely on the storage capacity at INL to plan for future Navy reactor projects. Without this storage capacity, these multi-billion-dollar future projects are more difficult to plan.

136. Butte County seeks only for DOE to comply with the law in Part B of the NWPA regarding the social and economic impacts of these activities, which amount to negligible action by DOE in proportion to the overall project size and costs.

137. Butte County does not oppose the lawful, safe, and environmentally sound administration of interim storage of spent nuclear fuel at INL. However, the plain language and clear intent of 42 U.S.C. § 10156(e) must first be acknowledged and addressed by DOE. DOE's failure to acknowledge this mandate makes it no surprise that no communities are volunteering to become host communities to these activities.

138. DOE's resistance to acknowledging the plain language of these statutory provisions in Part B as well as the obvious, indisputable intent of Part B is confounding to Butte County given that the Navy has already contributed to the State of Nevada as well as Nye County, Nevada through the Navy's Nuclear Waste Fund contributions under the standard contract with DOE for what is now the abandoned Yucca Mountain Repository project that has never received one

kilogram of Navy spent nuclear fuel. Butte County seeks to address DOE's inconsistency between the administration of Part A and Part B. (*e.g., see* <https://www.energy.gov/ig/articles/audit-report-ig-0600>)

Spent Nuclear Fuel from TMI-2.

139. Among the 325 metric tons of spent nuclear fuel currently utilizing storage capacity at INL, approximately 139 metric tons of spent nuclear fuel originated from a civilian commercial power reactor called TMI-2 also known as Three Mile Island Nuclear Power Station Unit #2, which at the time of acquisition by DOE in 1984 was owned by General Public Utilities Corp. (GPU) a private, for profit, commercial power generator.

140. The spent nuclear fuel from TMI-2 is the only known civilian spent nuclear fuel accepted by DOE for federal interim storage after January 7, 1983, the effective date of the NWPA. DOE currently has no plan for its disposal.

141. The history and background of TMI-2, and the transportation of spent nuclear fuel to INL are relevant based on the complexity of the subject matter of this suit. Discussing the history of TMI-2 provides clarity and context to the sequence of events. However, the history and background are not factually necessary for Butte County to prove, with undisputed facts, each cause of action herein below because each such cause of action is based upon annual obligations. Nor is TMI-2's history necessary to grant the relief Butte County is requesting. The only material fact within the history of TMI-2 relevant to Butte County's challenge is that the acquisition of the spent nuclear fuel occurred after January 7, 1983.

142. Butte County provides this disclaimer as a point of clarification and to preempt DOE's superficial assertion or argument that Butte County's causes of action are untimely by challenging past decisions. Butte County is not challenging past decisions made by DOE. As this Complaint

will make clear herein below, Butte County is challenging DOE's recent actions and omissions, as well as the ongoing violations of the NWPA.

History of TMI-2 and INL.

143. In 1979, an accident occurred at TMI-2 resulting in a partial melting of the fuel rods in the reactor core. TMI-2 had only operated for about three months prior to the accident. The accident was caused by several factors such as operator error, design errors, and equipment malfunctions.

144. In addition to the shutdown of Unit #2 from the accident, NRC ordered Unit # 1 to remain shut down. Unit #1 was already shutdown for refueling at the time of the accident.

145. The cleanup efforts of TMI-2 interfered with the continued operation of Unit #1 as well as an accurate assessment of any future use or operation of the entire site.

146. Shortly after the incident, a commission was formed to assist in the cleanup of TMI-2. DOE and NRC entered into a Memorandum of Understanding regarding each entities' respective role in the effort. One of the overall goals of NRC and DOE was to prevent Three Mile Island from becoming a permanent nuclear waste disposal site.

147. As a result of these joint efforts, NRC prepared a Programmatic Environmental Impact Statement (PEIS) addressing several issues regarding the cleanup, including whether the spent nuclear fuel and other core debris could be safely stored at the site of the reactor.

148. The owner of TMI-2 could not afford the cost of cleanup of TMI-2. Contributions were made from other industry groups to aid in the cleanup. DOE was keenly aware of the negative impacts to public perceptions of the TMI-2 accident on the nuclear power industry as a whole—an industry that was part of DOE's mission to promote.

149. In 1981, NRC's PEIS concluded that storage at the reactor site was not feasible for several reasons, which included environmental risks, human health and safety concerns, as well as the risk that the site would become a default disposal site.

150. DOE agreed to assist in the clean-up efforts with expertise and technical support as part of DOE's ongoing research program. DOE was first involved with the cleanup effort through a research program funded by DOE. The research program was funded and managed separately from the actual cleanup and disposal of the spent nuclear fuel. Small amounts of spent nuclear fuel were taken from TMI-2 by DOE for research purposes and are not part of the 139 metric tons now utilizing storage capacity at INL.

151. TMI-1 remained offline by order of the NRC until 1985 when the defueling of TMI-2 had begun. Resuming power generation was dependent on several factors, many unknown at the time, but one of which was removing the damaged fuel core from TMI-2 and removing it from the site. Revenues from the power generated by Unit #1 to aid in the cleanup efforts at Unit #2 were part of the justification to restart Unit #1.

152. GPU had not formally concluded that TMI-2 could not be rehabilitated or that TMI-2 was not cost effective to rehabilitate for future use until after DOE agreed to accept spent nuclear fuel and remove it from the reactor site. It would become evident over the subsequent years following the accident that any use or restarting of Unit #2 was not possible or at least not cost effective. Since 1986, the status of Unit #2 remains in a "post-refueling, monitored storage," condition and has not yet been formally decommissioned. Unit #1 may very well be formally decommissioned prior to Unit #2. See <https://www.nrc.gov/reading-rm/doc-collections/factsheets/3mile-isle.html>

153. In 1982, DOE entered into an “Agreement in Principle” with GPU to accept and provide storage and disposal of the spent nuclear fuel from TMI-2. This Agreement in Principle was a non-binding expression by DOE to agree to negotiate the terms of accepting the spent nuclear fuel with GPU in the future.

154. DOE and GPU eventually entered into a binding agreement, known as the “Core Contract”, whereby DOE agreed to accept and provide storage and disposal of the spent nuclear fuel from TMI-2.

155. This binding agreement was entered into on March 1984 coinciding with the fifth anniversary of the accident at TMI-2 and nearly fifteen months after the enactment of the NWPA.

156. The relevant terms of the agreement were that DOE would accept title to and provide storage and disposal and GPU would fully cover the costs of these actions. The amount of the contract amount to be paid by GPU was approximately \$10,700,000 including the increases from the 1987 amendment.

157. In retrospect, we can now see that the Core Contract unlawfully failed to comply with the NWPA. Although, the utility did later sign the standard contract for disposal under the NWPA. The errors made by DOE in executing the Core Contract were likely the result of DOE’s involvement with TMI-2’s cleanup efforts predating the NWPA. As referenced above, the NWPA created the Office of Civilian Radioactive Waste Management which was tasked with implementing the obligations and programs of the newly enacted NWPA. However, there is no evidence that the OCRWM was involved in the Core Contract as the administration of this agreement was apparently carried out by DOE personnel who were not under the administration of the OCRWM.

158. The terms of the core contract were extremely generous to the financially insecure utility. The total charges in the core contract, were in fact, only a fraction of the overall costs of storage and disposal despite DOE representing to Congress that the utility was paying for the interim storage and disposal.

159. DOE's upper management, in making these representations to Congress, was under the erroneous presumption that DOE was complying with the NWPAs as outlined herein below.

160. Ass. Sec. of Energy Shelby Brewer was very familiar with the newly enacted NWPAs from his experiences advising Congress on various proposals and provisions during its drafting and passage. (Joint Hearings Before the Committee on Energy and Natural Resources and the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works, U.S. Senate, 97th Congress, First Session, October 5, 1981).

161. Brewer was also the chief official overseeing the TMI-2 cleanup efforts for DOE. Subcommittee on Energy and Production of the Committee on Science and Technology, House of Representatives, 98th Congress, Second Session (May 22, 1984).

162. In May of 1984, about two months after the core contract was signed, Ass. Sec. Brewer testified before Congress about the cleanup efforts of TMI-2. Subcommittee on Energy and Production of the Committee on Science and Technology, House of Representatives, 98th Congress, Second Session (May 22, 1984).

163. Ass. Sec. Brewer testified that: "I have recently signed a contract with the utility [GPU] to accept responsibility for the damaged [TMI-2] core under terms consistent with the [Nuclear] Waste Policy Act of 1982. We are taking the entire core, not just the piece for research and development purposes; we are taking the entire core under the terms of the 1982 Act." Id at p. 23.

164. When asked about funding, Assistance Secretary Brewer responded: “We will charge the utility [GPU] and have, in fact, signed a contract for the transportation and storage of the core, just like we would any other [spent nuclear] fuel under the Waste Management [sic] Act of 1982.” Id at p. 36.

165. Assistant Secretary Brewer also entered into the record a letter he had written about TMI-2, which stated: “[I]n addition to concluding R&D of generic benefit under the authorization provided by the Atomic Energy Act (1954) and subsequent legislation, we have also stepped up promptly, in this case, to our operational responsibilities to provide a means for disposal of wastes. We have agreed to accept title of the [TMI-2] damaged fuel, not merely the portion of it for R&D purposes, under provisions consistent with the [Nuclear] Waste Policy Act of 1982.” Id at p. 42.

166. Brewer’s remarks to Congress represented DOE’s position on the NWPA despite the core contract not complying with the terms of the NWPA.

167. Twenty-four years later, in a 2008 report to Congress, DOE echoed Brewer’s testimony by reporting that (a) it had used its authority under the Atomic Energy Act of 1954 “to accept small amounts of SNF [i.e. spent nuclear fuel] for research and development purposes,” such as when it accepted “parts of the Three Mile Island Unit 2 damaged core,” and that (b) “the later-enacted NWPA” and its “detailed statutory scheme for SNF storage and disposal ... limited the Department’s authority to accept SNF under the [Atomic Energy Act].” DOE acknowledged that the NWPA, “by its specificity, limits the Department’s commercial SNF storage and disposal options” to either federal interim storage under Part B (§§ 10151–10157) or monitored retrievable storage under Part C (§§10161–10169) of the Act. DOE acknowledges the small research portions, the same as Brewer’s statement. But, this report is silent regarding DOE’s

authority to provide interim storage capacity of the 139 metric tons under the core contract—this silence is necessary to avoid the contradiction that DOE had authority to provide interim storage capacity under any statute other than the NWSA. *See*

https://www.energy.gov/sites/default/files/edg/media/ES_Interim_Storage_Report_120108.pdf

168. DOE transported the spent fuel from TMI-2 to INL in Butte County beginning in 1986, with the final shipment in August 1990. DOE originally intended to store the spent fuel in wet storage pools at Test Area North (TAN) at INL in Butte County. The wet storage pools were designed and constructed in the 1950's to store fuel and other radioactive waste from the long abandoned nuclear aircraft engine program.

169. The storage pools at TAN were environmentally inadequate to provide interim storage.

170. The Settlement Agreement required DOE, among other things, to move the spent fuel from TAN to dry storage at another location at INL and move other spent fuel, and radioactive waste from wet storage and into dry storage until disposal. This location, also in Butte County, called the Idaho Nuclear Technology and Engineering Center (INTEC), formerly known as the Idaho Chemical Processing Plant (ICPP). The Settlement Agreement also requires DOE to remove all spent nuclear fuel from Idaho entirely by no later than 2035.

171. INTEC required modification to include a dry storage containment system for the spent fuel from TMI-2 and the US Navy.

172. DOE began to move the spent fuel from TAN to INTEC in 1999.

173. DOE applied for and was granted a storage license from NRC, license number SNM-2508, in 1999 for this dry storage containment system situated inside INTEC called TMI-ISFSI (independent spent fuel storage installation) also known as ICPP-1774. This initial license had a term of 20 years and expired in 2019. The term "independent" in the title "independent spent fuel

storage installation” merely refers to the storage being independent from the site of the reactor from which the fuel was removed.

174. DOE submitted an application for renewal of this license and this application was published in the Federal Register on June 9 2017.

175. On September 8, 2016, prior to the application for renewal, DOE submitted a letter to NRC requesting to amend License SNM–2508 for a fifth time. The proposed amendment sought to revise the licensee delegation of authority on the license from “Manager, DOE Idaho Operations Office,” to “Deputy Manager, Idaho Cleanup Project.”

176. NRC processed this request to amend the license along with the application for renewal.

177. NRC performed an Environmental Analysis as opposed to an Environmental Impact Statement given that the containment system structure and footprint and found no significant environmental impact. NRC also conducted a safety evaluation of the proposed license renewal.

178. Butte County is not challenging NRC’s findings from the license renewal process as the scope of NRC’s license renewal are limited to the criteria under the Atomic Energy Act and NRC’s regulations regarding the safety and environmental standards of the containment equipment and facilities.

179. Butte County did not receive actual notice from DOE regarding DOE’s submission of an application to renew the license for an additional 20 years. Nor did DOE or NRC conduct any public outreach of any kind or conduct any hearings in Butte County regarding the continued storage.

180. The license amendment was incorporated into the renewed license, which was granted on September 16, 2019, for an additional 20 years and included additional license conditions for aging management, given that the life span of the ISFSI was 40 years.

181. INL is a controlled facility. Admittance to INL is prohibited without express permission to enter the facility at any location. All points of access into INL are controlled by armed security forces.

182. All programs within the boundaries of the INL share common management and administration, security and control, infrastructure including but not limited to Fire Protection, EMS, roadways, building maintenance, safety programs, power, solid waste utilities and other similar operations.

183. DOE's action to provide interim storage capacity for spent nuclear fuel originating from TMI-2 for an additional 20 years beyond the 2019 expiration of NRC License SNM-2508 is final agency action under APA 5 U.S.C. § 706 and with Article III and prudential standing to challenge this action.

184. The final action by DOE to extend interim storage capacity at INL is when DOE began operating storage capacity after License SNM-2508 would have expired on March 19, 2019.

185. DOE began providing interim storage for spent nuclear fuel from TMI-2 under renewed NRC License SNM-2508 for up to twenty years beginning on March 20, 2019.

186. The NRC license renewal process does not provide any administrative remedies for Plaintiff to challenge DOE's failure to perform obligations under Subtitle I, Part B of the NWPA. Nor has DOE made available to Butte County any administrative process where issues under Subtitle I, Part B of the NWPA. Therefore, all administrative remedies have been exhausted, or more accurately, are not required prior to bringing this action.

187. When the core contract for TMI-2 was signed, DOE never contemplated extending interim storage beyond 1998 or 2019.

188. Interim Storage of TMI–2 has continued for over thirty years, and more than twenty-five years longer than the target date set by the NWPA for the repository to begin receiving spent nuclear fuel and thus ending federal interim storage.

189. DOE has no plan to end the interim storage of TMI–2 or Navy spent nuclear fuel. Congress has recently provided funding to DOE for consent-based siting under the appropriation description of “interim storage activities”, but DOE has no candidate sites selected nor does DOE have any time frame on siting a repository. P.L. 116–260 (December 27, 2020); and, P.L. 117–103 (March 15, 2022) *See also* <https://www.energy.gov/sites/default/files/2022-09/Consent-Based%20Siting%20RFI%20Summary%20Report%200915.pdf>

190. The interim storage of spent nuclear fuel in Butte County is now de facto permanent disposal.

191. Interim storage of spent nuclear fuel is not a one-time event, which has lingering impacts later. The actions involving interim storage of spent nuclear fuel are perpetual acts requiring substantial resources for safety monitoring, security, and maintenance at all times. The impacts from these activities to a local community from the presents of highly radioactive materials are like an ongoing public nuisance or an ongoing trespass in that the ongoing act of storing these deadly materials create new and ongoing detrimental effects. No lapse of time can legalize ongoing unlawful activities with ongoing harm. It is this reason that DOE chose to utilize capacity at INL—to minimize the ongoing hazard and impacts to a community, not once, but also into the future. This perpetual hazard is the reason why the TMI–ISFSI is not located next to the Forrestal Building in Washington D.C. where DOE would be free from the need for state or local government cooperation.

192. DOE pays for the services of contractors, budgeted annually, to constantly monitor Navy or TMI-2 spent nuclear fuel and perform maintenance as needed, not just for the safety and containment equipment and apparatus, but to the infrastructure of the area servicing INL in general, which includes roads, security, emergency response, fire protection, utilities, and administrative support.

Impacts to Butte County from INL

193. The City of Arco is the County seat of Butte County. Butte County also has other small towns and hamlets such as Moore, Butte City, and Howe. The administration and maintenance of public services by Butte County and these municipalities are funded primarily by property taxes.

194. According to the Idaho Bureau Labor Statistics, the average weekly income of residents in Butte County is the highest in the State of Idaho. Paradoxically, Butte County also has the highest poverty rate in the State of Idaho among counties not hosting a university. *See* <https://lmi.idaho.gov/Portals/0/2022/WorkforceTrends/ButteProfile.pdf?v=012023>

195. This paradox is in part caused by the decades of impacts from the activities at INL. INL is the largest employer in Butte County and in eastern Idaho. Many of the workers at INL commute to Butte County for work but reside elsewhere, which has caused the economic statistics for Butte County to become inaccurate. These employment opportunities are of great benefit and value to the residents of Butte County and eastern Idaho. However, INL is owned by the federal government, which means that this entire facility is tax exempt.

196. INL, like any large-scale operation, has periods of growth and reduction. This has repeated many times over the course of more than seventy years. These periods greatly impact small communities like Arco and Butte City. For example, by disproportionately increasing the demand for housing for temporary workers such as construction workers. Then, once the

construction is complete, the workers leave the community leaving behind housing and infrastructure that eventually becomes occupied by low income, nonworking, or impoverished residents. This in turn places enormous strain on a very small community's resources, such as EMS, public safety, and other basic services and infrastructure. This problem continues to grow without a proportionately adequate tax revenue stream for planning and to provide public services.

197. The social and economic harm or impacts of hosting nuclear waste storage (or disposal) is expressed by Congress in numerous provisions in the NWPA. This impact is presumed in the plain language and intent of 42 U.S.C. § 10156(e). The social and economic impact of federal interim storage capacity has harmed and continues to harm Butte County.

VI. CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

Failure to Perform Nondiscretionary Annual Statutory Duty to Determine Social and Economic Impacts to Butte County, Idaho (APA and NWPA)

198. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs of this Complaint.

199. 42 U.S.C. § 10156(e) establishes a right to certain benefits for a state or unit of local government or both, such as Butte County.

200. DOE has “established and subsequently operated” interim storage capacity at “one or more facilities owned by [DOE] on January 7, 1983” to provide storage capacity for a department of the United States referred to in 5 U.S.C. §§ 101–102 (i.e. Department of the Navy), to-wit: multiple annual spent nuclear fuel shipments since 1995 from the US Navy to DOE's Idaho National Laboratory within the jurisdictional boundaries of Butte County, Idaho. 42 U.S.C. § 10155(a); 42 U.S.C. §§ 10156(b) & (e).

201. The Navy estimates that seven trains will carry 16 (total) shipping containers of naval spent nuclear fuel containing a total of approximately 1.8 metric tons of heavy metal to the INL in calendar year 2023.

202. 42 U.S.C. §§ 10156(b) & (e) requires DOE to act on an annual basis to determine social and economic impacts of interim storage occasioned by the establishment and subsequent operation of *any* interim storage capacity within the jurisdictional boundaries of Butte County, Idaho.

203. DOE's current and future actions in "establishing and subsequently operating" capacity for spent nuclear fuel from the US Navy is final agency action for purposes of initiating this suit. 42 U.S.C. § 10156(e).

204. DOE has failed to perform its nondiscretionary annual statutory mandates under 42 U.S.C. §§ 10156(b) & (e).

205. DOE's failure to perform its nondiscretionary duties are ongoing and will continue unless abated by an Order of this Court.

206. DOE's failure to perform its nondiscretionary statutory duties has impacted and will continue to impact Butte County.

SECOND CAUSE OF ACTION
Failure to Perform Nondiscretionary Annual Statutory Duty
to Determine Social and Economic Impacts to Butte County, Idaho
(APA and NWPA)

207. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs of this Complaint.

208. 42 U.S.C. § 10156(e) establishes a right to certain benefits for a state or unit of local government or both such as Butte County.

209. DOE has “established and subsequently operated” interim storage capacity at “one or more facilities owned by [DOE] on January 7, 1983” from a civilian power reactor, to-wit: providing capacity after March 18, 2019 for spent nuclear fuel from TMI-2 at DOE’s Idaho National Laboratory within the jurisdictional boundaries of Butte County, Idaho. 42 U.S.C. § 10155(a); 42 U.S.C. § 10156(e).

210. DOE agency action in extending interim storage capacity after March 18, 2019, an administrative benchmark for interim storage capacity, is reviewable by this Court under 5 U.S.C. § 702.

211. DOE’s actions in “establishing and subsequently operating” capacity for spent nuclear fuel from TMI-2 after March 18, 2019, is final agency action for purposes of initiating this suit. 42 U.S.C. § 10156(e). Alternatively, the failure to perform nondiscretionary statutory duties are ongoing for purposes of final agency action.

212. 42 U.S.C. §§ 10156(b) & (e) requires DOE to act on an annual basis to determine social and economic impacts of interim storage occasioned by the establishment and subsequent operation of *any* interim storage capacity within the jurisdictional boundaries of Butte County, Idaho.

213. DOE has failed to perform its nondiscretionary annual statutory mandate under 42 U.S.C. § 10156(e).

214. DOE’s failure to perform its nondiscretionary statutory duties are ongoing and will continue unless abated by an Order of this Court.

215. DOE’s failure to perform its nondiscretionary statutory duties has impacted and will continue to impact Butte County.

THIRD CAUSE OF ACTION
Unlawfully Providing Interim Storage Capacity
in Excess of Statutory Authority or Limitation
(APA and NWPA—42 U.S.C. §§ 10156(b) & (e))

216. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs of this Complaint.

217. The NWPA prohibits DOE from providing storage capacity of spent nuclear fuel from any department of the United States referred to in 5 U.S.C. §§ 101–102 or a civilian power reactor at a DOE facility except under the authorization and terms of Subchapter I, Part B.

218. 42 U.S.C. § 10156(e) establishes an independent and unqualified right to impact assistance for a local government suffering the impacts of the establishment and subsequent operation of federal interim storage capacity within a local government’s jurisdictional boundaries.

219. The Defendant are proving and intends to provide interim storage capacity for 1.1 metric tons of spent nuclear fuel from the US Navy in 2023 at INL in Butte County. This action is reviewable under 5 U.S.C. § 702.

220. The Defendant admits that US Navy Spent Nuclear Fuel is subject to the provisions of the Nuclear Waste Policy Act of 1982 and has required the US Navy to execute the standard contract for disposal.

221. DOE intends to increase the quantities of interim storage capacity of spent nuclear fuel from a department of the United States referred to in 5 U.S.C. §§101–102 (i.e. Department of the Navy) within the jurisdictional boundaries of Butte County, a unit of local government, to-wit: interim storage capacity for spent nuclear fuel from the US Navy.

222. DOE has failed to perform its statutory obligations under 42 U.S.C. §§ 10156(b) & (e) while providing interim storage capacity for spent nuclear fuel from military spent nuclear fuel.

223. Without compliance with 42 U.S.C. §§ 10156(b) & (e), DOE's actions of providing interim storage capacity of spent nuclear fuel military spent nuclear fuel is in excess of statutory authority under the NWPA, 42 U.S.C. § 10156(e) and the APA, 5 U.S.C. §706(2)C).

224. The unlawful actions by the Defendant in providing interim storage capacity of spent nuclear fuel in excess of defendant's statutory authority and limitations has harmed and will cause harm in the future to Butte County and the residents it serves.

FOURTH CAUSE OF ACTION
Unlawfully Providing Interim Storage Capacity
in Excess of Statutory Authority or Limitation
(APA and NWPA—42 U.S.C. §§ 10156(b) & (e))

225. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs of this Complaint.

226. The NWPA prohibits DOE from providing interim storage capacity of spent nuclear fuel from except under the authorization and terms of Subchapter I, Part B.

227. 42 U.S.C. § 10156(e) establishes an independent and unqualified right to impact assistance for a local government suffering the impacts of the establishment and subsequent operation of federal interim storage capacity within a local government's jurisdictional boundaries.

228. DOE has established, subsequently operated, and continues to operate interim storage capacity for spent nuclear fuel from a civilian power reactor within the jurisdictional boundaries of Butte County, a unit of local government, to-wit: interim storage capacity for spent nuclear fuel from TMI-2 and potentially more spent nuclear fuel from other sources yet to be identified.

229. DOE has failed to comply with the provisions of 42 U.S.C. § 10156(e) while continuing to provide interim storage capacity for spent nuclear fuel from civilian power reactors.

230. DOE has no plan or intent to remove the spent nuclear fuel from TMI-2 from INL, by 2035 or any other date. DOE's assertion that the storage of TMI-2 at INL is "interim" cannot be indefinite by design of the NWPA. 42 U.S.C §§ 10151-10157.

231. DOE intends to continue to store TMI-2 indefinitely at INL, thus making INL a default repository for spent nuclear fuel from TMI-2.

232. DOE's action to extend interim storage capacity after March 18, 2019, an administrative benchmark, is final agency action for purposes of this suit. Alternatively, DOE's action in providing interim storage capacity in violation of 42 U.S.C. § 10156(e) is an ongoing statutory violation for purposes of final agency action.

233. The Defendant's actions of applying for a license renewal from NRC and subsequently providing interim storage capacity for spent nuclear fuel from a civilian power reactor after March 18, 2019, is in excess of statutory authority under the NWPA, 42 U.S.C. § 10156(e) and the APA, 5 U.S.C. §706(2)C).

234. DOE's failures to comply with its obligations under Part A do not excuse DOE from unlawfully providing interim storage capacity after March 18, 2019.

235. Without compliance with 42 U.S.C. §§ 10156(b) & (e), DOE's actions of providing interim storage capacity of spent nuclear fuel from TMI-2 is in excess of statutory authority under the NWPA, 42 U.S.C. § 10156(e) and the APA, 5 U.S.C. §706(2)C).

236. The unlawful actions by the Defendant in providing interim storage capacity of spent nuclear fuel in excess of defendant's statutory authority and limitations has harmed and will cause harm in the future to Butte County and the residents it serves.

FIFTH CAUSE OF ACTION
Failure to Perform Nondiscretionary Duty to Promulgate Rules
(APA and NWPA)

237. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs of this Complaint.

238. 42 U.S.C. § 10156(e) establishes an independent and unqualified right to impact assistance for a local government suffering the impacts of the establishment and subsequent operation of federal interim storage capacity within a local government’s jurisdictional boundaries.

239. Impact Assistance under Part B of the NWPA “shall be subject to such terms and conditions as the Secretary determines necessary to ensure that the purposes of this subsection shall be achieved. The Secretary shall issue such regulations as may be necessary to carry out the provisions of this subsection.” 42 U.S.C. § 10156(e)(3).

240. DOE has not promulgated rules to implement the annual statutory duties and objectives of section 10156(e).

241. DOE’s failure to promulgate rules implementing the goals of the NWPA is a violation of the NWPA, 42 U.S.C. § 10156(e)(4), and the APA, 5 U.S.C. §706(1)(A).

SIXTH CAUSE OF ACTION
SEPARATION OF POWERS
Article I, US Constitution

242. Plaintiff realleges and incorporates the allegations of all the preceding paragraphs of this Complaint.

243. Article I of the Constitution grants exclusive power of the purse to Congress. U.S. Const. art. I, § 9, cl. 7; U.S. Const. art. I, § 8, cl. 1.

244. This power includes how the executive branch may spend funds appropriated by Congress.

245. No power in the Constitution allows the executive to thwart congressional will by expending funds for purposes not authorized by appropriations.

246. 42 U.S.C. § 10156, entitled “Interim storage Fund” prescribes the only funding methods for DOE to provide federal interim storage capacity for spent nuclear fuel after January 7, 1983.

247. DOE is currently expending public funds to provide interim storage capacity for spent nuclear fuel from TMI–2 from an appropriation not specifically allocated for this purpose and not intended as an alternative funding source to 42 U.S.C. § 10156.

248. Congress has appropriated funds, annually, for general facility maintenance purposes to DOE, none of which specify funds for federal interim storage of TMI–2.

249. While DOE has specifically requested appropriations for TMI–2 related activities at INL, Congress has not provided any specific appropriation for this purpose or otherwise repealed the only funding method for this specific activity in 42 U.S.C. § 10156(e).

250. DOE is violating Article I of the US Constitution and such violation is allowing DOE to avoid compliance with 42 U.S.C. § 10156 harming Butte County and the residents it serves.

VII. REQUEST FOR RELIEF

251. Declare Defendant’s actions violated and continue to violate 42 U.S.C. § 10156(e) of the NWPA by failing to determine social and economic impacts of federal interim storage capacity at issue in this litigation.

252. Enjoin future shipments of Navy spent nuclear fuel to DOE’s INL facilities in Butte County, Idaho, until such time as DOE complies with 42 U.S.C. §§ 10156(b) & (e).

253. Enjoin the Defendants from continuing to provide interim storage capacity for US Navy spent nuclear fuel in a manner that violates 42 U.S.C. §§ 10156(b) & (e).

254. Enjoin further operation of interim storage capacity and require defendant to prepare, submit, and once approved by NRC, execute a decommissioning plan of the TMI-ISFSI pursuant to 10 CFR § 72.54 as soon as practicable but no longer than twenty-four months after approval of the decommissioning plan by NRC and this Court, *or* until Defendants have demonstrated compliance with 42 U.S.C. § 10156(e).

255. Retain Jurisdiction over this matter until Defendants fully remedy the violations of law described herein.

256. Issue such other relief as the Court may deem just, proper, and equitable.

Respectfully submitted this 6 day of March, 2023.



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