Affidavit which refers to and incorporates the land use restrictions of 40 CFR 264.117(c) which controls post closure activities at the site

- * Envirocare is required under License Condition 36 to provide "as built" drawings every six months. Because of Envirocare's construction techniques, each generator's waste is segregated from other waste, and site records to be provided after closure will be detailed.
- * The transfer of site records is specifically directed by UAC R313-25-33, particularly subparagraph (4).
- * To be licensed, radioactive waste disposal facilities must meet siting criteria established in UAC R313–25–3, previously R447–25–3.
- * Utah regulations require that after closure there be a 5-year post closure and maintenance period by the licensee until the site is transferred to the site owner for institutional control.
- * Utah's regulations require licensees to establish a financial surety in the form of a trust agreement which gives the State exclusive control of the trust fund. The State requires that "financial or surety arrangements shall remain in effect until the closure and stabilization program has been completed * * * and the license has been transferred." Until a transfer of the license occurs, the surety arrangement remains in effect and will continue to be reviewed to determine the amount necessary to protect public health, safety, and property.

* The State and Envirocare entered into an Agreement Establishing Covenants and Restrictions which identifies the site and the purpose of the licensed operations at the site.

The license "Transfer and Termination" sections of the State regulations indicate that the site operator will transfer and/or terminate its license and turn over the site to a governmental agency for the active institutional control period. The exemption in controversy here is an exemption from those sections of the regulations. Since Envirocare is the site owner and operator and no governmental agency is or has been authorized to take title to the site. transfer and termination of the Envirocare license would not occur prior to the active institutional control period. Therefore, Envirocare would remain responsible for the site under the license and the institutional control phase would be implemented by Envirocare.

In order to determine the adequacy of the Utah regulatory framework for protecting the public health and safety, the NRC staff analyzed the control of the disposal site for the three major phases in the life of a low-level waste disposal site (operations, closure, and postclosure observation and maintenance; active institutional control; and passive institutional control). This analysis was conducted to determine which mechanisms, if properly constructed, could provide adequate control in lieu of Government ownership of the land. In addition, the NRC staff considered the special circumstances posed by the Envirocare site.

Operations, Closure, and Post-Closure Observation and Maintenance Period

Envirocare has title to the land and, therefore, is responsible for all activities on the site. The licensee has provided a Trust Agreement with the State of Utah that provides funds for closure and the post-closure period and the active institutional control period in the event the licensee is financially incapable of closing the site or abandons the site. The license limits the accumulation of undisposed waste to a specific amount that can be disposed of through the use of the trust funds.

One Hundred-Year Active Institutional Control Period

The State proposed that it is exercising control and can continue to exercise control of the site in such a manner that land ownership is not necessary to protect the public health and safety from the material that is being disposed of at the site. In particular, the State points to its control of the trust fund that includes the money for the active institutional control period. If the site owner is not capable of conducting the activities required during the active control period, the State will carry out the activities by using the money in the trust fund. Under the control mechanisms, the State would not need to own the site to carry out these activities.

Passive Institutional Control Period

The State proposed the use of deed annotation as a method of informing individuals who may wish to use the site in the future that the land was used for waste disposal and should not be disturbed.

The staff found that the mechanism submitted by the State lacked specificity needed to implement the requisite degree of control because the land annotation did not provide sufficient restrictions on the future use of the site. As a result of this deficiency, the staff suggested a proposed "restrictive covenant" that the State of Utah could use to implement the requisite degree of control.

In brief, the provisions of the restrictive covenant suggested by the NRC staff were in addition to any restrictions on the title already recorded in the Tooele County records, and, *inter alia*, proposed to restrict Envirocare and

its successors and assigns with respect to the property as follows: (1) No excavation or construction, except as necessary to maintain the premises, shall be allowed after the LLRW is disposed of and the facility closed; (2) No uses of the property shall be made which may impair its integrity; (3) Any change in use of the property following closure of the facility shall require the prior written consent of the Utah Department of Environmental Quality; (4) Envirocare and its successors or assigns, shall erect and continuously maintain monuments and markers, approved by the Department, to warn of the presence of radioactive material at the site; (5) Envirocare shall not convey the property without the prior written approval of the Department, nor shall Envirocare consummate any conveyance of any interest in the property without adequate and complete provision for continued maintenance of the property; and (6) Any State or Federal governmental agency affected by any violations of these restrictive covenant may enforce them by legal action in the District Court for Tooele County. As the proposed restrictive covenant made clear, the State of Utah will have the power to control the ownership, use, and maintenance of the Envirocare property after closure of the facility to a degree equivalent to ownership of the site. Moreover, both Utah and the NRC, in particular, would have the right to enforce the covenant.

The Commission, after careful consideration, came to the conclusion that the institutional controls, such as the proposed restrictive covenant, could be used in this case to achieve the same safety result as site ownership by State or Federal authorities. The Commission's decision was conveyed to the State in a June 28, 1993 letter from Mr. Kammerer to Dr. Nielson. The purpose of the Federal or State government land ownership requirement is to provide a higher degree of assurance that through State or Federal government ownership of the site, institutional control of the site will continue to exist for longer periods of time than under private ownership. Regarding the similarity between land ownership and a restrictive covenant, in each case there is an entity in existence to take action to remedy any on site difficulty. With land ownership, the State can take action with regard to its ownership of the land, and with a restrictive covenant, the State can take action to enforce the restrictive covenant. The State of Utah executed a restrictive covenant with the terms