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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	
PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

APPLICANT'S RESPONSE TO STATE REQUEST FOR CLARIFICATION REGARDING CONTENTIONS OGD O AND UTAH O

Pursuant to the Atomic Safety and Licensing Board's ("Board") order of June 1, 2001,¹ Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") responds to the State of Utah's Request for Clarification of the Effect of a Ruling on Ground and Surface Water in Contention OGD O on Contention Utah O, dated May 31, 2001. PFS agrees with the State that any Board ruling on PFS's motion for summary disposition of Contention OGD O² should not have res judicata or issue preclusive effect on the State.

Contention Utah O (Hydrology) asserts in part that "[t]he Applicant has failed to adequately assess . . . [p]otential for groundwater and surface water contamination." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 254 (1998). Contention OGD O (Environmental Justice) concerns PFS impacts on groundwater and surface water only indirectly, if at all. It asserts that the PFS application "fails to address environmental justice issues." Id. at 258. Specifically, Basis 5 of OGD O claims that the Skull Valley Band of Goshute Indians will suffer cumulative

¹ Order (Schedule for Responses to Request for Clarification) (June 1, 2001).

² Applicant's Motion For Summary Disposition of OGD Contention O - Environmental Justice (May 25, 2001) ("PFS Mot.").

impacts from emissions from six Tooele County facilities that handle hazardous materials and from the PFS project. Contentions at 34;³ see LBP-98-7, 47 NRC at 258. However, as noted in PFS's motion for summary disposition, other than providing information showing that hazardous materials are located at the facilities enumerated in OGD O and are emitted from some, OGD provided no information on how, or by what pathways, these facilities might impact Skull Valley Band members, given the facilities' distance from the Reservation. See PFS Mot. at 14. Thus, OGD does not claim in OGD O that the facilities would result in cumulative impacts to the Band via groundwater or surface water pathways. See Contentions at 32-34.⁴ Nevertheless, in anticipation of potential arguments that OGD might attempt to make in its response, PFS's motion briefly addresses this topic to show that there is no "conceivable" potential for such impacts in the vicinity of the PFS site. See PFS Mot. at 14-15; Declaration of George Liang (May 24, 2001).

Assuming arguendo the overlap of Contentions Utah O and OGD O on at least a hypothetical factual issue, the State would not suffer res judicata or issue preclusive effect from a Board ruling on Contention OGD O. First, res judicata and issue preclusion arising from a judicial ruling can only apply to a party to the ruling or one who is in privity with a party to the ruling. E.g., Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536 (1986). Here, the State would not be a party to a Board ruling on OGD O, as OGD is the sole sponsor of that contention. Nor would the State be in privity with OGD with respect to any Board ruling on OGD O. Privity would require legal accountability between the State and OGD or the virtual representation of the State by OGD. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 695-96 (1982). Privity is

³ Ohngo Gaudadeh Devia's Contentions Regarding the Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation (Nov. 24, 1997) ("Contentions").

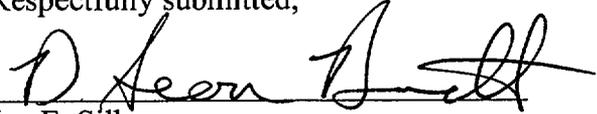
⁴ Nor do the exhibits filed in support of the contention assert or show groundwater or surface water impacts at the Reservation. See Contentions, Exhibits 21-28.

not created merely by a shared viewpoint on an issue. Id. at 696. Thus, because OGD is not representing the State with respect to the groundwater and surface water issue, there would be no res judicata or issue preclusion. Therefore, if the Board were to conclude that no genuine issue of material fact regarding PFS's water impacts is raised in the context of OGD O, the State would not be barred from attempting to raise such issues in responding to a summary disposition motion on Utah O (or at hearing).

Second, the State would also not be subject to res judicata or issue preclusive effect from a Board ruling on OGD O because the Board could rule in PFS's favor without reaching the issue of whether the PFS project would create significant groundwater or surface water impacts on the Skull Valley Reservation. If the resolution of an issue is not necessary to the outcome of the first ruling, it cannot serve as the basis for issue preclusion in a later ruling. Harris, ALAB-837, 23 NRC at 537. OGD O alleged that PFS had not adequately addressed cumulative impacts, in that PFS had not considered asserted impacts on the Goshutes from the Tooele County facilities enumerated in the contention. Contentions at 34. As discussed in PFS's motion, in order for cumulative impacts to exist, the facilities enumerated in OGD O would have to have an impact on the surface water or groundwater on the Reservation in the first place, independent of any impacts that PFS might create. PFS Mot. at 13-14; Liang Dec. ¶¶ 13-17. Thus, if the Board found that OGD had not raised a genuine issue of material fact with respect to the impact of the enumerated facilities on the groundwater or surface water on the Reservation, then it could rule in favor of PFS on the cumulative water impact issue (again, assuming arguendo that it is within the scope of the contention) without reaching PFS's water impacts. In that case, resolution of PFS's water impacts would not be necessary to the ruling on OGD O and hence it would not preclude the subsequent litigation of issues in Utah O.

Therefore, for the foregoing reasons, the State would not suffer res judicata or issue preclusive effects from a Board ruling on OGD O.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Sean Barnett". The signature is written in a cursive style with a horizontal line underneath it.

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Dated: June 6, 2001

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CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Response to State Request for Clarification Regarding Contentions OGD O and Utah O was served on the persons listed below (unless otherwise noted) by electronic mail with conforming copies by U.S. mail, first class postage prepaid, this 6th day of June 2001.

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